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No. 72926-8

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

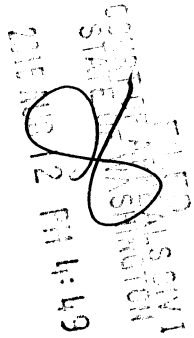
JAMES D. BEARDEN,

Plaintiff-Respondent,

v.

DOLPHUS A. MCGILL,

Defendant-Appellant.



BRIEF OF RESPONDENT

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I. INTRODUCTION

This case, an admitted liability car crash case involving serious but non-catastrophic injuries, is exactly the kind of case that the Mandatory Arbitration system was intended for. Arbitration offered plaintiff Jim Bearden a relatively quick and inexpensive procedure for resolving his claim, and kept this smaller matter off the busy superior court docket. After the arbitrator filed his arbitration award, for $45,187, McGill, through his counsel, elected to take the matter to jury trial in a de novo appeal, as was their right. But their risk was that they would be obliged to pay Bearden's attorneys' fees and costs if they did not improve their position; the one-sided fee-shifting mechanism in MAR 7.3 and RCW 7.06.060 is part of the scheme that encourages litigants to resolve smaller cases at arbitration.

McGill did not improve his position on the de novo appeal. The trial court entered judgment for $45,796.39 -- $609.30 more than the arbitration award. As the court stated, "The defendant did not improve his position; he worsened it slightly. The plaintiff is entitled to reasonable attorney's fees." CP 21.

McGill's appeal of the fee award is without merit. The trial court was well within his discretion in awarding the requested costs for 50% of Murphy discovery deposition, used to impeach witness Murphy at trial,

and for the Gaddis report, admitted in the arbitration. The cost bill was property documented. Finally, consistent with the case law and the history and revisions to the MARs, the trial court correctly compared the final arbitration award to the judgment amount to conclude that McGill did not improve his position on de novo appeal.

The trial court's order granting attorney's fees should be affirmed.

II. STATEMENT OF CASE

A. The Car Crash and Service on the Defendants

Dolphus McGill initiated a multi-car crash on January 28, 2011, when he rear-ended the car in front of him, which in turn rear-ended Jim Bearden's car as he was making his way home from work on I-5 northbound. *See* CP 288-89 (Complaint). Bearden, then ___ years old, sustained neck and upper back injuries which dogged him for several years. His car was totaled. McGill's passenger, Nellie Knox McGill, was the registered owner of the car he was driving. *See* CP 103-04.

After an unsuccessful effort to resolve the case before filing suit, Bearden filed the complaint in Snohomish County Superior Court, naming Dolphus McGill and Nellie Knox McGill as defendants. CP 288-89. He did not know their relationship but assumed them to be married. *See id.* (identifying defendants as "husband and wife"); CP 94. He was unable to locate Dolphus initially, CP 103-04 (¶4) but was able to obtain service on

Nellie, who was evasive about Dolphus's whereabouts. *Id.* Bearden's investigator eventually located Dolphus in jail, where he was served by the sheriff. *Id.* Only later did he learn that Nellie was Dolphus's mother, whereupon he agreed to dismiss the claims against her on the first day of trial. CP 94, ¶B.[1]

B. The Arbitration

Bearden elected to move the case into mandatory arbitration. CP 277-79. Following an arbitration hearing on December 5, 2013, the arbitrator issued an Arbitration Award of $44,000.00, which included $8663.91 in Special Damages and $34,336.09 in General Damages. CP 292-93. Bearden then submitted a Cost Bill in the amount of $1,187.00. CP 274. The arbitrator approved the cost bill, and on December 22, 2013, issued an "Amended Arbitration Award with Costs" in the amount of $45,187.00. CP 290-91. This Amended Arbitration Award was filed on December 26. The Amended Arbitration Award included an itemization of the costs awarded. *Id.*

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[1] As Plaintiff stated in his Reply in Support of Cost Bill:

> After all, she owned the car that Mr. McGill was driving when he struck the driver behind Mr. Bearden, it is Mrs. McGill's State Farm Insurance policy that is paying for the defense and damages in this case, and Plaintiff's counsel did not know Mrs. McGill's relationship to Mr. McGill until she took discovery. Indeed, Defendant resisted the dismissal of Mrs. McGill as a party.

