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NO. 72926-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JAMES D. BEARDEN,

Respondent,

vs.

DOLPHUS A. McGILL,

Appellant.

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable George F. B. Appel, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Rules and Regulations

Other Authorities

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I. NATURE OF THE CASE

This appeal stems from the trial court's erroneous decision to award attorney fees after a mandatory arbitration and trial de novo. First, the trial court incorrectly awarded plaintiff costs not allowed under statute. Second, the trial court improperly used those inflated costs in calculations to determine that the defendant did not improve his position at the trial as compared to arbitration. The trial court's award of attorney fees constitutes reversible error.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in awarding plaintiff costs for depositions and an expert arbitration report not used at trial. (CP 85, 88-89)

2. The trial court erred in entering judgment in favor of plaintiff which included costs to which plaintiff was not entitled. (CP 86-87)

3. The trial court erred in issuing its order determining that plaintiff was entitled to attorney fees. (CP 20-23)

4. The trial court erred in entering conclusions of law which stated that defendant failed to improve his position at a trial de novo and plaintiff was entitled to attorney fees. (CP 18-19)

III. ISSUES PRESENTED

1. Was it improper for the trial court to award costs to the prevailing plaintiff for a discovery deposition far in excess of its pro rata use at trial? (Pertaining to Assignments of Error Nos. 1 and 2)

2. Was it improper for the trial court to award costs to the prevailing plaintiff for an expert report and declaration used only at a prior mandatory arbitration? (Pertaining to Assignments of Error Nos. 1 and 2)

3. Was it improper for the trial court to award costs to the prevailing plaintiff without requiring any invoices or other supporting documentation for those costs? (Pertaining to Assignments of Error Nos. 1 and 2)

4. Was it improper for the trial court to include costs when comparing the arbitration award to the jury award for purposes of determining whether plaintiff was entitled to attorney fees pursuant to MAR 7.3? (Pertaining to Assignments of Error Nos. 3 and 4)

IV. STATEMENT OF THE CASE

A. FACTS OF THE CASE.

James Bearden and Dolphus McGill were involved in an automobile accident on January 28, 2011. (CP 288) On November 2, 2012, Bearden sued McGill in Snohomish County Superior Court alleging

negligence and seeking damages for his injuries. (CP 288-89) Bearden moved the matter to mandatory arbitration on July 19, 2013. (CP 277-79)

B. ARBITRATION.

On December 5, 2013, the parties conducted an arbitration hearing. (CP 292) Bearden then submitted a cost bill on December 12, 2013, identifying $1,187.00 in costs. (CP 274-75) The arbitrator filed his award on December 23, 2013, awarding Bearden "Special Damages" in the amount of $8,663.91 and "General Damages" in the amount of $34,336.09, for a "Total Award" of $44,000.00. (CP 292-93) On December 26, 2013, the arbitrator filed an Amended Arbitration Award with Costs which reflected $44,000.00 in "Total Award" and $1,187.00 in "Total Costs." (CP 290-91)

C. TRIAL DE NOVO.

McGill filed a request for trial de novo on December 30, 2013.[1] (CP 268-71) The case proceeded to trial on September 16, 2014. (CP 246) Bearden testified at trial and also called additional witnesses for his case: Kristy Reichel; Dr. James Gaddis; Dr. Thomas Seib; and Patrick

[1] For some reason, McGill filed a second request for trial de novo on January 3, 2014. (CP 265-67)

McKilligan[2] (by reading his deposition transcript aloud). (CP 246-60; RP 102-23) McGill called Dr. Lawrence Murphy to testify by videotaped deposition for the defense. (*Id.*) The jury returned a verdict in favor of Bearden in the amount of $42,500.00. (CP 109)

D. PLAINTIFF'S COST BILL.

On September 29, 2014, Bearden submitted a cost bill requesting a total of $4,049.22 in taxable costs. (CP 106-08) Plaintiff did not provide any invoices or receipts to justify the claimed expenses. (CP 103-05) McGill registered numerous objections to the cost bill. (CP 99-102) First, McGill objected to the $30.00 ex parte fee and an $8.00 fee to file by facsimile. (CP 99) Second, McGill objected to the service fees on Nellie Knox McGill who was dismissed prior to trial. (CP 100) Third, McGill objected to the appearance fees for Bearden's witnesses because there was no contemporaneous record of those fees. (CP 100) Fourth, McGill objected to the recovery of costs for Dr. Murphy's discovery deposition and Mr. McKilligan's deposition, noting the lack of supporting documentation. (CP 100-01) Finally, McGill objected to costs for medical records, the police report, and the arbitration declaration/report from Dr. Gaddis. (CP 101)

