

No. 66753-0-1

STATE OF WASHINGTON COURT OF APPEALS
DIVISION I

DOLORES JOHNSON
Appellant

v.

SARA ROBERTSHAW,
Respondent.

On Appeal from the King County Superior Court
Case No. 10-2-16830-3 SEA
The Honorable Jeffrey Ramsdell

BRIEF OF RESPONDENT SARA ROBERTSHAW

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF THE ISSUES.....	5
III. STATEMENT OF THE CASE.....	6
A. This Case Was Resolved Through Mandatory Arbitration.....	6
B. Ms. Johnson Did Not Request a Trial <i>De Novo</i> , So the Superior Court Entered Judgment.....	7
C. Ms. Johnson Is Seeking Direct Appellate Review Without Requesting a Trial <i>De Novo</i>	8
IV. STANDARD OF REVIEW	9
V. LEGAL ARGUMENT	10
A. The Court of Appeals Lacks Jurisdiction to Accept Direct Appellate Review After Entry of Judgment On a Mandatory Arbitration Award.....	10
B. The Superior Court Lacks Jurisdiction to Alter the Arbitrator’s Award by Granting the Requested Offset.....	14
1. <i>Trusley v. Statler</i>	15
2. <i>Mercier v. Geico</i>	17
C. Ms. Johnson Waived Any Right to Offset	23
D. The Superior Court Acted Within Its Discretionary Authority When It Denied Ms. Johnson’s Untimely Request for an Offset	29
E. Ms. Robertshaw Is Entitled To Her Attorneys’ Fees and Expenses Under RCW 7.06.060(1), MAR 7.3, and RAP 18.9	30
1. RCW 7.06.060 and MAR 7.3.....	30

2.	RAP 18.9.....	32
VI.	CONCLUSION.....	33

TABLE OF AUTHORITIES

CASES

<i>Beggs v. Department of Soc. & Health Servs.</i> , 171 Wn.2d 69 (2011)	9
<i>Cook v. Selland Constr., Inc.</i> , 81 Wn. App. 98 (1996)	2, 13
<i>Crosby v. Spokane County</i> , 137 Wn.2d 296 (1999)	9
<i>Dill v. Michelson Realty Co.</i> , 152 Wn. App. 815 (2009)	2, 10, 11, 12, 13, 31
<i>Eagle Point Condominium Owners Assoc. v. Coy</i> , 102 Wn. App. 697 (2000)	9, 29
<i>In re Estates of Palmer</i> , 145 Wn. App. 249 (2008)	23
<i>Kim v. Pham</i> , 95 Wn. App. 439 (1999)	31
<i>Locke v. City of Seattle</i> , 133 Wn. App. 696 (2006)	23
<i>MacKay v. MacKay</i> , 55 Wn.2d 344 (1959)	29
<i>Mahler v. Szucs</i> , 135 Wn.2d 398 (1998)	28
<i>Mahoney v. Tingley</i> , 85 Wn.2d 95 (1975)	24, 25
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518 (2003)	2, 12, 13, 21, 32
<i>Mercier v. Geico</i> , 139 Wn. App. 891 (2007)	3, 14, 17, 18, 19, 20
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804 (1997)	10

<i>Perkins Coie v. Williams</i> , 84 Wn. App. 733 (1997)	30, 31
<i>Phillips v. Richmond</i> , 59 Wn.2d 571 (1962)	9
<i>Pybas v. Paolino</i> , 73 Wn. App. 393 (1994)	2, 14
<i>Sherry v. Financial Indem. Co.</i> , 160 Wn.2d 611 (2007)	20, 22
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12 (1971)	29
<i>State ex rel. Clark v. Hogan</i> , 49 Wn.2d 457 (1956)	29
<i>State ex rel. Nielsen v. Superior Court</i> , 7 Wn.2d 562 (1941)	29
<i>Tolson v. Allstate Ins. Co.</i> , 108 Wn. App. 495 (2001)	20
<i>Trusley v. Statler</i> , 69 Wn. App. 462 (1993)	3, 14, 15, 16, 17, 19
<i>Wiley v. Rehak</i> , 143 Wn.2d 339 (2001)	30, 31

STATUTES

RCW 4.84.185	15, 16
RCW 4.84.250	15, 16, 19
RCW 7.06.050	11
RCW 7.06.060	4, 30, 31
RCW Chapter 7.04.....	21
RCW Chapter 7.06.....	1, 6, 10, 12, 21

RULES

RAP 18.1.....	5
---------------	---

RAP 18.9.....	4, 5, 30, 32, 33
CR 8	23
MAR 6.3	2, 11, 12
MAR 7.3	4, 30, 31

I. INTRODUCTION

This case was resolved through mandatory arbitration, as provided for in RCW Chapter 7.06. The arbitrator awarded Ms. Robertshaw \$12,443.75.

During the course of this litigation, Ms. Johnson did not plead offset as an affirmative defense, she did not offer evidence of any offset at the arbitration, and she did not ask the arbitrator for any offset against his award. Accordingly, the arbitrator did not grant Ms. Johnson an offset, and he did not apply any offset to his award. ***Importantly, Ms. Johnson did not request a trial de novo after the arbitrator filed his award with the Superior Court.***

Ms. Robertshaw moved for entry of judgment on the arbitration award. In response, Ms. Johnson asked the Superior Court—for the very first time—for an offset against the award for medical expenses paid by her insurer on behalf of Ms. Robertshaw. The Superior Court declined the requested offset and entered judgment in the amount of the award. Ms. Johnson moved for reconsideration of the order entering judgment. The Superior Court denied that motion.

Ms. Johnson now seeks review of the Superior Court's order denying her motion for reconsideration, and she asks this Court to remand this matter to Superior Court for application of the requested offset and for entry of a corrected judgment. The Court must dismiss this appeal for four reasons.

