

No. 94320-6

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JAMES D. BEARDEN,

Plaintiff/Petitioner,

vs.

DOLPHUS A. McGILL,

Defendant/Respondent.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper interpretation and application of MAR 7.3 and RCW 7.60.060(1).

## II. INTRODUCTION AND STATEMENT OF THE CASE

The facts are drawn from the Court of Appeals opinions and from the briefs of the parties. *See Bearden v. McGill*, 197 Wn. App. 852, 391 P.3d 577, *review granted*, 188 Wn.2d 1015 (2017); *Bearden v. McGill*, 193 Wn. App. 235, 372 P.3d 138, *review granted and remanded for reconsideration*, 186 Wn.2d 1009 (2016); *Bearden Supp. Br. at 2-4* (2017); *McGill Supp. Br. at 2-6* (2017).

Bearden sued McGill seeking an award of damages for injuries from an automobile accident. In mandatory arbitration, the arbitrator awarded Bearden \$34,336.09 in general damages and \$8,663.91 in special damages, for a “total award” of \$44,000.<sup>1</sup> Subsequently, the arbitrator entered an amended arbitration award, awarding Bearden the damages award of

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<sup>1</sup> \$34,336.09 + \$8,663.91 = \$43,000. The Court of Appeals refers to an arbitration award of \$44,000. *See Bearden v. McGill*, 197 Wn. App. 852, 855; 193 Wn. App. 235, 240. This discrepancy does not affect the respective parties' arguments, *i.e.*, even if the total arbitration award was \$43,000 rather than \$44,000, the parties' arguments and the issue would be the same.

\$44,000, combined with \$1,187 in statutory costs, for an amended arbitration award, inclusive of costs, of \$45,187.

McGill requested a trial de novo. The jury awarded Bearden \$42,500 for general damages; Bearden did not seek an award for special damages at trial. The trial court awarded Bearden \$3,296.39 in statutory costs, for a total judgment against McGill of \$45,796.39. 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 amended arbitration award. The trial court agreed, and awarded Bearden \$71,800 in attorney fees pursuant to MAR 7.3.

McGill appealed. In *Bearden v. McGill*, 193 Wn. App. 235, 372 P.3d 138 (2016) (*Bearden I*), the court held that to determine whether a party improved its position in 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. 193 Wn. App. at 239. The Court of Appeals parsed through each particular cost awarded following arbitration and trial de novo, included only the particular costs presented at both arbitration and trial, and excluded any costs Bearden incurred after arbitration for trial. *Id.* at 247. The court included the \$1,187 award of arbitration costs and \$765.49 of the \$3,296.39 award of trial costs. *Id.* Comparing the damages plus costs awarded at arbitration and trial, the court found that McGill improved his

position by \$1,921.51. *Id.* The court held that Bearden was not entitled to an award of attorney fees under MAR 7.3. *Id.* at 248-49.

Bearden petitioned for review. This Court granted the petition and remanded the case 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). *Bearden v. McGill*, 186 Wn.2d 1009 (2016).

In *Bearden v. McGill*, 197 Wn. App. 852, 391 P.3d 577 (2017) (*Bearden II*), the Court of Appeals pointed to two “rules” from *Nelson* and from *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012), a case relied upon by the Court in *Nelson*: “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”; and a court should determine the requesting party’s posttrial position “by looking at only the jury verdict, not the final judgment including costs.” *Bearden II*, 197 Wn. App. at 858-59. In response to Bearden’s argument that the court should look at the final judgment, which includes the award of statutory fees and costs, to decide McGill’s posttrial position, the Court of Appeals noted that in *Nelson* and *Niccum* the Supreme Court looked only to the jury verdict. *Id.* at 859. In *Bearden II*, looking at the damages the trial court awarded, exclusive of costs, McGill improved his position at trial. The Court of Appeals reversed the trial court’s award of MAR 7.3 attorney fees to Bearden. 197 Wn. App. at 861.

