

FILED

NOV 20 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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.

BRIEF OF APPELLANTS

CARL E. HUEBER, WSBA No. 12453
F. COLIN WILLENBROCK, WSBA No. 43165
WINSTON & CASHATT
601 W. Riverside, Ste. 1900
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Appellants

FILED

NOV 20 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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.

BRIEF OF APPELLANTS

CARL E. HUEBER, WSBA No. 12453
F. COLIN WILLENBROCK, WSBA No. 43165
WINSTON & CASHATT
601 W. Riverside, Ste. 1900
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Appellants

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENT OF ERROR	2
III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR	2
IV. STATEMENT OF THE CASE	3
V. ARGUMENT	13
A. Standard of Review	13
B. Washington law requires compliance with the Franklin Hills ADR Agreement.	13
C. There is no evidence to refute that Mr. Coon signed the ADR Agreement sufficient to form a contract, and Franklin Hills' internal policy on additional witnesses' signatures is inapplicable.	16
D. Ms. Rushing cannot meet her burden of establishing by clear, cogent, and convincing evidence that Mr. Coon was incapacitated at the time he signed the ADR Agreement, and the undisputed evidence is that he did in fact have capacity to contract at the time he signed.	19
E. The testimony of Franklin Hills' employees, former employees, and expert witnesses is admissible to establish Mr. Coon's mental status at the time of his signature.	24
F. The mere existence of a Durable Power of Attorney did not preclude Mr. Coon from contracting with Franklin Hills.	27

G.	Ms. Rushing should also be required to arbitrate her individual claims even though she is a non-signatory to the ADR Agreement because she is knowingly exploiting the contract in which the Arbitration Agreement is contained.	30
H.	Franklin Hills is entitled to its attorney fees and costs incurred at the trial court level and on appeal.	33
VI.	CONCLUSION	34

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Adler v. Fred Lind Manor,</u> 153 Wn.2d 331, 103 P.3d 773 (2004)	13
<u>Bland v. Health Care and Retirement Corp. of America,</u> 927 So.2d 252 (Fla. 2006)	15
<u>Comer v. Micor, Inc.,</u> 436 F.3d 1098 (9 th Cir. 2006)	30
<u>Deacy v. College Life Ins. Co. of America,</u> 25 Wn.App. 419, 607 P.2d 1239 (1980)	26
<u>Degginger v. Martin,</u> 48 Wash. 1, 92 P. 674 (1907)	17
<u>Erickson v. Robert F. Kerr, M.D., P.S., Inc.,</u> 125 Wn.2d 183, 883 P.2d 313 (1994)	25-27
<u>Estate of Eckstein v. Life Care Centers of America, Inc.,</u> 623 F.Supp.2d 1235 (E.D.Wash. 2009)	14,15, 33
<u>Estate of Lennon v. Lennon,</u> 108 Wn.App. 167, 29 P.3d 1258 (1991)	25-27
<u>Harris v. Rivard,</u> 64 Wn.2d 173, 390 P.2d 1004 (1964)	20
<u>Harvey v. University of Washington,</u> 118 Wn. App. 315, 76 P.3d 276 (2003)	13
<u>Herzog Aluminum, Inc. v. General America Window Corporation,</u> 39 Wn. App. 188, 692 P.2d 867 (1984)	33

<u>In re Estate of Bussler,</u> 160 Wn.App. 449, 247 P.3d 821 (2001)	17, 28
<u>In re Estate of Miller,</u> 134 Wn.App. 885, 143 P.3d 315 (2006)	25
<u>In re Jack,</u> 390 B.R. 307 (S.D.Tex. Bkcty. 2008)	21
<u>Jacob’s Meadow Owner’s Ass’n. v.</u> <u>Plateau 441 II, LLC,</u> 139 Wn.App. 743, 162 P.3d 1153 (2007)	18
<u>Mendez v. Palm Harbour Homes, Inc.,</u> 111 Wn.App. 446, 45 P.3d 594 (2002)	14
<u>Miller v. Cotter,</u> 863 N.E.2d 537 (Mass. 2007)	16
<u>Mt. Hood Beverage Co. v. Constellation Brands, Inc.,</u> 149 Wn.2d 98, 63 P.3d 779 (2003)	33
<u>Mundi v. Union Sec. Life Ins. Co.,</u> 555 F.3d 1042 (9th Cir.2009)	30
<u>Nail v. Consol. Resources Heath Care Fund,</u> 155 Wn.App. 227, 229 P.3d 885 (2010)	15
<u>Owens v. National Health Corp.,</u> 263 S.W.3d 876 (Tenn. 2007)	15
<u>Page v. Prudential Life Ins. Co. of America,</u> 12 Wn.2d 101, 120 P.2d 527 (1942)	19, 20
<u>Powell v. Sphere Drake Ins. PLC,</u> 97 Wn.App. 890, 988 P.2d 12 (1999)	30
<u>Reed, Wible and Brown, Inc. v. Mahogany Run Dev. Corp.,</u> 550 F.Supp. 1095 (D.V.I. 1982)	17

<u>Satomi Owners Assn. v. Satomi, LLC,</u> 167 Wn.2d 781, 225 P.3d 213 (2009)	13, 30
<u>Scott v. Goldman,</u> 82 Wn.App. 1, 917 P.2d 131 (1996)	29
<u>Stein v. Geonerco, Inc.,</u> 105 Wn.App. 41, 17 P.3d 1266 (2001)	14
<u>Toombs v. Northwest Airlines, Inc.,</u> 83 Wn.2d 157, 516 P.2d 1028 (1973)	14
<u>Townsend v. Quadrant Corporation,</u> 173 Wn.2d 451, 268 P.3d 917 (2012)	31, 32
<u>U.S. v. Wexler,</u> 657 F.Supp. 966 (E.D. Pa. 1987)	17
<u>Woodall v. Avalon Care Center-Federal Way, LLC,</u> 155 Wn. App. 919, 231 P.3d 1252 (2010)	13,15,21,30,33

Statutes and Court Rules

RCW 5.60.030	24-26
RCW 7.04.060	13
RCW 7.04A.070	14
RCW 71.05.320	9
ER 602	24
ER 701	23
ER 704	23
RAP 18.1(a)	33

Other Authorities

CJS, <u>Signature</u> , §6	17
----------------------------	----

I. INTRODUCTION

Franklin Hills Health and Rehabilitation Center, et al. (“Franklin Hills”) appeals from an order denying a motion to compel arbitration. This case involves a voluntary agreement to arbitrate all claims, in consideration of the “speed, efficiency, and cost-effectiveness” of the ADR process. The principal issue for this Court to determine is whether the resident had the capacity to contract at the time of signing, thus making the agreement binding on all further proceedings.

