FILED

JAN 2 2 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 31055-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MARY RUSHING as the Administrator 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 RESPONDENT

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I. INTRODUCTION

Contrary to Franklin Hills Health and Rehabilitation Center's ("Franklin Hills") claim, there are three primary issues for this Court to resolve as follows:

- Whether Franklin Hills has met its burden of proving the mark or squiggle on the arbitration agreement in question is that of the decedent, Robert Coon, such that a validly executed arbitration agreement exists;
- Whether the decedent, Robert Coon, had the requisite mental capacity to enter into an arbitration agreement given his mental illnesses including schizoaffective disorder (bipolar type), auditory hallucinations, delusional thought process, impaired cognitive abilities secondary to dementia and impaired insight/judgment all of which led to his involuntary commitment at Eastern State Hospital in 2010 and the execution of a durable power of attorney naming his daughter Mary Rushing as his attorney-in-fact granting her among other things "all powers of absolute ownership" over Mr. Coon's healthcare decisions.
- Whether Ms. Rushing, as a non-signatory to an arbitration agreement, can be compelled to arbitrate her claim.

Mr. Coon, at age 63, was admitted to Franklin Hills for assisted living care from an emergency room visit at Holy Family Hospital on April 1, 2011. Mr. Coon had previously been residing at Cherrywood Place (Cherrywood") where his care had been managed by a case manager. While at Franklin Hills from June 3 through June 5, 2011, Mr. Coon exhibited significant dehydration including decompensation, difficulty breathing and altered mental state. Mr. Coon's treating nurses including defendants Melissa Chartney, R.N., Aurilla Poole, R.N., and Janene Yorba, Director of Nursing, failed to properly supervise and treat his condition which continued to deteriorate rapidly resulting in his admission to Holy Family Hospital by ambulance and his subsequent death. An investigation by the State of Washington confirmed these failures.

Mr. Coon's daughter, Mary Rushing ("Ms. Rushing"), brought a wrongful death claim against Franklin Hills both in her individual capacity and as Administrator of Mr. Coon's Estate. Despite requests to engage in discovery, Franklin Hills instead removed the case to Federal Court. Following contested briefing, the Federal Court granted Ms. Rushing's motion for remand sending the case back to Spokane County Superior Court. Again, requests for discovery went unheeded and instead Franklin Hills moved to compel arbitration and stay discovery. At the time the motion was heard, no discovery had occurred. The Honorable Jerome J. Leveque denied Franklin Hills' motions finding that it had failed to prove

that the signature attached to the disputed arbitration agreement was that of Mr. Coon and further, that there was insufficient evidence to establish that Mr. Coon had the requisite mental capacity to enter into an arbitration agreement. Specifically, Mr. Coon had six months prior been involuntarily committed to Eastern State Hospital where he was determined to be mentally incompetent. Judge Leveque left the door open for Franklin Hills to again move to compel arbitration should discovery reveal evidence sufficient to support Franklin Hills' claim that the mark or squiggle in dispute was Mr. Coon's signature and further, that Mr. Coon had the requisite mental capacity to enter into an arbitration agreement on April 1, 2011 (the date of his admission to Franklin Hills). Franklin Hills instead chose to appeal the trial court's decision.

The burden of proving that a validly executed arbitration agreement exists is on the party seeking to enforce the agreement or, in this case, Franklin Hills. Just as before the trial court, on appeal Franklin Hills cannot establish that the mark or squiggle on the disputed arbitration agreement is that of Mr. Coon. Mary Rushing, by affidavit, has testified that the mark on the disputed arbitration agreement is not that of her father. Further, that her father spelled out his name when he signed documents which is supported by other documentation executed by Mr. Coon before this Court. Finally, the arbitration agreement in dispute by its own terms requires the signatures, dates and printed names of two witnesses where a resident signs with a mark. It is undisputed that

Franklin Hills did not comply with this requirement and thus, there are no witnesses to validate Franklin Hills' claim that the mark or squiggle is that of Mr. Coon. Moreover, the disputed arbitration agreement also contains a signature line for a legal representative such as a guardian or power of attorney for healthcare decisions. Although Ms. Rushing had the power of attorney, Franklin Hills did not seek her signature and thus consent to the arbitration agreement.

Finally, Ms. Rushing's individual claim is not subject to arbitration. Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012). Thus, among other things, discovery as to her claim should not have been stayed.

II. RESTATEMENT OF ISSUES

1. **Whether Franklin Hills has met its burden of proof in establishing that a validly signed/executed arbitration agreement exists.**

2. **Whether Mr. Coon possessed the requisite mental capacity to enter into the disputed arbitration agreement at issue.**

3. **Whether Ms. Rushing, who is neither a party or signatory to the disputed arbitration agreement, is required to arbitrate her individual claim.**

III. RESTATEMENT OF THE CASE

Robert Coon ("Mr. Coon"), a long time resident of Spokane and a former attorney, suffered from significant mental illnesses which included schizoaffective disorder (bipolar type), auditory hallucinations, delusional thought processes, impaired cognitive abilities secondary to dementia and impaired insight/judgment. (CP 83-84). These illnesses led to Mr. Coon's involuntary commitment at Eastern State Hospital in 2010. CP 83-94). This commitment was extended by a 180-day Less Restrictive Alternative ("LRA") petition which was signed by Spokane Mental Health Designated Mental Health Professional Mark Ingdeby on November 5, 2010. (CP 83-92). According to the petition and Mr. Coon's physician, Robert Mullvihill, M.D., Mr. Coon suffered from, among other things, delusional thinking with poor insight and judgment. (CP 83-94). Additionally, Mr. Coon was experiencing and endorsing auditory and visual hallucinations which included commands to "murder yourself", seeing a skeleton in Dr. Mullvihill's exam room at the time of his visit, and problems with poor short term and long term memory connected to "devils and demons" who were also telling him to request legal paperwork from the facility he stayed at. (CP 83-94). At the time of the LRA petition, Mr. Coon was residing at Cherrywood Place ("Cherrywood"), which is an assisted living facility in Spokane. (CP 83-94). During his visit with Dr. Mullvihill, Mr. Coon's case manager, Dan Keenan accompanied Mr. Coon

and provided additional information to Dr. Mullvihill about Mr. Coon. (CP 83-91).

