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State of Washington  
No. 74149-7-I

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

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LISA GROESCHELL and JOHN DOE GROESCHELL, husband and  
wife, both individually and on behalf of their marital community  
composed thereof,

Appellants,

vs.

MARIA HEDGER, an individual,

Respondent.

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BRIEF OF RESPONDENT HEDGER

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## A. INTRODUCTION

Trial litigation is more expensive than arbitration. The Legislature has sought to discourage parties from clogging the courts with unnecessary trials de novo of low value claims after an arbitrator has ruled. To that end, the statutes and rules governing trial de novo require a party to pay the opposing party's attorney fees if they fail to "improve their position" after the arbitration. This broad term "position" has been a source of confusion and conflict in our appellate courts.

If a party forces a trial and ends up with an even larger judgment than what resulted from arbitration, his or her "position" has not "improved." When that larger judgment is the result of costly conduct committed in the superior court combined with a similar amount of monetary relief, that party has not demonstrated that the trial de novo was justified. In fact, that is why our Legislature crafted the Mandatory Arbitration Rules ("MAR") to discourage trials de novo in all but the most meritorious cases.

This case is particularly offensive to the purposes of mandatory arbitration because Groeschell attempted to game the system by raising a new defense on the eve of trial de novo that she had not raised in the arbitration. When Hedger was forced to oppose the tactic, Groeschell incurred sanctions at the superior court that the arbitrator *could not* have

considered. She now claims that the sanctions imposed on her for this conduct should not be counted as part of the judgment because she did not commit the same sanctionable conduct during the arbitration.

To allow a party to game the system in the manner Groeschell suggests here contradicts the plain purpose and language of RCW 7.06.050.

#### B. STATEMENT OF THE CASE

Groeschell's statement of the case recites some of the procedural history, but omits some facts that bear emphasis.

Hedger filed a complaint arising from injuries incurred in a motor vehicle collision. CP 1-4. Hedger was proceeding straight through an intersection on a green light, Groeschell was attempting to turn left. CP 227. Groeschell followed an SUV turning left, and turned in front of Hedger's vehicle. *Id.* Groeschell's answer did not mention the affirmative defense of the deception doctrine.<sup>1</sup> CP 5-10. This case was sent to mandatory arbitration before Bradford Fulton. CP 1230. The

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<sup>1</sup> As explained in Groeschell's opening brief, the deception doctrine is a specific affirmative defense applicable only where the favored driver has by some wrongful driving conduct deceived a reasonably prudent disfavored driver into believing that he or she can make a left turn with a fair margin of safety. *Hammel v. Rife*, 37 Wn. App. 577, 582, 682 P.2d 949 (1984); *Chapman v. Claxton*, 6 Wn. App. 852, 856, 497 P.2d 192 (1972). The doctrine is limited to those situations where the favored driver's deception is "tantamount to an entrapment, a deception of such marked character as to lure a reasonably prudent driver to the illusion that he has a fair margin of safety in proceeding." *Mondor v. Rhoades*, 63 Wn.2d 159, 167, 385 P.2d 722 (1963).

deception doctrine was not referenced in any written materials during arbitration, nor was it mentioned to Hedger's counsel verbally. RP 8/27/15:75. The arbitrator awarded Hedger \$18,811.86. CP 1230.

Groeschell requested a trial de novo. During the pretrial process, Groeschell was sanctioned several times for procedural abuses that caused Hedger's legal fees to skyrocket. First, Hedger properly noted Groeschell's deposition and sent along with it a letter offering to reschedule the deposition if that date was unacceptable. CP 835-38. Groeschell never contacted Hedger to reschedule but subsequently failed to attend her deposition. CP 842. Hedger had to bring a sanctions motion, after which the judge ordered Groeschell to attend her deposition. CP 903.<sup>2</sup>

Then, Groeschell demanded a judicial conference to compel Hedger to mediate, and then failed to meaningfully participate. CP 20, 75-76. In response to a second motion for sanctions, the judge ordered Groeschell to pay \$100 for the failure to participate in ADR, to pay Hedger's share of the mediation fee, and to pay \$2,000 of Hedger's attorney fees accrued in filing the motion. *Id.*; CP 1202. Groeschell moved for reconsideration of those sanctions, citing information that was

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<sup>2</sup> The judge noted that Hedger had noted the deposition for one day after the discovery cutoff, but that Groeschell's counsel should not have "ignored the notice." CP 903.

available to her at the time of the original motion. CP 1199-1200. Her motion was denied.

