No. 93778-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 72926-8-I

JAMES D. BEARDEN,

Petitioner (Plaintiff-Respondent),

v.

DOLPHUS A. MCGILL,

Respondent (Defendant-Appellant)

PETITION FOR REVIEW

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I. INTRODUCTION & IDENTITY OF PETITIONER

James Bearden, respondent in the Court of Appeals,[1] asks this Court to accept review of a portion of the Court of Appeals' decision terminating review, designated in Part II.

The Court of Appeals in *Bearden v. McGill,* No. 72926-8-I (slip op., April 11, 2016), Appendix A,[2] applied a literalistic misconstruction of its own "compare comparables" doctrine,[3] straining to absurdity the Legislature's intent in MAR 7.3 and RCW 7.06.060(1). MAR 7.3[4] requires the trial court to assess reasonable attorney fees and costs if the appealing party "fails to improve his or her position on the trial de novo." *Id.* The Legislature established this one-way fee-shifting mechanism for the purpose of deterring meritless or unwarranted appeals from mandatory arbitration, furthering the MAR system's goal of easing court congestion.[5] *Bearden* holds that, in determining whether the appealing party failed to

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[1] Mr. Bearden was the prevailing party at arbitration, and the nonappealing party/plaintiff in the Superior Court trial de novo.

[2] Respondent is Dolphus McGill.

[3] This Court has not adopted the doctrine. *Niccum v. Enquist,* 175 Wn.2d 441, 448, 286 P.3d 966 (2012) ("The court's reliance on this doctrine in preference to the plain language of the statute is problematic for several reasons. First, this court has not adopted the doctrine of comparing comparables....") Similarly, *Bearden*'s reliance on the "compare comparables" doctrine in preference to the plain language of the statute is problematic for the reasons discussed here and to be explored further if review is accepted. It would be helpful to practitioners for this Court to explicitly address the applicability and meaning of this doctrine by accepting review of this case.

[4] Because MAR 7.3 and RCW 7.06.060 (1) are substantively identical, they are hereafter collectively referred to as MAR 7.3. Both are attached as **Appendix B.**

[5] *E.g., Niccum,* at 452; *Williams v. Tilaye,* 174 Wn.2d. 57, 63-64, 272 P.3d 235 (2012); *Christie-Lambert Van & Storage Co. v. McLeod,* 39 Wn. App. 298, 302-03, 693 P.2d 1616 (1984).

improve his position on the trial de novo, the trial court must segregate and **exclude** statutory (RCW 4.84.010) costs that the nonappealing party incurs during the "time lag" [6] following arbitration through trial, to defend the arbitration award. The *Bearden* court reasoned that these post-arbitration RCW 4.84.010 costs should be excluded because they were not presented to the arbitrator. *Bearden* created this unprecedented formula without giving the parties the opportunity to submit briefing.

The decision's new rule undermines the legislative intent behind mandatory arbitration: *Bearden* encourages, rather than discourages, the party losing at arbitration to bring meritless or close appeals, since it eliminates post-arbitration RCW 4.84.010 costs from the trial court's MAR 7.3 determination whether that party failed to improve his position at trial. Yet, consistent with MAR 7.3's purposes, the threat of MAR 7.3 fees due to post-arbitration RCW 4.84.010 costs being included in the trial judgment is a risk the appealing party should weigh in deciding whether to demand a trial de novo.

The rule of first impression created by *Bearden,* if allowed to stand, will significantly decrease the risk of bringing an appeal, particularly in cases where only a few hundred dollars determines whether

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[6] *Cormar, Ltd. v. Sauro* 60 Wn.App. 622, 623, 806 P.2d 253 (1991).

the appealing party improved his position at trial.[7] Insurers (who have effectively limitless resources) will appeal not only meritless causes but also close calls.[8] The additional RCW 4.84.010 costs for trial--witness fees, filing fees, costs of deposition transcripts, and all other items allowed by RCW 4.84.010 and included in the trial judgment—no longer will count against the appealing party.

Thus, *Bearden* runs counter to this Court's authority on statutory construction to avoid absurd or strained consequences[9] and conflicts directly with decisions of this Court and the Court of Appeals on the meaning of "fails to improve the party's position." RAP 13.4(b)(1), (2). *Bearden* affects every appeal from mandatory arbitration, requiring the parties to segregate costs incurred only for trial from those incurred only in the arbitration. This case presents the opportunity for this Court to provide guidance to the lower courts and resolve conflicts on a frequently-arising issue of substantial public interest. RAP 13.4(b)(4).

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[7] Reported decisions on MAR 7.3 fees and what it means to improve one's position have often turned on what would otherwise be considered insignificant amounts: *Christie-Lambert,* 39 Wn. App. at 300 -- $113; *Monnastes v. Greenwood,* 170 Wn.App. 242, 244, 283 P.3d 603 (2012) -- $339; *Niccum*, at 445 -- $700; *Tran v. Yu,* 118 Wn.App. 607, 610, 75 P.3d 970 (2003) -- $1,330; and in this case, $582.39. *Compare* CP 290-91 *with* CP 86-87.

[8] As of 2002, when RCW 7.06.060 was being amended to include a procedure for offers of compromise, testimony for the amendment showed "[m]ost appeals (86 percent) are filed by defendants and this means that injured parties are not being paid in a timely manner." Senate Bill Report, SB 5373, p. 2 (Feb. 11, 2002), http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bill%20Reports/Senate/5373.SBR.pdf , p. 2. **Appendix E.**

[9] *E.g., Christie-Lambert,* at 305 (interpreting MAR 7.3/RCW 7.06.060(1)).

II. COURT OF APPEALS DECISION

Bearden requests review of that part of the Court of Appeals' published decision, *Bearden v. McGill,* No. 72926-8-I (slip op., April 11, 2016) (Appendix A), reversing the award of attorney fees to Bearden under MAR 7.3 and declining to award attorney fees under RAP 18.1 (slip op., at 1-14, 19-20).

III. ISSUE PRESENTED FOR REVIEW

Should this Court accept review to address a question of substantial public interest in *Bearden's* undermining of the Legislature's intent to discourage meritless appeals, and to resolve *Bearden's* conflicts with previous decisions, by a literalistic application of the Court of Appeals' "compare comparables" approach, requiring trial courts to exclude all post-arbitration RCW 4.84.010 costs necessarily incurred by the nonappealing party, from the MAR 7.3 determination? RAP 13.4(b)(1), (2), (4).

IV. STATEMENT OF THE CASE

A. Arbitration and Trial De Novo.

This is an admitted liability car crash case involving non-catastrophic injuries to Bearden by McGill—exactly the kind of case the mandatory arbitration system was intended to take off the superior court docket and resolve speedily. At mandatory arbitration initiated by

Bearden, the arbitrator awarded $44,000.00 in damages ($34,336.09 in general damages; $8,663.91 in special (medical) damages), and $1,187.00 in RCW 4.84.010 costs, for a total arbitration award of **$45,187.00.** CP 290.

McGill elected to appeal in a trial de novo. CP 265-69. The jury awarded Bearden $42,500.00 in general damages only, CP 109, as Bearden did not seek special/medical damages at trial.[10] The trial court awarded RCW 4.84.010 costs of $3,296.39, CP 88-89, for a total trial judgment against McGill of **$45,796.39.** This was **$582.39 more** than the arbitration award of $45,187.00. CP 86-87; slip op., at 3. **Appendix D.**

The trial court then granted Bearden's request for reasonable attorney fees under MAR 7.3 because McGill had failed to improve his position on the trial de novo. Consistent with the case law and history of the MARs, the trial court compared the final arbitration award (damages plus RCW 4.84.010 costs--$45,187.00) to the judgment amount (damages plus RCW 4.84.010 costs--$45,769.39) of defending the arbitration award at the trial de novo. The trial court awarded Bearden $71,800.00 in attorney fees. Slip op., at 3; CP 7-12.

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[10] Using *Bearden*'s "compare comparables" approach, the only element of damages at issue at Bearden's arbitration and at trial was general damages. The jury's award of general damages was **$8,163.91 more** than the $34,336.09 in the general damages at arbitration. Thus, McGill failed to improve his position on general damages at trial.

B. McGill's Appeal.

McGill appealed. At oral argument in the Court of Appeals, the Court (Judge Leach, writing judge) presented a theory new to both parties: that the trial court, in calculating whether the appealing party failed to improve his position on the trial de novo, should segregate and exclude any RCW 4.84.010 costs requested by the nonappealing party (Bearden) that were not considered at the arbitration, though the costs could only have been incurred from the time after the arbitration through trial.[11]

Even McGill objected to the Court's proposed new theory. The Court pointed out, "You would win under my proposal. That's what puzzles me about your rejection". VRP 17:10-11.[12]

> [B]ut here's my--here's my challenge. And I have a few moments to think about your formula adopted here to make my client win, but here are the problems that I foresee for other cases, and even for this case--I was unable to answer your question about what

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[11] "JUDGE LEACH: I'm going to propose a way of looking at this, and **see what you think about it.** What if we were to take the view that we examine all of the claims, both for damages and costs submitted to the arbitrator, total up the dollar amounts plaintiff recovered under all of those, and then take all of those claims but **not any new claims for costs**, for example, that arise because of the trial de novo, determine for those same claims what the plaintiff recovered in Superior Court on those claims, and then compare those two numbers. Is there any problem with that analysis from your perspective?" VRP 4:1-12 (emphasis added). **Appendix C.**

McGill responded: "Well, I don't know that there's any case --...I guess in your proposal, it's somewhat of a comparative comparables, but you're changing the comparables. And it would be a difficult thing." VRP 4:13-14; 5:2-7.

[12] The *Bearden* Court stated it arrived at this new formula in an effort to "reconcile all of the cases that are out there. **And this is the best that I'm able to do. I'm trying to identify where I've gone wrong. And I'm asking for your help**." VRP 6:7-10 (emphasis added). "We're talking about whether there is a fee shifting that's going to occur because of [what statutory costs are awarded at trial]". VRP 14:7-9. "And how we do the arithmetic." VRP 14:14.

