

NO. 94320-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES D. BEARDEN,

Petitioner,

vs.

DOLPHUS A. MCGILL,

Respondent.

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable George F. B. Appel, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

REED McCLURE

By **Marilee C. Erickson**

Suzanna Shaub

Attorneys for Respondent

WSBA #16144

WSBA #41018

Address:

Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

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APPENDIX 1

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I. NATURE OF THE CASE

This case presents a question of statutory interpretation. What did the legislature intend when it said a party who fails to improve his or her position on trial de novo. RCW 7.06.060(1). The Court of Appeals correctly concluded defendant's pretrial position is the arbitrator's compensatory award and the party's posttrial position is the jury verdict. Costs are not considered.

The jury verdict was less than the arbitrator's compensatory award. Therefore, defendant Mr. McGill improved his position on trial de novo. The Court of Appeals correctly reversed the MAR 7.3 award of attorney fees to plaintiff Mr. Bearden. *Bearden v. McGill*, 197 Wn. App. 852, 391 P.3d 577 (2017), *rev. granted*, 396 P.3d 343 (2017). Division I's decision is consistent with *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016), and furthers the purposes of mandatory arbitration. This Court should affirm.

II. ISSUE PRESENTED

1. Does a defendant who requests trial de novo improve his position for purposes of MAR 7.3 when the compensatory damages awarded by the jury are less than the compensatory damages awarded by the arbitrator?

2. When determining whether a defendant requesting trial de novo improved his position, does comparing the compensatory damages awarded by the arbitrator with the compensatory damages awarded by the jury:
 - a. Comport with this Court's direction to view MAR 7.3 from the perspective of an ordinary person?
 - b. Promote simplicity in analysis?
 - c. Allow parties to more accurately predict the likely outcome of a trial de novo and further the purpose of MAR 7.3 by discouraging meritless trials de novo?
 - d. Discourage the prevailing party from manipulating its cost requests to recover attorney fees?

III. STATEMENT OF THE CASE

Plaintiff James Bearden sued defendant Dolphus McGill alleging negligence and seeking damages for his injuries from an automobile accident. (CP 288-89) Mr. Bearden moved the matter to mandatory arbitration. (CP 277-79) The arbitrator awarded Mr. Bearden \$44,000 in compensatory damages. (CP 292-93) Mr. Bearden submitted a cost bill for \$1,187.00. (CP 292, 274-75) The arbitrator issued an amended arbitration award adding \$1,187 in costs to the \$44,000 damages award. (CP 290-91)

Mr. McGill requested trial de novo. (CP 268-71) At trial, the jury awarded Mr. Bearden \$42,500 in compensatory damages. (CP 109, 246)

After trial, the court awarded \$3,296.39 in costs. (CP 86-87, 88-89) The court entered a Judgment reflecting the “Total Principal Judgment Amount” of \$42,500.00 and costs of \$3,296.39.¹ (CP 86-87)

Mr. Bearden moved for MAR 7.3 and RCW 7.06.060 attorney fees and expenses. (CP 75-84) He argued Mr. McGill had not improved his position on the trial de novo when the arbitration award plus statutory costs was compared to the jury award plus statutory costs. (CP 79) Mr. McGill opposed the motion, asserting he had improved his position at trial because the jury’s damages award was less than the arbitrator’s damage award. (CP 45-47)

The trial court accepted Mr. Bearden’s argument and awarded him \$71,800.00 in MAR 7.3 attorney fees. (CP 18-19, 20-23) Mr. McGill appealed. (CP 5-16)

¹ Somewhat confusingly, the amounts were not written in the proper blanks. In the “Judgment Summary” section, the court appears to have erroneously listed the total amount of award plus taxable costs on the line labeled “Taxable Costs & Attorney’s fees.” (CP 86) In addition, in the “Judgment” section, the court appears to have erroneously written the amount “\$42,500” in the space where the total amount of the award plus taxable costs should have been written. (*Id.*) These anomalies are not pertinent to any issue in the case.

