No. 83983-2

CHAMBERS, J. (dissenting) — I would affirm the Court of Appeals. The majority reasons, according to its statutory interpretation, once an arbitration award is appealed by the filing of a request for a trial de novo, no costs from the arbitration exist that can be included in an offer of compromise. But the statute providing for offers of compromise does not limit how offers of compromise are made or what parties may include within their offer. I disagree with the majority's rationale and therefore dissent.

The issue in this case is whether the trial court properly considered Jeffery Niccum's inclusion of statutory costs in his offer of compromise in determining whether Ryan Enquist improved his position under MAR 7.3 and RCW 7.06.060(1). Enquist contends that the total amount of Niccum's second offer of compromise, $17,350.00, replaced the arbitrator's award of $24,496.00 and, therefore, by obtaining a $16,650.00 verdict on trial de novo, he improved his position by $700.00. Niccum responds that since the second offer expressly included "costs and statutory attorney fees," these costs must be taken into account and subtracted from the $17,350.00 offer before that offer can be properly compared to the jury's verdict, which consisted exclusively of damages. If $1,016.28 in costs is subtracted from the second offer, the net result, $16,333.72, is smaller than the jury verdict, meaning that Enquist did not improve his position.

Determining whether or not a party requesting trial de novo has failed to improve that party's position is not always a simple task. There may be multiple parties and multiple claims, counterclaims, and cross claims. *See, e.g.*, *Sultani v. Leuthy*, 86 Wn. App. 753, 943 P.2d 1122 (1997); *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 693 P.2d 161 (1984). Simply looking at the dollar amount awarded by an arbitrator may be deceiving because some damages, such as accrued interest, will continue to accumulate. *See Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 806 P.2d 253 (1991) (including award at trial de novo of prejudgment interest in determining that party improved its position). It is possible that after arbitration some parties or some claims will settle while others will not. The court must consider all factors in determining whether a party has achieved a better result at the trial de novo.

RCW 7.06.050(1) provides that "the arbitrator shall file his or her decision and award with the clerk of the superior court" and "[w]ithin twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact." RCW 7.06.050(2) states that "*[i]f no appeal has been filed* at the expiration of twenty days following filing of the arbitrator's decision and award, *a judgment shall be entered* and may be presented to the court by any party, on notice, which judgment when entered shall have the same force and effect as judgments in civil actions." (Emphasis added.) Upon entry of judgment, Niccum would have been awarded taxable costs. But, if a party appeals the arbitrator's award by requesting a trial de

novo, the arbitrator's award is not reduced to judgment, and thus the prevailing party at arbitration is not statutorily entitled to costs, at least not before the entry of judgment on the trial de novo.

Niccum acknowledges that he was not entitled by statute to costs on mandatory arbitration, but only because Enquist requested a trial de novo. Niccum argues consideration of costs was nevertheless implicit in his offer to settle:

> Had [Enquist] not appealed the mandatory arbitration award such witness fees and costs would have been allowed by [the] superior court and in addition to the arbitration award Mr. Niccum would have been entitled to recover the costs awarded. However, *because such award was appealed, the opportunity for entry of an award for costs was not available to Mr. Niccum*.

Resp't's Suppl. Br. at 5 (emphasis added). Niccum contends that since he would have been entitled to costs following the arbitration had there been no request for a trial de novo, he was "not required to waive such costs in order to make an appropriate offer of compromise" just because a request for a trial de novo was filed. *Id.* Niccum argues that by its plain language the second offer of compromise included "those costs which were properly awardable after the arbitration hearing had there not been an appeal." *Id.*

The majority, following Enquist's argument, does not meaningfully dispute that Niccum intended to include both damages and costs in making the offer. It merely contends that Niccum was not entitled to any costs after the request for a trial de novo and therefore was precluded from including costs in his offer of compromise. But the latter proposition does not necessarily follow from the former.

Had Enquist not appealed or had he abandoned the appeal, Niccum would have been entitled to reduce the arbitration award to judgment and the judgment would have included costs. Niccum's offer of compromise, in essence, was an offer to induce Enquist to abandon his appeal. Nowhere does the majority satisfactorily explain why lack of a statutory entitlement to costs at the particular moment in time that Niccum made his offer precludes the right to include costs in an offer of compromise. Niccum was free to make any offer of compromise he wanted. There is nothing in the statutory language or scheme that suggests otherwise. The legislature, having provided for statutory costs to a prevailing party at arbitration,[1] would surely have been clear if the benefits of prevailing at arbitration were to be extinguished by a request for a trial de novo. *See State v. Edwards*, 104 Wn.2d 63, 68, 701 P.2d 508 (1985) (courts should not add or subtract language from a statute unless required to make the statute rational).

I am not suggesting that costs should be considered if no offer of compromise were made or if an offer contained no reference to costs. But that did not happen here. Niccum made two offers of compromise. The first was for $22,000.00 and made no reference to costs. Clerk's Papers (CP) at 11. The second was for $17,350.00, "including costs and statutory attorney fees." CP at 12. To determine whether Enquist failed to improve his position by refusing to accept the last offer, the court must determine what exactly was offered in the offer to compromise. The offer included costs, and those could only have been the costs to which Niccum

[1] *Compare* RCW 7.06.050(2), *with* RCW 4.84.010.

would have been entitled upon entry of judgment after arbitration. I would hold that the trial court in this case correctly took those costs into account in making its determination.

Because I disagree with the majority that the mandatory arbitration statute precludes Niccum from including costs in his offer of compromise, I dissent.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson

Justice Debra L. Stephens

Justice Charles K. Wiggins