

NO. 74149-7-I

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

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**MARIA HEDGER, a single woman,**

**Respondent,**

**vs.**

**LISA GROESCHELL and JOHN DOE GROESCHELL, wife and husband, and the  
marital community composed thereof,**

**Appellants.**

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**APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Beth M. Andrus, Judge  
Honorable Sean P. O'Donnell, Judge**

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**BRIEF OF APPELLANTS**

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## I. INTRODUCTION

Lisa Groeschell requested a trial de novo after mandatory arbitration. The arbitrator awarded damages of \$17,880.10 to Maria Hedger and statutory costs of \$931.76 for a total arbitration award of \$18,811.86. At trial, Maria Hedger was awarded damages of \$10,640.00 plus \$835.76 of statutory costs in the same category of those considered by the arbitrator for a total award of \$11,295.76. Yet, Ms. Hedger argued Ms. Groeschell failed to improve her position at the trial de novo because the total judgment, including costs, fees, and sanctions not considered by the arbitrator, totaled \$18,949.64. Rather than comparing the arbitration award plus the statutory costs awarded at arbitration to the jury award plus the same category of statutory costs, the superior court compared the arbitration award to the jury verdict plus all trial statutory costs, attorney fees, and sanctions. The superior court concluded Ms. Groeschell failed to improve her position at the trial de novo and awarded Ms. Hedger \$62,167.50 in fees and costs under RCW 7.06.060 and MAR 7.3.

Under the recently clarified rule in *Bearden v. McGill*, comparing every element of monetary relief the arbitrator considered with the trial court's award for those same elements, Ms. Groeschell improved her position at trial de novo. Also, comparing the jury's verdict to the arbitration award, Ms. Groeschell clearly improved her position at the trial

de novo, therefore, no MAR 7.3 fees and costs were warranted. This Court should reverse the \$62,167.50 judgment for MAR 7.3 fees and costs.

In addition, the superior court's awards of fees and sanctions based on Ms. Groeschell's deception doctrine defense was an abuse of discretion. Ms. Groeschell fairly and timely raised the deception doctrine defense and should not have been sanctioned. The total judgment is thousands of dollars less than the arbitration award when deducting \$3,125 in sanctions. Ms. Groeschell clearly improved her position at the trial de novo. This Court should reverse the award of fees, costs, and sanctions and the MAR 7.3 judgment.

## **II. ASSIGNMENTS OF ERROR**

1. The superior court erred in entering judgment on the verdict. (CP 456-57)
2. The superior court erred when it entered the Order Granting Motion for Award of Fees and Costs Pursuant to MAR 7.3 and RCW ch. 7.06. (CP 665-68)
3. The superior court erred when it entered the Order Denying Defendant's Motion for Reconsideration. (CP 629-30)
4. The superior court erred when it entered the Order Awarding Some Fees on Plaintiff's Motion for Sanctions. (CP 436-39)

5. The superior court erred when it entered the Judgment on Order. (CP 1235-37)

### **III. STATEMENT OF ISSUES**

1. Should this Court reverse the MAR 7.3 award and judgment for attorney fees and costs because comparing every element of monetary relief the arbitrator considered with the trial court's award for those same elements, Ms. Groeschell improved her position at the trial de novo?

2. Should this Court reverse the MAR 7.3 award and judgment for attorney fees and costs where Ms. Groeschell improved her position at the trial de novo because the jury awarded less than the arbitrator awarded?

3. Should this Court reverse the MAR 7.3 award and judgment for attorney fees and costs where Ms. Groeschell improved her position at the trial de novo because the jury found plaintiff 5 percent at fault and the arbitrator found plaintiff fault free?

4. Should this Court reverse the superior court's order of sanctions and award of fees related to the deception doctrine where there was no misrepresentation to the court and there was no procedural bad faith?

#### IV. STATEMENT OF CASE

Maria Hedger and Lisa Groeschell were involved in a motor vehicle accident at an intersection in Seattle. (CP 1-4)<sup>1</sup> Ms. Hedger proceeded through the intersection while Ms. Groeschell was turning left. (CP 6-7)

Ms. Hedger (“plaintiff”) sued Ms. Groeschell. (CP 1-4) Ms. Groeschell denied liability and asserted plaintiff’s negligence as an affirmative defense. (CP 3-10, affirmative defenses ¶¶ 2, 5, 8) The case was moved into mandatory arbitration. The arbitrator found that plaintiff did not contribute to the cause of the accident and initially awarded plaintiff \$17,880.10 (CP 503) but then amended the award to add \$931.76 in statutory costs. (CP 1189) The statutory costs/attorneys fees consisted of statutory attorney fees of \$200, reasonable expenses in obtaining reports and records of \$199.28, filing fees of \$462.98, and fees for service of process of \$69.50. (CP 1191) The total amended arbitration award was \$18,811.86. (CP 1189)

Ms. Groeschell sought a trial de novo. (CP 483) The case was tried before a jury from August 26 to September 2, 2015. (CP 78-94) The jury returned its verdict on September 3, 2015. (CP 94) The jury found

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<sup>1</sup> Nathaniel Pryor was a passenger in the Hedger vehicle. (CP 2)

plaintiff and Ms. Groeschell at fault. (CP 131-32, 507-08) The jury allocated 5 percent fault to plaintiff. (CP 94, 508) The jury awarded plaintiff damages of \$11,200 (\$6,200 economic damages and \$5,000 in general damages). (CP 507)