CP 94.

C. Defendant McGill's De Novo Appeal

McGill's attorney appealed the arbitration award. CP 265-269. McGill retained neurologist Lawrence Murphy, MD, to conduct a CR 35 exam. Bearden's attorney deposed Dr. Murphy on May 27, 2014.

The case went to trial before the Hon. George Appel, Snohomish County Superior Court, on September 16, 2014. Plaintiff called five witnesses, including Bearden's physical medicine and rehabilitation physician, his physical therapist, and his chiropractor. *See* CP 246-60 (Trial Minutes). The defense called neurologist Lawrence Murphy, M.D. *Id.* Bearden's physical therapist, Patrick McKilligan, PT, and Dr. Murphy testified by videotaped perpetuation deposition. CP 110-187 (Murphy); CP 216-245 (McKilligan).

The parties gave closing arguments the afternoon of September 18. Bearden elected not to request Economic or Special Damages but only General Damages. The jury returned a verdict the morning of September 19, awarding Bearden $42,500.00 in General Damages. CP 109.

D. Post-Trial Proceedings

On September 29, 2014 Bearden submitted a cost bill requesting $4049.22 in costs pursuant to CR 54(d) and RCW 4.84.010 *et seq.* CP 106-07. In support of the Cost Bill Bearden filed the Declaration of Corrie

J. Yackulic re: Plaintiff's Cost Bill, explaining each item in the cost bill. CP 103-04.

Defendant responded, conceding most but not all of the costs, on October 9, 2014. CP 99-101. Bearden filed a Reply in Support of Cost Bill, along with a Reply Declaration of Corrie J. Yackulic. CP 93-97 (Reply); CP 90-92 (Reply Decl.).

The trial court heard argument on the cost bill on October 24, 2014. Following argument, the Court entered an Order Granting Plaintiff's Cost Bill in the amount of $3296.39. CP 88-89. Among the costs the trial court denied were the costs of obtaining Bearden's medical records, CP 88, and the costs incurred in serving Nellie Knox McGill. CP 89, 290.

The Court then entered Judgment for $45,796.39. CP 86-87. This was $609.39 more than the Amended Arbitration Award of $45,187.00.

On November 3, 2014 Bearden timely filed a motion for attorney's fees and costs pursuant to MAR 7.3. CP 75. McGill filed his opposition on November 12, CP 45, and Bearden replied on December 3, 2014. CP 25. The Court heard oral argument on the motion, granting a portion of the fees requested. CP 7-8 (Court's Findings of Fact and Conclusions of Law); CP 9-12 (Memorandum Decision Granting Attorney's Fees).

Without explanation, the court did not grant any of the expert witness costs requested.[2]

III. ISSUES PRESENTED

1. Was the trial court within its discretion when it awarded Plaintiff:

   (a) 50% of the transcription fee for the defense expert's discovery deposition, when the trial court was in the best position to determine whether at least 50% of the discovery deposition was used for impeachment? and

   (b) The cost of the treating chiropractor's report, which was used in the arbitration?

2. Did the trial court abuse its discretion in accepting and relying on the sworn declarations of trial counsel, which detailed the amount and basis for each cost, as documentation of the costs incurred?

3. Did the trial court abuse its discretion in refusing to award Plaintiff the costs of (a) service on Nellie Knox McGill, and (b) obtaining the medical records, which were allowed by the arbitrator?

4. Did the trial court err in awarding Bearden attorney's fees and costs pursuant to MAR 7.3 and RCW 7.06.060 when Defendant, the

[2] Bearden believes this may have been an oversight. However, the issue is not before this Court.

appealing party from an arbitration award of $45,187, failed to improve its position following the trial de novo, where judgment was entered for $45,796.39?

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion In Awarding 50% of The Deposition Transcript Cost or the Cost of The Gaddis Report.

