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WASHINGTON STATE
SUPREME COURT

No. 94320-6

IN THE SUPREME COURT OF WASHINGTON

Court of Appeals NO. 72926-8-I

JAMES D. BEARDEN,

Petitioner (Plaintiff-Respondent),

v.

DOLPHUS A. MCGILL,

Respondent (Defendant-Appellant)

PETITION FOR REVIEW

Kathleen Garvin, WSBA #10588
Law Offices of Kathleen Garvin
Corrie J. Yackulic, WSBA #16063
Corrie Yackulic Law Firm, PLLC
Carla Tachau Lawrence, WSBA #14120
(Of Counsel)
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
(206) 340-0600; (206) 787-1915
Counsel for Petitioner Bearden

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I. SUMMARY & IDENTITY OF PETITIONER

Petitioner James Bearden (the injured plaintiff in this admitted-liability car accident case) successfully petitioned this Court in 2016 for review of the Court of Appeals' first decision in this case.[1] The Court granted review and remanded to the Court of Appeals for reconsideration in light of its decision in *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016).[2] On remand, the Court of Appeals again reversed the trial court's award of MAR 7.3 fees[3] to Mr. Bearden, but on a different basis than its first opinion. *Bearden v. McGill*, No. 72926-8 (slip op., February 21, 2017), Appendix A. The *Bearden* court complained, "[a]s is typical of many remand orders from the Washington and United States Supreme Courts, the order in this case provided no guidance about how Nelson bears on our earlier decision." Slip op., at 6.

Bearden asks this Court to accept review, this time to explicitly provide the requested guidance to the lower courts and resolve an issue of substantial public interest squarely presented by this case: For purposes of awarding MAR 7.3 fees, when determining if the appealing party failed to

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[1] *Bearden v. McGill*, 193 Wn. App. 235, 372 P.3d 138, *remanded for reconsideration*, 186 Wn.2d 1009 (2016).

[2] Bearden was the prevailing party at arbitration, and the nonappealing party in the Superior Court trial de novo. In this context, to appeal means to request trial de novo, as defendant McGill did.

[3] MAR 7.3 provides: "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." Because MAR 7.3 and RCW 7.06.060 (1) are substantively identical, they are collectively referred to as MAR 7.3. Both are attached as **Appendix B.**

improve its "position on the trial de novo," does the trial court compare the total amount of the arbitration award to the total trial de novo judgment, or is the court required to subtract RCW 4.84.010 costs from the arbitration award and the trial de novo judgment? RAP 13.4(b)(4), (b)(1)-(2). This is a frequently-arising question occurring in every mandatory arbitration that proceeds to trial de novo without an offer of compromise. This case involves a straightforward comparison of both positions, unlike many decisions analyzing MAR 7.3 awards, which consider offers of compromise, offers of judgment, new claims, cross-claims, or fault allocations.

Bearden recognizes that the rule it announces—turning on whether RCW 4.84.010 costs are included in or excluded from the appealing party's position at arbitration and at trial de novo—will either "further" or "frustrate" the purposes and legislative intent behind MAR 7.3—i.e., to ease court congestion and deter meritless or unwarranted appeals from arbitration.[4] Slip op., at 8. But by subtracting RCW 4.84.010 costs from the arbitration award and looking to the jury verdict (judgment minus RCW 4.84.010 costs) instead of the trial judgment, *Bearden* frustrates and does not further MAR 7.3's purposes. After a previous acceptance of

[4] *Niccum v. Enquist,* 175 Wn.2d 441, 452, 286 P.3d 966 (2012); *Williams v. Tilaye*, 174 Wn.2d 57, 63-64, 272 P.3d 235 (2012) (MAR 7.3's purpose is "to discourage unwarranted appeals from mandatory arbitration"); *Christie-Lambert Van & Storage Co. v. McLeod,* 39 Wn. App. 298, 302-03, 693 P.2d 1616 (1984).

review and remand and two erroneous Court of Appeals decisions, this case now cries out for this Court to accept review and resolve the question.

Bearden states, "[f]ollowing the Supreme Court's approach [in *Nelson*], we contrast the jury verdict with the initial arbitration award to determine whether McGill improved his position at trial." Slip op., at 2, 7.[5] But with all due respect, Bearden contends that requiring trial courts to subtract RCW 4.84.010 costs from both positions is not what this Court intended by remanding in light of *Nelson*, and the Court of Appeals misconstrued that decision. RCW 4.84.010 trial de novo costs are completely absent from the comparison of positions in *Nelson.*[6] Instead, *Nelson* carries forward from *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012), the requirement that courts interpret "whether a party improves on their position at trial" as would be "understood by ordinary people." *Nelson*, at 390-91.[7] In a case like this, not involving an offer of compromise (as *Nelson* and *Niccum* did), "an ordinary person would understand that the 'amount'" of the appealing party's (McGill's) position

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[5] "[W]e follow the Supreme Court's example and adopt the jury verdict as McGill's posttrial position." Slip op., at 7. However, *Nelson* did not actually use the "jury verdict." *See infra,* p. 8 n. 14.

[6] In *Nelson*, on appeal, plaintiff did not discuss the issue of RCW 4.84.010 costs incurred in the trial de novo. *See infra*, p. 10 *ff.* Similarly, in *Niccum*, RCW 4.84.010 costs incurred for trial were not at issue. *See infra*, p. 10 *ff.*

[7] The "ordinary person" approach was one of two conflicting principles involved in *Nelson* and *Niccum*; the other principle was "that parties generally cannot include costs in their settlement offers[.]" *Nelson*, at 388-89. In *Nelson*, the "ordinary person" principle prevailed. This case does not involve the "offer of compromise" principle.

"is the total sum of money"[8] the appealing party must pay to satisfy the trial judgment, compared to the amount the appealing party would have been required to pay to satisfy the total arbitration award.

While the *Bearden* court believed that "[n]ot considering the costs when deciding" the appealing party's position at arbitration "furthers MAR 7.3's policy," slip op., at 8, the actual effect of the court's ruling is to encourage unwarranted, meritless or close appeals. Including nominal, "very narrowly defined,"[9] and predictable RCW 4.84.010 costs in both positions provides a disincentive for such appeals, which cost tens of thousands of dollars to improve the appealing party's position by a few hundred dollars. *See infra*, n.32.

Consistent with MAR 7.3's purposes, the legislature intended that the appealing party weigh the risk of nominal RCW 4.84.010 costs being included in the comparison of total amounts awarded at arbitration and trial. *Bearden*, however, justifies subtracting costs from the position at arbitration by citing the fact that defendants bring 86 percent of appeals from arbitration, and then without authority or evidence concludes, "a

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[8] *Nelson*, at 390-91.

[9] *Colarusso v. Petersen*, 61 Wn. App. 767, 772, 812 P.2d 862 (1991) ("Costs have historically been very narrowly defined, and RCW 4.84.010 ... limits that recovery to a narrow range of expenses") (quoting *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987)); *Niccum*, at 445 n.2 (e.g., filing fees, process fees, notary fees, portions of depositions used at arbitration or trial, statutory attorney fees ($200), and witness fees).

larger pretrial side position makes it easier for the defendant to 'improve its position' at trial." Slip op., at 8.[10]

Bearden's analysis turns the legislative history and intent on its head. Bearden asks this Court to accept review to address this important recurring issue of substantial public interest, reverse the Court of Appeals' decision (revised on this Court's remand), and explicitly instruct lower courts and practitioners that RCW 4.84.010 costs are part of evaluating the risk of demanding a trial de novo.

