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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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The superior court erred in comparing the combination of the trial costs and jury verdict to the arbitration award to conclude that Mr. McGill had not improved his position on trial de novo. The arbitration award was $44,000. (CP 290-91) The jury's verdict on trial de novo was $42,500. (CP 109) Comparing these amounts, it is apparent that Mr. McGill improved his position on trial de novo. It was error to award Mr. Bearden attorney fees under MAR 7.3.

The superior court erred as a matter of law in broadly applying the narrow scope of Washington's cost statute. Awarding costs for Dr. Gaddis's expert report and 50% of Dr. Murphy's discovery deposition was legal error. The cost award should be reduced by $912.05: $400 improperly awarded for Gaddis's report and $512.05 ($522.50 - $10.45) for the 48% cost of Dr. Murphy's discovery deposition. (CP 89)

Assuming for the sake of argument that the superior court was entitled to compare the arbitration award plus arbitration costs of $45,187.00, when that amount is compared to the jury verdict ($42,500) plus the correct trial cost award ($2,384.34) for a total or $44,884.34, Mr. McGill still improved his position on the trial de novo. This Court should reverse and remand for entry of judgment in the amount of $44,884.34.

II. ARGUMENT

A. THIS COURT'S REVIEW OF SUPERIOR COURT'S INTERPRETATION OF RCW 4.84.010 AND 7.06.060 AND MAR 7.3 IS DE NOVO.

Respondent Mr. Bearden argues the superior court did not abuse its discretion in awarding costs. (Resp. Br. at 7-15). This Court's review is de novo, not an abuse of discretion. In awarding costs, the superior court was applying a statute. Applying a statute is a legal determination subject to de novo review. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (construction and meaning of statute is question law reviewed de novo).

Mr. Bearden does not specifically argue a standard of review for the RCW 7.06.060 and MAR 7.3 attorney fees. In determining whether Mr. Bearden was entitled to attorney fees, the superior court was applying a statute and rule. This Court's review is de novo. *Dep't of Ecology,* 146 Wn.2d at 9; *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.3d 721 (1997) (construction of statute is a matter of law reviewed de novo).

The superior court erred as a matter of law in ruling that RCW 4.84.010 allows costs for an expert report and for more than the 2% portion of Dr. Murphy's discovery deposition used for impeachment. The superior court erred as a matter of law in ruling that Mr. McGill had not improved his position on the trial de novo. This Court should reverse and remand.

B. THE SUPERIOR COURT ERRED IN AWARDING BEARDEN COSTS FOR DR. MURPHY'S DEPOSITION.

The superior court erred in awarding Mr. Bearden the entire cost of Dr. Murphy's discovery deposition. RCW 4.84.010(7) expressly states that "the expenses of depositions shall be allowed on a pro rata basis for those portions of the deposition introduced into evidence or used for purposes of impeachment." It is undisputed that Dr. Murphy's discovery deposition was not introduced into evidence. Thus the only possible basis for awarding statutory costs to Mr. Bearden for Dr. Murphy's discovery deposition is the pro rata portion of the deposition used for purposes of impeachment.

Mr. Bearden contends that he used the entirety of Dr. Murphy's discovery deposition to prepare his cross-examination of Dr. Murphy. (Resp. Br. at 8-10) The argument is a fallacy. Statutory costs are narrowly construed. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 674, 880 P.2d 988 (1994) (RCW 4.84.010 very narrowly defined and limited to narrow range of expenses). One expects that an opponent would study the entirety of his opponent's deposition testimony. Studying the opponent's deposition testimony and using that to prepare one's cross-examination do not convert the entire discovery deposition into use for impeachment.

RCW 4.84.010(7) specifically refers to the expense of a deposition transcript on a pro rata basis for portions used for impeachment. Mr. Bearden seeks to read the statute as saying costs are allowed for the entire deposition if one studies the deposition to prepare for cross-examination. His broad interpretation of the statute ignores the plain language of RCW 4.84.010(7). Statutory construction cannot be used to read additional words into a statute. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007), *citing State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). And statutory construction cannot be used to ignore words in a statute. *Chelan County v. Fellers*, 65 Wn.2d 943, 946, 400 P.2d 609 (1965) (long established rules of construction require each word be given effect). According to the plain language of RCW 4.84.010(7), Mr. Bearden was only entitled to the pro rata portions of the deposition used for impeachment. During Dr. Murphy's cross-examination, Mr. Bearden used only two pages of the discovery deposition to impeach him. (CP 174-75, 178). The superior court erred in applying RCW 4.84.010(7) to award costs beyond 2% of Dr. Murphy's deposition transcript.