McGill challenges the trial court's award of two costs – 50% of the defense expert discovery deposition, used for impeachment at trial, and the chiropractor's report, used at arbitration. Appellant's Br. at 2 (Issues Presented ##1 and 2). The trial court did not abuse its discretion in awarding either cost.

1. The Trial Court Did Not Abuse Its Discretion In Concluding That At Least 50% of the Murphy Discovery Deposition Was Used for the Impeachment of Dr. Murphy on Cross-Examination.

As McGill acknowledges, RCW 4.84.010(7) gives the trial court the authority to award the prevailing party the "expenses of depositions" "on a pro rata basis for those portions of the depositions . . . used for impeachment." *See* Appellant's Br., at 11. Here, the trial court awarded Bearden half the $522.50 cost ($261.25) of the discovery deposition of Lawrence Murphy, MD, who was the defense CR 35 examiner and sole

defense witness. (McGill does not dispute that the cost of the Murphy discovery deposition was $522.50. *Id.*)

The sole basis of McGill's challenge to this cost is that Bearden did not "use" 50% of the transcript for the impeachment of Murphy at trial, but that he "used" only "two pages" for "impeachment." *Id.* at 11-12. Though McGill does not say so explicitly, he apparently believes that "impeachment" is limited to confrontation of the witness with prior inconsistent deposition statements that are actually quoted in the cross-examination. McGill offers no support for this narrow and incorrect definition of "impeachment." In fact, "impeachment" of an expert can be achieved through a wide variety of methods, including for instance "by a showing of bias, . . . a reputation for untruthfulness, . . . by contradiction," and "the fact of payment." K. Tegland, Washington Practice, Evidence Law & Practice 5B, at §705.8 (2007). Indeed, as Tegland states, "perhaps the most familiar method of impeachment is to demonstrate that a witness is biased or prejudiced against a party or has some other motive to fabricate testimony." K. Tegland, Washington Practice, Evidence Law & Practice 5A at §607.6 (2007). *See also* Black's Law Dictionary *online* (2d ed.) ("impeach" under the laws of evidence means "To call in question the veracity of a witness"). Tegland uses "cross-examination" and

"impeachment" virtually interchangeably, since a core purpose of cross-examination is to impeach. *See id.*

Here, the cross-exam of Dr. Murphy was approximately the same length as the direct exam. *See* CP 110-185. On cross Dr. Murphy admitted – as he had to – that he has testified "hundreds of times" in the 20-plus years he has done medical-legal work, and that the "overwhelming majority" of that testimony has been for defendants in civil cases. CP 149, 147. Especially with such a seasoned witness, it is essential to have the prior deposition testimony – page and line -- at the ready to control the witness if he should try to fudge his answers. Bearden's attorney necessarily drew from, and thus "used," most of the Murphy discovery deposition to structure and formulate the cross-examination of this witness.

Much of the cross pertained to Dr. Murphy's years of work as a defense expert, including the income he has earned in that work. *See, e.g.,* CP 144-49, 156-59, 179-80 (admitting that he had earned over $2 million doing defense medical work in the 3.5 years since Bearden was injured in the crash). Other portions pertained to the limited records he reviewed or incomplete history he took at the CR 35 exam in formulating his opinions. *See., e.g.,* CP 145-46, 157, 161-65, 170-75, 176-79. And yet other portions of the cross pertained to his inaccurate disclosure of his prior

testimony, which he had produced in response to the discovery deposition subpoena. CP 149-155. Throughout the cross exam counsel made either direct or inferential reference to Dr. Murphy's discovery deposition testimony. Dr. Murphy – a highly skilled and experienced expert witness – was well aware of those references, knew what his prior deposition testimony was, knew that Bearden's attorney had it ready to use, and knew that it reined him in. All of the cross-exam testimony was used to ***impeach*** Dr. Murphy's credibility and opinions – by showing his enormous financial stake in preserving his business as a defense medical examiner, by showing that his review of Bearden's history was woefully incomplete and thus that his opinions were unreliable, and sometimes by showing direct contradictions between his trial testimony and his deposition testimony.