Bearden filed a second petition for review, which this Court granted on June 28, 2017. *Bearden v. McGill*, 188 Wn.2d 1015 (2017).

### **III. ISSUE PRESENTED**

Under RCW 7.06.060(1) and MAR 7.3, in determining whether the party who appeals an arbitration award “fails to improve the party’s position on the trial de novo,” should a court compare the arbitration award, including statutory costs and fees awarded in the arbitration, with the trial de novo judgment, including statutory costs and fees awarded in the trial?

### **IV. SUMMARY OF ARGUMENT**

If the Court applies a plain language analysis of RCW 7.60.060(1) and MAR 7.3, both of which require a court to determine whether a party fails to improve his or her position between the arbitration award and the trial de novo, the plain language requires a comparison of the total arbitration award, including statutory fees and costs awarded by the arbitrator, with the judgment from the trial de novo, including statutory fees and costs awarded by the trial court. The broad language used in the statute and the mandatory arbitration rule indicates an intention for a broad application that compares the final arbitration award with the trial de novo judgment without segregating the award and the judgment into separate amounts of compensatory damages and statutory costs and fees. Alternatively, if the Court finds that MAR 7.3 is ambiguous, including any award of statutory costs and fees in comparing an arbitration award and the result in a trial de novo will further the purposes of MAR 7.3 to favor arbitration, to reduce superior court congestion and delays in hearing cases,

and to provide a relatively inexpensive procedure to resolve smaller cases quickly.

## V. ARGUMENT

### A. **The Supreme Court Has Applied The *Cormar* “Ordinary Person” Standard Only To Determine The Amount Of An Offer Of Compromise Under RCW 7.60.050(1)(b).**

The Supreme Court has analyzed whether a party improved its position at trial pursuant to RCW 7.06.060(1) and MAR 7.3<sup>2</sup> on three occasions: *Nelson v. Erickson, supra*; *Niccum v. Enquist, supra*; and *Haley v. Highland*, 142 Wn.2d 135, 12 P.3d 119 (2000). Both *Nelson* and *Niccum* concerned offers of compromise by the nonappealing party after the appealing party sought a trial de novo. RCW 7.06.050(1)(b) provides that “for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator’s award for determining whether the party appealing the arbitrator’s award has failed to improve that party’s position on the trial de novo.” Both *Nelson* and *Niccum* involved disputes over “the amount of the offer of compromise” caused by the vague and confusing language used by the nonappealing parties to describe the respective offers of compromise in those cases. In both cases, the Supreme Court cited *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 623, 806 P.2d 253, review denied, 117 Wn.2d 1004 (1991), in holding that RCW

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<sup>2</sup> RCW 7.06.060(1) provides, in pertinent part: “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.” 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.” The full text of RCW 7.06.050, RCW 7.06.060 and MAR 7.3 are reproduced in the Appendix to this brief.

7.06.050(1)(b) was “meant to be understood by ordinary people,”<sup>3</sup> and then considered how an ordinary person would calculate the amount of the offer of compromise in those cases. *Nelson*, 186 Wn.2d at 390-92; *Niccum*, 175 Wn.2d at 452.

On the other hand, *Haley v. Highland*, *supra*, did not concern an RCW 7.60.050(1)(b) settlement offer, but rather concerned an MAR 7.3 award of costs and reasonable attorney fees in the context of comparing an arbitration award with the results from a trial de novo. In *Haley*, despite being decided nine years after *Cormar*, the Supreme Court made no reference to *Cormar* or the “ordinary person” standard, and instead focused its analysis on whether the appellant “improved his position under MAR 7.3.” *Haley*, 142 Wn.2d at 154.