Judgment was entered on the jury verdict in the principal amount of \$10,640. (CP 456-57) The judgment also included statutory costs, attorney fees and costs, and sanctions. (CP 456) Of the statutory costs considered by both the arbitrator and the superior court, the superior court awarded \$835.76, which is \$96 less than the arbitrator's statutory cost award. (CP 1189; 10/2/15 RP 93:16-17; 103:15-18; 104:2-3; 109:20-110:2) The superior court awarded plaintiff statutory attorney fees of \$200, reasonable expenses in obtaining reports and records of \$124.77, filing fees of \$441.49, and fees for service of process of \$69.50. (10/2/15 RP 93:16-17; 103:15-18; 104:2-3; 109:23-24)

The superior court's total judgment added amounts for claims which were not considered by the arbitrator (CP 456): statutory costs for the trial testimony by video deposition of Dr. Watson (10/2/15 RP 104-105, 109:21-22); attorney's fees and costs (10/2/15 RP 88:17-90:20, 113:13-14), and sanctions. (10/2/15 RP 113:13-14) The fees for sanctions were based in part on a ruling related to the deception doctrine defense. (CP 436-39; 9/25/15 RP 78:20-79:6) The plaintiff took issue with the

deception doctrine after the trial began. (8/27/15 RP 57) The judgment totaled \$18,949.64. (CP 456) The judgment was satisfied. (CP 697-98)

**A. PLAINTIFF CHALLENGES GROESCHELL'S DECEPTION DOCTRINE DEFENSE.**

The superior court awarded attorney fees as sanctions for procedural bad faith for Ms. Groeschell's "last minute injection" of the deception doctrine in the case.<sup>2</sup> (CP 438-39) Ms. Groeschell asserted plaintiff's fault from the beginning of the case. (CP 7) In her Answer, Ms. Groeschell alleged that after she began making her left turn, plaintiff accelerated into the intersection. (CP 7, Answer ¶ 3.7) Pursuant to CR 8(c), Ms. Groeschell's answer asserted contributory negligence: plaintiff's alleged damages were the result of plaintiff's negligence and proximately caused or contributed to by the negligent acts of plaintiff. (CP 8-9, Affirmative Defenses ¶¶ 2, 5,)

The factual basis for plaintiff's negligence was further disclosed in discovery. In response to interrogatories, Ms. Groeschell described the facts of the accident. (CP 943) She was stopped at a green light waiting to turn left. After the light turned red, Ms. Groeschell turned left to clear

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<sup>2</sup> Deception doctrine applies "when 'the disfavored driver sees the favored vehicle and is deceived by the actions of that vehicle. . .'" *Oliver v. Harvey*, 31 Wn. App. 279, 283, 640 P.2d 1087, rev. denied, 97 Wn.2d 1020 (1982).

the intersection. At the same time, plaintiff entered the intersection. (CP 943)

Plaintiff testified at deposition that she noticed the traffic light was going to turn from green to yellow. (CP 1051) She decreased her speed but then accelerated after seeing Ms. Groeschell turning left. (CP 1054, 1056)

In her deposition, Ms. Groeschell testified that she turned left only after the light turned red (CP 343, 346-47), and that plaintiff entered the intersection after the light turned red. (CP 331-33)

In the pre-trial submissions, both plaintiff and Ms. Groeschell discussed the facts supporting plaintiff's fault. The Plaintiff even recited the facts supporting the deception doctrine in her trial brief.

Defendant contests liability owed to Plaintiff and asserts that Ms. Hedger is at fault and ran a red light. Defendant asserts that she was only trying to clear the intersection when she turned left in front of Ms. Hedger's vehicle.

(CP 1129, 1138) Plaintiff's trial brief was signed and dated August 17, 2015, nine days before trial. (CP 1138)

In her submission, Ms. Groeschell specifically used the phrase "deception doctrine" to describe the legal theory of plaintiff's fault. (CP 62, 1006) Ms. Groeschell's proposed jury instructions included the deception doctrine. (CP 33-74, 62) Her proposed instructions were

served and filed on August 17, 2015, the same date as plaintiff's trial brief. (CP 33, 71-74, 1138)

Finally, Ms. Groeschell discussed the deception doctrine in the liability argument section of her trial brief. (CP 1003-11) The trial brief was filed and served on the morning of August 27, 2015. (CP 1003; 8/27/15 RP 57)

The deception doctrine was also discussed in the report of defense expert, Bryan Jorgensen, which was provided to plaintiff on August 21, 2015, five days before trial. (CP 78, 189) This report was specifically discussed on the first day of trial, August 26, 2015, when plaintiff renewed a motion in liming regarding Mr. Jorgensen's report. (8/26/15 RP 21-22) She had no evidentiary objection to Mr. Jorgensen's testimony, but wanted to provide Mr. Jorgensen's report to the investigating officer, Officer Be shay, to address Mr. Jorgensen's opinions from an accident reconstructionist perspective. *Id.* at 22:6-7, 12-22. The court reserved ruling on this motion. *Id.* at 23:8-9, 25:11-12. At this time, the plaintiff did not raise an issue with the deception doctrine defense.

It was not until the second day of trial that plaintiff moved, for the first time, to strike Ms. Groeschell's deception doctrine defense. (8/27/15 RP 57) During trial, plaintiff argued that the deception doctrine was an affirmative defense which must be specifically pled. The plaintiff argued

that the defense was raised for the first time in Mr. Jorgenson's report. *Id.* The plaintiff could not provide the court with any legal authority to support this argument. (8/27/15 RP 61:13-20) Despite the court's request, plaintiff never provided the court with legal authority supporting the position that the deception doctrine is an affirmative defense that must be specifically pled.

Ms. Groeschell responded plaintiff had sufficient notice because plaintiff's fault was asserted in the Answer. (8/27/15 RP 58) Ms. Groeschell also noted she had spoken with plaintiff's prior counsel about the deception doctrine many times so plaintiff was clearly aware of the defense. (8/27/15 RP 59) Ms. Groeschell's counsel was not certain the deception doctrine was included in the arbitration briefing. *Id.* The following colloquy occurred:

THE COURT: And was [the deception doctrine] in writing somewhere in the arbitration materials? Did you put it in an arbitration brief or anything like that?

