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NO. 93178-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES D. BEARDEN,

Petitioner,

vs.

DOLPHUS A. McGILL,

Respondent.

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

ANSWER TO PETITION FOR REVIEW

REED McCLURE
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Washington Cases

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I. NATURE OF THE CASE

This case involves a personal injury case where defendant Bearden was dissatisfied with the award at the mandatory arbitration. Bearden exercised his right to have a jury determine damages and requested a trial de novo. The jury awarded plaintiff less than the arbitrator awarded. Of the category of statutory costs plaintiff requested at arbitration, plaintiff was awarded less at trial. Division I correctly held that Bearden had improved his position on the trial de novo so the trial court erred in awarding RCW 7.06.060 and MAR 7.3 fees to McGill. This Court should allow Division I's decision to stand.

II. ISSUE PRESENTED

1. Should this Court review Division I's decision reversing the MAR 7.3 attorney fees award where defendant improved his position and Division I's decision does not conflict with any decisions of the Washington appellate courts?

2. Should this Court review Division I's decision reversing the MAR 7.3 attorney fees award where defendant improved his position and Division I's decision does not raise an issue of substantial public interest?

III. STATEMENT OF THE CASE

James Bearden and Dolphus McGill were involved in an automobile accident. (CP 288) Bearden sued McGill alleging negligence and seeking damages for his injuries. (CP 288-89) Bearden moved the matter to mandatory arbitration. (CP 277-79)

After the arbitration hearing, Bearden submitted a cost bill identifying $1,187.00 in costs. (CP 292, 274-75) The arbitrator awarded Bearden $44,000 in damages. (CP 292-93) The arbitrator awarded costs for the filing fee, costs of service of process, records, reports, and statutory attorney fees. (CP 290-91) The arbitrator issued an amended arbitration award with costs of $1,187.00 for a total award of $45,187.00. (CP 290-91)

McGill requested trial de novo. (CP 268-71) The case proceeded to trial. (CP 246) The jury returned a verdict for Bearden in the amount of $42,500.00. (CP 109)

After trial, Bearden sought taxable costs of $4,049.22. (CP 106-08) The court awarded taxable costs of $3,296.39. (CP 86-87, 88-89) The costs were for the ex parte and fax filing fees, witness fees, 50% of the costs for Dr. Murphy's discovery deposition, the entire cost of Dr. Murphy's perpetuation deposition, the cost of the deposition of Mr. McKilligan, police report costs, cost of Dr. Gaddis' report, and statutory

attorney fees. (CP 88-89) The court entered a Judgment reflecting the "Total Principal Judgment Amount" of $42,500.00 and costs of $3,296.39.[1] (CP 86-87) The costs at trial included items not requested at arbitration (e.g., deposition testimony and transcripts). (CP 86-87, 88-89, 290-91)

Bearden moved for MAR 7.3 and RCW 7.06.060 attorney fees and costs. (CP 75-84) He argued McGill had not improved his position on the trial de novo when the arbitration award plus costs was compared to the jury award plus costs. (CP 79) McGill opposed the motion, pointing out that he had improved his position at trial. (CP 45-47)

The trial court ruled 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) Bearden was awarded $71,800.00 in attorney fees. (CP 18-19, 21-23)

McGill appealed. (CP 5-16) Division I Court of Appeals held McGill had improved his position on the trial and reversed the award of MAR 7.3 and RCW 7.06.060 fees. Division I's decision stated:

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[1] 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.*) These anomalies are not pertinent to any issue in the case.

> We hold that 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. Here, this means the damages and statutory costs that both the arbitrator and the trial court considered. It excludes those statutory costs requested only from the trial court.

Bearden v. McGill, 193 Wn. App. 235, 239, ___ P.3d ___ (2016). The *Bearden* court explained:

> [A]ll three divisions of the Washington Court of Appeals agree that to determine if a party improved its position at a trial de novo, the superior court should compare the aggregate success on claims actually litigated between the parties at both the arbitration and the trial de novo—whether those claims were for damages, statutory fees, costs, or sanctions.

Id. at p. 245 (footnotes omitted). The arbitration damages award was more than the trial damages award. Also the statutory costs considered and awarded by the arbitrator were more than the same category of statutory costs awarded at trial. Thus, McGill improved his position by requesting a trial.

IV. ARGUMENT

This Court will only accept review if the Court of Appeals' decision fits one of the four criteria in RAP 13.4(b):

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner contends this case qualifies for review because Division I's decision conflicts with a decision of the Supreme Court, conflicts with another Court of Appeals' decision, and presents an issue of substantial public interest. Division I's decision is consistent with Supreme Court and Court of Appeals' case authority. Any public interest in the issue is not substantial and certainly does not justify this Court's review. Mr. McGill asks this Court to deny the petition.

A. DIVISION I'S DECISION IS CORRECT AND SUPPORTS THE PURPOSES OF MANDATORY ARBITRATION.

Division I's decision correctly applied the "comparing comparables" test for assessing under RCW 7.06.060 whether a party has improved his position on a trial de novo. Contrary to petitioner's arguments, there is no conflict with any Washington appellate decision.

Petitioner contends Division I's decision conflicts with *Christie-Lambert Van & Storage Co. v. McLead*, 39 Wn. App. 298, 693 P.3d 161 (1984); *Cormar, Ltd v. Sauro*, 60 Wn. App. 622, 806 P.2d 253, *rev. denied*, 117 Wn.2d 1004 (1991), and *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 316 P.3d 1113 (2014). In fact, the decision is consistent with

these cases. And Division I's decision explains how it followed this line of cases.

