

Case No. 72705-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CHARLENE KENNEDY,
Plaintiff-Respondent,

v.

EVERGREEN AT BELLINGHAM, LLC d/b/a NORTH CASCADES
HEALTH AND REHABILITATION CENTER; EHC MANAGEMENT,
LLC d/b/a NORTH CASCADES HEALTH AND REHABILITATION
CENTER,
Defendants-Appellants.

Appeal relating to Whatcom County Superior Court,
Case No. 13-2-02846-4 (Judge Ira Uhrig)

BRIEF OF APPELLANTS

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I. INTRODUCTION

The parties executed a signed arbitration agreement on June 4, 2012. After plaintiff Charlene Kennedy filed the instant lawsuit, Defendants-Appellants Evergreen at Bellingham, LLC, and EHC Management, LLC (collectively “defendants” herein) moved to compel arbitration pursuant to the terms of the agreement. In response, plaintiff did not challenge the form or content of the arbitration agreement. Rather, she sought only to rescind the agreement on the grounds that she been allegedly incompetent to sign it at the moment of execution. The trial court accepted this defense of incompetency and denied the motion to compel arbitration, resulting in the present appeal under RCW 7.04A.280(1)(a).

As detailed below, the trial court committed error in accepting the plaintiff’s proposed findings of fact and conclusions of law and in finding “clear, cogent, and convincing” evidence of plaintiff’s lack of competency. Simply put, plaintiff’s alleged lack of competency on June 4, 2012 was not shown by evidence to be “highly probable.” In addition, the trial court neglected to make any findings or conclusions on defendants’ alternative argument that the arbitration agreement had been assented to or else ratified by the plaintiff’s sisters (acting under a durable power of attorney), which is a separate basis on which arbitration should be compelled.

For all of the reasons discussed below, defendants request that the trial court's order be reversed, and that this lawsuit be placed into mandatory arbitration pursuant to the agreement of the parties.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error No. 1:

The trial court's Finding of Fact #5 was not supported by "highly probable" evidence.

B. Assignment of Error No. 2:

The trial court's Finding of Fact #6 was not supported by "highly probable" evidence.

C. Assignment of Error No. 3:

The trial court's Finding of Fact #7 was not supported by "highly probable" evidence.

D. Assignment of Error No. 4:

The trial court's Finding of Fact #8 was not supported by "highly probable" evidence.

E. Assignment of Error No. 5:

The trial court's conclusion of law that plaintiff lacked the requisite competency to sign the Arbitration Agreement on June 4, 2012, was not supported by the quantum of proof (i.e., "clear, cogent, and convincing" evidence) necessary to defeat the general presumption of competency in Washington.

F. Assignment of Error No. 6:

Alternatively, if plaintiff in fact lacked competency on June 4, 2012, and so relied upon her sisters as her legal decision-makers, then the trial court's denial of defendants' motion to compel arbitration was erroneous because plaintiff's sisters had assented to and/or ratified the terms of the arbitration agreement.

G. Assignment of Error No. 7:

The trial court erred in failing to make any findings of fact or conclusions of law on the "material issue" of defendants' alternative argument that plaintiff's sisters had assented to and/or ratified the terms of the arbitration agreement.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were the trial court's Findings of Fact #5, 6, 7, and 8 supported by sufficient evidence in the record to make them "highly probable"?

2. Was the trial court's Conclusion of Law regarding incompetency supported by evidence to the degree of "clear, cogent, and convincing"?

3. Alternatively, even if plaintiff in fact lacked competency on June 4, 2012, did the plaintiff's sisters subsequently assent to and/or ratify the arbitration agreement that plaintiff had signed?

4. Did the trial court err in declining to make any findings of fact or conclusions of law regarding defendants' alternative argument regarding the sisters' assent and/or ratification of the arbitration agreement?

IV. STATEMENT OF CASE

A. Procedural History

On November 13, 2013, plaintiff filed this lawsuit for damages relating to injuries allegedly sustained while a resident at North Cascades Health & Rehabilitation Center ("North Cascades"), a skilled nursing facility operated by defendant Evergreen at Bellingham, LLC. Plaintiff resided at North Cascades between June 1, 2012 and January 2013.

On March 10, 2014, defendants filed a motion under RCW 7.04A.070 to stay the proceedings and compel arbitration pursuant to a written arbitration agreement signed by plaintiff and a North Cascades representative on June 4, 2012 (the "Arbitration Agreement"). *See* App-1 (copy of Arbitration Agreement).

Plaintiff requested a continuance to respond to this motion, so it did not come before the trial court until August 15, 2014. Plaintiff did *not* challenge the form or content of the Arbitration Agreement. Rather, plaintiff's only contention was that the Arbitration Agreement should be rescinded because plaintiff allegedly lacked the requisite mental capacity to sign it at the time of execution.

Plaintiff's rescission theory came before the trial court on October 13, 2014 for a two-day evidentiary hearing. Plaintiff did not offer the testimony of any treating medical or mental health providers. Rather, plaintiff only called a forensic neuropsychologist (Tedd Judd, Ph.D.) and plaintiff's two sisters. In contrast, defendants called a treating physician (Dr. Giroto), a treating mental health provider (Ms. Huang), a treating speech pathologist (Ms. Wiklund), and the admissions coordinator at North Cascades (Ms. Herrera) who had completed the Arbitration Agreement with plaintiff. Defendants also called a neuropsychologist (Ken Muscatel, Ph.D.) regarding his forensic opinions.

At the conclusion of the evidence, plaintiff argued that she had presented "clear, cogent, and convincing" evidence that she had lacked the requisite mental capacity to sign the Arbitration Agreement. In response, defendants argued that the motion to compel arbitration should be granted either (1) because plaintiff had failed to meet her burden to prove incapacity; or alternatively, (2) because plaintiff's fiduciaries (i.e., her sisters) had subsequently assented to or else ratified the Arbitration Agreement.

The trial court took the matter under advisement and invited both parties to submit their proposed Order with Findings of Fact and Conclusions of Law. Both parties submitted proposed Orders. *See* App-3 (defendants' proposed Order) & App-10 (plaintiff's proposed Order). On October 17, 2014, the trial court signed plaintiff's Order

denying the motion, with a single edit to fix a typo. App-10. Defendants timely appealed this Order under RCW 7.04A.280(1)(a).

B. Undisputed Facts Relating to Plaintiff's Competency

Numerous facts relating to plaintiff's competency status were undisputed at the hearing. Per plaintiff's forensic neuropsychologist, Dr. Judd, plaintiff (born in 1954) had dropped out of school in the 11th grade, but she has never been considered mentally retarded or intellectually disabled. Tr. 7:22-25.¹ There is nothing in her medical records to support any diagnoses pertaining to alleged brain damage. Tr. 98:2-5. She has worked as a housekeeper and as a caregiver for others. Tr. 8:1-4. She is able to read, and receiving information through auditory channels is something with which she has been very familiar. Tr. 98:9-11, 17-20.

Plaintiff has *never* been declared incompetent or incapacitated by any person or tribunal, and she has never had a guardian or conservator appointed over her affairs. Tr. 140:23 – 141:4. In 2011, plaintiff had the requisite capacity to execute a durable power of attorney on her own behalf. Tr. 145:4-6. Although that durable power of attorney gave signing authority to plaintiff's two sisters, plaintiff remained free at all times to sign and execute documents on her own behalf. Tr. 144:23-25.

¹ All references to "Tr." in this brief refer to the transcript for the first day of the evidentiary hearing before the trial court, which occurred on October 13, 2014.

Dr. Judd's one and only encounter with plaintiff was a short office interview on April 25, 2014—almost two years after she signed the Arbitration Agreement. Tr. 53:10-14. Dr. Judd elected to not perform any standardized tests, assessments, or evaluations during that interview. Tr. 86:16-20. Notably, Dr. Judd made *no determination* as to whether plaintiff had the requisite mental capacity to sign the Arbitration Agreement on the day he met with her. Tr. 86:23 – 87:2. That said, without having performed any testing, Dr. Judd concluded that plaintiff had the requisite mental capacity to personally sign a three-page legal agreement regarding his forensic investigation. Tr. 87:8-13. Dr. Judd conceded that plaintiff understood what she was signing at that time. Tr. 69:4-8.

