

NO. 66753-0-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

Dolores Johnson,
Appellant,

vs.

Sara Robertshaw,
Respondent

BRIEF OF APPELLANT DOLORES JOHNSON

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A. Assignment of Error

Assignment of Error

The superior court erred in entering the order of January 28, 2011 denying Defendant Dolores Johnson's motion for reconsideration of the January 6, 2011 order entering judgment.

Issues Pertaining to Assignment of Error

1. Whether a defendant who pays medical bills pursuant to the Personal Injury Protection (PIP) provisions of an automobile liability policy is entitled to an offset when the arbitrator awards those same medical bills as damages regardless of whether offset is affirmatively pled in the answer to the complaint?

2. Whether the superior court judge had jurisdiction to apply Defendant's offset to the arbitrator's segregated damages award thereby reducing the amount of the judgment entered?

3. Whether Defendant's failure to plead offset was a harmless error, if it was an error at all?

4. Whether Plaintiff is made whole, according to the arbitrator's segregated damages award, if the offset is applied; and whether Plaintiff gets double recovery if the offset is not applied?

B. Statement of the Case

On October 30, 2007 Ms. Johnson was driving her automobile, stopped at a red light and then began to make a right turn. In the process

of turning, Ms. Johnson's car struck pedestrian Ms. Robertshaw as she walked across the street. CP 2 and 5.

State Farm, as Ms. Johnson's insurer, was notified of the accident. State Farm collected information regarding the facts of the accident and Ms. Robertshaw's medical treatment. State Farm paid bills in the amount of \$4,437.40 submitted to it for Ms. Robertshaw's medical treatment. State Farm made these payments prior to Ms. Robertshaw filing suit. CP 37-38.

Ms. Robertshaw initiated her lawsuit in May 2010. CP 1-3. Ms. Johnson answered the Complaint in June 2010. CP 4-6. Ms. Johnson's answer did not plead offset as an affirmative defense. CP 4-6.

This case then was transferred to mandatory arbitration pursuant to the Ms. Robertshaw's request. The arbitration hearing took place in November 2010. Ms. Johnson testified during arbitration that she had no recollection of looking to the right before she began making her turn. Thus, the arbitrator found Ms. Johnson 100% liable for causing the accident. CP 29-30.

The arbitrator correctly noted in his decision letter that the primary dispute in this case is general damages. The arbitrator found that Ms. Robertshaw's injuries were minor and temporary. The arbitrator stated his award as follows: "I am awarding medical specials in the amount of \$4,662; lost wages in the amount of \$144; and general damages in the amount of \$6,500. The total award is therefore \$11,306. I believe this award represents the fair value of the plaintiff's claim." CP 29-30.

The arbitration award was filed on November 24, 2010. CP 32. An amended arbitration award was filed December 7, 2010 that awarded Ms. Robertshaw statutory costs and fees; the new total was \$12,443.75. CP 31.

On December 17, 2010, only ten days after the amended arbitration award was filed, the attorneys for the parties communicated in regards to the amount of money Defendant owed Ms. Robertshaw in light of the arbitrator's award. Defendant's intention to apply State Farm's offset to the arbitrator's award was implicit in the written communications between counsel as a copy of State Farm's check in the amount of \$8,006.75 was attached to defense counsel's email in response to an email from Plaintiff's counsel. CP 33-34.

On December 28, 2010, twenty-one days after the amended arbitration award was filed, Plaintiff's counsel emailed defense counsel stating, "Ms. Robertshaw cannot stipulate to a dismissal in exchange for \$8,006.75. I believe that she is entitled to [\$12,443.75] because you did not plead offset as an affirmative defense. We will be filing a motion today to have the award reduced to judgment..." Defense counsel replied, "[Ms. Robertshaw] cannot recover twice..." To which Plaintiff's counsel retorted, "State Farm's right to reimbursement is a separate issue. If State Farm believes that it has such a right, it can address that issue [later]." CP 33-34.

Plaintiff moved to have the December 7, 2010 amended arbitration award entered as a judgment. CP 10-17. Defendant Johnson responded to

Plaintiff's motion for entry of judgment by proposing a corrected judgment that applied State Farm's offset to the award. CP 18-26. Defendant's motion was supported by the arbitrator's letter ruling and a declaration by the State Farm adjuster who oversaw the medical payments made to Plaintiff that were related to the subject claim. CP 29-30 and 37-38.