> costs were requested at arbitration. By the very nature of a mandatory arbitration, there's not a record. So if we get into this question of what costs were asked for and what were awarded at the arbitration, and we're going to only look at those and then compare it to the ultimate outcome at the trial, it would be difficult.

VRP 17:13-18:1.

On April 11, 2016, the Court of Appeals issued a published opinion adopting this new theory and reversing the Superior Court's judgment:

> [A] court determines if a party improved its position at a trial de novo by comparing every element of monetary relief the arbitrator considered with the trial court's award for those same elements. Here, this means the damages and statutory costs that both the arbitrator and trial court considered. It excludes those statutory costs requested only from the trial court.

Slip op., at 2.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. *Bearden* Raises an Issue of Substantial Public Interest Meriting Review Because Excluding Post-Arbitration RCW 4.84.010 Costs Undermines the Goals of Mandatory Arbitration.

MAR 7.3 provides:

> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo.

The application of a court rule or statute is a legal question reviewed de novo.[13]

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[13] *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 966, 316 P.3d 1113 (2014)(citing *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012)).

Citing basic rules of statutory construction, the *Bearden* Court stated it would interpret an ambiguous statute "in the way that best fulfills the legislature's intent." Slip op., at 5.[14] The *Bearden* Court proceeded to construe the phrase "fails to improve his or her position at trial" contrary to legislative intent.

A long line of cases emphasizes the intent that "RCW 7.06.060(1) and MAR 7.3's purposes are to ease court congestion, encourage settlement, and discourage meritless appeals." *Miller v. Paul M. Wolff Co.,* 178 Wn. App. 957, 966, 316 P.3d 1113 (2014)(quoting *Huntington v. Mueller,* 175 Wn. App. 77, 81, 302 P.3d 530 (2013)(citing *Niccum v. Enquist,* 175 Wn.2d 441, 451, 286 P.3d 966 (2012)); *e.g., Hutson v. Rehrig Int'l, Inc.*, 119 Wn. App. 332, 335, 80 P.3d 615 (2003); *Christie-Lambert Van & Storage Co. v. McLeod,* 39 Wn. App. 298, 302, 693 P.2d 161 (1984).[15]

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[14] Even without an ambiguity, "Interpreting statutes requires the court to discern and implement the legislature's intent." *Williams*, 174 Wn.2d at 61; *Christie-Lambert,* at 302 ("The primary objective of statutory construction is to carry out the intent of the Legislature....The intent must be determined primarily from the statutory language itself. ...Where, however, the intent is not clear from the language of the statute, the legislative history may be considered."). When statutory language is susceptible to more than one reasonable interpretation, it is ambiguous and the Court may resort to statutory construction, legislative history, and relevant case law for assistance in determining legislative intent. *E.g., Estate of Haselwood v. Bremerton Ice Arena, Inc.,* 166 Wn.2d 489, 498, 210 P.3d 308 (2009).

[15] "The purpose of RCW 7.06 authorizing mandatory arbitration in certain civil cases is primarily to alleviate the court congestion and reduce the delay in hearing civil cases. Senate Journal, 46th Legislature (1979), at 1016-17." *Id.* at 302. "The determination of whether or not the appealing party's position has been improved is based **on the amount awarded in arbitration compared to the amount awarded at the trial de novo.**" *E.g.,*

> A party who appeals a decision of an arbitrator, but fails to improve his or her position at the trial de novo, will be assessed costs and reasonable attorney's fees....**The intent of this rule is to encourage the parties to accept the decision of the arbitrator.**

King County Pro Se Handbook,[16] at p. 24 (emphasis added).

The risk of incurring attorney fees as a consequence of disputing the arbitration award and taking the controversy to court is a well-known part of this overarching purpose:

> [The] purpose of arbitration...is to keep disputes out of the courts....That purpose is best served by reading MAR 7.3 as a **broad warning** that one who asks for a trial de novo, and thereafter suffer a judgment for a greater amount than the arbitration award, will be liable for attorney's fees.

Cormar, Ltd. v. Sauro, 60 Wn. App. 622, 623-24, 806 P.2d 253 (1991) (emphasis added; citation omitted).

Like other one-way fee-shifting statutes, restricting "an award of attorney fees under RCW 7.06.060 and MAR 7.3 only to the successful appellee...reflects a policy decision **favoring arbitration and deterring appeals**[.]" *Christie-Lambert,* at 302-03 (emphasis added).[17]

SB 5373 (2002), Final Bill Report, http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bill%20Reports/Senate/5373.FBR.pdf (emphasis added.) **Appendix E.**

[16] https://www.kcba.org/publications/pdf/pro-se2006.pdf,

[17] *Christie-Lambert* compared MAR 7.3's fee-shifting scheme to a similar fee-shifting statute, RCW 4.84.290, "designed 'to encourage out-of-court settlement of small claims, and to **penalize parties who unjustifiably pursue or resist the claims**.'" *Id.* at 302-03 (emphasis added); *id.* at 303 (comparing MAR 7.3 to federal local rule governing compulsory arbitrations, discouraging meritless appeals by assessing fees and interest). As the Washington Court of Appeals observed in *Colarusso v. Petersen,* 61 Wn. App. 767, 770-71, 812 P.2d 862 (1991), this Court in *Ford Motor Co. v. Barett,* 115 Wn.2d 556, 800 P.2d 367 (1990), upheld the one-way fee-shifting provision of the Motor

Without the deterrent effect of this fee-shifting provision, "the defeated party would be likely to appeal in nearly all instances and the arbitration proceedings would tend to become a mere nullity and waste of time." *Id.* at 303 (quoting *In re Smith Case,* 381 Pa. 223, 233, 112 A.2d 625, 629 (1955)). If there is no disincentive to appeal, the arbitration is just another procedural step, a "dress rehearsal for the real trial, with each side getting a good look at the other's case." *Williams v. Tilaye*, 174 Wn.2d 57, 63, 272 P.3d 235 (2012).

MAR 7.3 "was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo, would certainly answer 'no' in the face of a superior court judgment against them for more than the arbitrator awarded." *Cormar,* at 623. In this case, an ordinary person would certainly answer that McGill did not improve his position by taking the case to trial de novo, with all the attendant costs which McGill and his insurer fully anticipated. *Bearden* completely contradicts an ordinary person's understanding.

As the late Justice Tom Chambers noted in *Niccum:*

> The legislature, having provided for statutory costs to a prevailing party at arbitration, 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

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Vehicle Warranties law (Lemon Law), noting that, like MAR 7.3, the Lemon Law promotes arbitration of disputes.

508 (1985)(courts should not add or subtract language from a statute unless required to make the statute rational).

Id. at 455-56 (Chambers, J., dissenting). Precisely so: The Legislature would surely have been clear if the benefits of prevailing at arbitration were to be extinguished by disallowing RCW 4.84.010 costs incurred after arbitration through the trial de novo, because the risk of failing to improve one's position at trial and incurring MAR 7.3 attorney fees will be much lower. *See* note 6. *Supra* (and cases cited therin).

It is true that MAR 7.3 was not intended to discourage "meritorious" appeals. Slip op., at 14. But is it warranted[18] or justified to spend $70,000 in fees for plaintiff's counsel, a similar sum for defense counsel, costs for the court's time, and unquantifiable costs in requiring the citizen jurors to abandon their daily lives for a week of jury service in order for an appealing party to attempt to improve a damage award by $1,500? It is not. Yet this absurd result follows from *Bearden's* new formula.

The very narrow and limited costs authorized by RCW 4.84.010 which the non-appealing party necessarily incurs after an arbitration should be included in an MAR 7.3 analysis.[19] The unwarranted

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[18] *See Williams,* 174 Wn.2d at 63-64 ("unwarranted").

[19] The *Tran* court's dicta that trials are almost always more expensive than arbitration and that adopting Tran's position would mean a party would invariably improve its position at trial lacks support, and, as discussed here, is contrary to MAR 7.3's legislative intent,

expenditure of resources required by an MAR appeal is exactly what the MAR system is designed to prevent. The deterrent effect of including post-arbitration taxable costs in the MAR 7.3 analysis clearly furthers the statute and rule's purpose.

This Court should accept review to fulfill the Legislature's intent behind MAR 7.3's fee-shifting provision.

B. Bearden Conflicts with Precedent Comparing the Arbitration Award (Damages Plus Costs) to The Judgment (Damages Plus Costs).

The Court of Appeals' decision in *Bearden* is not "consistent"[20] with previous precedent from this Court and the Court of Appeals determining whether a party failed to improve his position for purposes of awarding MAR 7.3 fees. The few reported cases that simply compare a party's position after arbitration to its position on the same claims after trial de novo include post-arbitration costs and fees in the MAR 7.3 determination.[21] *E.g., Miller,* 178 Wn. App. at 966-68 (request for RCW 49.48.030 attorney fees denied at arbitration, but awarded at trial;

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and conflicts with on-point decisions. *Id.* 118 Wn.App. at 612; *e.g.* $200 statutory attorney fee (RCW 4.84.080).

[20] Slip op., at 11. *See also id.* at 5 (court of appeals "has consistently held" trial court may compare only claims actually arbitrated with those tried); *id.* at 9 (stating all 3 divisions of the Court of Appeals "agree" the trial court compares "the aggregate success on claims actually litigated between the parties at both the arbitration and the trial de novo").

[21] Most of the reported cases on MAR 7.3 involve comparisons other than arbitration award vs. judgment, such as offers of compromise, offers of judgment, new claims or cross-claims, multiple parties, or allocation of fault.

comparing aggregate claims asserted, court did not segregate or exclude fees incurred only for trial); *Christie-Lambert,* 39 Wn. App. at 302-03 (including increased interest incurred post-arbitration; excluding new cross-claim at trial); *Cormar,* 60 Wn. App. at 623-24 (including increased interest after arbitration); *Colarusso v. Petersen*, 61 Wn. App 767, 812 P.2d 862 (1991) (including RCW 4.84.010 costs of $470.34 requested only from trial court).

