

No. 94320-6

IN THE SUPREME COURT OF WASHINGTON

Court of Appeals No. 72926-8-I

JAMES D. BEARDEN,

Petitioner (Plaintiff-Respondent),

v.

DOLPHUS A. MCGILL,

Respondent (Defendant-Appellant)

PETITIONER BEARDEN'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION AND ISSUE PRESENTED

This Court granted review of the Court of Appeals' decision in this case for the second time¹ to address an important, frequently-arising, and unresolved issue of law regarding MAR 7.3's² award of costs and attorney fees following a trial de novo: When determining if the appealing party³ failed to improve its "position on the trial de novo" under MAR 7.3, does the trial court compare the total amount of the arbitration award to the total trial de novo judgment, or is the court required to subtract RCW 4.84.010 costs from the arbitration award and the trial de novo judgment?

The answer depends on how the Court interprets the term "position," which is not defined in the statute or rule, and generally not used in other laws or cases. *See Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 623, 806 P.2d 253 (1991).⁴ Disposition of this issue will affect every mandatory arbitration that proceeds to trial de novo without an "offer of

¹ This Court granted review of *Bearden v. McGill*, 193 Wn. App. 235, 372 P.3d 138, review granted, 186 Wn.2d 1009 (2016) (*Bearden I*), and remanded for reconsideration in light of *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016). The present grant of review is from *Bearden v. McGill*, 197 Wn. App. 852, 391 P.3d 577 (2017) (*Bearden II*).

² MAR 7.3 provides: "The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo." Because MAR 7.3 and RCW 7.06.060 (1) are substantively identical, the decisions and briefs collectively refer to them as MAR 7.3.

³ *Bearden* was the prevailing party at arbitration, and the nonappealing party in the Superior Court trial de novo. In this context, to appeal means to request trial de novo, as defendant McGill did.

⁴ ("We have found no cases or rulemaking history that would aid in determining the drafter's intent in using the rather unspecific word 'position.'")

compromise.” See RCW 7.06.050(1). The Court reviews this legal issue de novo. *Niccum v. Enquist*, 175 Wn.2d 441, 446, 286 P.3d 966 (2012).

The existing decisions analyzing MAR 7.3 awards do not directly resolve the issue: Many of them consider offers of compromise under RCW 7.06.050(1);⁵ others address offers of judgment (CR 68), or apply the “compare comparables”⁶ doctrine with respect to new claims, cross-claims, fault allocations, or sanctions awards. This case, in contrast, involves a straightforward comparison of the appealing party’s position at arbitration and at the trial de novo. Thus, the positions being compared are the total arbitration award including RCW 4.84.010 costs and the total trial judgment including RCW 4.84.010 costs. The appealing party—Respondent McGill—failed to improve his position at trial de novo because he had to pay \$609.39 more than at arbitration. Accordingly, Petitioner Bearden asks the Court to reverse the Court of Appeals and reinstate the trial court’s award of MAR 7.3 fees.

II. STATEMENT OF THE CASE

At mandatory arbitration in this admitted liability car accident case, the arbitrator awarded Bearden \$44,000.00 in general plus special

⁵ The amount of the offer of compromise takes the place of the arbitration award for purposes of determining whether the appealing party failed to improve its position. RCW 7.06.050(1)(b); *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012).

⁶ This Court has not adopted the “compare comparables” doctrine. *Niccum*, at 448.

damages,⁷ and \$1,187.00 in RCW 4.84.010 costs, for a total arbitration award of **\$45,187.00**. McGill requested a trial de novo.

In McGill's trial de novo, the jury awarded Bearden \$42,500.00 in general damages only, and the court awarded Bearden RCW 4.84.010 costs of \$3,296.39, for a total trial judgment against McGill of **\$45,796.39**.

As an example of additional RCW 4.84.010 costs incurred for trial, McGill (who did not call a medical expert at the arbitration) retained a CR 35 independent medical examiner, Lawrence Murphy, M.D., for his appeal. This necessitated a discovery deposition of Dr. Murphy and then, when this witness was not available for trial, a perpetuation deposition. CP 259, 264. The depositions resulted in RCW 4.84.010 taxable costs of \$1,013.55 for Bearden. CP 89.

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

⁷ \$34,336.09—general damages; \$8,663.91—special (medical) damages. CP 277-79, 288-91.