Franklin Hills moved to compel arbitration in response to claims brought in Spokane County Superior Court by the Administrator of Robert Coon’s estate against the skilled nursing facility where Mr. Coon had temporarily resided. The Administrator, also Mr. Coon’s daughter, brought claims on behalf of Mr. Coon as well as on her own behalf. She claimed that the arbitration agreement was not properly executed, and alternatively, that Mr. Coon was incapacitated at the time of signing. She further claimed that her individual claims were not subject to arbitration because she did not sign the agreement. The trial court denied the motion to stay proceedings and compel arbitration.

The burden of proving that an arbitration agreement is unenforceable is on the party seeking to avoid arbitration—here the

Respondent. That burden cannot be met, however, as the uncontroverted evidence in the record indicates that Mr. Coon checked himself into Franklin Hills, did not invoke any power of attorney, nor had any physician issued a written finding invoking any power of attorney. And while tremors may have impacted his signature, it appears on the Arbitration Agreement sufficient to form a contract. Mr. Coon had dealt with various mental ailments in the past, but was compliant with all medications at the time he was admitted to Franklin Hills, had no barriers to communication or comprehension, and told his social worker that he self-managed his financial affairs. The Agreement is valid and enforceable.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its August 2, 2012 Order Denying Defendants' Motion to Stay Proceedings and Compel Arbitration of all the claims in this action against Franklin Hills.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court erred in its denial of Defendant's Motion to Stay Proceedings and Compel Arbitration of all claims in this action against Franklin Hills where:

- (A) The standard of review on appeal is de novo;

- (B) Washington law requires compliance with the properly executed ADR Agreement;
- (C) There is no evidence to refute that Mr. Coon signed the ADR Agreement sufficient to form a contract, and Franklin Hills' internal policy on additional witnesses' signatures is inapplicable;
- (D) Ms. Rushing cannot meet her burden of establishing by clear, cogent, and convincing evidence that Mr. Coon was incapacitated at the time he signed the ADR Agreement, and the undisputed evidence is that he did in fact have capacity to contract at the time he signed;
- (E) The testimony of Franklin Hills' employees, former employees, and expert witnesses is admissible to establish Mr. Coon's mental status at the time of his signature;
- (F) The mere existence of a Durable Power of Attorney did not preclude Mr. Coon from contracting with Franklin Hills;
- (G) Ms. Rushing should also be required to arbitrate her individual claims even though she is a non-signatory to the ADR Agreement because she is knowingly exploiting the contract in which the Arbitration Agreement is contained.

IV. STATEMENT OF THE CASE

On April 1, 2011, Robert Coon, a 63-year old former attorney, fell while trying to get up from his bed at Cherrywood Assisted Living Facility. (CP 172) He was seen and examined that day in the Holy Family Hospital Emergency Room by Dr. Lynn Bergman. (CP 173) Dr. Bergman and Mr. Coon discussed his minor injuries and together they decided that a living facility with a higher level of care might be appropriate. (CP 173-74) Dr. Bergman did not contact Mr. Coon's family

members, did not place him on a psychiatric hold, and discharged him to Franklin Hills. (CP 174)

Mr. Coon admitted himself to Franklin Hills. Aurilla Poole, R.N., performed the initial assessment, and she noted that he was alert and oriented, was able to communicate all necessary medical information to her, and she found no cognitive functioning problems. (CP 150-51) Ms. Poole further noted that Mr. Coon was cooperative in taking all of his medications and was stable and well controlled on them. (CP 151-52)

On April 1, 2011, Mr. Coon signed a number of documents required for his admission, including an "Alternative Dispute Resolution Agreement." (CP 260-62) The admissions assistant that checked Mr. Coon in, Jennifer Wujick, knew Mr. Coon from previously caring for him at Cherrywood as a Certified Nurse's Assistant. (CP 262) She went through the standard practice of explaining all of the admissions documents with Mr. Coon. (CP 262) Franklin Hills' training policy requires that the admitting personnel stop the admissions process if there is a question about the resident's mental capacity to understand, and find a physician to make the assessment. (CP 261) The policy also requires that the ADR Agreement be explained in detail, with various specific points addressed. (CP 261-62) Ms. Wujick explained the ADR Agreement to

Mr. Coon, and he reminded her that he had been an attorney and understood the forms. (CP 262)

The ADR Agreement's first sentence informed Mr. Coon that the ADR Agreement was not a condition to admission in the facility. (CP 45) Instead, the parties agreed that the "speed, efficiency and cost effectiveness of the ADR process" constituted good and sufficient consideration for the acceptance and enforcement of the agreement. (CP 45-6) The "covered disputes" portion of the Agreement provides for broad inclusion of all claims in the ADR process:

This Agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law sitting in the State of Washington and shall include, but not be limited to, all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party; a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; fraud; misrepresentation; negligence; gross negligence; malpractice; death or wrongful death and any alleged departure from any applicable federal, state, or local medical, health care, consumer or safety standards...

