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No. 31055-8-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

MARY RUSHING as the Administrator and on Behalf of the Estate of
ROBERT COON, and MARY RUSHING, individually,

Respondent,

vs.

FRANKLIN HILLS HEALTH & REHABILITATION CENTER,
MELISSA CHARTNEY, R.N., AURILLA POOLE, R.N.,
JANENE YORBA, Director of Nursing,

Appellants.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. RESTATEMENT OF FACTS	2
III. ARGUMENT	6
A. Ms. Rushing failed to present evidence to refute that Mr. Coon executed the ADR agreement sufficiently to form a contract.	6
B. Ms. Rushing failed to meet her burden of establishing by clear, cogent, and convincing evidence that Mr. Coon lacked the requisite mental capacity to enter into the ADR Agreement.	13
C. Ms. Rushing failed to establish that the testimony of Franklin Hills' employees is inadmissible to establish Mr. Coon's mental status at the time of his signature.	19
D. Ms. Rushing failed to establish that Mr. Coon's durable power of attorney was in effect at the time of his admission to Franklin Hills.	20
E. Ms. Rushing failed to establish that, even though she is a non-signatory to the ADR, she is allowed to knowingly exploit the contract in which the ADR agreement is contained.	22
F. Franklin Hills is entitled to its attorney fees and costs.	22
IV. CONCLUSION	23

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Baugh v. City of Milwaukee</u> , 823 F.Supp. 1452 (E.D. Wis. 1993), aff'd, 41 F.3d 1510 (7th Cir. 1994)	8
<u>Beck v. University of Wisconsin Bd. of Regents</u> , 75 F.3d 1130 (7 Circuit 1996)	8
<u>Comer v. Micor, Inc.</u> , 436 F.3d 1098 (9 th Cir. 2006)	22
<u>Degginger v. Martin</u> , 48 Wash. 1, 92 P. 674 (1907)	11
<u>Estate of Bussler</u> , 160 Wn. App. 449, 247 P.3d 821 (2001)	11,15, 21
<u>In re Jack</u> , 390 B.R. 307 (S.D.Tex. Bkcty. 2008)	17
<u>Jacob's Meadow Owner's Ass'n. v. Plateau 441 II, LLC</u> , 139 Wn.App. 743, 162 P.3d 1153 (2007)	6
<u>Lamon v. McDonnell Douglas Corp.</u> , 91 Wn.2d 345, 588 P.2d 1346 (1979)	10
<u>Mt. Hood Beverage Co. v. Constellation Brands, Inc.</u> , 149 Wn.2d 98, 63 P.3d 779 (2003)	23

<u>Page v. Prudential Life Ins. Co. of America</u> , 12 Wn.2d 101, 120 P.2d 527 (1942)	13, 15
<u>Poncin v. Furth</u> , 15 Wash. 201, 46 P. 241 (1896)	6, 11
<u>Powell v. Sphere Drake Ins. PLC</u> , 97 Wn.App. 890, 988 P.2d 12 (1999)	22
<u>Raab v. Wallerich</u> , 46 Wn.2d 375, 282 P.2d 271 (1955)	20
<u>Satomi Owners Assn. v. Satomi, LLC</u> , 167 Wn.2d 781, 225 P.3d 213 (2009)	6
<u>Thompson v. Henderson</u> , 22 Wn.App. 373, 591 P.2d 784 (1979)	19
<u>White v. Kent Medical Center</u> , 61 Wn.App. 163, 810 P.2d 4 (1991)	8, 9
<u>Woodall v. Avalon Care Center-Federal Way, LLC</u> , 155 Wn. App. 919, 231 P.3d 1252 (2010)	17, 18
<u>Statutes and Court Rules</u>	
RCW 5.60.030	19
RCW 7.04A.280(a)	2
RCW 71.05.320	14
CR 6(d)	8
LCR 40(b)(13)	8
RAP 18.1	23
<u>Other Authorities</u>	
5A K. Tegland, Wash.Prac. § 213 (1989)	20

I. INTRODUCTION

This brief is filed in reply to the Brief of Respondent filed by Mary Rushing as the Administrator and on Behalf of the Estate of Robert Coon, and Mary Rushing, individually.

