No. 72926-8

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

JAMES D. BEARDEN,

Plaintiff-Respondent,

v.

DOLPHUS A. MCGILL,

Defendant-Appellant.

RESPONDENT BEARDEN'S SUPPLEMENTAL BRIEF ON REMAND FOR RECONSIDERATION IN LIGHT OF *NELSON v. ERICKSON*

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I. INTRODUCTION

Following the Supreme Court's grant of appellant James Bearden's Petition for Review and remand to this Court "for reconsideration in light of" *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016),[1] this Court requested "supplemental briefing ... addressing the impact of the Supreme Court's decision in *Nelson* ... on our decision." 10-19-16 Ruling.[2] *Nelson* addresses how a court should determine whether an appealing party has improved its position at trial for purposes of awarding attorney fees under the one-way fee-shifting mechanism of MAR 7.3.[3] *Nelson* holds the appealing party's "position prior to trial should be interpreted as an ordinary person would." *Nelson,* at 387. In other words, the court compares the appealing party's "position prior to trial" with its position after trial, viewing those positions "as an ordinary person would." *Id.*

The Supreme Court's acceptance of review and remand for reconsideration in light of *Nelson* directs this Court to evaluate whether McGill improved his position at trial, comparing the trial judgment to the arbitration award "as an ordinary person would," rather than applying its

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[1] *Bearden v. McGill*, 193 Wn. App. 235, 372 P.3d 138 (2016)("*Bearden I*"), *review granted,* 186 Wn.2d 1009 (Sept. 28, 2016).

[2] Bearden incorporates his Petition for Review in full and refers this Court to the Statement of the Case and all arguments and authority in his Petition.

[3] "If a party requests trial de novo after mandatory arbitration and he or she does not improve his or her position at trial, he or she must pay the other side's attorney fees." *Nelson,* at 388. Because MAR 7.3 and RCW 7.06.060(1) are substantively identical, they are collectively referred to here as MAR 7.3.

formula for "compar[ing] comparables." *Bearden I,* at 242-49. The Supreme Court's ruling signifies its disapproval of the "compare comparables" approach as applied in *Bearden I. See also Niccum v. Enquist,* 175 Wn.2d 441, 448, 286 P.3d 966 (2012)(declining to adopt compare comparables approach).

In this case, an ordinary person would conclude that, since the judgment at trial was $609.39 more than the arbitration award, McGill did not improve his position at trial and must therefore pay Bearden's attorney fees. An ordinary person would not segregate and exclude from the MAR 7.3 analysis those RCW 4.84.010 statutory costs arising during the "time lag"[4] between arbitration and trial. *Cf. Bearden I,* at 247-48. *Bearden I*'s element-by-element comparison[5] conflicts with an ordinary person's understanding of the rule and unnecessarily complicates the determination whether a party has improved its position. That approach also contradicts the purpose of MAR 7.3 and its legislative intent to "keep disputes out of

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[4] In *Cormar, Ltd. v. Sauro,* 60 Wn. App. 622, 623-24, 806 P.2d 253 (1991), the court rejected defendant's "sophisticated argument having to do with the use value of money and how it is affected by the time lag between" arbitration and trial. The court observed that Cormar's argument "fails to refute the simple fact that [plaintiff] **Sauro emerged from superior court with a judgment for more money** than the arbitrator awarded." *Id.* (emphasis added). This "**time lag**" approach encourages, rather than discourages, appeals and is thus "not consonant with the purpose of mandatory arbitration, which 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 suffers a judgment for a greater amount than the arbitration award, will be liable for attorneys fees." *Id.* at 624.

[5] "[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." *Bearden I,* at 239.

the courts" and discourage unwarranted or meritless appeals. *E.g., Cormar, Ltd. v. Sauro,* 60 Wn. App. 622, 623-24, 806 P.2d 253 (1991); *Niccum,* at 452.[6] A party defeated at arbitration (and his insurer), when deciding whether to take the chance to lower damages in a trial de novo, must weigh the fact that relatively insignificant and predictable post-arbitration RCW 4.84.010 costs will be included in the judgment, potentially triggering MAR 7.3 fees.

