

NO. 74149-7-I

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

MARIA HEDGER, a single woman,

Respondent,

vs.

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

Appellants.

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

REPLY BRIEF OF APPELLANTS

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STATE OF WASHINGTON

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I. INTRODUCTION

Lisa Groeschell, appellant, offers this Reply to the Brief of Respondent. Ms. Groeschell asks this Court to reverse the \$62,167.50 in MAR 7.3 fees and costs because she improved her position at the trial de novo.

II. REPLY TO STATEMENT OF FACTS

Plaintiff/respondent Hedger criticizes Ms. Groeschell for omitting certain facts. (BOR at 2) Respondent's brief includes selected and misleading "facts."

Respondent asserts Ms. Groeschell was "sanctioned several times for procedural abuses that caused [Respondent's] legal fees to skyrocket." (BOR at 3) Respondent fails to disclose that she initiated every request for sanctions.

Respondent also fails to disclose that the sanctions and non-MAR 7.3 attorney fees have been paid in full. (CP 456-57, 697-98) The judgment on the jury verdict including all costs and awards other than the MAR 7.3 fees and costs has been paid. (CP 667, 697-98, 1235-37) Ms. Hedger has been paid \$18,949.64. (CP 456, 697-98)

Respondent depicts herself as blameless. Yet the record reveals that respondent is not without blemish. At least twice, respondent agreed with Ms. Groeschell's proposal and then respondent changed her mind:

CR 35 examination (CP 699-705, 733-34, 739) and mediation with Judit Gebhardt (7/15/15 RP 6-8)

Consistent with the case scheduling order and KCLCR 16, Ms. Groeschell made plans to meet the Alternative Dispute Resolution (“ADR”) requirement. (7/15/15 RP 6) Ms. Groeschell proposed mediating with Judit Gebhardt. *Id.* Respondent agreed (7/15/15 RP 6-7), but later changed her mind and would only agree to mediate with Ms. Gerhardt if Ms. Groeschell paid the entire mediation fee. (7/15/15 RP 7-8) If Ms. Groeschell would not pay the entire mediation fee, respondent intended to ask the court to be excused from the ADR requirement. (*Id.* at 7-8, 11)

In a telephone conference hearing with the judge about mediation, respondent violated MAR 7.2(b)(1) by disclosing that the amount of the arbitration award was less than \$20,000. (7/15/15 RP 8:7-15) MAR 7.2(b)(1) states:

The trial de novo shall be conducted as though no arbitration proceeding had occurred. No reference shall be made to the arbitration award, in any pleading, brief, or other written or oral statement to the trial court or jury either before or during the trial . . .

In her later motion for sanctions regarding mediation, respondent violated the RCW 7.07.030 mediation privilege. The motion referred to Ms. Groeschell’s offer at mediation (CP 21, ¶ 9), the mediator’s attempt to

see if Ms. Groeschell would offer policy limits (CP 21, ¶ 10), and Ms. Groeschell's alleged refusal to offer policy limits. (CP 21, ¶ 10)

Respondent's motion to compel Ms. Groeschell's deposition is another example of respondent's contentiousness. Respondent moved to compel the deposition and also moved to strike affirmative defenses and for monetary sanctions. (CP 902-03) The court denied relief except to order the deposition. *Id.* In its order, the court handwrote:

[N]either party has entirely clean hands here. . . The Court expects this deposition to occur without the acrimony counsel have engaged in to date.

(CP 903)

Respondent refers to a "late-filed expert report." (BOR at 5) Presumably she is referring to expert Jorgenson. Respondent moved to strike Mr. Jorgensen as a witness arguing Ms. Groeschell's witness disclosure about him was inadequate. (CP 904-12) The court denied the motion to strike and ordered that Mr. Jorgensen's report be provided by August 21, 2015. (CP 994-95) The report was provided on August 21, 2015, as ordered by the court, five days before trial. (CP 78, 189)

III. ARGUMENT

A. MS. GROESCHELL IMPROVED HER POSITION SO SHE OWES NO MAR 7.3 FEES AND COSTS.

Ms. Groeschell improved her position at the trial de novo. 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. (CP 1189, 1191) 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 \$11,475.76. (CP 456-57, 1189; 10/2/15 RP 93:16-17; 103:15-18; 104:2-3; 109:20-110:2)

Under the plain language of RCW 7.06.060 and MAR 7.3, Ms. Groeschell improved her position. The superior court erred in imposing attorney fees against Ms. Groeschell.