II. COURT OF APPEALS DECISION

Bearden requests review of the Court of Appeals' published decision, *Bearden v. McGill*, No. 72926-8-I (Feb. 21, 2017), Appendix A.

III. ISSUE PRESENTED FOR REVIEW

Should this Court accept review to address "an issue of substantial public interest that should be determined by" this Court, and to resolve conflict with previous decisions: When considering a request for MAR 7.3 fees and costs, is the trial court required to subtract RCW 4.84.010 costs from the arbitration award and the trial de novo judgment, to decide if the appealing party failed to improve its "position" at trial? RAP 13.4 (b)(1), (2), (4).

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[10] Citing S.B. Rep. on SB 5373, at 2, 57th Leg., Reg. Sess. (Wash. 2002) ("Most appeals (86 percent) are filed by defendants"). Appendix C-8.

IV. STATEMENT OF THE CASE

This is a non-catastrophic injury, admitted-liability car crash case—exactly the type of case that the legislature intended the mandatory arbitration system to keep out of court and resolve speedily. At mandatory arbitration, the arbitrator awarded Bearden $44,000.00 in general plus special damages.[11] The arbitrator awarded $1,187.00 in RCW 4.84.010 costs, for a total arbitration award of **$45,187.00**. CP 290-91.

McGill elected to appeal in a trial de novo. CP 265-71. There was no offer of compromise. Slip op., at 2. The jury awarded Bearden $42,500.00 in general damages only, CP 109, since Bearden did not seek special/medical damages at trial.

As an example of additional costs incurred for trial, defendant McGill perpetuated the testimony of his CR 35 medical examiner, Dr. Lawrence Murphy, CP 259, 264, rather than present him as a live witness at trial, thereby causing Bearden to incur $1,013.55 in taxable deposition costs. CP 89. The court granted Bearden RCW 4.84.010 costs of $3,296.39, for a total trial judgment against McGill of **$45,796.39**. Slip op., at 2.

[11] CP 292-93 ($34,336.09-general damages; $8,663.91-special (medical) damages).

	Arbitration award (CP 290)	Trial Judgment (CP 86-89, 109, 261)	Difference
Special damages	$ 8,663.91	Not Requested	
General damages	$34,336.09	$42,500.00	+$8,164
Total damages	$44,000.00	$42,500.00	-$1,500
Costs	$ 1,187.00	$ 3,296.39	+$2,109.39
Total	**$45,187.00**	**$45,796.39**	**+ $609.39**

To determine whether McGill improved his position at trial under MAR 7.3, the trial court compared the final arbitration award (damages plus RCW 4.84.010 costs—$45,187.00) to the judgment amount (damages plus RCW 4.84.010 costs—$45,796.39). Since the judgment was **$609.39** greater than the arbitration award, the court awarded Bearden $71,800.00 in attorney fees. Slip op., at 2; CP 7-12. McGill appealed.

Reversing the MAR 7.3 award, the Court of Appeals excluded RCW 4.84.010 costs altogether from the MAR 7.3 analysis, comparing McGill's position before the arbitrator awarded costs ("postarbitration, pretrial 'position'")[12] to the trial judgment minus costs incurred for trial (the jury verdict). In so doing, the Court of Appeals stated it was "following the Supreme Court's approach" in *Nelson*:[13] "we follow the Supreme Court's example and adopt the jury verdict as McGill's post-trial position." Slip op., at 7.[14] The *Bearden* court also relied on *Niccum v.*

[12] Slip op., at 8.
[13] Slip op., at 2.
[14] *Nelson* did not actually use the "jury verdict" for the position at trial de novo, because "upon the plaintiff's **motion for additur, the judge added $3,000** for future noneconomic damages" to the jury verdict. *Nelson*, at 387 (emphasis added).

Enquist, 175 Wn.2d 441, 286 P.3d 966 (2012), stating *Nelson* "based its analysis almost entirely" on *Niccum*. Slip op., at 3. Both *Nelson* and *Niccum* involved offers of compromise, which take the place of the arbitration award when comparing positions for purposes of awarding MAR 7.3 fees.[15] *Nelson*, at 388; *Niccum*, at 452-53. Neither case addressed whether RCW 4.84.010 trial de novo costs, if any, should be part of the MAR 7.3 analysis (comparing positions).

Bearden rejected a rule comparing the total amount of the arbitration award to the total judgment amount, reasoning that: (1) Bearden identified no part of *Nelson* or *Niccum* supporting this view; (2) in *Nelson* and *Niccum* "the Supreme Court looked only to the jury verdict[;]" and (3) Bearden offered no persuasive reason to distinguish this case from those cases. Slip op., at 6. The court justified its approach by relying on *Niccum's* observation that a prevailing party is entitled to costs only "upon the judgment." Slip op., at 7-8 (citing *Niccum*, at 449-50, in turn citing RCW 4.84.010).

The *Bearden* court concluded that subtracting costs from the appealing party's position at arbitration furthers MAR 7.3's policy to encourage settlement and discourage meritless appeals, by making

[15] RCW 7.06.050(1)(b).

recovery of attorney fees under MAR 7.3 less difficult than it would be when costs are included in the first position:

> An interpretation of MAR 7.3 that includes costs in the pretrial position thus makes it easier for defendants to improve their position. This, in turn, may incentivize defendants to request trials de novo to the detriment of MAR 7.3's purpose.

Slip op., at 8-9. Comparing Bearden's arbitration award of $44,000 (general plus special damages) to the jury verdict of $42,500 (general damages only), subtracting RCW 4.84.010 costs awarded by the arbitrator and by the trial court, *Bearden* held McGill improved his position so that Bearden is not entitled to attorney fees. *Id.* at 9.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

By subtracting RCW 4.84.010 costs from the arbitration award, looking to the jury verdict instead of the trial judgment, and excluding RCW 4.84.010 costs altogether from the MAR 7.3 analysis, *Bearden* frustrates MAR 7.3's purposes to ease court congestion and deter meritless or unwarranted appeals from arbitration. The decision contradicts the Rule's legislative history, intent, principles of statutory construction, and prior caselaw.[16] Accepting review to settle this question will simply and promptly end any further confusion.

[16] The application of a court rule or statute is a legal question reviewed de novo. *Niccum*, at 446. The court is required "to discern and implement the legislature's intent." *Williams*, at 61. The court accomplishes this "primarily from the statutory language

A. *Nelson* and *Niccum* Require An Ordinary Person's Understanding To Be Applied To Both Positions Being Compared; An Ordinary Person Would Compare The Total Arbitration Award To The Total Trial Judgment.

In deciding to subtract costs from the nonappealing party's position at both arbitration and at trial de novo, the *Bearden* court stated, "Bearden does not identify any part of either the *Nelson* or *Niccum* decision that supports" looking "at the **final judgment** to decide McGill's posttrial position[,]" as opposed to the "jury verdict." Slip op., at 6 (emphasis added). In fact, neither *Nelson* nor *Niccum* addresses where to set the point of comparison; that issue was not presented in either case.