Groeschell also failed to timely disclose a summary or report of a noted defense expert under LCR 26(k). CP 994. Groeschell's counsel was ordered to provide a copy of their expert's report or a detailed summary of his anticipated trial testimony no later than August 21, 2015, which was three days before trial. CP 994. The judge also ordered \$500 sanctions on Groeschell for the "failure to comply with LCR 26(k) ... given the paucity of information disclosed." *Id.*

When Hedger did receive a copy of Brian Jorgensen's report three days before the trial de novo was scheduled to commence, it contained a reference to a new defense never previously raised. RP 8/27/15:57. The report outlined the affirmative defense of the deception doctrine. *Id.* This was the first notice Hedger had of this defense. *Id.* In response, Groeschell alleged that she had discussed this affirmative defense with Hedger's prior counsel and that she had argued this defense at the arbitration hearing as well as included it in her written materials to the arbitrator:

THE COURT:           And then, you specifically made the argument, the deception defense argument to the arbitrator?

COUNSEL:            Yes.

RP 8/27/15:59.

The trial court asked Groeschell's counsel to provide written evidence that the doctrine had been raised. *Id.* After reviewing her arbitration materials, Groeschell's counsel withdrew the defense, stating that no mention of the deception defense could be found. RP 8/27/15:76.

After the trial de novo, Hedger brought a motion for sanctions for legal fees incurred in having to respond to Groeschell's attempt to inject the deception doctrine defense on the eve of trial in a late-filed expert report. CP 476-78. The trial court accepted Groeschell's representation that she had made a mistake in believing she had raised the defense before, but found her actions had caused Hedger to incur attorney fees unnecessarily:

However, the Court also believes it was unfair inject the deception defense into this case on the eve of trial, after the close of discovery, without first reviewing the case file to verify that notice of the defense had been provided to Plaintiff sufficient [sic] in advance of trial prepare for it. As a result of the last minute injection of this issue in the case, and the subsequent withdrawal of it during pretrial motions, Plaintiff's counsel had to divert her attention away from trial preparation to investigate this particular defense and prepare to address it at trial.

CP 477-78. The trial court awarded Hedger \$3,125.00 in attorney fees incurred. *Id.*

### C. ARGUMENT

(1) Standard of Review

This Court reviews the trial court's application of arbitration rules and statutes de novo because they are questions of law. *Cascade Floral Products, Inc. v. Dep't of Labor & Indus.*, 142 Wn. App. 613, 618, 177 P.3d 124 (2008). Interpreting statutes requires the court to discern and implement the Legislature's intent. *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 302, 693 P.2d 161 (1984). "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." *Id.*

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).

The decision to impose sanctions for failing to disclose a defense so that meaningful discovery may be had is a "discretionary determination [that] should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated*

*Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wn. App. 223, 229, 548 P.2d 558, *review denied*, 87 Wn.2d 1006 (1976).

(2) The Legislature Imposed Attorney Fees on Parties Who Fail to Improve Their Position *Because* Trials Are More Expensive; Refusing to Compare the Judgments Inclusive of Trial Costs Frustrates Legislative Purpose

The Legislature’s purpose in adopting mandatory arbitration legislation was to “reduce congestion in the courts and delays in hearing civil cases.” *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997) (*quoting Perkins Coie v. Williams*, 84 Wn. App. 733, 737, 929 P.2d 1215 (1997)). “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.” SB 5373 (2002), Final Bill Report, <http://lawfilesextra.leg.wa.gov/biennium/200102/Pdf/Bill%20Reports/Senate/5373.FBR.pdf>. Following mandatory arbitration, a party may request a trial de novo in the superior court. RCW 7.06.050; MAR 7.1(a). But to discourage meritless appeals, the requesting party is liable for costs and attorney fees should it fail to improve its position in the trial de novo. MAR 7.3. *See also*, RCW 7.06.060; *Christie-Lambert*, 39 Wn. App. at 303.

MAR 7.3 states:

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.

RCW 7.06.050(1)(c) incorporates the "improve that party's position" language of MAR 7.3.

The language of the rule and statute were "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, Ltd. v. Sauro*, 60 Wn. App. 622, 623, 806 P.2d 253, review denied, 117 Wn.2d 1004, 815 P.2d 266 (1991); *Gautam v. Hicks*, 177 Wn. App. 112, 118, 310 P.3d 862, 865 (2013).

The term "position," as understood by ordinary people, means "the place where someone or something is in relation to other people or things." [www.merriam-webster.com/dictionary/position](http://www.merriam-webster.com/dictionary/position)." It is a broad term that compares relative status. Yet this deceptively simple concept has been the source of consternation and conflict as courts have addressed varying factual scenarios.