The following chart shows these amounts and calculations:

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

In *Bearden v. McGill*, 193 Wn. App. 235, 372 P.3d 138 (2016) (*Bearden I*), the Court of Appeals reversed the MAR 7.3 fees award, comparing “damages and statutory costs that both the arbitrator and trial court considered” and “exclud[ing] those statutory costs requested only from the trial court”—which were necessarily incurred for trial only during the time lag following arbitration. *Id.* at 239. This Court granted *Bearden*’s first Petition for Review, 186 Wn.2d 1009 (2016), and remanded for reconsideration in light of *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016).

The Court of Appeals then issued its second decision and again reversed the trial court award of MAR 7.3 fees on alternative grounds. *Bearden v. McGill*, 197 Wn. App. 852, 391 P.3d 577 (2017) (*Bearden II*). This Court granted review for a second time, to consider the question set forth above.

III. SUPPLEMENTAL ARGUMENT

A. In Deciding Whether the Appealing Party Improved its Position, an Ordinary Person Would Compare the Amount the Party Would Have Had to Pay to Satisfy the Arbitration Award to the Amount the Party Would Be Required to Pay to Satisfy the Trial Court Judgment.

To compare the positions at arbitration and at trial de novo, the Court of Appeals in *Bearden II* chose the unprecedented approach of “contrast[ing] the jury verdict with the initial arbitration award to determine whether [defendant/appealing party] McGill improved his position at trial.” *Id.*, 197 Wn. App. at 854 (slip op., at 2).⁸ The Court stated that in doing so, it was “[f]ollowing the Supreme Court’s approach [in *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016)].” *Bearden II*, at 854, 859 (slip op., at 2, 7).

However, *Nelson* did not actually use the “jury verdict” of \$24,167 for the post-trial position. The trial court granted plaintiff’s motion for additur and increased the jury verdict by \$3,000 for future noneconomic damages, pursuant to RCW 4.76.030. *Nelson*, at 387.⁹

Bearden contends that, instead of choosing the “jury verdict” (without RCW 4.84.010 costs) to compare to the arbitration award (minus costs), this Court intended by its previous remand that the Court of

⁸ The slip opinion is Appendix A to the Petition for Review.

⁹ RCW 4.84.010 trial de novo costs were not at issue and in fact are completely absent from the *Nelson* decision. See n.13 below.

Appeals apply the “ordinary person” principle which *Nelson* carried forward from *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012). *Nelson* and *Niccum* require courts to interpret “whether a party improves on their position at trial” as would be “understood by ordinary people.” *Nelson*, at 390-91.

The Court of Appeals in *Nelson*, and this Court in *Nelson* as well as *Niccum*, quoted the now 26-year-old “ordinary person” principle as first applied to MAR 7.3 awards in *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 806 P.2d 253 (1991):

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**¹⁰ against them for more than the arbitrator awarded.

Cormar advances a sophisticated argument We are not persuaded by the argument, which **fails to refute the simple fact that Sauro emerged from superior court with a judgment for more money than the arbitrator awarded.**

Id. at 623-24 (emphasis added; quoted in *Nelson v. Erickson*, 190 Wn. App. 1003, 2015 Wn. App. LEXIS 2194 at *26-27, *aff'd*, 186 Wn.2d 385, 377 P.3d 196 (2016)).¹¹ In a case like this one, not involving an offer of compromise (as *Nelson* and *Niccum* did), “an ordinary person would

¹⁰ Not jury verdict.

¹¹ In *Cormar*, that sum of “more money” included prejudgment interest, which the arbitrator had not awarded but the trial court included in the trial “judgment.” *Id.* Like *Sauro*, *Bearden* “emerged from superior court with a judgment for more money [\$609.39] than the arbitrator awarded.” *Id.*

understand that the ‘amount’” of the appealing party’s (McGill’s) position to be “the total sum of money”¹² McGill must pay to satisfy the trial judgment, compared to the amount he would have been required to pay to satisfy the total arbitration award.

Here, following trial, McGill owed Bearden \$609.39 more than he would have after the arbitration award, had he not appealed and the arbitration award been entered as the judgment. The trial court properly ruled:

The question whether the defendant improved his position at trial can be fairly decided by comparing an award of damages and costs handed down by the arbitrator and the judgment for damages and costs following the trial de novo. The defendant did not improve his position; he worsened it slightly.