The new *Bearden* formula excluding "those fees and costs that arise only for trial"[22] conflicts with the analysis of all three divisions of the Court of Appeals: *Cormar* (Div. 2), *Miller* (Div. 3), and *Christie-Lambert* (Div. 1). In *Cormar*, the arbitrator awarded damages to defendant Sauro, but rejected his claim for prejudgment interest. Cormar requested a trial de novo. The trial court awarded lesser damages to Sauro, but granted prejudgment interest, making the total amount of the judgment greater than the arbitration award. The court of appeals affirmed the trial court's award of MAR 7.3 attorney fees to Sauro.

The court specifically considered and rejected Cormar's "sophisticated argument" having to do with the time value of money and "how it is affected by the time lag between" arbitration and trial. *Id.* at 623. The court held that Cormar's time lag argument "fails to refute the

[22] Slip op., at 12.

simple fact that Sauro emerged from superior court with a judgment for more money than the arbitrator awarded." *Id.* As noted, the court held Cormar's approach was inconsistent with the purpose of mandatory arbitration, which is best served by reading MAR 7.3 as a "broad warning" against appeals. *Id.* at 623-24.

In *Miller,* a former employee recovered $22,802.84 in his arbitration against the employer, but the arbitrator denied his request for attorney fees and costs under RCW 49.48.030. Miller requested a trial de novo, at which the court awarded slightly less in damages ($21,628.97), but granted $897.95 in costs and $74,662.00 in attorney fees under the statute, making the judgment substantially higher than the arbitration award. The court of appeals held that the trial court correctly considered the total amounts awarded to Miller at arbitration and trial, because Miller obtained fees "based on the exact argument" he had made to the arbitrator. *Id.* at 967.

Miller certainly improved his position on the trial de novo, comparing the arbitration award to the trial judgment. In that situation, "'to truly compare comparables, the success of aggregate claims asserted should be considered in deciding if Mr. Miller 'improve[d] [his] position.'" *Id.* at 968. Again, the *Miller* court did not segregate or exclude the fees and costs incurred post-arbitration to reach its MAR 7.3

determination.

In *Christie-Lambert,* defendant McLeod moved for a trial de novo following an arbitration award in favor of Christie-Lambert. *Id.* at 300. The arbitration award against McLeod was for $3,045.42 plus $453.05 interest, while the trial judgment against McLeod was $3,090.96 plus $521.30 interest. *Id.* at 299. The court did not segregate or exclude interest incurred during the time lag between arbitration and trial de novo. The court observed that the difference between Christie-Lambert's arbitration award and trial de novo judgment against McLeod was de minimis yet sufficient to award MAR 7.3 fees. *Id.* at 305.

The *Christie-Lambert* court interpreted MAR 7.3 to give effect to its purpose to deter meritless appeals and to favor arbitration as a means of reducing court congestion by concluding McLeod had failed to improve his position on the trial de novo as to the claims that were arbitrated:

> [I]t is inherently unfair to deny an attorney fee award to a party that has borne the cost of mandatory arbitration and a trial de novo without a change in results....

Christie-Lambert, 39 Wn. App. at 304; *Haley v. Highland,* 142 Wn.2d 135, 154 n.7, 12 P.3d 119 (2000). Citing the rule of statutory construction that "a statutory provision should be interpreted to avoid strained or absurd consequences that could result from a literal reading," *Christie-Lambert,* at 305, the court held:

> Here denying an attorney fee award to Christie-Lambert would have the absurd consequence of defeating the statutory purposes to deter meritless appeals and to favor arbitration.

Id.

Do v. Farmers Ins. Co., 127 Wn. App. 180, 110 P.3d 840 (2005) is also instructive on the role of trial costs in the MAR 7.3 analysis, though the case involved a CR 68 offer of judgment and an offer of compromise, rather than the relatively simple comparison of arbitration award with a judgment. In *Do,* defendant Getty requested a trial de novo from an arbitration awarding $18,692.72 (not including costs). Plaintiffs served an offer of compromise for $15,000 plus statutory costs of $2,004. Getty did not accept the offer but later made a CR 68 offer of judgment, which plaintiffs accepted. Judgment was entered in the amount of $17,004, together with RCW 4.84.010 costs of $2,426. The trial court declined to award MAR 7.3 attorney fees. *Id.* at 184.

The court of appeals reversed, holding that Getty had failed to improve his position, comparing the offer of compromise to the judgment, including costs. The proper comparison was between the judgment amount--which as here included costs under RCW 4.84.010--and the offer of compromise. *Id.* at 184-87.

The court considered "the purpose of MAR 7.3--'to discourage meritless appeals and to thereby reduce court congestion'"--noting that

"the rule threatens mandatory attorney fees for any party who requests a trial de novo but does not improve its position." *Id.* at 187.

> Next, it offers the party an incentive to withdraw its request, with the possibility of avoiding attorney fees at the discretion of the court. Both the stick and the carrot are directed at the party requesting the trial de novo, attempting to influence its choices in the hope of reducing court congestion.

Id. By making an offer of judgment, defendant Getty had done nothing to "end the court case and, thus, the expenditure of court resources." *Id.* Likewise, McGill decided to continue to dispute Bearden's claims, carrying the case into litigation in court, knowing there would be RCW 4.84.010 costs and possibly MAR 7.3 fees and costs.

This Court has twice spoken on what it means to fail to improve a party's position on trial de novo for purposes of awarding MAR 7.3 fees, in *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012)(construing offer of compromise to exclude costs, so plaintiff did not improve position), and *Haley,* 142 Wn.2d at 135 (plaintiff did not improve position because at arbitration he did not request attorney fees under the State Securities Act).

Niccum was a split 5-4 decision in which the Court held that an offer of compromise—which takes the place of an arbitration award--does not include costs and attorney fees. A bare majority of this Court held that Niccum was not entitled to MAR 7.3 attorney fees because, under the

terms of RCW 7.06.060(1) regarding offers of compromise, the amount of costs awarded on a de novo verdict may not be deducted from the plaintiff's offer of compromise. *Id.* at 447-50. This is because RCW 7.06.060(1) explicitly prohibits including costs on an offer of compromise: "a party is not entitled to costs in connection with an offer of compromise." *Niccum* at 448.

Applied here, *Niccum* stands for the proposition that when a rule or statute mandates recovery of costs, as MAR 6.4 and RCW 4.84.010 do, those costs must be included in the determination whether a party improved their position.[23] This Court should accept review to conclude that the trial court properly compared the arbitration award (damages plus RCW 4.84.010 costs) to the judgment (damages plus RCW 4.84.010 costs), without subtracting costs Bearden necessarily incurred in defending the arbitration award.

In the 2000 case of *Haley v. Highland*, plaintiff Haley requested a trial de novo after recovering $2,500 in damages at the arbitration. He was awarded the same amount at trial de novo; however, the court also

[23] This Court's 2011 amendments to the MAR directly support this analysis: MAR 3.2, 6.4, and 7.1 now clarify that the arbitrator has the authority to award costs to the prevailing party at arbitration. 2011 02 WSR-31 (Jan. 19, 2011) Since the amendments provide that costs are to be included in the arbitration award, the correct comparison is between the arbitration award (including costs) and the trial judgment (including costs, not just the verdict).

awarded him interest and attorney fees under RCW 21.20.430(1)[24] in the amount of $19,262, resulting in a total judgment in favor of Haley for $23,126. *Id.* at 152 & n.4. The court concluded Haley had failed to improve his position and granted Highland his MAR 7.3 attorney fees. After the Court of Appeals reversed, this Court reinstated the MAR 7.3 fees, on the ground that Haley's failure to ask the arbitrator for attorney fees "precludes a finding that he has improved his position under MAR 7.3." *Id.* at 154-55 & n.8. It would be improper in that situation to compare an arbitration award that "did not reflect an award of attorney fees" to a trial judgment that did (under the State Securities Act). *Id.* at 154.

But in the present case, Bearden requested RCW 4.84.010 costs at both the arbitration and the trial de novo. In other words, where statutory fees or costs are at issue at arbitration **and** trial, the trial court must include and may not exclude them in determining whether the appealing party failed to improve his or her position at trial. *E.g., Miller,* 178 Wn. App. at 968; *Christie-Lambert,* at 302-03; *Cormar,* at 623-24.

Bearden thus stands in conflict with this Court's and the Court of Appeals' decisions, in addition to undermining the Legislature's intent behind MAR 7.3 and goals of mandatory arbitration.

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[24] RCW Chapter 21.20 is the Securities Act of Washington.

VI. CONCLUSION

Bearden's unprecedented formula undermines the purpose of MAR 7.3 and conflicts with previous caselaw. The court's literalistic application of its "compare comparables" approach, excluding RCW 4.84.010 costs incurred during the time following arbitration through trial de novo, drastically reduces the risk of incurring MAR 7.3 attorney fees and thus encourages unwarranted appeals from an arbitration—the very opposite of the Legislature's intent. Review is necessary to correct *Bearden*'s erroneous analysis, resolve the conflicts, and address this recurring issue of substantial public interest.

DATED this 11th day of May, 2016.

Respectfully submitted,

LAW OFFICES OF KATHLEEN GARVIN
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By: _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I served by legal messenger, a copy of the foregoing Brief of Respondent this 11th day of May, 2016, to the following counsel of record at the following addresses:

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Patricia Siefert
Paralegal to Corrie J. Yackulic

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES BEARDEN, Respondent, v. DOLPHUS MCGILL, Appellant, NELLIE KNOX MCGILL, Defendant.	No. 72926-8-I DIVISION ONE PUBLISHED OPINION FILED: April 11, 2016

LEACH, J. — MAR 7.3 and RCW 7.06.060(1)[1] require that the superior court assess costs and reasonable attorney fees against a party who asks for a trial de novo and does not improve his or her position at trial. Here, the parties disagree about how to determine if Dolphus McGill improved his position at a trial de novo.