(CP 46)

The Agreement specifies that the arbitrator/neutral will have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of the Agreement, including

whether it was void or voidable, and notes that the governing law will be the Washington Uniform Arbitration Act. (CP 46-7) The Agreement contemplates mediation for claims over \$50,000, with any claim or controversy that remains unresolved to proceed to arbitration; Franklin Hills agrees to pay fees and costs associated with the mediation process and for arbitration expenses of up to five days of arbitration. (CP 47-8) The parties agree to bear their own costs and attorney fees except in cases where the arbitrator awards a successful party costs and fees under a provision of Washington law that expressly authorizes such an award. (CP 48) The Agreement gives the resident (Mr. Coon) the right to revoke the agreement within thirty days of signing it. (CP 48)

The Agreement further clarifies the significance of the agreed dispute resolution process:

THE PARTIES UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY ENTERING INTO THIS AGREEMENT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR DISPUTES DECIDED BY A COURT OF LAW OR TO APPEAL ANY DECISION OR AWARD OF DAMAGES RESULTING FROM THE ADR PROCESS EXCEPT AS PROVIDED HEREIN. THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. YOUR SIGNATURE BELOW INDICATES YOUR UNDERSTANDING OF AND AGREEMENT TO THE TERMS SET OUT ABOVE. PLEASE READ IT COMPLETELY, THOROUGHLY AND CAREFULLY BEFORE SIGNING.

Initial: _____ Resident _____ Center

(CP 48) The parties then acknowledged that they had read the Agreement, had an opportunity to seek legal counsel, and executed it voluntarily. (CP 48-9)

The Agreement placed no limits on the causes of action included in the ADR process. The Agreement further specified that it applied not only to the Resident, but also to his estate:

Resident as used in this Agreement shall refer to the Resident, all persons whose claim is or may be derived through or on behalf of the Resident, all persons entitled to bring a claim on behalf of the Resident, including any person representative, responsible party, guardian, executor, administrator, legal representative, agent or heir of the Resident, and any person who has executed this Agreement on behalf of the Resident.

(CP 45) The Agreement stated 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) Mr. Coon signed the ADR Agreement. (CP 48-9)

During the admissions process, Mr. Coon also signed Medicare/Medicaid forms regarding his benefits; he was able to relay information about his Medicaid status, including accurate information on his monthly benefits. (CP 262) Mr. Coon physically struggled to sign the numerous forms because of severe tremors; nonetheless, he signed them in front of Ms. Wujick. (CP 262) And although his signature was difficult to

read in places, Ms. Wujick did not seek additional witnesses because she knew Mr. Coon, and knew he was affixing his signature as best he could and not using an “X” or other mark. (CP 262)

Once admitted, Franklin Hills’ staff conducted Medicare and care plan assessments for Mr. Coon during his first week of residence. (CP 200-01) Mr. Coon independently communicated all of the information for the assessments; no family members or other legal representatives were involved. (CP 201-03) On April 7, 2011, Mr. Coon’s cognitive patterns were assessed, and he scored the maximum 15 points on the “brief interview for mental status” conducted by Franklin Hills Social Services department. (CP 201) He was also assessed for customary routines and activities by the Life Enrichment Department, who noted that it was important to Mr. Coon to read, particularly history books, and watch television. (CP 186-89)

Later that week, Mr. Coon’s interdisciplinary team developed goals and care plans for Mr. Coon. He was classified as a “short stay patient” with a goal of returning to less assisted living at Cherrywood Place; that goal is not possible for cognitively impaired residents. (CP 187, 203) Everyone that assessed Mr. Coon described his love of reading, his enjoyment of late night television comedies such as Jay Leno and Saturday Night Live, and his love of talking with people about his

interests and having been an attorney. (CP 152, 187-89, 198) He was described as fully communicative, “distinguished,” and “with it.” (CP 132, 188, 203) Nursing progress notes reflect that Mr. Coon was alert and oriented, and that in fact he called a cab a couple weeks after admission and took himself to the Outback Steakhouse for dinner. (CP 151)

Mr. Coon’s medical records reflect some past mental ailments. (CP 175-76, 182) Yet, the last indication that he had any such conditions occurred some five months earlier when Mr. Coon’s caseworker at Spokane Mental Health filed a petition to extend his Least Restrictive Alternative (LRA)¹ placement. (CP 83-92, 175-76, 183) 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 on April 1, 2011, he was properly medicated for his conditions, stable, his symptomatology was not interfering with sufficient cognitive ability to

¹ An LRA insures court ordered mental health treatment under RCW 71.05.320; Mr. Coon’s LRA did not commit him to any institution, but was simply a means by which Mr. Coon continued court ordered treatment through Spokane Mental Health at his assisted living facility, which he was getting.

communicate and comprehend concepts, and he had reasonable mental capacity for decision making. (CP 174-75)

In fact, the Spokane Mental Health records, including an assessment by Dr. Mulvihill on March 3, 2011, indicate that Mr. Coon's caregivers continued to communicate with him personally regarding his own health care treatment. (CP 94-5) Dr. Mulvihill felt comfortable giving instructions to Mr. Coon to contact him if his symptomology worsened, something a physician would not have done if a patient was mentally incapacitated. (CP 94-5, 173-74)

Mr. Coon did not invoke any power of attorney. (CP 77-9) He instead communicated his desires and needs to Franklin Hills' personnel upon admission and during assessments. (CP 151-52, 187-89, 202-03, 262) His daughter, Ms. Rushing, was not at Holy Family when he was admitted into the emergency room based on the fall he had taken at Cherrywood; nor was she present when Mr. Coon was admitted to Franklin Hills. (CP 173-76, 261-62) Ms. Rushing never contacted the facility to object to the admission, or the validity of any of the many forms necessary for her father's care and treatment at Franklin Hills.

