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Spokane Co. Superior Court Cause No. 11-2-04875-1

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SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs-Petitioners,

vs.

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

Defendants-Respondents.

MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

| | |
|---|-----|
| TABLE OF AUTHORITIES..... | iii |
| IDENTITY OF PETITIONER | 1 |
| DECISION BELOW | 1 |
| ISSUE PRESENTED FOR REVIEW..... | 1 |
| STATEMENT OF THE CASE | 1 |
| ARGUMENT IN SUPPORT OF DISCRETIONARY REVIEW | 7 |
| a. Discretionary review is warranted because the deprivation of Ms. Rushing's constitutional right to trial by jury—resulting from nothing more than the sequencing of arbitration and trial—cannot be remedied by direct appeal. | 7 |
| b. Ms. Rushing's request to sequence jury trial of non-arbitrable claims before arbitration of related claims is not an attack on arbitration; it simply reflects the fact that arbitration is a matter of contract and parties to arbitration are not entitled to more than they bargained for. | 9 |
| CERTIFICATE OF SERVICE..... | 12 |

1. IDENTITY OF PETITIONER

This motion is filed on behalf of Petitioner, Mary Rushing, individually, and as the Administrator of the Estate of Robert Coon.

2. DECISION BELOW

The decision subject to review is the superior court's order staying litigation of non-arbitrable wrongful death claims of Ms. Rushing pending arbitration of survival claims of the Estate, attached to this motion as Exhibit C.¹

3. ISSUE PRESENTED FOR REVIEW

Where arbitration proceedings would potentially have collateral estoppel effect in related litigation, does the right to trial by jury require the proceedings to be sequenced so that litigation precedes arbitration?

4. STATEMENT OF THE CASE

a. Overview.

Ms. Rushing filed suit against Franklin Hills Health & Rehabilitation Center and certain employees of the facility for the death of her father, Robert Coon, under the wrongful death and

¹ The orders compelling arbitration of the survival claims of the Estate are the subject of a separate motion for discretionary review in related Cause No. 91538-5, pursuant to the Commissioner's rulings in this case and the related cause, dated July 7, 2015. Copies of the orders compelling arbitration are attached to this motion as Exhibits A and B.

survival statutes.² Mr. Coon, who had a significant history of mental illness, was a resident of Franklin Hills before he died. *See Rushing v. Franklin Hills Health & Rehab. Ctr.*, No. 31055-8-III, slip op., at 1-2 (Wn. Ct. App., Jan. 30, 2014).³

The superior court below determined that Mr. Coon signed a valid and enforceable arbitration agreement as part of his admissions paperwork at Franklin Hills, and compelled arbitration of the *survival* claims of his estate. *See* Exs. A & B. In accordance with *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010), the lower court properly declined to compel arbitration of the *wrongful death* claims of Ms. Rushing. However, the court stayed litigation of the wrongful death claims pending arbitration of the survival claims. *See* Ex. C. Ms. Rushing seeks direct discretionary review of this decision because the potential collateral estoppel effect of the arbitration would violate her right to trial by jury under the circumstances.

² *See* RCW 4.20.005, .010 & .020 (wrongful death statutes); RCW 4.20.046 & .060 (survival statutes).

³ A copy of the slip opinion from the prior appeal is attached as Exhibit I.

b. Procedural history.

After Ms. Rushing filed suit, Franklin Hills moved to compel arbitration of the wrongful death and survival claims, contending that Mr. Coon signed an enforceable arbitration agreement when he was admitted to the facility. *See Rushing*, slip op., at 2-3. The superior court denied Franklin Hills' motion to compel arbitration because it did not have a sufficient factual record to determine whether the arbitration agreement was enforceable. *See id.* at 3-5.

Franklin Hills appealed, but the Court of Appeals, Division III, determined that it could not review the superior court's denial of the motion to compel arbitration without a decision on the enforceability of the arbitration agreement, and remanded the case back to the superior court. *See Rushing*, slip op., at 9-11.