Although Dr. Judd's ultimate opinion was that plaintiff lacked the requisite competency on June 4, 2012, to sign the Arbitration Agreement, Dr. Judd conceded that he could *not* determine the period of time in which plaintiff had lacked competency. Tr. 88:14-16.

Dr. Judd did acknowledge that a hospital nurse found plaintiff to have been competent as of May 28, 2012, and Dr. Judd did not dispute that real-time finding. Tr. 90:2-23. Dr. Judd also conceded that plaintiff *likely had competency* on June 1, 2012 when she was transferred from the hospital into North Cascades. Tr. 93:2-16. In other words, *the evidence was undisputed by plaintiff's own expert that plaintiff came to North Cascades on June 1, 2012, in a state of competency.*

When asked whether plaintiff had the requisite competency to sign a written arbitration agreement on the very next day, June 2, 2012, Dr. Judd responded that he was “uncertain.” Tr. 95:17-21. He later added that he *could not say* whether plaintiff first began to lack the requisite mental competency to sign the Arbitration Agreement on June 1, June 2, or June 3.

C. Plaintiff’s Condition between June 1 and June 4

Defendants’ forensic neuropsychologist, Dr. Muscatel, carefully walked through all of the nursing notes from these dates in a sequential manner. *See* 2 Tr. 91:2 – 99:18;² *see also* Defs’ Ex. 13 (progress notes). Dr. Muscatel summarized these records as follows:

June 1: Plaintiff was noted to have been fully alert and oriented, although “very tearful” at times. 2 Tr. 91:15-23. She had some occasional episodes of confusion and forgetfulness, but she was able to make her needs known and respond to her environment. 2 Tr. 92:10-19.

June 2: Plaintiff continued to be alert and oriented and was essentially stable, again with occasional episodes of forgetfulness and tearfulness. 2 Tr. 93:22 – 94:4.

² Because the page numbers for the two-day evidentiary hearing were not numbered sequentially, all references in this brief to “2 Tr.” refers to the transcript for the second day of the hearing: October 14, 2014. On citations to the transcript in this brief, *see also* footnote 1, *supra*.

June 3: Plaintiff did not demonstrate any changes; she was “participating in treating” and “eating”, which “seems pretty stable, pretty normal.” 2 Tr. 95:11-13.

June 4: Plaintiff was up and moving around, and her condition “sounds pretty much more of the same.” 2 Tr. 96:6-8.

D. Execution of the Arbitration Agreement

Melinda Herrera was the admissions coordinator for North Cascades in June 2012. 2 Tr. 16:12-14. It was her job to explain and complete admissions paperwork for each new resident, a process that would take 20 to 60 minutes. 2 Tr. 18:20-24. Although she does not have an independent recollection of plaintiff, Herrera testified as to her usual practices which she would have followed in her interactions with plaintiff. 2 Tr. 19:5-25.

Herrera would not necessarily go through the admissions paperwork on the resident’s first day, not wanting them to be overly tired or distracted. 2 Tr. 21:2-15. (Here, she waited until June 4, the Monday after plaintiff’s Friday, June 1 admission.) Herrera would first check in with the nursing staff regarding medications and diagnoses to confirm that the resident would be able to communicate and understand the admissions paperwork. 2 Tr. 23:12-20. Herrera would then introduce herself to the resident and engage in initial conversation to ensure that the resident is alert, oriented, and able to have a conversation. 2 Tr. 20:1-17. If the resident appeared sleepy or

drowsy or otherwise unable to participate, she would come back at a later time, or if necessary, see if someone else was needed to help complete the paperwork for the resident. 2 Tr. 24:1-9.

The first document discussed is the admissions agreement. *See* Def's Ex. 1 & 2 Tr. 25:13-20. Herrera would ask the resident if they wanted anyone else to be present. 2 Tr. 29:21-25. She would explain the terms of the agreement not in legal jargon, but in paraphrases that a layperson can understand. 2 Tr. 28:1-4, 17-25. In the admissions agreement signed by plaintiff on June 4, 2012, plaintiff both consented to and declined various items for which her decision was needed. *See* 2 Tr. 30:4 – 32:1 & Def's Ex. 1.

The second document discussed is the Arbitration Agreement. *See* Def's Ex. 2 & 2 Tr. 33:17-19. Herrera does not simply read this document, but she explains it in easy-to-understand terms. 2 Tr. 34:15 – 35:8. She lets the resident know that they have 30 days to change their mind about it after signing it. 2 Tr. 35:12-15; *see also* Def's Ex. 2 (stating that the resident “has thirty (30) days from the execution of this Arbitration Agreement to revoke this Arbitration Agreement”). Herrera explains that the Arbitration Agreement is voluntary and optional, and she testified that residents routinely decline to sign it. 2 Tr. 36:3-11.

Here, the Arbitration Agreement was signed by both plaintiff and Herrera on June 4, 2012. Def's Ex. 2. The fact that Herrera counter-signed it confirms her belief at that time that plaintiff

understood their discussion and was otherwise able, alert, and oriented throughout their conversation. 2 Tr. 37:25 – 38:1.

At the end of the conversation, Herrera would have asked plaintiff if she wanted a copy of the paperwork, and if desired, she would have left a copy in plaintiff's room. 2 Tr. 38:16-23. Herrera also provided her business card with her name and contact information on it. 2 Tr. 39:9-14.

E. Receipt of Arbitration Agreement by Plaintiff's Sisters

Both of plaintiffs' sisters testified that they recalled entering the plaintiff's room at North Cascades while a non-nurse employee (i.e., Herrera) was just finishing going through and completing the admissions paperwork with plaintiff. Tr. 133:22-25 (sister Overland) & Tr. 171:23 – 172:5 (sister Massey).

Sister Overland recalled that North Cascades then left a folder with copies of all of the admissions paperwork in plaintiff's room. Tr. 154:6-12. As noted above, Herrera routinely provided copies of the admissions paperwork to residents. Herrera confirmed in her testimony that there are no admission documents *other than* the admission agreement and Arbitration Agreement, both of which are discussed above. 2 Tr. 39:24 – 40:7. Thus, accepting the testimony of plaintiff's sisters as being true, Herrera agreed that she made a copy of the Arbitration Agreement and left a copy of it in the packet in plaintiff's room for her and her family to review. 2 Tr. 41:5-13.

Sister Overland testified that she reviewed the documents at the time, but now claims she “just glanced over them.” Tr. 154:13-14. In any event, she did not see anything in those papers that was a cause of concern to her. Tr. 155:2-4. The packet remained in a drawer in plaintiff’s room, and Overland knew she was free at any time to review it. Tr. 155:14-23. Sister Massey was aware of the packet, but she chose to never personally review the records contained therein. Tr. 173:9-10.

As noted above, the Arbitration Agreement expressly states a 30-day revocation period. *See* Def’s Ex. 2. Neither plaintiff nor her sisters ever contacted Herrera or anyone else at North Cascades about revoking the signed Arbitration Agreement, either within the 30-day window or thereafter. 2 Tr. 39:15-20.

F. Plaintiff’s Subsequent Condition

Though not directly relevant to the question of plaintiff’s competency on June 4, the trial court also received evidence regarding plaintiff’s condition on the days following her execution of the Arbitration Agreement. First, plaintiff was evaluated by her treating physician, Gilson Giroto, D.O., around 9:00 a.m. on June 5, 2012. 2 Tr. 6:3-25 & Def’s Ex. 18 (record of evaluation). Dr. Giroto concluded that plaintiff was “pleasant but very anxious, obese, she is alert and oriented and in no apparent distress or no acute distress.” 2 Tr. 8:17-20. Plaintiff had oxygen saturation of 100%, which is

perfectly normal. 2 Tr. 8:21-25.