In *Bearden II*, the Court of Appeals stated the Supreme Court directed that MAR 7.3 should be viewed “from the perspective of an ordinary person.” 197 Wn. App. at 860. However, the Supreme Court has not utilized the *Cormar* “ordinary person” standard outside of the context of determining the amount of an offer of compromise under RCW 7.60.050(1)(b). *Bearden* argues persuasively that an “ordinary person” would compare the judgment entered following a trial de novo, including any award of fees and costs, with the judgment following arbitration,

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<sup>3</sup> In *Cormar*, the court discussed the meaning of MAR 7.3: “We have found no cases or rule-making history that would aid in determining the drafter's intent in using the rather unspecific word ‘position.’... 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 against them for more than the arbitrator awarded.” 60 Wn. App. at 623.

including any award of fees and costs, to determine whether a party improved its position. *See* Pet. for Rev. at 10-14; Bearden’s Supp. Br. at 5-9. This brief focuses on the plain meaning of the statutory language, and argues that if instead of the *Cormar* “ordinary person” standard, this Court uses a statutory plain meaning analysis to interpret RCW 7.60.060(1) and MAR 7.3, the Court should hold that a trial court must compare the arbitration award, including any fees and costs awarded by the arbitrator, with the trial de novo result, including any fees and costs awarded by the court, to assess whether a party improved its position under MAR 7.3.

**B. Interpreting RCW 7.06.060(1) And MAR 7.3 Under The “Plain Meaning” Rule, A Trial Court Should Compare The Final Arbitration Award, Including Statutory Fees And Costs, With The Trial De Novo Judgment, Including Statutory Fees And Costs, To Determine Whether A Party Improved Its Position.**

The Washington Supreme Court interprets the mandatory arbitration rules as though they were drafted by the legislature. *Hudson v. Hapner*, 170 Wn.2d 22, 29, 239 P.3d 579 (2010); *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 525, 79 P.3d 1154 (2003). The meaning of a statute is a question of law, and the “fundamental objective is to ascertain and carry out the Legislature’s intent....” *Dep’t of Ecology v. Campbell & Gwynn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). “When a statutory term is undefined, the words of a statute are given their ordinary meaning....” *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). The Supreme Court has adopted a broad, contextual “plain language” rule which discerns legislative intent from the language of the statute at issue, related statutes, the statutory

scheme as a whole, and facts of which the court may take judicial notice. See *Dep't of Ecology*, 146 Wn.2d at 10-12. Only if the statute, read in its full context, is reasonably susceptible to more than one meaning, will the Court resort to rules of statutory construction, including legislative history. *Id.* at 12; see also *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

1. **The language used in RCW 7.06.060(1) and MAR 7.3 must be given its plain and ordinary meaning, requiring a broad application that compares the final arbitration award with a trial de novo judgment without segregating the award and the judgment into separate amounts corresponding to damages and statutory costs.**

In RCW 7.06.060(1), the legislature utilized broad language to instruct that a court shall assess fees and costs when a party who appeals an arbitration award “fails to improve his or her position on the trial de novo.” The statutory language identifies no exceptions or exclusions. The plain meaning of this broad language supports a comparison of the final arbitration award with the trial de novo judgment, and does not suggest that statutory fees and costs awarded by the arbitrator and the trial court should be deducted before a comparison of the final arbitration award with the trial judgment. “[T]he legislature knows how to craft a broad statute when it wants to do so.” *State v. Larson*, 184 Wn.2d 843, 852-53, 365 P.3d 740 (2015) (brackets added).<sup>4</sup> When the legislature uses broad language in a

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<sup>4</sup> The legislature also knows how to craft a more specific statute when it wants to do so. See, e.g., RCW 4.84.270: “The defendant... shall be deemed the prevailing party... if the plaintiff... recovers nothing, or if the recovery, *exclusive of costs*, is the same or less than the amount offered in settlement by the defendant...” (Emphasis added.)

statute, it demonstrates an intention for the statute to have a broad application. *See id.* Broad statutory language supports an expansive reading of a statute. *Segura v. Cabrera*, 184 Wn.2d 587, 599, 362 P.3d 1278 (2015) (Gordon McCloud, J. concurring).<sup>5</sup>