After an evidentiary hearing on remand, the superior court issued a written decision finding the arbitration agreement enforceable and granting Franklin Hills' motion to compel arbitration of the *survival claims* of the Estate. *See Ex. A.* Ms. Rushing filed a notice of discretionary review to this Court of the superior court's written decision.

In accordance with *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010), the lower court

had previously made an oral ruling on summary judgment that the *wrongful death* claims of Ms. Rushing are not subject to arbitration.⁴ This decision is not subject to review.

Meanwhile, Rushing filed a motion to stay arbitration of the survival claim pending litigation of the wrongful death claim.⁵ Franklin Hills filed a “cross motion” seeking the opposite relief, i.e., a stay of litigation of the wrongful death claim pending arbitration of the survival claim.⁶ The parties argued these motions together at a hearing on April 10, 2015.⁷

At the hearing on April 10, 2015, the superior court entered three orders. The first order duplicated the written decision compelling arbitration of the survival claims of the Estate. *See* Ex. B. The second order reduced to writing the court’s prior oral ruling that Rushing’s wrongful death claims are not subject to

⁴ The superior court later issued a written order denying arbitration of the wrongful death claims of Ms. Rushing, which is attached as Exhibit D.

⁵ Documents relevant to the motion for stay are attached as Exhibits E (Transcript of Oral Arg., Feb. 13, 2015, at 1-17), F (memorandum in support of motion re: right to trial by jury), G (reply re: jury trial and stay) & H (renewed motion re: jury trial and stay).

⁶ Franklin Hills’ cross motion is attached to this response to the motion to modify as Exhibit J.

⁷ *See* Transcript of Oral Arg., Apr. 10, 2015, at 2:18 & 9:7-9 (Rushing’s counsel describing the motions as “the converse” of each other and involving “the same issue”); *id.* at 10:16 (Franklin Hills’ counsel stating intent to argue the motion and cross motion together); *id.* at 16:21-22 & 17:9-14 (superior court stating “[t]hese are somewhat competing motions,” and noting that the authorities cited in the motions “tend to be, to some extent, conflicting”). This transcript is attached as Exhibit K.

arbitration. *See* Ex. D. The third order provided that the wrongful death claims would be stayed pending arbitration of the survival claims. *See* Ex. C.

Following entry of the foregoing orders, Ms. Rushing moved to amend her notice of direct discretionary review to add the order duplicating the court's written decision compelling arbitration, and the order staying litigation of Rushing's wrongful death claims pending arbitration of her survival claims. The motion included a request for an extension of time to file a motion for discretionary review and statement of grounds for direct review until after a ruling on the motion to amend. Franklin Hills did not object or otherwise respond to the motion to amend.

By June 15, 2015, no decision had been received from the Court, and the process of arbitrating Rushing's survival claims was beginning, while litigation of her wrongful death claims was stayed. On that date, Ms. Rushing filed a motion to expedite a ruling on the motions to amend and for direct discretionary review, or, in the alternative, for a stay of arbitration proceedings until the motions could be decided. At the same time, she filed a proposed motion for discretionary review and statement of grounds for direct review to provide a preview of the reasons why she was seeking direct

discretionary review.⁸ Franklin Hills' did not object to Ms. Rushing's motion to expedite, but did object to her alternative motion for stay.

The Commissioner granted Rushing's motion to amend and ordered a stay of proceedings until her motion for direct discretionary review could be decided. The Commissioner split the amended notice of discretionary review into two cause numbers, this one for the order staying litigation of Rushing's wrongful death claims pending arbitration of her survival claims, and a separate cause for the orders compelling arbitration (No. 91538-5).

With respect to the order staying litigation of wrongful death claims pending arbitration of the survival claims, the Commissioner stated that it "is a distinct issue that could prove to raise issues appropriate for direct review" by the Supreme Court. *See* Ruling, No. 91852-0, July 7, 2015, at 4. Franklin Hills moved to modify the Commissioner's ruling, but the motion to modify was denied.