Dr. Giroto did not make any diagnoses regarding her cognitive function. 2 Tr. 11:14-16. He did not refer her for a cognitive evaluation. 2 Tr. 11:17-19. He saw no signs of dementia. 2 Tr. 14:6-7. He agreed that he would have charted such findings in his record had he made them. 2 Tr. 9:13-17.

Two days later, on June 7, two notable events occurred. First, plaintiff was started on a new medication, Ativan (also known as lorazepam), a benzodiazepine to address the plaintiff's increased anxiety. 2 Tr. 104:1-17. The purpose of Ativan is to sedate and calm the individual. 2 Tr. 104:18-21. Plaintiff first received a dose of Ativan during the evening of June 7. 2 Tr. 105:16-19. Second, on June 7, based on a concern for confusion and impaired memory, the North Cascades nursing staff referred plaintiff for an evaluation by a speech pathologist, Michele Wiklund. 2 Tr. 105:20-22 & Def's Ex. 21 at p.2.

On the morning of June 8, plaintiff received another dose of Ativan. 2 Tr. 105:16-18. She then underwent her initial evaluation by Ms. Wiklund. Wiklund recalled that plaintiff was emotional and tearful, but that she was able to provide a history and generally had insight into her condition and changes. 2 Tr. 56:4-13. She found plaintiff able to comprehend their conversation throughout the examination. 2 Tr. 57:25 – 58:1. She conducted a brief assessment called the SLUMS test, on which the plaintiff performed poorly. 2 Tr.

58:2-24. However, Wiklund does not draw any conclusions based on the SLUMS test alone, which is dependent upon factors including the patient's level of alertness, their willingness to participate, etc. *Id.*; *see also* 2 Tr. 60:9-17 (noting that the results of the SLUMS test "definitely could vary from day to day" based on these factors).

Ms. Wiklund explained that she scores cognitive deficits based on a four-level scale: mild, moderate, severe, and profound. 2 Tr. 63:4-9. Although Ms. Wiklund assessed plaintiff as having "mild" and "moderate" impairments across different functions, she did not assess any impairments that were "severe" or "profound." *Id.* & Def's Ex. 21 at p.2. Similarly, while Ms. Wiklund concluded that plaintiff would benefit from assistance in managing her finances from her family, she did *not* conclude that plaintiff was unable to manage her finances independently. 2 Tr. 66:5-18.

As noted by Dr. Muscatel, plaintiff's "mental capacity on the 4th [of June] could be very different for a lot of reasons than it was on the 8th, including the variable state of her health, including psychological factors." 2 Tr. 106:22 – 107:1. This variation was in fact illustrated by plaintiff's own history, such as by her performing poorly on the SLUMS on June 8, then getting a perfect score on the similar BIMS assessment on June 13, and then performing adequately on the Mini-Mental State Examination (MMSE) on July 16. 2 Tr. 107:3-16.

Finally, when plaintiff decided to go to a different nursing care facility in February 2013, she again chose to sign the admission agreement there on her own behalf. Def's Ex. 9 at pp. 6-7.

V. STANDARD OF REVIEW

The trial court in this matter conducted an evidentiary hearing to determine whether plaintiff had presented “clear, cogent, and convincing” evidence to defeat the presumption of competency. *See generally Johnson v. Perry*, 20 Wn. App. 696, 703, 582 P.2d 886 (1978) (internal quotation omitted).

This Court reviews the trial court's findings of fact and conclusions of law to determine whether or not they are supported by “substantial evidence.” *See In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973); RCW 4.44.060. Notably, however:

[E]vidence that may be sufficiently ‘substantial’ to support an ultimate fact in issue based upon a ‘preponderance of the evidence’ *may not be sufficient* to support an ultimate fact in issue, proof of which must be established by clear, cogent, and convincing evidence.

Sego, 82 Wn.2d at 739 (italics added). As a result, the question on appeal here is “not merely” if “substantial evidence” supports the trial court's determinations, but whether “substantial evidence” in the record makes the trial court's findings to be “highly probable.” *Id.*

This heightened standard of review in cases involving the “clear, cogent, and convincing” standard of proof has been re-

affirmed many times by the Washington Supreme Court and the Washington Courts of Appeals in the forty-plus years since *Sego*. See, e.g., *In re Dependency of K.R.*, 128 Wn.2d 129, 144, 904 P.2d 1132 (1995) (noting that trial court’s “findings will not be disturbed unless clear, cogent, and convincing evidence does not exist in the record”); *In re H.J.P.*, 114 Wn.2d 522, 532, 789 P.2d 96 (1990) (stating that trial court’s findings of fact based on “clear, cogent, and convincing evidence” must be “supported by ‘substantial evidence’ which satisfies the ‘highly probable’ test”); *In re Labelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986) (“highly probable” test); *Kitsap Bank v. Denley*, 177 Wn. App. 559, 569, 312 P.3d 711 (2013) (“highly probable” test; reversed trial court because “[n]o rational trier of fact could find clear, cogent, and convincing evidence” establishing undue influence); *Bale v. Allison*, 173 Wn. App. 435, 453-54, 294 P.3d 789 (2013) (“highly probable” test). Thus, on appeal, the trial court’s findings and conclusions must be supported by “substantial evidence” to the degree of being “highly probable.”

VI. ARGUMENT

First Assignment of Error: “The trial court’s Finding of Fact #5 was not supported by ‘highly probable’ evidence.”

In the trial court’s Findings of Fact, the first four findings discussed undisputed procedural history. See App-10. Then, in Finding of Fact #5, the trial court found as follows:

Expert testimony of Dr. Tedd Judd, based on interview and medical record review, confirms that Ms. Kennedy did not have capacity to understand the Arbitration Agreement signed on June 4, 2012. Dr. Judd supported his opinions with substantial evidence, such as the multiple notations of confusion and memory problems noted in the medical chart from North Cascades Health and Rehabilitation Center during the week of June 1, 2012, following her admission to that facility. Ms. Kennedy evidenced a complete lack of memory of even being admitted to North Cascades, which evidences cognitive disability at the time the Arbitration Agreement was signed.

The issue of “capacity” or “competency”, however, is not a medical diagnosis but a legal determination. In Washington, parties to a contract are “presumed” to be competent. *Johnson v. Perry*, 20 Wn. App. 696, 703, 892 P.2d 886 (1978) (quoting *Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942)). That “presumption is overcome only by clear, cogent, and convincing evidence.” *Id.* Such clear, cogent, and convincing evidence of incompetency must be found “at the time the transaction occurred.” *Id.* The key issue is not whether the person actually understood the terms of the contract, but “whether the contractor possessed sufficient mind or reason to enable [her] to comprehend the nature, terms, and effect of the contract at issue.” *Id.*

This high burden ensures that lawful contracts can only be rescinded in exceptional circumstances. As the Washington Supreme Court confirmed:

[M]ere mental weakness falling short of incapacity to appreciate the business at hand will not invalidate a contract; physical condition not adversely affecting mental competence is immaterial, and neither age, sickness, extreme distress, nor debility of body will affect the capacity to make a contract or conveyance, if sufficient intelligence remains to understand the transaction....

Page, 12 Wn.2d at 108-09 (internal quotation omitted). Additionally:

[A] contract will not be invalidated because [the contractor] was of a less degree of intelligence than his co-contractor, because he was fearful or worried; because he was eccentric or entertained particular beliefs; or because he was aged or both aged and mentally weak, or insane....

Id. (internal quotation omitted)

At the hearing in this matter, it is true that plaintiff's forensic neuropsychologist, Dr. Judd, stated his opinion that plaintiff lacked the requisite mental competency to sign the Arbitration Agreement on June 4, 2012. *See* Tr. 78:9-16 ("A. Deferring to the judge to bring the values of society to this, but I would say from my perspective, yes.") However, defendants assert that Dr. Judd's opinion is of limited value, given that he never treated the plaintiff as a medical or mental health provider (Tr. 79:4-6) and given that he never spoke with any of her treating providers from the relevant timeframe (Tr. 85:2-7).