First, this Court lacks jurisdiction to accept direct appellate review after judgment is entered on a mandatory arbitration award. The Washington Supreme Court has ruled that “trial de novo is the sole method to seek judicial review from mandatory arbitration.” *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 522 (2003). If none of the parties requests a trial *de novo*, the prevailing party “shall present to the court a judgment on the award of arbitration for entry as the final judgment,” and that judgment “is not subject to appellate review and it may not be attacked or set aside except by a motion to vacate under CR 60.” MAR 6.3; *see also Dill v. Michelson Realty Co.*, 152 Wn. App. 815, 820 (2009) (“A judgment that is entered on a mandatory arbitration award is generally not subject to appellate review.”); *Cook v. Selland Constr., Inc.*, 81 Wn. App. 98, 102 (1996) (“The correct avenue for review of an adverse arbitration award is trial de novo.... Direct appeals from the judgment on the arbitration award are not proper unless the appeal relates to a defect inherent in the judgment or the means by which the judgment was obtained.”); *Pybas v. Paolino*, 73 Wn. App. 393, 398 (1994) (“Furthermore, a judgment on the award is not subject to appellate review, nor subject to attack or vacation except by a motion to vacate under CR 60.”).

As indicated above, Ms. Johnson did not request a trial *de novo*. She also did not file a motion to vacate under CR 60. Accordingly, this Court lacks jurisdiction to consider the issues raised in Ms. Johnson’s appeal.

Second, the Superior Court lacks jurisdiction to alter the arbitrator’s award by granting the requested offset. This too is due to the fact that Ms. Johnson did not request a trial *de novo*. “A party to a mandatory arbitration who does not ask for a trial *de novo* thereby accepts the arbitrator’s award ‘and may not alter it by requesting action by the Superior Court which would amend that award.’” *Mercier v. Geico*, 139 Wn. App. 891, 901 (2007) (*quoting Trusley v. Statler*, 69 Wn. App. 462, 465 (1993)). Accordingly, even if this Court *were* to address the issues raised in Ms. Johnson’s appeal—though it should not—her appeal fails on its merits because the Superior Court lacks jurisdiction to grant the requested relief.

Third, even if the Superior Court *did* have jurisdiction to alter the arbitrator’s award by granting the requested offset—though the law is clear that it does not—Ms. Johnson waived any right she might have had to an offset when (1) Ms. Johnson did not plead offset as an affirmative defense, (2) Ms. Johnson did not offer evidence of any offset at the arbitration, (3) Ms. Johnson did not ask the arbitrator for any offset against his award, (4) there is no proper evidence in the record to prove the merits or the amount of any offset, (5) Ms. Johnson did not request a trial *de novo* to challenge the arbitrator’s failure to grant her an offset, and (6) *Ms. Johnson admits that she did all of this intentionally, for “tactical reasons.”* (Br. of Appellant Dolores Johnson, p. 10.)

Although Ms. Johnson had the burden of proving her own affirmative defenses, she intentionally did not take any steps whatsoever

to plead or prove the merits or amount of her alleged offset. Instead, she made a “tactical” decision to wait until *after* the arbitration award had been entered, and *after* the time for requesting a trial *de novo* had passed, before seeking relief from the Superior Court. Under these circumstances, the Superior Court was justified in refusing Ms. Johnson’s request for an offset.

Ms. Johnson argues repeatedly that she is somehow “entitled” to an offset. Ms. Johnson is mistaken. A party to litigation is not automatically “entitled” to affirmative relief. They are entitled to an *opportunity* to prove their right to affirmative relief. In this case, Ms. Johnson received an opportunity to plead and prove the merits of her affirmative defense, but she intentionally did not take advantage of it for “tactical reasons,” thereby waiving that defense.

Fourth, Ms. Johnson cannot argue, and in fact she does not argue, that the Superior Court otherwise abused its discretion by denying her untimely request for an offset.

For these and other reasons discussed below, the Court must dismiss Ms. Johnson’s appeal. Upon doing so, the Court must award Ms. Robertshaw her attorneys’ fees and expenses under RCW 7.06.060(1), MAR 7.3, and RAP 18.9.

RCW 7.06.060(1) and MAR 7.3 state that courts “shall” assess attorneys’ fees and expenses if a party files an appeal from a mandatory arbitration and they fail to improve their position on appeal. If the Court dismisses Ms. Johnson’s appeal, she will have failed to improve her

position, and Ms. Robertshaw will be entitled to her attorneys' fees and expenses.

RAP 18.9 states that this Court may award Ms. Robertshaw attorneys' fees and expenses for having to respond to a frivolous appeal. This appeal is frivolous because the law is clear that this Court lacks jurisdiction to accept direct appellate review after judgment is entered on a mandatory arbitration award, and because the Superior Court lacks jurisdiction to alter the arbitrator's award by granting the requested offset.

Pursuant to RAP 18.1(b), Ms. Robertshaw has devoted a section of her brief below to her request for attorneys' fees and expenses under the cited statute and civil rules.

II. STATEMENT OF THE ISSUES

1. Whether the Court of Appeals lacks jurisdiction to accept direct appellate review after judgment is entered on a mandatory arbitration award when none of the parties requested a trial *de novo* of the award and none of the parties moved to vacate the judgment under CR 60.

2. Whether the Superior Court lacks jurisdiction to alter a mandatory arbitration award when none of the parties requested a trial *de novo* of the award.

3. Whether Ms. Johnson waived any right she might have had to an offset when (1) Ms. Johnson did not plead offset as an affirmative defense, (2) Ms. Johnson did not offer evidence of any offset at the arbitration, (3) Ms. Johnson did not ask the arbitrator for any offset against his award, (4) there is no proper evidence in the record to prove the merits

or the amount of any offset, (5) Ms. Johnson did not request a trial *de novo* to challenge the arbitrator's failure to grant her an offset, and (6) Ms. Johnson admits that she did all of this intentionally, for "tactical reasons."

4. Whether the Superior Court acted within its discretionary authority when it denied Ms. Johnson's untimely request for an offset.

III. STATEMENT OF THE CASE

This lawsuit arises from an automobile-pedestrian accident that took place on October 30, 2007. (CP 1-3.) Ms. Robertshaw was at an intersection crossing the street in a crosswalk, when Ms. Johnson made a right hand turn and struck Ms. Robertshaw with her vehicle. (CP 1-3.)