⁸ Rushing filed a proposed statement of grounds for direct review and motion for discretionary separately after being notified by the Clerk that they should not be combined into a single document.

4. **ARGUMENT IN SUPPORT OF DISCRETIONARY REVIEW**

- a. **Discretionary review is warranted because the deprivation of Ms. Rushing's constitutional right to trial by jury—resulting from nothing more than the sequencing of arbitration and trial—cannot be remedied by direct appeal.**

Discretionary review is warranted when “[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act[.]” RAP 2.3(b)(2). Ordering arbitration of the survival claims to proceed, while at the same time staying litigation of Ms. Rushing's wrongful discharge claims constitutes probable error, which limits her freedom to act because it cannot be remedied on direct appeal.

Washington Constitution, Article I, § 21 provides in pertinent part that “[t]he right of trial by jury shall remain inviolate[.]” (Brackets added.) The doctrine of collateral estoppel is consistent with the constitutional right to jury trial only if the plaintiff chooses to litigate first in a forum where a jury is not available. *See Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn. 2d 255, 265-69, 956 P.2d 312 (1998) (addressing collateral estoppel effect of federal tort claims act judgment, where no jury was available, with respect to subsequent state court action). However, a stay of proceedings in

the non-jury forum may be requested to avoid the potential for waiving or mooting the right to trial by jury. *See Nielson*, 135 Wn. 2d at 269 (noting Court of Appeals determination that plaintiffs had impliedly waived their constitutional right to a jury trial by failing to ask for a stay, but declining to reach issue where plaintiffs had already litigated in the non-jury forum).

Ms. Rushing seeks to litigate her wrongful death claims before arbitration of the Estate's related survival claims in order to preserve her right to jury trial. If discretionary review is not granted, then arbitration of the survival claims will proceed while litigation of the wrongful death claims will be stayed. The potential collateral estoppel effect arising from this sequencing of arbitration and litigation would prevent her from obtaining her requested relief on direct appeal. Moreover, proceeding with arbitration may preclude her from raising the issue on direct appeal. *See Nielson*, at 269. Ms. Rushing does not appear to have any alternative to direct discretionary review to preserve her right to trial by jury.

- b. Ms. Rushing's request to sequence jury trial of non-arbitrable claims before arbitration of related claims is not an attack on arbitration; it simply reflects the fact that arbitration is a matter of contract and parties to arbitration are not entitled to more than they bargained for.**

While Washington law clearly favors arbitration, arbitration is nonetheless grounded in contract. *See Hill v. Garda CL Nw., Inc.*, 179 Wn. 2d 47, 53, 308 P.3d 635 (2013). A party cannot be required to submit to arbitration any dispute that she has not agreed to submit to arbitration. *See id.*, 179 Wn. 2d at 53; *see also Townsend v. Quadrant Corp.*, 173 Wn. 2d 451, 464-66, 268 P.3d 917 (2012) (Stephens, J., concurring/dissenting, joined by 4 other Justices, holding non-signatories not bound to arbitration agreement); *Woodall*, 155 Wn. App. at 923-36 (pre-*Townsend* case holding that wrongful death claims are not subject to arbitration, based on arbitration agreement between decedent and nursing home).

Allowing arbitration to take place before litigation of related but non-arbitrable claims, and thereby preclude a jury trial of the non-arbitrable claims through application of collateral estoppel, effectively gives the parties to an arbitration agreement more than

they bargained for.⁹ The problem is acute because arbitration agreements such as the one in this case are becoming more and more common, they often lack the safeguards of court procedure, and arbitration typically takes less time than litigation under current court staffing and caseloads.¹⁰

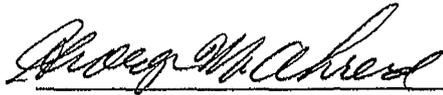
“The right of trial by jury shall remain inviolate.” Wash. Const., Art. I, § 21. It is “deserving of the highest protection,” “the essential component of our legal system,” and “must be protected from all assaults to its essential guarantees.” *Davis v. Cox*, 183 Wn. 2d 269, 288-89, 351 P.3d 862 (2015) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)). Collateral estoppel is consistent with the right to trial by jury when the plaintiff *chooses* to litigate first in a forum where a jury is not available. *See Nielson*, 135 Wn. 2d at 265-69 (addressing collateral estoppel effect of Federal Tort Claims Act judgment on subsequent state court action). The right to trial by jury should not be lost when the plaintiff is *forced* to litigate first in a forum where a jury is