In an effort to support his revised version of RCW 4.84.010(7), Mr. Bearden's cites to Professor Tegland's treatise. (Resp. Br. at 8). Tellingly, § 705.8 of WASHINGTON PRACTICE 5B, *Evidence Law and Practice*, is titled "Cross-examination and impeachment of experts." The

section discusses how to cross-examine an expert. The section also discusses how to impeach experts, including specific methods. One specific method is impeaching by prior inconsistent statement such as a deposition. CR 32(a)(1) states "[a]ny deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness . . ." Impeaching by deposition is the precise method referenced in RCW 4.84.010(7). The statute expressly limits costs to the expense for the pro rata portion of the deposition transcript used for impeachment.

The statute limits costs to the specific portions of a deposition, not the entirety of a discovery deposition used to prepare a cross-examination. This Court should modify the superior court's cost award to reflect the 2% of the discovery deposition used to impeach Dr. Murphy. The superior court's cost award should be reduced by $512.05.

C. THE SUPERIOR COURT ERRED IN AWARDING $400 COSTS FOR DR. GADDIS'S EXPERT REPORT.

Mr. Bearden argues that Dr. Gaddis's report was the type of report allowed as a statutory cost under RCW 4.84.010(7). Dr. Gaddis's report does not appear in the appellate record. The only source about Dr. Gaddis's report is from Mr. Bearden's superior court briefing. Mr. Bearden argued that Dr. Gaddis provided opinions that the medical care

Mr. Bearden received was causally related to the accident. (CP 97) A medical report is not specified in the statute as a recoverable statutory cost.

Mr. Bearden acknowledged that Dr. Gaddis's report established that Mr. Bearden's medical care was related to the accident and reasonable in the amount of bills. (CP 97) Mr. Bearden ignores that when a professional prepared conclusions for purposes of litigation, that professional is an expert witness. *Paiya v. Durham Constr. Co.*, 69 Wn. App. 578, 579, 849 P.2d 660 (1993). The *Paiya* court explained:

> An expert person is not necessarily an expert witness. The fact that a person considers himself any expert witness alone is insufficient to qualify him as an expert. A treating health care provider is not a CR 26(b)(5) expert, but, instead is a factual (occurrence) witness unless facts and opinions are developed in anticipation of litigation. Professionals who acquire or develop facts not in anticipation of litigation are not entitled to expert witness fess. The clear implication of CR 26(b)(5) is that to be classified as an expert witness the individual necessarily must have been retained by a party to develop facts and opinions in anticipation of litigation.

69 Wn. App. at 579-80 (internal citations omitted). The *Paiya* case was decided under an earlier version of CR 26, before the amendment adding the requirement that a party seeking discovery from a treating provider must pay a reasonable fee for the provider's time. In *Paiya*, a treating chiropractor was deposed. He insisted that he be paid an hourly fee for his time preparing for and being deposed. The chiropractor was a treating

provider who had not acquired any facts or information or developed any opinions outside of his treatment of plaintiff. This Court held the chiropractor was not a testifying expert.

Here by contrast, Dr. Gaddis did reach conclusions and offered opinions based on facts and information that were not part of his treatment of plaintiff. Dr. Gaddis did not acquire, as part of his care for Mr. Bearden, the facts or develop the opinions that Mr. Bearden's medical *c*are was reasonable in amount. Dr. Gaddis did not reach, as part of his care for Mr. Bearden, an opinion that Mr. Bearden's medical care was causally related to the motor vehicle accident. A health care provider takes medical history, conducts examinations, orders and reviews diagnostic tests, reaches a diagnosis, and determines the appropriate care for the patient. A health care provider does not, as part of caring for a patient, make an opinion about whether the charges of medical care are reasonable in amount. A health care provider does not, as part of caring for a patient, develop an opinion about the cause of the patient's condition. The health care provider is concerned with assessing the symptoms, determining the diagnosis, and preparing an appropriate treatment plan.

A similar concept exists under the Federal Rules of Civil Procedures. Experts are required to prepare written reports. FED. R. CIV. P. 26(a)(2)(B). Treating providers are exempt from the written report

requirement to the extent opinions are formed during the course of treatment. *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011). If the provider reviews records, especially those provided by the plaintiff's attorney, then the provider falls outside the treating provider exception to a written report requirement. In *Goodman*, the treating physician reviewed information that was not reviewed during the course of treating the plaintiff. The information was provided by the plaintiff's attorney. This "non-treatment" related information and the opinions based on it converted the treating provider into a retained expert.