Despite Ms. Rushing's attempt to argue the merits of the underlying case, there remains only one core issue before this court on appeal: whether Mr. Coon had the capacity to contract at the time he signed the ADR Agreement. The myriad of unsubstantiated factual assertions concerning the level of care provided by Franklin Hills constitute an improper attempt to distract this court from the issue at hand. Furthermore, any contention that Franklin Hills has somehow delayed resolution of this dispute is contradicted by Ms. Rushing's absolute refusal to agree to the bargained for dispute resolution process and her sustained requests for additional time to submit briefing.

Ms. Rushing cannot meet her burden of proving the ADR Agreement is unenforceable. Mr. Coon voluntarily checked himself into Franklin Hills and signed all admissions documents, including the ADR Agreement; a trained member of Franklin Hills staff knew Mr. Coon, witnessed him sign the admissions documents (including the arbitration agreement), and read the signatures thereafter. Mr. Coon was compliant with all medications at the time he signed and had no barriers to

communication or comprehension. Mr. Coon also did not invoke any power of attorney, nor had any physician issued a written finding invoking any power of attorney. The agreement is valid and enforceable.

II. RESTATEMENT OF FACTS

Ms. Rushing sued Franklin Hills both in her individual capacity and as Administrator of Mr. Coon's estate despite the binding ADR Agreement. (CP 1-7, 14-24) Franklin Hills moved to compel arbitration and stay discovery in the case. (CP 31-41) Judge Leveque denied that motion, thus creating an immediately appealable order under RCW 7.04A.280(a). (CP 315-17) Judge Leveque did not order an evidentiary hearing. In fact, after denying the motion, he ordered the parties to move forward with comprehensive discovery in the case:

Mr. Kamitomo: I think actually, Your Honor, I think I understand what [opposing counsel] is asking. I think what he's saying is he'd like the Court to say the only discovery we get and the only questions we ask go to whether or not he's mentally competent and whether or not that's his signature. (RP 33)

THE COURT: I'm not in a position to do that right now because I need to know more on the merits of the argument. (RP 33)

The ruling was in direct contradiction to the parties' contractual pronouncement that they desired the "speed, efficiency and cost-effectiveness" of the ADR process. (CP 45-6) Franklin Hills then had a

legal obligation to pursue enforcement of the contract, as opposed to moving forward with the costly discovery process and allowing Ms. Rushing more time. (CP 48) Ms. Rushing moved the trial court to compel depositions and proceed with pre-trial discovery, believing that the mere possibility that Judge Leveque could entertain a renewed motion to compel arbitration somehow obligated Franklin Hills to proceed with discovery. Commissioner McCown disagreed and ordered all trial court proceedings to be stayed.

It was established at the trial court that Mr. Coon knew the ADR Agreement was not a condition to admission in the facility. (CP 45) He knew the speed, efficiency and cost effectiveness of the ADR process constituted good and sufficient consideration for acceptance of the agreement. (CP 45-6) He knew Franklin Hills agreed to pay fees and costs associated with the ADR process. (CP 47-8) He was keenly aware he had the right to revoke the agreement within thirty days of signing it. (CP 48) And after being given all of this information, Mr. Coon acknowledged he had read the Agreement, had an opportunity to seek legal counsel, and executed it voluntarily. (CP 48-9) Mr. Coon physically struggled to sign the various forms because of severe tremors, but he nonetheless signed all of them with Ms. Wujick watching. (CP 262)

After being admitted, Mr. Coon independently communicated all of the information for his Medicare and care plan assessments; neither Ms. Rushing nor any other legal representatives were involved. (CP 201-03) Six days after signing the admissions documents, Mr. Coon's cognitive patterns were assessed, and he scored the maximum 15 points on the "brief interview for mental status." (CP 201) Mr. Coon was classified as a "short stay patient" with a goal of returning to his less assisted living at Cherrywood place; that goal is not possible for cognitively impaired residents. (CP 187, 203) Every professional that assessed Mr. Coon noted his love of reading, late night television, and talking with people about his interests, including having been an attorney. (CP 152, 187-89, 198) Mr. Coon even called a cab a couple weeks after admission and took himself to the Outback Steakhouse for dinner, a far cry from the restricted status alleged by Ms. Rushing. (CP 151)