In *Niccum v. Enquist*, *supra*, the Court considered whether the language of a related statute, RCW 7.60.050(1)(b), required subtracting costs from a settlement offer before comparing that offer to a jury's verdict for purposes of determining whether a party improved its position under MAR 7.3. The Supreme Court reversed the Court of Appeals:

After quoting RCW 7.06.050(1)(b) and MAR 7.3, [the Court of Appeals] observed that a "court's objective in construing a statute is to determine the intent of the legislature," which is "derived from the language of the statute."... Unfortunately, the Court of Appeals did not derive its rule "from the language of the statute." It held that "RCW 7.06.050(1)(b) should be read so that any *segregated* amount of an offer must replace an amount in the same category granted under the arbitrator's award."... RCW 7.06.050(1)(b) directs courts to "replace" the arbitrator's award with the "amount of the offer of compromise." There is not a word in that statute about subtracting "any segregated amount" from that offer.

175 Wn.2d at 447 (brackets added; citations omitted). The Supreme Court concluded: "There is ... no statutory justification for segregating an offer of compromise into separate amounts corresponding to damages and costs."

175 Wn.2d at 450.

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<sup>5</sup> In *Cormar*, the court suggested "reading MAR 7.3 as a broad warning that one who asks for a trial de novo, and thereafter suffers a judgment for a greater amount than the arbitration award, will be liable for attorneys fees." 60 Wn. App. at 624.

Similar to the Supreme Court's analysis of the plain language of RCW 7.60.050(1)(b) and MAR 7.3 in *Niccum*, the plain language of RCW 7.60.060(1) and MAR 7.3, which directs a court to determine whether a party improved its position, provides no statutory justification for segregating an arbitration award and a trial de novo judgment into separate amounts corresponding to damages and costs.

**2. The Supreme Court does not modify or correct an unambiguous legislative enactment.**

The Supreme Court does not modify plain and unambiguous statutory language. *See State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001). "It is neither the function nor the prerogative of courts to modify legislative enactments." *Anderson v. Seattle*, 78 Wn.2d 201, 202, 471 P.2d 87 (1970). The Court has long recognized that: "we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission.... [I]t would be a clear judicial usurpation of legislative power for us to correct that legislative oversight." *State v. Reis*, 183 Wn.2d 197, 214, 351 P.3d 127 (2015) (quoting *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980)). The Court will not remove words from statutes or create judicial fixes, even if it thinks the legislature would approve. *See Reis*, 183 Wn.2d at 215. As long as a statute with a perceived omission remains rational, the Court will not "arrogate to [itself] the power to make legislative schemes more perfect, more comprehensive and more consistent." *See State v. Taylor*, 97 Wn.2d 724, 729, 649 P.2d 633 (1982) (brackets added).

Even if it is believed the Legislature omitted language clarifying that an arbitration award and trial de novo result should exclude awards of statutory fees and costs for purposes of MAR 7.3, the plain language of MAR 7.3 and RCW 7.60.060(1) remains rational and should not be modified by the courts. Any statutory omission should be fixed by the legislature.

**C. Claims Asserted In Both The Arbitration And The Trial De Novo Should Be Considered In Determining Whether A Party Improved Its Position For Purposes Of MAR 7.3.**

In construing MAR 7.3, this Court has held that a party does not improve his or her position where the alleged “improvement” is solely because a new claim was brought in the trial de novo that had not been asserted in the arbitration. *Haley*, 142 Wn.2d at 154-55. In *Haley*, this Court reversed the Court of Appeals’ denial of a defendant’s MAR 7.3 fee award where a plaintiff appealed an arbitration award and the only basis for the plaintiff’s larger verdict in the trial de novo was an award of attorney fees which had not been properly requested at arbitration. *Id.* at 154. The Court explained: “In this case, the arbitrator’s award did not reflect an award of attorney fees. Haley could have requested a ruling from the arbitrator on the issue of attorney fees and his failure to do so precludes a finding that he has improved his position under MAR 7.3.” *Id.* Implicit in this holding is the conclusion that a party does not “improve his or her position” by raising new claims that were not part of the original position at arbitration.<sup>6</sup>