⁹ Application of collateral estoppel also implicates the right of access to courts, which includes a right to discovery guaranteed by the *Civil Rules*. *See Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn. 2d 974, 979, 216 P.3d 374 (2009). Discovery is often restricted by arbitration agreements, such as the one at issue in this case.

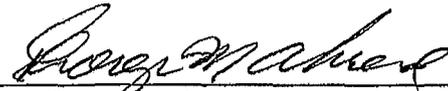
¹⁰ *See, e.g.*, Jessica Silver-Greenberg & Robert Gebeloff, “Arbitration Everywhere, Stacking the Deck of Justice,” *New York Times*, Oct. 31, 2015 (available at www.nytimes.com); Jessica Silver-Greenberg & Michael Corkery, “In Arbitration, a ‘Privatization of the Justice System,’” *New York Times*, Nov. 1, 2015.

unavailable, or when the plaintiff is unable to do otherwise as a result of clogged courts. This does not represent an attack on arbitration. It is an issue of general applicability based on the relationship between the right to trial by jury and collateral estoppel, and it arises any time related disputes are subject to litigation in both jury and non-jury forums. *See, e.g., Nielson, supra.*¹¹ The Court should grant direct discretionary review to address this issue.

Respectfully submitted this 5th day of November, 2015.



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¹¹ Franklin Hills suggests that the issue could be addressed by seeking to avoid collateral estoppel effect of the arbitration award in subsequent non-arbitral proceedings. However, it is unclear whether that option is available in light of this Court's decision in *Nielson, supra*, and Rushing should not have to take the risk of waiting for direct appeal to find out whether she will receive her right to trial by jury.

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On November 5, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
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and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

Mark Kamitomo at mark@markamgrp.com
Collin Harper at collin@markamgrp.com

Signed on November 5, 2015 at Ephrata, Washington.



Shari M. Canet, Paralegal

OFFICE RECEPTIONIST, CLERK

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Subject: Supreme Court No. 91852-0, Rushing v. Franklin Hills et al.

Please accept for filing the attached **Motion for Discretionary Review and Statement of Grounds for Direct Review**. The Appendix (110 pages) is being mailed to your office today.

Thank you.

--
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Spokane Co. Superior Court Cause No. 11-2-04875-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs-Petitioners,

vs.

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

Defendants-Respondents.

APPENDIX TO MOTION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

| | |
|---|------|
| Exhibit A | |
| Court’s Decision, Mar. 3, 2015 | A-1 |
| Exhibit B | |
| Order Compelling Arbitration of Claims of Mary Rushing As Administrator and on Behalf of the Estate of Robert Coon, Apr. 10, 2015..... | A-13 |
| Exhibit C | |
| Order Granting Defendant’s Cross Motion to Stay Mary Rushing’s Wrongful Death Claim Pending Arbitration, Apr. 10, 2015 | A-19 |
| Exhibit D | |
| Order Denying Defendants’ Motion to Compel Arbitration and Granting Mary Rushing’s Summary Judgment Motion re: Arbitration of Wrongful Death Claim, Apr. 10, 2015 | A-21 |
| Exhibit E | |
| Excerpt of Verbatim Report of Proceedings, Feb. 13, 2015... | A-24 |
| Exhibit F | |
| Plaintiff’s Memorandum in Support of Motion Re: Right to Trial By Jury, Feb. 6, 2015 | A-41 |
| Exhibit G | |
| Plaintiff’s Reply Re: Jury Trial and Stay, Apr. 3, 2015 | A-49 |
| Exhibit H | |
| Plaintiff’s Renewed Motion Re: Right to Trial By Jury, Mar. 12, 2015 | A-56 |
| Exhibit I | |
| Slip Opinion from prior appeal, 31055-8-III, Jan. 30, 2014, | A-59 |
| Exhibit J | |
| Defendants’ Cross Motion to Stay Mary Rushing’s Wrongful Death Claim Pending Arbitration, Mar. 13, 2015, | A-72 |