Cormar and *Miller* both involved situations where the arbitrator rejected part of the party's request (i.e. pre-judgment interest in *Comar* and attorney fees in *Miller*) but at trial each obtained the relief rejected by the arbitrator. As in this case, the relief requested and awarded at arbitration was compared to the result of the same relief requested at trial. Division I's decision explains the *Miller* court "concluded that a court should compare the success of aggregate claims litigated in both the arbitration and trial to decide if Miller improved his position at trial." 193 Wn. App. at 245.

In *Christie,* like here, Division I compared the claims actually litigated between the parties at both arbitration and trial. The *Christie* court determined that a party had not improved his position on trial de novo and therefore RCW 7.06.060 and MAR 7.3 fees were owed. Nothing in *Christie* conflicts with Division I's decision here.

Petitioner also discusses *Do v. Farmers Ins. Co.*, 127 Wn. App. 180, 110 P.3d 840 (2005). (Petition at 16-17) *Do* is not applicable here. *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. There was no CR 68 offer here nor was there an offer of compromise.

Petitioner also discusses *Niccum v. Enquist*, 175 Wn. 2d 441, 448, 286 P.3d 966 (2012). (Petition at 17-18) He argues that *Niccum* stands for the proposition that "when a rule or statute mandates recovery of costs . . . those costs must be included in the determination of whether a party improved their position." *Id.* at 18. *Niccum* contains no such holding or pronouncement. In fact, *Niccum* involves the RCW 7.06.050 offer of compromise situation. Again, Bearden did not make an offer of compromise.

Petitioner cites *Miller, Christie-Lambert*, and *Cormar* arguing when statutory costs are at issue in arbitration and trial, the trial court must include them in determining whether the appealing party improved his position on the trial de novo.[2] (Petition at 19) As explained above, these cases are consistent with Division I's decision. Division I's decision does include the same category of costs requested and awarded at arbitration with those requested and awarded at trial. There is no inconsistency or

[2] Petitioner also discusses *Haley v. Highland*, 142 Wn.2d 135, 12 P.3d 119 (2000), yet does not explain how *Haley* conflicts with Division I's decision. *Haley* is consistent with Division I's decision.

conflict with any Washington appellate decision. Review should be denied.

B. THIS CASE DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Petitioner argues his case raises an issue of substantial public interest, (Petition at 4, 7) yet surprisingly never states what that issue is. There is no issue of substantial public interest. This case involves a private dispute between private individuals based on unique facts and circumstances. There is no public interest, let alone substantial public interest.

Division I followed and applied the well established principles of statutory and rule construction: determine legislative intent. 193 Wn. App. at 241 (citations omitted). It is undisputed that the mandatory arbitration statutes and rules were intended to encourage settlement and discourage meritless appeals (i.e. requests for trial de novo). *Id.* at 242. Petitioner contends Division I's decision creates an absurd result, (Petition at 11) because a de novoing party would not request a new trial only to improve his position by $1,500. In essence, petitioner is arguing that improving one's position requires some minimal threshold of improvement.

Petitioner's argument ignores a fundamental principle of statutory construction: if the legislature had wanted to set a minimal threshold or fixed standard of improving one's position, the legislature could have included the provision in the statute. *State v. Delgado*, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003); *State v. Stattum*, 173 Wn. App. 640, 655, 295 P.3d 788, *rev. denied*, 178 Wn.2d 1010 (2013).[3] The statute contains no such language.

Under the plain meaning of the statutory language, improving is a betterment from the arbitration result. RCW 7.06.060. A defendant improves his position by having to pay less of an award after trial than after arbitration. A plaintiff who requests a trial de novo improves his position if he recovers more at trial than at arbitration. Had Bearden been dissatisfied with the arbitration award and requested trial de novo and obtained a trial award that was $1,500 more than the arbitration award, he would not likely be arguing that he had not improved his position.

Petitioner argues that if post-arbitration taxable costs are not included in comparing one's position from the arbitration to the trial, the deterrent effect of RCW 7.06.060 and MAR 7.3 is not advanced. (Petition

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[3] "We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. We assume the legislature 'means exactly what it says.'" *Delgado*, 148 Wn.2d at 727-28

at 11-12) He argues post-arbitration costs "which the non-appealing party necessarily incurs" should be included in the MAR 7.3 analysis because the expenditure of resources for trial costs "is exactly what the MAR system is designed to prevent." *Id.* But petitioner fails to explain how including the post-arbitration costs furthers the purposes of MAR. A prevailing party who asks for them can recover both his arbitration taxable costs and his trial taxable costs. *Niccum*, 175 Wn.2d at 450-451. Thus, the non-appealing party can recover costs he "necessarily incurs."

This case does not present an issue of public importance. It does not present an issue of substantial public importance. This Court should deny review.

V. CONCLUSION

The Court of Appeals correctly reversed the trial court's award of MAR 7.3 attorney fees and costs to plaintiff/petitioner Bearden. Division I's decision does not qualify for review under RAP 13.4. Respondent McGill respectfully requests that this Court deny review.

DATED this 24th day of June, 2016.

REED McCLURE

By _____

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Attached for filing please find the following:

- Answer to Petition for Review
- Motion to Strike Portion of Appendices to Petition for Review
- Affidavit of Service

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