The last indication that Mr. Coon suffered from any mental ailments occurred some five months prior to his admission at Franklin Hills when a petition was filed to extend his LRA placement. (CP 83-92, 175-76, 183) Contrary to Ms. Rushing's repeated assertions, Mr. Coon was not involuntarily committed to any hospital. That petition simply insured that Mr. Coon would continue to receive court ordered treatment at his living facility, Cherrywood Place. (CP 83-92, 175) Mr. Coon was

not medication compliant at that time. (CP 174-75) Conversely, at the time Mr. Coon was admitted to Franklin Hills he was properly medicated for his conditions, stable, his symptomatology was not interfering with sufficient cognitive ability to communicate and comprehend concepts, and he had reasonable mental capacity for decision making. (CP 174-75)

In the weeks and days leading up to his admission at Franklin Hills, Mr. Coon's caregivers continued to communicate with him personally regarding his own health care treatment. (CP 94-5, 106-08) Dr. Mulvihill and Dr. Bergman felt comfortable giving instructions to Mr. Coon to contact them or his primary care physician if his symptomatology worsened, something a physician would not have done if a patient was mentally incapacitated. (CP 94-5, 173-74) The medical assessment performed by Dr. Berman hours before Mr. Coon was admitted to Franklin Hills indicates Mr. Coon was alert, speech was fluent, strength was a 5/5, and sensation was grossly intact. (CP 107) This is consistent with Ms. Wujick's assessment that as Mr. Coon signed the admissions documents he was alert, understood them fully, accurately relayed all the necessary information, including his monthly income, and understood the nature of his Medicaid benefits. (CP 262)

Accordingly, there is no evidence that Mr. Coon was incapacitated at the point in time he voluntarily executed the ADR Agreement.

III. ARGUMENT

A. Ms. Rushing failed to present evidence to refute that Mr. Coon executed the ADR agreement sufficiently to form a contract.

Arbitration agreements are subject to the same law as contracts. Satomi Owners Ass'n. v. Satomi, LLC, 167 Wn.2d 781, 810, 225 P.3d 213 (2009). Signatures of the parties are not necessarily essential elements of a written contract. Jacob's Meadow Owner's Ass'n v. Plateau 44 II, LLC, 139 Wn.App. 743, 765, 162 P.3d 1153 (2007). But where an issue is raised regarding the genuineness of a particular signature, proof may be made by an eyewitness to its execution. See, Poncin v. Furth, 15 Wash. 201, 46 P. 241 (1896).

Jennifer Wujick not only witnessed Mr. Coon sign the ADR Agreement in dispute, she also explained all of the documents to him prior to his signing and then personally read his signatures thereafter to confirm their validity. (CP 262) Mr. Coon repeatedly reminded Ms. Wujick while he was signing the agreements that he had been an attorney and understood the forms. (CP 262) This did not surprise Ms. Wujick as she knew Mr. Coon well from previously caring for him at Cherrywood Place as a Certified Nurse's Assistant. (CP 262) Ms. Wujick noted that Mr. Coon struggled with signing the various documents due to his severe tremors, but signed all of them nonetheless:

I remember that Mr. Coon had severe tremors, and **struggled with signing all of the various documents, but signed each of them**, although his signature was difficult to read. I would not have gotten additional witnesses unless a patient could not sign and was using an “X,” especially since I knew who Mr. Coon was; and knew why his signature was difficult to read.

(CP 262) (Dec. of J. Wujick, ¶ 11, emphasis added)

Ms. Rushing contends Ms. Wujick did not actually witness Mr. Coon sign the ADR Agreement because she failed to use particular language in her declaration. Br. of Respondent at 16. This is a game of semantics. Ms. Wujick states that she explained “the ADR Agreement” to Mr. Coon and he reminded her that he was an attorney “while he was signing the agreements.” (CP 262) Ms. Wujick goes on to state that Mr. Coon “struggled with signing all of the various documents, but signed each of them.” Ms. Wujick certainly could not attest to Mr. Coon’s signing of the agreements, particularly his difficulty signing, if she had not actually watched him sign. Further, any suggestion that Ms. Wujick was required to make specific reference to the signing of the ADR Agreement is illogical in light of Ms. Wujick’s consistent references to the admissions documents as a comprehensive “admissions packet.” (CP 260-1) There has been no suggestion that any part of the packet was lost or misplaced. Ms. Wujick witnessed Mr. Coon sign all of the various documents in the packet, including the ADR Agreement.