Four days after the 180 day LRA petition was signed, Mr. Coon executed a durable power of attorney ("POA") which was properly notarized and appointed his daughter Mary Green-Rushing ("Ms. Rushing") as his attorney in fact. The POA dated November 9, 2010, granted Ms. Rushing all powers including those necessary to make healthcare decisions on Mr. Coon's behalf. (CP 77-81). The POA became effective according to its terms when Mr. Coon's incompetence was established resulting in his involuntary commitment to Eastern State Hospital. (CP 79). Thus, at the time Mr. Coon was admitted to Franklin Hills on April 1, 2011, Ms. Rushing was Mr. Coon's attorney in fact with the authority to sign all admission documents including the arbitration agreement in dispute. (CP 79). Franklin Hills did not contact Ms. Rushing nor obtain her signatures on any of the admission documents including the arbitration agreement at issue.

Prior to his admission to Franklin Hills, Mr. Coon had been residing at Cherrywood. (CP 106). On April 1, 2011, he was seen at Holy Family Hospital's Emergency Room subsequent to a fall that occurred at Cherrywood. (CP 106). In the ER, Mr. Coon was examined by Dr. Lynn Bergman, who noted that Mr. Coon admitted to suffering from hallucinations and that administrators at Cherrywood felt they could no longer meet Mr. Coon's level of care needs. (CP 106). As a result,

following his emergency room visit, Mr. Coon was discharged directly to Franklin Hills which occurred that same day (April 1, 2011). (CP 107). Contrary to Franklin Hills' contention, assuming the 180 day LRA was in effect, Mr. Coon could not have voluntarily admitted himself.

In early June, 2011, while under Franklin Hills' care, Mr. Coon began exhibiting significant health problems which included decompensation, difficulty breathing and altered mental status. (CP 4). Between June 4 and June 5, 2011, Franklin Hills' nursing staff incuding defendants Melissa Chartney, R.N. and Aurilla Poole, R.N., individually or cumulatively charted significantly low blood pressures of 90/60, noted that Mr. Coon looked "bad" and "puny and pale" and that Mr. Coon was dehydrated and needed fluids. (CP 17). Despite these concerns, the nursing staff failed to conduct a thorough assessment/evaluation of Mr. Coon, failed to document in the medical record a thorough assessment/evaluation, and failed to contact the facility physician and Mr. Coon's daughter Mary Rushing. (CP 17-22). Moreover, an IV to address Mr. Coon's dehydration was not started until June 4, 2011 and an IV flow sheet as required was not initiated which would chart the monitoring of the amount of fluid delivered to Mr. Coon as well as allow for recording of new orders on the medication administration sheet as required by Franklin Hills' policy. (CP 18). Finally, the Franklin Hills' nursing staff failed to initiate the facility's alert charting system in order to ensure that Mr. Coon's condition was properly monitored and charted on each shift. (CP 18). As a result, 17

hours elapsed without any documented assessment of Mr. Coon's condition despite his significantly low blood pressure, his "puny and pale" appearance and his documented dehydration with the need for fluids. (CP 18). On June 5, 2011 at 5:45 a.m., Mr. Coon was found in respiratory distress with a decreased level of consciousness and vomiting. (CP 18). As a result, 911 was called and Mr. Coon was transported by ambulance to Holy Family Hospital. (CP 18). A pre-hospital care report by emergency medical personnel documented that Franklin Hills' staff did not know how long Mr. Coon had been in respiratory distress as he had not been checked on since 7:00 p.m. the previous night. (CP 18). Thus, 10 hours and 45 minutes had elapsed where no one at Franklin Hills checked on Mr. Coon despite his significant health problems that were well-documented in the two days preceding his respiratory distress. (CP 18).

At Holy Family Hospital, Mr. Coon was found to have respiratory failure, septic shock, acute renal failure, hypercholemia, hyponatremia, lactic acidosis, marked hypoxemia, deep venous thrombosis and probable hydration. (CP 19). Despite aggressive medical treatment, Mr. Coon passed away on June 5, 2011, the same day he was taken to Holy Family Hospital. (CP 19). He was 63 years of age at the time. (CP 17).

Following Mr. Coon's death, the Department of Social and Health Services ("DSHS") engaged in an investigation surrounding the care and resulting death of Mr. Coon. (CP 22). This included unannounced on-site visits on June 10, 15, 17, and 20, 2011. (CP 22). The investigation

concluded that Franklin Hills and its nursing staff had failed to follow regulations regarding vulnerable residents in the care of Franklin Hills which had resulted in actual harm to Mr. Coon. (CP 22). This included Franklin Hills' failure to thoroughly assess/evaluate Mr. Coon's condition including the failure to monitor his IV for a period of 17 hours which resulted in his hospitalization on June 5, 2011. (CP 22).

On November 30, 2011, Mr. Coon's daughter, Ms. Rushing, brought suit against Franklin Hills in her individual capacity and as the administrator of Mr. Coon's estate. (CP 3-7). The suit alleged negligence by the nursing staff, improper training, instruction and supervision of its employees by Franklin Hills and violations of the Vulnerable Adult Statute, RCW 74.34, et seq. (CP 18-22).

At the outset of the litigation, Franklin Hills refused to participate in discovery and removed the case to Federal Court. On March 8, 2012, the Honorable Lonnie Suko granted Plaintiff's motion to remand and further granted Plaintiff's motion to amend the complaint to include nurses Melissa Chartney, R.N., Aurilla Poole, R.N. and Janene Yorba, Director of Nursing, as defendants.

After the demand, despite requests to do so, Franklin Hills again refused to participate in discovery and instead filed a motion to stay proceedings and compel arbitration. (CP 28).

At the hearing Franklin Hills unsuccessfully argued that the arbitration agreement in dispute was validly executed. Verbatim Report of

Proceedings Before the Honorable Jerome J. Leveque, ("RP") July 20, 2012, pp. 3-35. Further, the trial court recognized the need for an evidentiary hearing on the issue of competency and the difficulty or problems with deciding all issues on the basis of affidavits without the affiants having been deposed. Specifically, the court stated as follows:

> "THE COURT: That's kind of what I was talking about that came out of that. The option is an evidentiary hearing to sort through the issues to determine the questions of fact, if in fact the court - - I want you just to understand, if in fact the court gets there."