In *Niccum*, plaintiff made a "confusing"[17] offer of compromise referring to unknown "costs," to avoid defendant's appeal. Because costs were not awarded at arbitration, the offer's reference to unspecified costs was difficult for the parties to assess. *Niccum*, at 444; Nelson at 389. A bare majority of this Court (5-4) held those costs could not be included in the MAR 7.3 comparison of positions. Justice Chambers[18] vigorously

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itself." *Christie-Lambert*, at 302. 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 the legislative intent. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009).

[17] *Nelson v. Erickson*, 190 Wn. App. 1003, 2015 Wn. App. LEXIS 2194, at *24, *aff'd*, 186 Wn.2d 385, 377 P.3d 196 (2016).

[18] Joined by Justices Wiggins, Stephens, and C. Johnson.

dissented. *Niccum*, at 453-56 (Chambers, J. dissenting).[19] Niccum either did not request RCW 4.84.010 costs incurred for the trial de novo, or they were not awarded. *See id.* at 449, 456.

In contrast to *Niccum*, in *Nelson* (a 9-0 decision), plaintiff made an offer of compromise explicitly referring to known costs of $1,522, which the arbitrator had awarded (as this Court clearly authorized arbitrators to do in amending MAR 6.4 in 2011, *see infra*, p.16 & n.30).[20] This Court held in that particular case, costs must be included in the total amount of plaintiff's arbitration position because that is what an ordinary person would understand the total amount of the offer to be. *Nelson*, at 387-88, 392. Dealing only with offers of compromise, *Nelson* asks parties to be clear, not confusing, in their offers so ordinary persons can evaluate the risk of appealing and understand what amount they need to improve upon to avoid MAR 7.3 fees and costs. *Id.* at 391-92.

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[19] *Bearden* takes Justice Chambers' passing comments in his dissent far out of context, claiming the dissent **supported** subtracting RCW 4.84.010 costs from the arbitration award in a case without an offer of compromise. Slip op., at 8 ("even the *Niccum* dissent would not consider costs in the absence of an offer of compromise."). But the dissent in no way directed courts to subtract costs from the appealing party's position at arbitration; the comparison at issue here was not before the *Niccum* court. Rather, the dissent argued that it was proper for the trial court to count costs as part of the amount offered to settle the case and avoid trial de novo: Niccum's "offer included costs, and those could only have been the costs to which Niccum would have been entitled upon entry of judgment after arbitration. I would hold that the trial court in this case correctly took those costs into account in making its determination." *Niccum*, at 456. Because the controversy in *Niccum* began before this Court's 2011 amendments authorizing arbitrators to award costs, those amendments did not yet apply.

[20] *Nelson*, at 389-90 (quoting *Niccum*, at 452).

Bearden conflicts with this Court's decision in *Haley v. Highland*, 142 Wn.2d 135, 12 P.3d 119 (2000), which holds that a trial court certainly can count additional monetary elements beyond damages in determining whether the appealing party has failed to improve its position at trial de novo. In that case, deciding whether plaintiff Haley had improved his position at trial, the Court held it was improper to compare an arbitration award ($2,500 in damages) that "did **not** reflect an award of attorney fees" (because Haley did not request them at arbitration) to a judgment (the exact same amount in damages) that **did** include those fees under the State Securities Act. *Id.* at 154-55 & n.8 (emphasis added). The Court held Haley's failure to request fees from the arbitrator "precludes a finding that he has improved his position under MAR 7.3." *Id.* at 154. But had Haley requested attorney fees from the arbitrator, the Court would have counted that additional relief in comparing the position at arbitration (damages plus fees) to his position at trial (damages plus fees), and Haley would have improved his position.[21]

[21] The few reported cases comparing a party's position after arbitration to its position after trial **include** additional relief apart from damages, such as fees or interest, in the MAR 7.3 comparison. *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 967-69, 316 P.3d 1113 (2014) (RCW 49.48.030 attorney fees denied at arbitration, but awarded at trial; court compared arbitration award to trial "**judgment**" **including fees**); *Christie-Lambert*, 39 Wn. App. at 302-05 (comparing "**judgment**," **including increased interest** incurred after arbitration, to arbitration award; excluding new cross-claim at trial); *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 623-24, 806 P.2d 253 (1991) (comparing **judgment** including increased interest after arbitration to arbitration award without prejudgment interest); *Colarusso v. Petersen*, 61 Wn. App 767, 770, 812 P.2d 862 (1991) (comparing judgment,

Both the Court of Appeals and Supreme Court in *Nelson* and the Supreme Court in *Niccum* quoted *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 806 P.2d 253 (1991), the case first articulating the "ordinary person" principle in this context:

> We conclude that the rule was 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**[22] against them for more than the arbitrator awarded.[23]
>
> Cormar advances a sophisticated argument .... We are not persuaded by the argument, which **fails to refute the simple fact that Sauro emerged from superior court with a judgment for more money than the arbitrator awarded.**

Id. at 623-24 (emphasis added). In *Cormar*, that sum of "more money" included prejudgment interest, which the arbitrator had not awarded but the trial court included in the trial "judgment." *Id.* In short, an ordinary person looks at the bottom line. In this case, the bottom line includes costs awarded in both positions, at arbitration and trial. Like Sauro, Bearden "emerged from superior court with a judgment for more money [$609.39] than the arbitrator awarded." *Id.*

Thus, an ordinary person would "certainly answer" that McGill did not improve his position by taking the case to trial de novo, with all the

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including RCW 4.84.010 costs of $470.34 requested only from trial court, to arbitration award). *Bearden* appears to diverge from the correct analysis of all three divisions of the Court of Appeals: *Cormar* (Div. 2); *Miller* (Div. 3), and *Christie-Lambert* (Div. 1).

[22] Not jury verdict.

[23] Quoted in *Nelson*, 2015 Wn.App. LEXIS 2194, at *26-27.

attendant costs which he and his insurer could fully anticipate. McGill appealed from the total amount of the arbitration award, including RCW 4.84.010 costs. As McGill and his insurer understood well in evaluating the risk of MAR 7.3 fees should he fail to improve his position at trial, it is that total arbitration award—damages plus RCW 4.84.010 costs—which would have become the judgment under RCW 7.06.050(2) had McGill not requested trial de novo.[24] There is no valid or logical reason to subtract costs from the MAR 7.3 comparison, and the *Bearden* court gave none.[25]

Where there is no offer of compromise, the arbitration position can only be the total amount of the arbitration award with costs (as opposed to the substituted offer of compromise). The *Bearden* court cited no authority or evidence for using the arbitration award minus costs as the "total amount" an ordinary person would understand to be the basis of the appeal. *Bearden* completely contradicts an ordinary person's understanding.

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[24] *Bearden* rejects the approach of looking to the "amended" arbitration award, including RCW 4.84.010 costs, as the "position" to be improved upon in the trial de novo. But the amended award is the final, total amount granted by the arbitrator, including costs, if awarded: MAR 6.4(d) provides, "Within 14 days after the service of the request for costs ..., the arbitrator shall file an amended award granting the request ... or a denial of costs[.]"

[25] As Justice Chambers noted in *Niccum*, referring to cases more complex than this straightforward one, "[d]etermining whether or not a party requesting trial de novo has failed to improve that party's position is not always a simple task. There may be multiple parties and multiple claims, counterclaims, and cross claims. ... The court must consider all factors in determining whether a party has achieved a better result at the trial de novo." *Niccum*, at 453-54 (Chambers, J., dissenting).