Ms. Rushing alternatively contends that even if Ms. Wujick's declaration adequately establishes she witnessed Mr. Coon sign the ADR Agreement, the declaration constitutes inadmissible evidence because it was filed with Franklin Hills' reply memorandum. Br. of Respondent at 19. Civil Rule 6 addresses the submission of supporting and opposing affidavits, but is silent as to the submission of reply affidavits. CR 6(d). Spokane County Local Court Rule 40, however, permits the moving party to timely file a reply to the opposing party's written response. LCR 40(b)(13). And while not specifically addressed in Washington, most federal courts have permitted the filing of reply affidavits if they are limited to matters placed in issue by the responding brief or memorandum. See e.g., Beck v. University of Wisconsin Bd. Of Regents, 75 F.3d 1130 (7th Cir. 1996); Baugh v. City of Milwaukee, 823 F.Supp. 1452 (E.D. Wis. 1993), aff'd, 41 F.3d 1510 (7th Cir. 1994).

Ms. Rushing mistakenly relies on White v. Kent Medical Center, 61 Wn.App. 163, 810 P.2d 4 (1991) to support her assertion that reply affidavits are never permitted. In White, the Court of Appeals addressed in the context of a summary judgment motion the propriety of raising an issue for the first time in a reply memorandum. Id. at 168. The Court cited CR 56(c) for its broad allowance of rebuttal materials: "After the nonmoving party has filed its [response] materials, the rule allows the

moving party to ‘file and serve *any rebuttal documents* not later than 5 calendar days prior to the hearing.’ Id. (Italics in original.) The Court noted: “Rebuttal documents are limited to documents which explain, disprove, or contradict the adverse party’s evidence.” Id. at 169-70. The Court ultimately concluded it was error for the trial court to consider the issue first raised in the reply memorandum because the responsive materials did not actually address the issue. Id. at 169.

Contrary to Ms. Rushing’s assertions, *she* first raised the issue of whether Mr. Coon executed the ADR Agreement in her response to Franklin Hills’ motion to stay proceedings and compel arbitration. (CP 68-70) She explicitly alleged: “The mark on the signature line [of the ADR Agreement] is not Mr. Coon’s signature.” (CP 69) Ms. Rushing supported that assertion with her own self-serving affidavit. (CP 69) In the affidavit she again makes the conclusory statement that the signature on the ADR Agreement is not her father’s. (CP 98) Not only does the affidavit lack foundation, as Ms. Rushing is not a handwriting expert nor was she present when the documents were signed, but it also opened the door for Franklin Hills to file Ms. Wujick’s reply affidavit to contradict Ms. Rushing’s evidence. See, White, 61 Wn.App. at 168-70. Ms.

Wujick's affidavit then is properly admissible and demonstrates that she witnessed Mr. Coon sign the ADR Agreement in question.¹

Ms. Rushing contends that because she is personally familiar with her father's signature, she is the only person qualified to testify as to its authenticity. Br. of Respondent at 16. She states in her affidavit that the signature on the arbitration agreement is not her father's because he always spelled out his name. (CP 60) Yet, it is undisputed that Ms. Rushing was not at Holy Family Hospital when Mr. Coon was admitted into the emergency room based on a fall he had taken at Cherrywood; nor was she present when Mr. Coon was admitted to Franklin Hills. (CP 172-80, 260-97) In fact, Ms. Rushing has failed to demonstrate that she had seen her father sign anything in years. Ms. Rushing continues to raise the argument in an attempt to place the burden improperly on Franklin Hills, when in actuality it is her burden to prove the arbitration agreement was void based on Mr. Coon's incompetence.

¹ Ms. Rushing argues that the declarations are inadmissible, but she failed to object to the declarations at the time they were submitted. Where a party fails to object or move to strike before entry of a final order, the party is deemed to have waived any deficiency in the affidavit. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352, 588 P.2d 1346 (1979) (discussing failure to object before entry of summary judgment). Nothing in the record shows that Ms. Rushing objected or moved to strike any portion of Franklin Hills' declarations. Thus, she waived the argument.