In 2016, Division I of the Court of Appeals held Mr. McGill had improved his position on trial de novo and reversed the MAR 7.3 award.

The 2016 decision stated:

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

Bearden v. McGill, 193 Wn. App. 235, 239, 372 P.3d 138 (2016) (“*Bearden I*”).

Mr. Bearden petitioned for review of *Bearden I*. This Court granted the petition and remanded the case to Division I to reconsider its decision in light of the 2016 case of *Nelson v. Erickson*, 186 Wn.2d 385, 377 P.3d 196 (2016). *Bearden v. McGill*, 186 Wn.2d 1009, 380 P.3d 489 (2016). In *Nelson*, this Court held that a compromise offer should be read as an ordinary person would understand it. And determining whether a party has improved his position on the trial de novo is determined from the perspective of an ordinary person. Applying this test, the *Nelson* Court compared the pretrial position to the posttrial position, exclusive of statutory costs. 186 Wn. 2d. at 387, 390-91, 392.

On remand in 2017, Division I reached the same result—that Mr. McGill had improved his position on trial de novo--on a different rationale.

Division I explained:

[] Nelson and Niccum apply the same rule: 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. Also, in both Nelson and Niccum the court determined the requesting party’s posttrial position by looking at only the jury verdict, not the final judgment including costs.

...

[W]e follow the Supreme Court’s example and adopt the jury verdict as McGill’s posttrial position.

...

To determine a requesting party’s position pretrial when no offer of compromise has been made, a court looks at the arbitration award.

...

[W]e conclude that like the posttrial “position” of the requesting party, that party’s pretrial position is the initial arbitration award without costs.

197 Wn. App. at 858-60 (“*Bearden II*”) (footnotes omitted),

Division I also reasoned that excluding statutory costs in the comparison supports the mandatory arbitration purpose of discouraging meritless appeals. If arbitration statutory costs are included to determine the de noving party’s pretrial position, the pretrial position will generally be a greater amount and would make it easier for a de noving party to improve the position at the trial de novo.

Division I concluded:

On reconsideration in light of Nelson, we revise our view of the MAR 7.3 analysis. We hold that a trial court should determine a requesting party's position after trial by looking at the damages the court awarded, exclusive of costs, as the Supreme Court did in Nelson and Niccum. Under this test, McGill improved his position at trial. We therefore reverse the trial court's award of attorney fees to Bearden under MAR 7.3 and remand.

197 Wn. App. at 861.

This Court granted review under RAP 13.4. This Court should affirm.

IV. ARGUMENT

A. DIVISION I'S 2017 DECISION IS CORRECT AND CONSISTENT WITH WASHINGTON APPELLATE DECISIONS.

In assessing whether Mr. McGill improved his position, *Bearden II* correctly compared the compensatory damages awarded by the arbitrator with the compensatory damages awarded by the jury on trial de novo, exclusive of costs. This holding is consistent with Washington appellate decisions, including *Nelson* and *Niccum v. Enquist*, 175 Wn.2d 441, 452, 286 P.3d 966 (2012).

In both *Niccum* and *Nelson* (cases involving the award of fees at trial de novo based on offers of compromise), this Court compared only the compromise offer amount to the jury trial award. In other words, the requesting party's posttrial position for comparison purposes was the jury verdict, not the final judgment including costs. See *Niccum*, 175 Wn.2d at

452; *Nelson*, 186 Wn.2d at 387-88, 392. Statutory costs were excluded from the comparison.

Bearden II explains that both the *Nelson* and *Niccum* decisions require that courts applying MAR 7.3 view the pretrial and posttrial positions of the party requesting trial de novo from the perspective of “an ordinary person.” 197 Wn. App. at 858-59 (footnotes omitted) citing *Nelson*, 186 Wn.2d at 387.

Applying this rule, *Bearden II* correctly determined that an ordinary person would consider a defendant’s pretrial position for MAR 7.3 purposes as the arbitration award without costs. This is appropriate because costs at arbitration are generally statutory in nature and not based on the merits of the case. For example, the arbitrator may award \$2,000 in costs whether the compensatory award is \$50.00 or \$50,000.