CP 14. Accordingly, the court awarded Bearden \$71,800 in MAR 7.3 fees.

Bearden II, 197 Wn. App. at 855 (slip op., at 2); CP 7-12.

McGill misleadingly argues that in *Nelson* and *Niccum*, this Court compared only the amount of the offer of compromise to the trial award, and RCW 4.84.010 costs “were not included in the comparison.” Answer, at 9-10. This Court did not address post-arbitration RCW 4.84.010 costs in

¹² *Nelson*, at 390-91.

Nelson or *Niccum* because the issue was not raised or relevant to the parties' arguments in either case.¹³

McGill devotes two pages of his Answer to the argument that *Bearden* does not conflict with this Court's decision in *Haley v. Highland*, 142 Wn.2d 135, 12 P.3d 119 (2000). Noting that it was plaintiff who requested trial de novo, McGill contends that in *Haley*, the court simply compared the amount of the arbitration award to the trial award without costs. Answer, at 7-9; *Haley*, at 154-55 & n.8. These are distinctions without a difference. The *Haley* Court made it clear that had plaintiff requested attorney fees from the arbitrator, the Court would have counted that additional relief in comparing plaintiff's position at arbitration (damages plus statutory fees) to his position at trial (damages plus statutory fees). Thus, following *Haley*, in determining whether the appealing party has improved its position at trial, the court should count additional monetary elements beyond damages at the arbitration and trial de novo.

¹³ Plaintiff Nelson contended his offer of compromise for \$26,000 plus arbitration costs—awarded by the arbitrator in the sum certain of \$1,522—meant \$26,000, under the *Niccum* rule. This result would have entitled Nelson to MAR 7.3 fees. Post-arbitration costs, if any, were not before the court. In *Niccum*, the arbitrator did not award costs, but after the trial de novo the court awarded \$1,016 for costs *Niccum* would have been entitled to after the arbitration had there been no appeal (filing fees, service fees, \$250 statutory attorney fees and medical records—no witness fees or deposition costs).

Apart from *Haley*, reported cases comparing a party's position after arbitration to its position after trial include additional relief separate from damages, such as fees, interest, and costs, in the MAR 7.3 comparison. *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 967-69, 316 P.3d 1113 (2014) (RCW 49.48.030 attorney fees denied at arbitration, but awarded at trial; court compared arbitration award to trial judgment including fees); *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 302-05, 693 P.2d 1616 (1984) (comparing judgment, including increased interest incurred after arbitration, to arbitration award; excluding new cross-claim at trial); *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 623-24, 806 P.2d 253 (1991) (comparing judgment including increased interest incurred after arbitration to arbitration award without prejudgment interest); *Colarusso v. Petersen*, 61 Wn. App. 767, 770, 812 P.2d 862 (1991) (comparing judgment, including RCW 4.84.010 costs of \$470.34 requested only from trial court, to arbitration award).

Bearden contends the ordinary person principle answers the issue presented here. In a case like this, with no offer of compromise or new claims or issues, an ordinary person would say McGill failed to improve his position because he owed \$609.39 more after trial.

B. The Court of Appeals’ Interpretation of “Position” Decreases the Risk of Incurring MAR 7.3 Fees, Making it Easier for the Appealing Party to Improve Its Position at Trial de Novo, Contrary to Legislative Intent.

1. MAR 7.3 Determinations Turn on Small Differences in the Appealing Party’s Position.

Like this case, reported decisions on MAR 7.3 fees have often turned on relatively small differences in the appealing party’s “positions” before and after trial: **\$355** (*Nelson*, at 387); **\$113** (*Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 300, 693 P.2d 1616 (1984)); **\$339** (*Monnastes v. Greenwood*, 170 Wn. App. 242, 244-46, 283 P.3d 603 (2012)); **\$700** (*Niccum v. Enquist*, 175 Wn.2d 441, 445, 286 P.3d 966 (2012)); **\$1,330** (*Tran v. Yu*, 118 Wn. App. 607, 610, 75 P.3d 970 (2003)); and **\$609.39** (*Bearden*). The effect of the Court of Appeals’ rule would be felt particularly in these cases, where only a few hundred dollars determines whether the appealing party improved its position at trial.