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[2] Mr. McKilligan is erroneously referred to as "McGilligan" in many of the pleadings. (RP 102)

The trial court's rulings were reflected in a court minute entry and the Order Granting Plaintiff's Cost Bill. (CP 85, 88-89) The court allowed the ex parte and fax filing fees but not the service fee for Nellie Knox McGill. (*Id.*) It allowed the witness fees. (*Id.*) It allowed 50% of the costs Dr. Murphy's discovery deposition and all of the costs for Dr. Murphy's perpetuation deposition. (*Id.*) The court allowed the costs for the deposition of Mr. McKilligan but not for the deposition of Mr. Bearden. (*Id.*) The court did not allow the costs for medical records, but it allowed the costs associated with the police report and the report by Dr. Gaddis. (*Id.*) Finally, the court allowed statutory attorney fees. (*Id.*) With those changes, the court entered an order granting plaintiff's cost bill in the amount of $3,296.39. (CP 88-89) On October 24, 2014, the court entered a Judgment reflecting the "Total Principal Judgment Amount" of $42,500.00 and costs of $3,296.39.[3] (CP 86-87)

E. MOTION FOR ATTORNEY FEES.

On November 3, 2014, Bearden moved for attorney fees and costs pursuant to MAR 7.3 and RCW 7.06.060. (CP 75-84) Bearden argued

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[3] Somewhat confusingly, the amounts were not written in the proper blanks. In the "Judgment Summary" section, the court appears to have erroneously listed the total amount of award plus taxable costs on the line labeled "Taxable Costs & Attorney's fees." (CP 86) In addition, in the "Judgment" section, the court appears to have erroneously written the amount "$42,500" in the space where the total amount of the award plus taxable costs should have been written. (*Id.*)

that the court should compare the arbitration award plus costs to the jury award plus costs. (CP 79) Bearden sought $107,632.50 for attorney fees and $9,250.00 for expert witness expenses. (CP 83) McGill opposed the motion, pointing out that he had improved his position at trial (and that plaintiff's inclusion of costs into the analysis was improper) so attorney fees were not appropriate. (CP 45-47) McGill also argued that Bearden's claimed fees were excessive. (CP 48-53)

The trial court issued a memorandum decision on December 10, 2014, which determined that McGill had not improved his position at the trial de novo as compared to the arbitration, and Bearden was entitled to attorney fees. (CP 20-23) Specifically, the court noted as follows:

> Here, costs were before the arbitrator as well as the trial court. The amounts in each judgment might therefore be compared for purposes of RCW 7.06.060 and MAR 7.3
>
> The question whether the defendant improved his position at trial can be fairly decided by comparing an award of damages and costs handed down by the arbitrator and the judgment for damages and costs following the trial de novo. The defendant did not improve his position; he worsened it slightly. The plaintiff is entitled to reasonable attorney's fees.

(CP 21)

The trial court awarded Bearden $71,800.00 in attorney fees and made no mention of the expert witness costs. (CP 21-23) The court also issued findings of fact and conclusions of law. (CP 18-19) In the

conclusions of law, the court determined that Bearden had failed to improve his position following the trial de novo and that plaintiff was entitled to an award of attorney's fees in the amount of $71,800.00. (CP 19)

A partial satisfaction of judgment in the amount of $45,796.39 was entered on January 16, 2015. (CP 1-4) McGill filed a notice of appeal on January 8, 2015. (CP 5-16)

V. ARGUMENT

A. STANDARD OF REVIEW.

Attorney fee and cost awards are reviewed for an abuse of discretion, and will be reversed when the court's decision is "'manifestly unreasonable.'" *In re Discipline of VanDerbeek*, 153 Wn.2d 64, 99, 101 P.3d 88 (2004) (*quoting Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 519, 910 P.2d 462 (1996)). The trial court in this case made several awards of costs pursuant to RCW 4.84.010 that were "manifestly unreasonable." *Id.* The court's award of particular costs should be reviewed for an abuse of discretion.