Most significantly, defendants assert that this Finding of Fact is erroneous because it is not supported by evidence that is "highly probable." The trial court wholly failed to address a number of

significant concessions made by Dr. Judd, concessions which make the remainder of his opinions unfounded and rather speculative. The trial court, for example, failed to reference any of the undisputed facts set forth in Part IV.B, above.

Notably, Dr. Judd conceded that plaintiff *had* the requisite mental competency to sign the Arbitration Agreement as of June 1, 2012, when she first arrived at North Cascades. Tr. 93:2-16. He was wholly unable to identify the subsequent point of time at which he believes plaintiff lost her competency status. Tr. 95:22 – 96:10 (indicating that he could not say whether plaintiff first lost competency status on June 1, 2, or 3). Dr. Judd just claims to be certain that plaintiff had lost her competency status by June 4 (the date on which she happened to sign the Arbitration Agreement), even though the medical records for June 4 do not contain any significant or notable entries, and even though an extensive evaluation by a treating physician on the morning of June 5 disclosed no cognitive impairments. *See* Parts IV.C & IV.F, *supra*.³

Dr. Judd is unable to support his own speculative opinion. He acknowledged that competency can ebb and flow over time, and that a person could go in and out of competency within a given day. Tr. 75:7-9 & 88:2-8. He acknowledged that plaintiff had “a number of

³ Likewise, Dr. Judd was unable to identify when plaintiff’s period of incompetency ended. Tr. 88:14-16. Thus, Dr. Judd did not claim that plaintiff remained incompetent throughout the 30 day revocation period of the Arbitration Agreement.

serious health difficulties that were chronic and...fluctuating during that period of time” (Tr. 8:15-17), but, of course, those chronic health difficulties were fully present on June 1, 2012, when he agreed that plaintiff had mental competency. Dr. Judd admitted that he had *no opinion* as to what had changed medically for the plaintiff between June 1 and June 4 to cause her alleged incompetency. Tr. 96:17-20. He agreed that her vital signs and oxygen levels remained stable at all times. Tr. 97:1-7. Although he interviewed both of plaintiff’s sisters two years after the fact, neither of the sisters were sure as to whether they even visited the plaintiff on June 4. Tr. 168:6-9 & 141:24 – 142:1.

In Finding of Fact #5, the trial court found support for Dr. Judd’s opinion regarding incompetency in two sources: (1) the “multiple notations of confusion and memory problems” in the nursing progress notes, and (2) Ms. Kennedy’s claim that she has a “complete lack of memory” regarding her admission. However, once again, neither finding is supported by evidence that meets the “highly probable” standard.

Regarding the nursing progress notes, discussed above in Part IV.C, although they reference intermittent tearfulness, confusion, or forgetfulness, they also routinely indicate that plaintiff was fully alert and oriented, had normal vital signs, was up and around the facility, was eating and sleeping normally, and was able to make her needs known. Indeed, any intermittent tearfulness, confusion, or forgetful is

just that—*intermittent*—and would not support anything more than fleeting or passing spells of incompetency. There is no evidence connecting such a fleeting spell to the precise moment when plaintiff signed the Arbitration Agreement. *Cf.* 2 Tr. 37:25 – 38:1 (testimony by Herrera indicating that she confirmed that plaintiff was able to understand the agreement at the time it was signed). Thus, for all of these reasons, *even Dr. Judd* conceded that the nursing notes do *not* provide clear, cogent, and convincing evidence regarding plaintiff's alleged lack of competency on June 4. Tr. 113:25 -114:4. The court's contrary finding is therefore in error.

Second, regarding plaintiff's alleged lack of memory of her initial days at North Cascades, Dr. Judd similarly *conceded* that this lack of memory did not provide clear, cogent, and convincing evidence of incompetency. Tr. 109:2-9. He further acknowledged that this fact was based *entirely* on the plaintiff's own subjective report of her lack of memory some two years after the fact, and while the present motion was being litigated. Tr. 109:10-21. Dr. Judd further acknowledged that plaintiff's medical records have never disclosed any reported diagnoses or symptoms relating to a lack of memory, such as amnesia. Tr. 111:5-9. In sum, as noted by Dr. Muscatel, a "lack of memory does not...tell you anything about whether the person had an understanding or awareness at the time." 2 Tr. 110:2-9.

Following the guidance of the *Page* opinion, “mere mental weakness falling short of incapacity to appreciate the business at hand will not invalidate a contract.” *Id.*, 12 Wn.2d at 108. Here, there is no evidence in the record to support Dr. Judd’s ultimate opinion, and certainly not to the degree of “highly probable” evidence.

Second Assignment of Error: “The trial court’s Finding of Fact #6 was not supported by ‘highly probable’ evidence.”

In its next Finding of Fact (#6), the trial court found:

The facility chart shows that Ms. Kennedy evidenced cognitive impairment throughout the week of June 1, 2012, leading the staff of North Cascades Health and Rehabilitation Center to refer Ms. Kennedy for a cognitive evaluation on June 7, 2012.

As discussed in the prior section, this finding is erroneous and is not supported by “highly probable” evidence, or even by Dr. Judd. This finding also mixes up the relevant timeframe. Although it is true that plaintiff was referred on June 7 for a cognitive evaluation (2 Tr. 105:20-22), that referral took place some three days after the relevant date for the court’s analysis of incompetency: *June 4*. In other words, no treating provider had sensed the need for a cognitive evaluation by June 4, and there is no evidence in the record to support the notion that one was warranted or required at that point in time.

This finding by the court also wholly neglects the findings by Ms. Herrera on June 4 of the plaintiff’s ability to understand their conversations about the admissions paperwork, and it ignores the real-

time findings by the plaintiff's treating physician (Dr. Girotto) on June 5, who did not make any findings of cognitive impairment or refer the plaintiff for a cognitive evaluation.

In sum, plaintiff needed to provide "clear, cogent, and convincing evidence" of incompetency "at the time the transaction occurred", *i.e.*, on June 4. *Johnson*, 20 Wn. App. at 703. A referral that was subsequently made on June 7 does not support such a finding, especially in light of Dr. Judd's concession that a person may go in and out of competency within the same day, and even within the span of an hour. Tr. 88:2-8.

Third Assignment of Error: "The trial court's Finding of Fact #7 was not supported by 'highly probable' evidence."

In the next Finding of Fact (#7), the trial court stated:

Cognitive testing showed Ms. Kennedy to be so impaired as to justify a finding of dementia, and the facility staff member responsible for testing assigned Ms. Kennedy a diagnosis indicating cognitive impairment. Michelle Wiklund, the North Cascades staff member responsible for evaluating Ms. Kennedy, described her as having "significant impairments with memory, complex problem solving and deductive reasoning." Ms. Kennedy was not able to grasp a simple story written at an elementary school level read to her on June 8, 2012.

This finding contains factual statements that are incorrect and unsupported by the evidence. Regarding its first sentence, Wiklund actually testified that the results from her testing (which were limited to the brief SLUMS test) *do not* and *cannot* result in a finding of

dementia. 2 Tr. 59:3-8 (stating that it “wouldn’t be accurate” to say that the SLUMS result could lead to a diagnosis of dementia).⁴ In fact, Wiklund never diagnosed plaintiff with dementia, and plaintiff has in fact never received that diagnosis or any related diagnosis from anyone.

This finding also ignores the testimony of the *very treating provider who performed the testing*, i.e., Wiklund. She explained that plaintiff was at all times aware of her limitations and able to understand their conversation. 2 Tr. 56:21 – 58:1. Wiklund further explained that she did not make any findings of “severe” or “profound” impairment (2 Tr. 63:4-9), and that she did *not* conclude that plaintiff was “unable” to manage her finances, only that she would benefit from assistance from her actively-involved sisters. 2 Tr. 66:5-18.