B. IMPOSING MAR 7.3 FEES AGAINST MS. GROESCHELL IS INCONSISTENT WITH THE LEGISLATIVE PURPOSE.

The purpose of the mandatory arbitration system is to reduce congestion and delays in the courts and deter meritless trials. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997); *Haley v. Highland*, 142 Wn.2d 135, 159, 12 P.3d 119 (2000) (Talmadge, J. concurring). A meritless trial is one in which the de novoing party fails to improve her position from the arbitration. RCW 7.06.060; MAR 7.3. When the de novoing party improves her position at trial, the MAR purposes are frustrated if the party is ordered to pay MAR 7.3 fees. *Bearden v. McGill*, 193 Wn. App. 235, 239, 372 P.3d 138 (2016).

Respondent argues that the Legislature crafted MAR “to discourage trials de novo in all but the most meritorious cases.” (BOR at

1) She argues “[t]o allow a party to game the system in the manner Groeschell suggests here contradicts the plain purpose and language of RCW 7.06.050¹.” (BOR at 2) She argues the Legislature imposed attorney fees on parties who fail to improve their position because trials are more expensive and if a party does not face the potential of having higher trial costs included in the analysis, “that party is encouraged to roll the dice on a new factfinder in the hope of obtaining even the most modest change in the damage award.” (BOR 7-8, 11) Respondent offers no legal authority for her argument, so this Court should disregard it. RAP 10.3(a)(6); *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). If this Court chooses to consider respondent’s argument, the argument supports Ms. Groeschell, not respondent.

Respondent refers to a trial de novo as a “gamble [that] would likely pay off in cases like [Respondent’s], where general damages are at issue. General damages are not mathematically certain; it is highly unlikely that a judge or jury would impose precisely the same amount of general damages as the arbitrator.” (BOR 11) Respondent’s explanation demonstrates that the risk of the trial de novo is borne by the de novoing

¹ RCW 7.06.050 provides the procedure for filing a trial de novo. It also contains the offer of compromise provision. It does not contain the “fails to improve . . . position” provision. The phrase is in RCW 7.06.060.

party. As respondent states, it is highly unlikely a judge or jury would impose precisely the same amount which means the party requesting de novo has no predictability. Because general damages are not predictable, the outcome at trial de novo is uncertain. Thus, a party who requests trial de novo of a general damages award is exposed to great risk merely to exercise her right to a jury trial. The de novoing party should not be penalized by imposing MAR 7.3 fees where, as here, she undertakes the risk of a trial de novo and improves her position.

Nevertheless, respondent persists and argues “The Legislature would surely have been clear if it intended to encourage trials de novo in such marginal cases. It could have allowed fee awards only upon *any* improvement in the damage award, rather than only allowing fees when parties improve their ‘position.’” (BOR 11) (emphasis in original). This is not a marginal case. Presumably respondent believes that from Groeschell’s perspective, a \$10,640.00 judgment for damages is not an improvement over an arbitration award of \$17,880.10 for damages. A 41 percent reduction in the damages award is certainly not marginal. And including the category of costs in the comparison ($\$17,880.10 + 931.76$) $\$18,811.86$ to $\$11,475.76$ ($\$10,640 + \835.76), a 39 percent reduction in the total is certainly not marginal.

Respondent offers no rationale for her contention that fees are only allowed in so called “marginal” cases. She suggests that if the Legislature wanted an award of MAR 7.3 fees to be based only on improving the damages award, the Legislature could have stated so. (BOR 11) RCW 7.06.060(1) states fees are assessed “against a party who appeals the award and fails to improve his or her position on the trial de novo.” The Legislature did not modify the word “improve.” The Legislature did not modify the word “position.”

Respondent may not like the statute. This Court cannot, however, ignore a fundamental principle of statutory construction: if the Legislature had wanted to set a minimal threshold or fixed standard of improving one’s position, the Legislature could have included the provision in the statute. *State v. Delgado*, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003); *State v. Stattum*, 173 Wn. App. 640, 655, 295 P.3d 788, *rev. denied*, 178 Wn.2d 1010 (2013).² The statute contains no such language.

If Respondent wants change, she should seek the change from the Legislature. A court has the duty to effectuate the Legislature’s intent in enacting a statute. The court must apply the language as the Legislature

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

wrote it, not amend the statute by judicial construction. *Salts v. Estes*, 133 Wn.2d 160, 170, 934 P.2d 275 (1997). “Courts do not amend statutes by judicial construction, nor rewrite statutes ‘to avoid difficulties in construing and applying them.’” *Millay v. Cam*, 135 Wn.2d 193, 203, 955 P.2d 791 (1998) (citation omitted). This Court cannot ignore a statute merely because a result might be impractical.