Plaintiff filed a reply in support of her motion to enter judgment and argued that: (1) the superior court lacked jurisdiction to apply offset, and (2) Defendant waived the right to an offset by not pleading offset as an affirmative defense. Plaintiff did not deny the facts that State Farm had previously paid \$4,437.40 for Plaintiff's medical treatment or that Plaintiff would stand to receive double recovery if her proposed judgment was entered. CP 39-44.

The superior court did not apply the offset and entered Plaintiff's proposed judgment in the amount of \$12,443.75. The judgment was entered without oral argument and without explanation. CP 45-46.

Defendant moved for reconsideration of the order entering judgment. Defendant's motion for reconsideration argued that entering judgment in the amount of \$12,443.75 was contrary to law and unjust because it effectively awarded Plaintiff double recovery for the medical bills that State Farm already paid. Defendant argued that failing to plead offset, if an error, was a harmless error and that the superior court had jurisdiction to apply the offset to the arbitrator's award. CP 47-55.

The superior court denied Defendant's motion for reconsideration. The court did not request a response brief from Plaintiff prior to the denial and did not hear oral argument. The only explanation on the order denying Defendant's motion for reconsideration was the following statement: "Defendant has failed to persuade this court that Mercier v. Geico Indem. Co., 139 Wn.App. 891 (2007) is applicable to the case at bar." The implication of that statement is that the superior court ruled it did not have jurisdiction to apply the offset to the arbitrator's award; Mercier was only cited in Defendant's motion for reconsideration in the argument section regarding jurisdiction. It is unclear whether the superior court considered the propriety of Plaintiff's double recovery and/or whether Defendant waived the right to offset. CP 56-57.

Defendant Johnson timely appealed the superior court's denial of her motion for reconsideration. CP 58-61.

C. Summary of Argument

An injured party is entitled to be made whole, but no more. Plaintiff was aware that State Farm had paid her medical bills even before she filed her lawsuit and claimed those expenses as damages. Plaintiff knew within the timeframe for requesting trial de novo following arbitration that Defendant was asserting the right to offset the arbitrator's award by the amount of medical bills State Farm had paid. The arbitrator's award clearly delineates Plaintiff's damages, including medical specials and general damages. Plaintiff did not seek to appeal the

arbitrator's award. Plaintiff does not dispute the amount of offset being claimed. Plaintiff does not deny she would be made whole if offset is applied. However, Plaintiff argues she is entitled to double recovery because Defendant did not plead offset as an affirmative defense. The law does not permit such unjust enrichment. The superior court's order denying Defendant's motion for reconsideration should be reversed and the matter remanded to the superior court for entry of a corrected judgment in the amount of \$8,006.35, which accounts for offset.

This case does not involve coverage issues. This case does not involve uninsured or underinsured motorist insurance policies. This case does not involve subrogation issues. Applying the offset to the arbitrator's award does not reweight the evidence as decided upon by the arbitrator or otherwise alter the arbitrator's decision. A superior court maintains jurisdiction at all times in mandatory arbitration cases. Here, the court had jurisdiction to apply the undisputed amount of offset to the arbitrator's segregated damages award of medical bills since payment of those very medical bills form the basis of the offset.

D. Argument

1. Defendant is entitled to offset.

“Offset” refers to a credit to which an insurer is entitled for payments made under one coverage (in this case, Defendant's PIP coverage) against claims made under another coverage (Defendant's liability coverage) within the same policy (Defendant's automobile

insurance policy). Matsyuk v. State Farm & Casualty Co., 155 Wn.App. 324, 332, 229 P.3d 893 (Div. 1 2010) (citing Winters v. State Farm Mutual Automobile Insurance Co., 144 Wn.2d 869, 31 P.3d 1164 (2002)).

The issue in Matsyuk, was whether an injured party is entitled to a contribution of attorney fees from an at fault party's insurer in an automobile accident. 155 Wn.App. at 329-30.

Olga Matsyuk was a passenger in a car driven by Omelyan Stremditsky. Matsyuk was injured in an accident where Stremditsky was at fault. Stremditsky's insurer paid \$1,874.00 of Matsyuk's medical bills under the PIP coverage of Stremditsky's insurance policy. Matsyuk sued for injuries and eventually settled for \$5,874.00, which was broken down into a \$4,000.00 payment and the PIP payments. Matsyuk then argued that Stremditsky's insurer owed Matsyuk a pro rata share of Matsyuk's legal expenses incurred in obtaining the liability recovery. 155 Wn.App. at 327-28.