Plaintiff initially requested that the trial court allow 75% of the discovery deposition fee. *See* CP 106-07. But in her Reply, Bearden's counsel revised the request downward to 50% of the transcript cost based on her close look "at the cross-examination outline." CP 95 (Yackulic Reply Dec. in Support of Cost Bill).

The trial court judge, who watched Dr. Murphy's testimony including the cross-examination, was in the best position to determine whether plaintiff's counsel "used" the discovery deposition to control and

impeach the witness at trial. That is why the deferential abuse of discretion standard of review applies to the trial court's determination on this element of the cost award. The trial court's award of 50% of the discovery deposition transcript cost, reflecting the court's observation that at least 50% of the transcript was "used" for impeachment, was not an abuse of discretion. The award of $261.25 for the Murphy discovery deposition should stand.

2. The Trial Court Did Not Abuse His Discretion In Awarding The Cost of the Gaddis Report.

Under Rule 5.3(d) of the Mandatory Arbitration Rules, a party may submit as part of the Prehearing Statement of Proof:

> (1) A bill, *report,* chart, or record of a hospital, doctor, dentist, registered nurse, licensed practical nurse, physical therapist, psychologist, or other health care provider, on a letterhead or billhead. . . .
> (2) The written statement of any other witness... including, a statement of opinion, if it is made by...declaration...

MAR 5.3(d)(1)(6) (emphasis supplied). Such documents are "presumed admissible." *Id.* These relaxed evidentiary rules further the goal of the Mandatory Arbitration program, to provide a forum and process for the resolution of smaller claims, keeping such claims out of the superior courts and providing claimants a cost-effective mechanism for obtaining redress. MAR 7.3.

Under MAR 6.4 the prevailing party in a mandatory arbitration is entitled to statutory attorney's fees and costs. RCW 4.84.010. These include:

> reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence . . . in mandatory arbitration. . ., including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files.

RCW 4.84.010(5). Here, the report of Bearden's treating chiropractor, James Gaddis, D.C., was admitted into evidence at the arbitration hearing. The cost of obtaining that report was $400. CP 104. Under the plain terms of the statute, the cost is allowable.

McGill is incorrect in arguing that the cost of the Gaddis report is not allowable because the report was not used at trial. *See* Appellant Br. at 8-9. McGill misquotes the statute, ignoring the clause "admitted into evidence . . . *in mandatory arbitration.*" *See* RCW 4.84.010. In fact, costs for records or reports admitted into evidence in a mandatory arbitration *are* recoverable following a trial *de novo,* regardless of whether they are admitted at trial. *Stedman v. Cooper*, 172 Wn.App. 9, 292 P.3d 764 (2012) addresses this squarely. In *Stedman*, the defense challenged the award of costs to the plaintiff following a *de novo* trial for medical records admitted at the arbitration, but not admitted at trial. The court stated:

> RCW 4.84.010(5) plainly allows costs for medical records so long as they are admitted into evidence, either in mandatory arbitration or at trial. The trial court did not err in allowing Stedman her costs for these records.

172 Wn.App. at 23, 292 P.3d at 771.[3]

Finally, McGill is incorrect that the Gaddis report was an "expert expense." Appellant Br. at 10. Gaddis was not an expert witness but a treating health care provider and the report was obtained from him in that capacity. The trial court considered all of this in exercising his discretion to award Bearden the cost of the Gaddis report. The trial court did not abuse his discretion in awarding the cost of the Gaddis report.

B. The Trial Court Did Not Abuse Its Discretion In Relying On the Sworn Declarations of Counsel As Sufficient Support for the Costs Requested.