Ms. Robertshaw filed this lawsuit in May 2010. (CP 1-3.) Ms. Johnson answered the Complaint for Damages in June 2010. (CP 4-6.) Ms. Johnson's answer did not plead offset as an affirmative defense, and Ms. Johnson did not otherwise indicate that she would be pursuing offset as an affirmative defense. (CP 4-6.)

A. This Case Was Resolved Through Mandatory Arbitration

In July 2010, Ms. Robertshaw transferred this case to mandatory arbitration, as provided for in RCW Chapter 7.06. The arbitration took place in November 2010.

During the arbitration, Ms. Johnson did not offer evidence of any offset, and she did not ask the arbitrator for any offset against his award. As a result, there is no proper evidence in the record to prove the merits or the amount of any offset. (CP 7-9.)

The arbitrator filed his arbitration award with the Superior Court on November 29, 2010. (CP 7.) The arbitrator found Ms. Johnson 100% liable for the accident and he awarded Ms. Robertshaw medical specials in the amount of \$4,662.00, lost wages in the amount of \$144.00, and general damages in the amount of \$6,500.00, for a total of \$11,306.00. (CP 7, 29-30.) The arbitrator did not grant Ms. Johnson any offset, and he did not apply any offset to his award. (CP 7.)

The arbitrator filed an amended arbitration award on December 7, 2010. (CP 8-9.) The amended arbitration award included the amount from the prior award, and it granted Ms. Robertshaw statutory costs and attorneys' fees in the amount of \$1,137.75, bringing the total award to \$12,443.75. (CP 8-9.) Once again, the arbitrator did not grant Ms. Johnson any offset, and he did not apply any offset to his amended arbitration award. (CP 8-9.)

B. Ms. Johnson Did Not Request a Trial *De Novo*, So the Superior Court Entered Judgment

Ms. Johnson did not request a trial *de novo* within twenty days after the arbitrator filed the amended arbitration award. (CP 10-17.) Accordingly, Ms. Robertshaw moved for entry of judgment in the full amount of the amended arbitration award. (CP 10-17.)

Ms. Johnson opposed Ms. Robertshaw's motion for entry of judgment. (CP 18-38.) Ms. Johnson argued—for the first time—that she was entitled to an offset for medical expenses paid by her insurer, State Farm, on behalf of Ms. Robertshaw. (CP 18-38.) Ms. Johnson submitted

a declaration from her insurance adjuster, who stated that State Farm had paid a total of \$4,437.40 towards Ms. Robertshaw's medical expenses, and Ms. Johnson requested an offset against the judgment in that amount. (CP 18-38.)

Ms. Robertshaw filed a reply brief in support of her motion for entry of judgment. (CP 39-44.) Ms. Robertshaw argued that the Superior Court lacked jurisdiction to alter the arbitrator's award by granting the requested offset, due to the fact that Ms. Johnson had not requested a trial *de novo*. (CP 39-44.) Ms. Robertshaw also argued that Ms. Johnson waived the right to an offset by failing to plead or prove the merits or amount of the alleged offset until after the arbitration award was entered and after the time for requesting a trial *de novo* had passed. (CP 39-44.)

The Superior Court denied Ms. Johnson's request for an offset and entered judgment in the amount of the amended arbitration award. (CP 45-46.) Ms. Johnson moved for reconsideration of the order entering judgment. (CP 47-55.) The Superior Court denied Ms. Johnson's motion for reconsideration. (CP 56-57.)

C. Ms. Johnson Is Seeking Direct Appellate Review Without Requesting a Trial *De Novo*

Ms. Johnson now seeks direct appellate review of the Superior Court's order denying her motion for reconsideration, and she asks this Court to remand this matter to Superior Court for application of the requested offset and for entry of a corrected judgment. (CP 58-61; Br. of Appellant Dolores Johnson, p. 20.)

IV. STANDARD OF REVIEW

There are several questions before this Court, and they are subject to two different standards of review.

The primary questions are (1) whether this Court lacks jurisdiction to accept direct appellate review after judgment is entered on a mandatory arbitration award, and (2) whether the Superior Court lacks jurisdiction to alter the arbitrator's award by granting the requested offset when Ms. Johnson failed to request a trial *de novo*. These questions are subject to *de novo* review. *Crosby v. Spokane County*, 137 Wn.2d 296, 301 (1999) (“The issue whether a court has jurisdiction is a question of law subject to *de novo* review.”). Any questions of statutory interpretation central to deciding these jurisdictional issues are also subject to *de novo* review. *Beggs v. Department of Soc. & Health Servs.*, 171 Wn.2d 69, 75 (2011) (“Statutory interpretation is a question of law reviewed *de novo*.”)

The other questions before the Court are (3) whether Ms. Johnson waived any right she might have had to an offset, and (4) whether the Superior Court acted within its discretionary authority when it denied her untimely request for an offset. These decisions are reviewed for abuse of discretion. *Phillips v. Richmond*, 59 Wn.2d 571, 575 (1962) (A trial court's decision about whether to give effect to an affirmative defense is reviewed for abuse of discretion); *Eagle Point Condominium Owners Assoc. v. Coy*, 102 Wn. App. 697, 701 (2000) (“We review a trial court's decision to grant an offset for abuse of discretion.”).

V. LEGAL ARGUMENT

Ms. Robertshaw will address Ms. Johnson's arguments out of order for two reasons. First, Ms. Johnson did not address the fact that this Court lacks jurisdiction to accept direct appellate review after entry of judgment on a mandatory arbitration award. This is the first issue that the Court should address because it affects the viability of the entire appeal.

Second, although Ms. Johnson opens her brief with the argument that she is "entitled" to offset, this argument is more properly addressed in connection with Ms. Johnson's waiver of offset as an affirmative defense. Accordingly, Ms. Robertshaw will address these two arguments together in the latter part of this brief.

With this understanding, Mr. Robertshaw now turns to the merits of Ms. Johnson's appeal.

A. **The Court of Appeals Lacks Jurisdiction to Accept Direct Appellate Review After Entry of Judgment On a Mandatory Arbitration Award**

To understand fully the reasons why this Court lacks jurisdiction to accept direct appellate review after entry of judgment on a mandatory arbitration award, some understanding of the statutes and civil rules governing mandatory arbitration, and the purpose behind mandatory arbitration, is necessary.