Exhibit K

Verbatim Report of Proceedings, Apr. 10, 2015,A-74

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On November 5, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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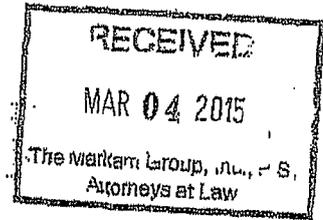
and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

Mark Kamitomo at mark@markamgrp.com
Collin Harper at collin@markamgrp.com

Signed on November 5, 2015 at Ephrata, Washington.



Shari M. Canet, Paralegal



| |
|---|
|  <p style="text-align: center;">SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE</p> |
| <p>MARY RUSHING as the Administrator and on Behalf of the Estate of ROBERT COON, and MARY RUSHING, individually,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>FRANKLIN HILLS HEALTH & REHABILITATION CENTER, MELISSA CHARTNEY, R.N., AURILLA POOLE, R.N., and JANENE YORBA, Director of Nursing,</p> <p style="text-align: center;">Defendants.</p> |

NO. 11-2-04873-1

COURT'S DECISION

The Court held an evidentiary hearing on this matter from February 17 through February 20, 2015. The only question before the Court is whether the Alternative Dispute Resolution Agreement (hereinafter "Agreement") is valid and enforceable in light of disputes as to whether Mr. Coon was competent at the time he signed the agreement. The Plaintiffs are represented by Mark Kamitomo and Collin Harper, of the Markam Group, Inc., and George Ahrend of the Ahrend Law Firm, PLLC. The Defendants are represented by Patrick Cronin, Carl Hueber, and Caitlin O'Brien, of Winston & Cashett.

Procedurally, the Honorable Jerome Leveque previously denied the Defendant's motion to compel arbitration. Among other issues, the Defendants appealed the denial of the motion to

COURT'S DECISION Page 1 of 12

EXHIBIT A - Page 1 of 12

compel arbitration. The Court of Appeals, in an unpublished opinion, reversed and remanded for an evidentiary hearing as to whether the arbitration agreement is enforceable.

At the evidentiary hearing, testimony was offered by Jacob Deakins, MD, Lynn Bergman, MD, Janenne Yorba, Aurilla Poole, Jennifer Wujick, Ronald Klein, Ph.D., James Winter, MD, Larry Weiser, Bob Crabb, Naomi Lungstrom, RN, James Spar, MD, and Mary Rushing Green. Both parties also offered numerous exhibits.

As a preliminary matter, during the evidentiary hearing the Plaintiffs' brought a motion to dismiss the motion to compel arbitration. The Plaintiffs' motion is grounded in Franklin Hillis not providing Mr. Coon the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure as referenced on page three of the Agreement. Based upon this fact, the Plaintiffs claim the parties lacked mutual assent. The Plaintiffs' filed a memorandum in support of their motion to dismiss. At the evidentiary hearing, the Court inquired as to whether the Defendants desired an opportunity to respond in writing. The Defendants declined, stating they would address the motion in their closing argument. The Defendants subsequently filed a response to the motion to dismiss. In relying on Defendants' earlier assertion, the Court did not consider their written response in deciding this matter.

It is undisputed that Franklin Hillis did not provide Mr. Coon with the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure referenced in the Agreement. This, however, is not fatal to the enforcement of the Agreement. As stated in the Agreement, the Extendicare Health Services, Inc., Alternative Dispute Resolution Rules of Procedure "may be obtained from the Center's Administrator or from DJS at the address or website listed in Section 6 of this Agreement." *Plaintiffs' Motion to Dismiss*, Ex. 2, Pg. 3, Sec. 7.