The Court in Matsyuk held that since Matsyuk's claim was against a third-party's (the tortfeasor, Stremditsky) insurer there was no subrogation and no equitable considerations behind the fee sharing rule as established in Mahler v. Szucs, 135 Wn.2d 398, 957 P.2d 632 (1998). Thus, Matsyuk was not entitled to receive a contribution of attorney fees from Stremditsky's insurer. 155 Wn.App. at 333.

Though the focus in Matsyuk was on the issue of fee sharing, and not on the issue of offset, Matsyuk is factually similar to the present matter and contains relevant analysis.

First, the Court in Matsyuk stressed that an important consideration where offset is involved is whether an injured party is made whole. The Court specifically noted in upholding the superior court's ruling in favor of State Farm that "Matsyuk did not receive any lesser recovery by virtue of the offset of coverages than the tortfeasor was obligated to pay." 155 Wn.App. at 333-34 (citing Norris v. Church & Co. Inc., 115 Wn.App. 511, 517, 63 P.3d 153 (Div. 2 2002)).

Second, the Matsyuk Court carefully distinguished cases involving offset related issues between an injured party and a tortfeasor's insurer from cases involving an injured party and the injured party's own insurer. Specifically, the Matsyuk Court upheld Young v. Teti, 104 Wn.App. 721, 16 P.3d 1275 (Div. 2 2001). Matsyuk, 155 Wn.App. at 332.

In Young, Patricia Young was injured in an accident where Victor Teti was at fault. Teti's insurer paid \$9,386.00 to Young under the PIP coverage of Teti's insurance policy. Young sued Teti. A jury awarded Young \$20,000.00, which included \$13,000.00 for past economic damages. Teti moved to offset the award by the insurer's earlier PIP payments. Young agreed offset was appropriate. However, Young argued the amount of offset should be reduced because she should receive contribution for her attorney fees. 104 Wn.App. at 722-23.

As previously mentioned, the court in Young held that there was no justification to require the insurer to contribute to the injured party's legal expenses. 104 Wn.App. at 727. The court explained that the jury's \$20,000.00 verdict had increased Teti's and his insurer's obligation to

Young \$10,614.00 more than the insurer had already paid under PIP coverage. 104 Wn.App. at 725. Offset prevents an insurer from having to pay an injured party again for the same thing already paid under PIP coverage. 104 Wn.App. at 726.

Lange v. Raef, 34 Wn.App. 701, 664 P.2d 1274 (Div. 1 1983) is another case where the superior court judge applied offset to a jury verdict. There, Eugene Lange and Rick McCallum were injured in an accident caused by David Raef. Raef's insurer paid Lange and McCallum under the PIP coverage of Raef's insurance policy. Lange and McCallum sued Raef and the matter went to trial. 34 Wn.App. at 702.

However, the Court of Appeals reversed because the verdict in Lange was a general verdict and did not segregate special damages. The Lange Court reasoned that offset should only be applied to prevent double recovery and without a segregated verdict there was no means by which to tell if double recovery was awarded. 34 Wn.App. at 705-6.

It is clear from Lange and the cases from other jurisdictions cited therein, that it is proper for a judge to apply offset to an award where the damages are segregated. This point ties into Defendant Johnson's other arguments regarding equity. For instance in the case of Dupuis v. Nielson, 624 P.2d 685 (Utah 1981), which was discussed in Lange, the Utah Supreme Court held that a judgment may be reduced to the extent it specifically and identifiably included special damages of the types as those for which benefits had previously been received. See Lange, 34 Wn.App. at 707. "To the extent that [a] plaintiff would receive double recovery of a

particular type of damage, an adjustment of the judgment [is] appropriate.”

Id.

Moreover, the case Tolson v. Allstate Ins. Co., 108 Wn.App. 495, 500, 32 P.3d 289 (Div. 1 2001) seems to hold that in Washington an insurer is entitled to offset so long as the injured party is made whole in overall dollar amount; without regard to segregating different damages categories. But such holding is immaterial in the present matter where Plaintiff's damages categories were separated and there is no shortfall between the medical specials awarded and PIP payments.

Here, Plaintiff Robertshaw has already received \$4,437.40 in PIP payments for her medical treatment. CP 37-38. The arbitrator specifically stated in his decision that he awarded Plaintiff Robertshaw \$4,662.00 in medical specials in addition to other amounts for other damages. CP 29-30.