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<sup>6</sup> Courts of appeals that have adopted a similar rule have, in some instances, grounded their analysis in considerations of fairness and equity. See e.g. *Christie-Lambert Van & Storage*

This holding is consistent with court of appeals' decisions holding that a party did not improve its position under MAR 7.3 where the claimed improvement was solely due to sanctions awarded in the trial de novo, *see Hedger v. Groeschell*, 199 Wn. App. 8, 18-20, 397 P.3d 154 (2017)<sup>7</sup>, where the claimed improvement was due to sanctions and statutory fees and costs awarded in the trial de novo, *see Tran v. Yu*, 118 Wn. App. 607, 616-17, 75 P.3d 970 (2003), or where the claimed improvement was solely due to a cross-claim that was brought for the first time at the trial de novo, *see Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 304, 693 P.2d 161 (1984). In each of these cases, the element of compensatory damages, sanctions or statutory fees and costs that caused the trial de novo result to be larger than the arbitration award was an element that had not been requested at arbitration.

On the other hand, where a party had requested and was denied a particular element of damages in arbitration, but was subsequently awarded that same element of damages in the trial de novo, the appellate courts have generally held that the trial court should include that element of damages to

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*Co.*, 39 Wn. App. 298, 304, 693 P.2d 161 (1984) (concluding that "it is inherently unfair to deny an attorney fee award to a party that has borne the cost of mandatory arbitration and a trial de novo without a change in results where the denial is based upon the appellant's improving his overall position in the trial de novo solely because of a new claim brought for the first time on appeal"). Where a court is presented with a question of statutory construction, however, such considerations would appear to be beyond a court's interpretive role, whose "fundamental objective is to ascertain and carry out the Legislature's intent." *Dep't of Ecology*, 146 Wn.2d at 9.

<sup>7</sup> In *Hedger*, the court stated: "[N]one of the sanctions were or could have been litigated before the arbitrator, because each was based on ... conduct during the trial de novo process. We will not consider them in the MAR 7.3 determination." 199 Wn. App. at 20 (brackets added).

determine whether there has been a change in a party's position for purposes of an award of MAR 7.3 fees. *See, e.g., Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 967-68, 316 P.3d 1113 (2014) (award of attorney fees); *Cormar*, 60 Wn. App. at 623-24 (award of prejudgment interest).

*Miller* and *Cormar* conflict with the holding in *Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 815 P.2d 293 (1991), *review denied*, 118 Wn.2d 1013 (1992). *Wilkerson* appears to be the source of the "compare comparables" doctrine in Washington case law. The Washington Supreme Court has not adopted the doctrine. *Niccum*, 175 Wn.2d at 448; *Haley*, 142 Wn.2d at 154. While the Supreme Court stated in *Haley* that "[w]e generally agree with the Court of Appeals' view that only comparables are to be compared," *Haley*, 142 Wn.2d at 154 (brackets added), in *Niccum* the Supreme Court found the Court of Appeals' reliance on the doctrine in preference to the plain language of RCW 7.60.050(1)(b) to be problematic. *Niccum*, 175 Wn.2d at 448.<sup>8</sup>

The *Miller* and *Wilkerson* decisions disagree as to what should be compared under the "compare comparables" doctrine. In *Miller*, the plaintiff sought compensatory damages and attorney fees in arbitration, and

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<sup>8</sup> The court explained: "Instead of following the statutory language, the Court of Appeals derived its rule from the doctrine it had developed in prior opinions of 'comparing comparables.'... By 'compare comparables,' the court means that compensatory damages should be compared to compensatory damages, not to compensatory damages plus costs.... The court's reliance on this doctrine in preference to the plain language of the statute is problematic for several reasons. First, this Court has not adopted the doctrine of comparing comparables. Second, none of these prior cases involving the doctrine of comparing comparables addressed postarbitration offers of compromise; the courts in those cases were simply asked to compare a party's position after arbitration to its position after trial de novo."