Respondent’s entire argument ignores the fundamental fact that she was the one who forced the case to trial. Had respondent accepted Ms. Groeschell’s settlement offer, respondent would have recovered more than she did at trial. Respondent rejected a \$12,500 settlement offer at mediation. (CP 498) The jury awarded \$11,200 in damages. (CP 131-32) And the jury’s award was reduced by 5 percent because of respondent’s comparative fault, so the ultimate award was \$10,640. (*Id.*, CP 456-57) Had respondent simply accepted the fair settlement amount, no trial would have been necessary.

Ms. Groeschell improved her position at the trial. Imposing MAR 7.3 fees on Ms. Groeschell is inconsistent with the plain language of MAR 7.3 and RCW 7.06.060. And imposing MAR 7.3 fees defeats the purpose of the rule and statute. This Court should reverse.

C. *BEARDEN V. MCGILL* APPLIED THE COMPARING COMPARABLES TEST AND DID NOT CREATE A NEW TEST TO DETERMINE WHETHER A PARTY IMPROVED HER POSITION ON TRIAL DE NOVO.

Respondent argues *Bearden* is inconsistent with *Christie-Lambert Van & Storage Co. v. McLead*, 39 Wn. App. 298, 693 P.3d 161 (1984); *Cormar, Ltd v. Sauro*, 60 Wn. App. 622, 806 P.2d 253, *rev. denied*, 117 Wn.2d 1004 (1991); and *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 316 P.3d 1113 (2014). (BOR 12-16) In fact, *Bearden* is consistent with these cases. And in *Bearden*, this Court explained how it followed this line of cases.

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

In *Christie*, this Court compared the claims actually litigated between the parties at both arbitration and trial. The *Christie* court

determined that a party had not improved his position on trial de novo and therefore RCW 7.06.060 and MAR 7.3 fees were owed. Nothing in *Christie* supports respondent's position.

Respondent also argues that *Bearden* is inconsistent with *Colarusso v. Petersen*, 61 Wn. App. 767, 812 P.2d 862, *rev. denied*, 117 Wn.2d 1024 (1991). Respondent describes *Colarusso* in a parenthetical "including RCW 4.84.010 costs of \$470.34 requested only from trial court." (BOR 12) In *Colarusso*, the arbitration award against the appellants was \$29,500. After the trial de novo, the award against the appellants was \$73,250 plus statutory costs of \$470.34. 61 Wn. App. at 770. MAR 7.3 fees were imposed. The appellants argued that their trial de novo had merit and the MAR 7.3 fee award infringed on their jury trial right and due process. 61 Wn. App. at 768. This Court disagreed. Statutory costs were mentioned but not included in the actual comparison of whether the de novoing party had improved their position. It was not necessary to consider statutory costs to conclude that a \$73,250 judgment was not an improvement from a \$29,500 arbitration award. *Bearden* is entirely consistent with *Colarusso*.

Respondent argues *Do v. Farmers Ins. Co.*, 127 Wn. App. 180, 110 P.3d 840 (2005) is "instructive on the role of trial costs in the MAR 7.3 analysis." (BOR 15-16) *Do* is neither instructive nor applicable here. *Do*

did not compare an arbitration award plus costs to a judgment plus costs. *Do* involved a judgment entered on a CR 68 offer after a RCW 7.06.050 compromise. There was no CR 68 offer here nor was there an offer of compromise.

Respondent argues a party does not improve his or her position when as a result of his or her actions, he or she is ordered to pay thousands of dollars of new costs and sanctions. (BOR 20) She argues Groeschell did not improve her position because her conduct increased costs and sanctions “tremendously.” (BOR at 20) Respondent cites no legal authority for her position. More surprisingly, she fails to acknowledge the authority which rejected this argument: *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003).

In *Tran*, this Court held sanctions are not included in determining whether a party has improved her position at the trial de novo. 118 Wn. App. at 612. In *Tran*, the Court noted that a trial is almost always more expensive than arbitration so including all costs and sanctions to determine whether a party has improved her position was inconsistent with the purpose of the rule. Accepting that position would mean that a party would invariably fail to improve one’s position.

Ms. Groeschell improved her position at the trial de novo. No MAR 7.3 fees are owed.

D. THE ATTORNEY FEE SANCTIONS WERE AN ABUSE OF DISCRETION BECAUSE THERE WAS NO PROCEDURAL BAD FAITH.

Respondent attempts to morph the “procedural bad faith” sanctions into a discovery sanction. In her order granting sanctions, Judge Andrus specifically concluded CR 37 did not apply. (CP 187, 437, second page of order) Therefore, any legal authority based on CR 37 or a discovery sanction is not applicable here.