Ms. Wujick informed Mr. Coon that he had the opportunity to take the Agreement with him to be either signed or rejected within 30 days. Ms. Wujick also informed Mr. Coon that he had the right to seek advice from an attorney prior to entering into the Agreement. The

responsibility to acknowledge the contents of a contract rests upon each party individually. "It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973) *citing* Perry v. Continental Ins. Co., 178 Wash. 2d, 33 P.2d 661 (1934).

Mr. Coon was provided the Agreement, informed of his right to seek the advice of an attorney, and informed of his right to either sign or reject it within 30 days. Further, even though the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure was not provided to him, the Agreement did provide Mr. Coon information on how it could be obtained. Given the 30 day acceptance or rejection period, Mr. Coon had ample opportunity to obtain and review the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure prior to execution or rejection of the Agreement. As is the case here, "One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand." National Bank of Washington at 912-13. The Plaintiffs' motion to dismiss the motion to compel arbitration is therefore denied.

FINDINGS OF FACT

After reviewing the evidence and being mindful of the arguments of the parties, the Court hereby enters the following findings facts:

1. Robert Coon was diagnosed with mental illness more than three decades ago.
2. During a majority of his life, Mr. Coon lived independently as he continually sought treatment for his mental illness. Indeed, Mr. Coon graduated from Gonzaga University School of Law, passed the bar exam, and practiced law for a brief period of time.

3. At no time during Mr. Coon's life was he ever under a guardianship, deemed incompetent, or granted power of attorney to another.
4. During the course of Mr. Coon's life, his mental illness was treated, but his cognition gradually decreased. This was due to aging as well as his diagnosed schizoaffective disorder and dementia.
5. Other than temporary mental illness related problems, once Mr. Coon's cognition decreased it would not return to previous levels.
6. In late 2010, Mr. Coon sought a power of attorney at Gonzaga University Law School's Legal Clinic. He was presented with the option for an immediate power of attorney or a springing power of attorney. After weighing his options, Mr. Coon settled on a springing power of attorney and executed it on November 9, 2010.
7. This power of attorney became effective upon Mr. Coon's disability and granted his daughter, Mary Rushing, authority over his finances, his medical treatments, the withdrawal or withholding of life-sustaining treatments for him, and the disposition of his remains.
8. On February 1, 2011, Dr. Jacob Deakins requested Mr. Coon complete a hemocult test after an initial exam revealed Mr. Coon had an enlarged prostate. After explaining the procedure and cost to Mr. Coon, as well as the lack of insurance funding for this procedure, Mr. Coon declined the test.
9. On March 11, 2011, Mr. Coon met with his psychiatrist, Dr. Robert Mulvihill, who stated in his formal Mental Status Examination that Mr. Coon's "thought process is concrete. Insight and judgment is poor. Concentration is normal." D-9, pp. 273-74.
10. On March 25, 2011, Mr. Coon again saw Dr. Mulvihill. Dr. Mulvihill reported in his formal Mental Status Examination that Mr. Coon's "Thought process is

concrete. Insight and judgment is fair. Concentration is normal. He is alert and oriented times four." D-9, pp. 276-77.

11. On April 1, 2011, Mr. Coon was transported by ambulance from his residence at Cherrywood Place to Holy Family Hospital after he fell while transferring into his wheelchair. Mr. Coon was treated by Dr. Lynn Bergman, who found Mr. Coon interactive and cooperative during his exam.
12. On April 1, 2011, Mr. Coon moved from Cherrywood Place to Franklin Hills Health and Rehabilitation Center as he needed greater assistance than Cherrywood Place could offer. Nurse Aurilla Poole admitted Mr. Coon that afternoon, and noted that he was alert and oriented to who he was, where he was, and what date and time it was. D7, p. 311.
13. On April 3, 2011, Mr. Coon sat in the dining room of Franklin Hills with Ms. Wujick and reviewed a number of documents related to his residency at Franklin Hills. During this meeting, Mr. Wujick did not notice Mr. Coon exhibit any symptoms that would have called into question his mental capacity. He reviewed a number of documents, asked questions, and appropriately executed the documents.
14. Mr. Coon signed every document presented to him. Of importance, Ms. Wujick provided Mr. Coon with the Agreement. She informed Mr. Coon that it was an agreement to resolve disputes through alternatives to court intervention, that it was optional, not a condition of his residency at Franklin Hills, that he had 30 days to make a decision, and that he could seek the advice of counsel if he desired.
15. On April 3, 2011, Mr. Coon, after asking a couple of questions, signed the Agreement in the presence of Ms. Wujick.