MS. SAINT GERMAIN: That I'm going to have to look into, Your Honor.

THE COURT: And then, and you specifically made the argument, the deception defense argument to the arbitrator?

MS. SAINT GERMAIN: Yes.

(8/27/15 RP 59:18-25) The court asked Ms. Groeschell's counsel to provide her with anything in writing that specifically disclosed the deception doctrine. *Id.* at 60:19-21

The court deferred ruling, stating that if there was something in writing about the defense, it "certainly would put to rest any assertion that this is the first time that this defense has arisen" and that it was an undue surprise to plaintiff. *Id.* at 60:15-25.

The court stated:

So I think what we need to do, then, is we need to make one of two choices here. The first choice is, Ms. Graham, if this is such a significant surprise to you such that you are not in a position to address this issue if I were to allow it to be argued, you can certainly make a motion to continue this trial. So that you can be prepared to address this defense.

On the other hand, we can proceed with jury selection this morning, with neither side making reference to the deception defense until the Court has given the defense attorneys an opportunity to determine if there's any written materials to establish that they did, in fact, disclose this defense . . . [t]o prior counsel. And then, you know, if you can't, then I'll just take, I'll deal with the issue then if there's nothing in writing. Make a ruling.

(8/27/15 RP 61:23-62:9, 11-13) The Plaintiff opted to proceed with jury selection. *Id.* at 62:10. During the remainder of the morning of August 27, 2015, jury selection was completed. (CP 82-83)

Immediately after the lunch break, Ms. Groeschell's counsel then addressed the deception doctrine. (8/27/15 RP 71-75) She explained that

the arbitration hearing was not transcribed but she looked through the available written arbitration materials. She did not find the deception doctrine mentioned “[s]o, of course, then the defendant will withdraw its defense about the deception doctrine.” (8/27/15 RP 75:15-25, 76:4-5)

Ms. Groeschell’s counsel further stated:

I would just like to add that earlier this morning, what I said on the record, I said believing 100 percent that we did, in fact, argue the deception doctrine. And that is, I will say that partially because I have been preparing that defense since prior to the transfer of this case from Mr. DeMers to Ms. Graham. So I in no way intended to mislead the Court on that issue.

(8/27/15 RP 76:6-12) Ms. Groeschell withdrew Mr. Jorgensen as an expert as well. *Id.* at 77.

Two weeks after trial, the plaintiff moved for sanctions for alleged misrepresentations made regarding the deception doctrine. (CP 187-249)<sup>3</sup> Plaintiff argued Ms. Groeschell first asserted the “affirmative defense” of the deception doctrine in the report of defense expert, Bryan Jorgensen. (CP 189, 246) The declaration of plaintiff’s counsel, Ms. Graham, in support of this motion stated:

[T]he Court stated that if Defense counsel had raised [deception doctrine] earlier, it needed to be in writing.

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<sup>3</sup> The superior court denied plaintiff’s request for relief under CR 37 related to Ms. Groeschell’s deposition. (CP 187)

Defense counsel stated that there was a written memorialization of the defense in her arbitration materials .

..

(CP 274) The report of proceedings shows that when the court asked Ms. Groeschell's counsel whether the deception doctrine was in the written arbitration materials, counsel answered: "That I'm going to have to look into, Your Honor." (8/27/15 RP 59:18-22) The report of proceedings also shows the court said if the deception doctrine was in the written arbitration materials, it would resolve plaintiff's argument of surprise. (8/27/15 RP 60:19-23)

Plaintiff argued CR 8(c) required Ms. Groeschell to specifically assert the deception doctrine as an affirmative defense in her initial answer to the complaint. (CP 192-93) She quoted one case—*Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975)—that CR 8(c) requires certain defenses to be affirmatively pled to avoid surprise. (CP 193) Plaintiff also argued Ms. Groeschell's counsel violated RPC 3.3(a) which states in pertinent part: a lawyer shall not knowingly make false statement to tribunal. (CP 194) Plaintiff asked for fees for the time addressing the deception defense and for sanctions of \$5,000. (CP 195)

Ms. Groeschell opposed the motion (CP 280-87) arguing that the deception doctrine is not an affirmative defense but rather, relates to an issue on which plaintiff bears the burden of proof. (CP 284-86) She

pointed out that CR 8(c) does not list the deception doctrine as a specific affirmative defense. (CP 284) Finally, Ms. Groeschell asserted RPC 3.3 was not a basis for imposing civil liability and furthermore, her counsel complied with RPC 3.3 because the comments and statements made to the court were made in good faith as explained on the record during trial. (CP 286-87)

Plaintiff's reply argued that the statements to the court were not in good faith because the deception doctrine was not referenced in the arbitration pre-hearing statement of proof. (CP 358-59)

On September 25, 2015, the court granted plaintiff's motion for sanctions in part. (CP 436-39) The court concluded there was no misrepresentation but it was unfair to raise the deception doctrine so late. (9/25/15 RP 79) The court's order states in part:

Plaintiff contends that [Ms. Groeschell's counsel] falsely told the Court that she had raised the deception defense in the case with opposing counsel and had argued the defense at arbitration. [Ms. Groeschell's counsel] has indicated that she did not knowingly make a false representation to the Court because she believed, in good faith, that she had memorialized the deception defense in the arbitration materials. The Court will accept this representation.