In Poncin, a witness testified that he was intimately acquainted with the decedent for nearly 40 years. 15 Wash. at 205. During a portion of that time he was in partnership with the decedent, and he stated he was almost as familiar with decedent's handwriting as his own, having frequently seen him sign his name. Id. The Supreme Court opined that while there is no precise standard fixing the degree of knowledge necessary to give an opinion on the authenticity of a signature, a witness must "show[] knowledge of the handwriting... founded on adequate means of knowledge." Id. at 206 (internal quotations omitted). Ms. Rushing has not made such a showing.

Ms. Rushing further suggests the "scribble" or "mark" on the arbitration agreement is illegible. Br. of Respondent at 19. But, an illegible signature or a signature by initials does not impact the validity of a contract. Degginger v. Martin, 48 Wash. 1, 4, 92 P. 674 (1907) (initials sufficient for signature); Estate of Bussler, 160 Wn. App. 449, 462-63, 247 P.3d 821 (2001) ("shaky" signature did not establish lack of testamentary competency to void documents). Ms. Rushing attempts to distinguish Degginger and Bussler on the grounds that one case involved a typewritten name above the initials and the other involved witnesses. Br. of Respondent at 19. We have both here—Mr. Coon's name is

typewritten below his signature and Ms. Wujick witnessed him sign. (CP 49, 262)

Neither Franklin Hills nor its legal counsel professes to be handwriting experts. Ms. Rushing simply submitted several uncontested documents which are in direct contradiction to the statements in her affidavit. (CP 60) For example, Ms. Rushing's contention that her father always spelled out his name is inconsistent with the March 14, 2011, Spokane Mental Health records release form where Mr. Coon used shorthand or initials—"R.H. Coon." (CP 111) Ms. Rushing submitted that document and does not challenge its validity. Similarly, the Admission Record and ADR Agreement are also signed with Mr. Coon's initials—RHC. (CP 49, 285)

Ms. Rushing again contends that the ADR Agreement required two witnesses to a resident signing with an "X" or mark. Br. of Respondent at 17. But, Mr. Coon did not sign with a mark; the signature line of the Agreement plainly reads "RHC." (CP 48-9) Mr. Coon's name is even printed right below his signature. (CP 49) Ms. Wujick witnessed Mr. Coon sign the Agreement and has affirmatively stated that Mr. Coon did not sign with an "X" or other mark. (CP 262) Only if he had signed with a mark would Ms. Wujick have been required to follow internal policy and request the presence of two witnesses. (CP 261-2)

A staff member witnessed Mr. Coon sign the ADR Agreement and provided a sworn statement detailing the occasion. Additional witnesses were not required because Mr. Coon used his own signature. Though not required, that signature is legible. Documents submitted by Ms. Rushing support the conclusion that Mr. Coon often signed his name with initials or partial initials. Ms. Rushing was not present during the admissions process, or any other time during her father's stay at Franklin Hills, and has not proven she saw her father sign anything in years. The ADR Agreement is a valid contract.

B. Ms. Rushing failed to meet her burden of establishing by clear, cogent, and convincing evidence that Mr. Coon lacked the requisite mental capacity to enter into the ADR Agreement.

The law presumes that a person is competent until contrary proof is offered. Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d 101, 109, 120 P.2d 527 (1942). The challenging party has the burden of overcoming the presumption of competency with clear, cogent, and convincing evidence. Id. A person is deemed mentally competent to sign an ADR Agreement if he "possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue." Id. Mental competency is a factual issue that must be determined at the time of the challenged transaction. Id. Ms. Rushing has absolutely failed to meet her burden of proof, and the ADR Agreement is valid.

Ms. Rushing presented as evidence of Mr. Coon's incapacity a November 5, 2010 petition for a 180-day Less Restrictive Alternative ("LRA"). (CP 84) This occurred some five months prior to the time Mr. Coon signed the ADR Agreement. (CP 48-9) Mr. Coon was non-compliant with his medications at the time. (CP 84) Regardless, an LRA is simply a living arrangement that is less restrictive than total confinement and may even be in the person's own home in the community. The LRA insured that Mr. Coon would continue to receive court ordered treatment through Spokane Mental Health at his assisted living facility. See RCW 71.05.320. Contrary to Ms. Rushing's assertion, the LRA did not commit Mr. Coon to any institution. Br. of Respondent at 21-22. In truth, there is no evidence in the record that Mr. Coon was ever committed to any institution. The LRA specifically notes that Mr. Coon has no violations and has remained "outside the hospital." (CP 84) The LRA does not establish Mr. Coon was in a state of perpetual incapacitation.