On or about June 5, 2011, Mr. Coon was admitted to Providence Holy Family Hospital where he died. Ms. Rushing was appointed as Administrator of his estate, and despite the ADR Agreement, she sued

Franklin Hills in Spokane County Superior Court. (CP 1-7, 14-24) The complaint consists of personal injury claims based on alleged negligence of the defendants in caring for Mr. Coon while he was a resident at Franklin Hills. (CP 1-7, 14-24) All of the causes of action are unambiguously encompassed by the ADR Agreement; the claims arise out of and are related to or connected with Mr. Coon's stay and care provided at Franklin Hills. (CP 45-9)

Accordingly, Franklin Hills asked the trial court to stay the proceedings and compel arbitration pursuant to the validly executed Agreement. (CP 28-30, 31-41) Franklin Hills argued that Ms. Rushing had failed to meet the burden of showing by clear, cogent, and convincing evidence that the arbitration agreement was unenforceable. (CP 37-38, 122-25) Ms. Rushing responded that Mr. Coon did not actually sign the ADR Agreement and, even if he did, he was incapacitated on the date he signed as evidenced by his reported condition some five months prior to admission at Franklin Hills—a period of time in which he was not medication compliant. (CP 68-71) The trial court denied the motion to compel arbitration due to insufficient information in the record and left open the option of a future evidentiary hearing:

THE COURT: [W]hat ultimately I am doing here is I am going to—I'm denying today the motion to stay. I'm denying that based on the fact that I haven't made a finding

as to whether or not the agreement is binding and enforceable or in existence because I do not believe I can do so based on the record provided.

(Report of Proceedings (RP) 31; CP 315-17)

...

Mr. Cronin: ... Your Honor, I would think by law we could note this up for evidentiary hearing. (RP 32)

THE COURT: You could do that and that would be fine. In terms of direction from the Court, I don't know exactly what you are asking the Court to give... Maybe I'm missing both but you got a denial on your motion so it's not stayed and it's not being compelled. That's kind of where you're left and I think your direction now is your basic lawyering instincts on what tactical approach is best suited for your client's best interest. (RP 32-33)

Franklin Hills, along with all other named defendants herein, timely appealed the order denying the motion to compel arbitration. (CP 318-23) Meanwhile, Ms. Rushing moved the trial court to compel depositions and proceed with pre-trial discovery. Franklin Hills objected to the motion and asked the Court of Appeals for an emergency stay of all trial court proceedings pending appeal. Commissioner McCown granted that motion on August 29, 2012, agreeing that the trial court lacked authority under RAP 7.2 to engage in further discovery or pretrial motion practice pending appellate review of the arbitration issue. Accordingly, all trial court proceedings have been stayed.

V. ARGUMENT

A. **Standard of Review**

Whether the trial court properly denied a motion to compel arbitration is reviewed de novo. Satomi Owners Assn. v. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (2009); Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 924, 231 P.3d 1252 (2010). This Court may reach any decision the trial court could have reached based on the record before it. The burden of proving that the arbitration agreement is unenforceable rests with the party seeking to avoid arbitration—here Ms. Rushing. Satomi, 167 Wn.2d at 797.

B. **Washington law requires compliance with the Franklin Hills ADR Agreement.**

“Washington ... has a strong public policy favoring arbitration of disputes.” Adler v. Fred Lind Manor, 153 Wn.2d 331, 341, n. 4, 103 P.3d 773 (2004). “Agreements to arbitrate are valid, supported by public policy, and enforceable.” Harvey v. University of Washington, 118 Wn. App. 315, 318, 76 P.3d 276 (2003) (disapproved of on other grounds by Optimer Intern., Inc. v. RP Bellevue, LLC, 170 Wn.2d 768, 246 P.3d 785 (2011)); RCW 7.04.060 (an agreement to arbitrate is valid, enforceable and irrevocable except upon a ground that exists at law or equity for the revocation of a contract). Under the Washington Uniform Arbitration Act,

the court is required to stay an action and compel arbitration if the agreement is enforceable. RCW 7.04A.070.

Washington courts have routinely enforced valid arbitration agreements and compelled arbitration. See e.g., Toombs v. Northwest Airlines, Inc., 83 Wn.2d 157, 162, 516 P.2d 1028 (1973) (the court held that where the agreement provides for alternative dispute resolution, the parties must pursue that method before resorting to the courts); see also, Stein v. Geonerco, Inc., 105 Wn.App. 41, 48, 49, 17 P.3d 1266 (2001) (holding it was an abuse of discretion for the trial court to refuse to enforce a contractual arbitration provision). In fact, arbitration agreements should be liberally construed, and any doubt construed in favor of arbitration. See, Mendez v. Palm Harbour Homes, Inc., 111 Wn.App. 446, 456, 45 P.3d 594 (2002).

Washington courts have utilized this same analysis to enforce arbitration agreements between residents and long term care facilities. Just as with any other arbitration agreement, a person attempting to avoid a long term care facility ADR agreement must establish that the agreement was entered into without knowledge, involuntarily, or under circumstances where the consideration was inadequate. See, Estate of Eckstein v. Life Care Centers of America, Inc., 623 F.Supp.2d 1235, 1240 (E.D.Wash. 2009). In Eckstein, the court compelled arbitration of claims brought by

the personal representative of the estate of a deceased nursing home resident claiming neglect of a vulnerable adult, negligence, and wrongful death. Id. at 1236, 1241. The court ruled that the provisions of the agreement were plainly written to include all of the claims being made by the estate, the signator of the agreement had the authority to bind the resident, and that no basis existed to preclude enforcement of the agreement, which was valid and enforceable. Id. at 1240. Other Washington courts have similarly upheld parties' rights to contractually agree to arbitrate claims against long term care facilities. See, Nail v. Consol. Resources Heath Care Fund, 155 Wn.App. 227, 229 P.3d 885 (2010); Woodall v. Avalon Care Center Federal Way, LLC, 155 Wn.App. 919, 931, 231 P.3d 1252 (2010) (enforcing arbitration agreement for claims of resident despite claim that resident lacked mental capacity to sign agreement).