However, the Court also believes it was unfair to inject the deception defense into this case on the eve of trial, after the close of discovery, without first reviewing the case file to verify that notice of the defense had been provided to Plaintiff sufficient[ ] in advance of trial to prepare for it. As a result of the last minute injection of this issue into the

case, and the subsequent withdrawal of it during pretrial motions, Plaintiff's counsel had to divert her attention away from trial preparation to investigate this particular defense and prepare to address it at trial. Plaintiff incurred attorney fees to undertake this unexpected work. The procedural bad faith warrants an award of attorney fees and costs.

(CP 438-39) The court awarded attorneys fees of \$3,125 which was added to the judgment. (CP 439, 456)

Ms. Groeschell moved for reconsideration on the grounds that the record did not establish any procedural bad faith. (CP 458-62) Ms. Groeschell's motion for reconsideration was denied. (CP 629-30)

**B. PLAINTIFF'S MOTION FOR MAR 7.3 FEES AND COSTS.**

Plaintiff requested fees and costs under MAR 7.3 and RCW 7.06.060 arguing that Ms. Groeschell did not improve her position at the trial de novo. (CP 483-554) Plaintiff argued that if Ms. Groeschell paid the amount of the arbitration award and arbitration costs—\$18,811.86—Ms. Groeschell would pay less than the total superior court judgment amount of \$18,949.64. (CP 488) Based on these figures, plaintiff contended Ms. Groeschell did not improve her position on the trial de novo. *Id.* Plaintiff sought fees for 156 hours of attorney time and 38 hours of paralegal time, (CP 491), and litigation costs of \$7,682.64. (CP 492-94)

Ms. Groeschell opposed the MAR 7.3 motion because she improved her position at trial: the amount of the jury's verdict was less than the arbitration award and the jury found plaintiff 5 percent at fault,

whereas the arbitrator found plaintiff fault free. (CP 634-37) She further asserted that costs, sanctions and fees could not be considered in determining whether Ms. Groeschell improved her position at trial. (CP 637-40)<sup>4</sup>

The superior court granted plaintiff's MAR 7.3 fee motion. (CP 665-68) The court concluded it was bound to follow *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 316 P.3d 1113 (2014), explaining:

In Miller, the court of appeals held that it was appropriate to compare an arbitration award with a trial judgment that included an award of attorney fees and costs. Thus, this Court believes it must compare the total arbitration award of \$18,811.86 against the total monetary judgment entered after the trial de novo of \$18,949.64. The defendant failed to improve her position because she will be paying Plaintiff \$137.78 more than she would have paid had she paid the arbitration award. Thus, an award of attorney fees and costs is mandated.

(CP 666-67) The court awarded attorney fees of \$56,367.50 and MAR 7.3 costs of \$5,800. (CP 667) Judgment on the order granting MAR 7.3 fees and costs was entered on February 19, 2016. (CP 1235-37)

Ms. Groeschell timely appealed. (CP 672-95, 1238-64)

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<sup>4</sup> Ms. Groeschell also challenged the reasonableness of the fees and the lack of service of the motion. (CP 640-42)

## V. ARGUMENT

### A. STANDARD OF REVIEW.

This Court's review of the MAR 7.3 ruling is de novo. In awarding fees and costs, the superior court was applying a statute (RCW 7.06.060(1)) and a rule (MAR 7.3), therefore, this Court's review is de novo. *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (construction and meaning of statute is a question of law reviewed de novo); *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997) (construction and meaning of rule is a question of law review de novo).

The superior court erred in concluding that Ms. Groeschell failed to improve her position at the trial de novo because as this Court recently held and clarified in *Bearden v. McGill*, \_\_\_ Wn. App. \_\_\_ (April 11, 2016, No. 72926-8-1), comparing every element of monetary relief the arbitrator considered with the trial court's award for those same elements, Ms. Groeschell improved her position at trial de novo. The superior court also erred because the jury's determination of fault and award of damages was more favorable than the arbitrator's award so Ms. Groeschell improved her position at the trial de novo.

With regard to the court's sanctions ruling, the ruling is reviewed for abuse of discretion. *Washington State Physicians Ins. Exchange &*

*Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). A court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992).

The superior court's order was manifestly unreasonable and based on untenable grounds because plaintiff was not surprised by the deception doctrine since Ms. Groeschell had asserted the affirmative defense of contributory negligence which relied upon the same facts. Therefore, plaintiff knew the facts supporting the defense and, furthermore, had notice of the legal term describing the defense more than one week before trial. (CP 7, 9, 33, 62, 71-74, 78) Ms. Groeschell asserted contributory negligence in her answer, identified the factual basis for the affirmative defense, provided fair notice of the legal term for the affirmative defense, and honestly and accurately answered the court's questions. (*Id.* 8/27/15 RP 59:18-25, 76:6-12) When plaintiff claimed surprise on the second day of trial, she was given the option of a continuance which she declined. (8/27/15 RP 61-62) Any disruption to plaintiff's trial preparation was minimal. (8/27/15 RP 71, 75; CP 193, 246-49, 394) Therefore, there was no procedural bad faith regarding the deception doctrine and the court abused its discretion in awarding fees.

**B. THE SUPERIOR COURT ERRED IN AWARDING FEES AND COSTS UNDER MAR 7.3 BECAUSE MS. GROESCHELL IMPROVED HER POSITION ON THE TRIAL DE NOVO.**

Ms. Groeschell improved her position on the trial de novo because comparing every element of monetary relief the arbitrator considered with the trial court's award for those same elements, the trial court award was less. Here the arbitrator's award of damages totaled \$17,880.10. (CP 503) At trial, the jury awarded damages of \$11,200 reduced by plaintiff's 5-percent fault to a total damages award of \$10,640. (CP 131-32, 456-57) The arbitration award including damages and statutory costs/attorney fees totaled \$18,811.86. (CP 1189) At trial, the jury's award plus the statutory costs/attorney fees awarded by the court totaled \$11,475.76. (CP 456-67; 10/2/15 RP 93:16-17; 103:15-18; 104:2-3; 109:23-24). As in *Bearden*, Ms. Groeschell's "combined damages, costs, and fees were less after trial than after arbitration when comparing only those costs and fees litigated before both the arbitrator and trial court." *Bearden*, slip op. at 20.