The standard of review for a trial court's decision involving the interpretation of a court rule is de novo. *See Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544, *rev. denied*, 139 Wn.2d 1009 (1999). Similarly, a trial court's application of a statute is reviewed de novo. *Basin Paving*

Co. v. Contractors Bonding and Ins. Co., 123 Wn. App. 410, 414, 98 P.3d 109 (2004). In this case, the superior court made a legal error in its interpretation and application of RCW 7.06.060, and MAR 7.3. Whether or not attorney fees were properly awarded should be reviewed de novo.

B. THE TRIAL COURT IMPROPERLY AWARDED COSTS.

1. Dr. Gaddis's Report.

RCW 4.84.010 allows the "prevailing party upon the judgment certain sums for the prevailing party's expenses in the action" including:

> Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files.

RCW 4.84.010(5) (emphasis added). Dr. Gaddis's report with declaration does not qualify as a taxable cost, and the trial court abused its discretion in awarding Bearden $400.00 for it.

First, the Gaddis report was not used at the trial. (RP 3-101) There is no dispute that the report was not used at trial or admitted into evidence as required by RCW 4.84.010(5). (CP 261-64) Thus, while Bearden could have argued that it was a taxable cost at the arbitration,[4]

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[4] For whatever reason, Bearden did not claim the Gaddis report as a cost following the arbitration. (CP 274) Hypothetically, had the cost of the Gaddis report been awarded at

once the trial de novo was requested, he was no longer the prevailing party and thus was not entitled to any costs from the arbitration. *See Niccum v. Enquist*, 175 Wn.2d 441, 449-50, 286 P.3d 966 (2012). RCW 4.84.010(5) addresses costs that can be awarded following a trial for which the plaintiff is the prevailing party. Although Bearden prevailed at the trial, he did not incur that cost for the trial. Indeed, Bearden acknowledged that the report was used only at the arbitration in lieu of his live or perpetuation testimony. (CP 97)

Second, the Gaddis report failed to qualify under RCW 4.84.010(5) because it was not a "report[] or record[]" within the letter or spirit of that provision. That statute contemplates costs associated in "obtaining" copies of records that have already been generated in the ordinary course of business, not the cost of paying a provider to create a special report or document to be used at trial. RCW 4.84.010(5). The Gaddis report was specifically generated for Bearden for the litigation because "[i]t was far less expensive to obtain a report from Dr. Gaddis than to perpetuate his essential testimony by deposition." (CP 97). The report did not qualify as any of the items listed in RCW 4.84.010(5), and was not similar to any of

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the arbitration instead of the trial, the resulting comparison ($45,587.00 at arbitration and $45,396.39 at trial) would not have resulted in MAR 7.3 fees – even if the costs were included in the calculation.

those examples because it was not prepared in the ordinary course of business.

In fact, the Gaddis report constituted an expert expense that was not proper under RCW 4.84.010. Costs under the Mandatory Arbitration Rules are limited to those items set forth in RCW 4.84.010, and do not include expert witness fees. *Colarusso v. Petersen*, 61 Wn. App. 767, 771, 812 P.2d 862, *rev. denied*, 117 Wn.2d 1024 (1991). As Washington courts have noted:

> RCW 4.84.010 does not authorize expert witness fees in an award of costs to the prevailing party. Moreover, our Supreme Court has recognized there are no grounds for awarding expert witness fees as costs. *See Wagner* [*v. Foote*, 128 Wn.2d 408, 417-18, 908 P.2d 884 (1996)]; *Fiorito v. Goerig*, 27 Wn.2d 615, 620, 179 P.2d 316 (1947). Specifically, "[w]here 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 against the losing party as a part of the costs of the action." *Fiorito*, 27 Wn.2d at 620. Accordingly, the trial court erred in awarding costs for Mr. Salina's expert witness fee.

Estep v. Hamilton, 148 Wn. App. 246, 263, 201 P.3d 331 (2008), *rev. denied*, 166 Wn.2d 1027 (2009) (emphasis added). Although he also treated Bearden, in preparing this report specifically for the litigation, he was acting as Bearden's expert.