Further, as *Bearden II* pointed out, once the de novo request is asserted, the prevailing party who sought costs at arbitration does not get paid those costs. 197 Wn. App. at 860. Including them in the party’s pretrial position therefore is inappropriate and contrary to what an ordinary person would understand.

Applying the “ordinary person” test again, *Bearden II* also properly determined that a defendant’s posttrial position is the jury’s award of compensatory damages, exclusive of costs. As recognized by *Bearden II*,

this application of the ordinary person test, “promotes simplicity in analysis and avoids the problems of confusion, vagueness, and need for dissection that concerned the court” in *Nelson*. 197 Wn. App. at 859; *Nelson*, 186 Wn.2d at 391-92. This furthers the policy of the mandatory arbitration system.

An ordinary person would understand that the arbitrator’s award on the merits should be compared to the jury’s award on the merits. Stated differently, an ordinary person would not conclude that a party improved his position when that party did so only by winning on a claim that was not arbitrated. On the other hand, a straight comparison of the compensatory damages awarded by the arbitrator with the compensatory damages awarded in the trial de novo is the most uncomplicated approach and comports with the purpose of mandatory arbitration.

This straightforward comparison also promotes predictability for litigants – another aim of Washington’s MAR system. As this Court explained in both *Nelson* and *Niccum*, the purpose of mandatory arbitration is to encourage settlement and discourage meritless appeals. *Nelson*, 186 Wn.2d at 391 (citing *Niccum*, 175 Wn.2d at 452). The *Nelson* Court explained, “In order to do so, parties must be able to determine ‘what position it must improve upon to avoid paying reasonable attorney's fees if it elects to continue to trial.’” *Id.*

Analyzing MAR 7.3, the concurrence in *Haley v. Highland*, 142 Wn.2d 135, 12 P.3d 119 (2000) written by Justice Talmadge explains, “The award of fees under this provision should compel parties to assess the arbitrator's award and the likely outcome of a trial *de novo* with frankness and prudence; meritless trials *de novo* must be deterred.” *Haley* concurrence (Talmadge, J.) at 159. To best advance this policy, courts should compare the compensatory damages awarded by the arbitrator to the prevailing party with the compensatory damages awarded in the trial *de novo*.

Mr. McGill, as the defendant, had no control over what costs Mr. Bearden would request and ultimately be awarded by the trial court. If costs are included in the comparison for MAR 7.3 fees, parties requesting trial *de novo* like Mr. McGill will be unable to know “what position it must improve upon to avoid paying reasonable attorney's fees if it elects to continue to trial.”

In *Nelson*, this Court did not direct that “costs must be included” in assessing a party’s pretrial position in every case. (Petition at 11) In *Nelson*, the amount of costs was known and specifically referenced in the offer of compromise. The requesting party could calculate the amount the opponent was willing to accept in settlement with certainty. The Court

therefore concluded that “an ordinary person” would have understood the offer to include the known arbitration costs.

Here the only issue in dispute was the amount of Mr. Bearden’s damages. Therefore, Mr. Bearden was the prevailing party at arbitration. And Mr. Bearden was the prevailing party at trial. Mr. McGill did not know and could not predict what costs Mr. Bearden would seek at the trial de novo.

Mr. Bearden submits the test for determining whether a party has improved one’s position on trial de novo requires a comparison of the pretrial position of the arbitration award plus costs and the posttrial position of the jury award plus costs. This test reduces predictability and more likely promotes more trials de novo. It also permits gamesmanship among litigants seeking to recover attorney fees. If costs are included in the MAR 7.3 analysis and the prevailing party at arbitration knows or has reason to believe that the other party will request trial de novo, the prevailing party may purposefully forego submitting a cost bill following arbitration and then seek inflated costs after trial. Excluding costs from the determination of whether the de novoing party improved his position eliminates this possible manipulation of costs in order to recover attorney fees.