Washington thus joins the majority of states which enforce ADR agreements contained in nursing home contracts, barring some proof of a basis not to enforce. See e.g., Owens v. National Health Corp., 263 S.W.3d 876, 888 (Tenn. 2007) (arbitration agreement in nursing home contract does not violate public policy); Bland v. Health Care and Retirement Corp. of America, 927 So.2d 252 (Fla. 2006) (abrogated on

other grounds by Shotts v. OP Winter Haven, Inc., 86 So.3d 456 (2011); Miller v. Cotter, 863 N.E.2d 537, 545 (Mass. 2007)).

Here, the ADR Agreement's language was clear, conspicuously capitalized and bolded, the resident was a former attorney who was not under any guardianship, and the relevant consideration was cited in the contract. (CP 48, 262) Mr. Coon had an opportunity to rescind for one month after signing, the facility agreed to pay the cost of the ADR process, and the Agreement informed both parties they were giving up a right to a jury trial. (CP 45-9) By signing, Mr. Coon also acknowledged having read the Agreement and acknowledged his right to legal counsel. (CP 48-9) There exists no basis to claim procedural or substantive unconscionability, or other basis to void the ADR contract. Under these circumstances, the parties are bound by the ADR Agreement they executed.

C. There is no evidence to refute that Mr. Coon signed the ADR Agreement sufficient to form a contract, and Franklin Hills' internal policy on additional witnesses' signatures is inapplicable.

Ms. Rushing's contention that the signature on the ADR Agreement was not her father's lacks foundation. She is not a handwriting expert, was not present when the documents were signed, and is incorrect that Mr. Coon always spelled out his name. (CP 60) Mr. Coon's

signature varied throughout the admission agreement forms, and the testimony is that he struggled to sign his name based on his tremors. (CP 104-05, 111, 262, 285)

A difficult to read or illegible signature does not impact the validity of a contract, nor establish incompetency to contract. A signature used by a person may be sufficient to give validity to an instrument, even though it is illegible; it is unnecessary that the entire name be written. CJS Signature, §6; Degginger v. Martin, 48 Wash. 1, 4, 92 P. 674 (1907) (initials sufficient for signature); U.S. v. Wexler, 657 F.Supp. 966, 971 (E.D. Pa. 1987) (signature can consist of initials only); Reed, Wible and Brown, Inc. v. Mahogany Run Dev. Corp., 550 F.Supp. 1095, 1098 (D.V.I. 1982) (a document can be executed by initials with the intent to sign); see also, Estate of Bussler, 160 Wn.App. 449, 462-463, 247 P.3d 821 (2001) (“shaky” signature did not establish lack of testamentary competency to void documents).

Here, Mr. Coon’s signature consisted of initials, full name, or some combination of the two. On April 3, 2011, Mr. Coon signed the Admission Record and Agreement form with his initials—“RHC”. (CP 285) The script appears shaky, but is legible. He also signed the last page of the ADR Agreement with his initials—“RHC”. (CP 49) The script again appears shaky, but is legible. He similarly signed his initials to the

prior page—"RHC". (CP 48) The script appears shaky and only the "R" and the "C" are legible. On March 14, 2011, Mr. Coon signed "R.H. Coon" to a records release form with Spokane Mental Health. (CP 111) The script of that signature matches the shaky appearance of the signatures on the ADR Agreement, but again is legible. On November 9, 2010, Mr. Coon signed "Robert Henry Coon" to a springing power of attorney. (CP 80) The script of that signature is less shaky, but still bears some visible waves in the "R", "b", and "C". Overall, each signature is sufficient to give validity to the instrument on which it appears. In the case of the ADR Agreement, Ms. Wujick even witnessed Mr. Coon sign. The contract is valid.

Furthermore, Franklin Hills' internal policy of requiring two additional witnesses where the resident signs with an "X" or other mark is inapplicable. The signature line of the Agreement plainly reads "RHC," not an "X" or other mark. (CP 48-9) Regardless, the internal policy cannot serve to invalidate a contract between two parties. In fact, the signatures of the parties are not even essential to the determination of the existence of a contract. Jacob's Meadow Owner's Ass'n. v. Plateau 441 II, LLC, 139 Wn.App. 743, 765, 162 P.3d 1153 (2007). The existence of mutual assent as to the essential terms is necessary to the existence of a contract, which can be deduced from the circumstances. Id. Mr. Coon

either signed or attempted to sign, and a representative for Franklin Hills accepted. That created a contract.

Ultimately, Ms. Rushing's unsubstantiated claim that Mr. Coon did not sign the Agreement does not invalidate the contract, and simply attempts to place the burden improperly on Franklin Hills to establish the contract, instead of on Ms. Rushing to prove it was void, based upon a claim of Mr. Coon's incompetence.

D. Ms. Rushing cannot meet her burden of establishing by clear, cogent, and convincing evidence that Mr. Coon was incapacitated at the time he signed the ADR Agreement, and the undisputed evidence is that he did in fact have capacity to contract at the time he signed.

When capacity to contract is challenged, there is a presumption that a party signing an ADR Agreement was competent to sign; that presumption can be overcome only by clear, cogent, and convincing evidence. Citing Page v. Prudential Life Ins. Co. of America, 12 Wn.2d 101, 108-09, 120 P.2d 527 (1942) (unpublished in part). Ms. Rushing has absolutely failed to meet that burden of proof, and the ADR Agreement is valid. The existence of past mental health diagnoses such as Mr. Coon's does not, as a matter of law, establish incapacity to contract, and instead, the undisputed evidence is that he had such capacity.