James Bearden sued McGill for damages caused by an auto accident. An arbitrator awarded Bearden $44,000.00 in compensatory damages and $1,187.00 in statutory costs, for a total arbitration award of $45,187.00. McGill requested a trial de novo. The jury awarded Bearden less in compensatory

[1] Because the rule and statute are substantively identical, we refer to them together as MAR 7.3.

damages, $42,500.00. But the trial court awarded more in costs, $3,296.39, for a total judgment against McGill of $45,796.39. Bearden then asked for an award of reasonable attorney fees. By comparing the total arbitration award with the total trial judgment, including all statutory costs, the trial court decided that McGill failed to improve his position at trial; the total judgment exceeded the total arbitration award. It awarded Bearden $71,800.00 in attorney fees. McGill appeals.

We hold that a court determines if a party improved its position at a trial de novo by comparing every element of monetary relief the arbitrator considered with the trial court's award for those same elements. Here, this means the damages and statutory costs that both the arbitrator and trial court considered. It excludes those statutory costs requested only from the trial court. This comparison shows that McGill improved his position at a trial de novo. Thus, the trial court erred in awarding Bearden MAR 7.3 attorney fees. We reverse that award. Because McGill does not show that the trial court abused its discretion in awarding Bearden certain challenged costs, we affirm the award of those costs.

FACTS

Dolphus McGill injured James Bearden in a January 2011 automobile accident. After Bearden sued, the parties took part in mandatory arbitration. The

arbitrator awarded Bearden $44,000 in compensatory damages and $1,187 in fees and costs, for an arbitration award of $45,187.

McGill requested a trial de novo. The jury awarded Bearden $42,500.00 in damages. The trial court then awarded Bearden $3,296.39 in costs. These included costs incurred after the arbitration. The total judgment against McGill was thus $45,796.39.[2]

Bearden then asked for attorney fees under MAR 7.3, arguing that McGill failed to improve his position by appealing the arbitration award. Bearden pointed out that the $45,796.39 trial court judgment against McGill exceeded the $45,187.00 arbitration award. McGill responded that costs should not factor into the analysis: he improved his position from a $44,000.00 damages award after arbitration to a $42,500.00 damages award after trial. McGill also argued that Bearden's claimed fees were excessive.

The trial court compared the total amounts after arbitration and trial, including costs, to see if McGill improved his position by going to trial. The court ruled McGill did not improve his position, so MAR 7.3 entitled Bearden to $71,800 in attorney fees. McGill appeals.

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[2] The trial court judge filled in the judgment form erroneously, writing that Bearden was awarded a total judgment of $42,500.00 rather than the correct sum, $45,796.39. McGill points this error out but does not contend that it makes $42,500.00 the true judgment.

STANDARD OF REVIEW

This court reviews de novo whether a statute authorizes an award of attorney fees.[3] The application of a court rule is also a question of law we review de novo.[4] This court upholds attorney fee and cost awards unless it finds the trial court manifestly abused its discretion.[5]

ANALYSIS

MAR 7.3 Attorney Fees

Washington generally follows the "American rule," where each party in a civil action pays its own attorney fees and costs.[6] But a party may recover attorney fees when authorized by statute, a recognized ground of equity, or party agreement.[7] Bearden asserts a right to recover fees under MAR 7.3 and RCW 7.06.060(1). McGill disagrees, claiming that Bearden does not meet the requirements of the rule and statute. He contends that the trial court should not have compared the total arbitration award with the total trial court judgment to decide if McGill improved his position for purposes of applying MAR 7.3. He

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[3] Niccum v. Enquist, 175 Wn.2d 441, 446, 286 P.3d 966 (2012).
[4] Niccum, 175 Wn.2d at 446.
[5] In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 99, 101 P.3d 88 (2004).
[6] Cosmo. Eng'g Grp., Inc. v. Ondeo Degremont, Inc., 159 Wn.2d 292, 296, 149 P.3d 666 (2006).
[7] Niccum, 175 Wn.2d at 446.

argues that he improved his position using the proper comparison, the arbitrator's damages award to the jury's damages award.

To resolve this case, we follow several principles of statutory construction. A court accepts, without interpretation, the plain meaning of a clearly worded statute.[8] A court will deem a statute ambiguous if it has more than one reasonable interpretation.[9] A court will interpret an ambiguous statute in the way that best fulfills the legislature's intent.[10]

MAR 7.3 imposes on a party who appeals an arbitration award an obligation to pay costs and reasonable attorney fees incurred after the filing of a request for a trial de novo when that party "fails to improve the party's position on the trial de novo."[11] Like all mandatory arbitration rules, we interpret this rule as if the legislature drafted it.[12] The legislature intended this provision to encourage settlement and discourage meritless appeals.[13]

This court has consistently held that to decide if a party improved its position, the trial court may compare only the claims the party actually arbitrated with those it tried in superior court. We first applied this rule in Christie-Lambert

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[8] Biggs v. Vail, 119 Wn.2d 129, 134, 830 P.2d 350 (1992).
[9] In re Marriage of Kovacs, 121 Wn.2d 795, 804, 854 P.2d 629 (1993).
[10] Kovacs, 121 Wn.2d at 804.
[11] MAR 7.3; RCW 7.06.060(1).
[12] Wiley v. Rehak, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).
[13] Niccum, 175 Wn.2d at 451.

Van & Storage Co. v. McLeod.[14] There, Christie-Lambert arbitrated its claims against McLeod and Nolan. McLeod did not arbitrate his crossclaim against Nolan because he had not served her. The arbitrator made an award in favor of Christie-Lambert. McLeod requested a trial de novo. He did not improve his position on the issues arbitrated with Christie-Lambert but, having served Nolan, received a judgment against her. The trial court denied Christie-Lambert's fee request because McLeod had improved his overall position due to his recovery from Nolan.[15] We reversed and awarded Christie-Lambert fees because McLeod had not improved his position on the arbitrated claim.[16] To reach this result, we compared the disposition of claims actually litigated between the parties both at arbitration and trial.

In Sultani v. Leuthy,[17] Sultani sued four defendants for injuries he suffered in two separate car accidents. An arbitrator awarded damages against the four defendants jointly and severally. At a trial de novo, requested by a defendant, a jury awarded Sultani a higher amount of damages but apportioned the total award among the defendants based on a percentage of fault. This meant that Sultani recovered a lesser damages award from each individual defendant at trial than he recovered in arbitration. Because Sultani had improved his overall

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[14] 39 Wn. App. 298, 303, 693 P.2d 161 (1984).
[15] Christie-Lambert, 39 Wn. App. at 300-01.
[16] Christie-Lambert, 39 Wn. App. at 305-06.
[17] 86 Wn. App. 753, 755, 943 P.2d 1122 (1997).

award. the trial court awarded him MAR 7.3 fees.[18] We reversed, holding that the court should have compared the result at arbitration and trial for the claim litigated between Sultani and each individual defendant. Because Sultani recovered a lesser amount at trial from each individual defendant, each had improved its position.[19]

In Yoon v. Keeling,[20] Division Two followed Christie-Lambert and Sultani. Yoon sued Fernau and Keeling for injuries he suffered in a car accident. An arbitrator awarded Yoon $10,769.00 and apportioned fault 25 percent to Fernau and 75 percent to Keeling. Fernau requested a trial de novo. Before trial, Yoon settled with Fernau and Keeling for $8,000.00, leaving only the issue of apportionment of liability for trial. A jury allocated this liability 32 percent to Fernau and 68 percent to Keeling. This resulted in Fernau owing Yoon $132.25 less than she owed under the arbitration award.[21]

The trial court awarded Keeling MAR 7.3 fees against Fernau. Fernau appealed, claiming she improved her position because she had reduced the amount she owed Yoon.[22] Division Two affirmed the trial court, holding that because Fernau had not improved her position on the only issue litigated at both

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[18] Sultani, 86 Wn. App. at 755-56.
[19] Sultani, 86 Wn. App. at 761.
[20] 91 Wn. App. 302, 305-06, 956 P.2d 1116 (1998).
[21] Yoon, 91 Wn. App. at 304.
[22] Yoon, 91 Wn. App. at 304.

arbitration and trial between Fernau and Keeling, apportionment of fault, MAR 7.3 entitled Keeling to fees.[23]

In Mei Tran v. Yue Han Yu,[24] this court considered facts analogous to those in this case. In mandatory arbitration with Yu, Tran recovered $14,675.00 in damages. Yu requested a trial de novo. At trial, Tran recovered $13,375.00. Posttrial, Tran requested and received statutory costs of $955.80 and $3,205.00 in attorney fees under CR 37(c) for proving in superior court matters that Yu denied in requests for admission. This resulted in a total judgment of $17,535.80. Because this total exceeded the arbitration award, Tran asked for MAR 7.3 attorney fees.[25] The trial court denied the request, and Tran appealed.[26] We affirmed, holding that only the disposition of claims litigated at both the arbitration and trial should be compared to decide if Yu improved her position.[27]

Most recently, in Miller v. Paul M. Wolff Co.,[28] Division Three approved a similar approach.[29] Miller sued Wolff for unpaid commissions. An arbitrator

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[23] Yoon, 91 Wn. App. at 306.
[24] 118 Wn. App. 607, 75 P.3d 970 (2003).
[25] Mei Tran, 118 Wn. App. at 609-10.
[26] Mei Tran, 118 Wn. App. at 611.
[27] Mei Tran, 118 Wn. App. at 616-17.
[28] 178 Wn. App. 957, 316 P.3d 1113 (2014).
[29] We view this recent decision, rather than the older Wilkerson v. United Investment, Inc., 62 Wn. App. 712, 815 P.2d 293 (1991), as representing Division Three's current jurisprudence on the issue.

awarded Miller $22,802.84 but denied his request for attorney fees under RCW 49.48.030. Miller requested a trial de novo. The trial court awarded damages of $21,628.97 plus $74,662.00 in attorney fees under RCW 49.48.030.[30] Wolff appealed, claiming in part that MAR 7.3 entitled it to a fee award because Miller had not improved his position at trial because he received a smaller damages award.[31] Division Three affirmed the trial court. It concluded that a court should compare the success of aggregate claims litigated in both the arbitration and trial to decide if Miller improved his position at trial. Because the parties litigated the attorney fee claim at both, it should be considered.[32]

