No. 93178-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 72926-8-I

JAMES D. BEARDEN,

Petitioner (Plaintiff-Respondent),

v.

DOLPHUS A. MCGILL,

Respondent (Defendant-Appellant)

PETITIONER'S RESPONSE TO RESPONDENT'S MOTION TO STRIKE PORTION OF APPENDICES TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDING PARTY

James Bearden, respondent in the Court of Appeals,[1] asks this Court to deny Dolphus McGill's[2] Motion to Strike Portion of Appendices to Petition for Review. The Motion is a waste of this Court's and the parties' time.

II. GROUNDS FOR DENYING MOTION TO STRIKE

A. Oral Argument in the Court of Appeals Is Part of the "Record on Review", Essential to This Court's Decision Whether to Accept Review.

Without citation to any authority, McGill claims the transcript of the oral argument before the Court of Appeals in *Bearden v. McGill,* No. 72926-8 (slip op., April 11, 2016), Appendix C, is not part of the "record on review" under RAP 9.1(a) and therefore not permitted in the Appendix under RAP 10.4(c).[3] This misconstruction of the rules is not only wrong but unfair to Bearden because the transcript demonstrates that the oral argument is the first time the Court of Appeals sprung its new formulation on the parties—that is, the court's proposal for determining

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

[2] Defendant at arbitration, appellant/defendant in the trial de novo, and appellant in the Court of Appeals.

[3] RAP 10.4(c) provides: "Text of Statute, Rule, Jury Instruction, or the Like. **If a party presents an issue which requires study of** a statute, rule, regulation, jury instruction, finding of fact, exhibit, **or the like,** the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief." (*Emphasis added*).

when an appealing party "fails to improve" its position for the purpose of assessing reasonable attorney fees and costs under MAR 7.3 and RCW 7.06.060 (1).[4]

The "record on review" includes the record in the Court of Appeals, since it is the Court of Appeals' decision which Bearden asks this Court to review. The oral argument before that court is integral to the record on review, because that is the first time the Court of Appeals presented to either party its novel formula for calculating whether a party improved its position under MAR 7.3. McGill apparently does not want the Court to read the transcript of the oral argument because he does not wish this Court to review the Court of Appeals' misguided surprise theory.

RAP 9.1(a) (entitled "Generally") provides that the "record on review" generally "may consist of (1) a 'report of proceedings'" and other materials. RAP 9.1(b) requires that the report of proceedings "of any oral proceeding must be transcribed in the form of a typewritten report of proceedings." The transcript of oral argument in the Court of Appeals is at a minimum a convenience to the Court (as well as McGill). If the Court

[4] Because MAR 7.3 and RCW 7.06.060(1) are substantively identical, they are hereafter collectively referred to as MAR 7.3. Petition, Appendix B. The new *Bearden* formula provides that, in determining whether the appealing party failed to improve his position on the trial de novo, the trial court must segregate and exclude statutory (RCW 4.84.010) costs that are incurred during the "time lag" following arbitration through trial, to defend the arbitration award.

strikes the transcript, Bearden contends it is essential that this Court listen to the oral argument.

To be fair and avoid the surprise to both parties which occurred at oral argument in this case, the Court of Appeals could have issued an order notifying the parties of its novel theory and requesting briefing or argument on it, as contemplated by RAP 12.1(b):

> Issues Raised by the Court. If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.[5]

Otherwise, as RAP 12.1(a) provides: "... the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs."

The transcript shows that the Court of Appeals went beyond the issues briefed by the parties to come up with its own new mathematical formula requiring the trial court to segregate and exclude statutory (RCW 4.84.010) costs incurred during the "time lag" following arbitration through trial, to defend the arbitration award.[6] That is the issue Bearden asks this Court to review. A "study" of the transcript of the Court of

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[5] Similarly, where the parties did not raise an issue at trial, it is usually appropriate to request additional briefing or argument. *Crawford v. Wojnas,* 51 Wn. App. 781, 754 P.2d 1302 (1988).

[6] McGill's counsel admitted in rebuttal argument that by then she had time to think about the Court's new approach, which she initially opposed. The Court pointed out to McGill's counsel that she would win under its formulation. Appendix C, 4:20-5:6, 17:10-12.

Appeals hearing below, is precisely the type of "*or the like*" material contemplated by RAP 10.4(c). The motion to strike the transcript should be denied.