If Bearden's expansive definition of "obtaining" is credited, then he would be able to collect, as taxable costs, the money paid for all of his

medical visits because he "obtained" his records as a result of paying his doctor for the patient visits. Clearly, that is not the intent of the statute, and there is no caselaw supporting recovery of anything other than the retrieval costs under RCW 4.84.010. *See Austin v. U.S. Bank*, 73 Wn. App. 293, 310, 869 P.2d 404, *rev. denied*, 124 Wn.2d 105 (1994). It was manifestly unfair for the court to include the $400 fee for the Gaddis report as part of taxable costs. *See VanDerbeek*, 153 Wn.2d at 99.

2. Dr. Murphy's Discovery Deposition.

A prevailing party may be awarded costs:

> To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

RCW 4.84.010(7) (emphasis added). Dr. Murphy's discovery deposition was not introduced into evidence, so it could only have been the basis for costs on a pro rata basis to the extent it was used for impeachment. (CP 261-64) The only portions of the deposition which were used for impeachment were pages 78 and 57. (CP 174-75, 178) Those two pages equal approximately 2% of the deposition. (CP 100) The deposition cost for Bearden was $522.50, so the proper pro rata share contemplated by

RCW 4.84.010(7), should have been approximately $10.45.[5] (CP 104) Instead, the court awarded Bearden 50% of the deposition cost ($261.25). Unquestionably, 50% does not represent a true "pro rata" share demanded by RCW 4.84.010(7).[6] The two pages represented such a minimal use of the deposition that if the court was inclined to round, then it should have rounded down to 0% rather than up to 50%. Where so little of the deposition was actually used at trial for impeachment purposes, it was an abuse of the trial court's discretion to award 50% of the cost ($261.25) and not the actual pro rata share ($10.45) as specified in the statute. (CP 85, 89)

3. Lack of Documentation.

Finally, the trial court more generally abused its discretion by not requiring any sort of bills, invoices, or receipts to justify the claimed expenses. McGill generally objected that Bearden did not submit any supporting bills with his proposed cost bill and supporting declaration.

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[5] "Pro rata" is defined as: "Proportionately; according to a certain rate, percentage, or proportion. According to measure, interest, or liability. According to a certain rule or proportion. For example, if a corporation has ten shareholders each of whom owns 10% of the stock, a pro-rata dividend distribution of $1,000 would mean that each shareholder would receive $100." BLACK'S LAW DICTIONARY 1220 (6th ed. 1990).

[6] It would have been improper for the court to round up to 50% because, as Bearden alleged, counsel's "cross-examination outline was drawn from, and thus 'used,' Dr. Murphy's discovery deposition testimony." (CP 95-96) The language of RCW 4.84.010 does not authorize this (it unequivocally states "used for purposes of impeachment") and no Washington court has interpreted the statute so broadly.

(CP 101) The lack of invoices is particularly problematic with regard to the depositions. Dr. Murphy's discovery deposition allegedly cost Bearden $522.50. (CP 104) However, Dr. Murphy's perpetuation deposition allegedly cost Bearden $752.30. (CP 104, 110-86) The court failed to require Bearden to justify how the transcription costs of what was likely a shorter deposition cost over $200 more before agreeing to award such costs.[7]

Further, Bearden did not use Dr. Murphy's deposition in his case in chief. The testimony from the video deposition was part of McGill's case, introduced after Bearden had rested. (CP 259) Bearden did not need to incur any costs related to Dr. Murphy's perpetuation deposition in order to prosecute his case. Bearden provided it. Because it did not require Bearden to provide any sort of documentation to justify his cost bill, the trial court abused its discretion by awarding the unjustified deposition costs.

As discussed below, the trial court later compounded its errors by allowing these improper and inflated costs to serve as the justification for an award of attorney fees under MAR 7.3. However, if the amounts for

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[7] It is also unclear how the perpetuation deposition (for which Bearden presumably only purchased a copy) cost Bearden so much more than the discovery deposition that Bearden actually noted and conducted. Certainly, Bearden was not entitled to recover for the videotaping of the deposition, only the transcription. RCW 4.84.010(7). Again, the trial court failed to require any supporting documentation before awarding those costs.

the Gaddis report and the inflated pro rata share of Dr. Murphy's deposition are excluded ($650.80) – even if costs are included in the comparison – the composite judgment amount would only be $45,145.59, which is less that the composite arbitration amount of $45,187.00. McGill improved his position (even under the trial court's faulty interpretation of MAR 7.3), and the amount of attorney fees must be reversed.