Lastly, the trial court’s finding ignores that all of these events and findings took place some *four days* after the signing of the Arbitration Agreement. Indeed, on June 8, plaintiff had just received her second dose of Ativan, which she had not been taking on June 4.

⁴ Ms. Wiklund further explained that the SLUMS test is a “quick assessment” and that she does not draw any conclusions based on its results. 2 Tr. 58:5-17. The results would vary day-to-day, and are dependent on the patient’s level of alertness and willingness to participate. 2 Tr. 58:18-21 & 60:9-17. Indeed, as noted above, plaintiff received a perfect score on the similar BIMS assessment on June 13, and an acceptable score on the similar MMSE assessment on July 16. 2 Tr. 107:3-16.

2 Tr. 105:16-18. As noted by Dr. Muscatel:

[C]ompetence is kind of a moment to moment, hour to hour or day to day thing. Her mental capacity on the 4th could be very different for a lot of reasons than it was on the 8th, including medications, including the variable state of her health, includ[ing] psychological factors.

2 Tr. 106:21 – 107:2; *accord* Dr. Judd at Tr. 75:7-9 & 88:2-8.

The trial court's findings fail to account for this reality. Thus, in addition to being inadequate to support a finding of incompetency, the trial court's Finding of Fact #7 contains factual statements that are inaccurate, taken out of context, and not supported by the evidentiary record.

Fourth Assignment of Error: “The trial court’s Finding of Fact #8 was not supported by ‘highly probable’ evidence.”

For its final Finding of Fact (#8), the court stated:

The cognitive testing and findings of significant impairment, including an inability to manage her own finances and medications, took place in close in time to the signing of the Arbitration Agreement. The Court finds Dr. Judd's testimony credible that Ms. Kennedy's condition at the time of the signing of the Arbitration Agreement was unchanged from her condition on June 8, 2012, when testing showed her to have cognitive impairment at a level to render her unable to understand the nature, terms and effect of the Arbitration Agreement signed on June 4, 2012.

This finding repeats some of the errors discussed in previous sections. For example, it references a “finding” on June 8 that plaintiff had an “inability to manage her own finances”; however,

neither Ms. Wiklund nor any other person ever made such a "finding." See 2 Tr. 66:5-18. Thus, this Finding of Fact is based on a misstatement of the evidence, and all of its subsequent logic is therefore flawed and unsupported.

In addition, the trial court's reference to Dr. Judd's opinions again neglects to mention his key concession that plaintiff had full competency to sign the Arbitration Agreement on June 1, as well as the lack of any evidence in the record to support a significant change to plaintiff's mental competency status between June 1 and June 4. In other words, Dr. Judd's attempt to "work backwards" from his June 8 opinion does not account for his other concessions and undisputed facts, and his opinions fail to achieve the necessary standard of being "highly probable" evidence.

Fifth Assignment of Error: "The trial court's conclusion of law regarding incompetency was not supported by 'highly probable' evidence."

Just as all of the trial court's Findings of Fact were not supported by "highly probable" evidence, as discussed above, neither was the trial court's ultimate legal finding of incompetency as of June 4, 2012. Moreover, even if the trial court's Findings of Facts are affirmed in whole or in part, they are still inadequate to result in a finding of incompetency under the heightened standard set forth in cases such as *Johnson v. Perry* and *Page v. Prudential Life Insurance Company*, as discussed above at pp. 21-22.

Notably, “[s]trong public policy favors arbitration” of cases. *Rodriguez v. Windermere Real Estate/Wall St., Inc.*, 142 Wn. App. 833, 836, 175 P.3d 604 (2008). Likewise, the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, manifests a “liberal federal policy favoring arbitration agreements.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). Arbitration is a question of law for the court, and the court is *mandated* to compel arbitration in the presence of a valid and enforceable arbitration agreement. RCW 7.04A.070(1); *Woodall v. Avalon Care Ctr.-Federal Way, LLC*, 155 Wn. App. 919, 924, 231 P.3d 1252 (2010). Arbitration agreements are presumed to be “valid, enforceable, and irrevocable.” RCW 7.04A.060(1). As noted, here plaintiff did not challenge *any* aspect of the form or content of the Arbitration Agreement that she signed.

Plaintiff’s only argument was to rescind the Arbitration Agreement based on her alleged incompetency. As noted, competency is “presumed”⁵ in Washington, and incompetency *cannot* be found in Washington based on “mere mental weakness”; “age, sickness, extreme distress [or] debility of body,” or because the

⁵ Also of note, given that “clear, cogent, and convincing evidence” is necessary to defeat this presumption of competency, the presumption at issue is the so-called “Morgan” or “rebuttable mandatory” presumption, not the “Thayer” or “bubble-bursting” presumption. *See* WPI 24.05 & 5 Teglund, Wash. Prac.: Evidence Law & Prac. §301.15 (noting that such presumptions “usually have a strong policy basis and are sometimes called ‘enhanced’ presumptions”). Thus, the presumption stays in place and does not disappear upon the presentation of some evidence by the plaintiff to support her position.

contracting party has a “less degree of intelligence,” was “fearful or worried,” or was “both aged and mentally weak, or insane.” *Page*, 12 Wn.2d at 108-09. This presumption is grounded in the strong public policy favoring the finality and enforceability of contracts.

Based on this high burden, courts have routinely rejected claims for incompetency despite the submission of some evidence that could support such a finding. *See, e.g., Johnson*, 20 Wn. App. at 701-05 (enforcing contract despite expert testimony on contracting party’s low IQ level and very limited education); *Page*, 12 Wn.2d at 103-05 (enforcing contract despite evidence about contracting party’s very poor health and opinion testimony by his brother that “he wasn’t competent to transact business”).

Here, plaintiff offered testimony that plaintiff had multiple chronic medical problems, that she intermittently confused and forgetful, that she has a poor memory, that she has a limited education, *etc.*, but under *Johnson* and *Page*, none of this evidence is “highly probable” to rebut the presumption of competency. Such subjective and speculative evidence of incompetency threatens to undermine the enforceability of contracts between two consenting adults, and plaintiff has never offered a case from any jurisdiction reaching a finding of incompetency based on a similar factual record.

Moreover, plaintiff’s theory was defeated by Dr. Judd’s own concessions, including that plaintiff has been competent *in general* to sign the Arbitration Agreement. In other words, by plaintiff’s own

concession, she is *not* an individual who has never been capable of executing this Arbitration Agreement. Plaintiff's theory that she happened to be under a temporary or fleeting bout of incompetency on June 4, 2012, when she signed the Arbitration Agreement, is not supported by substantial evidence, and certainly not by evidence that is "highly probable" to defeat the enhanced presumption of competency.

Sixth Assignment of Error: "Alternatively, the trial court's denial of arbitration was in error because the agreement was assented to and/or ratified by plaintiff's sisters."

As a result of unexpected testimony offered by plaintiff during the evidentiary hearing, defendants offered a second, alternative ground upon which to enforce the Arbitration Agreement and compel arbitration in this case. 2 Tr. 165:13 – 167:7 (stating argument to trial court).

Simply put, if plaintiff was in fact incompetent (as plaintiff and her sisters allege), then her legally-responsible parties necessarily became her two sisters pursuant to her durable power of attorney. Def's Ex. 5. Here, as discussed above in Part IV.E, both sisters agreed that they were aware that plaintiff had signed the admissions paperwork with a North Cascades representative either at or else immediately after the time of execution. The sisters were also then provided with a complete copy of these records, which included a copy of the signed Arbitration Agreement. At least one of the sisters

then reviewed the paperwork, but did not find anything of concern and so did not object to anything contained therein. This review by plaintiff's sister occurred well within the 30-day window to revoke the Arbitration Agreement pursuant to its own terms. *See* Def's Ex. 2 (stating 30-day revocation period).