"The mandatory arbitration of civil actions is provided for in *chapter 7.06 RCW.*" *Dill v. Michelson Realty Co.*, 152 Wn. App. 815, 818-19 (2009) (*quoting Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809 (1997)). "The purpose of authorizing mandatory arbitration in certain

civil cases is to alleviate court congestion and reduce delay in hearing civil cases.” *Dill*, 152 Wn. App. at 819.

“The procedures to implement the mandatory arbitration of civil actions are as provided in the Superior Court Mandatory Arbitration Rules (MAR) adopted by our supreme court.” *Id.* “Washington courts interpret these rules strictly to effectuate their purpose of reducing court congestion.” *Id.*

“RCW 7.06.050 provides a method of appealing from an arbitration award and, if no appeal is taken, a method for reducing the arbitration award to judgment.” *Id.* The statute states 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.

... .

(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.

RCW 7.06.050 (emphasis added).

“MAR 6.3 expands upon the consequences of failing to request a trial de novo.” *Dill*, 152 Wn. App. at 819. The rule states as follows:

Judgment. If within 20 days after the award is filed no party has sought a trial de novo under rule 7.1, the prevailing party on notice as required by CR 54(f) **shall**

present to the court a judgment on the award of arbitration for entry as the final judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but ***it is not subject to appellate review and it may not be attacked or set aside except by a motion to vacate under CR 60.***

MAR 6.3 (emphasis added).

“There is no mechanism for reconsideration of a mandatory arbitration award.” *Dill*, 152 Wn. App. at 820 (emphasis added). ***“The Washington Supreme Court recently emphasized that the trial de novo is the sole way to appeal an adverse decision in chapter 7.06 RCW arbitration.”*** *Id.* at 822 (emphasis added) (citing *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 532 (2003)).

The analysis in *Dill* is directly on point and it precludes this Court from exercising jurisdiction over the issues raised in Ms. Johnson’s appeal. In *Dill*, which was decided less than two years ago, the plaintiff prevailed at mandatory arbitration and none of the parties pursued a trial *de novo* (one of the defendants initially requested a trial *de novo*, but it later withdrew that request). *Id.* at 817-818. The trial court entered judgment on the arbitration award, and one of the defendants subsequently appealed. *Id.* at 818.

The Court of Appeals determined that the appeal was improper, and in fact *prohibited* by the mandatory arbitration rules, because none of the parties had pursued a trial *de novo*, judgment had already been entered, and none of the parties had moved to vacate the judgment under CR 60. *Id.* at 820-22. In doing so, the *Dill* court noted that the *de novo* review process fulfills the purpose of the mandatory arbitration rules by reducing

court congestion, and allowing parties to circumvent that process would therefore defeat the purpose of mandatory arbitration. *Id.* at 822. The *Dill* court specifically stated as follows:

A party who appeals an arbitration award and fails to improve its position following trial de novo must pay costs and attorney fees. If a party could avoid the usual de novo review procedures required for arbitration, it would avoid one of the effective inducements to accept the arbitrator's award—the potential for an award of attorney fees to the prevailing party.

Id. (quotations and citations omitted).

For these and other reasons, the *Dill* court summarily dismissed the appeal, ruling as follows: “[*Defendant*] **decided against a trial de novo and instead filed an appeal that the arbitration rules do not allow. We, therefore, dismiss its appeal without addressing the substantive issue presented.**” *Id.* (emphasis added).

As indicated above, *Dill* reaffirmed the recent decision in *Malted Mousse, Inc.*, where the Washington Supreme Court ruled that “**trial de novo is the sole method to seek judicial review from mandatory arbitration.**” 150 Wn.2d at 522 (emphasis added).

Dill and *Malted Mousse, Inc.* are just two of the many recent decisions rejecting appellate review after entry of judgment on a mandatory arbitration award. For example, in *Cook v. Selland Constr., Inc.*, 81 Wn. App. 98, 101-02 (1996), the court summarily dismissed an appeal filed by a defendant who failed to request a trial *de novo*, ruling that “[t]he correct avenue for review of an adverse arbitration award is trial de novo.... Direct appeals from the judgment on the arbitration

award are not proper unless the appeal relates to a defect inherent in the judgment or the means by which the judgment was obtained.” *Id.* (citations omitted)

Similarly, in *Pybas v. Paolino*, 73 Wn. App. 393, 398 (1994), the court ruled that “a judgment on the award is not subject to appellate review, nor subject to attack or vacation except by a motion to vacate under CR 60.”

As indicated above, Ms. Johnson did not request a trial *de novo* and she did not file a motion to vacate under CR 60. Therefore, the above authorities clearly and unequivocally dictate that this Court lacks jurisdiction to consider the issues raised in Ms. Johnson’s appeal. As a result, Ms. Johnson’s appeal must be dismissed.

B. The Superior Court Lacks Jurisdiction to Alter the Arbitrator’s Award by Granting the Requested Offset

The Superior Court’s lack of jurisdiction to alter the arbitrator’s award is not an issue of first impression in Washington, as Ms. Johnson suggests. The law is clear that “[a] party to a mandatory arbitration who does not ask for a trial *de novo* thereby accepts the arbitrator’s award ***‘and may not alter it by requesting action by the Superior Court which would amend that award.’***” *Mercier v. Geico*, 139 Wn. App. 891, 901 (2007) (quoting *Trusley v. Statler*, 69 Wn. App. 462, 465 (1993) (emphasis added)). Washington courts have consistently applied this rule of law for nearly twenty years.

Although different circumstances can affect the application of this rule, the circumstances relevant in this case are not unique, or even very complex. To illustrate this, below is a discussion of the two cases cited above—*Trusley* and *Mercier*—which are the primary two authorities on this issue. As demonstrated below, the present case is identical to *Trusley* in all relevant respects, leaving no question that the Superior Court in this case lacks jurisdiction to alter the arbitration award by granting Ms. Johnson’s requested offset.