175 Wn.2d at 447-48.

was awarded compensatory damages but denied attorney fees. The plaintiff requested a trial de novo, and at trial was awarded a lesser amount of compensatory damages than he had received at arbitration but was awarded attorney fees, and the combined total of compensatory damages and attorney fees from trial exceeded the arbitration award. The Court of Appeals acknowledged that if it compared solely the compensatory damages, Miller did not improve his position at trial, but noted that Miller was awarded attorney fees at trial after the fees were denied in arbitration based on the same argument that was successful at trial. 178 Wn. App. at 967-68. The court stated “the situation might be different if attorney fees were not requested that arbitration,” but “to truly compare the comparables, the success of aggregate claims asserted should be considered in deciding if Mr. Miller ‘improved his position.’ MAR 7.3; RCW 7.06.060(1).” *Id.* at 968.

In *Wilkerson*, the plaintiff sought and was awarded both compensatory damages and attorney fees at arbitration. The defendant requested a trial de novo, and at trial the plaintiff was awarded a greater amount of compensatory damages but was denied attorney fees. The combined total of the compensatory damages and attorney fees at arbitration exceeded the trial verdict. The Court of Appeals refused to include the attorney fee award in comparing the arbitration and trial results, found the defendant failed to improve his position for purposes of MAR 7.3 and awarded attorney fees to the plaintiff. 62 Wn. App. at 716-17.

As stated in *Miller*, “the success of aggregate claims asserted” should be considered in deciding whether a party improved its position for purposes of MAR 7.3 and RCW 7.06.060(1), including a claim for statutory fees and costs asserted in both the arbitration and trial de novo. The observation by the court in *Tran* that “[a] trial is almost always more expensive than arbitration,” and “a party would invariably improve its position because additional costs, attorney fees, and interest would be incurred,” 118 Wn. App. at 612 (brackets added), is not sufficient reason to exclude an award of statutory fees and costs in deciding whether a party improved its position between arbitration and trial. Other types of claims may increase between arbitration and trial (*e.g.*, medical expenses, wage loss, the value of continuing pain and suffering), and are not excluded on that basis in deciding whether a party has improved its position. Statutory fees and costs should not be treated differently.

Consideration of all aggregate claims, including statutory fees and costs, in deciding whether a party improved its position comports with a plain meaning analysis of MAR 7.3 and RCW 7.06.060(1). Similar to this Court’s holding in *Niccum*, *see* 175 Wn.2d at 450, there is no statutory justification for segregating an arbitration award and the trial de novo judgment into separate amounts corresponding to damages and costs.<sup>9</sup>

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<sup>9</sup> In *Bearden I*, the Court of Appeals adopted a similar rule, but with a caveat: for purposes of determining whether a party improved his or her position, the court held that it must compare only the particular damages and statutory costs actually considered in both the arbitration and trial de novo, and exclude “those statutory costs requested only from the trial court.” *Bearden*, 193 Wn. App. at 239. Given the broad statutory language, there would appear to be no textual basis for such an exclusion.

Statutory fees and costs awarded at arbitration and trial should be included in deciding whether a party improved its position for purposes of awarding attorney fees pursuant to MAR 7.3 and RCW 7.06.060(1).