Here, Dr. Gaddis's report did not consist of the facts and opinions he acquired during his treatment of Mr. Bearden. Dr. Gaddis's report about the reasonableness of the medical expenses and the causation of the conditions were opinions developed for purposes of this litigation. *Paiya*, 69 Wn. App. at 579-80. Dr. Gaddis's report was an expert report. Expert fees are not recoverable statutory costs. *Wagner v. Foote*, 128 Wn.2d 408, 416-18, 908 P.2d 884 (1996).

Mr. Bearden seems to contend that the cost of Dr. Gaddis's report was a statutory cost under RCW 4.84.010 because the report is admissible in MAR. (Resp. Br. at 11-12) Admissibility does not convert an expert report into a taxable statutory cost. Costs are narrowly defined and a prevailing party is not permitted to inflate his cost bill to recover

additional fees. *Boeing Company v. Sierracin Corporation*, 108 Wn.2d 38, 66, 738 P.2d 665 (1987). Costs are strictly limited to those listed in RCW 4.84.010. The superior court erred in concluding that Dr. Gaddis's export report was a statutory cost. The cost award should be reduced by $400.

D. MR. BEARDEN WAIVED ANY CHALLENGE TO COSTS DENIED.

Mr. Bearden attempts to challenge the superior court's denial of certain statutory costs. (Resp. Br. at 15) Mr. Bearden argues he was entitled to costs of serving Nellie McGill and medical records submitted at arbitration. This argument is a request for affirmative relief, yet Mr. Bearden did not seek review of the superior court's denial of these costs. He is not entitled to affirmative relief. RAP 2.4(a) In the absence of a cross-appeal, this Court's review is limited to issues which were preserved at the superior court and challenged by appellant. *Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 213, 680 P.2d 425 (1984) (notice of cross-appeal essential when respondent seeking affirmative relief). This Court should reject Mr. Bearden's argument regarding these costs.

Mr. Bearden's argument that he was entitled to another $471.51 in costs should not be considered. Mr. Bearden has not sought this Court's review on any issue. And the these items of costs do not fit the RAP

2.5(a) provision that this Court will review issues that support affirming the superior court decision.

E. THE SUPERIOR COURT ERRED IN AWARDING FEES AND COSTS UNDER MAR 7.3 BECAUSE MR. MCGILL IMPROVED HIS POSITION ON TRIAL DE NOVO.

Mr. McGill improved his position on the trial de novo because the jury awarded less than the arbitrator awarded. The jury's damages award was $42,500. The arbitrator's damages award was $44,000. Under the plain language of RCW 7.06.060(1) and MAR 7.3, Mr. McGill did not "fail[] to improve his . . . position on the trial de novo." He improved his position.

In determining whether a party has improved its position on de novo, the superior court must compare the jury's verdict to the arbitrator's award without regard to statutory costs. *Tran v. Yu*, 118 Wn. App. at 612. While the Washington Supreme Court has not expressly adopted the comparing comparable test, *Niccum v. Enquist*, 175 Wn. 2d at 448 (2012), the Supreme Court has not rejected the test. *Niccum v. Enquist*, 175 Wn. 2d 441, 448, 286 P.3d 966 (2012). This Court has expressly applied the test. *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003).

Mr. Bearden argues that Mr. McGill did not improve his position on trial de novo because the jury's verdict was based only on general damages. (Resp. Br. at 24-25) Mr. Bearden has no record reference to

support this statement. In fact, there is nothing in the appellate record to verify that the jury's verdict was general/non-economic damages only and did not include any special/economic damages. Therefore, his argument should be rejected.

Mr. Bearden argues that in determining whether a de novoing party has improved his position a court should not subtract costs from an arbitration award or judgment. (Resp. Br. at 22-25) He contends subtracting those costs penalizes the plaintiff. Yet, he fails to explain how he is supposedly penalized. In a case such as this where liability is admitted and the plaintiff is seeking and obtains a damages award, the plaintiff is the prevailing party. As the prevailing party, the plaintiff is entitled to statutory costs. Here, Mr. Bearden was awarded statutory costs. Those statutory costs were paid. (CP 1-4) He is not being penalized. Rather, Mr. McGill who had to bear the risk of MAR 7.3 fees is penalized by the Court's contrived calculation of whether he improved his position