As a result, through this conduct by plaintiff's sisters acting under the durable power of attorney, they assented to and/or ratified the terms of the Arbitration Agreement. Indeed, the terms of a contract can be accepted by silence in certain situations, including where there is a duty to speak. *See, e.g., Goodman v. Darden, Doman & Stafford Assoc.*, 100 Wn.2d 476, 482-83, 670 P.2d 648 (1983) (so stating); *see generally* Restatement (Second) of Contracts §69 (1981) ("Acceptance by Silence or Exercise of Dominion"). The Restatement in particular considers the "reasonableness" of acceptance by silence, including whether the offeree has a "reasonable opportunity" to reject the contract. *Id.*

Additionally and alternatively, a "party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, the party remains silent or continues to accept the contract's benefits." *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 584, 291 P.3d 906 (2012).

Here, under plaintiff's own theory, plaintiff's sisters had a duty to speak because they were acting as the responsible parties on behalf of their incapacitated sister, the plaintiff. By their own admission,

they were aware that their incapacitated sister had completed a variety of admissions paperwork (of which the Arbitration Agreement was just one example), and they were in possession of a complete copy of these papers for their own review. Sister Overland reviewed the paperwork, found nothing of concern, and so took no action in response to it, such as by requesting revocation. In fact, the terms of the very Arbitration Agreement that she would have reviewed made it clear that the document was freely revocable upon request within 30 days, and yet she took no action whatsoever.

Given these circumstances and accepting *arguendo* that plaintiff was incapacitated as of June 4, 2012, the conduct by plaintiff's sisters assented to, affirmed, and ratified the terms of the Arbitration Agreement under their durable power of attorney on their sister's behalf. The trial court erred in not compelling arbitration on these alternate grounds.

Seventh Assignment of Error: “The trial court failed to make findings and conclusions on the material issue of the sisters’ assent and/or ratification.”

Alternatively to the Sixth Assignment of Error, above, the trial court committed reversible error by failing to address in either its Findings of Fact or Conclusion of Law the defendants’ contention that plaintiff's sisters had assented to and/or ratified the Arbitration Agreement. *See* App-10 (no mention of contention). Defendants had specifically raised this argument during the evidentiary trial and

included relevant findings of fact and conclusions of law regarding it in their proposed form of Order. *See* App-3 at FOF #10 and COL#4. And yet, the Order entered by the trial court was wholly silent on and made no findings regarding this material contention by defendants.

It is well established in Washington that a trial court's order following an evidentiary hearing should be reversed where it fails to account for or discuss a material issue. *See, e.g., In re Marriage of Horner*, 151 Wn.2d 884, 93 P.3d 124 (2004) (holding that trial court abused its discretion by failing to document its consideration of each child relocation factor within the final order); *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 707, 592 P.2d 631 (1979) (holding that "a finding must be made as to all of the 'material issues'" in a case, including "the manner in which [all material questions] were decided"; reversing because the "trial court's findings here do not so inform this court" on all issues); *Boe v. Hodgson Graham Co.*, 97 Wn. 444, 445-46, 166 P. 779 (1917) (noting that "findings and conclusions are essential" and "mandatory" on all issues presented to the court below); *Wold v. Wold*, 7 Wn. App. 872, 875, 503 P.2d 118 (1972) (stating "it is necessary that [the trial court] make findings of fact concerning all of the ultimate facts and material issues").

Similarly, in *Bowman v. Webster*, 42 Wn.2d 129, 253 P.2d 934 (1953), the court reversed the trial court for inadequate findings of fact and conclusions of law, including regarding an "additional issue interjected during the trial" alleging the defense of waiver. *See id.* at

139. The court also noted that such failures by the trial court can result in either (a) a remand to the trial court to supplement and correct its findings; or (b) the ordering of a new trial. *Id.* at 135.

Here, defendants assert that, at a minimum, the trial court's order should be reversed and remanded for a proper consideration of defendants' contention based on the sisters' assent and ratification of the Arbitration Agreement. However, as stated in Assignment of Error #6, above, given that the evidentiary record contains nothing but *undisputed facts* on this issue, defendants assert that a remand is unnecessary, and that defendants should have prevailed on this issue below. Defendants therefore request that the trial court's order be reversed, and that the Arbitration Agreement alternatively be upheld based on the sisters' assent and/or ratification.

VII. CONCLUSION

Based on the foregoing, defendants-respondents respectfully ask that the trial court's Order be reversed in its entirety, and that the present case be placed in mandatory arbitration pursuant to the parties' written agreement.

Dated this 29th day of April, 2015.

LINDSAY HART, LLP

By: 

Michael J. Estok, WSBA #36471

mestok@lindsayhart.com

Attorneys for Defendants-Appellants

APPENDIX

Arbitration Agreement (Defendant's Trial Ex 2)APP 1

Proposed Findings of Fact, Conclusions of Law, and Order
Granting Defendants' Motion to Compel Arbitration.....APP 3

Findings of Fact, Conclusions of Law in Support of Order
Denying Defendants' Motion to Compel Arbitration.....APP 10

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WASHINGTON ARBITRATION AGREEMENT (OPTIONAL)

The parties understand that any legal dispute, controversy, demand, or claim (hereinafter referred to as "claim" or "claims") that arises out of or relates to the Resident Admission Agreement or any service or care provided by the Facility to the Resident will be resolved exclusively by binding arbitration and not by a lawsuit or court process except as otherwise stated herein or to the extent that applicable state or federal law provides for judicial review of arbitration proceedings or the judicial enforcement of arbitration awards. The arbitration shall be conducted by one neutral arbitrator mutually selected by the parties. If the parties cannot agree on a neutral arbitrator for the parties, the arbitration service selected to administer the arbitration shall select a neutral arbitrator for the parties. The arbitration shall be conducted in the county in which the Facility is located at a place mutually agreed upon by the parties, or in absence of such agreement, at a place decided by the arbitrator. Except as required by law, each party shall bear its own cost and fees relating to the arbitration. All claims covered by this Arbitration Agreement are subject to Washington State Statute of Limitations.

This Arbitration Agreement applies to, but is not limited to, any claim arising from or in any way related to violations of any right granted to the Resident by law or under the Resident Admission Agreement, breach of the Washington Vulnerable Adult Act (RCW 74.43.34), breach of contract, fraud or misrepresentation, negligence, gross negligence, wrongful death, malpractice, or any other claim based on any departure from accepted standards of care, including medical or nursing care or safety, whether sounding in tort or contract. This Arbitration Agreement shall not limit either party's right to properly bring a claim in small claims court pursuant to Washington law. This Arbitration Agreement shall not apply to issues that state law requires be resolved through administrative hearings, such as involuntary transfer of residents from the Facility. Nothing in this Arbitration Agreement shall limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility or any appropriate state or federal agency.

This Arbitration Agreement will remain in effect for all care and services subsequently rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

The parties agree that damages awarded if any in an arbitration conducted pursuant to this Arbitration Agreement will be determined in accordance with the provisions of the state and federal law applicable to a comparable civil action including any prerequisites to, credit against, or limitations on such damages.

It is the intention of the parties of this Arbitration Agreement that it shall benefit and bind the parties, their successors and assigns, including the agents, employees, servants, members, manager, or affiliates of the Facility, and all persons whose claim is derived through or on behalf of the Resident, including that of any parent, spouse, child, guardian, executor, administrator, legal representative, personal representative, or heir of the Resident.

All claims based in whole or in part on the same incident, transaction or related course of care or services provided by the Facility to the Resident shall be arbitrated in one proceeding. A claim shall be waived and forever barred if it arose prior to the date upon which notice of arbitration is given to the Facility or received by the resident and is not presented in the arbitration proceeding.

THE PARTIES UNDERSTAND AND AGREE THAT BY ENTERING THIS ARBITRATION AGREEMENT THEY AGREE TO WAIVE THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY.

Except as is required by law, each party shall bear its own cost and fees relating to the arbitration.