C. ATTORNEY FEES WERE NOT WARRANTED.

MAR 7.3 provides in relevant part:

> 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.

MAR 7.3 (emphasis added). Similarly, RCW 7.06.060(1) provides:

> 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.

RCW 7.06.060(1) (emphasis added).

In this case, the trial court added the costs Bearden received from the arbitrator to the arbitration award and compared that amount ($45,187.00) to the sum of the jury's award plus the costs from the trial ($45,796.39). As a result, the trial court awarded Bearden MAR 7.3 attorney fees despite the fact that McGill improved his position in terms of damages awarded at the trial ($42,000.00) as compared to the arbitration ($44,000.00). The trial court's methodology and decision are inconsistent

with Washington caselaw and the purpose and legislative history of the rules.

1. The Trial Court's Interpretation Is Unsupported by Washington Caselaw.

Although the particular factual scenario of this case has not been specifically addressed, no Washington cases have included costs in the comparison of the arbitrator's award to the jury's award on the trial de novo. *See i.e., Sultani v. Leuthy*, 86 Wn. App. 753, 943 P.2d 1122 (1997) (although the trial de novo resulted in a higher amount of damages as a result of a reallocation of fault, two defendants owed less and were not required to pay attorney fees), *rev. denied*, 134 Wn.2d 1001 (1997); *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003) (the award of damages at trial was less than the award of damages at arbitration, so defendant did not owe attorney fees); *Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 815 P.2d 293 (1991) (the court only compared the jury's compensatory damages award to the arbitrator's award of compensatory damages – not the attorney fees awarded at arbitration – to determine that defendant did not improve its position), *rev. denied*, 118 Wn.2d 1013 (1992). Rather, Washington courts are directed to "compare comparables" when determining whether a party has improved his position on the trial de novo. *Tran v. Yu*, 118 Wn. App. at 612; *see also Wilkerson v. United Inv.,*

Inc., 62 Wn. App. at 717. In those cases, the "comparables" that are compared are the economic and general damages – not costs.

For example, in *Tran*, plaintiff was awarded $14,675.00 in damages at arbitration. 118 Wn. App. at 609-10. Defendant requested a trial de novo. *Id.* at 610. The jury's award of $13,375.00 in economic and non-economic damages was less than the arbitration award. *Id.* In a post-trial motion, plaintiff was awarded $3,205.00 in attorney fees pursuant to CR 37(c) (for costs incurred in proving issues that defendant had denied in response to requests for admission) and $955.80 in statutory costs (as the prevailing party under RCW 4.84.010). *Id.* The CR 37(c) costs and statutory costs were added to the jury's award for a total judgment of $17,535.80. Plaintiff then argued that because the total judgment exceeded the arbitration award, she was also entitled to attorney fees under MAR 7.3. *Id.* The trial court denied plaintiff's request for MAR 7.3 fees. *Id.* at 611.

The Court of Appeals affirmed. *Id.* at 616-17. The *Tran* Court noted that plaintiff's proposal to include the costs and sanctions was inconsistent with the purpose of MAR 7.3. *Id.* at 612.

> A trial is almost always more expensive than arbitration. If Tran's interpretation were accepted, a party would invariably improve its position because additional costs, attorney fees, and interest would be incurred.

Id. The court determined that it was more appropriate to "compare comparables," and that was "the compensatory damages awarded by the arbitrator and the compensatory damages awarded at the trial de novo." *Id.* In the subsequent case of *Monnastes v. Greenwood*, 170 Wn. App. 242, 283 P.3d 603 (2012), the court summarized the *Tran* holding as follows:

> In sum, under *Tran*, a trial court is to compare the compensatory damages awarded by the arbitrator with the compensatory damages awarded at trial.

Id. at 246 (emphasis added). Washington courts have consistently ruled on this isssue in a manner which excludes costs from the equation and focuses on comparing compensatory damages.