1. *Trusley v. Statler*

In *Trusley*, the plaintiff sued the defendants (the Statlers) for breach of an agreement, and the Statlers asserted in their answer a right to attorneys’ fees under **RCW 4.84.185**. 69 Wn. App. at 463. The case was submitted to mandatory arbitration, where the arbitrator dismissed the plaintiff’s complaint with prejudice. *Id.* The arbitrator also denied the Statlers’ request for attorneys’ fees under **RCW 4.84.185**. *Id.* The Statlers did not request a trial *de novo* to challenge the arbitrator’s denial of attorneys’ fees. *Id.*

The Statlers subsequently moved for entry of judgment on the arbitrator’s award, and they also asked the Superior Court to award them attorneys’ fees under **RCW 4.84.250**, based upon an offer of settlement they had served on the plaintiff prior to arbitration. *Id.* It is significant that during the arbitration, the Statlers did not request attorneys’ fees under **RCW 4.84.250**. *Id.* at 463-65. They only requested attorneys’ fees under **RCW 4.84.185**. *Id.*

The Superior Court granted the Statlers' request for attorneys' fees under RCW 4.84.250, and the plaintiff appealed. *Id.* at 464-65. On appeal, the plaintiff argued that the Statlers had no right to attorneys' fees because they did not request a trial *de novo* challenging the arbitrator's denial of attorneys' fees under RCW 4.84.185, and they did not make any request at the arbitration for attorneys' fees under RCW 4.84.250. In response, the Statlers made the exact same argument that Ms. Johnson is making in this case—they argued that the Superior Court “retained authority to rule on requests not presented to the arbitrator,” including their request for attorneys' fees under RCW 4.84.250. *Id.* at 464. The Court of Appeals disagreed.

The Court of Appeals ruled that because the Statlers failed to ask the arbitrator to exercise his delegated authority to award attorneys' fees under RCW 4.84.250, such fees were not included in the award, and because such fees were not included in the award, they could not become part of the final judgment. *Id.* at 464-65. Moreover, the Court of Appeals ruled that by failing to request a trial *de novo*, the Statlers accepted the arbitrator's award, thereby precluding any action by the Superior Court that would alter that award, including an award of attorneys' fees. *Id.* The court specifically ruled as follows:

Since the Statlers did not ask the arbitrator to exercise his delegated authority and award them attorney fees under RCW 4.84.250 for the arbitration hearing, fees were not part of the arbitration award. Consequently, they cannot become part of the final judgment. Both parties, by not asking for a trial *de novo*, accepted the arbitrator's award

and may not alter it by requesting action by the Superior Court which would amend that award.

Id.

The present case is exactly like *Trusley* in all relevant respects. The arbitrator in this case had the authority to award an offset if one was warranted. Ms. Johnson did not ask the arbitrator to exercise that authority for “tactical reasons.” As a result, the arbitrator did not award Ms. Johnson an offset. Ms. Johnson then failed to request a trial *de novo*, thereby accepting the arbitrator’s award. Accordingly, the Superior Court now lacks jurisdiction to alter the arbitrator’s award by granting the requested offset.

Ms. Johnson does not distinguish, or even address, the *Trusley* decision. Instead, she relies heavily on *Mercier* to support her argument that the Superior Court does in fact have jurisdiction to apply an offset. As demonstrated below, however, there are critical differences between the facts in *Mercier* and the facts in this case, and for that reason Ms. Johnson’s reliance on the case is wholly misplaced.

2. *Mercier v. Geico*

In *Mercier*, there was a dispute over an insured’s request for underinsured motorist benefits from his insurer, Geico. 139 Wn. App. at 893-95. The contract of insurance provided that such disputes were to be resolved by private arbitration or, alternatively, in court. *Id.* at 894-95. The parties were unable to resolve their dispute privately, so the insured filed suit. *Id.* at 893-95. In its answer, Geico alleged, as an affirmative

defense, Geico's entitlement to "a setoff of any monies paid on its behalf." *Id.* at 895. The case was subsequently submitted to mandatory arbitration.

In *private* arbitration, the insurance contract limited the task of the arbitrator to determining the tortfeasor's liability and calculating damages. *Id.* at 895-96. Coverage issues, including Geico's right to a setoff, were to be resolved by a court. *Id.* at 896. Geico took the position that this division of labor also applied in *mandatory* arbitration. *Id.* The insured disagreed. *Id.* Accordingly, the issue was submitted to the arbitrator for resolution prior to arbitration. *Id.*

Shortly before the arbitration, the arbitrator ruled that "references to amounts of money available from insurance would be inadmissible in the arbitration." *Id.* In response to the plaintiff's motion for reconsideration, the arbitrator clarified as follows: "Additionally, I do not believe that coverage issues [including issues of offset and setoff] would be appropriate for determination under Rules of Mandatory Arbitration.... Coverage issues [including issues of offset and setoff] would necessarily need to be resolved subsequently, either by agreement of the parties, or by declaratory judgment." *Id.*

The plaintiff subsequently prevailed at arbitration, and the arbitrator filed his award with the Superior Court. *Id.* at 897. The arbitrator's award did not include any offset. *Id.* Neither party requested a trial *de novo*. *Id.*

The plaintiff then moved for entry of judgment in the full amount of the award, and Geico responded by requesting an offset against the

award to account for medical expenses paid by Geico, and to account for a settlement that the plaintiff had already received. *Id.* The Superior Court granted the offset, reduced the award, and entered judgment on the reduced award. *Id.* at 897-98. The plaintiff appealed. *Id.* at 898.

The Court of Appeals analyzed the decision in *Trusley* and noted the rule that “[a] party to a mandatory arbitration who does not ask for a trial de novo thereby accepts the arbitrator’s award ‘and may not alter it by requesting action by the Superior Court which would amend that award.’” *Id.* at 901 (quoting *Trusley*, 69 Wn. App. at 465). ***The Court of Appeals also noted, however, that the arbitrator in Trusley had the authority to award the relief at issue, whereas the arbitrator in Mercier specifically ruled that he lacked such authority.*** *Id.* at 901-03. Accordingly, unlike the Statlers in *Trusley*, who failed to ask the arbitrator to exercise his delegated authority to grant them attorneys’ fees under RCW 4.84.250, Geico never had an *opportunity* to ask the arbitrator to award an offset, and absent court intervention, Geico would have been completely deprived of an *opportunity* to litigate all aspects of its case.