Thus, all three divisions of the Washington Court of Appeals agree that to determine if a party improved its position at a trial de novo, the superior court should compare the aggregate success on claims actually litigated between the parties at both the arbitration and the trial de novo—whether those claims were for damages,[33] statutory fees,[34] costs, or sanctions.[35]

The Supreme Court has neither adopted nor rejected the "compare comparables" rule.[36] In Haley v. Highland,[37] the Supreme Court "generally

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[30] Miller, 178 Wn. App. at 962.
[31] Miller, 178 Wn. App. at 966.
[32] Miller, 178 Wn. App. at 967-68.
[33] Christie-Lambert, 39 Wn. App. at 303-06.
[34] Miller, 178 Wn. App. at 967-68.
[35] Mei Tran, 118 Wn. App. at 616-17.
[36] Niccum, 175 Wn.2d at 448; Haley v. Highland, 142 Wn.2d 135, 154, 12 P.3d 119 (2000); see Miller, 178 Wn. App. at 967.

agree[d] with the Court of Appeals' view that only comparables are to be compared." But it declined to consider if attorney fees have any place in an MAR 7.3 determination because the party seeking to include fees in the comparison could have requested them at arbitration but did not.[38] The Supreme Court held this precluded inclusion of those fees in the MAR 7.3 comparison.[39] In Niccum v. Enquist,[40] the Supreme Court held that trial courts should not subtract purported "costs" from offers of compromise when comparing those offers to jury awards. The court reasoned that "a party is not entitled to costs in connection with an offer of compromise," so there is no amount to deduct.[41] The court distinguished Mei Tran and other cases where—as in this case—courts "were simply asked to compare a party's position after arbitration to its position after trial de novo."[42]

Here, the trial court attempted to distinguish Mei Tran, explaining, "There, the arbitrator had not considered costs, so there were no arbitration costs to compare to costs following a trial de novo." The trial court then included all the fees and costs it had awarded Bearden in comparing the total trial judgment to

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[37] 142 Wn.2d 135, 154, 12 P.3d 119 (2000).
[38] Haley, 142 Wn.2d at 154-55.
[39] Haley, 142 Wn.2d at 154-55.
[40] 175 Wn.2d 441, 446, 450, 286 P.3d 966 (2012).
[41] Niccum, 175 Wn.2d at 448.
[42] Niccum, 175 Wn.2d at 448. In light of Niccum, this court reversed its decision in Stedman v. Cooper on reconsideration, holding that the trial court erred in subtracting "costs" from an offer of compromise before comparing it to a jury verdict. 172 Wn. App. 9, 23, 292 P.3d 764 (2012).

the total arbitration award. In support of this ruling, Bearden contends that "where statutory fees or costs are placed 'at issue' at arbitration and at trial, the trial court should include [those fees and costs] in determining whether the appealing party improved its position." Bearden distinguishes Mei Tran on that basis and contends that Miller required the trial court include all the costs at both stages. McGill responds that Mei Tran mandates the trial court compare only the damages the arbitrator awarded to those the trial court awarded.

Contrary to both parties' assertions, Mei Tran and Miller are consistent. Miller held that a trial court may consider certain fees and costs to determine whether a party improved its position under MAR 7.3. Division Three considered attorney fees where "the arbitrator denied attorney fees based on the exact argument that was successful at trial."[43] That argument was that RCW 49.48.030 entitled the plaintiff to attorney fees in his action on wages.[44] In contrast, here, the trial court awarded Bearden fees and costs not requested from the arbitrator.[45] Neither Mei Tran nor Miller allows a trial court to include in its comparison costs and fees the arbitrator was not asked to consider.

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[43] Miller, 178 Wn. App. at 967-68.

[44] Miller, 178 Wn. App. at 968-69.

[45] These included $103.84 in witness fees, $1,752.05 in deposition costs, $400.00 for Dr. Gaddis's report, $9.50 for a police report, and part of the $498.00 in filing fees. Of course, Bearden did not submit these costs to the arbitrator because he incurred them only in preparing for trial.

The arbitrator in this case awarded Bearden the filing fee, costs of service of process and records and reports, and statutory attorney fees totaling $1,187.00, all under RCW 4.84.010. After trial, the court considered all of these fees and costs and others that Bearden incurred after arbitration for trial. Of the fees and costs that Bearden presented to the arbitrator, the trial court awarded Bearden only $765.49.[46] Thus, among the fees and costs the arbitrator had considered, the trial court awarded Bearden $421.51 less. Combined with the $1,500.00 less that Bearden recovered in damages, McGill thus improved his position by $1,921.51 when comparing those fees, costs, and damages that both the arbitrator and trial court considered. McGill improved his position at trial.

This result comports with cases from the three divisions of this court and the Supreme Court. Consistent with our observation that "[a] trial is almost always more expensive than arbitration," this result does not consider those fees and costs that arise only for trial.[47] In Haley, the Supreme Court "generally agree[d] with" this court's compare comparables rule but found it unnecessary to adopt a bright-line rule that "attorney fee awards have no place in making an

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[46] This includes $232.49 in filing fees, $200.00 in statutory attorney fees, and $333.00 for serving McGill, all of which the arbitrator had awarded Bearden. But the trial court declined to award two more costs the arbitrator awarded: $276.00 for medical records and $195.00 for serving Nellie Knox McGill.

[47] Mei Tran, 118 Wn. App. at 612; Haley, 142 Wn.2d at 159 (Talmadge, J., concurring).

MAR 7.3 determination."[48] This rule compares comparables while allowing that courts may in some cases consider fee awards in making MAR 7.3 decisions. And in Niccum, the Supreme Court excluded fees and costs from its comparison because a party making an offer of compromise is not yet entitled to fees and costs.[49] Unlike an offer of compromise, an arbitrator's award can include fees and costs, so Niccum does not preclude their inclusion here.

Bearden also asserts that the 2011 amendments to the MAR support the trial court's inclusion of costs in comparing awards. Those amendments clarified "the authority of the arbitrator to award costs and attorney fees."[50] They did not address if, for application of MAR 7.3, a party "fails to improve [its] position on the trial de novo" where the total judgment is greater than the arbitration award. We presume the Supreme Court knew about the Court of Appeals' decisions we have discussed above and could have changed the rule to require a different result if it disagreed.

Finally, Bearden contends that the policies of the mandatory arbitration system support his position. Bearden correctly notes that the legislature intended mandatory arbitration to relieve court congestion and provide a speedy

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[48] Haley, 142 Wn.2d at 154.
[49] Niccum, 175 Wn.2d at 450.
[50] Purpose statement to proposed amendment to MAR 3.2(a), Wash. St. Reg. 11-01-023 (Dec. 2, 2010).

and inexpensive method for resolving claims of $50,000 or less.[51] But an interpretation of MAR 7.3 that discourages meritorious appeals would also frustrate the purposes of the mandatory arbitration system.[52]

Because McGill improved his position at trial, MAR 7.3 did not entitle Bearden to attorney fees, and the trial court erred in awarding him those fees. We reverse that award.[53]

The Trial Court's Cost Awards

Dr. Gaddis's Report

McGill contends the trial court erred in awarding Bearden $400.00 for Dr. Gaddis's report. RCW 4.84.010(5) allows for reasonable expenses "incurred in obtaining reports and records[ ] which are admitted into evidence." Although McGill improved his position at trial, Bearden was the prevailing party at both arbitration and trial. RCW 7.06.060(3) "does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions."

McGill makes three challenges to the award of report costs under RCW 4.84.010(5). All three lack merit.

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[51] Christie-Lambert, 39 Wn. App. at 302-03.

[52] See Hutson v. Costco Wholesale Corp., 119 Wn. App. 332, 338, 80 P.3d 615 (2003); Niccum, 175 Wn.2d at 452.

[53] See Stedman, 172 Wn. App. at 25.

First, McGill argues the trial court erred in awarding costs for the report because the trial court did not admit the report into evidence. But this court has held that RCW 4.84.010(5) "plainly allows costs for medical records so long as they are admitted into evidence, either in mandatory arbitration or at trial."[54] The same rule applies to reports under the same provision. Since the arbitrator admitted Gaddis's report, the trial court did not need to admit it to award its cost.

Second, McGill contends the Gaddis report did not qualify under RCW 4.84.010(5) because that statute covers only costs of "obtaining" preexisting documents, not producing new ones for litigation. McGill cites no authority for this restrictive reading of the statute. This proposed interpretation would require this court to add language to the statute that the legislature did not include.

Third, McGill contends the report was an expert expense and therefore not permitted under RCW 4.84.010. "[C]osts under the Mandatory Arbitration Rules are limited to those items set forth in RCW 4.84.010."[55] "'Where an expert is employed and is acting for one of the parties, it is not proper to charge the allowance of fees for such expert.'"[56] "The party presenting an issue for review

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[54] Stedman, 172 Wn. App. at 23 (holding RCW 4.84.010(5) entitled injured motorist to costs for medical records admitted during mandatory arbitration but not during trial de novo).

[55] Colarusso v. Petersen, 61 Wn. App. 767, 771, 812 P.2d 862 (1991).

[56] Wagner v. Foote, 128 Wn.2d 408, 417-18, 908 P.2d 884 (1996) (quoting Fiorito v. Goerig, 27 Wn.2d 615, 620, 179 P.2d 316 (1947)).

has the burden of providing an adequate record to establish such error and should seek to supplement the record when necessary."[57]

McGill contends that Gaddis acted as Bearden's expert in preparing his report, even though Gaddis also treated Bearden. McGill acknowledges that Gaddis's report is not part of the appellate record and Bearden's trial court briefing provides the only description of it. That brief states the arbitrator admitted the report in lieu of a perpetuation deposition to help "establish the reasonableness and necessity of the chiropractic and massage therapy billings"—not, as McGill contends, as an opinion on the cause of Bearden's injuries. This purpose is consistent with the report's cost being a "[r]easonable expense[ ] . . . incurred in obtaining reports and records" from a treating physician, rather than a cost for an expert witness.[58] This court cannot say on this record that the trial court erred in awarding Bearden the cost of Gaddis's report under RCW 4.84.010(5). We affirm that cost.