**D. If The Court Finds RCW 7.06.060(1) And MAR 7.3 Ambiguous, Legislative History Supports Including Statutory Fees And Costs In Determining Whether A Party Improved Its Position For Purposes Of MAR 7.3.**

After application of the plain meaning rule, if a statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and the Court will turn to rules of statutory construction, including consideration of legislative history. *Dep't of Ecology*, 146 Wn.2d at 12; *Cockle*, 142 Wn.2d at 808. While this brief contends that RCW 7.06.060(1) and MAR 7.3 are unambiguous and their meaning should be determined by their plain language, if the Court determines the meaning of the phrase "to improve his or her position on the trial de novo" is ambiguous, the legislative history showing the purpose of the MARs is consistent with an interpretation that statutory fees and costs awarded at arbitration and trial should be included for purposes of determining whether a party improved its position under MAR 7.3.

The Court construes mandatory arbitration rules consistent with their purpose. *See Malted Mousse, Inc.*, 150 Wn.2d at 525; *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001). Courts have reviewed legislative history and described the purpose of the mandatory arbitration rules in general as follows: "to reduce congestion in the courts and delays in hearing cases," *Hudson*, 170 Wn.2d at 30; "to provide a relatively expedient

procedure to resolve claims where the plaintiff is willing to limit the amount claimed,” *Williams v. Tilaye*, 174 Wn.2d 57, 63, 272 P.3d 235 (2012); “to take relatively small and simple cases off the superior court’s docket and resolve them quickly and inexpensively,” *Evans v. Mercado*, 184 Wn. App. 502, 508, 338 P.3d 285 (2014) (quoting *Mercier v. GEICO Indem. Co.*, 139 Wn. App. 891, 899, 165 P.3d 375 (2007), *review denied*, 163 Wn.2d 1028 (2008)); to encourage settlement and discourage meritless appeals, *see Nelson*, 186 Wn.2d at 391; *Niccum*, 175 Wn.2d at 451.

Washington courts have also specifically discussed the purpose of RCW 7.60.060 and MAR 7.3 fee shifting:

If there was no disincentive for requesting a trial de novo following the arbitration, mandatory arbitration itself could become just another procedural step before trial.... [M]andatory 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.

Under RCW 7.60.060, only the party requesting the trial de novo is at risk of paying the other party’s attorney fees. The party requesting the trial de novo must improve its position or pay its opponent’s attorney fees. RCW 7.06.060(1). By this mechanism, the nonappealing party is compensated for having been put through a useless appeal and the attorney fees operate as a disincentive or penalty for a party that pursues a meritless appeal. The penalty can be substantial.

*Williams*, 174 Wn.2d at 63-64 (brackets added).

Similar to *Niccum*, in *Cormar*, in an appeal of an award of MAR 7.3 attorney fees, the appellate court denied a party’s attempt to segregate the particular categories of damages awarded at arbitration and trial. The court rejected an argument to parse out the amount of prejudgment interest accrued between arbitration and trial:

Cormar advances a sophisticated argument having to do with the use value of money and how it is affected by the time lag between arbitration award and a court hearing. 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. Moreover, Cormar's approach is not consonant with the purpose of arbitration, which is to keep disputes out of the courts.... That purpose is best served by reading MAR 7.3 as a broad warning that one who asks for a trial de novo, and thereafter suffers a judgment for a greater amount than the arbitration award, will be liable for attorney fees.

60 Wn. App. at 623-24.

In *Bearden II*, the Court of Appeals stated that including statutory costs and fees in the arbitration award while not including statutory costs and fees in the trial de novo award when comparing a party's postarbitration and posttrial de novo "position" would frustrate the purpose of MAR 7.3:

The legislature intended MAR 7.3 to "encourage settlement and discourage meritless appeals." 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." 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. This, in turn, may incentivize defendants to request trials de novo to the detriment of MAR 7.3's purpose.