RP p. 14, lines 12-16.

> "THE COURT: It would be like a fact witness who said I saw the light and it was green and I saw the vehicle enter into the intersection and it was green and that's the affidavit. So then you take the deposition, you find out well the individual was standing behind a street sign and was talking to his friend and he actually looked up at the time the vehicle was almost through the inter - - I mean there's all kind of stuff that can be brought out challenging what has been stated in good faith and under oath a fact that they believed was true until they're examined on it."

RP at 15, lines 14-23.

Of equal importance, Ms. Rushing objected to the use of Franklin Hills' late filed affidavits of its employees and experts as support for its motion. Specifically, it is undisputed that Franklin Hills did not file the affidavits of its employees and 2 experts Ronald Klein, Ph.D. and James Winters, M.D., an emergency room physician, until it submitted its reply. Notwithstanding the inadequacy of the affidavits, Ms. Rushing, in her sur reply, argued for the exclusion of the affidavits relying upon White v.

Kent Medical Center, 61 Wn. App. 163, 168, 810 P.2d 4 (1991) which holds that it is the responsibility of the moving party to raise in its initial motion all issues upon which it believes entitles it to prevail. White, at 168. This has been long been the rule for appellate review where it is well established that a court will not consider issues raised for the first time in a reply brief. White, at 168 citing In Re Marriage of Sacco, 114 Wn.2d 1, 5, 784 P.2d 1266 (1990); Stevens v. Security Pac. Mortgage Corp., 53 Wn. App. 507, 519, 768 P.2d 1007, review denied, 112 Wn.2d 1023 (1989); State v. Manthie, 39 Wn. App. 815, 826, n.1, 696 P.2d 33, review denied, 103 Wn.2d 1042 (1985); RAP 10.3(c). In addition to the use of self-serving affidavits lacking foundation for the opinions rendered to which Ms. Rushing has not been allowed any discovery or more specifically, depositions, to test the foundation and factual basis for the affidavit opinions, permitting the same affidavits to be filed with Franklin Hills' reply and thus, no opportunity for plaintiffs to adequately address the same violates the well established principle that "trial by ambush" has little place in the present day adversarial system which strives for procedural fairness. Lybbert v. Grant County, State of Washington, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000).

The trial court recognized the unfairness of considering affidavits filed in a reply without any opportunity by Ms. Rushing to address the same. The court's comments and colloquy addressing the same was as follows:

> "THE COURT: What I think he's saying is kind of the tain't fair doctrine. I mean I have to have the opportunity to absorb and understand and then try to determine whether or not that information can be challenged out of fairness."

RP at 28.

> "MR. CRONIN: Well, you know, t'aint fair goes on and on and on and this court has seen it in numerous cases where tain't fair is a CR 56(f) at the end of a two year case where there's been a discovery deadline..."

RP at 28.

Franklin Hills has not advanced this "tain't fair" argument in its opening brief and thus, has not provided basis upon which the affidavits in dispute should be considered. Thus, as will be argued more fully herein, the affidavits should be disregarded in their entirety thus eliminating any basis upon which this Court can consider the relief sought by Franklin Hills.

Notwithstanding the impropriety of the affidavits in question, at the time of the hearing before Judge Leveque, Franklin Hills relied upon the affidavit of Jennifer Wujick who purportedly was present when Mr. Coon signed the admission documents including the disputed arbitration agreement to establish that the mark or scribble at issue belonged to Mr. Coon. (CP 260-263). Notably, Ms. Wujick does not state she witnessed Mr. Coon sign ADR agreement. (CP at 262). By contrast, Ms. Rushing,

Mr. Coon's daughter, submitted an affidavit with respect to the alleged signature contesting the mark or scribble as her father's stating as follows:

> "I have seen the mark on the alleged arbitration agreement. Notwithstanding my father's inability to comprehend the nature of the agreement, the mark is not his signature. My father spelled out his name when he signed documents."

(CP at 98)

Moreover, there were other documents with Mr. Coon's signatures that are spelled out as attested to by his daughter Mary Rushing and do not remotely resemble the mark or scribble on the arbitration agreement in dispute. Specifically, the POA signed and notarized signature is not only legible but is spelled out as attested to by Ms. Rushing. (CP at 80).

After consideration of the evidence, the trial court denied Franklin Hills' motion finding that there was insufficient evidence in the record provided to support Franklin Hills' motion to compel arbitration and to stay discovery. RP, lines 15-23. Specifically, the court held that it did not have enough information to find one way or the other whether the mark or scribble on the disputed arbitration agreement is that of Mr. Coon or that he had the mental competency to sign the same. RP at 31-32, lines 25, and 1-4. (CP 321-323).

The lack of sufficient evidence to establish that the mark or scribble on the arbitration agreement is that of Mr. Coon has not changed on appeal nor has there been any argument or evidence advanced to alter the trial court's observation that Ms. Rushing was in a better position to identify her father's signature than Franklin Hills. RP, p. 26, lines 19-21.

Despite the trial court specifically reserving the right to Franklin Hills to renew its motion if evidence justifying the same was uncovered, Franklin Hills instead chose to appeal. RP, p. 31, lines 20-23, p. 32, lines 12-22.

As will be more fully argued herein, Franklin Hill cannot meet its burden of establishing that the scribble or mark on the disputed arbitration agreement is that of Mr. Coon. Further, Franklin Hills cannot establish that Mr. Coon's incompetency which had previously been established by clear, cogent and convincing evidence resulting in an involuntary commitment at Eastern State Hospital in November, 2010, rendered Mr. Coon competent on April 1, 2011, to knowingly and voluntarily enter into an arbitration agreement with Franklin Hills. Finally, Ms. Rushing as a non-signatory to the disputed arbitration agreement cannot be compelled to arbitrate pursuant to Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012).

IV. ARGUMENT

A. Standard of Review

An appellate court engages in de novo review of a trial court's decision granting a motion to compel or deny arbitration. Satomi Owners Ass'n. V. Satomi, LLC, 167 Wn.2d 781, 797, 225 P.3d 213 (2009) citing Adler v. Fred Lind Manor, 153 Wn.2d 331, 342, 103 P.3d 773 (2004). Arbitration agreements are contracts and are subject to the same law as

contracts. Satomi, at 810; Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn. App. 919, 925, 231 P.3d 1252 (2010). *See also* McKee v. AT&T Corp., 164 Wn.2d 372, 383, 191 P.3d 845 (2008). The burden of establishing a valid contract or arbitration agreement is on the party asserting the existence of a contract to prove the contract was executed. Weiss v. Lonnquist, 153 Wn. App. 502, 511, 224 P.3d 787 (2009), citing Jacob's Meadow Owners Ass'n v. Plateau, 139 Wn. App. 743, 162 P.3d 1153 (2007).