McGill overlooks this reality, contending “[n]othing about Division I’s 2017 decision reduces the risk to the party requesting the trial de novo, and certainly nothing reduces the risk to a defendant like Mr. McGill.” Answer, at 12. To the contrary, Bearden’s increased statutory costs (\$2,109.39) exceeded the amount of decrease in the compensatory award (\$1,500) by \$609.39: this is **the** factor that determines whether

McGill failed to improve his position because he now has to pay \$609.39 more than had he not appealed.

McGill does not deny that defendants bring the vast majority of appeals from arbitration—as of 2002, 86 percent.¹⁴ These appeals are funded by insurance companies with the resources and desire to take the gamble of lowering damages in a trial de novo.¹⁵

2. Principles of Statutory Construction Support Including RCW 4.84.010 Costs in Both Positions.

This Court could conclude the term “position” is ambiguous and apply rules of statutory construction “to discern and implement the legislature's intent.” *Williams v. Tilaye*, 174 Wn.2d 57, 61, 272 P.3d 235 (2012). When statutory language is susceptible to more than one reasonable interpretation, it is ambiguous and the Court may resort to statutory construction, legislative history, and relevant case law for assistance in determining the legislative intent. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009);

¹⁴ S.B. Rep. on SB 5373, at 2, 57th Leg., Reg. Sess. (Wash. 2002) (“Most appeals (86 percent) are filed by defendants”). The Court of Appeals cited this statistic to justify leaving out costs from the position at arbitration, in order to avoid frustrating MAR 7.3's purpose by making it “more difficult” to recover fees. *Bearden II*, 197 Wn. App. at 861 (slip op., at 8). For the reasons argued here and in his previous briefs, Bearden contends that interpretation is incorrect.

¹⁵ Insurance industry representatives testified in 2002 that they expect juries to award lower damages than arbitrators, and “[t]hat is why many of them are appealed[.]” H.B. Rep. on SB 5373, p. 3, 57th Leg., Reg. Sess. (Wash. 2002); *see also* S.B. Rep. on SB 5373, p. 3, 57th Leg., Reg. Sess. (Wash. 2002). Testifying against the bill were State Farm Ins., Washington Defense Trial Lawyers Attorneys, Safeco Corp., National Association of Independent Insurers and Allstate Insurance, Farmers Ins. *Id.*

Christie-Lambert Van & Storage Co. v. McLeod, 39 Wn. App. 298, 302, 693 P.2d 161 (1984). “[A] statutory provision should be interpreted to avoid strained or absurd consequences[.]” *Id.* at 305.¹⁶

This court construes “remedial statutes liberally in accordance with the legislative purpose behind them.” *Faciszewski v. Brown*, 187 Wn.2d 308, 320, 386 P.3d 711 (2016) (quoting *Jametsky v. Olsen*, 179 Wn.2d 756, 763, 317 P.3d 1003 (2014)). “A remedial statute is one which relates to practice, procedures[,] and remedies.” *Faciszewski*, at 320 (quotations omitted); *Silverstreak, Inc. v. Department of Labor & Indus.*, 159 Wn.2d 868, 882, 154 P.3d 891 (2007) (court construes a remedial statute liberally in favor of its beneficiary). Here, RCW 7.06.060 (MAR 7.3) is a remedial statute intended to benefit the nonappealing party.

The cases considering MAR 7.3 awards unanimously recognize that the legislature’s purpose behind the one-way fee-shifting mechanism is to encourage settlement, ease court congestion and deter meritless or unwarranted appeals from arbitration. *E.g.*, *Niccum*, 175 Wn.2d at 451; *Williams*, 174 Wn.2d at 63-64 (“unwarranted”):

¹⁶ “[D]enying an attorney fee award to *Christie-Lambert* would have the absurd consequence of defeating the statutory purposes to deter meritless appeals and to favor arbitration. Another absurd consequence is that a party would be unfairly subjected to the expense of mandatory arbitration and a trial de novo without a change in results.” *Christie-Lambert*, at 305. *Christie-Lambert* was awarded MAR 7.3 fees even though the difference between “arbitration award and trial de novo judgment against *McLeod* was de minimis.” *Id.*

The purpose of RCW 7.06 authorizing mandatory arbitration in certain civil cases is primarily to alleviate the court congestion and reduce the delay in hearing civil cases. Senate Journal, 46th Legislature (1979), at 1016-17.