Ms. Rushing also presented records of medical assessments by Dr. Mulvihill and Dr. Bergman. (CP 94-5, 106-08) Ms. Rushing contends that because Mr. Coon suffered from hallucinations days and months before he signed the ADR Agreement he absolutely must have been incapacitated at the time he signed. Br. of Respondent at 23. But, a

contract is not invalidated because a person is eccentric, aged, mentally weak, or insane. Page, 12 Wn.2d at 108; see also In re Bussler, 160 Wn.App. 449, 247 P.3d 821 (2011) (persons use of sedatives or other medications not evidence of incapacity). Ms. Rushing must show that Mr. Coon did not possess sufficient capacity to understand the nature of the transaction at the time he signed the ADR Agreement:

“[I]t is insufficient to show merely that the party was of unsound mind or insane when it was made, but it must also be shown that this unsoundness or insanity was of such a character that he had no reasonable perception or understanding of the nature and terms of the contract.”

Page, 12 Wn.2d at 109 (quoting 17 C.J.S. 479, § 133). A history of mental incapacity or even allegations of mental instability are insufficient offers of proof. Ms. Rushing needed to produce the testimony of someone qualified based on either personal knowledge or scientific expertise that Mr. Coon was of unsound mind at all times and in all situations, including when he signed. Instead, she presented evidence that Mr. Coon was receiving treatment and was completely stable when he took his medications, which included the time he signed the ADR Agreement. (CP 174-75, 262)

The record contains no evidence that Mr. Coon was incapacitated at the time he signed the ADR Agreement. Ms. Rushing presented no expert opinion at all regarding Mr. Coon’s state of mind at the time he

signed the ADR Agreement, although she certainly had experts available. Designated Mental Health Professional Mark Ingabee, Dr. Robert Mulvihill, and Dr. Berman were possible candidates to provide such evidence. None of them submitted affidavits or declarations in support of Ms. Rushing's claim that Mr. Coon was incapacitated at the time he signed the ADR Agreement. Even so, none of them really could have testified to any degree of medical certainty that Mr. Coon was totally incapacitated at the time he signed because they each communicated with him personally about his conditions and allowed him to continue residing in an assisted living facility. (CP 94-5, 173-74) Ms. Rushing contends she has been deprived of the opportunity to conduct such additional discovery, when in fact she had some six months from the date the complaint was filed to the date of Franklin Hills' motion to compel arbitration. (CP 1-7, 31-41) She had ample opportunity to meet her burden of proof, attempted to do so, and failed.

Ms. Rushing challenges the declarations of Dr. Ronald Klein, Ph.D. and James Winters, M.D., on the grounds that neither declaration supports the contention that Mr. Coon was competent when he signed the ADR Agreement. Br. of Respondent at 24. It is true that neither Dr. Klein nor Dr. Winters unequivocally state that Mr. Coon was or was not mentally competent at the time he signed. (CP 172-80, 181-85) However,

that was Ms. Rushing's burden. The declarations of Dr. Klein and Dr. Winters merely confirm that the LRA petition and the prior medical assessments do not establish Mr. Coon was in a state of perpetual incapacitation, as alleged by Ms. Rushing. In other words, he could contract. Dr. Klein indicates there is "no data or observation throughout the record on or about [Mr. Coon's] admission date which would establish any inability to understand verbal or written information provided to him." (CP 182) He further indicates the records are "too remote in time to be useful to the specific question of Mr. Coons [sic] comprehension of the ADR Agreement on April 1, 2011." (CP 183) Dr. White reiterates those same sentiments. (CP 175)