B. Franklin Hills cannot meet its burden of establishing that the arbitration agreement in dispute was executed by Mr. Coon.

Arbitration agreements are contracts and are subject to the same law as contracts. Satomi Owners Assn. v. Satomi, LLC, 167 Wn.2d at 810. The burden is on the party asserting the existence of a contract to prove the contract was executed. Weiss v. Longquist, 153 Wn. App. at 511.

In the instant case, Franklin Hills' counsel argues that the scribble or mark on the disputed arbitration agreement constitutes the initials "RHC" and although the script appears shaky, is legible. Brief of Appellant at pp. 17-18. Counsel further attempts to compare the signature of Mr. Coon from the November 9, 2010 Power of Attorney to the scribble or mark on the disputed arbitration agreement and concludes "the script of that signature is less shaky, but still bears some visible waves in the "R", "b" and "C". Brief of Apellants at p. 18. Franklin Hills then challenges Ms. Rushing's contention that the signature on the disputed arbitration

agreement is not that of her father based upon the fact that she is "not a handwriting expert". Brief of Appellants at p. 16. Franklin Hills' argument is legally incorrect and further, lacks logic. Its counsel has not established himself as a handwriting expert with the expertise to compare Mr. Coon's signatures yet purports to do so comparing "visible waves in the "R", "b", and "C" in Mr. Coon's printed signature on his power of attorney with that of the scribble or marking to the disputed arbitration agreement. Brief of Appellants at p. 18. By contrast Ms. Rushing can testify as to her father's signature. It is well settled in Washington that a party who is familiar with another's signature, either as a result of personal or business relationships may testify regarding that signature. State v. McGuff, 104 Wash. 501, 506, 177 P. 316, 318 (1918), citing Poncin v. Furth, 15 Wn. 201, 46 P. 241, (1891). Unlike counsel for Franklin Hills, Ms. Rushing is personally familiar with her father's signature and appropriate to testify about the same. Her affidavit states unequivocally "I have seen the mark on the alleged arbitration agreement. Notwithstanding my father's inability to comprehend the nature of the agreement, the mark is not his signature. My father spelled out his name when he signed documents". (CP at 98).

The only evidence Franklin Hills offers contrary to that of Ms. Rushing's is the affidavit of Jennifer Wujick who does not state that she actually witnessed Mr. Coon sign the arbitration agreement in dispute but rather refers generally to all agreements. (CP at 262). Her affidavit provides in pertinent part:

> "....I followed my standard practice in explaining the forms, including the ADR agreement. He reminded me again that he was an attorney while he was signing the agreements, and he understood them fully..."

RP at 262.

Franklin Hills relies upon this broad statement to argue that "in the case of the ADR agreement, Ms. Wujick even witnessed Mr. Coon sign." Brief of Appellant, p. 18. No such definitive conclusion can be drawn from her statement. If Ms. Wujick recalled Mr. Coon specifically signing the ADR agreement, she would have stated so. Ms. Wujick's broad statement that she conversed with Mr. Coon while he was "signing the agreements" does not meet Franklin Hills' burden of establishing that Mr. Coon actually signed the arbitration agreement in dispute. Moreover, Franklin Hills has offered no evidence to establish that Mary Rushing's statement that the signature is not her father's is incorrect.

Of equal importance or significance, the disputed arbitration agreement requires two witnesses to a resident signing with an "X" or mark. (CP at 49). Franklin Hills dismisses this requirement and argues that its failure to comply cannot serve to invalidate a contract between two parties. Brief of Appellant at p.18. This argument has merit only where a valid contract has already been established. In Mr. Coon's case, the validity of the arbitration agreement is disputed and rests upon Franklin Hills first establishing that the scribble or mark belonged to Mr. Coon. The

witnesses would have established that Mr. Coon had signed the document and thus confirmed that a valid contract to arbitrate existed between the parties. It has long been recognized that "attestation is not a mere form. It has a vital object to certify that a document was acknowledged in the presence of a witness and **that the signature at issue is genuine**." In Re Chafey's Estate, 167 Wash. 185, 188, 8 P.2d 959 (1932) (emphasis added). Thus, requiring witnesses in the disputed arbitration agreement was to confirm that the mark or scribble constituted the signature of Mr. Coon. Franklin Hills now seeks to have this Court excuse and condone its failure to have witnesses confirm the scribble or mark as Mr. Coon's signature by characterizing the requirement as an "internal policy" that is inapplicable. Franklin Hills should not be rewarded for its dismissive attitude towards a requirement that could have established that the scribble or mark belonged to Mr. Coon.

Franklin Hills cites a number of cases for the proposition that difficult to read or illegible signatures do not invalidate a contract, that signatures may consist of initials only and that a "shaky" signature is not sufficient to establish lack of testamentary competence. Brief of Appellant at p. 17. Each case is distinguishable. Moreover, the cases support Ms. Rushing's argument that Franklin Hills bears the burden of proving that Mr. Coon executed the arbitration agreement in dispute. In Degginger v. Martin, 48 Wash. 1, 4, 92 P. 674 (1907), the court found that a contract was sufficiently executed where the real estate agent initialing the contract

had typewritten his name above the initials and further testified that the initials were his. Degginger, at 3-4. Thus, contrary to Mr. Coon's case, there was no dispute as to the agent signing the document. In U.S. v. Wexler, 657 F.Supp. 966, 971 (E.D. Pa. 1987) there was no argument as to whether the initials in question were that of the defendant. In Reed, Wibble & Brown, Inc. v. Mahogany Run Devp. Corp., 550 F.Supp. 1095, 1098 (D. Vi. 1982) the individual whose initials were in question admitted to initialing the document. Finally, in The Estate of Bussler, 160 Wn. App. 449, 462-463, 247 P.3d 821 (2001) there were witnesses to establish both competency and that the shaky signature belonged to the individual in question.