Logically, damages awards and costs should not be lumped together for purposes of determining whether a party improved his position at trial. The jury award represents the factual assessment of the merits of the case. The post-trial award of costs is a legal determination made by the court about what costs are recoverable under the statute. At arbitration, an arbitrator wears the hat of a fact finder when making a damages award. The arbitrator then switches roles to that of a judge when determining what costs are legally appropriate for the prevailing party.

The MAR 7.3 fee and cost provision was intended to deter only meritless appeals of the arbitrator's award. *Christie-Lambert Van &*

Storage Co., Inc. v. McLeod, 39 Wn. App. 298, 302-03, 693 P.2d 161 (1984); *Haley v. Highland*, 142 Wn.2d 135, 159, 12 P.3d 119 (2000) (Talmadge, J. concurring). In discussing whether a de novo appeal is "meritless," the courts are naturally concerned with the underlying merits of the claims as demonstrated by the compensatory damages. *See Tran*, 118 Wn. App. at 612. Only the damages awards by the arbitrator and the jury deal with assessing and valuing the actual merits of the claim.

The amount of costs is not in any way tied to the value of damages or the merits of the claim. As a hypothetical example, if a jury awarded a plaintiff one million dollars in damages in a personal injury case, that plaintiff might only be entitled to several hundred dollars for his cost bill (if, for example, the case did not call for the use of extensive records and depositions). If, in that same hypothetical case, the jury only awarded the plaintiff damages of $1,000, he would still be entitled to the same amount of costs. The costs do not reflect the relative success of the litigant.

The case before this Court presents the perfect example of how costs can improperly skew the numbers for comparison. Bearden was not more successful as a litigant at trial simply because he was entitled to more costs than after his arbitration. Rather, Bearden was less successful at trial than at the arbitration in convincing the trier of fact about the merits of his claims – as reflected by the comparative award of economic

and general damages by the respective fact finders. In other words, the jury found Bearden's claims to be less meritorious – from a monetary standpoint – than the arbitrator did. However, the costs associated with the arbitration were considerably less than those costs Bearden claimed related to the trial de novo. Bearden only received $1,187.00 in costs from the arbitrator, whereas he received $3,296.39 in costs from the court following the trial de novo. (CP 89, 290)

The disparity in taxable costs between the two proceedings makes sense. Washington's Legislature adopted a truncated mandatory arbitration system for simpler, smaller-value cases to reduce congestion and delays in the courts. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997). Discovery is limited during the streamlined arbitration process. For example, only the depositions of the parties can be conducted without a determination by the arbitrator that it was "reasonably necessary." MAR 4.2. Discovery for the trial de novo, including discovery depositions, is not restricted in the same manner. CR 30. At the arbitration, Bearden did not request any costs related to depositions. For trial, however, Bearden received $1,752.05 in costs related to non-party depositions alone (more than the entire arbitration cost bill). (CP 89) This is expected because trials are always more expensive than arbitrations. *See Tran*, 118 Wn. App. at 612. Although the higher

costs are expected, it is unfair to use those higher costs to determine whether a party improves its position.

2. The Trial Court's Decision Is Inconsistent with the Purposes of the Mandatory Arbitration System.

The purpose of the mandatory arbitration system is to reduce congestion and delays in the courts. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997). "'A supplemental goal of the mandatory arbitration statute is to discourage meritless appeals.'" *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001), *superseded by statute on other grounds by Splattstoesser v. Scott*, 159 Wn. App. 332, 246 P.3d 230 (2011); *Perkins Coie v. Williams*, 84 Wn. App. 733, 737, 929 P.2d 1215, *rev. denied*, 132 Wn.2d 1013 (1997). Justice Talmadge explained the purpose behind MAR 7.3 as follows:

> [T]he possibility of MAR 7.3 fees] should compel parties to assess the arbitrator's award and the likely outcome of a trial de novo with frankness and prudence; meritless trials de novo must be deterred.

Haley v. Highland, 142 Wn.2d at 159 (Talmadge, J. concurring).