B. Since Most Appeals Are By Defendants Seeking Lower Damages From Juries, The Legislature's Intent To Deter Appeals Can Only Be Furthered By Including Costs In Both Positions, While Subtracting Costs Will Frustrate That Intent.

As *Bearden* recognizes, the legislature established MAR 7.3's one-way fee-shifting mechanism for the purpose of deterring meritless or unwarranted appeals from mandatory arbitration, furthering the MAR system's goal of easing court congestion. *E.g., Niccum*, at 451-52. If there is no disincentive to appeal, the arbitration is "just another procedural step before trial[,]" and "mandatory arbitration would be nothing more than a dress rehearsal for the real 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). "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 *Do v. Farmers Ins. Co.*, 127 Wn. App. 180, 187, 110 P.3d 840 (2005); *see also Christie-Lambert*, at 302-03;[26] *Cormar*, at 623-24.

[26] The rule's purpose is similar to that of RCW 4.84.290, to "penalize parties who unjustifiably pursue or resist" claims; without the deterrent effect of fee-shifting, the defeated party would likely appeal "in nearly all instances" and arbitration "would tend to become a mere nullity and waste of time." *Id.* (quotation 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[.]" *Id.* "[D]enying 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. Another absurd consequence is that a party would be unfairly subjected to the expense of mandatory arbitration and a trial de novo without a change in results**." *Id.* at 305 (emphasis added). Christie-Lambert was awarded MAR 7.3 fees even though the difference between "arbitration award and **trial de novo judgment** against McLeod was de minimis." *Id.* (emphasis added).

Bearden effectively reduces the size of the "stick" (threat of MAR 7.3 fees as a deterrent) by ignoring the minimal increased RCW 4.84.010 costs the non-appealing party necessarily incurs for trial.[27]

Contrary to *Bearden*, the legislature and this Court intended that costs be included in both "positions." As stated in every bill report and analysis of SB 5373 (2002) (amending RCW 7.06.060), "[t]he 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."[28] The 2011 amendment to MAR 6.4 by this Court[29] clarified that the arbitrator has the authority to award costs to the prevailing party at arbitration,[30] including costs in the "amount awarded in arbitration." This signifies that the MAR 7.3 comparison is between the arbitration award including costs, and the trial judgment including costs.

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[27] For example, in this case, Bearden incurred approximately $2,109.39 in postarbitration RCW 4.84.010 costs.

[28] *E.g.*, Final S.B. Rep. on SB 5373, at 2, 57th Leg., Reg. Sess. (Wash. 2002), Appendix C.

[29] This Court is charged with enacting procedural rules to implement MAR proceedings. RCW 7.06.030.

[30] In amending the MARs, this Court stated: "The MARs do not specifically address the authority of the arbitrator to award costs and attorney fees. ... The suggested amendment to MAR 3.2(a) would add consistency by clearly stating this authority in a state-wide rule. ... Suggested MAR 6.4 then outlines a procedure to follow and a timeline for requests for costs and attorney fees." **Appendix D** (2011 MAR amendments). http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=240.

The benefits of prevailing at arbitration include RCW 4.84.010 costs awarded by the arbitrator; the legislature intended these costs to be counted in deciding whether to appeal, so that they function as a deterrent or "thumb on the scale" for the defeated party to consider. Including RCW 4.84.010 costs in both positions thus furthers the Rule's purpose. An interpretation that subtracts costs from both positions, as *Bearden* does, may incentivize defendants to request trial de novo because the additional minimal and predictable costs necessarily incurred by the non-appealing party for trial will no longer count against the appealing party.

Nowhere in the legislative history is there any evidence or suggestion that costs should be subtracted from the total positions at arbitration and at trial de novo; quite the opposite. Nor, as discussed, does any of the caselaw—including *Nelson* and *Niccum*—justify such a tortured interpretation.

C. *Bearden* Increases Rather Than Decreases The Incentive to Appeal, Making Trial De Novo More Likely.

Bearden speculated, with no citation to evidence, authority, or legislative history, that "a larger pretrial position" including RCW 4.84.010 costs awarded at arbitration "makes it easier for the defendant to 'improve its position' at trial." Slip op., at 8. But including costs in the appealing party's position at arbitration simply reflects the reality of the

arbitration award. If the defeated party does not appeal, that amount will be entered as the judgment.[31] Similarly, following a trial de novo, the verdict plus RCW 4.84.010 costs will be the amount the appealing party has to pay in the judgment. In cases like this one, where there is no offer to compromise (settle), a judgment will be entered— in the amount of either the arbitration award including costs, or the judgment on the trial de novo including costs. *But cf.* slip op., at 7-8 (quoting *Niccum*, at 449-50).

Bearden's effect of decreasing the risk of bringing an appeal will particularly be felt in the many cases where only a few hundred dollars determines whether the appealing party improved its position at trial.[32] Insurers (who have the resources to continue litigation) will have an incentive to appeal not only meritless causes but also close calls. The approach adopted in *Bearden*—subtracting costs from both positions—is likely to increase defendants' requests for trial de novo.

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[31] Defendants testified against SB 5373 in 2002 that they expect juries to award lower damages than arbitrators, and "[t]hat is why many of them are appealed. Defendants in arbitration know that juries will be more reasonable on an appeal[.]" H.B. Rep. on SB 5373, p. 3, 57th Leg., Reg. Sess. (Wash. 2002); *see also* S.B. Rep. on SB 5373, p. 3, 57th Leg., Reg. Sess. (Wash. 2002) ("This bill is implicit evidence that arbitration awards are generally too high. Juries typically award less than arbitrators.") (both in Appendix C). Testifying against the bill were State Farm Ins., Washington Defense Trial Lawyers Attorneys, Safeco Corp., National Association of Independent Insurers and Allstate Insurance, Farmers Ins. *Id.*

[32] Reported decisions on MAR 7.3 fees have often turned on relatively small differences in the positions before and after trial: **$355** (*Nelson*, at 387); **$113** (*Christie-Lambert*, at 300); **$339** (*Monnastes v. Greenwood*, 170 Wn.App. 242, 244-46, 283 P.3d 603 (2012); **$700** (*Niccum*, at 445); **$1,330** (*Tran v. Yu*, 118 Wn.App. 607, 610, 75 P.3d 970 (2003); and **$609.39** (*Bearden*).

Is it warranted or justified to incur $70,000 in fees for plaintiff's counsel, a similar sum for defense counsel, costs for the court's time, and unquantifiable expenses 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 $1,500? It is not. Yet this absurd result follows from *Bearden's* exclusion of RCW 4.84.010 costs from both positions.[33] The narrowly-defined, limited and predictable costs authorized by RCW 4.84.010 the non-appealing party necessarily incurs after an arbitration should be included in an MAR 7.3 analysis. The unwarranted expenditure of resources required by an MAR appeal is exactly what the MAR system is designed to prevent. The deterrent effect of including RCW 4.84.010 costs in the MAR 7.3 analysis clearly furthers the statute and Rule's purpose. This Court should accept review to fulfill the legislature's intent behind MAR 7.3's one-way fee-shifting provision.