The scribble or mark on the arbitration agreement alleged by Franklin Hills to belong to Mr. Coon is illegible. It is not witnessed as required by Franklin Hills' own policy. Further, the signature of Mary Rushing, who was Mr. Coon's power of attorney, does not appear on the document as required. Finally, Ms. Rushing has unequivocally testified in her affidavit that the scribble or mark is not that of her father. By contrast, the affidavit of Jennifer Wujick does not state that she actually witnessed Mr. Coon sign the arbitration agreement in dispute. Moreover, Ms. Wujick's affidavit constitutes inadmissible evidence pursuant to White v. Kent Medical Center, 61 Wn. App. at 168 because it was filed with Franklin Hills' reply and thus, Ms. Rushing has not had an adequate opportunity to address the many issues raised by Ms. Wujick which were

not part of Franklin Hills' Motion. Finally, counsel for Franklin Hills is not competent to analyze and compare Mr. Coon's handwriting including the shakiness of the signature or the alleged "visible waves in the "R", "b" and "C". As such, Franklin Hills cannot meet its burden of establishing that the scribble or mark in question belongs to Mr. Coon and thus cannot establish the existence of a valid contract.

C. At the time of his admission to Franklin Hills on April 1, 2011, Mr. Coon lacked the requisite mental capacity to enter into an arbitration agreement.

The rule relative to mental capacity to contract is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue. Johnson v. Perry, 20 Wn. App. 696, 703, 582 P.2d 886 (1978), citing Page v. Prudential Life Ins. Co. of America, 12 Wn. 2d 101, 108, 120 P.2d 527 (1942). In applying this rule, it must be remembered that contractual capacity is a question of fact to be determined at the time the transaction occurred. Johnson v. Perry, 20 Wn. App. 696, 703, 582 P.2d 886 (1978), citing Page v. Prudential Life Ins. Co. of America, 12 Wn. 2d 101, 108, 120 P.2d 527 (1942). Everyone is presumed sane and this presumption is overcome only by clear, cogent and convincing evidence. Johnson v. Perry, at 703.

It is undisputed that on November 5, 2010, Designated Mental Health Professional ("DMHP") Mark Ingabee filed a petition for a 180

day Lesser Restrictive Alternative ("LRA") secondary to an ongoing involuntary commitment at Eastern State Hospital which occurred sometime prior. According to the petition and report of Robert Mullvihill, M.D., a physician with Spokane Mental Health, Mr. Coon suffered from, among other things, delusional thinking with poor insight and judgment. (CP 83-94). Additionally, Mr. Coon was experiencing and endorsing command auditory and visual hallucinations which included commands to "murder yourself", seeing a skeleton in Dr. Mullvihill's exam room at the time of his visit, and problems with poor short term and long term memory connected to "devils and demons" who were also telling him to request legal paperwork from the facility he stayed at. (CP 83-94). At the time of the LRA petition, Mr. Coon was residing at Cherrywood, an assisted living facility in Spokane. (CP 83-94). Although Franklin Hills contends that Mr. Coon "voluntarily" checked himself into Franklin Hills, he would not have been able to do so under a 180 day LRA. At the time of his admission to Franklin Hills on April 1, 2011, Mr. Coon would have been approximately 150 days into his 180 day LRA. Thus, he would still have been under a mental health commitment court order and technically, a ward of the State of Washington. Because Franklin Hills has refused to participate in discovery, Ms. Rushing has not been able to conduct the depositions necessary to adequately explore Mr. Coon's mental state which would include depositions of DMHP Mark Ingabee, Dr. Robert Mulvihill, M.D., Dan Keenan, who was Mr. Coon's case manager at

Cherrywood Place and staff/employees at Cherrywood Place and Franklin Hills.

Regardless and importantly, at the time the LRA was filed on November 5, 2010, Mr. Coon had already been adjudged mentally incompetent secondary to an involuntary commitment proceeding which placed him at Eastern State Hospital. This fact has not been contested by Franklin Hills. This led the trial court to comment:

> "THE COURT: So does the burden of clear, cogent and convincing back in 2010 where there was the involuntary commitment carry forward other than by argument that it existed at the time of the signing in what was it April, I think, 2012.
>
> MR. KAMITOMO: I think it carries forward as clearly to March 2011, three weeks beforehand because at that point he is being evaluated and his diagnosis hasn't changed.
>
> THE COURT: That diagnosis would never change, it's whether or not it's symptomatic."

RP at pp. 22-23.

Mr. Coon's incompetency had already been established six months prior by clear, cogent and convincing evidence. As the trial court noted, the mental health diagnosis would not change but rather, the question is whether or not Mr. Coon was asymptomatic or lucid at the time he was reported to have signed the arbitration agreement on April 1, 2011. Franklin Hills argues that the mental health records are too remote in time

yet conspicuously fails to address the medical record from Spokane Mental Health dated March 11, 2011, just 21 days prior to Mr. Coon's admission to Franklin Hills which documents significant auditory hallucinations which were commands for self-harm including a command to "murder yourself", visual hallucinations seeing a skeleton in the exam room at the time of the visit with Dr. Mullvihill on March 11, 2011, and delusional thinking and poor insight and judgment. (CP at 94-95). Further, Mr. Coon's care was managed by a nurse manager at Cherrywood Place where he resided pursuant to the 180 day LRA at the time of his visit to Dr. Mullvihill on March 11, 2011. (CP at 95). Finally, and of equal importance, on the same day Mr. Coon was admitted to Franklin Hills on April 1, 2011, he was seen earlier that day at Holy Family Hospital's emergency center where he admitted to hallucinations including seeing designs in the wall and a glittery substance over the furniture. (CP at 106). Hallucination under any circumstance cannot be considered normal nor does Franklin Hills argue as such. At a minimum, the hallucinations on the date of his admission to Franklin Hills calls into question his mental capacity and ability to knowingly and voluntarily enter into an arbitration agreement.