This Court recently clarified the formula for determining whether a party has improved her position on trial de novo. *Bearden v. McGill*, \_\_\_ Wn. App. \_\_\_ (April 11, 2016, No. 72926-8-1). In *Bearden*, plaintiff Bearden sued defendant McGill for injuries from an accident. The dispute went to mandatory arbitration. Bearden was awarded \$44,000 in compensatory damages and \$1,187 in fees and costs for a total arbitration

award of \$45,187. McGill requested a trial de novo. At trial, the jury awarded Bearden \$42,500 in damages and the court awarded \$3,296.39 in costs, including costs that were incurred after the arbitration, for a total trial court judgment of \$45,796.39. Bearden asked for MAR 7.3 fees and costs arguing that the total judgment was greater than the arbitration award so McGill had not improved his position on trial de novo. The trial court agreed and awarded MAR 7.3 fees and costs to Bearden. This Court reversed stating:

We hold a court determines if a party improved its position at a trial de novo by comparing every element of monetary relief the arbitrator considered with the trial court's award for those same elements. Here, this means the damages and statutory costs that both the arbitrator and the trial court considered. It excludes those statutory costs requested only from the trial court.

*Bearden v. McGill*, slip op. at p. 2. The *Bearden* court explained:

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

Slip op. at p. 9 (footnotes omitted). In *Bearden*, the damages award at arbitration was more than the damages award at trial. Also the statutory costs considered and awarded by the arbitrator were more than the same

category of statutory costs awarded at trial. Thus, McGill improved his position by requesting a trial.

Similarly here the arbitrator's award of damages totaled \$17,880.10. (CP 503) At trial, the jury awarded damages of \$11,200 reduced by plaintiff's 5-percent fault to a total damages award of \$10,640. (CP 131-32, 456-57) The arbitration award, including damages and statutory costs/attorney fees, totaled \$18,811.86. (CP 1189) At trial, the jury's award plus the statutory costs/attorney fees awarded by the court totaled \$11,475.76. (CP 456-67; 10/2/15 RP 93:16-17; 103:15-18; 104:2-3; 109:23-24) As in *Bearden*, Ms. Groeschell's "combined damages, costs, and fees were less after trial than after arbitration when comparing only those costs and fees litigated before both the arbitrator and trial court." *Bearden*, slip op. at 20.

Here, the arbitrator awarded plaintiff past medical specials of \$5,544.66, medical expenses of \$335.44, general damages of \$12,000, and statutory costs/attorney's fees of \$931.76. (CP 1189) The statutory costs/attorneys fees consisted of statutory attorney fees of \$200, reasonable expenses in obtaining reports and records of \$199.28, filing fees of \$462.98, and fees for service of process of \$69.50. (CP 1191) Of those same categories, the superior court awarded plaintiff statutory attorney fees of \$200, reasonable expenses in obtaining reports and

records of \$124.77, filing fees of \$441.49, and fees for service process of \$69.50. (10/2/15 RP 93:16-17; 103:15-18; 104:2-3; 109:23-24) Of the costs considered by both the arbitrator and the superior court, the arbitrator awarded a total of \$931.76 (CP 1189) and the superior court awarded \$835.76, which is \$96 less. (10/2/15 RP 93:16-17; 103:15-18; 104:2-3; 109:23-24)

The superior court's statutory costs included items that were not part of the arbitration: deposition costs for Dr. Watson's deposition testimony which was used at trial. (10/2/15 RP 105:16-24; 109:16-22) The court awarded \$1,469 in court reporter costs and \$693.15 in videographer costs. (10/2/15 RP 105:22-106:3; 107:25-108:2; 109:16-22) Under the recent holding in *Bearden*, the costs associated with Dr. Watson's deposition trial testimony are not considered in determining whether Ms. Groeschell improved her position at the trial de novo. Also the sanctions and attorneys fees were not considered by the arbitrator and cannot be considered in determining whether MAR 7.3 applies. (CP 456) Under *Bearden*, Ms. Groeschell improved her position on trial de novo. Therefore, she is not liable for fees and costs under RCW 7.06.060. The superior court's judgment in the amount of \$62,167.50 should be reversed.

Ms. Groeschell also improved her position on the trial de novo because the jury awarded less than the arbitrator awarded. The jury's

damages award to plaintiff was \$10,640 (90 percent of the \$11,200 damages). (CP 456-57) The arbitrator's damages award was \$17,880.10. (CP 503) Under the plain language of RCW 7.06.060(1) and MAR 7.3, Ms. Groeschell did not "fail[] to improve [her]. . . position on the trial de novo." She actually improved her position. The arbitrator found Ms. Groeschell 100 percent at fault for the accident and awarded plaintiff \$5,880.10 in special damages, \$335.44 in mileage, and \$12,000 in general damages for a total award of \$17,880.10. (CP 503) The jury found plaintiff was 5 percent negligent and awarded her \$6,200 in special damages and \$5,000 in general damages for a gross award of \$11,200 and a net award of only \$10,640. (CP 131-32)

The purpose of the mandatory arbitration system is to reduce congestion and delays in the courts. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997). Justice Talmadge explained the purpose behind MAR 7.3 as follows:

[The possibility of MAR 7.3 fees] should compel parties to assess the arbitrator's award and the likely outcome of a trial de novo with frankness and prudence; meritless trials de novo must be deterred.

*Haley v. Highland*, 142 Wn.2d 135, 159, 12 P.3d 119 (2000) (Talmadge, J. concurring).