Dr. Murphy's Deposition

McGill also contends that the trial court abused its discretion in awarding Bearden 50 percent of the cost of Dr. Murphy's discovery deposition. Bearden's attorney used Murphy's discovery deposition in cross-examining Murphy during

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[57] State v. Sisouvanh, 175 Wn.2d 607, 619, 290 P.3d 942 (2012) (citations omitted); RAP 9.2(b), 9.6, 9.10.

[58] RCW 4.84.010(5).

Murphy's perpetuation deposition. The parties recorded and played the perpetuation deposition at trial in lieu of Murphy's live testimony.

RCW 4.84.010(7) allows cost awards for depositions "on a pro rata basis for those portions of the depositions introduced into evidence or used for . . . impeachment." Neither party introduced Murphy's discovery deposition into evidence, but Bearden used part of it to impeach Murphy. The question is thus what constitutes a permissible "pro rata basis" for the portions Bearden used to impeach Murphy in cross-examination.

Bearden argued successfully that he should receive 50 percent of the cost of Dr. Murphy's discovery deposition because his "cross-examination outline was drawn from, and thus 'used,' Dr. Murphy's discovery deposition testimony." McGill asserts that RCW 4.84.010 does not allow for such a broad definition of "used for . . . impeachment." He contends the proper basis is closer to 2 percent than 50 percent because Bearden's counsel directly cited only two pages during cross-examination.[59]

The appellate record does not contain Murphy's discovery deposition. Although Bearden's attorney cited directly to the transcript only twice during the perpetuation deposition, she impeached Murphy throughout using his history of work as a defense witness and his incomplete basis for his opinions. This court

[59] This would make the proper pro rata amount $10.45 rather than $261.25.

cannot say on this record that the trial court abused its discretion in deciding that Bearden "used" 50 percent of Murphy's discovery deposition for impeachment. We therefore reject McGill's challenge to the award of costs for Murphy's deposition.

Lack of Contemporaneous Proof of Expenses

Next McGill contends, without citing authority, that the trial court "generally abused its discretion by not requiring any sort of bills, invoices, or receipts to justify the claimed expenses."[60]

A trial judge has broad discretion in determining the reasonableness of an award. This court will not disturb an award unless the appellant demonstrates that the trial court manifestly abused its discretion.[61] The trial court here relied on two sworn declarations from Bearden's counsel to support the costs. These declarations itemized and described each cost for the trial court and provided additional clarification where McGill challenged the costs. The trial court did not manifestly abuse its discretion by relying on Bearden's counsel's sworn declarations to determine costs.[62]

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[60] McGill notes that he objected to the lack of documentation in his objections to plaintiff's proposed judgment.

[61] Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001).

[62] McGill's contentions that that lack of documentation led to exorbitant costs also lack merit. He claims Murphy's perpetuation deposition cost over $200 more than Murphy's discovery deposition, despite being "likely a shorter deposition." McGill cannot say for certain the perpetuation deposition was shorter; the figures are not far apart ($750 to $520); and the factors that go into

Exclusion of Bearden's Proposed Costs

Bearden contends in his response brief that the trial court abused its discretion in refusing to award Bearden the costs of serving Nellie Knox McGill and obtaining Bearden's medical records. The arbitrator had allowed both costs.

This court will grant a respondent affirmative relief of a trial court's decision "only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case."[63] Because Bearden requests affirmative relief but did not file a notice of appeal or "independently demonstrate[ ] a basis for relieving [him] of the requirements of RAP 2.4," we reject his challenges to the trial court's exclusions of costs.[64]

Attorney Fees and Costs for Appeal

Finally, Bearden argues that RAP 18.1 entitles him to fees on appeal. RAP 18.1 authorizes appellate courts to award reasonable attorney fees or expenses where authorized by applicable law. "A party entitled to attorney fees

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pricing depositions are not before the court. McGill also claims that because Bearden did not use Murphy's deposition in his case in chief, Bearden did not "need" to spend money on Murphy's perpetuation deposition. McGill cites no authority to support this proposition. Further, McGill did not object before trial to the perpetuation deposition costs or their lack of documentation.

[63] RAP 2.4(a), 2.5(a); Happy Bunch, LLC v. Grandview N., LLC, 142 Wn. App. 81, 90 n.2, 173 P.3d 959 (2007).

[64] See Happy Bunch, 142 Wn. App. at 90 n.2.

under MAR 7.3 at the trial court level is also entitled to attorney fees on appeal if the appealing party again fails to improve her position."[65]

Because we reverse the trial court's award of attorney fees to Bearden, McGill has improved his position on appeal. We therefore decline to award Bearden RAP 18.1 fees.

CONCLUSION

Under MAR 7.3 and RCW 7.06.060(1), McGill improved his position by requesting a trial: Bearden's combined damages, costs, and fees were less after trial than after arbitration when comparing only those costs and fees litigated before both the arbitrator and trial court. The trial court thus erred in ruling otherwise. We reverse the trial court's award of attorney fees to Bearden. Because the record does not show the trial court abused its discretion in awarding Bearden the costs of Dr. Gaddis's report or Dr. Murphy's discovery

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[65] Arment v. Kmart Corp., 79 Wn. App. 694, 700, 902 P.2d 1254 (1995); Boyd v. Kulczyk, 115 Wn. App. 411, 417, 63 P.3d 156 (2003).

deposition, we affirm those awards. We deny Bearden's request for fees on appeal.

WE CONCUR:

APPENDIX B

RCW 7.06.060

Costs and attorneys' fees.

(1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo. The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

(2) For the purposes of this section, "costs and reasonable attorneys' fees" means those provided for by statute or court rule, or both, as well as all expenses related to expert witness testimony, that the court finds were reasonably necessary after the request for trial de novo has been filed.

(3) If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.

MAR 7.3

Costs And Attorney Fees

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JAMES D. BEARDEN, Plaintiff-Respondent, vs. DOLPHUS A. MCGILL, Defendant-Appellant.	No.72926-8

Verbatim Transcript of Proceedings
Transcribed from Audio Recording

January 14, 2016

BEFORE:

HONORABLE J. ROBERT LEACH

HONORABLE ANN SCHINDLER

HONORABLE STEPHEN DWYER

APPEARANCES:

CORRIE YACKULIC for the Plaintiff-Respondent

ALICE BROWN for the Defendant-Appellant

REPORTED BY: Yvonne A. Southworth, CCR No. 2129.

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(Beginning of provided recording.)

MS. BROWN: Mr. Bearden was awarded $44,000 at mandatory arbitration. Mr. McGill sought a trial de novo. The jury awarded Mr. Bearden at trial $42,500, $1,500 less than the arbitrator awarded. Under these facts, Mr. McGill improved his position at the trial de novo. So the Superior Court committed legal error by awarding attorney's fees to Mr. Bearden in the amount of $71,800.

JUDGE LEACH: Does the trial court record, or the record before us more correctly, indicate the total amount of costs that the plaintiff asked the arbitrator to award?

MS. BROWN: I don't believe it does, Your Honor. We know the amount that was awarded. We know the amount that was requested by Mr. Bearden at the Superior Court, but in my review of the record -- and I may have overlooked it. Maybe counsel, opposing counsel can answer that question.

JUDGE LEACH: The other question I have for you -- well, I have several other questions. But we have a case, Stedman versus Cooper, I think you were involved in.

MS. BROWN: I was, Your Honor.

JUDGE LEACH: And that hasn't been cited to us. And I'm curious as to why you apparently don't think that case has any application here.

MS. BROWN: Well, the Stedman versus Cooper case was a case in which there was an offer of compromise. So first of all, that was one reason not to cite the Stedman versus Cooper case. Mr. Bearden, Mr. McGill -- this was a de novo from an arbitration award. There was no offer of compromise.

JUDGE LEACH: Does offer of compromise under the MAR statute simply replace the arbitration award?

MS. BROWN: It does, Your Honor.

JUDGE LEACH: So why the distinction?

MS. BROWN: The distinction is because under the Niccum case, and also in the Stedman case that followed the Niccum holding, there was the determination, as the Court has stated, in the earlier case that an offer of compromise becomes the total amount. And there isn't a segregation of costs, because at the time that a party submits an offer of compromise, they're not entitled to costs.

So this case is in a different line of cases. Mr. McGill's case is in a different line of cases than those that deal with the office of compromise analysis.

JUDGE LEACH: I'm going to propose a way of looking at this, and see what you think about it. What if we were to take the view that we examine all of the claims, both for damages and costs submitted to the arbitrator, total up the dollar amounts plaintiff recovered under all of those, and then take all of those claims but not any new claims for costs, for example, that arise because of the trial de novo, determine for those same claims what the plaintiff recovered in Superior Court on those claims, and then compare those two numbers. Is there any problem with that analysis from your perspective?

MS. BROWN: Well, I don't know that there's any case --

JUDGE LEACH: I'm not asking about case. I'm asking if there's a problem.

MS. BROWN: Oh, from the --

JUDGE LEACH: A case that would say that's wrong, or a practical problem doing that.

MS. BROWN: Well, I think that's -- Judge Leach, I think that's inconsistent with Tran versus Yu, which we believe with the case that controls here. And I know that Tran did not involve any award of costs at the arbitration proceeding. But the Tran case, and this Court has stated we -- they adopted --

this Court adopted the comparative comparables.

And I guess in your proposal, it's somewhat of a comparative comparables, but you're changing the comparables. And it would be a difficult thing. And if I understand your hypothetical situation, if it's whatever the costs that were awarded at the arbitration award --

JUDGE LEACH: It's not what costs were awarded. It's what the claims were and then the dollar amount recovered, because the plaintiff could make a claim for a cost at arbitration, for example, the cost of supplying medical records that the arbitrator for some reason did not award, but the Superior Court did award, so that the plaintiff would have actually done better on that part of the plaintiff's case, but it is the same case that was in arbitration. So we're comparing things that were litigated in both venues.