Mr. Bearden argues that *Bearden II* decreases the deterrence effect of a trial de novo. (Petition at 15-16, 17-19). But *Bearden II* correctly

recognizes that including costs in a party's pretrial position actually makes it easier for defendants to improve their position at the trial de novo. Incentivizing defendants to request trials de novo runs counter to the purpose of MAR 7.3 to encourage settlement and discourage meritless appeals.

In fact, under *Bearden II* excluding costs from the comparison, the same disincentives to request trial de novo exist. Nothing in the decision to exclude costs from the MAR 7.3 comparison reduces the risk to the party requesting the trial de novo, and certainly nothing reduces the risk to defendants like Mr. McGill. Because compensatory damages cannot be computed by any formula or standard, a party requesting the trial de novo always takes a risk of trying to predict the fact finder's damages award.

If the fact finder makes a larger compensatory damage award than the arbitrator, the requesting party must still pay the MAR 7.3 attorneys' fee and litigation expenses. And if the requesting party is also not the prevailing party, the requesting party still must pay the damages award plus the RCW ch. 4.84 costs to the prevailing party, as Mr. McGill did in this case. (CP 1-4)

B. DIVISION I'S DECISION TO EXCLUDE STATUTORY COSTS FROM THE PRETRIAL AND POSTTRIAL COMPARISON IS CONSISTENT WITH STATUTES, RULES, AND THE LEGISLATIVE INTENT.

Bearden II's test of excluding costs from its analysis of whether the requesting party improves his position on trial de novo follows the established rules of statutory construction and implements the legislative intent.

Civil mandatory arbitration is founded on compensatory relief. A non-maintenance or child support case is only subject to mandatory arbitration if it fits two categories: (1) the sole relief is a monetary judgment and (2) the monetary judgment, "exclusive of interest and costs," is less than \$50,000. RCW 7.06.020(1). The legislature specifically excluded "interest and costs" from determining whether the case is subject to mandatory arbitration. The same test—excluding "interest and costs"—should apply when determining whether a defendant improves his position on trial de novo.

When the legislature amended RCW 7.06.060 in 2002, it added subsection (3), which allows the prevailing party to recover the statutory costs for both the arbitration and the trial. *See* SB 5373 in Appendix 1. RCW 7.06.060(3) provides:

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.

The statutory language treats a “prevailing party” entitled to RCW 4.84 costs as a separate and distinct concept from a requesting party improving his or her position on the trial de novo. *State v. Tracer*, 173 Wn.2d 708, 718, 272 P.3d 199 (2012) (basic rule of statutory construction that legislature intends different terms used in same statute to have different meanings). Based on the clear language of the statute, the legislature intended the entities to be distinct.

This suggests that in determining whether a party improved his position, one does not consider who the prevailing party is. In other words, the nonmoving party can be the prevailing party under the statute, even when the de novoing party has improved his or her position at the trial de novo.

Since the statutes treat the prevailing party as entirely separate from the issue of whether a party improved his position for purposes of attorney fees, it follows that trial courts also treat the related issue of costs awarded to the prevailing party as distinct from the determination of whether the appealing party improved his position. Statutory costs are an entirely separate subject from improving one’s position on the trial de novo.

Mr. Bearden contends the legislature intended that statutory costs are to be included in determining whether a de novo party has improved his or her position. (Pet. at 4-5, 1-17) He points to two amendments as support for his legislative intent argument. First, the bill analysis of the 2002 amendment to RCW 7.06.050 and .060 that referenced a comparison of “the amount awarded in arbitration” and “the amount awarded at the trial de novo.” (Pet. 16) Second, the 2011 amendment to MAR 6.4. Neither amendment provides guidance on the phrase at issue here: “improves his or her position on trial de novo.”

The 2002 bill analysis speaks generically about “amount awarded.” There is no indication whether the legislature meant statutory costs awarded to the prevailing party are to be included or excluded from determining whether a party has “improved his or her position.”

The 2011 amendment to MAR 6.4 also is silent about the question of whether one “improve[s] his or her position.” The MAR 6.4 amendment established a specific procedure for seeking and awarding fees and costs at arbitration.