Mischaracterizing the record and citing no authority whatsoever, McGill asserts that it was an abuse of discretion not to require Bearden to produce invoices "or other supporting documentation" in support of the cost bill. Appellant's Br., at 2. But Bearden did provide "supporting documentation" for every single cost requested: two sworn declarations of counsel, the person who actually incurred the costs and paid the bills. *See* CP 103-105, CP 90-92. The declarations itemize and describe each cost,

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[3] That Plaintiff did not request the cost of obtaining the Gaddis report from the arbitrator is neither here nor there. McGill's insinuation to the contrary does not merit discussion. Appellant's Br. at 8 fn. 4.

and where challenged, provide additional explanation, such as to clarify that the deposition fees requested did *not* include "'the time spent [by the witnesses] in the deposition.'" CP 91 (Reply Dec.) Such sworn testimony constitutes documentation. The trial court did not abuse its discretion by not requiring additional paper in support of these costs.

McGill then uses this argument to attempt an improper back-door challenge to the award of the Murphy *perpetuation deposition costs.* Appellant's Br., at 13. But as McGill well knows, he did not object to the perpetuation deposition costs before the trial court. *See* CP 100-101 (Def Objections to Proposed Judgment), at ¶4. Nor did McGill object to the lack of an invoice for the perpetuation deposition – because his counsel had a copy of the same invoice and knew that the requested charges were accurate. *Id.* On appeal McGill has *not* assigned error to the award of the perpetuation deposition costs, nor to the lack of an invoice for the Murphy perpetuation deposition. McGill's effort to challenge costs that he accepted at the trial court is improper. The trial court did not abuse its discretion in relying on the sworn declarations of counsel in awarding costs.

C. The Trial Court Abused Its Discretion When It Disallowed The Costs of Serving Nellie Knox McGill and of Obtaining The Medical Records.

The trial court denied Bearden the cost of serving the summons and complaint on Nellie Knox McGill. CP 88. But Bearden had good reason to serve her in the first instance – she was the registered owner of the car, was a passenger in the car, and shared a last name with the driver, whom Bearden could not locate. CP 103-104. While he dismissed her on the first day of trial, after learning that she was the mother of Dophus, it was reasonable for Bearden to have named her as a defendant and to have served her. The cost of serving her -- $195.00 -- should have been allowed.

The trial court also denied the cost of the medical records that Bearden obtained and submitted in the arbitration. CP 89. The arbitrator awarded this cost, CP 290, but of course Bearden did not collect it because of the *de novo* appeal. Under established case law, costs awarded at arbitration should be awarded to the successful party following a *de novo* appeal. *Stedman v. Cooper*, 172 Wn.App. at 23, 292 P.3d at 771. The trial court abused its discretion in failing to award Bearden the $276.51 cost of obtaining his medical records, which were admitted at the arbitration.

D. The Trial Court Correctly Awarded Attorneys' Fees and Costs Pursuant to MAR 7.3 and RCW 7.06.060

Because Defendant Failed to Improve His Position on Trial De Novo.

Under RCW 7.06.060 if the party appealing an arbitration award does not "improve his or her position on the trial de novo" the "superior court ***shall*** assess costs and reasonable attorneys' fees against [that] party." (Emphasis added.) *Accord* MAR 7.3. The simple mathematical truth is that McGill failed to "improve his position on the trial de novo." The ***final arbitration award*** was $45,187.00. The final judgment was $45,796.39. MAR 7.3 makes an award of attorneys' fees and costs mandatory under these circumstances.

McGill argues that the Court must deduct the allowed costs from the arbitration award and from the judgment before determining whether he "improved his position." His argument is contrary to the caselaw, most of which he fails to cite. His position is inconsistent with the 2011 revisions to the MAR rules clarifying that costs are properly included in the final arbitration award. And McGill's position would undermine the goals of the MAR system. The trial court did not err in concluding that McGill "did not improve his position; he worsened it slightly." CP 21 (Memorandum Decision at 2).

1. The Arbitration Award Should Be Compared to the Judgment.

In general, the appellate courts urge that where possible trial courts

should compare "comparables." *See, e.g., Haley v. Highland,* 142 Wn.2d 135, 153, 12 P.3d 119 (2000); *Miller v. Paul M. Wolff Co.,* 178 Wn.App. 957, 968, 316 P.3d 1113, 1119 (2014). Thus, where statutory fees or costs are placed "at issue" at arbitration ***and*** at trial, the trial court should include them in determining whether the appealing party improved its position. The appellate courts have consistently applied this proposition in a wide range of cases, including those cited by McGill.

