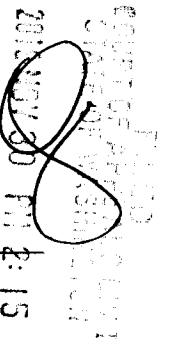
NO. 72926-8-I

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

SUPPLEMENTAL BRIEF OF APPELLANT

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I. NATURE OF THE CASE

Dolphus McGill, defendant/appellant, submits this supplemental brief.

This Court previously held correctly that Mr. McGill had improved his position on a trial de novo and that the trial court erred in awarding RCW 7.06.060 and MAR 7.3 fees to plaintiff/respondent James Bearden.

The Washington Supreme Court granted Mr. Bearden's Petition for Review and remanded the case to this Court, Division I of the Court of Appeals, to reconsider its decision in light of the Supreme Court's decision in *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016). This Court's decision should stand because *Nelson v. Erickson* involved interpretation of a statute, RCW 7.06.050; an offer of compromise, and how an offer of compromise should be understood. There is no offer of compromise here. Therefore, nothing in *Nelson v. Erickson* changes the result. This Court correctly held that when determining whether a party has improved his position on the trial de novo after an arbitration award, a 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.

This Court's prior Opinion should be affirmed.

II. STATEMENT OF THE CASE

James Bearden and Dolphus McGill were 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)

The arbitrator awarded Bearden $44,000 in damages. (CP 292-93) Bearden submitted a $1,187.00 cost bill for the filing fee, costs of service of process, records, reports, and statutory attorney fees. (CP 274-75) The arbitrator awarded $1,187.00 in costs and issued an amended arbitration 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 85, 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. (*Id.*) 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) This Court held McGill had improved his position on the trial de novo and reversed the award of MAR 7.3 and RCW 7.06.060 fees. This Court's decision stated:

> 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

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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.

> court's award for those same elements. Here, this means the damages and statutory costs that both the arbitrator and trial court considered. It excludes those statutory costs requested only from the trial court.

Bearden v. McGill, 193 Wn. App. 235, 239, 372 P.3d 138, *rev. granted and remanded*, 186 Wn.2d 1009, 380 P.3d 189 (2016). This 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 de novo.

Bearden petitioned the Washington Supreme Court for review. The Supreme Court granted the petition and remanded to this Court for reconsideration in light of *Nelson v. Erickson.*

III. ARGUMENT

A. COMPARING COMPARABLES IS THE PROPER TEST FOR DETERMINING WHETHER A PARTY HAS IMPROVED HIS POSITION ON TRIAL DE NOVO.

This Court properly applied the common sense and fair comparing comparables test. Based on that test, Mr. McGill improved his position at the trial de novo. The Supreme Court neither rejected nor adopted the comparing comparables test in *Nelson v. Erickson* because it was construing how to interpret a statutory offer of compromise.

In *Nelson,* the arbitrator awarded Nelson $43,401.59 in compensatory damages and taxable costs of $1,522.19. Erickson requested a trial de novo. Nelson presented Erickson with a RCW 7.06.050(1)(b) offer of compromise to settle for $26,000 plus taxable costs incurred at arbitration. Erickson confirmed that Nelson would settle the case for $27,522.19, the $26,000 plus the $1,522.19 taxable costs awarded at arbitration.

Erickson did not accept the offer of compromise, and the case proceeded to a jury trial. The jury awarded Nelson $24,167 in compensatory damages and the trial court granted additur of $3,000. Nelson was also awarded statutory costs of $729.98. Nelson moved for MAR 7.3 attorney fees, arguing Erickson had not improved his position on trial de novo. The trial court ruled Nelson's offer of compromise was for

$26,000 and the jury award and additur totaling $27,167.00 was more than the offer of compromise. This Court and the Supreme Court reversed, holding the offer of compromise was $27,522.19 so the trial result of $27,167 was an improvement.

Nelson v. Erickson involved the question of when a party offers to settle a case for "$26,000 plus taxable costs incurred at arbitration" and the taxable costs at arbitration are $1,522.19 is the amount of the offer of compromise $27,522.19? If a party offers to settle prior to trial, that settlement offer replaces the arbitration award when determining whether the party who requested trial de novo improved his or her position. RCW 7.06.050(1)(b). The Supreme Court concluded the offer should be read as an ordinary person would: $26,000 plus the known arbitration costs of $1,522.

The Supreme Court explained that reading an offer of compromise as an ordinary person "comports with the plain language of the rule and provides an incentive for parties to avoid making confusing settlement offers." 186 Wn.2d at 389.

The *Nelson* decision did not address the question of whether a party has improved his position at the trial de novo when compared to the arbitration award. The Supreme Court's holding hinges on the offer of

compromise. The Supreme Court quoted *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012), another offer of compromise case.

> [T]he purpose of the Mandatory Arbitration Rules is to encourage settlement and discourage meritless appeals. In order to do so, parties must be able to determine "what position it must improve upon to avoid paying reasonable attorney's fees if it elects to continue to trial." [*Niccum*,] at 452, 286 P.3d 966. When **settlement offers** are uncertain, it stymies the system. Not only is it more difficult for parties to figure out whether to settle, it will likely increase litigation after the fact, as the parties must then litigate the meaning of vague **offers**. *Id.* at 451, 286 P.3d 966.

186 Wn.2d at 391 (emphasis added).

The *Bearden v. McGill* case does not involve an offer of compromise. Although both *Nelson v. Erickson* and *Bearden v. McGill* involve the question of whether a party improved his position at the trial de novo, the context of the issue is distinctly different in each case. This Court's decision should be affirmed.

IV. CONCLUSION

This Court correctly decided *Bearden v. McGill*. When determining whether a party has improved his position on the trial de novo after an arbitration award, a 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. Nothing in *Nelson v. Erickson* affects, alters, or changes this Court's decision. This Court should affirm its decision.

DATED this 30th day of November, 2016.

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