Mr. Bearden’s position requires this Court to read words into the statute and rule. A court has the duty to effectuate the legislature’s intent in enacting a statute. The court must apply the language as the legislature wrote it, not amend the statute by judicial construction. *Salts v. Estes*, 133

Wn.2d 160, 170, 943 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).

RCW 7.06.060(1) does not say a party fails to improve his or her position on trial de novo when the arbitrator’s award plus prevailing party costs is less than the jury verdict plus prevailing party costs. “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.’” *State v. Delgado*, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003). This Court should not adopt Mr. Bearden’s position under the guise of interpreting the statute because to do so would rewrite the statute.

Adopting Mr. Bearden’s interpretation of the statutes and rules runs counter to not only the statutory language, but the clear legislative intent. *Bearden II* is consistent with the statutes and rules, follows the established rules of statutory construction, and implements the legislative intent.

This Court should affirm.

V. CONCLUSION

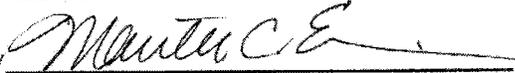
The Court of Appeals correctly reversed the trial court’s award of MAR 7.3 attorney fees and costs to Mr. Bearden because Mr. McGill improved his position on the trial de novo. When the compensatory

V. CONCLUSION

The Court of Appeals correctly reversed the trial court's award of MAR 7.3 attorney fees and costs to Mr. Bearden because Mr. McGill improved his position on the trial de novo. When the compensatory damages of \$44,000 awarded by the arbitrator—Mr. Bearden's pretrial position—is compared to the compensatory damages of \$42,500 awarded at the trial de novo—the posttrial position—Mr. McGill owed less. Mr. McGill respectfully requests that this Court affirm.

DATED this 20th day of July, 2017.

REED McCLURE

By 
Marilee C. Erickson WSBA #16144
Suzanna Shaub WSBA #41018
Attorneys for Respondent

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APPENDIX 1

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 Filed in Office of Secretary of State April 3, 2002.

CHAPTER 339

[Senate Bill 5373]

ARBITRATION—OFFER OF COMPROMISE

AN ACT Relating to mandatory arbitration of civil actions; amending RCW 7.06.050 and 7.06.060; and adding a new section to chapter 7.06 RCW.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 7.06.050 and 1982 c 188 s 2 are each amended to read as follows:

(1) Following a hearing as prescribed by court rule, the arbitrator shall file his 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.

Sec. 2. RCW 7.06.060 and 1979 c 103 s 6 are each amended to read as follows:

(1) The ((supreme)) superior court ((may by rule provide for)) shall assess costs and reasonable attorney's fees ((that may be assessed)) against a party ((appealing from)) who appeals the award ((who)) 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.

NEW SECTION. Sec. 3. A new section is added to chapter 7.06 RCW to read as follows:

RCW 7.06.050 and 7.06.060 apply to all requests for a trial de novo filed pursuant to and in appeal of an arbitrator's decision and filed on or after the effective date of this act.

Passed the Senate February 11, 2002.

Passed the House March 7, 2002.

Approved by the Governor April 3, 2002.

Filed in Office of Secretary of State April 3, 2002.

CHAPTER 340

[Engrossed Substitute House Bill 2505]
CIVIL DISORDER TRAINING

AN ACT Relating to instruction in civil disorder; reenacting and amending RCW 9.94A.515; adding a new section to chapter 9A.48 RCW; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. A new section is added to chapter 9A.48 RCW to read as follows:

(1) A person is guilty of civil disorder training if he or she teaches or demonstrates to any other person the use, application, or making of any device or technique capable of causing significant bodily injury or death to persons, knowing, or having reason to know or intending that same will be unlawfully employed for use in, or in furtherance of, a civil disorder.

(2) Civil disorder training is a class B felony.

(3) Nothing in this section makes unlawful any act of any law enforcement officer that is performed in the lawful performance of his or her official duties.

(4) Nothing in this section makes unlawful any act of firearms training, target shooting, or other firearms activity, so long as it is not done for the purpose of furthering a civil disorder.

(5) For the purposes of this section:

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