Franklin Hills has presented no evidence to overcome the clear, cogent and convincing determination of Mr. Coon's mental illness leading to his involuntary commitment. Notwithstanding, Ms. Rushing's argument that the affidavits of Franklin Hills' employees and experts Ronald Klein,

Ph.D. and James Winters, M.D., should not be considered because they were not timely provided as mandated by White v. Kent Medical Center, 61 Wn. App. at 168, because the issue is Mr. Coon's competence at the time he was alleged to have signed the arbitration agreement in dispute on April 1, 2011, the only employee with knowledge of Mr. Coon at that time is Jennifer Wujick, the C.N.A. who admitted Mr. Coon to the facility. The affidavits of the other employees including nursing staff contain observations made after the date of admission and thus, do not provide any information related to the time of Mr. Coon's alleged signing of the disputed arbitration agreement. Ms. Wujick does not express an opinion as to Mr. Coon's mental competency nor does Franklin Hills suggest that a C.N.A. is qualified to do a mental health evaluation. (CP 260-263). Moreover, given Mr. Coon's report of hallucinations in the ER at Holy Family Hospital the same day he met with Ms. Wujick raises a question as to her limited observations of Mr. Coon's interaction with her to establish competency.

With regard to the affidavits of Franklin Hills' experts Ronald Klein, Ph.D. and James Winters, M.D., neither support Franklin Hills' contention that Mr. coon was competent on April 1, 2011, to enter into the disputed arbitration agreement.

Dr. Winters is an emergency room physician and does not provide a foundation to establish an expertise in mental health evaluations. Furthermore, Dr. Winters' observations are confined to the limited

medical records discovered thus far. As to the records reviewed, Dr. Winters fails to address Dr. Mullvihill's statement that Mr. Coon was suffering from delusional thinking with poor insight and judgment, had impaired cognitive abilities secondary to dementia, suffered from schizoaffective disorder, was experiencing and endorsing auditory and visual hallucinations including commands to murder himself, poor short term and long term memory connected to "devils and demons" who are also telling him to request legal paperwork from the facility he stayed at and seeing a skeleton in Dr. Mullvihill's exam room at the time of the visit which occurred just 21 days prior to Mr. Coon's admission to Franklin Hills. Dr. Winters also fails to mention or address the hallucinations Mr. Coon was experiencing in the ER at Holy Family Hospital on the same day of his admission to Franklin Hills. Finally, Dr. Winters' opinion that "this patient had a reasonable mental capacity – understanding information and understanding reasonable consequences in his ability for decision making" does not refer to nor establish that Dr. Winters believes that Mr. Coon had the requisite mental capacity to enter into an arbitration agreement on April 1, 2011. (CP at 175-176).

Similarly, the declaration of Ronald Klein, Ph.D., a clinical psychologist, also fails to support Franklin Hills' position that Mr. Coon was mentally competent. Notably, Dr. Klein does not state that he believes that Mr. Coon was mentally competent at the time he was alleged to have signed the arbitration agreement in dispute. (CP at 181-184). Furthermore,

as with Dr. Winters, Dr. Klein neglects to mention or address the involuntary commitment at Eastern State Hospital 6 months prior or the existing 180 day LRA that was in effect at the time of Mr. Coon's admission to Franklin Hills or Dr. Mullvihill's visit on March 11, 2011. Finally, Dr. Klein incorrectly states that "there existed only one isolated report of any hallucination near the end of April." (CP 183). To the contrary, there were multiple reports of auditory and visual hallucination during the visit with Dr. Mullvhill as already referenced herein as well as a report of hallucinations to the ER physician on the same day Mr. Coon was admitted to Franklin Hills which occurred at the beginning of April, 2011. (CP 106-108). Notably, Dr. Klein makes no mention of the hallucinations in the ER nor does he comment on whether they would affect a determination of Mr. Coon's competency on that date.

Franklin Hills refers to case law for the proposition that individuals with mental illnesses such as Mr. Coon nonetheless have been found to have the capacity to contract. These cases are factually distinguishable and do not stand for the proposition asserted by Franklin Hills. In re Jack, 390 B.R. 307, 315 (S.D. Tex. Bktcy. 2008) involves a longshoreman named Samuel Jack who in 1986 sustained right hemispheric brain injury when he was struck in the head while working as a longshoreman. Id at 312. Mr. Jack sued his employer which resulted in a lump sum settlement of $375,000 and future monthly payments of $1,472.63 from July 1, 1992 until June 1, 2012, and continuing each month thereafter for the rest of Mr.

Jack's life. Id at 312. In 1995, Mr. Jack was charged with a DUI. Because Mr. Jack had insufficient funds to pay for his legal defense against the DUI charge, he entered into four separate purchase and sale agreements which assigned Mr. Jack's interest to his future payments under the personal injury settlement in return for access to immediate cash to fund his legal defense. Id at 313. Mr. Jack passed away on November 20, 2004, whereupon litigation ensued regarding, among other things, Mr. Jack's capacity to contract given his brain injury and diagnosis of schizoaffective disorder. Jack at 315. Notably, a three day trial ensued regarding Mr. Jack's competency at the time he entered into the contracts. Jack at 317. A total of ten witnesses testified including two medical experts, one of which was Mr. Jack's treating physician, in addition to a number of lay witnesses. Jack at 317. Upon hearing from all witnesses, the court ultimately concluded that Mr. Jack was sufficiently competent at the time he entered into the four contracts such that the agreement should be upheld. Jack at 334.

In comparison to Mr. Coon, although suffering from schizoaffective disorder and a brain injury, Mr. Jack functioned independently and was not residing in an assisted living facility pursuant to a 180 day LRA having been previously committed to a mental institution. Further, it is clear that discovery and ultimately a three day trial with the testimony of many witnesses for both parties transpired before a determination of competency to contract was reached. No such

discovery or trial to determine competency has transpired thus far in Mr. Coon's case. Finally, unlike Mr. Jack, Mr. Coon additionally suffers from delusional thought process, impaired cognitive abilities secondary to dementia and impaired insight/judgment and hallucinations including commands to murder himself, seeing skeletons and problems with poor short term and long term memory connected to "devils and demons". (CP 83-94) Thus, there is sufficient evidence including reports of hallucinations on the day of his admission to Franklin Hills that raise questions about Mr. Coon's competency which unlike In re Jack, *supra*, have not yet been explored through discovery nor has there been any hearing to specifically determine Mr. Coon's competence at the time he allegedly signed the arbitration agreement in dispute. Consequently, In re Jack is distinguishable and does not support Franklin Hills' argument that Mr. Coon's capacity can be determined despite his diagnosis of schizoaffective disorder.