Consequently, the impact of *Nelson* is that this Court must: (1) vacate its previous opinion; (2) compare Bearden's total arbitration award of $45,187 (damages plus RCW 4.84.010 costs) to his total judgment amount of $45,796.39 (damages plus RCW 4.84.010 costs); (3) hold that because the judgment required McGill to pay $609.39 more than the arbitration award, he failed to improve his position; and (4) affirm the trial court's award of $71,800 to Bearden in attorney fees.[7]

II. STATEMENT OF THE CASE ON RECONSIDERATION

At mandatory arbitration in this admitted liability car accident case, the arbitrator awarded Bearden $44,000.00 in general plus special damages,[8] and $1,187.00 in RCW 4.84.010 costs, for a total arbitration award of **$45,187.00.** In McGill's trial de novo, the jury awarded Bearden

[6] *Williams v. Tilaye,* 174 Wn.2d 57, 63-64, 272 P.3d 235 (2012)("unwarranted").
[7] The Court should also award Bearden his attorney fees on appeal. RAP 18.1.
[8] $34,336.09-general damages; $8,663.91-special (medical) damages. CP 277-79, 288-91.

$42,500.00 in general damages only, and the court awarded Bearden RCW 4.84.010 costs of $3,296.39, for a total trial judgment against McGill of **$45,796.39.**[9]

To determine whether McGill improved his position at trial under MAR 7.3, 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—$45,796.39). Since the judgment was $609.39 greater than the arbitration award, the trial court awarded Bearden $71,800.00 in attorney fees. *Bearden I,* at 239; CP 7-12.

In *Bearden I,* this Court reversed, comparing "damages and statutory costs that both the arbitrator and trial court considered" and "exclud[ing] those statutory costs requested only from the trial court," which were necessarily incurred for trial only during the time lag following arbitration. *Id.* at 239.

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	Arbitration award (CP 290)	Trial Judgment (CP 86-87)	Difference
Special damages	$ 8,663.91	Not Requested	
General damages	$34,336.09	$42,500.00 (CP109)	
Total damages	$44,000.00	$42,500.00	
Costs	$ 1,187.00	$ 3,296.39	
Total	$45,187.00	$45,796.39 (CP 88-89)	+$609.39

III. ARGUMENT ON RECONSIDERATION

A. *Nelson* Requires The Court To Determine Whether A Party Improved Its Position At Trial As An Ordinary Person Would.

The prevailing principle of *Nelson* is that courts must compare the appealing party's positions before and after trial as "ordinary people" would, using a "straightforward application" of the rule's language. *Nelson,* at 389-90 (quoting *Niccum,* at 452).[10] The *Nelson* Court noted that in *Niccum,*

> We explained that the rule under MAR 7.3—whether a party improves on their position at trial—was "'meant to be understood by ordinary people.'" *Id.* (quoting *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 623, 806 P.2d 253 (1991)). We held that "[i]t is our view that an ordinary person would consider that the 'amount' of an offer of compromise [or in cases like *Bearden,*[11] the arbitration award] **is the total sum of money**...." *Id.* (citing Webster's Third New International Dictionary 72 (2002)[12]).

Nelson, at 390 (emphasis added). The Supreme Court in *Nelson* affirmed the Court of Appeals' observation that 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 arbitration award.

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[10] Both *Nelson* and *Niccum* involved "offers of compromise," which take the place of an arbitration award for purposes of calculating MAR 7.3 fees. McGill may argue that *Nelson* does not govern here because it involves an offer of compromise and therefore is part of a different line of cases than *Bearden I.* The Supreme Court has clearly rejected that argument by remanding this case for reconsideration in light of *Nelson.*

[11] That is, cases where the court determining MAR 7.3 fees compares the arbitration award (instead of an offer of compromise) to the judgment at trial de novo.

[12] Defining "amount" as "the total number or quantity." *Niccum,* at 452.

Nelson, 190 Wn. App. 1003, 2015 Wn. App. LEXIS 2194, at *26-27 (2015)(quoting *Cormar*, at 623).

In deriving this rule of "straightforward application" from *Niccum,* the *Nelson* Court explained that, when comparing (1) an offer of compromise (at issue in *Niccum* and *Nelson*) to (2) the trial judgment, the offer should be treated as a "lump sum." *Nelson,* at 390. The positions being compared—starting with an offer of compromise, or as here, an arbitration award; and ending with the judgment—"should be interpreted as an ordinary person would interpret" them, that is, "view[ed] as a whole—as 'the total sum of money.'" *Nelson,* at 391-92 (quoting *Niccum,* at 452).[13]

Reading the rule's "plain language," *Nelson* concluded, "We hold parties to the total ... amount, and we do not dissect the offer [or arbitration award] after the fact. This reasoning and result is the most faithful to *Niccum*, MAR 7.3, and common sense." *Nelson,* at 391-92.

