

WASHINGTON CASE UPDATE

Post-Arbitration Sanctions Are Not Considered When Determining Whether a Party Improved its Position at Trial De Novo

From the desk of Kyle Riley: Washington's recreational immunity statute protects landowners from liability if they hold out their land to the public for recreational use. What analysis does a court use to determine whether immunity applies? Read on to find out.

Claims Pointer: In this case arising out of a fall on a trail open for public use, the Court of Appeals held that summary judgment was inappropriate where material issues of fact existed as to whether the land was held open to the public solely for recreational use. The case provides clear guidelines for determining whether recreational immunity will apply, an important consideration for landowners (and their insurers) who allow the public to use their lands for recreation.

Hedger v. Groeschell, No. 74149-7-I, Washington Court of Appeals, Div. I (May 15, 2017)

Maria Hedger ("Hedger") and Lisa Groeschell ("Groeschell") were involved in a car accident in September 2013. Hedger was proceeding straight through the intersection as Groeschell started to make a left turn, and the two vehicles collided. Hedger sued Groeschell for negligence, and the case proceeded to mandatory arbitration where the arbitrator found Groeschell to be entirely at fault and awarded Hedger \$17,880.10 in damages. The arbitrator later amended the award to include an additional \$931.76 in statutory costs and fees, bringing the total award to \$18,811.86.

Groeschell requested a trial de novo. Prior to trial, the trial court sanctioned Groeschell for failing to participate in good faith in the mediation and failing to timely disclose expert witness reports. Then, a few days before trial, Groeschell raised a new defense that she later withdrew when she could not produce written documents showing she had raised it at arbitration. The trial court sanctioned her \$3,125 for procedural bad faith.

Following trial, the jury returned a verdict for Hedger and awarded her \$11,200 in combined economic and general damages. However, because the jury also found her to be five percent at fault, her total damage award at trial was \$10,640. The court awarded an additional \$2,162.15 in statutory costs, and when the sanctions total of \$6,147.49 was taken into account, the total judgment after

the trial de novo was \$18,949.64. Hedger moved for attorney fees on the ground that Groeschell had not improved her position after the trial de novo. The court agreed and awarded Hedger over \$60,000 in attorney fees. Groeschell appealed the award of attorney fees, arguing that she improved her position at the trial de novo because the jury awarded less in damages than the arbitrator. Hedger contended that the trial court properly compared the total judgment after arbitration with the total judgment after the trial de novo.

In Washington, when a party seeks a trial de novo after mandatory arbitration and fails to improve her position, she must pay the other party's reasonable attorney fees. Washington courts have recently held that a party's position prior to trial should be interpreted as an ordinary person would (see our prior case update on *Nelson v. Erickson*: <https://smithfreed.com/resource/washington-case-law-update-including-costs-in-settlement-offers-may-cost-you/>), and that the trial court should only compare the jury verdict and the arbitrator's initial award (see our prior case update on *Bearden v. McGill*: <https://smithfreed.com/resource/what-amounts-will-the-court-consider-when-comparing-an-arbitration-award-and-a-trial-judgment/>). Because Washington courts will not conclude that a party has improved its position when the party did so only by prevailing on a claim that was not arbitrated, the trial court must consider only the portion of a jury's verdict attributable to claims that were arbitrated.

case in point...



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Hedger pointed out that her award at arbitration was for \$17,880.10, and that while the jury only awarded Hedger \$10,640.00 at trial de novo, the final judgment, including statutory costs and sanctions, was \$18,949.64. Hedger argued that the court had to include the more than \$6,000 in sanctions when evaluating the awards or it would allow Groeschell to “game the system.” The Court of Appeals, however, noted that the trial court imposed the sanctions after the mediation, that none of the sanctions were related to the merits of the case, and that none of the sanctions were or could have been litigated before the arbitrator because each of them was based on Groeschell’s conduct during the trial de novo. Moreover, the court pointed out that the purpose of the rule requiring a court to award attorney fees where a party seeking trial de novo fails to improve its position is to encourage meritless appeals. Given that the jury reduced Hedger’s damages by roughly 40 percent, the Court determined that Groeschell’s appeal clearly had merit. Accordingly, an award of attorney fees was inappropriate, and the case was remanded to the trial court for entry of a new judgment.

View full opinion at: <https://www.courts.wa.gov/opinions/pdf/741497.PDF>

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