The arbitrator's decision in the present matter segregated the damages like the verdict in Young and the settlement agreement in Matsyuk. The present case does not involve a general verdict like in Lange and so there is no danger of applying Defendant Johnson's offset to an incorrect category of Plaintiff Robertshaw's damages. But failing to apply the offset unquestionably permits Ms. Robertshaw to receive a double recovery; and by association requires State Farm to pay for medical expenses twice.

Defendant Johnson chose not to present evidence of her insurance coverage and previous payments at arbitration for tactical reasons, but she

was not estopped from doing so prior to entry of judgment. It was appropriate for Defendant Johnson to apply the offset following arbitration and before entry of judgment. In this case especially, there was no prejudice to Plaintiff Robertshaw because the amount of offset is undisputed and Ms. Robertshaw will not receive any lesser recovery by virtue of the offset than she is entitled to receive pursuant to the arbitrator's award.

Finally, to force State Farm to sue Ms. Robertshaw to recover the \$4,437.40 offset in this case flies in the face of judicial economy and forces both parties to incur additional fees and costs over an issue that is undisputed. For one, if that were the procedure the court ruled applied to mandatory arbitration proceedings then there would be no reason for a defendant like Ms. Johnson to ever plead the affirmative defense of offset because at the conclusion of the case on liability the defendant's insurer would simply file a second lawsuit and recover the offset. Cases such as Matsyuk and Young where the offset was applied on behalf of an insured without the need for a separate lawsuit demonstrate that this is not the procedure required by the court. This issue will be discussed further below, in the argument section regarding jurisdiction, in light of cases such as Sherry v. Financial Indemnity Company, 160 Wn.2d 611, 160 P.3d 31 (2007) and Tolson, supra.

Defendant Johnson is entitled to offset. The amount of offset is not in dispute. The offset should be applied to the medical special damages award set forth in the arbitrator's decision letter.

2. The Superior Court has jurisdiction to apply offset.

This appears to be a matter of first impression in Washington. While other published opinions discuss a Superior Court's authority to apply offset to an arbitrator's award, those other cases concern private arbitration, coverage issues, and/or subrogation issues. Here, the case was transferred to mandatory arbitration and the subject PIP payments were made by Defendant Johnson's insurer, not the injured Plaintiff's insurer.

The underlying issue currently at the forefront of this case is Plaintiff's belief that she is entitled to double recovery. In confirming that Washington courts do not allow double recoveries, the Supreme Court stated eighty-eight years ago, "This view of the law is too elementary to call for extended citation of authorities to lend it support." Blenz v. Fogle, 127 Wash. 224, 231-32, 220 P. 790 (1923). Thus, while this jurisdictional argument may be novel and interesting from the standpoint of legal analysis it is essentially a question of form versus substance and has probably been handled without fanfare in other similar instances on the basis of equity alone. Defendant has found no case law that prohibits a superior court from applying offset to an arbitrator's award where damages categories are segregated.

In Tolson, 108 Wn.App. 495, a private arbitration case, William Tolson was a passenger in a car that hit an abandoned vehicle in the middle of Interstate 5. The owner of the abandoned vehicle did not have

insurance. Tolson submitted an uninsured motorist claim to Allstate, which insured the driver of the car in which Tolson was riding. Allstate paid \$8,504.70 in medical payments for Tolson prior to arbitration. The arbitrator awarded Tolson \$19,060.54, including \$3,418.30 in medical specials. 108 Wn.App. at 497.

Following arbitration, the parties submitted the issue of offset to the trial court. The trial court offset the entire \$8,504.70 from Tolson's total award despite the arbitrator's decision that only \$3,418.30 were for medical specials. In affirming the offset, the Court of Appeals reasoned that Tolson was still fully compensated.

In Sherry, 160 Wn.2d 611, another private arbitration case, Kevin Sherry was walking when he was struck by an uninsured motorist. Sherry submitted a claim to his own insurance company. Arbitration ensued regarding the amount of Sherry's damages. 160 Wn.2d at 614-15.

After the arbitrator made an award, Sherry's insurer asked both the arbitrator and court to apply offset. The arbitrator apparently deferred the issue to the courts. At the hearing to confirm the arbitrator's award, the superior court applied the offset. 160 Wn.2d 615-16.

The Supreme Court held that the Superior Court unquestionably had jurisdiction to decide whether an offset should be applied. 160 Wn.2d at 617. The issue was simply whether the court could apply offset at the confirmation hearing or whether the insurer should have filed a declaratory judgment action. Id. The Sherry Court determined that the parties had effectively amended their pleadings to better reflect the nature

of the case by raising the issue of offset with the court. 160 Wn.2d at 618. The Court upheld the Superior Court's decision to apply offset to an arbitrator's award. Id.