16. The signature on the Agreement is comprised of Mr. Coon's initials, rather than his entire name.

17. On April 7, 2011, Mr. Coon was given a cognition test. The conclusion of the evaluation performed on Mr. Coon showed he scored 15 out of 15.

18. Defendants' expert witnesses, Ronald Klein, Ph.D. and James Winter, MD, concluded that Mr. Coon possessed the requisite level of competence to enter into the Agreement.

19. Plaintiffs' expert witness, James Spar, MD, concluded Mr. Coon possessed enough cognitive functioning to allow him to appreciate the difference between arbitrating a claim versus using traditional court intervention, but lacked the cognitive functioning necessary to appreciate the negative consequences associated with the Agreement (that being a reduced monetary award).

20. Dr. Spar further concluded that Mr. Coon possessed a level of cognitive functioning necessary to execute his power of attorney as well as a will.

CONCLUSIONS OF LAW

After considering the evidence and being mindful of the arguments of counsel, the Court enters the following conclusion of law:

The Defendants' filed a motion to compel arbitration. Once such motion is filed, it then becomes the court's obligation to determine whether the arbitration agreement is valid and enforceable. See McKee v. AT&T Corp., 164 Wn.2d 372, 383-84, 191 P.3d 845 (2008). If the other party opposes the motion to compel arbitration, "the court shall proceed summarily to decide the issue." RCW 7.04A.07(1). Here, the Court of Appeals directed the trial court to summarily decide the issues surrounding the enforceability of the arbitration agreement. In doing so, the Court of Appeals allowed the trial court to decide the issue of enforceability on affidavits and evidence in the record alone. A full evidentiary hearing may not have been

required. Given the nature of the Plaintiffs' assertions that the Agreement is not enforceable, the Court authorized a four day evidentiary hearing.

Under both Washington law as well as federal law, a strong public policy favoring arbitration is recognized. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 810, 225 P.3d 213, 229 (2009). It is the courts duty to determine whether an arbitration agreement is valid and enforceable, and the party who seeks to avoid arbitration bears the burden of showing that the agreement is not enforceable. McKee v. AT&T Corp., 164 Wn.2d 372, 383, 191 P.3d 845, 851 (2008). An arbitration agreement is enforceable unless the court finds a legal or equitable basis for revocation of contract, RCW 7.04A.060(1).

Initially, the party seeking to enforce an arbitration agreement must only prove the existence of a contract and the other party's objective manifestation of the intent to be bound. Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 944, 840 P.2d 1051 (1982). A party's signature on a contract shows an objective manifestation of the signor's intent to be bound to the contract. Retail Clerks, 96 Wn.2d at 944. After the proponent of the contract presents such evidence, the burden then shifts to the opponent to prove a defense to contract enforcement. Id.

On April 3, 2011, Jennifer Wujick, Franklin Hills' admission assistant, witnessed Mr. Coon sign, among other documents, the Agreement. After she witnessed Mr. Coon sign the Agreement, Ms. Wujick signed it. Based upon the Plaintiffs' concession that Mr. Coon signed the agreement, as well as the direct evidence provided by Ms. Wujick, the Court concludes the signature on the Agreement is that of Mr. Coon. Therefore, the Defendant (proponent of the enforceability of the Agreement) has met its burden of establishing the existence of a contract and of Mr. Coon's objective manifestation of his intent to be bound by it.