Including costs in the comparison to determine whether an appeal is meritorious runs counter to the goal of allowing informed decisions and certainty because the amount of costs is unknown. The trial court's analysis undermines the requesting party's ability to assess whether to pursue a trial de novo. Although an attorney is generally in a good

position to assess the merits of the case and the potential damages awarded by a jury (based on open discovery and mechanisms such as the RCW 4.28.360 request for statement of damages), he or she is not able to fairly predict what costs opposing counsel may seek to recover after the trial. By injecting an unknown amount of potential costs into the equation, a requesting party will be unable to fairly and accurately determine whether the trial de novo has merit. Such uncertainty thwarts the statute's purpose of discouraging only meritless appeals. *See Niccum*, 175 Wn.2d at 452. The parties are unable to assess the arbitrator's award and the likely outcome at trial with the "frankness and prudence" contemplated by Justice Talmadge. *Haley*, 142 Wn.2d at 159 (Talmadge, J. concurring).

Future application of the trial court's method of including costs may likely have the effect of more manipulation of cost bills to qualify for attorney fees after the fact. Essentially, parties will be encouraged to tailor their cost bills to fit with the jury verdict in an attempt to beat the arbitrator's award and costs.[8] This is not within the purpose or spirit of

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[8] The trial court's application of costs would also be virtually unworkable in cases involving multiple defendants. *See Yoon v. Keeling*, 91 Wn. App. 302, 956 P.2d 1116 (1998) (a defendant owed attorney fees to a co-defendant where his percentage of fault increased at the trial de novo.); *Hutson v. Costco Wholesale Corp.*, 119 Wn. App. 332, 80 P.3d 615 (2003) (a defendant did not owe attorney fees to a co-defendant where it owed less damages to the plaintiff per the jury award as opposed to arbitration.). Attributing costs to particular parties would be difficult to accurately allocate and could lead to further manipulations and abuse.

the rules. The subsequent effect of such cost bill manipulation would be to increase litigation due to more post-trial motions and appeals. *See Niccum*, 175 Wn.2d at 452. Litigants will benefit by the simple rule contemplated by MAR 7.3 and utilized to date by Washington courts – attorney fees can be assessed against a party who requests a trial de novo, and does not receive a more favorable damages award from the jury than he did from the arbitrator on the merits of his claims.

3. The Trial Court's Interpretation Is Inconsistent with the Legislative History of the Relevant Mandatory Arbitration Rules.

MAR 6.1 and 6.4 discuss the arbitration "award" and "costs" separately. MAR 6.1 describes the form and content of the arbitration award as follows:

> The award shall be in writing and signed by the arbitrator. The arbitrator shall determine all issues raised by the pleadings, including a determination of any damages. Findings of fact and conclusions of law are not required.

MAR 6.1 (emphasis added). By the language of this rule, the award of the arbitrator is focused on the issues of the case as resolved by the damages determination. Costs are not contemplated in MAR 6.1's discussion of the award.

Costs are separately addressed in MAR 6.4 which sets forth the manner in which costs and attorney fees may be addressed by the

arbitrator. MAR 6.4 was amended in 2011: 1) to expressly authorize arbitrators to award costs; and 2) to provide the procedure and timeline for that process.[9] 4A Tegland, WASH. PRAC. *Rules Practice* at 14-15 (7th ed. Supp. 2014-15). The changes never contemplated altering the method of comparison for determination of whether attorney fees are appropriate. Notably, MAR 7.3, which allows a court to award attorney fees against a party who "fails to improve [his] position on the trial de novo," was not amended in 2011. Had the legislature intended to have costs included in the comparison calculations, it could have specified it at that time. As it stands, there is nothing about the language of the relevant rules or the legislative history that would suggest that the legislature intended to have the costs added to the damages awards for purposes of determining the propriety of attorney fees. Further, no Washington Court has ever interpreted them in that way.

VI. CONCLUSION

Bearden received less in damages from the jury on his trial de novo than he received from the arbitrator. In other words, McGill improved his position. However, in an attempt to recover attorney fees, Bearden

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[9] MAR 3.2, enumerating the powers of the arbitrator, was amended at the same time to explicitly authorize the arbitrator to award costs. 4A Tegland, WASH. PRAC. *Rules Practice* at 6-7 (7th ed. Supp. 2014-15).

requested an inflated amount of costs. The trial court improperly awarded some of those statutory costs, and then misapplied the rules and caselaw to determine that attorney fees were appropriate. McGill requests that the Court overturn the award of attorney fees and costs and remand for entry of judgment on the jury verdict with corrected costs only.

Dated this 18th day of May 2015.

REED McCLURE

By _____
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