

NO. 66753-0-1

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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Dolores Johnson,  
Appellant,

vs.

Sara Robertshaw,  
Respondent

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**REPLY BRIEF OF  
APPELLANT DOLORES JOHNSON**

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## ARGUMENT

- 1. The only decision regarding offset in this case was made by the Superior Court. The Superior Court's decision not to apply offset is the subject of Ms. Johnson's appeal. Mandatory Arbitration Rules do not apply to this appeal because it is not an appeal of an arbitrator's decision.**

This case appears to be a matter of first impression in Washington as none of the cases cited in either party's brief is directly on point as to the issue of the trial court's jurisdiction. Appellant Ms. Johnson relies on cases that involved private arbitration or where the arbitrator specifically deferred ruling on an issue the trial court was later asked to consider. See e.g. Mercier v. Geico Indemnity Company, 139 Wn.App. 891, 165 P.3d 375 (Div. 1 2007); Sherry v. Financial Indemnity Company, 160 Wn.2d 611, 160 P.3d 31 (2007) Respondent Ms. Robertshaw relies on cases where the arbitrator specifically ruled against one of the parties on an issue the trial court was later asked to reconsider. See Trusley v. Statler, 69 Wn.App. 462, 849 P.2d 1234 (Div. 3 1993). Here, the arbitrator was not asked to rule on offset and, therefore, he did not rule one way or the other on that issue.

If Ms. Johnson had asked the arbitrator to apply offset and he denied that request, then the circumstances would be identical to Trusley. If Ms. Johnson had asked the arbitrator to apply offset, but he deferred to the court on that issue, then the circumstances would be identical to Mercier. Again, this case is different because the issue of offset was never before the arbitrator.

Whether the issue of offset could have been before the arbitrator is immaterial. Ms. Johnson admits she could have asked the arbitrator to rule on offset. But Ms. Johnson decided to wait and have the Superior Court apply offset. Ms. Johnson's decision is consistent with the rules of court and applicable laws. The rules of evidence limit evidence regarding insurance (ER 411) and payment of medical bills (ER 409). The only way to put the payment of the bills before the arbitrator would be to disclose the insurance. Frankly, Ms. Johnson did not anticipate that Ms. Robertshaw would insist on double recovery, but Ms. Johnson believed the Superior Court would apply offset if necessary (Mercier); especially since Ms. Robertshaw agrees the payments were made to her providers.

Applying offset in this case is the only way to yield an equitable result. Otherwise, Ms. Robertshaw will receive double recovery. Ms. Robertshaw does not dispute this fact. State Farm's payment information

is irrefutable evidence that Ms. Robertshaw was compensated for medical expenses. CP 37-38.

As it did in Mercier, the Superior Court has the power to decide an issue that was not decided by the arbitrator and thereby supplement the arbitrator's award. In this case, everyone is in agreement that the arbitrator did not decide the issue of offset. Thus, Trusley is not analogous. Ms. Robertshaw argues that Mercier is not analogous because Ms. Johnson did not at least ask the arbitrator to decide the offset issue before submitting the issue to the Superior Court. But, as previously stated, there is no case law on point to support Ms. Robertshaw's conclusion.

Ms. Johnson analyzed several cases where offset was applied to draw comparisons. See e.g. Tolson v. Allstate Ins. Co., 108 Wn.App. 495, 32 P.3d 289 (Div. 1 2001); Young v. Teti, 104 Wn.App. 721, 16 P.3d 1275 (Div. 2 2001). The cases cited by Ms. Johnson stand for the proposition that a defendant is entitled to offset so long as the plaintiff is made whole. Based on this observation, Ms. Johnson's conclusion is that offset should be applied by the trial court when equitable regardless of whether an arbitrator deferred the issue to the court or the arbitrator was never asked to decide the issue.

Ms. Johnson agrees that if the arbitrator had ruled on the offset issue, then a trial de novo would have been necessary to re-argue the offset issue. However, Ms. Johnson was not re-arguing the offset issue to the Superior Court. That issue was being argued for the first time when the Superior Court was asked to apply offset to the arbitrator's award. Ms. Johnson did not want a new trial. She simply wanted the undisputed amount of offset to be applied, which is equitable and prevents Ms. Robertshaw from a double recovery windfall.

Rules regarding appeal of an arbitrator's decision or requests for trial de novo are not applicable in this case because the arbitrator's decision is not what is being appealed. All of the cases cited in Ms. Robertshaw's Motion, except Mercier, are cases where an arbitrator made a specific ruling on a particular issue and then the offended party sought to re-argue that issue. But that is not the circumstances of this matter. Ms. Johnson agrees that the arbitration is final and none of the arbitrator's decisions can be appealed. However, offset was not one of the arbitrator's decisions. Since Ms. Johnson is appealing the Superior Court's decision and not the arbitrator's, the mandatory arbitration rules and statutes regarding trial de novo and fees for an appeal of an arbitrator's decision do not apply.

**2. Double recovery is prohibited. The Superior Court abused its discretion when it allowed double recovery by failing to apply the undisputed offset amount to the segregated award.**

The Superior Court's order denying Ms. Johnson's motion for reconsideration simply stated, "Defendant has failed to persuade this court that [Mercier] is applicable to the case at bar." Ms. Johnson believes such decision was in error. Further, to the extent the Superior Court may have exercised discretion, Ms. Johnson believes it was an abuse of discretion not to apply the undisputed amount of offset.