Mr. Bearden criticizes Mr. McGill for not referring to *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 316 P.3d 1113 (2014) and *Do v. Farmers Ins. Co.*, 127 Wn. App. 180, 110 P.3d 840 (2005). (Resp. Br. at 17, 20). *Miller* actually support Mr. McGill's position. And *Do* is distinguishable. In *Miller v. Paul M. Wollf Co.*, 178 Wn. App. 957, 316 P.3d 1113 (2014), Division III did compare comparables. 178 Wn. App.

at 968. There plaintiff sought unpaid commissions and RCW 49.48.030 attorney fees at arbitration. He was allowed his commissions but denied the attorney fees. He requested a trial de novo. At trial, plaintiff was awarded commissions, in an amount less than awarded by the arbitration. At trial, plaintiff was also awarded RCW 49.48.030 attorney fees. The total of the superior court award (without taking into account any statutory costs) was greater than the arbitration award. The *Miller* case supports Mr. McGill's position that comparables are to be compared.

Do was not comparing an arbitration award with costs to a judgment with costs. *Do* involved a judgment entered on a CR 68 offer after a RCW 7.06.050 compromise. The CR 68 offer was for the exact amount as plaintiff's RCW 7.06.050 compromise. Plaintiff had prevailed at the mandatory arbitration. Defendant requested trial de novo. Plaintiff submitted a RCW 7.06.050 offer of compromise in the amount of $15,004 plus costs of $2,004. Defendant made a CR 68 Offer of Judgment in the amount of $17,004 inclusive of all special damages. Plaintiff accepted the CR 68 offer. Judgment was entered on the CR 68 in the amount of $17,004 plus RCW 4.84.010 costs of $2,426.36. Plaintiff then sought fees under MAR 7.3 arguing that defendant had not improved his position on the trial de novo. The superior court denied the motion. Plaintiff appealed.

This Court defined the issue as whether a CR 68 offer is considered a voluntary withdrawal of a trial de novo request. If the CR 68 offer is a voluntary withdrawal, an award of MAR 7.3 fees is discretionary. If the CR 68 offer is not a voluntary withdrawal, MAR 7.3 fees are mandatory. This Court concluded that judgment entered after accepting a CR 68 offer is not a voluntary withdrawal of a trial de novo request. The party that requested the trial de novo is not responsible for ending the proceeding. 127 Wn. App. at 187. Therefore, the *Do* court concluded the CR 68 offer was not a voluntary withdrawal of the de novo request and awarded attorney fees under MAR 7.3. The *Do* judgment with statutory costs was a CR 68 judgment after an offer of compromise. The case is not applicable here.

The 2011 amendments to the MARs do not support the conclusion that a court should compare statutory costs awarded at arbitration with costs awarded at trial to determine whether a party has improved his position on de novo. (Resp. Br. at 21-22) The amendments merely clarified the scope of an arbitrator's authority under MAR 3.2 to award costs and extended the time under MAR 7.1 for requesting a de novo to 20 days after an arbitrator's decision on costs. 4A Tegland, WASH. PRAC. *Rules Practice* at 6-7, 23-26 (7th ed. Supp. 2015). The 2011 amendments did not change MAR 7.3. 4A Tegland, WASH. PRAC. *Rules Practice* at 34-

35 (7th ed. Supp. 2014-15). The 2011 amendments did not change or in any way explain the phrase "fails to improve the party's position on the trial de novo." The amendments do not support the superior court's rulings.

Assuming that statutory costs from the superior court judgment are to be compared to the statutory costs awarded by the arbitrator, Mr. McGill still improved his position on trial de novo. When the correct amount of statutory costs plus the amount of the jury verdict is compared to the arbitration award plus costs, Mr. McGill improved his position. The jury verdict--$42,500--plus correct statutory costs--$2,384.34—equals $44,884.34. That amount is less than the $45,187.00 total of the arbitrator's damage award and statutory costs. The superior court's MAR 7.3 award was error and should be reversed. And because Mr. McGill did improve his position on trial de novo, Mr. Bearden is not entitled to MAR 7.3 fees or fees in this appeal.

III. CONCLUSION

Mr. McGill improved his position on de novo because Mr. Bearden received less in damages from the jury on his trial de novo than he received from the arbitrator. The superior court improperly awarded some of those statutory costs, and then misapplied the rules and caselaw to determine that attorney fees were appropriate. Mr. McGill respectfully

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 14th day of September 2015.

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