Christie-Lambert, at 302. The rule’s purpose is similar to that of RCW 4.84.290, to “penalize parties who unjustifiably pursue or resist” claims; without the deterrent effect of fee-shifting, the defeated party would likely appeal “in nearly all instances” and arbitration “would tend to become a mere nullity and waste of time.” *Christie-Lambert*, at 302-03 (quotations and citations omitted). As with other one-way fee-shifting statutes, restricting “an award of attorney fees under RCW 7.06.060 and MAR 7.3 only to the successful appellee . . . reflects a policy decision favoring arbitration,” *id.* at 303, and deterring unwarranted or meritless appeals. “Both the stick and the carrot¹⁷ are directed at the party requesting the trial de novo, attempting to influence its choices in the hope of reducing court congestion.” *Do v. Farmers Ins. Co.*, 127 Wn. App. 180, 187, 110 P.3d 840 (2005).

As the legislature stated in every bill report and analysis of SB 5373 (2002) (amending RCW 7.06.060), “[t]he determination of whether or not the appealing party’s position has been improved is based on **the amount awarded in arbitration** compared to **the amount awarded at**

¹⁷ An incentive to withdraw the request for trial de novo, with the possibility of avoiding attorney fees in the court’s discretion.

the trial de novo.” *E.g.*, Final S.B. Rep. on SB 5373, at 2, 57th Leg., Reg. Sess. (Wash. 2002) (emphasis added). This Court’s 2011 amendment to MAR 6.4 clarified that the arbitrator has the authority to award costs to the prevailing party at arbitration.¹⁸ This signifies that the MAR 7.3 comparison is between the arbitration award including costs, and the trial judgment including costs.

McGill argues that the legislative language is silent on the subject of statutory costs. The legislature is presumed to know its own statutes, such as RCW 4.84.010, as well as judicial interpretation of them. *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wn.2d 488, 496, 825 P.2d 300 (1992); *Dailey v. N. Coast Life Ins. Co.*, 129 Wn. 2d 572, 581, 919 P.2d 589 (1996) (Talmadge, J., concurring). In drafting RCW 7.06.060, the legislature had no reason to specifically direct statutory costs to be included in an arbitration award or trial judgment, when that is the logical, everyday practice and law in both systems.

Nothing in the legislative scheme or history demonstrates that statutory costs should be ignored, not counted, or subtracted in comparing the arbitration award to the trial judgment resulting after trial de novo. Nor does any of the caselaw justify such a tortured interpretation. The

¹⁸

http://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=240.

Court of Appeals’ analysis turns the legislative history and intent on its head.

3. The Court of Appeals’ Interpretation Frustrates MAR 7.3’s Purposes and the Legislature’s Intent.

Instead of “furthering” the purposes and legislative intent behind MAR 7.3, *Bearden II* “frustrates” those goals. *Id.*, 197 Wn. App. at 860 (slip op., at 8). Its actual effect is to “make[] recovery of attorney fees under MAR 7.3 more difficult”, *id.*,¹⁹ thereby encouraging unwarranted, meritless, and close appeals.

Obviously, the parties incur significant actual costs with a trial de novo—only a small fraction of which are taxable costs under RCW 4.84.010.²⁰ For example, McGill’s CR 35 examiner, retained only after the arbitration, charged the parties \$12,000 for the 19 hours he spent on the case, at \$600-700 an hour. CP 157-59. The only associated taxable cost was \$1,013 for the cost of the portions of the depositions used at trial. CP 104; CP 89. (Again, *Bearden* was awarded a total of approximately \$2,109.39 in taxable post-arbitration RCW 4.84.010 costs.)

¹⁹ The *Bearden II* court acknowledged, “An interpretation that makes recovery of attorney fees under MAR 7.3 more difficult frustrates the rule’s purpose.” *Id.* at 860 (slip op., at 8).

²⁰ RCW 4.84.010 costs are limited to “a narrow range of expenses, e.g., filing fees, process fees, notary fees, portions of depositions used at arbitration or trial, statutory attorney fees (\$200), and witness fees. *Colarusso v. Petersen*, 61 Wn. App. 767, 772, 812 P.2d 862 (1991) (costs historically have been “very narrowly defined”; RCW 4.84.010 “limits that recovery to a narrow range of expenses”); *Niccum*, at 445 n.2.