VI. CONCLUSION

Bearden recognizes the purpose of MAR 7.3 to discourage unwarranted appeals and ease court congestion, but frustrates rather than furthers that goal, contradicts the legislature's intent, and conflicts with previous caselaw. Subtracting narrowly-defined and predictable costs in comparing both positions to determine whether an appealing party failed

[33] "[A] statutory provision should be interpreted to avoid strained or absurd consequences[.]" *Christie-Lambert*, 39 Wn. App. at 305.

to improve its position drastically reduces the risk of incurring MAR 7.3 fees and costs, and thus encourages unwarranted and close appeals from an arbitration—the very opposite of the legislature's intent. Review is necessary to address this recurring issue of substantial public interest, resolve the conflict with prior caselaw, and provide the guidance explicitly requested by the Court of Appeals in *Bearden*.

DATED this 23rd day of March, 2017.

Respectfully submitted,

LAW OFFICES OF KATHLEEN GARVIN
CORRIE YACKULIC LAW FIRM, PLLC

By: /s/ Kathleen Garvin
Kathleen Garvin, WSBA #10588
Corrie J. Yackulic, WSBA #16063
Carla Tachau Lawrence, WSBA #14120[34]
Counsel for Petitioner

[34] Of counsel.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I served by the means selected below, a copy of the foregoing Petition for Review this 23rd day of March, 2017, to the following counsel of record at the following addresses:

Merilee Erickson
Michael N. Budelsky
Reed McClure
1215 Fourth Ave., Suite 1700
Seattle, WA 98161-1087

[ ] U.S. Mail (First Class)
[X] Via Legal Messenger
[X] E-Mail
[ ] E-Filed

/s/ Patricia Seifert
Patricia Seifert
Paralegal to Corrie J. Yackulic

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES BEARDEN, Respondent, v. DOLPHUS MCGILL, Appellant, NELLIE KNOX MCGILL, Defendant.	)	No. 72926-8-I DIVISION ONE PUBLISHED OPINION FILED: February 21, 2017

LEACH, J. — MAR 7.3 and RCW 7.06.060(1) require that a party who appeals an arbitration award and fails to improve its position at a trial de novo pay the costs and reasonable attorney fees incurred by the opposing party after the request for the trial.[1] The purpose of these provisions is to "encourage settlement and discourage meritless appeals."[2]

Dolphus McGill appeals the trial court's award of $71,800 in attorney fees to James Bearden. McGill claims that he improved his position at a trial de novo he requested. In an earlier opinion,[3] we agreed. We stated that a trial court should include in its MAR 7.3 analysis those costs that both the arbitrator and trial court awarded but exclude costs that

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[1] MAR 7.3 requires a court to "assess costs and reasonable attorney fees against a party who appeals [an arbitration] award and fails to improve the party's position on the trial de novo." Because the rule and the statute, RCW 7.06.060(1), are substantively identical, we refer to them together as MAR 7.3.

[2] Nelson v. Erickson, 186 Wn.2d 385, 391, 377 P.3d 196 (2016)).

[3] Bearden v. McGill, 193 Wn. App. 235, 372 P.3d 138, remanded, 186 Wn.2d 1009 (2016).

arose only for trial. The Supreme Court granted review and remanded for us to reconsider our opinion in light of its intervening decision in Nelson v. Erickson.[4] Following the Supreme Court's approach, we contrast the jury verdict with the initial arbitration award to determine whether McGill improved his position at trial. Because that verdict was less than the arbitration award, we again conclude that McGill improved his position at trial. As in our earlier opinion, we reverse.

FACTS

Dolphus McGill caused injuries to James Bearden in a January 2011 automobile accident. Bearden sued, and the parties took part in mandatory arbitration. The arbitrator awarded Bearden $44,000 in compensatory damages. He then amended the award to include $1,187 in fees and costs for a total of $45,187.

McGill requested a trial de novo. The jury awarded Bearden $42,500.00 in damages. The trial court then awarded Bearden $3,296.39 in costs under RCW 4.84.010. The trial court awarded Bearden a $45,796.39 judgment against McGill.

Bearden then moved for attorney fees and costs under MAR 7.3, arguing that McGill failed to improve his position by appealing the arbitration award because with costs the trial court judgment against McGill, $45,796.39, was greater than the $45,187.00 amended arbitration award. McGill responded that costs should not factor into his "position" under MAR 7.3 and that he actually improved his position from owing $44,000.00 in damages after arbitration to owing $42,500.00 in damages after trial. The trial court agreed with Bearden and awarded him $71,800.00 in attorney fees.

[4] 186 Wn.2d 385, 377 P.3d 196 (2016).

McGill appealed, and this court reversed. The Supreme Court granted Bearden's petition for review and remanded to this court for reconsideration in light of its intervening opinion in Nelson.

STANDARD OF REVIEW

This court reviews de novo the application of a court rule and whether a statute authorizes an award of attorney fees.[5]

ANALYSIS

In our earlier opinion in this case, we held 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."[6] We said that this required the trial court to "compar[e] every element of monetary relief the arbitrator considered with the trial court's award for those same elements."[7] On remand, McGill contends that our analysis was correct. Bearden contends that the Nelson decision requires that we compare the total amended arbitration award and trial judgment, including costs, and thus conclude that McGill did not improve his position.

Although we revise our earlier analysis in light of Nelson, we again conclude that McGill improved his position at trial. The Nelson court based its analysis almost entirely on Niccum v. Enquist.[8] We therefore confine our analysis to these two decisions.

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[5] Niccum v. Enquist, 175 Wn.2d 441, 446, 286 P.3d 966 (2012).
[6] Bearden, 193 Wn. App. at 245.
[7] Bearden, 193 Wn. App. at 239.
[8] 175 Wn.2d 441, 286 P.3d 966 (2012).

Like this case, Niccum involved an automobile collision that went to arbitration.[9] After the arbitrator awarded the plaintiff $24,496.00 in compensatory damages, the defendant requested a trial de novo.[10] The plaintiff ultimately made an offer of compromise to accept "an award of $17,350.00 *including costs and statutory attorney fees.*"[11] The jury awarded the plaintiff $16,650.00 in compensatory damages.[12]

The plaintiff then requested an award of costs and attorney fees under MAR 7.3 because the defendant had not improved his position at trial. The plaintiff argued that the court should subtract the amount of costs, $1,016.28, included in his $17,350.00 settlement offer to decide if the defendant had improved his position. Because the result, $16,333.72, was less than the $16,650.00 verdict, the defendant had failed to improve his position.[13]

The Supreme Court rejected this argument, stating that "[a] straightforward application of the statutory language shows that [the defendant] improved his position on trial de novo."[14] The court observed that "a party is not entitled to costs in connection with an offer of compromise."[15] Thus, the court reasoned, it would be improper to subtract from the offer of compromise the costs the trial court eventually awarded when comparing the offer with the jury verdict.[16] The court also stated that "[t]he statute was 'meant to be understood by ordinary people'" and "an ordinary person would consider that the 'amount'

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[9] Niccum, 175 Wn.2d at 443-44.
[10] Niccum, 175 Wn.2d at 444.
[11] Niccum, 175 Wn.2d at 444.
[12] Niccum, 175 Wn.2d at 444.
[13] Niccum, 175 Wn.2d at 445.
[14] Niccum, 175 Wn.2d at 452.
[15] Niccum, 175 Wn.2d at 448.
[16] Niccum, 175 Wn.2d at 448.

of an offer of compromise is the total sum of money that a party offered to accept in exchange for settling the lawsuit."[17] For this reason, the court compared the $17,350 offer to the lesser jury verdict to decide that the defendant improved his position at trial.[18]

Nelson also involved an automobile collision that went to arbitration.[19] After the arbitrator awarded Nelson $44,923, including costs and attorney fees, the defendant requested a trial de novo.[20] To avoid trial, Nelson offered to settle for "'$26,000 plus taxable costs incurred at arbitration.'"[21] The parties knew the arbitration costs to be $1,522. At trial, a jury awarded Nelson $24,167 in compensatory damages.[22] The trial court added $3,000 for future noneconomic damages, bringing the total compensatory award for Nelson to $27,167—more than $26,000 but less than $26,000 plus the known arbitration costs.