With regards to Woodall v. Avalon Care Center–Federal Way LLC, 155 Wn.App. 919, 231 P.3d 1252 (2010), Franklin Hills improperly relies upon the unpublished portion of the Woodall decision to support its contention that Mr. Coon had the capacity to contract. Appellant's Brief at p. 21. GR 14.1(a) provides that a "party may not cite as an authority an unpublished opinion of the Court of Appeals". Consequently, the discussion that ensues regarding competency should not be considered. Notwithstanding, unlike Coon, there was no issue as to whether an

arbitration agreement had been signed. Further, the medical evidence that had been submitted addressing the alleged incompetency of Woodall was determined to lack foundation both factually and as to the medical conclusion as, among other things, the affiant based his opinion on unspecified medical records of Mr. Woodall. Woodall at 936. By contrast, Mr. Coon's lack of mental capacity had already been established pursuant to an involuntary commitment prior to Mr. Coon's admission to Franklin Hills. The medical records and other evidence documenting Mr. Coon's mental illnesses have not been challenged as to their veracity by Franklin Hills. Those records, unlike the ones in Woodall establish conclusively that Mr. Coon had been adjudged mentally incompetent by clear, cogent and convincing evidence as little as six months prior to his admission at Franklin Hills and that his mental illness persisted at the time of his admission by virtue of, among other things, reports of hallucinations on the date of admission.

D. The testimony of Franklin Hills' employees and former employees is inadmissible to establish Mr. Coon's mental status at the time of his signature.

Franklin Hills offers the affidavits of its employees and former employees as proof Mr. Coon executed the arbitration agreement in dispute and further, had the requisite capacity to do so.

Washington's Deadman Statute RCW 5.60.030 prevents interested parties, that is, parties that stand to gain or lose by the operation and effect

of the action or judgment in question, from giving self-serving testimony about conversations or transactions with the deceased. Ebel v. Fairwood Park II Homeowner's Ass'n., 136 Wn. App. 787, 150 P.3d 1163 (2007).

Defendants Melissa Chartney, RN, Aurilla Poole, RN, and Janene Yorba, Director of Nursing's testimony should be excluded as each is an interested party whose testimony is being offered against Mr. Coon's estate with regards to the alleged arbitration agreement in dispute and Mr. Coon's mental capacity to contract. Franklin Hills' argument that Ms. Poole, Ms. Yorba and Ms. Chartney do not have a direct pecuniary interest in the case as they will be indemnified by Franklin Hills is irrelevant and unsupported by citation to legal authority. RCW 5.60.030 provides no exception that stands for the proposition that indemnification of a party in interest works to waive the protection of the Deadman Statute. Further, while Franklin Hills magnanimously maintains it will indemnify Defendants Chartney, Poole and Yorba should a judgment be rendered against each Defendant at the time of trial, nonetheless, because discovery has not yet started, there is no reasonable way to determine what the evidence will show with respect to the conduct of each Defendant involved. Should the evidence later show that employees Chartney, Poole and Yorba were not acting within the scope of their employment, Franklin Hills would not be vicariously liable or responsible for such conduct and thus, would not be legally obligated to pay any judgment or verdict against each Defendant. Roble v. Roundup Corp., 148 Wn.2d 35, 52-53, 59 P.3d

611 (2002). Consequently, if indemnification is permitted as an exception to the otherwise protection of the Deadman Statute with respect to Defendants Chartney, Poole and Yorba, Franklin Hills would profit not only by having each Defendant's otherwise inadmissible testimony considered on appeal, but further could later disavow any responsibility to indemnify each Defendant should it be determined that each Defendant was not acting within the scope of their employment with regards to Mr. Coon. Regardless, the Deadman Statute clearly bars the testimony of Defendants Chartney, Poole and Yorba as interested parties. Roble v. Roundup Corp., 148 Wn.2d 35, 52-53, 59 P.3d 611 (2002).

With respect to the affidavit of Franklin Hills employees Erika Ramirez, Kori Martin, Linda Lane and Jennifer Wujick, Plaintiffs respectfully submit that their testimony is inadmissible for the reasons already stated including lack of foundation to establish each's ability to testify regarding competency, the timing of each in relation to Mr. Coon's signing of the disputed arbitration agreement and the lack of testimony stating that one or more of the witnesses actually saw Mr. Coon sign the arbitration agreement in dispute.

Franklin Hills' argument that Ms. Rushing's individual claim waives the protection of the Deadman Statute as to Mr. Coon's estate claim is incorrect. Specifically, Erickson v. Robert F. Kerr, M.D., P.S., Inc., 125 Wn.2d 183, 883 P.2d 313 (1994) relied upon by Defendants for their position holds to the contrary and states that the protection of the

Deadman Statute as to an estate is not waived where a plaintiff pursues an independent action in conjunction with the estate's claim. Erickson at 189. Consequently, RCW 5.60.030 still applies to a determination of whether Mr. Coon signed the disputed arbitration agreement and further, whether he was competent at the time to do so. Thus, the testimony of Defendants Chartney, Poole and Yorba as interested parties should be excluded.

Franklin Hills' argument that Mr. Coon's estate has waived the protection of the Deadman Statute by the introduction of records is incorrect. Contrary to its reliance upon Erickson, *supra*, that case states the opposite. Specifically, like Franklin Hills, the defendant in Erickson argued that it was fundamentally unfair for an estate to admit medical records, draw factual inferences there from by the use of expert witnesses, and then invoke the statutory bar of the Deadman Statute to silence any reply. Erickson at 189. The court, while recognizing this potential inequity, nonetheless held that admission of the medical records by the estate did not waive the protection of the Deadman Statute as to the estate noting that any argument contrary was more properly reserved for the legislature. Erickson, 189. Consequently, Mr. Coon's estate's submission of records related to his mental illnesses and involuntary commitment to Eastern State Hospital do not waive the protection of the Deadman Statute and open the door for Franklin Hills. Thus, all testimony governed by RCW 5.060.030 including the testimony of Defendants Chartney, Pool and Yorba should be excluded.

E. Mr. Coon's durable power of attorney was in effect at the time of his admission to Franklin Hills and precluded him from executing the disputed arbitration agreement.