Conflict about how to ascertain relative "positions" after trial de novo was most recently revealed by this Court's decision in *Bearden v.*

*McGill*, 193 Wn. App. 235, 372 P.3d 138 (2016), *petition for review filed*, Supreme Court Cause No. 93178-0 (May 11, 2016). Groeschell relies almost exclusively on *Bearden* in support of her argument for reversal. Br. of Appellant at 1, 16, 18-21, 23-24, 27-28, 35.

Even assuming the Supreme Court does not accept review and reverse or modify the *Bearden* rule, that case does not end the discussion here. The overarching purposes of the provision should be considered in each case. 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*, 39 Wn. App. at 302.<sup>3</sup>

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*

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<sup>3</sup> 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.*, SB 5373 (2002), Final Bill Report, <http://lawfilesexternal.leg.wa.gov/biennium/200102/Pdf/Bill%20Reports/Senate/5373.FBR.pdf>.

*of this rule is to encourage the parties to accept the decision of the arbitrator.*

King County Pro Se Handbook<sup>4</sup> 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*, 60 Wn. App. at 623-24 (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*, 39 Wn. App. at 302-03.

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 *Application of Smith*, 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

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<sup>4</sup> <http://www.kcba.org/publications/pdf/pro-se2006.pdf>.

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).

If a party faces no danger of having the higher costs of trial considered as part of whether he or she has improved "position" from arbitration, that party is encouraged to roll the dice on a new factfinder in the hope of obtaining even the most modest change in the damage award. This gamble would likely pay off in cases like Hedger's, where general damages are at issue. General damages are not mathematically certain; it is highly unlikely that a judge or jury would impose precisely the same amount of general damages as the arbitrator.

The Legislature would surely have been clear if it intended to encourage trials de novo in such marginal cases. It could have allowed fee awards only upon *any* improvement in the damage award, rather than only allowing fees when parties improve their "position."

It is true that MAR 7.3 was not intended to discourage "meritorious" appeals. But is it warranted (*see Williams*, 174 Wn.2d at 63-64) (Legislature intended to deter "unwarranted" requests for trial de novo) 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, for example, \$10? Yet this result follows from *Bearden's* new formula.

*Bearden* is not consistent with previous precedent determining whether a party failed to improve his position for purposes of awarding MAR 7.3 fees. Case law on this subject include post-arbitration costs and fees in the MAR 7.3 determination. *E.g.*, *Miller*, 178 Wn. App. at 966-68 (request for RCW 49.48.030 attorney fees denied at arbitration, but awarded at trial; 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”<sup>5</sup> conflicts with the analysis of all three divisions of the Court of Appeals: *Cormar* (Div. II), *Miller* (Div. III), and *Christie-Lambert* (Div. I).

In *Cormar*, the arbitrator awarded damages to defendant Sauro, but

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<sup>5</sup> Slip op. at 12.

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. This Court 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 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, “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 between arbitration and trial de novo.

The *Christie-Lambert* decision 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....

*Id.* 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*, 39 Wn. App. 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.

This Court 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 included costs – and the offer of compromise. *Id.* at 184-87. This 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.*

The notion that the MAR analysis is simply a matter of “comparing comparables” has not been accepted by our Supreme Court. *Niccum*, 175 Wn.2d at 448. The *Niccum* court noted that *Haley* only “generally agreed” with that doctrine, and pointed out that it was unnecessary to decide whether to adopt the view expressed in *Wilkerson v. United Investment, Inc.*, 62 Wn. App. 712, 815 P.2d 293 (1991), that “attorney fee awards have no place in making an MAR 7.3

determination.” 142 Wn.2d at 154.

The Supreme Court’s reticence to adopt a strict “comparing comparables” formula is sensible. Arbitrations, offers of compromise, and trials de novo are not always strictly comparable in terms of what costs, damages, and other elements are included. There are amounts incurred in a trial that could not have been incurred at arbitration, and vice versa. But parties deciding about the risks and benefits of each proceeding *know* that these amounts are at risk. It is illogical to discount them from the final judgment amounts incurred in one proceeding that could not have been incurred in the other.

The logical approach is the one established by our Supreme Court and the Legislature in the use of the simple word “position.” Looking at the results of arbitration and the results of trial de novo, is the appealing party in a better “position” having sought a new trial? Comparing the arbitration award with the judgment is the best way to answer that question.

Here, the arbitrator awarded Hedger those statutory costs available in arbitration, which were close to \$1,000. CP 505. Unsurprisingly, after a contentious jury trial, litigation costs were higher than the arbitration costs, totaling more than \$7,700.00. CP 456.