Under Washington common law, the test of "mental capacity" to contract is "whether the contractor possesses sufficient mind or reason to

enable him to comprehend the nature, terms, and effect of the contract in issue.” Harris v. Rivard, 64 Wn.2d 173, 175, 390 P.2d 1004 (1964). The contracting party must be able to “appreciate the effect of what he is doing and exercise his will with respect thereto.” Page v. Prudential Life Ins. Co. of America, 12 Wn.2d 101, 108, 120 P.2d 527 (1942) (quoting C.J.S., Contracts, p. 479, § 133). Any physical condition not adversely affecting mental competence is irrelevant. Id. When a “person possesses sufficient mental capacity to understand the nature of the transaction, ... [the] contract is not ... invalidated because [the person] was eccentric, ... aged, mentally weak, or insane.” Id.

The mere existence of mental conditions or physical infirmity does not preclude capacity to contract. Page, 12 Wn.2d at 108. Basically, a party seeking to void a contract must not only show that the party was of unsound mind or insane when it was made, but also show that this unsoundness or insanity was of such character that he had no reasonable perception or understanding of the nature of the contract. See, id. The mental capacity to contract is to be determined at the time the transaction occurred. Harris, 64 Wn.2d 175. Incidents remote in time will not be relevant. Page, 12 Wn.2d at 109-110.

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 In re Jack, 390 B.R. 307, 315 (S.D.Tex. Bkcty. 2008), a contracting party had been diagnosed with a "schizoaffective disorder," anger control issues, paranoia, suicidal ideation, agitation, and anxiety. The court noted that the records established that the contracting party had been medicated for these conditions and a physician testified that while untreated or unmedicated, the conditions could cause a degree of mental impairment, but that the patient at issue had been regularly taking the prescribed medications and his symptoms were suppressed such that he would not have been impaired. Jack, 390 B.R. at 322. Similarly, in Woodall, the court found a diagnosis of "dementia w Behavior Dist." along with a son's testimony that his father had no mental ability to understand anything he read, insufficient to void an ADR agreement. 155 Wn.App. at 936 (unpublished in part).

Ultimately, Mr. Coon's conditions do not, as a matter of law, establish that the ADR agreement was void, and Ms. Rushing presents little else. Franklin Hills, however, presented extensive medical records, expert opinions, and testimony of percipient medical caregivers that Mr. Coon was alert to time, place and person, scored high on cognitive functioning analysis, communicated well and often, understood and participated in health care decisions, enjoyed books and television programs, and generally operated at a sufficient mental status to

understand the nature of the admissions agreement, including the ADR Agreement, despite his mental conditions. (CP 131-32, 151-52, 173-76, 182-84, 187-89, 198, 201-03)

Ms. Rushing presents no evidence of Mr. Coon's incapacity to contract at the time of his admission to Franklin Hills. She basically concludes that because Mr. Coon had been diagnosed with mental conditions, including in the months leading up to his Franklin Hills admission, he had no capacity to contract. That, however, is an incorrect legal conclusion; those with mental illness are not automatically without the capacity to contract, and it remains Ms. Rushing's burden to present clear, cogent, and convincing evidence that, at the time of admission, Mr. Coon had no ability to understand the ADR agreement; she has not done so.

The mental health records presented by Ms. Rushing are too remote in time to establish Mr. Coon's incapacity on April 1, 2011. (CP 175, 183-84) Furthermore, the LRA Petition indicates that Mr. Coon was not medication compliant in November of 2010, months before his Franklin Hills admission. (CP 83-92) This is significant in relation to the conditions Mr. Coon had, because his symptomatology could be addressed and mental functioning returned based on proper treatment. (CP 183-84) The undisputed testimony presented by Franklin Hills establishes that, at

the time of admission, Mr. Coon's condition had changed dramatically; he was compliant with his psychotropic medication treatment and not exhibiting any of the issues noted in the LRA documents. (CP 175-76, 183)

Ms. Rushing's use of Dr. Mulvihill's report of Spokane Mental Health similarly does not establish any clear, cogent, and convincing evidence of incompetence. In fact, that report establishes that Mr. Coon was discussing his health care and symptomatology with his caretakers, seeking medication changes, and his physician trusted him to report changes in symptomatology. (CP 94-5, 175) Thus, none of the records supplied by Ms. Rushing creates an issue of fact on Mr. Coon's incompetence.

Further, Ms. Rushing's testimony is inadmissible to establish Mr. Coon's capacity because it lacks foundation, is conclusory, and offers expert opinions. Ms. Rushing testifies that Mr. Coon was "unable to understand information conveyed to him," and "could not have understood the nature, terms and effect of the alleged arbitration agreement." (CP 59-61) She also testifies that her power of attorney remained effective through Mr. Coon's death. (CP 60) Such testimony constitutes either legal conclusions or expert testimony not based on the perception of the witness, and which Ms. Rushing is not qualified to give. ER 701, 704.

Such opinions are also not based sufficiently on personal knowledge. ER 602.

More importantly, Ms. Rushing's conclusions are directly contradicted by those caregivers who had contact with Mr. Coon on a daily basis, and knew him to read books, watch Saturday Night Live and converse about a variety of topics. (CP 152, 198, 188-89, 203) It is directly contradicted by his ability to discuss his medical care with his physicians and express a goal to return to independent living. (CP 201-03) It is contradicted by his ability to call a taxi and take himself out to dinner. (CP 170) Ms. Rushing's conclusion that her father could not understand any information given to him lacks all credence.

E. The testimony of Franklin Hills' employees, former employees, and expert witnesses is admissible to establish Mr. Coon's mental status at the time of his signature.