Appeals such as this actually cost tens of thousands of dollars to improve the appealing party's position by a relatively small amount. Is it warranted or justified to expend \$70,000 for plaintiff's counsel (approximately what the trial court awarded in this case),²¹ a similar sum for defense counsel, costs for the court's time, and unquantifiable costs in requiring the citizen jurors to abandon their daily lives for a week of jury service, all for an appealing party to attempt to improve a damage award by \$1,500 (as here)? It is not. This is the absurd result that *Bearden II* would encourage by excluding RCW 4.84.010 costs from both positions.

Including costs in the appealing party's positions simply reflects reality. If the defeated party does not appeal, the arbitration costs will be entered as the judgment. Similarly, following a trial de novo, the verdict plus RCW 4.84.010 costs will be the amount the appealing party has to pay in the judgment. Where there is no offer to compromise, a judgment will be entered—in the amount of either the arbitration award including costs, or the judgment on the trial de novo including costs.

Thus, RCW 4.84.010 costs should be a factor in deciding whether to appeal, so that they function as a “thumb on the scale” for the appealing party to consider. Including the increased RCW 4.84.010 costs in the trial de novo position furthers MAR 7.3's intended deterrent effect: *Bearden's*

²¹ The trial court awarded *Bearden* \$71,800 in MAR 7.3 fees. *Bearden II*, 197 Wn. App. at 855 (slip op., at 2); CP 7-12.

recovery of MAR 7.3 fees follows logically because McGill failed to improve his position at the trial de novo when he had to pay \$609.39 more.

The Court of Appeals' new formula effectively reduces the size of the "stick" or threat of MAR 7.3 fees, by ignoring the nominal, predictable increased RCW 4.84.010 costs the nonappealing party necessarily incurs for trial. These additional minimal RCW 4.84.010 costs will no longer count against the appealing party. Insurers will have an incentive to appeal not only meritless causes but also close calls.

McGill ignores this deterrent effect, arguing that because **damages** are inherently unpredictable, the Court of Appeals' formula would not reduce the risk of appealing. The argument misses the point: unlike general damages, the RCW 4.84.010 costs are relatively predictable and should be weighed in deciding whether to appeal.

C. McGill Confuses Prevailing Party Status With Failing to Improve One's Position.

McGill confusingly uses a comparison of the term "prevailing party" to argue costs "are an entirely separate subject from improving one's position on the trial de novo." Answer, at 11 (citing RCW

7.06.060).²² “Prevailing party” is a term of art used in RCW 4.84.010, to allow an award of statutory attorney fees of \$200 plus specified costs to the party that wins the proceeding. “Prevailing party” status alone does not determine whether the party appealing an arbitration has improved its position. McGill does not appear to argue otherwise.

Prevailing party taxable costs are but a “thumb on the scale” to deter an unwarranted trial de novo request. Contrary to McGill’s contentions, Bearden is not urging this Court to add terms to RCW 7.06.060 and MAR 7.3.

IV. CONCLUSION

This Court should reverse the Court of Appeals and reinstate the trial court’s award of MAR 7.3 costs and fees. Bearden asks this Court to interpret MAR 7.3 as an ordinary person would and conclude that McGill failed to improve his position at the trial de novo. In the end, McGill owed Bearden \$609.39 than he would have after the arbitration award, had he not appealed and that amount been entered as the judgment.

²² RCW 7.06.060(3) simply clarifies that the amendments adding the offer of compromise option do not change the longstanding prevailing party cost provision of RCW 4.84.010.

This Court's decision will provide the guidance explicitly requested by the Court of Appeals in *Bearden*.²³ The Court should state the rule to be that in a case involving an appeal from an arbitration award without an offer of compromise or new issues or claims, the trial court deciding whether to award MAR 7.3 fees and costs simply compares the arbitration award including RCW 4.84.010 costs to the trial judgment including RCW 4.84.010 costs. That is how an ordinary person would determine whether a party improved its position.

Bearden reiterates his request for attorney fees on appeal. RAP 18.1.

DATED this 28th day of July, 2017.

Respectfully submitted,

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²³ “As is typical of many remand orders from the Washington and United States Supreme Courts, the order in this case provided no guidance about how Nelson bears on our earlier decision.” *Bearden II*, 197 Wn. App. at 858 (slip op., at 6).

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