“A supplemental goal of the mandatory arbitration statute is to discourage meritless appeals.” *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001); *Perkins Coie v. Williams*, 84 Wn. App. 733, 737-38, 929 P.2d 1215, *rev. denied*, 132 Wn.2d 1013 (1997). Stated another way, a goal of mandatory arbitration is to permit meritorious appeals. “[A]n interpretation of MAR 7.3 that discourages meritorious appeals would also frustrate the purposes of the mandatory arbitration system.” *Bearden v. McGill*, \_\_\_ Wn. App. \_\_\_ (April 11, 2016, No. 72926-8-1), slip opinion at 14 (emphasis in original) (*citing Cooper v. Stedman*, 172 Wn. App. 9, 25, 292 P.3d 764 (2012)). The superior court’s interpretation of MAR 7.3 here undermines a party’s right to a meritorious trial de novo.

Here, Ms. Groeschell carefully considered a trial de novo believing that a jury would find the plaintiff some percentage at fault for the accident and award less than the arbitration award. Ms. Groeschell’s assessment of the outcome was correct. The jury found plaintiff 5 percent at fault and awarded total (gross) damages that were a fraction of the arbitrator’s award. Ms. Groeschell improved her position at the trial de novo.

Since the amount of costs are unknown, including costs in the determination as to whether a de novo trial is meritorious runs counter to the goal. Although an attorney is generally in a good position to assess the

merits of the case and the potential damages awarded by a jury, he or she is not able to fairly predict what costs opposing counsel may seek to recover after a trial de novo is requested. By injecting an unknown amount of potential costs, fees, and sanctions into the equation, a requesting party is unable to fairly and accurately determine whether the trial de novo has merit. Such uncertainty thwarts the statute's purpose of discouraging only meritless appeals. See *Niccum v. Enquist*, 175 Wn.2d 441, 452, 286 P.3d 966 (2012). The parties are unable to assess the arbitrator's award and the likely outcome at trial with the "frankness and prudence" contemplated by Justice Talmadge. *Haley*, 142 Wn.2d at 159 (Talmadge, J. concurring). This Court followed this rationale in *Bearden* and concluded the assessment is limited to comparing results of claims actually litigated at both arbitration and trial.

Here the superior court erred in its interpretation of *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 316 P.3d 1113 (2014). The superior court stated:

The Court has reviewed *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012), *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 316 P.3d 1113 (2014), and *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003). The Plaintiff's reading of these cases appears to be the more persuasive one. Even if the Court deems the Supreme Court's statement regarding the "compare the comparables" rule in *Niccum* as "dicta," the Court is obligated to follow the most recent court of appeals decision on the issue. In *Miller*, the court

of appeals held that it was appropriate to compare an arbitration award with a trial judgment that included an award of attorney fees and costs. Thus, the Court believes it must compare the total arbitration award of \$18,811.86 against the total monetary judgment entered after the trial de novo of \$18,949.64. The defendant failed to improve her position because she will be paying Plaintiff \$137.78 more than she would have paid had she paid the arbitration award. Thus, an award of attorney fees and costs is mandated.

(CP 666-67)

*Miller* does not support the superior court's order because *Miller* did compare comparables, i.e. those claims actually litigated at both arbitration and trial. 178 Wn. App. at 968. There, Miller worked as a commissioned sales representative for Paul M. Wolff Company ("PMW"). Miller resigned his position and started his own company. Miller sued PMW for unpaid commissions. Miller also sought attorney fees under RCW 49.48.030. RCW 49.48.030 mandates an award of attorney fees for a person who is successful in recovering a judgment for wages or salary owed as part of the potential recoverable damages in a salary action taken by the plaintiff.

Miller's case was submitted to mandatory arbitration. The arbitrator found for Miller and awarded commissions of \$22,802.84. The arbitrator concluded Miller's lawsuit was equitable in nature and not for

not apply and Miller was not entitled to attorney fees. 178 Wn. App. at 962.

Miller requested a trial de novo. At trial, he was awarded commissions of \$21,628.97, an amount less the commissions awarded by the arbitrator. At trial, Miller was also awarded attorney fees of \$74,662 pursuant to RCW 49.48.030. 178 Wn. App. at 962. PMW argued it was entitled to fees under MAR 7.3 because Miller failed to improve his position on the trial de novo. PMW argued Miller's commissions awarded at trial de novo were less than the commissions awarded at arbitration. PMW also argued that the RCW 49.48.030 attorney fees could not be considered in assessing whether Miller improved his position on the trial de novo.

The Court of Appeals concluded Miller improved his position on the trial de novo. The *Miller* court noted that in *Tran v. Yu*, the superior court did not include the statutory costs and sanctions in assessing whether the de novoing party improved on the trial de novo because the statutory costs and sanctions were not before the arbitrator. 178 Wn. App. at 967.

The *Miller* court explained:

If we were to compare solely the compensatory damages in this case, Mr. Miller did not improve his position on trial de novo. But, Mr. Miller was awarded attorney fees on trial de novo after the arbitrator denied attorney fees based on the exact argument that was successful at trial. The

situation may be different if attorney fees were not requested at arbitration. Indeed, to truly compare the comparables, the success of aggregate claims asserted should be considered in deciding if Mr. Miller “improve[d] . [his] position.”

178 Wn. App. at 967-68.

Here the superior court misconstrued the holding of *Miller*. As this Court ruled in *Bearden*, the *Miller* court’s application of the comparing comparable test requires comparing what relief a party requested and obtained at arbitration with the result of that same requested relief at the trial de novo. Miller asked for commissions and RCW 49.48.030 attorney fees at arbitration. He was awarded only commissions. Miller asked for commissions and RCW 49.48.030 attorney fees at the trial de novo. He was awarded commissions and the attorney fees.