The conditions with which Mr. Coon had been diagnosed have been addressed by various courts, which recognize that contracts executed by such patients are not void. In re Jack, 390 B.R. 307, 315 (S.D. Tex. Bkcty. 2008) (party diagnosed with schizoaffective disorder, anger control issues, paranoia, suicidal ideation, agitation, and anxiety was capable of contracting); Woodall v. Avalon Care Ctr., 155 Wn.App. 919, 936, 231 P.3d 1252 (2010) (diagnosis of "dementia w Behavior Dist." insufficient to void ADR Agreement). Ms. Rushing attempts to distinguish Jack on the grounds that Mr. Jack functioned independently and did not reside in an assisted living facility. Br. of Respondent at 27. Mr. Coon also

functioned independently; he checked himself into Franklin Hills and later took himself out to the Outback Steakhouse for dinner. (CP 151) It is nonsensical to suggest all persons who reside in an assisted living facility are incapable of contracting. Ms. Rushing also mistakenly suggests the court should not consider Woodall because it is unpublished. But that decision *is* published in part and applicable to this case. Similar to the evidence presented by Ms. Rushing, the medical evidence in Woodall was determined to lack foundation both factually and as to the medical conclusions. Woodall, 155 Wn.App. at 936.

Basically, Ms. Rushing attempts to overcome the presumption favoring Mr. Coon's competency with her own affidavit, excerpts from past doctor's notes, and a five-month old petition from Mr. Coon's caseworker to extend his LRA placement. None of the evidence is based on knowledge of Mr. Coon's mental state at the time he signed the ADR Agreement. Ms. Rushing's affidavit relies entirely on past interactions with Mr. Coon and her unqualified opinion of Mr. Coon's ability to understand information. Likewise, the medical records contain no entries describing Mr. Coon's mental state at the time he signed the ADR Agreement. Finally, the statements by Mr. Coon's caseworker, as set forth in the LRA petition, suffer from the same infirmity of lack of

timeliness, as they were made well before Mr. Coon's admission to Franklin Hills.

Conversely, there is evidence supporting the presumption of competency. The attesting witness present when Mr. Coon signed the ADR Agreement indicated that he was mentally alert and acted on his own volition. The treatment providers recalled that Mr. Coon was mentally competent and able to manage his own affairs. He could contract and did contract. Thus, the evidence viewed in the light most favorable to Franklin Hills simply is insufficient to establish a prima facie case of incompetence. The trial court erred in denying the motion to compel arbitration.

C. Ms. Rushing failed to establish that the testimony of Franklin Hills' employees is inadmissible to establish Mr. Coon's mental status at the time of his signature.

Ms. Rushing again argues that the testimony of Franklin Hills' employees is prohibited by Washington's deadman statute (RCW 5.60.030). Br. of Respondent at 29-30. The purpose of the deadman's statute is to prevent interested parties from giving self-serving testimony about conversations or transactions with the deceased, because the deceased is not available to rebut such testimony. See Thompson v. Henderson, 22 Wn.App. 373, 591 P.2d 784 (1979).

The statute bars only testimony of an “interested party.” See Raab v. Wallerich, 46 Wn.2d 375, 282 P.2d 271 (1955) (testimony of decedent’s wife regarding transaction permissible, because although she was a party in the action, she was not a party in interest). In his treatise, Karl Tegland states that a witness is considered an interested party with respect to the deadman’s statute:

(1) if the witness stands to either gain or lose as a direct result of the judgment, or (2) if the record may be used as evidence against the witness in some other action. The witness will be considered interested only if the witness’s interest is present, certain, and vested. An interest that is uncertain, remote, or contingent is insufficient to bar the witness’s testimony.

(Footnote omitted.) 5A K. Tegland, Wash.Prac. § 213 (1989).

None of Franklin Hills’ employees are seeking any financial gain or interest in Mr. Coon’s estate. It can fairly be said that they will receive no *direct* benefit from a judgment for or against Franklin Hills. Applying the definition set forth in Tegland, the employees are not interested parties, and their testimony is not barred by the deadman’s statute.

D. Ms. Rushing failed to establish that Mr. Coon’s durable power of attorney was in effect at the time of his admission to Franklin Hills.

Ms. Rushing contends the signing of the durable power of attorney (POA) is evidence of Mr. Coon’s perpetual incapacity. Br. of Respondent at 33. The POA specifically states it shall only become effective upon the

disability, incapacity or incompetency of Mr. Coon. (CP 79) Thus, the mere existence or prior use of the POA cannot relieve Ms. Rushing of her burden to establish with clear, cogent and convincing evidence that Mr. Coon was incompetent when he signed the ADR Agreement. Bussler, 160 Wn.App. at 449.