Nelson then requested an award of costs and attorney fees under MAR 7.3, claiming that the defendant had not improved his position at trial. Nelson characterized his settlement offer as simply $26,000, which is less than the $27,167 damage award, entitling him to recover costs and attorney fees.

As in Niccum, the Supreme Court stated that a trial court should interpret a party's "position prior to trial . . . as an ordinary person would."[23] But the court noted that unlike in Niccum, this principle was in tension with the principle that "parties generally cannot

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[17] Niccum, 175 Wn.2d at 452 (quoting Cormar, Ltd. v. Sauro, 60 Wn. App. 622, 623, 806 P.2d 253 (1991)).
[18] Niccum, 175 Wn.2d at 452-53.
[19] Nelson, 186 Wn.2d at 387.
[20] Nelson, 186 Wn.2d at 387.
[21] Nelson, 186 Wn.2d at 387.
[22] Nelson, 186 Wn.2d at 387.
[23] Nelson, 186 Wn.2d at 387; see Cormar, 60 Wn. App. at 623.

include costs in their settlement offers."[24] It nonetheless concluded that "an ordinary person" would have understood Nelson's offer to include the $1,522 in known arbitration costs. Thus, the trial court properly included those costs in its MAR 7.3 test.[25] Because Erickson went from owing $27,522 to owing $27,167, the Supreme Court concluded, Erickson improved his position at trial.[26]

As is typical of many remand orders from the Washington and United States Supreme Courts, the order in this case provided no guidance about how Nelson bears on our earlier decision. But Nelson and Niccum apply the same rule: a court applying MAR 7.3 must view the pretrial and posttrial positions of the party requesting the trial de novo from the perspective of an ordinary person.[27] Also, in both Nelson and Niccum the court determined the requesting party's posttrial position by looking at only the jury verdict, not the final judgment including costs.[28]

Bearden contends that we should not look at the jury verdict but instead look at the final judgment to decide McGill's posttrial position. Bearden does not identify any part of either the Nelson or Niccum decision that supports this view. And Bearden does not offer any persuasive reason to distinguish this case from the two cases in which the Supreme Court looked only to the jury verdict. We note that the Supreme Court's approach promotes simplicity in analysis and avoids the problems of confusion, vagueness, and

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[24] Nelson, 186 Wn.2d at 388.
[25] Nelson, 186 Wn.2d at 391.
[26] Nelson, 186 Wn.2d at 392.
[27] Applying the ordinary person standard outside the settlement context is appropriate because the Supreme Court drew the concept from a decision that compared a posttrial award with an arbitration award, not a settlement offer. See Cormar, 60 Wn. App. at 623.
[28] See Niccum, 175 Wn.2d at 452; Nelson, 186 Wn.2d at 387-88, 392.

need for dissection that concerned the court.[29] Also, even the dissenters in Niccum would not consider costs in their analysis.[30] Thus, we follow the Supreme Court's example and adopt the jury verdict as McGill's posttrial position.

To decide the requesting party's pretrial position, Niccum and Nelson looked at offers of compromise. Bearden did not make an offer of compromise. But RCW 7.06.050(1)(b) states that "for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award."[31] To determine a requesting party's position pretrial when no offer of compromise has been made, a court looks at the arbitration award.

This statement does not provide a complete answer because some arbitration cases result in two awards: an initial award of damages followed by an amended award that includes costs.[32] Here, the arbitrator initially awarded Bearden $44,000 in damages, then amended the award to include $1,187 in costs. We must decide which award represents McGill's pretrial position.

While Niccum and Nelson do not provide a direct answer to this question, we conclude that like the posttrial "position" of the requesting party, that party's pretrial position is the initial arbitration award without costs. The Niccum court emphasized that a prevailing party is only entitled to costs "'upon the judgment.'" It reasoned that "when a party appeals the arbitrator's award, not only is there no judgment, there is also no

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[29] Nelson, 186 Wn.2d at 391-92.

[30] Niccum, 175 Wn.2d at 456 (Chambers, J., dissenting) ("I am not suggesting that costs should be considered if no offer of compromise were made or if an offer contained no reference to costs.").

[31] See Niccum, 175 Wn.2d at 446-47; Nelson, 186 Wn.2d at 388.

[32] See MAR 6.4.

'prevailing party' for purposes of RCW 4.84.010" and therefore no right to costs.[33] As we noted, even the Niccum dissent would not consider costs in the absence of an offer of compromise. After a trial de novo request, a successful party at arbitration is not entitled to costs despite an amended award's inclusion of costs. So the trial court should look to the initial arbitration award to determine the requesting party's position after arbitration.[34] This approach comports with the Supreme Court's direction to view MAR 7.3 from the perspective of an ordinary person.

Not considering the costs when deciding the requesting party's postarbitration, pretrial "position" also furthers MAR 7.3's policy. The legislature intended MAR 7.3 to "'encourage settlement and discourage meritless appeals.'"[35] An interpretation that makes recovery of attorney fees under MAR 7.3 more difficult frustrates the rule's purpose. Including the arbitrator's costs as part of a party's pretrial "position" would in most cases make recovery of attorney fees under MAR 7.3 more difficult. In passing the latest amendments to the mandatory arbitration statutes, RCW 7.06.050 and RCW 7.06.060, the legislature heard testimony that "[m]ost appeals (86 percent) are filed by defendants[,] and this means that injured parties are not being paid in a timely manner."[36] When a defendant requests trial, a larger pretrial side position makes it easier for the defendant to "improve its position" at trial. An interpretation of MAR 7.3 that includes costs in the pretrial position thus makes it easier for defendants to improve their position.

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[33] Niccum, 175 Wn.2d at 449-50 (quoting RCW 4.84.010).
[34] Accord dissent at 456.
[35] Nelson, 186 Wn.2d at 388 (quoting Niccum, 175 Wn.2d at 451).
[36] S.B. REP. ON H.B. 5373, 57th Leg., Reg. Sess. (Wash. 2002).

This, in turn, may incentivize defendants to request trials de novo to the detriment of MAR 7.3's purpose.

Here, McGill owed $44,000 in damages after arbitration and $42,500 in damages after trial. He improved his position. MAR 7.3 does not entitle Bearden to attorney fees. We note that including arbitration costs to determine McGill's pretrial position would not change the result in this case because both the initial award and the amended award are more than the jury verdict.

CONCLUSION

On reconsideration in light of Nelson, we revise our view of the MAR 7.3 analysis. We hold that a trial court should determine a requesting party's position after trial by looking at the damages the court awarded, exclusive of costs, as the Supreme Court did in Nelson and Niccum. Under this test, McGill improved his position at trial. We therefore reverse the trial court's award of attorney fees to Bearden under MAR 7.3 and remand.