Franklin Hills anticipates that Ms. Rushing will again attempt to assert that testimony from Franklin Hills personnel and experts is inadmissible under the deadman's statute. RCW 5.60.030.² Normally, a

² That in an action or proceeding where the adverse party sues...as executor, administrator or legal representative of any deceased person...or as deriving right or title by, through or from any deceased person...and a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statements made to him or her, or in his or her presence, by any such deceased...

person may not be excluded from testifying as a witness based on his or her interest in the action, although that interest may be used to impeach his or her credibility. RCW 5.60.030. The exception to the rule is known as the deadman's statute and provides that a "party in interest" claiming a right or title by, through, or from "any deceased person" may not testify to "statement[s]" or "transaction[s]" with the decedent. RCW 5.60.030. The purpose of the exception is to "prevent interested parties from given self-serving testimony about conversations or transactions with the deceased." In re Estate of Miller, 134 Wn.App. 885, 890, 143 P.3d 315 (2006). Contrary to any assertion by Ms. Rushing, there are a number of applicable exceptions to the deadman's statute.

First, the deadman's statute is inapplicable when a plaintiff pursues an independent action not limited to pursuit as executor, administrator or legal representative of an estate. RCW 5.60.030; Erickson v. Robert F. Kerr, M.D., P.S., Inc., 125 Wn.2d 183, 189, 883 P.2d 313 (1994). Because Ms. Rushing has an individual action, the deadman's statute is inapplicable to exclude evidence.

Next, the deadman's statute only bars testimony by a "party in interest." RCW 5.60.030. A "party in interest" is "one who stands to gain or lose in the action in question." Estate of Lennon v. Lennon, 108 Wn.App. 167, 174, 29 P.3d 1258 (1991). "To be a party in interest for

purposes of the deadman's statute, a witness must have a direct pecuniary interest in the outcome of the litigation." Deacy v. College Life Ins. Co. of America, 25 Wn.App. 419, 607 P.2d 1239 (1980). The testimony of the various Franklin Hills caregivers and expert witnesses is not testimony by a party in interest. Ms. Poole, Ms. Yorba, and Ms. Chartrey do not have a direct pecuniary interest in this case, as they are indemnified by Extendicare/Franklin Hills, and will not be financially liable for any judgment. And, similarly, none of the other employees, ex-employees or experts will gain or lose by any judgment.

Furthermore, the deadman's statute does not prohibit consideration of testimony that does not directly relate to comments or transactions; a witness can testify to feelings and impressions without implicating the deadman's statute. Lennon, 108 Wn.App. at 175. Additionally, the records kept in the ordinary course of business are not excluded under the deadman's statute. Erickson, 125 Wn.2d at 188. And, the deadman's statute does not apply to documents written or executed by the deceased. Id. Thus, all of the admissions records and medical records submitted by Franklin Hills are not excludable.

Finally, protection of the deadman's statute can be waived by the introduction of records by the opposing party; here, the adverse party has introduced testimony and records disputing Mr. Coon's capacity. See e.g.,

Erickson, 125 Wn.2d at 187-188. Once the party protected by the deadman's statute has opened the door, the interested party is entitled to rebuttal. Lennon, 108 Wn.App. at 175. Ms. Rushing is not entitled to admit evidence that Mr. Coon was incompetent based on his medical diagnoses and then attempt to preclude all opposing testimony evidencing competence.

F. The mere existence of a Durable Power of Attorney did not preclude Mr. Coon from contracting with Franklin Hills.

Mr. Coon signed a Durable Power of Attorney (POA) on November 9, 2010. (CP 77-80) The POA designates Ms. Rushing as the attorney-in-fact. (CP 77) However, it is specifically limited to periods of Mr. Coon's disability, incapacity or incompetency and thus did not preclude him from contracting with Franklin Hills. (CP 79)

The clear language of the POA states that it shall become effective only upon Mr. Coon becoming disabled or incapacitated or incompetent, and only "continue throughout any disability, incapacity or incompetency of the Principal." (CP 79) Accordingly, the mere existence of the document does not relieve Ms. Rushing of her burden to establish with clear, cogent, and convincing evidence that Mr. Coon was incompetent on April 1, 2011. Also, any prior use of a POA does not establish the lack of

competency to execute documents. In re Estate of Bussler, 160 Wn.App. 449, 466, 247 P.3d 821 (2001).

In fact, the POA by its terms became effective when disability is “evidenced by a written statement of a qualified physician regularly attending the Principal and/or by other qualified persons with knowledge of any confinement, detention or disappearance. Incompetence or incapacity may be established by a finding of a court having jurisdiction over the incompetent Principal.” (CP 79) Ms. Rushing has presented no such written statement. While she has presented medical records from November 2010 from Spokane Mental Health on a 180-day "LRA," there is no specific written statement on Mr. Coon’s established disability for the purposes of the Power of Attorney.

Moreover, the POA presented by Ms. Rushing limits the authority of the attorney-in-fact to control of “assets and liabilities.” (CP 77-78) The powers designated similarly are limited to those “of absolute ownership over the assets and liabilities of the Principal”; the examples all relate to the power to contract in relation to selling property, endorsing checks, banking, conveying stocks, and designating life insurance beneficiaries. (CP 77-78) It also allows the power to make health care decisions. (CP 78) None of these powers relate to the pursuit of a cause of action or resolution of a dispute through Alternative Dispute

Resolution. Courts strictly construe the powers set forth in a power of attorney. Scott v. Goldman, 82 Wn.App. 1, 9, 917 P.2d 131 (1996) (court found that a POA in which a parent granted powers to a son to administer financial interests did not extend to accept process in a lawsuit).

It is also important to note that when Mr. Coon went to the hospital from Cherrywood, Ms. Rushing was not present to sign medical decision making forms, did not admit him, and did not discharge him. Similarly, she was not at Franklin Hills to admit him and insure that Medicaid payments were properly processed and payors made, or medical forms filled out. Instead, 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. He never invoked any POA.

Ms. Rushing also never contacted Franklin Hills Facility to make other arrangements, to re-sign documents, to demand effectuation of her power of attorney, or any other necessary admission papers, even though she obviously knew her father was residing there. She is therefore estopped from now claiming he could not have effectuated a contract for his admission for his care, when in fact he most certainly needed to and did, and she did not interject herself into the process.