The *Miller* court did not direct superior courts to compare the total arbitration award to the total monetary judgment in assessing whether a party has improved his or her position on the trial de novo. Instead, superior courts must compare the relief that was requested and awarded at arbitration with the result of the same relief requested and awarded at the trial de novo. At trial here plaintiff was awarded less damages and less statutory costs for the same elements of statutory costs requested at arbitration. At trial, plaintiff asked for additional elements of statutory costs, i.e. the deposition costs, which were not requested at arbitration.

Here plaintiff did not request any sanctions or attorney fees at the arbitration. Therefore, the superior court erred in concluding *Miller v. Paul M. Wolff* required the court to include items not before the arbitrator in assessing whether Ms. Groeschell improved her position on the trial de novo. And finally, as *Bearden* tells us, the elements which were considered only at trial are not factored into determining whether a party improves her position at trial de novo.

In addition, when the amount that was requested and awarded at arbitration and the amount that was requested and awarded by the jury are compared, Ms. Groeschell improved her position at the trial de novo. Plaintiff sought a finding of no liability and requested compensatory damages at arbitration. The arbitrator found no liability on the plaintiff and awarded \$17,880.10 in compensatory damages. (CP 503) At the trial de novo, plaintiff again sought a finding of no liability and requested compensatory damages. The jury concluded plaintiff was 5 percent at fault and awarded her only \$11,200 gross/\$10,640 net in compensatory damages. (CP 131-32, 456-57) MAR 7.3 is to be understood by the ordinary person. *Cormar Ltd. v. Sauro*, 60 Wn. App. 622, 623, 806 P.2d 253, *rev. denied*, 117 Wn.2d 1004 (1991). An ordinary person would understand that Ms. Groeschell who de novoed the \$17,880.10 arbitration award that found her 100 percent at fault and obtained a \$11,200 award

that found plaintiff 5 percent at fault at trial, improved her position. This Court should reverse the MAR 7.3 award of fees and costs.

**C. THE ORDER ON SANCTIONS RELATED TO “PROCEDURAL BAD FAITH” REGARDING THE DECEPTION DOCTRINE WAS AN ABUSE OF DISCRETION.**

The superior court’s order was manifestly unreasonable and based on untenable grounds because plaintiff was not surprised by the deception doctrine. Ms. Groeschell had asserted the affirmative defense of contributory negligence which relied upon the same facts.

The superior court’s order regarding the deception doctrine was premised on the unfounded bases that (a) Ms. Groeschell did not timely assert the affirmative defense of deception doctrine, (b) plaintiff had insufficient time in advance of trial to prepare for the defense, and (c) plaintiff had to divert attention away from trial preparation to prepare for the defense. This defense was timely asserted, and plaintiff was not surprised by the deception doctrine. Plaintiff knew the facts supporting the defense and had notice of the legal term describing the defense more than one week before trial. (CP 7, 9, 33, 62, 71-74, 78) Ms. Groeschell asserted contributory negligence in her answer, identified the factual basis for the affirmative defense, provided fair notice of the legal term for the affirmative defense, and honestly and accurately answered the court’s questions.

CR 8(c) lists what affirmative defenses must be specifically pled. Contributory negligence is one of the CR 8(c) affirmative defenses and Ms. Groeschell pled it. (CP 8-9) The deception doctrine is not listed as a specific affirmative defense under CR 8(c). Therefore, Ms. Groeschell was not required to specify the deception doctrine as an affirmative defense.

At the superior court, plaintiff cited *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975), in support of her argument that she was surprised by the deception doctrine defense. (CP 193) *Mahoney* states that the CR 8(c) requirement of specifically pleading certain defenses is to avoid surprise. Yet, the *Mahoney* court also noted that federal courts construing the similar federal rule have “determined that the affirmative defense requirement is not absolute.” *Id.* And there is a “need for . . . flexibility in procedural rules.” *Id.* The *Mahoney* court ultimately held the defendants were allowed to rely on an affirmative defense they had not specifically pled because it did not affect the plaintiff’s substantial rights. The plaintiff was fully aware of the basis of the defendants’ affirmative defense. The *Mahoney* court stated:

To conclude that defendants are precluded from relying upon that clause as a defense would be to impose a rigid and technical formality upon pleadings which is both unnecessary and contrary to the public policy underlying CR 8(c), and we refuse to reach such a result.

85 Wn.2d at 101.

Similarly here, plaintiff's insistence that Ms. Groeschell was required to assert the deception doctrine in her answer or at mandatory arbitration was a "rigid and technical formality upon pleadings which is both unnecessary and contrary to the policy underlying CR 8(c)." 85 Wn. 2d at 101. Asserting contributory fault should be construed as including the deception doctrine when facts supporting the doctrine are alleged. CR 8(f) (pleadings shall be construed to do substantial justice).

Although no Washington authority specifically states whether the deception doctrine is an affirmative defense, it should be construed as a component of contributory fault. Deception doctrine is the legal term for a theory of showing that plaintiff is at fault. Deception doctrine applies "when 'the disfavored driver sees the favored vehicle and is deceived by the actions of that vehicle. . .'" *Oliver v. Harvey*, 31 Wn. App. 279, 283, 640 P.2d 1087, *rev. denied*, 97 Wn.2d 1020 (1982). If the deception doctrine is established, the favored driver does not have the right of way. WPI 70.02.06.