Leach, J.

WE CONCUR:

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APPENDIX A-9

APPENDIX B

RCW 7.06.060

Costs and attorneys' fees.

(1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo. ...

(2) For the purposes of this section, "costs and reasonable attorneys' fees" means those provided for by statute or court rule, or both, as well as all expenses related to expert witness testimony, that the court finds were reasonably necessary after the request for trial de novo has been filed. ...

MAR 7.3

Costs And Attorney Fees

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. ...

APPENDIX B

FINAL BILL REPORT
SB 5373

C 339 L 02
Synopsis as Enacted

Brief Description: Changing mandatory arbitration of civil actions.

Sponsors: Senators Sheahan, Kline, McCaslin, Thibaudeau, Kastama, Long, Roach, Johnson and Constantine.

Senate Committee on Judiciary
House Committee on Judiciary

Background: Arbitration is a nonjudicial method for resolving disputes in which a neutral party is given authority to decide the case. A statute allows any superior court, by majority vote of its judges, to adopt mandatory arbitration in prescribed cases. In counties of 70,000 or more population, the county legislative authority may also impose this mandatory arbitration. This mandatory arbitration applies to cases in which the sole relief sought is a money judgment of $15,000 or less. By a two-thirds vote, the judges of the superior court may raise this limit to $35,000.

An award by an arbitrator may be appealed to the superior court. The superior court will hear the appeal "de novo;" that is, the court will conduct a trial on all issues of fact and law essentially as though the arbitration had not occurred.

The mandatory arbitration statute provides that Supreme Court rule will establish the procedures to be used in mandatory arbitration. The statute also provides that the Supreme Court rules may allow for the recovery of costs and "reasonable" attorney fees from a party who demands a trial de novo and fails to improve his or her position on appeal. 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.

Summary: An offer of compromise procedure is provided for mandatory arbitration cases that are appealed to the superior court.

- A non-appealing party may serve an appealing party with a written offer to settle the case.
- If the appealing party does not accept the offer, the amount of the offer becomes the basis for determining whether the party that demanded the trial de novo fails to improve his or her position on appeal for purposes of awarding reasonable attorney fees and costs under the court rules.
- The award of reasonable attorney fees and costs against an appealing party who fails to improve his or her position is made mandatory in statute. The superior court is also authorized to assess these same fees and costs against a party who voluntarily withdraws a request for a trial de novo, but only if the voluntary withdrawal is not made in connection with the acceptance of an offer of compromise.

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Votes on Final Passage:

Senate	37	11
House	65	28

Effective: June 13, 2002

APPENDIX C-2

HOUSE BILL REPORT
SB 5373

As Passed House:
March 7, 2002

Title: An act relating to mandatory arbitration of civil actions.

Brief Description: Changing mandatory arbitration of civil actions.

Sponsors: By Senators Sheahan, Kline, McCaslin, Thibaudeau, Kastama, Long, Roach, Johnson and Constantine.

Brief History:
Committee Activity:
Judiciary: 2/22/02, 2/25/02 [DP].
Floor Activity:
Passed House: 3/7/02, 65-28.

Brief Summary of Bill

- Provides an offer of compromise procedure that effects the award of reasonable attorney fees and costs when an arbitration award is appealed to superior court.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 5 members: Representatives Lantz, Chair; Hurst, Vice Chair; Dickerson, Lovick and Lysen.

Minority Report: Without recommendation. Signed by 4 members: Representatives Carrell, Ranking Minority Member; Boldt, Esser and Jarrett.

Staff: Bill Perry (786-7123).

Background:

Arbitration is a nonjudicial method for resolving disputes in which a neutral party is given authority to decide the case. Arbitration is intended to be a less expensive and time-consuming way of settling problems than taking a dispute to court. Parties are generally free to agree between themselves to submit an issue to arbitration. In some cases, however, arbitration is mandatory.

APPENDIX C-3

A statute allows any superior court, by majority vote of its judges, to adopt mandatory arbitration in prescribed cases. In counties of 70,000 or more population, the county legislative authority may also impose this mandatory arbitration. This mandatory arbitration applies to cases in which the sole relief sought is a money judgment of $15,000 or less. By a two-thirds vote, the judges of the superior court may raise this limit to $35,000.

An award by an arbitrator may be appealed to the superior court. The superior court will hear the appeal "de novo;" that is the court will conduct a trial on all issues of fact and law essentially as though the arbitration had not occurred.

The mandatory arbitration statute provides that supreme court rule will establish the procedures to be used in mandatory arbitration. The statute also provides that the supreme court rules may provide for the recovery of costs and "reasonable" attorney fees from a party who demands a trial de novo and fails to improve his or her position on appeal. The supreme court has adopted rules that require recovery of those costs and fees in such cases. 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. Only costs and fees incurred after the demand for a trial are recoverable under these provisions.

"Reasonable" attorney fees are set by the court based on factors designed to reflect the actual cost of legal representations. "Statutory" attorney fees are set by statute at $125 and are part of the "costs" which a prevailing party may be awarded in any case, not just a case involving mandatory arbitration. "Costs" also include items such as the filing fee and fees for service of process, notarization, and witness fees.

Summary of Bill:

An offer of compromise procedure is provided for mandatory arbitration cases that are appealed to the superior court. The award of reasonable attorney fees and costs against an appealing party who fails to improve his or her position is made mandatory in statute. The superior court is also authorized to assess these same fees and costs against a party who voluntarily withdraws a request for a trial de novo, but only if the voluntary withdrawal is not made in connection with the acceptance of an offer of compromise. The procedure regarding an offer of settlement includes the following:

- A non-appealing party may serve an appealing party with a written offer to settle the case.

- If the appealing party does not accept the offer, the amount of the offer becomes the basis for determining whether the appealing party fails to improve his or her position on appeal for purposes of awarding reasonable attorney fees and costs under the court

APPENDIX C-4

rules.

- At a trial de novo, the offer of compromise will not be made known to the trier of fact until after a judgment is reached in the trial.

- A party who prevails in arbitration and at a trial de novo may still recover statutory attorney fees and costs even if the party who appealed the arbitration award improved his or her position on appeal.

The act applies to all requests for a trial de novo filed on or after the effective date of the act.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: Mandatory arbitration can be a valuable tool in resolving cases, but under the current law, cases take too long to get to trial on appeal. Today, an injured claimant with a pending arbitration award may have outstanding bills that are just accumulating interest and may need medical treatment that they cannot pay for, all because there is insufficient incentive for the party appealing the award to come to a compromise on the award before going to trial. Too many arbitration awards are being appealed now. The bill will allow an offer of compromise procedure to spur agreement between the parties and thereby reduce the number of cases that otherwise would add to court congestion and delay. The bill provides a fair method of resolving relatively small disputes in a timely and efficient manner.

Testimony Against: The only problem with the current system is simply that the awards of arbitrators are too high. That is why many of them are appealed. Defendants in arbitration know that juries will be more reasonable on an appeal. The bill is unbalanced and would have a chilling effect on a defendant's right to a jury determination of the case. Parties can already offer settlements at any time under the current law. The bill allows claimants to recover statutory costs even when the defendant improves its position on appeal. The real need is for better training of arbitrators who all too often simply want to split the difference between the parties without considering the real merit or lack of merit in a claim. Defendants want to settle claims quickly as much as claimants do. The bill will result in higher insurance costs.