Mercier v. Geico Indemnity Company, 139 Wn.App. 891, 165 P.3d 375 (Div. 1 2007), a mandatory arbitration case, involved an injured party's claim against his own insurance company for underinsured motorist benefits. Ralph Mercier was rear-ended. Mercier received policy limits of \$25,000.00 from the at fault driver's insurance company. Mercier received \$10,000.00 in PIP benefits from his own insurance company. Mercier then sued his insurance company for additional damages under his underinsured motorist coverage. 139 Wn.App. at 893-94.

The arbitrator awarded Mercier \$36,000.00, inclusive of Mercier's medical expenses and income loss. 139 Wn.App. at 897. However, the arbitrator expressly informed the parties that he believed applying offset and/or setoff was beyond the scope of his authority and should be left to the court. 139 Wn.App. at 896.

Neither party sought a trial de novo. Mercier moved for entry of judgment on the arbitrator's award and proposed a judgment for \$36,000.00. Mercier's insurer responded that judgment should be reduced to account for the \$10,000.00 offset as well as a setoff of \$25,000.00 for a net judgment amount of \$1,000.00. The Superior Court applied both the offset and the setoff and entered judgment in the amount of \$1,000.00. 139 Wn.App. at 897-98.

Mercier appealed the Superior Court's decision to apply the offset. Mercier argued to the Court of Appeals, just as Ms. Robertshaw argued to the Superior Court in this matter, that since his insurer did not request a trial de novo, the superior court's only option was to enter judgment for the full amount stated in the arbitrator's award. 139 Wn.App. at 898.

Mercier's insurer, relying in part on Sherry, supra., argued that the superior court had jurisdiction to consider coverage issues at the confirmation of award hearing. 139 Wn.App. at 898-99.

The Mercier Court then held that while the arbitrator did have authority to decide the offset issue, it was appropriate for the court to apply the offset. 139 Wn.App. at 901-2. The Court reasoned that applying the offset was not a modification of the arbitrator's decision, but merely an extension of the adjudication regarding an undecided issue. 139 Wn.App. at 902. The Court recognized that in applying offset in that case, the Superior Court did not decide issues the arbitrator had already heard or decided. 139 Wn.App. at 903.

Here, the arbitrator did not rule on offset one way or another or make any decisions regarding the collateral source rule; he was not asked to consider those issues. However, the evidence presented to the arbitrator led him to issue a segregated damages award to which an offset easily can be applied. CP 29-30. Like in Mercier, the Superior Court should have applied an offset in the present case.

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. Offset had not been considered to that point. Evidence of PIP payments was not barred by the collateral source rule. The confirmation hearing was an appropriate time to raise the issue.

Based on the above cited cases, there is no question the superior court had jurisdiction to apply the offset; superior courts applied an offset in all of the cases discussed above. The only two things that would have prohibited the court from exercising its jurisdiction and applying offset would have been (1) if the arbitrator had already applied offset or, perhaps, (2) if applying offset was impossible because damages were not segregated. Here, the arbitrator had not applied an offset, but he did segregate damages. Applying the offset is necessary to complete the adjudication of the subject case.

3. Defendant's failure to plead offset prior to arbitration, if an error, was a harmless error.

The case of Mahoney v. Tingley, 85 Wn.2d 95,, 529 P.2d 1068 (1975) reflects that the purpose of affirmative defense pleading rules are to promote efficiency. To wit:

Plaintiff asserts that regardless of the validity of the [defense], defendants are precluded from raising [that defense] because they failed to plead the defense affirmatively. CR 8(c) lists certain defenses which must be pleaded affirmatively but extends, also, to 'any other matter constituting an avoidance or affirmative defense.' We need not decide whether [the subject defense] falls within the language of the rule, however. It is to avoid surprise that certain defenses are required by CR 8(c) to be

pleaded affirmatively. In light of that policy, federal courts have determined that the affirmative defense requirement is not absolute. Where a failure to plead a defense affirmatively does not affect the substantial rights of the parties, the noncompliance will be considered harmless... There is a need for such flexibility in procedural rules.

Mahoney 85 Wn.2d at 100-1 (citations omitted).

Here, the validity of Defendant Johnson's offset claim is unquestionable. But like the plaintiff in *Mahoney*, Plaintiff Robertshaw argued to the superior court that Defendant Johnson waived her right to offset by failing to plead it.