The deception doctrine was a defense included within Ms. Groeschell's affirmative defense of plaintiff's fault. Plaintiff knew from the time of Ms. Groeschell's answer that Ms. Groeschell was claiming plaintiff was at fault. Plaintiff knew Ms. Groeschell contended that

plaintiff accelerated through the intersection while Ms. Groeschell was turning left. (CP 7, 33, 62) Not only did the Answer provide the factual and legal basis for the affirmative defense, discovery disclosed further facts supporting the deception doctrine: that Ms. Groeschell who was stopped waiting to turn left at an intersection controlled by a light believed that plaintiff was going to stop when the light turned red and allow her to turn. (CP 6-7, 1006-07, 1028-29)

Ms. Groeschell did not “inject the deception defense into th[e] case on the eve of trial.” (CP 438 ) The legal term “deception doctrine” was referenced in pre-trial written submissions (i.e. proposed jury instructions, Mr. Jorgensen’s report, and trial brief). (CP 62, 189, 1003-11) The court’s award of \$3,125 in fees was an abuse of discretion and should be reversed. (CP 439) This Court should reverse because the conduct here was not abusive litigation conduct.<sup>5</sup>

Procedural bad faith is ““vexatious conduct during the course of litigation.”” *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 928, 982 P.2d 131 (1999), *quoting*, Jane P. Mallor, *Punitive Attorneys’ Fees for Abuses of the Judicial System*, 61 N.C. L. REV. 613,

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<sup>5</sup> Reversal is also appropriate because the superior court did not make an express bad faith finding. *State v. S.H.*, 102 Wn.2d 468, 479, 8 P.3d 1058 (2000) (in absence of an express finding, appellate court will not assume a finding of bad faith). Unfairness (CP 438) is not the equivalent of bad faith.

644 (1983), *rev. denied*, 140 Wn.2d 1010 (2000). The purpose of sanctions for procedural bad faith is “to protect the efficient and orderly administration of the legal process.” Mallor, *Id.* Sanctions may be appropriate if the act affects “the integrity of the court and, [if] left unchecked, would encourage future abuses.” *State v. S.H.*, 102 Wn. App. at 475, *quoting Gonzales v. Surgidev Corp.*, 120 N.M. 151, 899 P.2d 594, 600 (1995). There was no harm to the integrity of the court here. There was no harm to the efficient and orderly administration of the legal process. Parties are routinely required to adjust their litigation strategies based on developments in the case, including the trial court’s pre-trial rulings on motions in limine and evidentiary rulings during trial. And here, plaintiff’s protestations of being distracted from trial preparation ring hollow. (CP 193) Such circumstances occur frequently in trial. This was not the type of “vexatious conduct” which undermines “the integrity of the court and, [if] left unchecked, would encourage future abuses.” *Rogerson Hiller Corp.*, 96 Wn. App. at 928; *State v. S.H.*, 102 Wn. App. at 475. There was no procedural bad faith by Ms. Groeschell.

As of August 17, 2015, when plaintiff was served with Ms. Groeschell’s proposed jury instructions (CP 33, 71-74), plaintiff was officially on notice that Ms. Groeschell’s affirmative defense of contributory negligence specifically included the deception doctrine. On

the same day (August 17, 2015, nine days before trial), plaintiff's trial brief recited the defense theory that plaintiff was at fault for running a red light. (CP 1129, 1138) Plaintiff knew of the defense and had at least nine days notice before trial of the specific phrase "deception doctrine."

Plaintiff was provided further pre-trial notice of the deception doctrine on August 21, 2015, when Mr. Jorgensen's report was served. (CP 189) In fact, on the first day of trial, plaintiff specifically addressed the report. Plaintiff had no evidentiary objection to it. (CR 78-81; 8/26/15 RP 22) Rather than address the legal issue on the first day of trial, or in her motions in limine, including the motion in limine regarding Mr. Jorgensen's report, plaintiff waited until the second day of trial to challenge the deception doctrine. (CP 78-81; 8/25/15 RP 22; 8/27/15 RP 57) Ten days after having notice of the legal phrase "deception doctrine," plaintiff finally claimed surprise.

If there was any unfairness here, it was to Ms. Groeschell. The timing of plaintiff's challenge, ten days after having official notice of the deception doctrine created a hardship for Ms. Groeschell. To respond to plaintiff's challenge, Ms. Groeschell's counsel had to spend her time during the lunch recess on the second day of trial reviewing and gathering information to address plaintiff's challenge. (8/27/15 RP 75-76) Ms.

Groeschell's counsel was required to divert her attention from working on trial matters during the trial because of plaintiff's last-minute objection.

This Court should reverse the \$3,125 in fees assessed against Ms. Groeschell. Once those fees are deducted from the judgment, the superior court judgment totals \$15,824.64—thousands of dollars less than the arbitration award and Ms. Groeschell certainly improved her position on the trial de novo and is not liable for MAR 7.3 fees and costs

## VI. CONCLUSION

Comparing comparables under the *Bearden* holding of the same elements considered and awarded at arbitration and trial or under a comparison of the liability and damages determination at arbitration and trial, Ms. Groeschell improved her position on the trial de novo. Therefore, the award of MAR 7.3 fees and costs was reversible error.

Alternatively, if the costs and fees awarded at the superior court are considered when assessing whether Ms. Groeschell improved her position on the trial de novo, this Court should still reverse because the superior court erred in awarding fees as a sanction. Ms. Groeschell did not interject the deception doctrine at the last minute. The deception doctrine was timely asserted and was not a surprise to plaintiff. Therefore, the \$3,125 in fees as sanctions was not justified.

This Court should modify the \$18,494.65 judgment to eliminate the \$3,125 in fees and sanctions. The reduced judgment would total \$15,369.65 which is less than the \$17,880.10 arbitration award and less than the \$18,811.86 amended arbitration award.

Ms. Groeschell improved her position on the trial de novo and is not liable for MAR 7.3 fees and costs. Ms. Groeschell respectfully requests this Court reverse and vacate the judgment for MAR 7.3 fees and costs.

DATED this 13<sup>th</sup> day of April, 2016.

**REED McCLURE**

By   
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