Most recently, in *Miller v. Paul M. Wolff Co.,* 178 Wn.App. at 966-67 (not cited by McGill), the court of appeals held that the trial court was right to consider the total "aggregate" amounts awarded to plaintiff at arbitration and on trial de novo, even though the arbitration award did not include attorneys fees while the de novo award did, making the de novo award "substantially" higher than the arbitration award. *Id.* This is because the plaintiff was denied his fee application at arbitration, while the trial court awarded him fees "based on the exact argument" he had made to the arbitrator. 178 Wn.App. at 967. Thus, "'to truly compare comparables, the success of aggregate claims asserted should be considered in deciding if Mr. Miller "improve[d] . . . [his] position.' MAR 7.3; RCW 7.06.060(1)."

The *Miller* court cited *Haley v. Highland*, 142 Wn.2d 135, 12 P.3d 119 (2000), which held that it was improper *in that case* to compare an

arbitration award that "did not reflect an award of attorney fees" to a judgment that did (under the State Securities Act), in deciding whether the appealing party (plaintiff Haley) had "improved his position." 142 Wn.2d at 154-55. Unlike the plaintiff in *Miller,* plaintiff Haley could have but failed to ask the arbitrator for an attorneys' fees award. 142 Wn.2d at 155 n. 8. Thus, the arbitration award did not include fees and costs, but only damages. At trial, the jury awarded Haley the exact same amount in damages as the arbitrator had – but Haley then requested and was awarded attorneys' fees under the State Securities Act, making the de novo judgment higher than the arb award. The Supreme Court refused to include the Securities Act fees in comparing the arbitration award to the de novo judgment. Thus, in contrast to *Miller,* 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. In other words, as in *Miller,* if Haley had requested attorneys' fees from the arbitrator as he did following trial, then it would have been proper for the trial court to consider "damages plus fees" for purposes of determining whether Haley had improved his position.[4]

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[4] Indeed, the Supreme Court in *Haley* expressly refused to follow Division III in *Wilkerson v. United Inv., Inc.*, 62 Wn.App. 712, 815 P.2d 293 (1991), in holding that attorneys' fees should not be considered in comparing an arbitration award to a judgment. 142 Wn.2d at 154. And subsequent cases have held that fees and costs *should* be

McGill relies heavily on *Tran v. Yu,* 118 Wn.App. 607, 611-13, 75 P.3d 970, 971-72 (2003), but the decision is consistent with the caselaw cited above and supports Bearden's position here. In *Tran*, as in *Miller*, the *damages* award at arbitration was higher than the *damages* awarded at trial. However, in *Tran* the trial court also awarded plaintiff CR 37 penalties and costs, so the de novo judgment was higher than the arbitration award. However, as the court of appeals noted, "[n]either the statutory costs nor the CR 37 sanctions were before [the] arbitrator," 118 Wn.App. at 616, and so the trial court was correct in excluding the amount of the CR 37 sanctions and statutory costs when comparing the arbitration award to the de novo result.[5] Here, by contrast, plaintiff Bearden *did* request statutory fees and costs from the arbitrator and he *did* request statutory fees and costs following the de novo trial – and both the arbitration award and the judgment included those costs. Thus, applying the rationale of the cases above, the correct comparison is between the

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included in the comparison. *See Miller v. Paul M. Wolff Co.,* 178 Wn.App. at 966-67; *Do v. Farmers Ins. Co.*, 127 Wn.App. 180, 110 P.3d 840 (2005).

Wilkerson, on which McGill relies, *see* Br. at 15, is thus not good authority for McGill's argument here.