The Court of Appeals ultimately affirmed the Superior Court’s application of Geico’s offset, but the court made it clear that the Superior Court had jurisdiction to apply the offset *only* because the arbitrator determined that he lacked the authority to decide the issue. *Id.* at 894.

The Court of Appeals specifically ruled as follows:

If an arbitrator determines that a particular issue is beyond the permitted scope of arbitration, the superior court can decide the issue and its decision is not an

improper “amendment” of the arbitration award. Here, ***because the arbitrator ruled that he lacked authority to decide issues of setoff and offset, the superior court needed to decide these issues in order to complete the adjudication of the case.***

Id. (emphasis added).

There can be no legitimate dispute that *Mercier* is demonstrably different from *Trusley* and the present case, and that Ms. Johnson’s reliance on *Mercier* is misplaced. The defendant in *Mercier* actually pleaded offset as an affirmative defense, and the arbitrator in *Mercier* determined that he lacked the authority to decide the issue. Neither of those critical facts exists in the present case.

The law is clear that if a party does not ask the arbitrator to exercise his delegated authority to award certain relief, and the arbitrator does not award that relief, and the party does not request a trial *de novo* to challenge the arbitrator’s failure to award that relief, then the party accepts the arbitrator’s award, thereby depriving the Superior Court of jurisdiction to alter the award by granting the relief at issue. Those are the exact facts in this case, and they lead to the unavoidable conclusion that the Superior Court lacks jurisdiction to apply the requested offset.

Ms. Johnson also relies on two other cases—*Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495 (2001) and *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611 (2007)—to support her argument that the Superior Court has continuing jurisdiction to apply an offset. These cases have no authoritative value at all, however, because they involved private

arbitration conducted pursuant to RCW Chapter 7.04, as opposed to mandatory arbitration conducted pursuant to RCW Chapter 7.06.

“Mandatory arbitration differs from private arbitration, and the appellate procedures should not be confused.” *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 525 (2003) (emphasis added). “While both [arbitration] acts deal with a form of alternative dispute resolution, ***they differ with respect to how a party appeals when dissatisfied with the arbitral decision.***” *Id.* at 526 (emphasis added).

In private arbitration, “[a] party dissatisfied with the arbitrator’s decision may move the superior court to vacate, modify, or correct the award.” *Id.* at 526. In fact, “[a] vacation, modification, or correction of an award ***requires*** a motion to the court.” *Id.* (emphasis added). By contrast, “[a] party aggrieved by an arbitrator’s decision in mandatory arbitration 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.*” *Id.* (emphasis in original) (quotations and citations omitted).

Given the specific differences between private arbitration and mandatory arbitration, Ms. Johnson’s authorities dealing with private arbitration are unpersuasive and irrelevant.

Ms. Johnson’s argument about amending the pleadings fails for similar reasons. Ms. Johnson makes the following argument at the end of the section of her brief dealing with the Superior Court’s jurisdiction (D.2.):

Further, like in *Sherry*, Defendant Johnson's response to Plaintiff Robertshaw's motion for entry of judgment effectively amended Defendant's affirmative defenses to include offset to better reflect the nature of the case at that point in the proceedings....The confirmation hearing was an appropriate time to raise this issue.

(Br. of Appellant Dolores Johnson, pp. 15-16.)

This argument fails because, again, *Sherry* involved private arbitration, which has very different post-arbitration procedures than mandatory arbitration. The argument also fails because the facts in *Sherry* differ significantly from the facts in this case. In *Sherry*, the insured and the insurer "explicitly agreed" to have the same judge who confirmed the arbitration award and also reduced it to judgment, also decide whether an offset was appropriate. 160 Wn.2d at 614. Under these circumstances, the court concluded that the parties "orally amended their pleadings to include a prayer for declaratory relief and that the trial court had authority and jurisdiction to resolve the offset dispute." *Id.*

In the present case, there was no explicit mutual agreement to amend the pleadings. Moreover, Ms. Johnson seeks an amendment that would automatically entitle her to affirmative relief, whereas the amendment in *Sherry* simply allowed the parties to proceed with a declaratory judgment proceeding. Finally, Ms. Johnson did not raise this issue until the deadline for filing an appeal had passed.

Ms. Johnson is asking this Court to amend the pleadings to include a request for affirmative relief, and she is asking this Court to actually grant her such relief, despite the fact that she did not prove her right to the relief at arbitration, and despite the fact that the deadline for requesting a

trial *de novo* has passed. This is the equivalent of a plaintiff asking a court to enter judgment without any proof of damages, and after the statute of limitations has expired, and it should not be allowed.

For all of the above reasons, Ms. Johnson's arguments about the Superior Court's jurisdiction fail as a matter of law. The law is clear that Ms. Johnson deprived the Superior Court of jurisdiction to alter the arbitrator's award by failing request an offset at arbitration, and then by failing to request a trial *de novo*. Therefore, Ms. Johnson's appeal must be dismissed.

C. Ms. Johnson Waived Any Right to Offset

Because this Court lacks jurisdiction to consider this appeal, and the Superior Court lacks jurisdiction to grant the requested relief, the Court should not reach the issue of waiver. But if it does, there is no question that Ms. Johnson waived any right to offset by failing to plead it or raise it at arbitration, and by failing to raise the issue before the deadline for requesting a trial *de novo*.

Offset is an affirmative defense for which Ms. Johnson bears the burden of proof. *Locke v. City of Seattle*, 133 Wn. App. 696, 713 (2006). Civil Rule 8(c) requires responsive pleadings to set forth "any ... matter constituting an avoidance or affirmative defense." "Affirmative defenses are thus waived unless they are (1) affirmatively pleaded, (2) asserted in a motion under CR 12(b), or (3) tried by the parties' express or implied consent." *In re Estates of Palmer*, 145 Wn. App. 249, 258-59 (2008) (quotations and citations omitted).