Defendant Johnson's response to Plaintiff Robertshaw's motion for entry of judgment may be treated as an amendment to the pleadings. There is no requirement for Defendant Johnson to have pled offset prior to arbitration. Flexibility must be allowed. Mahoney, supra.

Even if Defendant erred by failing to plead offset, such error was harmless. First, there is no surprise involved with an offset claim. Plaintiff received medical treatment, submitted the bills to Defendant's insurer, and Defendant's insurer paid the bills. Second, the Plaintiff submitted the very same bills that had already been paid to the arbitrator in this case who awarded Plaintiff all of her medical treatment expenses, so there is no question that the PIP payments apply to the treatment that is reflected in the arbitrator's award.

Finally, and probably most importantly, Plaintiff Robertshaw's rights are not affected by Defendant Johnson's failure to plead offset. Plaintiff Robertshaw is still going to be fully compensated once offset is

applied as she will still have all of her medical expenses paid for, receive reimbursement for lost wages awarded, and receive the full amount of money awarded as general damages. This is further demonstrated by applying Plaintiff Robertshaw's proposed solution and following it to its logical conclusion. Plaintiff Robertshaw proposes that Defendant's insurer file an action for reimbursement, which when ordered, would find Plaintiff in the very same position as would occur if the offset was applied at this stage of the proceedings.¹

Defendant Johnson denies that the failure to plead offset was error. The case law reflects that it is common for offset to be applied following a settlement, verdict, or award and prior to entry of judgment. The case law reflects that arbitrators often defer the issue of offset to the court. A defendant may choose to wait to seek offset until after arbitration. In any event, Plaintiff Robertshaw's ultimate award is not affected by the way Defendant Johnson asserted her right to offset in this case.

4. Plaintiff must not be allowed double recovery, which is exactly what would occur if offset is not applied.

“[A] party suffering compensable injury is entitled to be made whole, but should not be allowed to duplicate his recovery.” Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 220, 588 P.2d 191 (1978). This

¹ It could be argued that Plaintiff's proposal would place Plaintiff in a worse position as she would be required to expend costs and time for a second meaningless and frivolous defense to a claim for reimbursement for payment of medical bills she admits were paid.

equitable principle is based on unjust enrichment. State Farm Mut. Auto Ins. Co. v. Lou, 36 Wn.App. 838, 841, 678 P.2d 339 (Div. 2 1984). This is the long established law in Washington. See Blenz, supra.

Here, the arbitrator awarded Plaintiff Robertshaw \$12,443.75. CP 31. Plaintiff Robertshaw's award included \$4,662.00 for medical specials. CP 29-30. \$4,437.40 of that \$4,662.00 has already been paid by Defendant Johnson's insurer. CP 37-38. Thus, to be made whole, Plaintiff Robertshaw is entitled to an additional \$8,006.35.

Plaintiff Robertshaw would receive a double recovery of \$4,437.40 for her medical bills if the judgment entered by the superior court in the amount of \$12,443.75 stands. This would be unjust enrichment. Plaintiff should not be allowed to duplicate her recovery.

E. Conclusion

Clint Eastwood's character in the movie Unforgiven famously said, "Deserve's got nothin' to do with it." But this is not the Old West. In a civil case involving money damages that is governed by the laws of the State of Washington, deserve has everything to do with it.

Plaintiff Robertshaw presented all of her evidence regarding damages to the arbitrator, including evidence of medical expenses that she knew had been previously paid by Defendant Johnson's insurer. The arbitrator found that Plaintiff Robertshaw's injuries were minor and temporary. CP 30. The arbitrator awarded Plaintiff Robertshaw \$12,443.75, inclusive of the already paid medical expenses. CP 31.

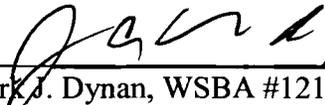
Plaintiff Robertshaw only “deserves” an additional \$8,006.35. Moreover, Defendant Johnson and her insurer do not “deserve” to pay twice for Plaintiff Robertshaw’s medical treatment.

For the reasons stated above, this Court should reverse the superior court’s order denying Defendant’s motion for reconsideration and remand the matter to the superior court for entry of a corrected judgment in the amount of \$8,006.35, which accounts for the offset for Plaintiff’s previously paid medical expenses.

DATED this 5th day of May, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the date given below I caused to be served, by personal delivery and/or U.S. Mail the foregoing **Brief of Appellant Dolores Johnson** upon the following persons:

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DATED this 5th day of May, 2011.


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