B. The Legislative History Is Not New Material, and Bearden Did Not Raise Any Impermissible New Argument.

McGill asserts that Bearden newly argues that, as a result of the Court of Appeals' decision in *Bearden*, insurers will appeal meritless causes and close calls. Because McGill believes this is a new argument, he claims the legislative history cited in support (Appendix E) should be stricken. How could Bearden argue against the Court of Appeals' new segregate-and-exclude-time-lag-costs variation of a "compare comparables" rule which even this Court has not adopted, before the Court of Appeals disclosed it at oral argument and then issued its decision? He could not.

In any event, even if the argument is considered "new," there is no rule against new arguments on issues that were fully briefed (though the *Bearden* Court's specific formulation was not briefed by either party before oral argument). The purpose of RAP 2.5(a) (errors raised for the first time on review) is met where the issue is advanced below and the court has an opportunity to consider and rule on relevant authority. *Bennett v. Hardy*, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990); *Washburn*

v. Beatt Equipment Co., 120 Wn.2d 246, 291, 840 P.2d 860 (1992).

McGill also contends Appendix E should be stricken because Bearden "did not rely on" the legislative history in the Court of Appeals to support the intent of MAR 7.3. That is absurd.[7] The cases cited in the Court of Appeals discuss and incorporate the legislative intent, relying on and citing the legislative history, which of course explicitly includes that intent.

Again, even if the argument concerning legislative history were new, especially when the court is tasked with statutory construction of a statute or rule, as here, it has "inherent authority to consider issues not raised by the parties if necessary to reach a proper decision." *Filo Foods, LLC v. City of SeaTac,* 183 Wn.2d 770, 792-793, 357 P.3d 1040 (2015) (internal quotations and citations omitted).

Furthermore, appellate courts can consider "legislative facts" for the first time on appeal. *See, 5* Tegland, *Wash. Prac.*, Evidence Law and Practice sec. 201.56 at 185 (2007)(5th ed.). Legislative facts include scholarly works, secondary legal authority, legislative history, scientific studies and social facts. Legislative facts need not be in the record on

[7] The purpose and history of MAR 7.3 was argued below in briefs of both parties. For examples, see McGill's Appellant Brief at 22, "The Trial Court's Interpretation is Inconsistent with the Legislative History of the Relevant Mandatory Arbitration Rules". McGill also references purpose and legislative history at 15, 17, and 20 of his opening brief. Bearden argues legislative history at 2, 16 and 21-24 of Respondent's Brief.

appeal and "simply supply premises in the process of legal reasoning". *Wyman v. Wallace,* 194 Wn.2d 99, 102, 615 P.2d 452 (1980)(citing *Houser v. State,* 85 Wn.2d 803, 807, 540 P.2d 412 (1975)). This Court will deny a motion to strike appendices containing "legislative facts" which the court may consider when interpreting a statute. *State v. CPC Fairfax Hospital*, 129 Wn.2d 439, 453-454, 918 P.2d 497 (1996)(denying motion to strike appendices including scholarly articles and excerpts, which the Court considered legislative facts rather than "specific facts of this case"). The motion to strike Appendix E should be denied.

In the event this Court determines the transcript of the oral proceeding in the Court of Appeals (Appendix C) or the legislative history (Appendix E) are not appropriate submissions under RAP 9.1, RAP 10.3(8) or RAP 10.4(c), Bearden requests permission under RAP 10.3(8) to include the transcript of the oral proceeding in the Court of Appeals (Appendix C) and the legislative history contained (Appendix E) for the Court's consideration in deciding whether to accept review.

DATED this 30th day of June, 2016.

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Respectfully submitted,

LAW OFFICES OF KATHLEEN GARVIN
CORRIE YACKULIC LAW FIRM, PLLC

By: _____

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[8] Of counsel.

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 11 day of July, 2016, to the following counsel of record at the following addresses:

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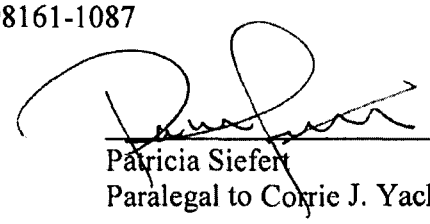

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Subject: Bearden v. McGill No. 93178-0

Dear Clerk of the Court,

Attached please find Petitioner's Response to Respondent's Motion to Strike Portion of Appendices to Petition for Review in the above entitled action.

Thank you,

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