Respondent argues there is a hierarchy of sanctions. She cites *Rivers v. Washington State Conference of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002); *Burnet v. Spokane Ambulance* 131 Wn.2d 484, 494, 933 P.2d 1036, *as amended on denial of reconsideration* (1997). These cases do support the concept of a hierarchy of sanctions, yet, not in the context of sanctions for “procedural bad faith.” None of these cases arises from sanctions for “procedural bad faith.” The hierarchy of sanctions approach has not been adopted for “procedural bad faith.”

Procedural bad faith is “vexatious conduct during the course of litigation” which warrants sanctions “to protect the efficient and orderly administration of the legal process” (*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, 644 (1983), *rev. denied*, 140 Wn.2d 1010 (2000)) if the

bad faith affects “the integrity of the court and, [if] left unchecked, would encourage future abuses.” *State v. S.H.*, 102 Wn. App. 468, 475, 8 P.3d 1058 (2000), quoting *Gonzales v. Surgidev Corp.*, 120 N.M. 151, 899 P.2d 594, 600 (1995). Here there was neither vexatious conduct nor harm to the court’s integrity. Ms. Groeschell’s counsel honestly, yet mistakenly, believed that the deception doctrine was raised at the arbitration. When Ms. Groeschell could not locate any written arbitration materials that referenced the deception doctrine, she withdrew the defense. (8/27/15 RP 75:15-25, 76:4-12)

Ms. Groeschell’s withdrawal of the deception defense was not a concession of “impropriety.” (BOR at 21) Nor was the voluntary withdrawal a concession that sanctions were reasonable and tenable. *Id.* Respondent cites *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999), for the proposition that Groeschell’s withdrawal of the deception doctrine defense was an admission that the trial court’s sanction was not manifestly unreasonable or untenable. *Wilson* does not stand for this proposition.

In *Wilson*, Horsley assaulted and injured Wilson. Wilson sued. Horsley, acting pro se, answered “In answer to the plaintiffs summons I am not really sure what she is talking about. The only instance I can think of is when on one of her drunks she smacked me in the back of the head

and hurt her finger, but what ever she is trying this time I deny any wrong doing.” 137 Wn.2d at 502.

The case went to mandatory arbitration. Wilson obtained an award. Horsley requested a trial de novo. In the superior court, Horsley moved to amend his answer to assert a counterclaim against Wilson and to raise several affirmative defenses. The motion was denied. The superior court noted it was “grossly unfair” and prejudicial to Wilson to raise new defenses on the eve of trial. The trial was continued and Horsley renewed his motion to amend. The superior court denied the motion again on the grounds of prejudice and also noting that Horsley’s counterclaim was compulsory.

Wilson, who had filed a jury demand, withdrew her demand and Horsley agreed. A bench trial proceeded but a mistrial was declared because the trial judge inadvertently saw the arbitration award. Before the retrial, Horsley asked for a jury trial. Another bench trial occurred and Wilson obtained a judgment. Horsley appealed, challenging the denial of the motion to amend and the denial of his jury demand.

The Supreme Court affirmed the trial court’s denial of the motion to amend. The Supreme Court agreed it would prejudice Wilson. One element of prejudice was that by allowing them to be raised at trial, Wilson would have been deprived of the opportunity to have the issue

resolved at arbitration. The Supreme Court reversed on the jury trial issue. *Wilson* did not involve sanctions. Nor did *Wilson* involve waiver or concession. Respondent has no legal authority to support her argument that Ms. Groeschell's withdrawal of the deception doctrine was anything more than a voluntary act to resolve a contentious issue and streamline the trial.

Voluntary withdrawal of the deception defense was more than was required because the deception doctrine is not a mandatory CR 8(c) affirmative defense. At the superior court, respondent had no legal authority for her position. (8/27/15 RP 61:13-20) In her brief, respondent still cites no legal authority to support her position that the deception doctrine is an affirmative defense that must be specifically pleaded.

And withdrawal of the defense was more than required because it was not a surprise to respondent. The phrase "deception doctrine" was in Groeschell's proposed jury instructions which were served on Respondent on August 17, 2015. (CP 33-74, 62) The doctrine was also discussed in Ms. Groeschell's trial brief. (CP 1003-11) Four days later, on August 21, 2015, the deception doctrine was referenced in Brian Jorgensen's report. (CP 78, 189) The doctrine was not a surprise.

Respondent chose when to raise the issue. And the attention she chose to give to the issue was no more a distraction or disruption than

routine adjustments during trial. There was no procedural bad faith. The superior court's sanction was an abuse of discretion and should be reversed.

IV. CONCLUSION

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 10th day of August, 2016.

REED McCLURE

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