197 Wn. App. at 860-61 (citations omitted).

The above-quoted analysis in *Bearden II* compared an arbitration award including costs with a posttrial de novo award excluding costs. Comparing an arbitration award including costs with a trial de novo award including costs would in most cases make recovery of attorney fees under MAR 7.3 less difficult. The courts have observed that a plaintiff's statutory fees and costs generally increase between arbitration and trial, because trial is almost always more expensive than arbitration. See *Miller*, 178 Wn. App. at 967; *Monnastes v. Greenwood*, 170 Wn. App. 242, 245, 283 P.3d 603 (2012); *Tran*, 118 Wn. App. at 112. As the court noted in *Bearden II*, the great majority of parties appealing arbitration awards are defendants. 197 Wn. App. at 861. Inclusion of awards of statutory fees and costs under MAR 7.3 thus provides a disincentive for the majority of parties requesting a trial de novo following arbitration, by providing an attorney fee award to the nonappealing party plaintiff that has borne the costs of mandatory arbitration and a trial de novo without a change in results. See *Christie-Lambert Van & Storage Co.*, 39 Wn. App. at 304.<sup>10</sup>

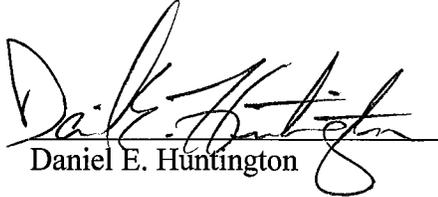
## VI. CONCLUSION

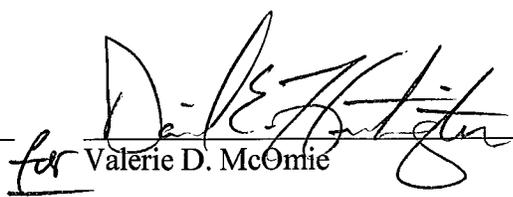
The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

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<sup>10</sup> Interpreting MAR 7.3 to include awards of statutory fees and costs when comparing an arbitration award with a trial de novo result would not provide a disincentive for plaintiffs to appeal an arbitration award. See *Haley v. Highland*, 142 Wn.2d at 159-60 (Talmadge, J. concurring). However, as noted in *Bearden II*, the Legislature heard testimony that 86% of MAR appeals are filed by defendants, suggesting that the risk posed by an assessment of MAR 7.3 attorney fees generally provides a disincentive for plaintiffs to seek a trial de novo.

DATED this 1<sup>st</sup> day of September, 2017.

  
Daniel E. Huntington

  
for Valerie D. McOmie

On Behalf of WSAJ Foundation

# APPENDIX

**RCW 7.06.050****Decision and award—Appeals—Trial—Judgment.**

(1) Following a hearing as prescribed by court rule, the arbitrator shall file his or her decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

(a) Up to thirty days prior to the actual date of a trial de novo, a nonappealing party may serve upon the appealing party a written offer of compromise.

(b) In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

(c) A postarbitration offer of compromise shall not be filed or communicated to the court or the trier of fact until after judgment on the trial de novo, at which time a copy of the offer of compromise shall be filed for purposes of determining whether the party who appealed the arbitrator's award has failed to improve that party's position on the trial de novo, pursuant to MAR 7.3.

(2) If no appeal has been filed at the expiration of twenty days following filing of the arbitrator's decision and award, a judgment shall be entered and may be presented to the court by any party, on notice, which judgment when entered shall have the same force and effect as judgments in civil actions.

[ 2011 c 336 § 164; 2002 c 339 § 1; 1982 c 188 § 2; 1979 c 103 § 5.]

**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. The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

(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.

(3) If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.

[ 2002 c 339 § 2; 1979 c 103 § 6.]

## Superior Court Mandatory Arbitration Rules

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### RULE 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. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

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**RICHTER-WIMBERLEY, P.S.**

**September 01, 2017 - 1:07 PM**

**Transmittal Information**

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**Appellate Court Case Title:** James Bearden v. Dolphus McGill, et al.  
**Superior Court Case Number:** 12-2-08993-9

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