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[13] In *Nelson,* the offer of compromise incorporated known costs of $1,522, as specified in the arbitration award. *Id.* at 387. In contrast, in *Niccum,* costs were not awarded at arbitration; consequently, the offer's reference to unspecified "costs" was difficult for the parties to assess. *Niccum,* at 444; *Nelson* at 389. *See also, e.g.,* SB 5373 (2002), Final Bill Report, http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bill%20Reports/Senate/5373.FBR.pdf (improvement in position is based on "amount awarded in arbitration compared to the amount awarded at the trial de novo."); MAR 6.4 amend. (2011) https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=243 (clarifying that arbitrator can award costs to prevailing party at arbitration, signifying MAR 7.3 comparison is between arbitration award (including costs) and trial judgment (including costs)).

Niccum similarly noted that "sorting out" of positions "after the fact ... is likely to increase rather than decrease litigation." *Niccum,* at 452.[14] Like *Niccum, Bearden* is "a case in point:" The approach adopted in *Bearden I*—dissecting the elements of monetary relief to determine whether the appealing party improved its position from arbitration to trial—is likely to increase litigation.[15] But dissecting the elements of the arbitration award and the judgment is exactly what this Court required in *Bearden I.*

B. Applying "Compare Comparables" To Exclude Post-Arbitration RCW 4.84.010 Costs From The Total Judgment Amount Runs Contrary To *Nelson* And The Purpose Of MAR 7.3.

In *Bearden I,* this Court did not compare the "total amount" McGill had to pay to satisfy the arbitration award with the total amount he

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[14] "[T]he purpose of MAR 7.3 is to encourage settlement and discourage meritless appeals." *Niccum,* at 451-52; *Christie-Lambert Van & Storage Co. v. McLeod,* 39 Wn. App. 298, 302-03, 693 P.2d 1616 (1984)(rule's purpose is to "penalize parties who unjustifiably pursue or resist" claims; without deterrent effect of fee-shifting, defeated party would likely appeal "in nearly all instances" and arbitration "would tend to become a mere nullity and waste of time."); *Williams,* at 63.

[15] Reported decisions on MAR 7.3 fees have often turned on relatively small differences in the positions before and after trial: **$355** (*Nelson,* at 387); **$113** (*Christie-Lambert,* at 300); **$339** (*Monnastes v. Greenwood,* 170 Wn.App. 242, 244-46, 283 P.3d 603 (2012)); **$700** (*Niccum,* at 445); **$1,330** (*Tran v. Yu,* 118 Wn.App. 607, 610, 75 P.3d 970 (2003)); and **$609.39** (*Bearden*). *Bearden I* increases the potential for litigation over "every element of monetary relief," *id.* at 239: For example, would the court consider the total witness fees awarded after trial as a whole or parse them—*i.e.*, $10 for a police officer's arbitration appearance plus the $10 fee to appear at trial, or just the $10 witness fee for arbitration because the trial fee was not before the arbitrator? Would the cost awarded for supplemental "time lag" medical records admitted at trial need to be parsed and excluded from the costs awarded in the trial judgment, because they were not before the arbitrator? If plaintiff suffers an unforeseen aggravation of injury during the time lag between arbitration and trial, requiring a $1,000 MRI study, would the court need to parse and exclude this previously unforeseen monetary element from the MAR 7.3 comparison of positions before and after trial?

had to pay to satisfy the judgment. Instead, the Court segregated and excluded statutory costs incurred post-arbitration, holding the costs incurred during the time lag between arbitration and trial, and thus not before the arbitrator, should be subtracted from the judgment. *Id.* at 242-45.

Bearden I's use of "compare comparables" to interpret MAR 7.3 in preference to the plain language of the rule is contrary to the prevailing principle of *Nelson*. The compare comparables approach has been applied in cases where the **claims or issues** at trial were different than those at arbitration.[16] But in this case, the arbitration award and trial judgment involved the same claims and issues: damages plus RCW 4.84.010 costs.[17] Stated another way, this case involves a comparison of apples to apples, while the "compare comparables" approach attempts to find a fair way to compare apples and oranges.