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The Resident understands that:

- (1) The Resident has the right to consult with or seek legal counsel or the Washington State long-term care ombudsman concerning this Arbitration Agreement;
- (2) The execution of this Arbitration Agreement is optional and not a precondition of admission to the Facility or a condition to receiving care; and
- (3) The Resident has thirty (30) days from the execution of this Arbitration Agreement to revoke the Arbitration Agreement. To do so, the Resident must give the Facility written notice of the rescission within the thirty (30) day period.

If this Arbitration Agreement is not rescinded within 30 days, this Arbitration Agreement shall remain in effect for all care and services rendered at or by the Facility, even if such care and services are rendered following the Resident's discharge from the Facility. This Arbitration Agreement shall continue to be effective even if the Resident discharges from the Facility and later re-admits and does not sign a new Arbitration Agreement.

If someone other than the Resident signs this Arbitration Agreement, they represent to the Facility by signing this Arbitration Agreement on the Resident's behalf that they are the legal agent for the Resident and have full power and authority to bind the Resident to this Arbitration Agreement.

The Resident and Resident's agent further acknowledge that they are voluntarily entering into this Arbitration Agreement and understand that it is not a condition of admission to the Facility or a condition for receiving care.

IN WITNESS WHEREOF, the parties, intending to be legally bound, have signed this Agreement on the date written below.

Resident: (Print Name) <u>Charlene Kennedy</u>	Admission Date: <u>6/1/12</u>
Signature <u>Charlene Kennedy</u> initials <u>CK</u>	Date <u>6/4/12</u>
Resident's Responsible Party: (Print Name) _____	
Signature _____	Initials _____ Date _____
Address _____	
Email Address _____	
Resident's Healthcare Decision Maker's: (Print Name) _____	
Signature _____	Initials _____ Date _____
Address _____	
Email Address _____	
Evergreen at Bellingham, L.L.C., dba North Cascades Health and Rehabilitation Center	
Facility Representative <u>Melinda Herrera</u>	Date <u>6/4/12</u>
Print Name and Title <u>Melinda Herrera</u>	
Witness* _____	Date _____
Witness* _____	Date _____

*Only required if resident signs with a mark

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF WHATCOM

CHARLENE KENNEDY,

Plaintiff,

v.

EVERGREEN AT BELLINGHAM, LLC d/b/a
NORTH CASCADES HEALTH AND
REHABILITATION CENTER; EHC
MANAGEMENT, LLC d/b/a NORTH
CASCADES HEALTH AND
REHABILITATION CENTER,

Defendants.

Case No. 13-2-02846-4

**FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER GRANTING
DEFENDANTS' MOTION TO COMPEL
ARBITRATION

[PROPOSED]**

In connection with the defendants' motion to compel arbitration on a signed arbitration agreement, this matter came before the Court and the Honorable Ira Uhrig for trial on the plaintiff's request to rescind that agreement on the grounds that the plaintiff lacked the requisite competency at the time to sign it. The bench trial on competency was conducted on October 13 and 14, 2014. Plaintiff appeared by and through her attorneys, Joseph Bartek and Stephen Hornbuckle. Defendants appeared by and through their attorney, Michael Estok.

Both parties had previously filed briefing with the court on the plaintiff's request to rescind the agreement due to lack of competency. The court heard testimony from the following witnesses: Tedd Judd, Ph.D., Shirley Overland, Sherry Massey, Charlene Kennedy, Chiung-Ju Huang, Gilson Giroto, D.O., Melinda Herrera, Michelle Wiklund, MA, CCC-SLP, and Kenneth Muscatel, Ph.D.

1 Plaintiff's Exhibits 1 - 18 were received into evidence. Defendant's Exhibits 1-5, 10-27, 29, and 32
2 were received into evidence. The court also heard oral argument and summation by counsel, and
3 took the matter under advisement.

4 NOW, having considered the evidence and arguments of counsel, and being fully informed,
5 the Court now makes the following:

6 **FINDINGS OF FACT**

7 1. Plaintiff has never been declared incompetent by any court or other fact-finder. She
8 signed a Durable Power of Attorney on November 30, 2011, naming her two sisters (Sherry Massey
9 and Shirley Overland) as her attorneys-in-fact, but retaining her own ability to manage her affairs.
10 It is undisputed that plaintiff had the requisite competency to execute this Durable Power of
11 Attorney.

12 2. On May 26, 2012, plaintiff was transferred from her home to St. Joseph's Hospital
13 with complaints of confusion, weakness, and diarrhea. After admission to the hospital, her
14 condition stabilized. On May 28, 2012, plaintiff executed a patient consent form on her own behalf
15 for placement of a Peripherally Inserted Central Catheter (PICC). This consent form was witnessed
16 by hospital nurse Naomi Jones, RN, who certified that "the patient has consented to this procedure
17 without coercion and appears competent to provide consent." On June 1, 2012, another hospital
18 nurse assessed plaintiff's neurological, psychological, and social statuses as being "within normal
19 limits."

20 3. Around noon on Friday, June 1, 2012, plaintiff was discharged out of St. Joseph's
21 Hospital and into a skilled nursing facility, North Cascades Health and Rehabilitation Center
22 ("North Cascades"), operated by defendant Evergreen at Bellingham, LLC. Plaintiff had numerous
23 diagnoses relating to her poor health, including chronic kidney disease, anemia, congestive heart
24 failure, pulmonary hypertension, COPD, and diabetes. Plaintiff was also receiving around eighteen
25 different medications.

26 4. Plaintiff called an expert neuropsychologist, Tedd Judd, Ph.D., to testify on her

1 behalf in this case. Dr. Judd conceded that plaintiff had the requisite competency to sign the
2 arbitration agreement on June 1, 2012, at the time she was admitted to North Cascades.
3 Defendants' expert neuropsychologist, Kenneth Muscatel, Ph.D., agreed with this opinion, and it is
4 thus undisputed. The court therefore accepts that plaintiff had the requisite competency to sign the
5 arbitration agreement on June 1, 2012, as of the time of her admission to North Cascades.

6 5. The nursing notes between June 1, 2012 and June 4, 2012 report that plaintiff was,
7 on occasion, forgetful, anxious, and tearful. On the other hand, the nursing notes also report that
8 plaintiff was alert and oriented, stable, eating and sleeping without difficulty, verbalizing her needs,
9 and answering questions appropriately. In sum, the records and testimony did not show any
10 material change in plaintiff's mental status or competency between June 1 and June 4, 2012.

11 6. On Monday, June 4, 2012, plaintiff met with the North Cascades admissions
12 coordinator, Melinda Herrera, to go through and complete the admissions paperwork, which
13 included the arbitration agreement. Ms. Herrera testified to her customs and standard practices in
14 completing such paperwork with new residents, as well as her understanding she followed those
15 customs and standard practices with plaintiff. No contrary evidence was received on that point.
16 Prior to meeting with a resident, Ms. Herrera reviews the medical chart and discusses the resident's
17 medical and mental status with the facility nurses. Here, Ms. Herrera took the time to explain and
18 paraphrase the arbitration agreement to the plaintiff, answering any questions that she might have.
19 She also explained that it could be rescinded or cancelled within 30 days. Ms. Herrera does not
20 complete the paperwork with a resident if she believes that the resident is not competent or is
21 otherwise not understanding the paperwork.

22 7. The court places less weight on evidence post-dating June 4, 2012, the date on which
23 the arbitration agreement was signed. On June 5, 2012, plaintiff was seen by a new physician (Dr.
24 Giroto) who performed a general evaluation but noted no confusion or cognitive deficits. On June
25 7, 2012, the North Cascades nursing staff noted cognitive changes and so obtained an order to start
26 providing the anti-anxiety medication Ativan, which was given that night and on the morning of

1 June 8. On June 7, the nursing staff also obtained an order to refer plaintiff to be evaluated by
2 speech pathologist Michelle Wiklund, MA, CCC-SLP. Ms. Wiklund evaluated the plaintiff on June
3 8, found mild-to-moderate cognitive impairments, and recommended that plaintiff's sisters assist in
4 managing her financial affairs. Ms. Wiklund testified that she recalled her interactions with the
5 plaintiff, who was communicative and cognizant of her own limitations and who did not have any
6 "severe" or "profound" deficits.