As indicated above, (1) Ms. Johnson did not plead offset as an affirmative defense, (2) Ms. Johnson did not offer evidence of any offset at the arbitration, (3) Ms. Johnson did not ask the arbitrator for any offset against his award, (4) there is no proper evidence in the record to prove the merits or the amount of any offset, (5) Ms. Johnson did not request a trial *de novo* to challenge the arbitrator's failure to grant her an offset, and (6) *Ms. Johnson admits that she did all of this intentionally, for "tactical reasons."* (Br. of Appellant Dolores Johnson, p. 10.)

Ms. Johnson cannot wait until *after* an arbitration award has been entered, and *after* the time for requesting a trial *de novo* has passed, before seeking relief from the Superior Court on an issue for which she bears the burden of proof. Just as Ms. Robertshaw is barred from asserting a new cause of action, and seeking entry of judgment on that cause of action without having proved it at arbitration, Ms. Johnson is similarly barred from asserting a new affirmative defense.

Ms. Johnson makes a number of arguments to justify her decision to avoid pursuing her affirmative defense, and to validate, *ex post facto*, that defense. Ms. Robertshaw will address each argument in turn.

First, Ms. Johnson urges the Court to allow flexibility in the rules of pleading, citing *Mahoney v. Tingley*, 85 Wn.2d 95 (1975). But the circumstances in the present case do not even closely resemble those in *Mahoney*.

In *Mahoney*, the court allowed the defendant to pursue an unpleaded affirmative defense only "where the record shows that a

substantial portion of plaintiff's trial memorandum and the entire substance of the hearing on summary judgment concerned the effect of the [affirmative defense]." *Id.* at 100-01. In other words, the affirmative defense in *Mahoney* was raised before trial, and it was the subject of a summary judgment proceeding. Ms. Johnson did not pursue her affirmative defense until *after* arbitration and *after* the time for requesting a trial *de novo* had passed.

Second, Ms. Johnson argues that that her response to Ms. Robertshaw's motion for entry of judgment should be treated like an amendment to the pleadings. This argument was addressed at section V.B.2, *supra*.

Third, Ms. Johnson argues, *without citation*, that her failure to plead offset was a harmless error because there was no surprise, and that Ms. Robertshaw's rights will not be affected because Ms. Robertshaw will be fully compensated. These arguments fail for several reasons. First, the failure to plead and prove offset was not an "error." Ms. Johnson admits that she did it for "tactical reasons." (Br. of Appellant Dolores Johnson, p. 10.) Second, if Ms. Johnson did it for "tactical reasons," then she must have derived some advantage or benefit from it, thereby undercutting her argument that it was "harmless." Third, it ultimately does not matter whether it was error, whether it was harmless, or whether Ms. Robertshaw will be fully compensated. All that matters is that Ms. Johnson failed to raise this issue until the deadline for filing an appeal had passed, and by

doing so she forever precluded herself from raising the affirmative defense.

Ms. Johnson is in the same position that a plaintiff would find themselves in if they let the statute of limitation expire before filing a lawsuit, and a plaintiff in that situation could make the exact same arguments made by Ms. Johnson, but to no avail.

For example, if Ms. Robertshaw had filed this lawsuit one day after the statute of limitation had expired, she could have argued that filing one day late was a harmless error, that Ms. Johnson would not be surprised by the lawsuit because Ms. Johnson knew that she had hit Ms. Robertshaw in a crosswalk, and that Ms. Johnson's rights would not be affected by the untimeliness of the lawsuit because it was only one day late, and because Ms. Johnson would not be required to pay any more than she would have paid had the lawsuit been filed in a timely manner. Ultimately, however, these arguments would have been as useless to Ms. Robertshaw as they are to Ms. Johnson.

There are several firm deadlines in our legal system. The statute of limitations is one, and the deadline for filing appeals is another. Ms. Johnson's intentional failure to address her affirmative defense until the deadline for filing an appeal had passed results in an absolute waiver of that defense, regardless of the circumstances.

Fourth, Ms. Johnson argues, *without citation*, that case law reflects that it is common for offset to be applied following a settlement, verdict, or award, and prior to entry of judgment. This is simply not true, and it is

telling that Ms. Johnson cites no authority to support her argument. Ms. Johnson may be referring to the private arbitration cases cited in her brief, but as discussed previously, private arbitration has very specific post-arbitration procedures that differ from those in cases like this, and from those in ordinary litigation. As a result, those private arbitration cases—if that is indeed what Ms. Johnson is referring to—do not support Ms. Johnson’s argument.

Fifth, Ms. Johnson mentions, in this section and elsewhere in her brief, that if she cannot pursue an offset in this litigation, then State Farm would have to pursue a separate action for reimbursement against Ms. Robertshaw. Unfortunately, that is true. Ms. Johnson failed to address the issue of offset in this litigation and, as a result, she is now precluded from doing so. If State Farm believes that it still has a right to reimbursement, State Farm can certainly address that issue later. That is State Farm’s right, and that is the only procedural remedy available to State Farm at this point in time. For reasons that need not be addressed in this litigation, however, State Farm stands no chance of succeeding in a separate action for reimbursement against Ms. Robertshaw, and in fact State Farm would end up paying Ms. Robertshaw’s attorneys’ fees if it chose to pursue such litigation. Regardless, State Farm’s right to proceed with a separate action for reimbursement against Ms. Robertshaw has no bearing on this Court’s jurisdiction, the Superior Court’s jurisdiction, Ms. Johnson’s waiver of her affirmative defense, or any other aspect of this appeal. The Court should disregard this argument entirely.

Sixth, and last, Ms. Johnson argues throughout her brief that she is somehow “entitled” to an offset, and that it would be unfair if Ms. Robertshaw were allowed a double recovery. As mentioned previously, a party to litigation is not automatically “entitled” to affirmative relief. They are entitled to an *opportunity* to prove their right to affirmative relief. In this case, Ms. Johnson received an opportunity to plead and prove the merits of her affirmative defense, but she intentionally did not take advantage of it for “tactical reasons,” thereby waiving that defense.

With regard to fairness, it is not unfair to expect a party to plead and prove their own affirmative defenses, and to hold them accountable when they intentionally decline to do so. It *would* be unfair, however, to allow Ms. Johnson to litigate under a completely different set of rules than everyone else. It *would* be unfair to resurrect an unpleaded and unproven affirmative defense after arbitration is over and all deadlines have passed, and after all avenues for further remedy and appeal are foreclosed.