Thus, the existence of a durable power of attorney for Ms. Rushing is irrelevant to Mr. Coon's Agreement to Arbitrate with Franklin Hills.

G. Ms. Rushing should also be required to arbitrate her individual claims even though she is a non-signatory to the ADR Agreement because she is knowingly exploiting the contract in which the Arbitration Agreement is contained.

Ms. Rushing contends that her individual claims are not bound by the ADR Agreement because she did not sign it. (CP 72-3) "Whether a person is bound by an agreement to arbitrate is a legal question that is to be determined by the courts." Woodall, 155 Wn.App. at 923. The general rule is that "arbitration is a matter of contract and thus a party should not be required to submit to arbitration any dispute when he has not signed an arbitration agreement." Satomi, 167 Wn.2d at 810 (citation omitted). However, there are a number of applicable exceptions to the general rule,³ including the principle of equitable estoppel. Id. at 811 n. 22; Mundi v. Union Sec. Life Ins. Co., 555 F.3d 1042, 1046 (9th Cir.2009).

³ The federal courts and the Washington Court of Appeals have recognized that "nonsignatories of arbitration agreements may be bound by the agreement under ordinary contract and agency principles." Comer v. Micor, Inc., 436 F.3d 1098, 1101 (9th Cir. 2006); Powell v. Sphere Drake Ins. PLC, 97 Wn.App. 890, 892, 988 P.2d 12 (1999) (citing Thomson-CSF, SA v. Am. Arbitration Ass'n., 64 F.3d 773, 776 (2d Cir. 1995)). Included in these principles are (1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel. Woodall, 155 Wn.App. at 924.

“Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.” Townsend v. Quadrant Corporation, 173 Wn.2d 451, 461, 268 P.3d 917 (2012) (internal quotation marks omitted). Accordingly, if a nonsignatory knowingly exploits a contract containing an arbitration agreement, then equitable estoppel may require that person to arbitrate all related claims. Id.

In Townsend, homeowners and their children brought an action against a homebuilder for fraud, negligence, negligent misrepresentation, rescission, and a declaration of the unenforceability of the arbitration clause contained in the Purchase and Sale Agreements (PSA). 173 Wn.2d at 454. The lead opinion found that the complaint included the children as plaintiffs and at least two of the causes of action related directly to the PSAs. Id. at 461. The lead opinion stated that the children could not simultaneously attempt to enforce the terms of the PSA and avoid the burden of arbitration it imposed. Id. at 461-62. The lead opinion held that the children were bound by the arbitration agreement to the same extent as their parents because they were “knowingly exploiting the terms of the contract.” Id. at 462.

The dissent, on the other hand, found that the builder owed the children an independent duty that did not arise from the PSA. Id. at 465

(Stephens, J. concurring and dissenting). Specifically, the children asserted personal injury claims that were not grounded in contract. Id.

The dissent reasoned:

True, the parents are obliged to arbitrate their tort claims along with their contract claims, but this is because the arbitration agreement in the contract they signed says so. It does not follow that nonsignatories are bound to arbitrate tort claims that do not arise out of the contract.

Id.

Similar to the children in Townsend, Ms. Rushing is attempting to exploit the existence of a contract while avoiding the burdens of arbitration. The difference is that her claims arise out of the contract. The Arbitration Agreement that Mr. Coon signed stated 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 a claim of violation of the Vulnerable Adult Act. (CP 21-22) The standard of care for Franklin Hills under that Act is in part based on its contractual obligations contained in the admission documents, and those admission documents include the ADR. (CP 279, “Center’s Responsibilities”) Thus, the mere fact that Ms. Rushing did not sign the ADR Agreement cannot constitute an automatic waiver of the contracted for right to arbitrate all claims relating to Mr. Coon’s stay at Franklin Hills. She should be estopped from avoiding enforcement of the ADR.

Moreover, Washington should enforce its policy of encouraging arbitration by including such interrelated claims in one arbitration proceeding. The trial court in Woodall sensibly acknowledged that litigation “in two separate forums is inefficient, unfair, and exposes [all parties] to the inherent dangers of conflicting outcomes based on the same set of intertwined facts.” 155 Wn.App. at 922-23; see also Eckstein, 623 F.Supp.2d at 1237. The Woodall court nevertheless split the proceedings because certain claims were not grounded in contract. Ms. Rushing’s claims, however, are grounded in the admissions contract, and she should not be allowed to avoid the accompanying ADR Agreement.

H. Franklin Hills is entitled to its attorney fees and costs incurred at the trial court level and on appeal.

Under RAP 18.1(a), Franklin Hills requests an award of all attorney fees and costs associated with the motion to compel arbitration in the trial court and on appeal as the prevailing party. A court may award attorney fees and costs to a prevailing party pursuant to a contractual provision, statutory provision, or a well-recognized principle of equity. Mt. Hood Beverage Co. v. Constellation Brands, Inc., 149 Wn.2d 98, 121-22, 63 P.3d 779 (2003). A “prevailing party” is the party in whose favor final judgment is rendered. Herzog Aluminum, Inc. v. General America Window Corporation, 39 Wn. App. 188, 192, 692 P.2d 867 (1984).

The contract between the parties here contains a prevailing attorney fee clause which states as follows:

The Parties shall bear their own costs and attorney's fees except in cases where the Neutral awards a successful Party such costs and/or fees under a provision of Washington law, if any, that expressly authorizes such an award.

(CP 48)

The prevailing attorney fee provision is enforceable, and Franklin Hills is entitled to its attorney fees and costs as the prevailing party at the trial court and on appeal.

VI. 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. Ms. Rushing has not met her burden to demonstrate the unenforceability of the arbitration clause to which Mr. Coon agreed, and this Court should, accordingly, reverse.

RESPECTFULLY SUBMITTED this 20th day of November, 2012.


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 November 20th, 2012, 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 November 20, 2012.

Cheryl Hansen