The fact that some of the costs awarded in litigation were not

available in the arbitration should have no bearing on whether Groeschell improved her “position” by insisting on a trial de novo. She did not improve her position, she worsened it. She may have convinced a jury to alter some of the damage award, but MAR 7.3 does not limit an award of fees to only those situations where there is an improvement in the amount of “damages.” The trial court recognized this, and the award should be upheld.

(3) Discounting Sanctions Imposed at Trial as a Result of the Opposing Party’s Actions – Particularly in Introducing a New Defense – Frustrates the Purpose of the Statute and Ignores the Legislature’s Broad Use of the Term “Position”

Groeschell complains that the trial court should not have considered certain costs that were not incurred at the arbitration. Br. of Appellant at 21. She challenges inclusion of deposition costs, court reporter costs, and videographer costs. *Id.* She also objects to inclusion of sanctions resulting from her own conduct before and during the trial. *Id.* Groeschell abused the mediation process and introduced a new defense theory after trial had begun. CP 20-22, 440-41, 450.

There is no doubt that when a claim for damages, costs, or attorney fees is *available* in arbitration, but not requested, amounts awarded on those same claims at trial will not be considered in the MAR 7.3 calculation. *Haley*, 142 Wn.2d at 153. In *Haley*, the plaintiff could have

but failed to ask the arbitrator for an attorney's fee award. *Id.* at 155 n.8. Thus, the arbitration award reflected only the damages. At trial, the jury awarded Haley the exact same amount in damages as the arbitrator. However, Haley also requested and was awarded attorney's fees available under a securities statute, making the de novo judgment higher than the arbitration award. Our Supreme Court refused to include those fees in comparing the arbitration award to the de novo judgment. Haley's "failure to [request fees from the arbitrator] preclude[d] a finding that he [had] improved his position under MAR 7.3." *Id.* at 154.

However, our Supreme Court has not addressed whether it is in keeping with MAR 7.3 to disregard items in the trial court judgment that *could not have been* requested before the arbitrator because by the very nature of an arbitration proceeding, they are not at issue, such as court reporter costs.

Our Supreme Court also has not addressed whether the MAR 7.3 calculation should include costs *resulting from the opposing party's own conduct committed for the first time at trial.*

However, this Court has found that it is unfair to count new claims raised for the first time at the trial de novo in the MAR 7.3 calculation. *Christie-Lambert*, 693 P.2d at 165. This Court explained the unfairness this way:

Moreover, it 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 where the denial is based upon the appellant's improving his overall position in the trial de novo solely because of a new claim brought for the first time on appeal.

*Id.*

If a plaintiff cannot game MAR 7.3 by bringing a new claim for the first time at a trial de novo, then a defendant should not be allowed to benefit from bringing a new defense at a trial de novo. Nor should a party be encouraged to commit intransigent, sanctionable conduct at trial knowing that it drives up an opponent's attorney fees and costs, and none of those costs will be counted when evaluating his or her ultimate "position."

The facts of this case should be considered in light of the broad language of MAR 7.3 and the purpose of the statute. A party does not improve his or her "position" if – as a result of his or her own actions – he or she is ordered to pay thousands of dollars of new costs and sanctions that arbitration is designed to avoid. Groeschell's trial de novo resulted in somewhat lower damages, but did not improve her position because her own conduct increased costs and sanctions tremendously.

The costs of bringing a case to trial are part and parcel of the risk borne by the parties. Costs granted to the prevailing party are an integral

part of the result – whether an arbitration award or a judgment. Also, committing new, sanctionable conduct at trial that was not committed at the arbitration, thereby increasing the non-appealing party’s fees and costs, should not be encouraged with an illogical interpretation of MAR 7.3.

(4) The Trial Court Did Not Abuse Its Discretion in Imposing Monetary Sanctions Against Groeschell for Raising a New Defense for the First Time During Trial De Novo

Groeschell argues that the trial court’s monetary sanction regarding her late insertion of the deception doctrine defense was an untenable abuse of discretion. Br. of Appellant at 29-35. The sanction came in the form of attorney fees Hedger incurred in having to respond to the new defense, which was never raised at arbitration. CP 438-39. Groeschell argues that her general references to contributory fault, and her “mention” of the specific defense in her proposed jury instructions nine days before the trial de novo, render the trial court’s decision to impose \$3,125.00 in monetary sanctions as manifestly unreasonable. Br. of Appellant at 29-35.