One of the problems we have with trials de novo, is there are new costs that develop, and including them in the calculation puts one party at a disadvantage, because you don't know what future costs are going to be. And where -- there's a Division 3 case where the actual issue was reasonable attorney's fees for a wage claim. And the Court said that that

was a claim that was in front of the arbitrator, and it was also in front of the Superior Court, and because the plaintiff prevailed in the Superior Court, you put that number into the basket to calculate the total recovery, and the plaintiff had done better.

I'm trying to come up with a way to reconcile all of the cases that are out there. And this is the best that I'm able to do. I'm trying to identify where I've gone wrong. And I'm asking for your help.

MS. BROWN: Thank you for that explanation. The case you're referring from Division 3, Miller versus Wolff is different. And as we pointed in our reply brief, it is different because that was a -- well, it wasn't compensatory damages. It was a right to attorney's fees that Mr. Miller asked for at the arbitration, was not awarded, but was awarded at the Superior Court. That is different than statutory costs or prevailing costs.

JUDGE LEACH: Why do we -- why do we focus on statutory costs? Well, I'll see you in ten minutes.

MS. BROWN: Okay. Thank you.

MS. YACKULIC: Good morning, Your Honor. Corrie Yackulic for Jim Bearden.

We're here because the defendant McGill's attorneys took a chance on a de novo appeal from an arb award, failed to improve their position, and now they don't want to pay the consequences of that decision. This was a perfect case for the mandatory arbitration system. It was a relatively small damages case, admitted liability.

JUDGE LEACH: You describe a premise that we really need to resolve that is failed to improve their position. What do you think the formula is for determining what position -- the status of the defendant was post arbitration, and what do you think the formula is for calculating whether the defendant's position post de novo trial is inferior or superior to where it was at arbitration?

MS. YACKULIC: It's the elements that were requested. So damages here and costs, requested in both forums and awarded in this case in both forums.

JUDGE LEACH: Have to be elements that could be requested in both forums?

MS. YACKULIC: Yes.

JUDGE LEACH: So costs that are incurred post arbitration could not have been requested in the arbitration, and should not be included?

MS. YACKULIC: No. The costs as a category

should be included. The reality is --

JUDGE LEACH: It's not the things that you could have asked for, but the label of things that you could have asked for?

MS. YACKULIC: Yes. And in fact, the Miller versus Wolff case is an example of that. The attorney's fees that were incurred at the trial de novo were significantly different than what could have been requested in the arbitration, but the Court of Appeals said, because that is a category that was requested at arb, denied but requested, and was awarded at the trial de novo, we're going to consider the aggregate amounts in both forums. And because the aggregate was greater in de novo, the plaintiff -- or the party had improved his position.

JUDGE DWYER: Way back in '84, the Christie-Lambert case came out. And what it said was that we compare what it referred to as claims actually arbitrated, arbitrated claims against those same claims and how they fared in the Superior Court. And there what happened was that a cross claim wasn't served. And on de novo, on the de novo trial, the cross claim had been served by then. And it was a multiparty litigation. So clearly, just looking at the numbers, one party had bettered its position.

And this Court said, we don't look at the bettered position. We look to the claims that were actually arbitrated. And so how do you arbitrate a claim that hasn't yet arisen? This is following up on Judge Leach's question about costs or anything else that arises after the arbitration proceeding. If it couldn't have been put before the arbitrator, which is what Christie-Lambert is talking about, then Christie-Lambert would say, we can't consider it.

You can get it in trial, because it's a de novo trial. You can recover it, but it's not part of what we look at. This is where the comp -- comparing comparables lingo came up. But the Christie-Lambert case, I think, is more specific about what that means.

MS. YACKULIC: Okay. Let's look at the Haley versus Highland case, which is a more resent Supreme Court case. In that case, the damages award in the arbitration and on the de novo were identical. But the plaintiff requested on the de novo the fees under the State Securities Act. He had not requested them in the arb. So the Court said, because he didn't request them, we won't consider the attorney's fees that were awarded on de novo. The implication being that if he had, they would have. And so --

JUDGE DWYER: Well, it would have been -- it

would have been actually arbitrated.

MS. YACKULIC: It would have been --

JUDGE DWYER: That's saying the same thing adds Christie-Lambert, right.

MS. YACKULIC: Yes, except that --

JUDGE DWYER: You can arbitrate something in front of the arbitrator, and he can rule against you.

MS. YACKULIC: Yes.

JUDGE DWYER: And then you can arbitrate the same thing, and you can win in Superior Court. That is the very reason for de novo trials to exist.

MS. YACKULIC: Yes, yes.

JUDGE DWYER: The question is whether or not the particular claim for relief, the request for a remedy in that particular amount was made before the arbitrator in order to compare. Are we -- are you saying that's what the Highland case stands for?

MS. YACKULIC: Yes, it's sort of -- the Highland is sort of the flip of the Miller versus Paul Wolff Company case, because in Miller versus Paul Wolff, the attorney's fees, which were vastly different at trial de novo than they would have been at the arbitration, because --

JUDGE DWYER: But there was no award for attorney's fees in that case in the arbitration.

Isn't that what happened? The arbitrator gave nothing.

MS. YACKULIC: That's right.

JUDGE LEACH: If the arbitrator had given the fees requested, the number would have been a better number than the plaintiff actually recovered at the arbitration. So the plaintiff did improve his position.

MS. YACKULIC: Yes.

JUDGE LEACH: On issues actually litigated to the arbitrator in the Superior Court.

MS. YACKULIC: So are you saying that costs aren't -- aren't litigated or -- I mean, there were --

JUDGE LEACH: What I'm asking you about is costs that are litigated at both forums. And excluding from the calculation costs that could not be litigated before the arbitrator, not the -- just the amount, but also sometimes the category. For example, witness fees in superior court where you had declarations at an arbitration.

JUDGE SCHINDLER: Before you answer, here as I understand it, the arbitrator awarded attorney's fees and costs. And those costs were related to arbitration, not the costs that Judge Leach has just identified.

MS. YACKULIC: In the Bearden case.

JUDGE SCHINDLER: Yes, your case.

MS. YACKULIC: Yes, my case. The arbitrator awarded -- yes, he awarded those costs that -- that we requested. I mean, honestly, I thought the case would go away after arbitration, and I wasn't as --

JUDGE LEACH: Were there any costs past the arbitration award that were not awarded?

MS. YACKULIC: I don't think so. Yeah.

JUDGE SCHINDLER: And so you had attorney's fees and costs.

MS. YACKULIC: Yes.

JUDGE SCHINDLER: Plus a damages award. All right.

MS. YACKULIC: The statutory $200 attorney's fee, yes. Yes, exactly. But if you start to parse the category of costs in this way, the unfairness of this is that necessarily the cost, the statutory costs that are recoverable are going to be higher on a de novo. And if the mandatory arbitration system is to work, the --

JUDGE DWYER: Not if you're just comparing the same costs. So if there's a cost that is only accrued in Superior Court, then it wasn't subject to the arbitrator. So it's -- it's not in the mix.

MS. YACKULIC: Okay.

JUDGE DWYER: I mean, it wouldn't -- if it's not subject, it doesn't tip anything.

JUDGE LEACH: Your argument is there are going to be additional statutory costs like the witness fees I just described.

MS. YACKULIC: I mean, necessarily.

JUDGE LEACH: Going to have to do some depositions and that sort of thing.

MS. YACKULIC: Yes.

JUDGE LEACH: So it's unfair, because you're going to incur some additional statutory costs in Superior Court, so we should factor those in as well.

JUDGE DWYER: But you get those if you prevail in a traditional sense. In other words, the finding is for you, you get those under 010 anyway.

MS. YACKULIC: Yes, but what's really going on here obviously is the attorney's fees, because if this were just about two thousand --

JUDGE DWYER: I know that. But what I'm saying, we're not saying -- when we're talking about trying to figure out what the -- what it is that's being compared, we're not indicating that that disentitles something, an otherwise prevailing party from that which 010 gives all prevailing parties.

We're not --

MS. YACKULIC: I understand that.

JUDGE DWYER: We're not getting mixed up in that morass. That's not what we're talking about.

MS. YACKULIC: Understood. We're talking about improving position.

JUDGE LEACH: We're talking about whether there is a fee shifting that's going to occur because of it, not what statutory costs can be recovered.

MS. YACKULIC: I understand that.

JUDGE LEACH: (Inaudible) -- fee shifting mechanism.

MS. YACKULIC: Yes.

JUDGE LEACH: And how we do the arithmetic.

MS. YACKULIC: But then in the Miller versus Wolff case, where certain fees were incurred in the de novo that could not have been considered by the arbitrator --

JUDGE DWYER: But the problem with that argument is the plaintiff would be better off if they had gotten dollar one of attorney's fees at arbitration, and the Superior Court held they were entitled to an award of reasonable fees at the arbitration, so they did improve their position over arbitration. We don't need to look at the extra money

they spent trying the Superior Court case to determine that they improved their position.

MS. YACKULIC: Okay.

JUDGE DWYER: The mere fact that they were entitled to recover fees improved their position. Dollar one got them there.

MS. YACKULIC: Okay. I want to call your attention to a case that neither party cited, but it was cited in Niccum, and it's been cited more recently.

JUDGE SCHINDLER: Go ahead.

MS. YACKULIC: The case is -- it's a Division 3 case, Sauro versus Cormar, or Cormar versus Sauro, 60 Wn. App. 622. It's from 1991. And basically the Court says, bring your common sense to the interpretation of the language, failed to improve his position and says -- this is the direct quote: "We conclude that the rule was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo would certainly answer no in the face of a Superior Court judgment against them for more than the arbitrator awarded." And it's, you know, sort of over arching principle here that underlies the MAR system, and that mandatory fee shifting. Thank you.

MS. BROWN: Following up on the common sense approach. The common sense approach is to look at what was awarded by the arbitrator, what was awarded by the jury, and --

JUDGE LEACH: The problem with all of that, we still have to explain what the words of statute -- the statutes mean. And just saying it makes common sense to say A or B really ignores the problem that we have, and that's what these words in the statute mean.

MS. BROWN: And I'm not suggesting that the Court ignore all the statute and the case law. That is a fundamental principle that needs to be applied in looking at these issues.