Ms. Rushing once more makes the unsupported assertion that Mr. Coon was involuntarily committed to a hospital some years prior to his signing and that event perpetually triggered the POA. Br. of Respondent at 33. Irrespective of the truthfulness of the assertion, it is not a “written statement of a qualified physician regularly attending the Principal.” (CP 79) Similarly, the LRA petition some five months prior is focused on continued treatment, not the POA. Neither event made the POA effective or perpetual as the POA could only “continue throughout any disability, incapacity, or incompetency of the Principal.” (CP 79)

Ms. Rushing has presented no specific written statement on Mr. Coon’s established disability for the purposes of the POA. She also was not present at Holy Family Hospital to sign medical decision making forms, or at Franklin Hills to sign admission forms. Mr. Coon was able to freely communicate with the staff at Franklin Hills, sign himself in at admission, indicate that no guardianship was in effect for him, and make his own arrangements. Ms. Rushing never contacted either facility. The

existence of a durable power of attorney is irrelevant to Mr. Coon's agreement to arbitrate with Franklin Hills.

E. Ms. Rushing failed to establish that, even though she is a non-signatory to the ADR, she is allowed to knowingly exploit the contract in which the ADR Agreement is contained.

A person not a party to an agreement to arbitrate may be bound to the agreement by ordinary principles of contract and agency. See, e.g., Powell v. Sphere Drake Inc. PLC, 97 Wn.App. 890, 892, 988 P.2d 12 (1999) (citing Thompson-CFS, SA v. Am. Arbitration Ass'n, 64 F.3d 773, 776 (2d Cir. 1995); Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006). "When a [nonsignatory] plaintiff bases its right to sue on the contract itself, not upon a statute or some basis outside the contract, the provision requiring arbitration as a condition precedent to recovery must be observed." Powell, 97 Wn.App. at 896-97 (internal quotations omitted) (quoting Aasma v. Am. S.S. Owners Mut. Prot. Idem. Assn., 95 F.3d 400, 405 (6th Cir. 1996).

Ms. Rushing contends that she cannot be bound to arbitrate as a nonsignatory. Br. of Respondent at 36. The ADR Agreement states that the "intent of the Parties" was that the Agreement "shall inure to the benefit of, bind, and survive the Parties, their heirs, successors, and assigns." (CP 45) Ms. Rushing is pursuing claims in which the standard of care arises out of the contractual obligations in the admissions

documents, which include the ADR Agreement. (CP 279) She is knowingly exploiting the contract while trying to avoid the bargained for dispute resolution process.

Ms. Rushing should not be permitted to avoid the voluntary ADR Agreement.

F. Franklin Hills is entitled to its attorney fees and costs.

The contract here contains a prevailing party attorney fee clause. (CP 48) That clause states that the award must be grounded in Washington law. Id.; see also RAP 18.1 (“If applicable law grants to a party the right to recover reasonable attorney fees or expenses....”). Washington law expressly authorizes an award of attorney fees and costs to a prevailing party if the contract so provides. Mt. Hood Beverage Co. v. Constellation Brands, Inc., 149 Wn.2d 98, 121-22, 63 P.3d 779 (2003). The contractual provision is enforceable, and Franklin Hills is entitled to attorney fees and costs as the prevailing party.

IV. CONCLUSION

Based upon the foregoing, Franklin Hills requests that this Court reverse, with directions to the trial court to compel arbitration of the

disputes raised herein.

RESPECTFULLY SUBMITTED this 19th day of February, 2013.

A handwritten signature in black ink, appearing to read "Carl E. Hueber", written over a horizontal line.

CARL E. HUEBER
F. COLIN WILLENBROCK
WINSTON & CASHATT
Attorneys for Appellants

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on February 19, 2013, I caused a true and correct copy of the foregoing document to be served on counsel for Respondent in the manner indicated:

Mark D. Kamitomo
The Markham Group, Inc., P.S.
421 W. Riverside, Suite 1060
Spokane, WA, 99201

VIA REGULAR MAIL	<input type="checkbox"/>
VIA EMAIL	<input type="checkbox"/>
HAND DELIVERED	<input checked="" type="checkbox"/>
BY FACSIMILE	<input type="checkbox"/>
VIA FEDERAL EXPRESS	<input type="checkbox"/>

DATED at Spokane, Washington, on February 19, 2013.

Cheryl Hansen

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