Groeschell acknowledged the impropriety of her own actions by withdrawing the defense. This constitutes an admission that the trial court’s decision to sanction her was not manifestly unreasonable or untenable. *See Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999) (a court’s imposition of a sanction for attempting to file an

amended answer on the eve of trial, when new defenses in answer were not raised at arbitration, was not an abuse of discretion).

Groeschell essentially self-imposed the “extreme sanction” of dismissing a defense, but attempts to argue that the must lesser sanction of modest attorney fees was an abuse of discretion. This illogical, because sanctions are a hierarchy. A trial court may not impose a more severe sanction without first considering whether lesser sanctions will suffice. *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002). When the trial court “chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,” and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent’s ability to prepare for trial. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036, *as amended on denial of reconsideration* (1997). Our Supreme Court has said that “it is an abuse of discretion to exclude testimony as a sanction [for noncompliance with a discovery order] absent any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.” *Id.*, quoting *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 706, 732 P.2d 974 (1987).

Groeschell asserting her new defense on the eve of trial was sanctionable, because she volunteered for the harshest sanction possible. In light of the fact that sanctions are considered hierarchical, with monetary sanctions being less severe than striking a defense, it is illogical to concede that withdrawing the defense was appropriate, but imposing modest monetary sanctions for the attorney fees Hedger incurred as a result of the late disclosure is manifestly unreasonable and untenable.

Groeschell claims that there is no evidence to support the judge's finding that she committed procedural bad faith. Br. of Appellant at 32. She claims that she did not inject the defense on the "eve of trial," because it was mentioned in her expert's report, her trial brief, and her proposed jury instructions. *Id.*

Procedural bad faith is unrelated to the merits of the case and refers to "vexatious conduct during the course of litigation." *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 928, 982 P.2d 131, 136 (1999). Bad faith attorney's fees may be imposed for dilatory tactics during discovery, failure to meet filing deadlines, misuse of the discovery process, and misquoting or omitting material portions of documentary evidence. *Id.* The purpose of this type of award is "to protect the efficient and orderly administration of the legal process." *Id.* In *State v. S.H.*, 95 Wn. App. 741, 977 P.2d 621 (1999), this Court recognized that this type of

bad faith could support the award of attorney's fees:

[W]e hold that a trial court's inherent authority to sanction litigation conduct is properly invoked upon a finding of bad faith. A party may demonstrate bad faith by, inter alia, delaying or disrupting litigation. The court's inherent power to sanction is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Sanctions may be appropriate if an act affects "the integrity of the court and, [if] left unchecked, would encourage future abuses."

*S.H.*, 95 Wn. App. at 747 (citations omitted).

The trial court imposed the sanction on the grounds that it was unfair and disruptive to raise the defense so close to the trial, particularly when it had not been litigated at the arbitration. CP 438-39. This bad faith was exacerbated by the fact that Groeschell claimed that the issue had been raised to arbitrator without first reviewing the arbitration record to confirm this. *Id.* Groeschell's actions caused Hedger to incur unnecessary attorney fees to respond. Although the trial court accepted Groeschell's counsel's statement that she had not intentionally misrepresented what occurred at arbitration, she found that Hedger was prejudiced by her late assertion of the defense. *Id.*

Imposing attorney fees incurred in having to respond to a late-raised defense that was properly dismissed is not an abuse of discretion.

(5) Hedger Is Entitled to an Award of Attorney Fees on Appeal

Hedger requests that the Court award attorney's fees and costs incurred on appeal, pursuant to RAP 18.1 and *Boyd v. Kulczyk*, 115 Wn. App. 411, 417, 63 P.3d 156 (2003) (when appealing party from an MAR award fails to improve his position on de novo appeal and appeal from de novo judgment, responding party is entitled to fees and costs incurred both on de novo appeal and in responding to appeal from de novo).

D. CONCLUSION

Parties should be discouraged from seeking trial de novo, and must pay their opposing parties' attorney fees if, after all is said and done, they fail to improve their position from arbitration. Costs, as well as sanctions for intransigent litigation conduct which drives up the opposing party's attorney fees should be considered in deciding whether trial de novo was worth the cost to the parties and the court.

DATED this 20<sup>th</sup> day of July, 2016.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the Brief of Respondent Hedger in Court of Appeals Cause No. 74149-7-I to the following:

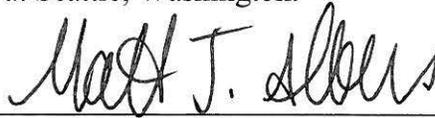
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Court of Appeals, Division I  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 20, 2016, at Seattle, Washington.



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