

No. 94320-6

IN THE SUPREME COURT OF WASHINGTON

JAMES D. BEARDEN,

Petitioner (Plaintiff-Respondent)

v.

DOLPHUS A. MCGILL,

Respondent (Defendant-Appellant)

**PETITIONER BEARDEN'S ANSWER TO
BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

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Petitioner Bearden agrees with the arguments submitted by the Washington State Association for Justice Foundation (WSAJ Foundation) in this matter.

Bearden's Supplemental Brief follows the direction of *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016) that the trial court interprets the phrase "fails to improve the party's position" in MAR 7.3 as would be "understood by ordinary people." *Id.*, 186 Wn.2d at 390 (quoting *Niccum v. Enquist*, 175 Wn.2d 441, 452, 286 P.3d 966 (2011)). WS AJ Foundation's application of the "plain language" principle of statutory construction yields the same result.

Under the ordinary person test, the court views the "position" at arbitration and trial de novo as an ordinary person would. *Nelson*, 186 Wn.2d at 391-92.

Under the plain language analysis, the Court gives undefined statutory terms their "ordinary meaning." *Bilanko v. Barclay Court Owners Ass'n*, 185 Wn.2d 443, 448, 375 P.3d 591 (2016); WS AJ Foundation Br., at 7. The Court derives legislative intent solely from the legislature's plain language, "considering the text of the provision itself, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." *Rodriguez v. Zavala*, 188 Wn.2d 586, 591, 398 P.3d 1071 (2017).

As the WSAJ Foundation points out, the legislature knows how to craft a broad or a specific statute. WSAJ Foundation Brief, at 8 & n.4 (citing RCW 4.84.270: in damages actions of \$10,000 or less, using “**exclusive of costs**”) (emphasis added).¹ Indeed, the enabling legislation behind the provision at issue here is RCW 7.06.020, which explicitly **excludes interest and costs** in defining the scope of cases subject to mandatory arbitration: “Actions subject to mandatory arbitration... (1) All civil actions ... up to fifty thousand dollars, **exclusive of interest and costs**, are subject to mandatory arbitration.” (Emphasis added.)² Had the legislature intended the “position” in RCW 7.06.060(1) to exclude RCW 4.84.010 costs, it would have said so.

Whether this Court applies the ordinary person or plain language standard to construe MAR 7.3, the trial court's analysis will compare the result at arbitration, including RCW 4.84.010 costs, to the result at trial de novo, including RCW 4.84.010 costs.

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¹ In fact, the statutes addressing attorney fees in damages actions of \$10,000 or less—RCW 4.84.250, RCW 4.84.260, and RCW 4.84.270—provide that attorney fee awards are based on the amount recovered “**exclusive of costs**”—precisely the opposite of the “position” in RCW 7.06.060(1)/MAR 7.3, where “exclusive of costs” is glaringly absent.

² This was true from the outset, in 1979. Laws of 1979, ch. 103, § 2. <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1979c103.pdf?cite=1979%20c%20103%20C2%A7%202>.

DATED this 29th day of September, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I served by the means selected below, a copy of the foregoing Petitioner Bearden's Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation this 29th day of September, 2017, to the following counsel of record at the following addresses:

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/s/ Kathleen Garvin

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Petitioner Bearden's Answer to Brief of Amicus Curiae Washington State Association for Justice Foundation

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