JUDGE LEACH: It's sort of an if we can't come up with any other answer approach. We don't get to decide the statute means what we think it ought to mean. We have to decide what the legislature --

MS. BROWN: Well, and I will come back to Tran versus Yu, which I think the Court did decide, and I'll read the language, and I know factually it's a little bit different, because as I said before, in Tran, there was no request for costs. Or if there was, there was no award of costs at the arbitration.

But this Court noted at 118 Wn. App. 612, compare the entire judgment at trial -- they rejected

the argument that we should compare the entire judgment including costs and sanctions. We look at what the award is. And here's the quote. "A trial is almost always more expensive than arbitration. If Tran's interpretation was accepted, a party would invariably improve its position, because additional costs, attorney's fees, and interest would be incurred." In other words, if the proposal, Judge Leach, that you have of the formula --

JUDGE LEACH: You would win under my proposal. That's what puzzles me about your rejection of --

MS. BROWN: Well, I would win under your proposal, but here's my -- here's my challenge. And I have a few moments to think about your formula adopted here to make my client win, but here are the problems that I foresee for other cases, and even for this case -- I was unable to answer your question about what costs were requested at arbitration. By the very nature of a mandatory arbitration, there's not a record.

So if we get into this question of what costs were asked for and what were awarded at the arbitration, and we're going to only look at those and then compare it to the ultimate outcome at the trial,

it would be difficult.

JUDGE LEACH: There are pieces of paper that we use to request them. So it's not that hard. And the lawyers will know what the numbers are. The problem is trying to decide whether to settle or not when you don't know what the number is that you're going to have to beat.

MS. BROWN: That is indeed the number -- I mean that is indeed the rub.

JUDGE LEACH: Like a race where you don't know where the finish line is. You can decide whether to sprint the last 10 yards if you can see where the finish line is. If you don't know that the finish line is going to move, you don't want to start your sprint.

JUDGE DWYER: I don't really see where that's any more of a problem than any other claim. What you just -- your last -- any claim in an arbitration suffers from the same practical obscurity, but -- but history has proven that there's ways to put words on paper, and it's clear what was asked for. And we're out of -- well, since the legislature passed the statute specifically giving arbitrators the ability to do this, I mean, it has somewhat formalized what used to be a more cultural behavior, and it seems

to be less of a problem than it might have been --

MS. BROWN: Perhaps, you're correct, judge Dwyer, that my concern about creating a record with regard to how a Superior Court would apply the who is -- who has improved his position on trial de novo under Judge Leach's formula maybe isn't as much of a concern as I have made it.

In this case, we would ask the Court to reverse the attorney fee award, because as a matter of law, Mr. McGill did improve his position under the comparing comparables of the arbitration award versus the jury award or under Judge Leach's formula.

Thank you, Your Honors.

(End of recording.)

C E R T I F I C A T E

State of Washington)
) Ss.
County of King)

I, the undersigned Certified Court Reporter and an Officer of the Court for the State of Washington hereby certify that the foregoing Proceedings before the Court of Appeals was transcribed under my direction;

That the transcript of the Proceedings is a full, true, and correct transcript to the best of my ability; that I am neither attorney for, nor a relative or employee of, any of the parties to the action or any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this date, May 3, 2016:

/S/Yvonne A. Southworth

Yvonne A. Southworth

APPENDIX D

Comparison of Arbitration Award v. Trial De Novo Judgment

	Arbitration Award (CP 290-291)	**Trial De Novo Judgment (CP 109) (CP 86)**	**Difference**
General Damages	$34,336.09	$42,500	Increase of $8,163.91
Special Damages	$8,663.91		
Subtotal	$45,187	$42,500	
RCW 4.84.010 Costs	$1,187.00	$3,296.39	
Total	**$45,187.00**	**45,769.39**	**Increase of $ 582.39**

APPENDIX E

Senate Bill Report, SB 5373 (Feb. 11, 2002), http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bill%20Reports/Senate/5373.SBR.pdf.

Final Bill Report, SB 5373 (2002), http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bill%20Reports/Senate/5373.FBR.pdf.

APPENDIX E

SENATE BILL REPORT
SB 5373

As Passed Senate, February 11, 2002

Title: An act relating to mandatory arbitration of civil actions.

Brief Description: Changing mandatory arbitration of civil actions.

Sponsors: Senators Sheahan, Kline, McCaslin, Thibaudeau, Kastama, Long, Roach, Johnson and Constantine.

Brief History:
Committee Activity: Judiciary: 2/1/01, 2/6/01 [DP].
Passed Senate: 3/13/01, 33-15; 2/11/02, 37-11.

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.
Signed by Senators Kline, Chair; Constantine, Vice Chair; Costa, Johnson, Kastama, Long, McCaslin, Roach, Thibaudeau and Zarelli.

Staff: Dick Armstrong (786-7460)

Background: Arbitration is a nonjudicial method for resolving disputes in which a neutral party is given authority to decide the case. Arbitration is intended to be a less expensive and time-consuming way of settling problems than taking a dispute to court. Parties are generally free to agree between themselves to submit an issue to arbitration. In some cases, however, arbitration is mandatory.

A statute allows any superior court, by majority vote of its judges, to adopt mandatory arbitration in prescribed cases. In counties of 70,000 or more population, the county legislative authority may also impose this mandatory arbitration. This mandatory arbitration applies to cases in which the sole relief sought is a money judgment of $15,000 or less. By a two-thirds vote, the judges of the superior court may raise this limit to $35,000.

An award by an arbitrator may be appealed to the superior court. The superior court will hear the appeal "de novo;" that is, the court will conduct a trial on all issues of fact and law essentially as though the arbitration had not occurred.

The mandatory arbitration statute provides that Supreme Court rule will establish the procedures to be used in mandatory arbitration. The statute also provides that the Supreme Court rules may allow for the recovery of costs and "reasonable" attorney fees from a party who demands a trial de novo and fails to improve his or her position on appeal. The determination of whether or not the appealing party's position has been improved is based on the amount awarded in arbitration compared to the amount awarded at the trial de novo.

"Reasonable" attorney fees are set by the court based on factors designed to reflect the actual cost of legal representations. "Statutory" attorney fees are set by statute at $125 and are part of the costs" which a prevailing party may be awarded. "Costs" also include items such as the filing fee and fees for service of process, notarization, and witness fees.

Summary of Bill: An offer of compromise procedure is provided for mandatory arbitration cases that are appealed to the superior court.

- A non-appealing party may serve an appealing party with a written offer to settle the case.

- If the appealing party does not accept the offer, the amount of the offer becomes the basis for determining whether the party that demanded the trial de novo fails to improve his or her position on appeal for purposes of awarding reasonable attorney fees and costs under the court rules.

- At a trial de novo, the offer of compromise will not be made known to the trier of fact until after a judgment is reached in the trial.

- The award of reasonable attorney fees and costs against an appealing party who fails to improve his or her position is made mandatory in statute. The superior court is also authorized to assess these same fees and costs against a party who voluntarily withdraws a request for a trial de novo, but only if the voluntary withdrawal is not made in connection with the acceptance of an offer of compromise.

- A part who prevails in arbitration and at a trial de novo may still recover statutory attorney fees and costs even if the party who appealed the arbitration award improved his or her position on appeal.

The act applies to all requests for a trial de novo filed on or after the effective date of the act.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill is fair and reasonable. Most appeals (86 percent) are filed by defendants and this means that injured parties are not being paid in a timely manner. The current system needs to be changed because litigants are opting out of the system. Mandatory arbitration is a good program because it is fast and it is an inexpensive way to handle cases. The current system rewards tactical delays. The process of an offer of compromise will help to improve the system. Some cases from 1996 are still pending in the court system. It should be remembered that jury trials in King County costs taxpayers $1,200 a day. There is a large number of cases waiting for trial, but the cases cannot be heard because of the huge backlog of civil cases. The usual attorney fee granted on appeal is around $11,000 and $12,000.

Testimony Against: The bill results in a detriment to some companies because it will make it harder for appealing parties to improve their position on appeal. An offer of compromise

changes the benchmark for determining the obligation to pay the other party's attorney fees. Some arbitrators tend to split the difference between claims of the plaintiff and the defendant.

There are more plaintiffs' attorneys who sign up for the mandatory arbitration program. Insurance companies want to settle cases, and attorneys who represent such companies do a good job both at arbitration and in court.

This bill is implicit evidence that arbitration awards are generally too high. Juries typically award less than arbitrators.

Testified: PRO: Larry Shannon, WSTLA; Shawn Briggs, Tacoma Pierce County Bar Association; CON: Mel Sorensen, National Association of Independent Insurers; Jean Leonard, State Farm; George McLean, State Farm.

FINAL BILL REPORT
SB 5373

C 339 L 02
Synopsis as Enacted

Brief Description: Changing mandatory arbitration of civil actions.

Sponsors: Senators Sheahan, Kline, McCaslin, Thibaudeau, Kastama, Long, Roach, Johnson and Constantine.

Senate Committee on Judiciary
House Committee on Judiciary

Background: Arbitration is a nonjudicial method for resolving disputes in which a neutral party is given authority to decide the case. A statute allows any superior court, by majority vote of its judges, to adopt mandatory arbitration in prescribed cases. In counties of 70,000 or more population, the county legislative authority may also impose this mandatory arbitration. This mandatory arbitration applies to cases in which the sole relief sought is a money judgment of $15,000 or less. By a two-thirds vote, the judges of the superior court may raise this limit to $35,000.

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- A non-appealing party may serve an appealing party with a written offer to settle the case.
- If the appealing party does not accept the offer, the amount of the offer becomes the basis for determining whether the party that demanded the trial de novo fails to improve his or her position on appeal for purposes of awarding reasonable attorney fees and costs under the court rules.
- The award of reasonable attorney fees and costs against an appealing party who fails to improve his or her position is made mandatory in statute. The superior court is also authorized to assess these same fees and costs against a party who voluntarily withdraws a request for a trial de novo, but only if the voluntary withdrawal is not made in connection with the acceptance of an offer of compromise.

Votes on Final Passage:

Senate	37	11
House	65	28

Effective: June 13, 2002