Ms. Johnson had a full and fair opportunity to plead and prove offset. Her failure to do so results in a clear and unequivocal waiver of that defense.¹

¹ Ms. Johnson devotes the entire opening argument of her brief (pages 6-11) to a discussion of her “entitlement” to an offset. In that discussion, Ms. Johnson cites cases that address fee sharing under *Mahler v. Szucs*, 135 Wn.2d 398 (1998) and the application of offset in cases with segregated damage awards. These cases, and this discussion, are irrelevant to the issues before the Court. The present case does not involve *Mahler* fees. Moreover, the mechanics of how courts apply offset in appropriate cases are not at issue. What is at issue is Ms. Johnson’s waiver of her affirmative defense, and it is noteworthy that none of the cases cited by Ms. Johnson to support her entitlement to an offset addresses the issue of waiver.

D. The Superior Court Acted Within Its Discretionary Authority When It Denied Ms. Johnson's Untimely Request for an Offset

As mentioned above, the Superior Court's decision to grant or deny an offset is reviewed for abuse of discretion. *Eagle Point Condominium Owners Assoc. v. Coy*, 102 Wn. App. 697, 701 (2000). In the present case, Ms. Johnson has not discussed the standard of review, and she has not identified a single reason why the Superior Court might have abused its discretion in denying her untimely request for an offset.

With regard to the abuse of discretion standard, the Washington Supreme Court has noted as follows:

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. *State ex rel. Clark v. Hogan*, 49 Wn.2d 457, 303 P.2d 290 (1956). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 1062 (1959); *State ex rel. Nielsen v. Superior Court*, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941).

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26 (1971).

It cannot be argued—and Ms. Johnson does not argue—that the Superior Court acted arbitrarily or capriciously when it denied Ms. Johnson's untimely request for an offset. As demonstrated above, there

were numerous justifications for the Superior Court's decision, and therefore no basis for concluding that it somehow abused its discretion.

E. Ms. Robertshaw Is Entitled To Her Attorneys' Fees and Expenses Under RCW 7.06.060(1), MAR 7.3, and RAP 18.9

If the Court dismisses Ms. Johnson's appeal, the Court must award Ms. Robertshaw her attorneys' fees and expenses under RCW 7.06.060(1), MAR 7.3, and RAP 18.9.

1. RCW 7.06.060 and MAR 7.3

"A supplemental goal of the mandatory arbitration statute is to discourage meritless appeals." *Wiley v. Rehak*, 143 Wn.2d 339, 348 (2001) (quoting *Perkins Coie v. Williams*, 84 Wn. App. 733, 737-38 (1997)). "That goal is reflected in RCW 7.06.060 and MAR 7.3, which require that attorney fees be assessed against a party who fails to improve [his or] her position as to an adverse party's claim at a trial de novo." *Id.* (alterations in original).

RCW 7.06.060(1) states as follows:

(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.

MAR 7.3 states as follows:

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.

“A full trial need not occur and fees may be awarded following a summary judgment or voluntary dismissal, or when the appellant voluntarily withdraws the notice for trial de novo.” *Wiley*, 143 Wn.2d at 348. “Courts have awarded fees against appellants who failed to improve their position both at trial de novo and on appeal.” *Id.* (quoting *Perkins*, 84 Wn. App. at 743).

MAR 7.3 requires a mandatory award of attorneys’ fees if a party does not improve their position “because they failed to comply with the requirements for proceeding to a trial de novo.” *Kim v. Pham*, 95 Wn. App. 439, 446 (1999); *see also Wiley*, 143 Wn.2d at 348. Accordingly, under MAR 7.3, the Court must award Ms. Robertshaw her attorneys’ fees and expenses if the Court dismisses this appeal for any reason, including the fact that Ms. Johnson failed to comply with the requirements for proceeding to a trial *de novo*.

As indicated above, one of the supplemental purposes of the mandatory arbitration rules is to discourage meritless appeals like this one. “If a party could avoid the usual de novo review procedures required for arbitration, it would avoid one of the effective inducements to accept the arbitrator’s award—the potential for an award of attorney fees to the prevailing party.” *Dill*, 152 Wn. App. at 822.

In the present case, there is no question that Ms. Johnson has filed an appeal, and if she does not prevail, there will be no question that she

failed to improve her position. Therefore, an award of attorneys' fees and expenses will be mandatory under RCW 7.06.060 and MAR 7.3.

2. RAP 18.9

Ms. Robertshaw is also entitled to her attorneys' fees and expenses under RAP 18.9, which states that this Court may award attorneys' fees and expenses for having to respond to a frivolous appeal. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Malted Mousse, Inc.*, 150 Wn.2d at 535.

This appeal is frivolous because the law is clear that this Court lacks jurisdiction to accept direct appellate review after judgment is entered on a mandatory arbitration award. The Court of Appeals addressed this exact issue in *Dill* less than two years ago, and the decision in that case leaves no debatable issues upon which reasonable minds might differ.

This appeal is also frivolous because the Superior Court clearly lacks jurisdiction to alter the arbitrator's award by granting the requested offset. As demonstrated above, the present case is exactly like *Trusley* in all relevant respects. There can be no legitimate dispute that if a party does not ask the arbitrator to exercise his delegated authority to award certain relief, and the arbitrator does not award that relief, and the party does not request a trial *de novo* to challenge the arbitrator's failure to award that relief, then the party accepts the arbitrator's award, thereby

depriving the Superior Court of jurisdiction to alter the award by granting alternative relief.

Because Ms. Johnson's appeal is frivolous, the Court should award Ms. Robertshaw her attorneys' fees and expenses under RAP 18.9.

VI. CONCLUSION

For all of the foregoing reasons, the Court must dismiss Ms. Johnson's appeal and award Mr. Robertshaw her attorneys' fees and expenses.

Respectfully submitted this 6th day of June, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on June 6, 2011, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated:

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- Hand Delivery
- Overnight Mail
- U.S. Mail
- Facsimile
- Other _____



Douglas C. McDermott

Executed this 6th day of June, 2011,
at Seattle, Washington.

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