7 8. Reviewing essentially the same evidence, the parties' expert neuropsychologists
8 reached differing conclusions. Plaintiff's expert, Dr. Judd, believed that there was "clear, cogent,
9 and convincing" evidence that plaintiff temporarily lacked competency to sign the arbitration
10 agreement on June 4, 2012. However, Dr. Judd was unable to identify the starting point for
11 plaintiff's claimed temporary period of incapacity, stating that it began either on June 1, 2, or 3.
12 Nor was Dr. Judd able to connect the claimed temporary period of incapacity to any particular event
13 noted in the chart or to any particular medical cause.

14 9. In contrast, defendants' expert, Dr. Muscatel, opined that any evidence regarding
15 plaintiff's mental status on June 4, 2012, did not reach the "clear, cogent, and convincing" evidence
16 threshold to rebut the presumption of competency. Though both experts have extensive
17 qualifications, the court places more weight in the opinions of Dr. Muscatel, which find greater
18 support in the entirety of the evidence and testimony received by the court. This is particularly true
19 in light of Dr. Judd's concession that plaintiff had the requisite competency on June 1, 2012, after
20 which her condition did not materially change.

21 10. Both of plaintiff's sisters, Shirley Overland and Sherry Massey, testified that they
22 personally observed plaintiff reviewing and completing admissions paperwork by herself with an
23 administrative employee on June 1, 2012. They did not seek to stop that encounter or to reverse the
24 signing of any of the admissions paperwork signed by the plaintiff. Although the evidence was
25 inconclusive as to whether this administrative employee was Melinda Herrera, the sisters also
26 independently testified that a packet with copies of plaintiff's signed admissions paperwork was

1 provided by the facility and was maintained in plaintiff's room throughout her stay. Ms. Overland
2 indicated that she reviewed the paperwork but could not recall its contents. Ms. Massey elected not
3 to review the paperwork. Ms. Herrera testified that she was not aware of any admissions paperwork
4 other than her own, and the court therefore finds by the weight of the evidence that this packet
5 included the signed arbitration agreement by plaintiff. Neither the sisters nor plaintiff sought to
6 rescind the arbitration agreement within the allotted 30 day period, or thereafter.

7 **CONCLUSIONS OF LAW**

8 1. Washington has a “[s]trong public policy favor[ing] arbitration.” *Rodriguez v.*
9 *Windermere Real Estate/Wall St., Inc.*, 142 Wn. App. 833, 836, 175 P.3d 604 (2008). The Federal
10 Arbitration Act, 9 U.S.C. §1 *et seq.*, also manifests a “liberal federal policy favoring arbitration
11 agreements.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991). Arbitration is a
12 question of law for the court, and the court is mandated to compel arbitration in the presence of a
13 valid and enforceable arbitration agreement. RCW 7.04A.070(1); *Woodall v. Avalon Care Ctr.-*
14 *Federal Way, LLC*, 155 Wn. App. 919, 924, 231 P.3d 1252 (2010).

15 2. Arbitration agreements are presumed to be “valid, enforceable, and irrevocable.”
16 RCW 7.04A.060(1). The “burden of proof of showing that the arbitration agreement is
17 unenforceable is on the party seeking to avoid arbitration,” here, the plaintiff. *Woodall*, 155 Wn.
18 App. at 924. Where a party seeks the disfavored remedy of rescission based on incompetency, that
19 party is “presumed” to be competent, and that “presumption is overcome only by clear, cogent, and
20 convincing evidence.” *Johnson v. Perry*, 20 Wn. App. 696, 703, 582 P.2d 886 (1978) (quoting
21 *Page v. Prudential Life Ins. Co.*, 121 Wn.2d 101, 109, 120 P.2d 527 (1942)). Such clear, cogent,
22 and convincing evidence of incompetency must be found “at the time the transaction occurred.” *Id.*
23 The issue is “whether the contractor possessed sufficient mind or reason to enable [her] to
24 comprehend the nature, terms, and effect of the contract at issue,” not whether the person
25 subjectively understood those terms. *Id.*

26 3. Plaintiff has not sustained her burden of proof by “clear, cogent, and convincing”

1 evidence to demonstrate that she lacked competency to sign the arbitration agreement on June 4,
2 2012. As a result, the court finds that the presumption of competency applies, that plaintiff has not
3 rebutted this presumption, and that the arbitration agreement is therefore enforceable.

4 4. The court also rejects plaintiff's claim for rescission on the grounds that the sisters—
5 both of whom were undisputedly competent and who had power of attorney over plaintiff—were in
6 fact provided with a copy of the admissions paperwork on or around the date of execution, and that
7 they either did not review the documentation or else did not seek to rescind the arbitration
8 agreement within its explicit 30-day rescission period.

9 5. Plaintiff has raised no other challenges to the enforceability of the arbitration
10 agreement signed on June 4, 2012.

11 **ORDER**

12 Based on the above findings of fact and conclusions of law, the Court HEREBY RULES AS
13 FOLLOWS:

- 14 1. Defendants' motion to compel arbitration is GRANTED.
- 15 2. The parties are ordered to conduct arbitration on plaintiff's claims in accordance
16 with the terms of their arbitration agreement, dated June 4, 2012.
- 17 3. This judicial proceeding is DISMISSED with prejudice.

18
19 IT IS SO ORDERED.

20 DATED this _____ day of _____, 2014.

21
22
23 _____
24 Hon. Ira Uhrig

1 PRESENTED BY:
2 LINDSAY HART, LLP

3
4 By: /s/ Michael J. Estok
5 Michael J. Estok, WSBA No. 36471
6 mestok@lindsayhart.com
7 Attorneys for Defendants Evergreen at Bellingham,
L.L.C. d/b/a North Cascades Health and
Rehabilitation Center, and EHC Management, L.L.C.

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The Honorable Ira Uhrig

FILED

OCT 17 2014

WHATCOM COUNTY CLERK

By: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WHATCOM

CHARLENE KENNEDY

Plaintiff,

v.

EVERGREEN AT BELLINGHAM, LLC d/b/a
NORTH CASCADES HEALTH AND
REHABILITATION CENTER; and EHC
MANAGEMENT, L.L.C. D/B/A NORTH
CASCADES HEALTH AND
REHABILITATION CENTER; EHC
MANAGEMENT

Defendants.

NO.: 13-2-02846-4

FINDINGS OF FACT AND
CONCLUSIONS OF LAW IN SUPPORT
OF ORDER DENYING DEFENDANT'S
MOTION TO COMPEL ARBITRATION

THIS MATTER comes before the Court upon motion and evidentiary hearing concerning Defendant's Motion to Compel Arbitration. The Court having considered the matter, and having heard evidence and testimony on October 13-14, 2014, and having reviewed:

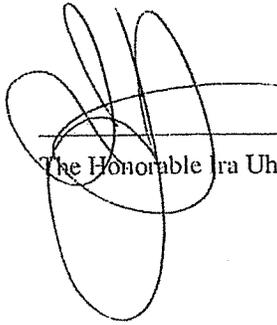
- 1. Defendant's Motion to Compel Arbitration;
 - 2. Plaintiff's Response to Defendant's Motion to Compel Arbitration;
- and;

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The Court makes this finding based on the character and extent of the evidence considered, viewed in connection with the surrounding facts and circumstances." *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

Defendants' Motion to Compel Arbitration is hereby DENIED.

DATED this 17 day of October, 2014.



The Honorable Ira Uhrig

Presented by:

By: /s/Stephen Hornbuckle
Stephen Hornbuckle, WSBA# 39065
Attorney for Plaintiff

By: /s/Joseph P. Bartek
Joseph P. Bartek, WSBA# 17624
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2015, I caused to be served a copy of the **BRIEF OF APPELLANTS** on the following persons(s) in the manner indicated below at the following address(es):

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