Testified: (In support) John Durkin, attorney; Denise Isbell; Shawn Briggs, Tacoma-Pierce County Bar Association; Larry Shannon, Washington State Trial Lawyers Association; and Dale Carlisle, Washington State Bar Association.

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(Opposed) George McLean, State Farm Insurance; Matt Williams, Washington Defense Trial Lawyers Attorneys and Safeco Corporation; Mel Sorensen, National Association of Independent Insurers and Allstate Insurance; and Mike Kapphahn, Farmers Insurance.

APPENDIX C-6

SENATE BILL REPORT
SB 5373

As Passed Senate, February 11, 2002

Title: An act relating to mandatory arbitration of civil actions.

Brief Description: Changing mandatory arbitration of civil actions.

Sponsors: Senators Sheahan, Kline, McCaslin, Thibaudeau, Kastama, Long, Roach, Johnson and Constantine.

Brief History:
Committee Activity: Judiciary: 2/1/01, 2/6/01 [DP].
Passed Senate: 3/13/01, 33-15; 2/11/02, 37-11.

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass.
Signed by Senators Kline, Chair; Constantine, Vice Chair; Costa, Johnson, Kastama, Long, McCaslin, Roach, Thibaudeau and Zarelli.

Staff: Dick Armstrong (786-7460)

Background: Arbitration is a nonjudicial method for resolving disputes in which a neutral party is given authority to decide the case. Arbitration is intended to be a less expensive and time-consuming way of settling problems than taking a dispute to court. Parties are generally free to agree between themselves to submit an issue to arbitration. In some cases, however, arbitration is mandatory.

A statute allows any superior court, by majority vote of its judges, to adopt mandatory arbitration in prescribed cases. In counties of 70,000 or more population, the county legislative authority may also impose this mandatory arbitration. This mandatory arbitration applies to cases in which the sole relief sought is a money judgment of $15,000 or less. By a two-thirds vote, the judges of the superior court may raise this limit to $35,000.

An award by an arbitrator may be appealed to the superior court. The superior court will hear the appeal "de novo;" that is, the court will conduct a trial on all issues of fact and law essentially as though the arbitration had not occurred.

The mandatory arbitration statute provides that Supreme Court rule will establish the procedures to be used in mandatory arbitration. The statute also provides that the Supreme Court rules may allow for the recovery of costs and "reasonable" attorney fees from a party who demands a trial de novo and fails to improve his or her position on appeal. 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.

APPENDIX C-7

"Reasonable" attorney fees are set by the court based on factors designed to reflect the actual cost of legal representations. "Statutory" attorney fees are set by statute at $125 and are part of the costs" which a prevailing party may be awarded. "Costs" also include items such as the filing fee and fees for service of process, notarization, and witness fees.

Summary of Bill: An offer of compromise procedure is provided for mandatory arbitration cases that are appealed to the superior court.

- A non-appealing party may serve an appealing party with a written offer to settle the case.

- If the appealing party does not accept the offer, the amount of the offer becomes the basis for determining whether the party that demanded the trial de novo fails to improve his or her position on appeal for purposes of awarding reasonable attorney fees and costs under the court rules.

- At a trial de novo, the offer of compromise will not be made known to the trier of fact until after a judgment is reached in the trial.

- The award of reasonable attorney fees and costs against an appealing party who fails to improve his or her position is made mandatory in statute. The superior court is also authorized to assess these same fees and costs against a party who voluntarily withdraws a request for a trial de novo, but only if the voluntary withdrawal is not made in connection with the acceptance of an offer of compromise.

- A part who prevails in arbitration and at a trial de novo may still recover statutory attorney fees and costs even if the party who appealed the arbitration award improved his or her position on appeal.

The act applies to all requests for a trial de novo filed on or after the effective date of the act.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill is fair and reasonable. Most appeals (86 percent) are filed by defendants and this means that injured parties are not being paid in a timely manner. The current system needs to be changed because litigants are opting out of the system. Mandatory arbitration is a good program because it is fast and it is an inexpensive way to handle cases. The current system rewards tactical delays. The process of an offer of compromise will help to improve the system. Some cases from 1996 are still pending in the court system. It should be remembered that jury trials in King County costs taxpayers $1,200 a day. There is a large number of cases waiting for trial, but the cases cannot be heard because of the huge backlog of civil cases. The usual attorney fee granted on appeal is around $11,000 and $12,000.

Testimony Against: The bill results in a detriment to some companies because it will make it harder for appealing parties to improve their position on appeal. An offer of compromise

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changes the benchmark for determining the obligation to pay the other party's attorney fees. Some arbitrators tend to split the difference between claims of the plaintiff and the defendant.

There are more plaintiffs' attorneys who sign up for the mandatory arbitration program. Insurance companies want to settle cases, and attorneys who represent such companies do a good job both at arbitration and in court.

This bill is implicit evidence that arbitration awards are generally too high. Juries typically award less than arbitrators.

Testified: PRO: Larry Shannon, WSTLA; Shawn Briggs, Tacoma Pierce County Bar Association; CON: Mel Sorensen, National Association of Independent Insurers; Jean Leonard, State Farm; George McLean, State Farm.

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MAR 3.2 - Authority of Arbitrator

- Proposed Changes to MAR 3.2 - Authority of Arbitrator (in Word Format)
- No comments were submitted.

GR 9 COVER SHEET
Suggested Amendment

SUPERIOR COURT MANDATORY ARBITRATION RULES (MAR)
Rule 3.2 – Authority of Arbitrators
(Establishing a uniform rule giving the arbitrator the authority to award costs and attorney fees as authorized by law)
Submitted by the Board of Governors of the Washington State Bar Association

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. For more information, please see the statements of purpose for the concurrent suggested amendments to MAR 6.3, 6.4, and 7.1. The amendment would also provide an "and" that was likely inadvertently omitted from the current list in MAR 3.2.

A new section (b) would: (1) restate the current rule that only the court may decide motions for involuntary dismissal, to change or add parties, and for summary judgment; and (2) clarify that, notwithstanding the express authority of the arbitrator to award costs and attorneys fees "as authorized by law," the court retains the authority to consider cost and attorney fee issues "if those issues cannot otherwise be decided by the arbitrator." The latter clarification is intended as a "catch-all" provision to ensure that the rule does not prevent the otherwise justified award of costs and attorney fees in some mandatory arbitration actions. For example, some appellate case law holds that it is improper for the trial court to make an attorney fee award pursuant to RCW 4.84.250-.280 when an MAR arbitrator had the authority under local rules to award attorney fees but was not asked to do so. *Trusley v. Statler*, 69 Wn. App. 462, 464-65, 849 P.2d 1234 (1993). However, attorney fee awards under RCW 4.84.250-.280 are determined through offer-of-settlement procedures, and the offer cannot be communicated to the trier of fact until after the judgment. See RCW 4.84.280; *Hanson v. Estell*, 100 Wn. App. 281, 290-91, 997 P.2d 426

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(2000). Because the trial court rather than the arbitrator enters judgment, some might conclude that, when the arbitrator has been authorized to decide the issue of costs and attorney fees, neither the arbitrator nor the court may make an award of costs and attorney fees pursuant to RCW 4.84.280 in a mandatory arbitration case. The proposed amended language is designed to avoid this and similar incongruous results.

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