[5] The court's *dictum* that since trials are "almost always more expensive than arbitration...a party would invariably improve its position" at trial must be read in the context of that case, where the arbitration award did to consider such *not* include costs. In any case, including allowable costs in the comparison is wholly consistent with the purposes of MAR 7.3. Somewhat higher allowable costs at trial are part of the risk borne by a party choosing to appeal an MAR award. To refuse costs would be inconsistent with the purpose of MAR -- to resolve modest-damages cases ***without*** costly trials.

arbitration award and the judgment, not a subpart of those.

McGill is simply incorrect in his statement that "Washington courts have consistently ruled . . . in a manner which excludes costs from the equation and focuses on comparing compensatory damages." Appellant's Br. at 17. For example, in *Do v. Farmers Ins. Co.*, 127 Wn.App. 180, 110 P.3d 840 (2005), this Court held that the proper comparison was between the judgment amount, *which as here included costs under RCW 4.84.010*, and the arbitration award, for purposes of awarding MAR 7.3 fees to the non-appealing plaintiff. 127 Wn.App. at 184, 110 P.3d at 841. *Accord Miller v. Paul M. Wolff Co.,* 178 Wn.App. at 966-67. McGill fails to cite or explain either *Do* or *Miller.*

Finally, *Niccum v. Enquist*, 175 Wn.2d 441, 447, 286 P.3d 966, 969 (2012), though addressing the separate issue of whether costs should be deducted from an offer of compromise, also provides guidance here. The Court held that the amount of costs awarded on a de novo verdict should not be deducted from the Plaintiff's Offer of Compromise. *Id.* This is because the *statute* says that "a party is not entitled to costs in connection with an offer of compromise." *Id.* In other words, *if* the statute allowed a party to recover costs in connection with an offer of compromise, then costs *should* be included in the comparison. Here, under the reasoning of *Niccum,* since the MAR rules very clearly provide

for inclusion of costs as part of the arb award, *see infra,* the trial court did not err when it compared the arbitration award to the judgment, without subtracting out costs.[6]

2. The 2011 Amendments to the MAR Rules Support Inclusion of Costs in the Analysis Here.

The 2011 amendments to the Mandatory Arbitration rules bear directly on whether the arbitration costs should be included in analyzing whether the defendant improved his position. Rules 3.2, 6.4 and 7.1 were amended in 2011 to clarify that the arbitrator has the authority to award costs to the prevailing party, and to establish a clear timeline and process for doing so. *See* MAR 3.2, 6.4 and 7.1. As the comments to the revision to MAR 3.2(a) state:

> **Purpose:** The MARs do not specifically address the authority of the arbitrator to award costs and attorney fees. Several counties have rules stating that the arbitrator decides requests for costs and attorney fees, but there is inconsistent authority from county to county.
>
> The suggested amendment to MAR 3.2(a) would add consistency by clearly stating this authority in a state-wide rule. This amendment would not expand the substantive availability of fees, as arbitrators would be authorized to award costs and attorney fees only as "authorized by law." This authority would then be a foundation to the concurrent proposals to amend the procedures in MAR 6.4 and 7.1 relating to costs and attorney fees. . . . .

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[6] McGill also cites *Monnastes v. Greenwood,* 170 Wn.App. 242, 283 P.3 603 (2012), but the case involved the effect of an Offer of Compromise and is wholly inapposite to the issues presented here. The issue was subsequently resolved by *Niccum v. Enquist*, discussed above.

See Statement of Purpose to proposed amendments to MAR 3.2(a). 2011 02 WSR-31 (Jan. 19, 2011).

These amendments, by clarifying the procedures and authority for including costs *in the arbitration award*, further validate the trial court's conclusion that the proper comparison was between the ***judgment,*** not just the verdict, and the ***arbitration award,*** which included costs. *See* CP 20-23 (Memorandum Decision, Dec. 10, 2014).