As demonstrated in Ms. Johnson's Brief of Appellant: offset should be applied when equitable (Tolson, supra.; Young, supra.); there is need for flexibility in rules of pleading and failure to plead an affirmative defense of offset does not bar the application of offset (Mahoney v. Tingley, 85 Wn.2d 95, 529 P.2d 1068 (1975)); and if offset is not applied in this case then Ms. Robertshaw will receive a double recovery, which is not allowed under Washington law (Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 588 P.2d 191 (1978)). Here, the amount of offset is undisputed. Ms. Robertshaw does not deny that she is defending a decision that if upheld would result in her double recovery. If the Superior Court reached this point of analysis, it was an abuse of discretion not to apply the offset and thereby allow Ms. Robertshaw double recovery.

**a. Full Compensation is the Ceiling**

The Mahoney Court stated, “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 need for such flexibility in procedural rules.” Mahoney, 85 Wn.2d at 100-1.

Ms. Robertshaw’s rights were not affected because she knew even before filing suit that her medical expenses had been paid by Ms. Johnson’s insurer. Thus, it was arguably frivolous for Ms. Robertshaw to claim medical expense damages to begin with. But Ms. Robertshaw now argues that her request for double compensation was valid and the judgment entered by the Superior Court that permits her double recovery should be upheld because, “it ultimately does not matter...whether Ms. Robertshaw will be fully compensated.” (Br. of Respondent Sara Robertshaw, p. 25).

Therein lies the fundamental difference between the parties’ arguments. Ms. Johnson argues that it does matter whether Ms. Robertshaw will be fully compensated because full compensation is all a plaintiff is entitled to. Thiringer, 91 Wn.2d at 220.

Ms. Robertshaw cites no authority to support her conclusion that she should receive double recovery. Instead, Ms. Robertshaw attempts to compare Ms. Johnson’s failure to plead offset to a plaintiff’s failure to file

suit before expiration of the applicable statute of limitations. But Ms. Robertshaw ignores that there is need for “flexibility” in pleading affirmative defenses, which is not the case with the statute of limitations.

The statute of limitations is based on public policy that an entity facing a potential claim needs finality. It would be cruel to force a person or business to carry on in perpetuity with the threat of litigation constantly looming for some act long since past. Further, it would decrease productivity because an entity facing a potential judgment may have little incentive to create wealth that could be transferred as the result of potential future litigation.

In Ms. Robertshaw’s situation, there was no threat of uncertainty. Ms. Robertshaw initiated the lawsuit and, as previously stated, Ms. Robertshaw has known all along that her medical expenses were paid by Ms. Johnson’s insurer. There was no firm deadline for Ms. Johnson to apply the undisputed amount of offset. At most, in this situation there is need for flexibility to prohibit double recovery.

**b. Full Compensation is the Ceiling**

Full compensation is all a plaintiff is entitled to. Thiringer, 91 Wn.2d at 220. It was worth saying again because that is the crux of this appeal. Ms. Robertshaw agrees that her previous medical expenses were paid for by Ms. Johnson’s insurer. Absent such agreement, this fact would

even be subject to judicial notice because the amount of offset is readily provable by the bills and cancelled checks that Ms. Johnson submitted to the Superior Court; and see CP 37-38.

If the Superior Court found that it had jurisdiction to apply offset, but then decided not to apply it, then the Superior Court abused its discretion by not applying the undisputed amount of offset and allowing double recovery. See Eagle Point Condominium Owners Ass'n v. Coy, 102 Wn.App. 697, 702, 9 P.3d 898 (Div. 1 2000) (“It is a basic principle of damages, both tort and contract, that there shall be no double recovery for the same injury.”).

The Superior Court effectively had no discretion not to apply offset based on the facts that the amount of offset is undisputed and the arbitrator’s award is a segregated award to which offset can be readily applied. Failure to apply the offset allows Ms. Robertshaw double recovery, which is clearly adverse to well established law.

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## CONCLUSION

Ms. Johnson did not and does not want a trial de novo. There was never any thought that she might request one. The decisions that were made by the arbitrator, based on the issues before him, are acceptable to Ms. Johnson. But the arbitrator made no decision regarding offset because he was not asked to consider that issue. Therefore, applying offset is not a modification of the arbitrator's decision. It is merely an extension of the adjudication regarding an undecided issue. This way of supplementing the arbitrator's decision has been approved by the courts in cases such as Mercier, supra.

The Superior Court denied Ms. Johnson's request to apply the undisputed amount of offset to the arbitrator's award. It is unclear whether the Superior Court decided it did not have jurisdiction to apply the offset or if it for some reason believed that Ms. Robertshaw should get a double recovery in this case. In either event, the Superior Court erred.

It cannot be overstated that Ms. Johnson is not appealing the arbitrator's decisions. Ms. Johnson is appealing the Superior Court's decision not to apply offset, which was an issue that was not decided by the arbitrator. Applicable law supports Ms. Johnson's method of applying offset. The Superior Court's order denying Ms. Johnson's motion for reconsideration must be reversed and this matter remanded with instructions that judgment be entered in the amount of \$8,006.35. This amount makes Ms. Robertshaw whole and does not permit a double recovery of previously paid medical expenses.

DATED this 27 day of June, 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 **Reply Brief of Appellant Dolores Johnson** upon the following persons:

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