Franklin Hills does not dispute that Mr. Coon signed a durable power of attorney (POA) on November 9, 2010. (CP 77-80) Further, Franklin Hills does not dispute that Ms. Rushing was designated as the attorney-in-fact under the terms of the POA or that it became effective upon Mr. Coon's disability, incapacity or incompetency and would continue to be effective through his disability, incapacity or incompetency. (CP at 77-80) Rather, Franklin Hills argues that Mr. Coon was not incompetent therefore the POA had not yet become effective. Further, even if the POA was effective, it did not provide Ms. Rushing with the authority to sign an arbitration agreement. Brief of Appellants at p. 28.

With respect to Mr. Coon's disability, incapacity or incompetency, Franklin Hills neglects to address Mr. Coon's involuntary commitment to Eastern State Hospital as a result of multiple mental illnesses six months prior to Mr. Coon's admission to Franklin Hills. Further, Franklin Hills neglects to address the fact that at the time Mr. Coon was admitted to Franklin Hills, he was still under the terms of a 180 day LRA based upon his ongoing mental illness which had already been established at the time of his involuntary commitment to Eastern State Hospital. The LRA provided in pertinent part:

> "The respondent [Mr. Coon] is gravely disabled because he/she manifests severe [mental] deterioration in routine functioning. There is recent evidence of a significant loss of cognitive or volitional control…He/she is unable because of a severe deterioration in mental functioning to make a rational decision with respect to his/her need for treatment."

(CP 87)

This LRA based upon Mr. Coon's lack of mental capacity was still in effect at the time of his admission to Franklin Hills. Thus, the POA which had become effective subsequent to Mr. Coon's involuntary commitment to Eastern State Hospital remained in effect by its own terms and required the signature Ms. Rushing as Mr. Coon's attorney-in-fact to the disputed arbitration agreement.

Franklin Hills' argument that the powers granted to Ms. Rushing by the POA did not extend to her ability to enter into the disputed arbitration agreement and thus, she did not have the power to pursue resolution of the dispute ignores the specific language of the durable power of attorney which provides in pertinent part:

> "The attorney in fact, as fiduciary…shall have all of the power the principal would have if competent…"

(CP at 77)

By its terms, Ms. Rushing had all powers Mr. Coon would have if competent which would include entering into an arbitration agreement and/or pursuing resolution of a claim such as the one at issue. Defendants'

claim to the contrary is without merit.

F. Ms. Rushing cannot be compelled to arbitrate because she has not signed the arbitration agreement in dispute.

Franklin Hills concedes that Ms. Rushing is a non-signatory to the arbitration agreement in dispute yet argues that she should be nonetheless bound by the agreement. Brief of Appellants at p. 30. By doing so, Franklin Hills misrepresents the holding in Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012). Specifically, Franklin Hills erroneously maintains that Townsend stands for the proposition that non-signatories to an arbitration agreement such as Ms. Rushing are still bound to arbitrate where it is determined that the non-signatory is knowingly exploiting the terms of the contract or arbitration agreement at issue. Brief of Appellants at 31.

In Townsend, several purchasers of new homes and their children brought suit against a builder/seller and its parent corporation for fraud, outrage, unfair business practices, negligence, negligent misrepresentation, rescission and breach of warranty. Townsend at 452. The plaintiffs also claimed that their purchase and sale agreement and the arbitration clauses contained in them were unconscionable and unenforceable. Townsend at 452. Although the lead opinion concluded that the children as non-signatories to the arbitration agreement should be required to arbitrate under principles of equitable estoppel, the concurrence/dissent signed by

five of the nine Supreme Court justices constitutes the ruling in the case on this issue and holds that non-signatories to a contract are not bound to an arbitration agreement. Townsend at 465-66.

It is undisputed that Ms. Rushing is a non-signatory to the arbitration agreement in dispute. Consequently, she cannot be bound to arbitrate. As such, the stay of discovery as it applies to Ms. Rushing was erroneous and regardless of this Court's ruling as to the estate, Ms. Rushing should be allowed to proceed with her case in Superior Court.

G. Franklin Hills is not entitled to its attorney fees and costs incurred at the trial court level and on appeal.

Franklin Hills' request for an award of attorney fees and costs should be denied. First, the contractual provision it relies upon is contained within the arbitration agreement in dispute. Further, that attorney fee clause specifically provides that the party to the disputed contract shall bear their own costs and attorney fees except where an arbitrator awards a successful party fees and costs under a provision of Washington law that expressly authorizes such an award. RAP 18.1(a) relied upon by Franklin Hills does not authorize an award of attorney fees and costs but rather provides the avenue or procedure through which attorney fees can be requested. It does not provide the substantive laws upon which fees and costs can be granted. . Specifically, the Rule provides in pertinent part:

"...If applicable law grants to a party the right to

> **recover reasonable attorney fees or expenses** on review before either the Court of Appeals or the Supreme Court, the party must request the fees or expenses as provided in this Rule, unless a statute specifies that the request is to be directed to the trial court."

RAP 18.1(a).

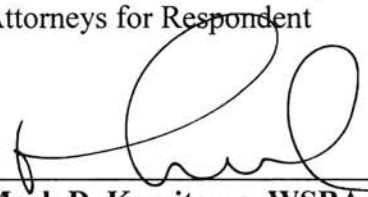
Franklin Hills has not provided references to applicable law upon which the Court could consider a request for attorney fees and costs. Thus, its request is improper and should be denied.

V. CONCLUSION

For the reasons stated herein, Ms. Rushing individually and as the administrator of the Estate of Robert Coon respectfully requests that this Court deny Franklin Hills' motion to stay proceedings and compel arbitration.

RESPECTFULLY SUBMITTED this 18 day of January, 2013.

THE MARKAM GROUP, INC., P.S.
Attorneys for Respondent



Mark D. Kamitomo, WSBA No: 18803

DECLARATION OF SERVICE

I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Patrick J. Cronin	[ ] First Class Mail
Winston & Cashatt	[ ] Fax
601 West Riverside, Suite 1900	[ ] Overnight Delivery
Spokane, WA 99201	[✓] Messenger Delivery

I further caused to be filed an original and one (1) copies of the foregoing document with the following:

Court of Appeals, Division III
500 North Cedar Street
Spokane, WA 99201

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Dated January 18, 2013, at Spokane, Washington.

Mary Rua