3. To Exclude RCW 4.84.010 Costs From Consideration Would Undermine The Goals of the Mandatory Arbitration System.

The caselaw and the MAR rule amendments acknowledge what every litigant knows: the costs of bringing a case to arbitration or trial are part and parcel of the risk borne by the parties. Costs granted the prevailing party under RCW 4.84.010 are an integral part of the result – whether an arbitration award or a judgment. As the trial court stated here, "The question whether the defendant improved his position at trial can be ***fairly*** decided by comparing an award of damages and costs handed down by the arbitration and the judgment of damages and costs following the trial de novo." CP 21 (emphasis added).

The Mandatory Arbitration system, including the fee-shifting rules, exists to relieve court congestion and to provide a speedy and inexpensive method for resolving smaller-damages cases. As General Rule 16 states:

> Purpose. The purpose of mandatory arbitration of civil actions under RCW 7.06 as implemented by the Mandatory Arbitration Rules is to provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes involving claims of fifty thousand dollars ($50,000.00) or less.

Accord Christie-Lambert Van & Storage Co. v. McLeod, 39 Wn.App. 298, 302-03, 693 P.2d 1616 (1984) ("the restriction of 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 in certain cases in order for mandatory arbitration effectively to relieve court congestion"). The statutes and rules that allow the prevailing party to recover certain costs are a recognition that arbitrations and trials are expensive; it would undermine the purpose and objectives of the Mandatory Arbitration program to subtract costs from the arbitration award and the judgment in considering whether the appealing party improved its position.

In an argument that defies reality and logic, McGill contends that to allow costs would encourage "more manipulation of cost bills" and would create "uncertainty" for a party contemplating a de novo appeal of an arbitration award. Appellant's Br., at 20-21. If actuality, there is far more certainty regarding potential costs than there is a jury verdict. The costs allowed under RCW 4.84.010 are clearly delineated and narrow in scope. They do not include items such as experts' time – which is the only category of out-of-pocket costs that might be difficult to predict.

Otherwise, the scope of allowable costs is finite and quite *predictable* for a party considering a de novo appeal. If statutory costs can be manipulated, McGill has not explained how one would do that. Moreover, an attorney working on contingent fee has no incentive to run up litigation costs in the hopes that in doing so, she would "beat" an arbitration award. Jury verdicts are too uncertain to play such a game.

To subtract costs from the arbitration award and judgment would penalize Bearden, the prevailing party in both proceedings, and the non-appealing party from the arbitration award. As McGill acknowledges, the costs associated with trial are necessarily higher than those associated with arbitration. This is one reason the Mandatory Arbitration system exists for smaller cases like this one – to make it financially feasible for litigants with meritorious but smaller-damages claims to have their day in court. To subtract and ignore statutory costs from the analysis of whether McGill improved his position would be contrary to the goals of the Mandatory Arbitration system – as well as the caselaw and the Rules.

One final point bears mention. McGill's argument relies on a misunderstanding of the jury's verdict. He repeatedly states that the trial court should have considered only the initial arbitration award and the jury's verdict, since those results both included "economic and general damages." Appellant's Br. at 16, 19-20. This is incorrect. At trial,

Bearden elected not to ask the jury for economic damages but for general damages only. At arbitration, he requested both general damages and medical specials. The arbitrator awarded $8663.91 in medical specials ("economic damages") and $34,336.09 in general damages. Thus, even disregarding the costs, Bearden improved his position at trial. Since the jury awarded only general damages and no amount for medical bills Bearden did not have to satisfy any medical lien. The net amount of the jury verdict available to him was thus higher than the net amount of the arbitration damages award. Thus, the only element of damages at issue in both proceedings was *general damages* – and McGill's "position" with respect to general damages worsened at trial.

4. Respondent Should Be Awarded Fees on Appeal Pursuant to RAP 18.1

Respondent Jim Bearden requests that the Court award him attorneys' fees and costs incurred on appeal, pursuant to RAP 18.1. *See, e.g., 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).

V. CONCLUSION

For the above-stated reasons the trial court's Memorandum Decision of December 10, 2014, granting Bearden attorneys' fees should be affirmed.

DATED this 12 day of August, 2015.

Respectfully submitted,

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Counsel for Plaintiff-Respondent

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 12th day of August, 2015, to the following counsel of record at the following addresses:

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