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[16] The compare comparable cases relied upon in *Bearden I* involved different claims or issues litigated at arbitration and trial. *Christie-Lambert,* at 300-06 (new cross-claim raised after arbitration); *Sultani v. Leuthy,* 86 Wn. App. 753, 755-61, 943 P.2d 1122 (1997)(joint and several award against four defendants at arbitration, compared to several judgment at trial, in lower amount); *Yoon v. Keeling*, 91 Wn. App. 302, 304-06, 956 P.2d 1116 (1998)(comparing only percentage of allocation of fault); *Tran,* at 609-17 (excluding CR 37 sanctions awarded after arbitration as part of judgment). In the following cases, however, the court **included** in the MAR 7.3 analysis monetary elements which the nonappealing party incurred after arbitration: *Miller v. Paul M. Wolff Co.,* 178 Wn. App. 957, 316 P.3d 1113 (2014)(post-arbitration attorney fees); *Christie-Lambert,* at 300-01 (prejudgment interest); *Cormar*, at 623-24 (post-arbitration interest); *Colarusso v. Petersen,* 61 Wn. App. 767, 812 P.2d 862 (1991)(post-arbitration costs).

[17] If any dissecting of claims or costs is to be done, Bearden's abandonment of medical expenses/special damages claims at trial requires comparing only the general damage awards: Bearden was awarded $34,000 in general damages at arbitration, compared to $42,000 in general damages at trial.

Nelson confirms that MAR 7.3's purpose is to encourage settlement and discourage unwarranted or meritless appeals. *Nelson,* at 388, 391.[18] Arguably, it is not warranted or justified for a party who is disappointed with the arbitration award to create very significant litigation expenses on appeal – such as $70,000 in fees for each party's counsel, costs for court time, and time and expenses for citizen jurors to serve – all in order to attempt to improve a damage award by a minimal amount.[19] *Nelson,* along with all the decisional law in this area, supports requiring the appealing party to bear the slightly increased risk created by including the additional minimal RCW 4.84.010 costs in the post-trial "position." The deterrent effect of MAR 7.3 fees due to these post-arbitration costs being included in the trial judgment is a risk the appealing party – reading the rule as an ordinary person would – should weigh in deciding whether to demand trial de novo.

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[18] Relying on dicta in *Tran,* at 612, McGill will likely argue that trials are always more expensive than arbitration. While only the comparison of the relatively minimal RCW 4.84.010 costs is at issue here, it is certainly true that the actual costs of litigating a jury trial are significant compared to arbitration. This is why trials de novo are disfavored and MAR 7.3 fees serve as a disincentive to appeal. The actual price of the trial is comparatively huge, while the recoverable statutory costs are minimal. Consistent with discouraging appeals, those statutory costs which are part of the trial judgment should be part of the MAR 7.3 analysis.

[19] Insurance companies with almost limitless resources are able to appeal even close calls. Senate Bill Report, SB 5373, p.2 (http://lawfilesext.leg.wa.gov/biennium/2001-02/Pdf/Bill%20Reports/Senate/5373.SBR.pdf (Feb. 11, 2002) ("Most appeals (86 percent) are filed by defendants", delaying timely payment to plaintiff).

Unlike general damages in a personal injury case, post-arbitration RCW 4.84.010 costs are narrow, limited, and relatively easy to predict, *e.g.,* witness fees ($10/day) and statutory attorney fees ($200.00). Consistent with MAR 7.3's purpose, plain language and common sense reading, to determine whether the appealing party improved its position at trial, the total lump sum judgment—including and not subtracting the post-arbitration RCW 4.84.010 costs—must be compared to the total lump sum arbitration award.

IV. CONCLUSION

Nelson requires a straightforward reading of MAR 7.3 as an ordinary person would, to determine whether McGill failed to improve his position at trial. This approach necessarily rejects *Bearden I's* application of the "compare comparables" approach. Instead, in this case an ordinary person would compare the total amount of the arbitration award (including RCW 4.84.010 costs) with the total amount of the trial judgment (including RCW 4.84.010 costs). Because McGill had to pay $609.39 more after trial, he failed to improve his position from arbitration. The previous decision in this case should be withdrawn and the trial court affirmed.

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DATED this 30th day of November, 2016.

Respectfully submitted,

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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 30th day of November, 2016, to the following counsel of record at the following addresses:

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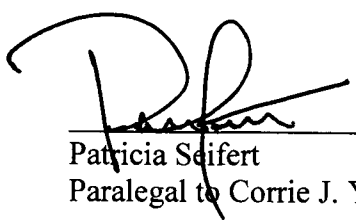

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