After the proponent of arbitration establishes the party's objectively manifested intent to be bound, the burden shifts to the opponent of the arbitration agreement to prove a defense to

the contractual agreement. See McKee, 164 Wn.2d at 383. One such defense is if the person lacks the mental capacity or competence to appreciate the nature and effect of the contract at issue. Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d 101, 108-9, 120 P.2d 527 (1942).

While in Washington there is a presumption that a person is competent to enter into an agreement, the person challenging such agreement may overcome the presumption by presenting "clear, cogent and convincing" evidence that the party signing the contract lacked sufficient mind or reason at the time he entered into the contract. Grannum v. Berdard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). The clear, cogent, and convincing burden has been defined as something greater than a preponderance of the evidence and less than beyond a reasonable doubt. Holmes v. Raffo, 60 Wn.2d 421, 374 P.2d 536 (1962); Matter of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). "Substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." Dalton v. State, 130 Wn.App. 653, 666, 124 P.3d 305, 312 (2005) *quoting In re Marriage of Schweitzer*, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

When a person possesses sufficient mental capacity to understand the nature of the contract, it is not invalidated because the person is aged, mentally weak, or insane. Page, 12 Wn.2d at 108. Incidents remote in time are irrelevant to the mental capacity of the party at the time of the contract; therefore, the party disputing competence must show that a mental unsoundness or insanity both occurred at the time of the transaction and were of such character that he had no reasonable perception or understanding of the nature and terms of the contract. See Page, 12 Wn.2d at 109-10. The trial court determines whether the evidence meets the clear, cogent, and convincing standard because the determination requires weighing and evaluating evidence and credibility determinations, viewed in connection with the surrounding facts and circumstances. Bland v. Mentor, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

It is undisputed that Mr. Coon suffered from schizoaffective disorder with a bi-polar component. The diagnosis did not render Mr. Coon incompetent, but did impact his cognitive abilities. Certainly, this cognitive deficit can be seen in the records from Mr. Coon's numerous visits with his psychiatrist, Dr. Muivihill. In fact, on both March 11, 2011 and March 25, 2011, Dr. Muivihill noted Mr. Coon's cognitive functioning as "thought process is concrete. Insight and judgment is fair. Concentration is normal. He is alert and oriented."

Of all the expert testimony presented, this Court affords the greatest weight to that of Dr. Spar. Dr. Spar was the only board certified psychiatrist to testify at the evidentiary hearing. The opinions rendered by Dr. Spar were based on his vast experience working in the psychiatric field at UCLA. Dr. Spar's testimony provided that cognitive deficiencies related to schizoaffective disorder and/or dementia present at various ranges conditioned on a number of factors. The range of the continuum would show Mr. Coon's capacity to accomplish day to day tasks while also indicating his inability to appreciate the potential negative consequences of his decisions.

In reviewing the evidence, the Court finds it compelling that Mr. Coon did not agree to everything presented to him. Rather, Mr. Coon was able to process certain situations and make decisions based upon the information before him. An example of this can be found in his decision to forego a medical test recommended by his physician. On February 1, 2011, Dr. Deakins requested Mr. Coon complete a hemocult test after an initial exam revealed Mr. Coon had an enlarged prostate. After explaining the procedure and cost to Mr. Coon, as well as the lack of insurance funding for this procedure, Mr. Coon declined test.

After reviewing numerous records related to Mr. Coon's mental illness, Dr. Spar concluded that Mr. Coon possessed sufficient cognitive functioning to understand the difference between arbitrating any potential claims against Franklin Hills versus using traditional court intervention to resolve any potential claims against Franklin Hills. However, according to Dr.

Spar, Mr. Coon would not have been able to understand the negative aspects of the Agreement (that being the potential for a reduced award). Dr. Spar further opined that Mr. Coon possessed an appropriate level of cognitive functioning to execute both his power of attorney and a will, but lacked the level of cognitive functioning necessary to enter into the Agreement. According to Dr. Spar, this conclusion was based upon the power of attorney and will not have the same negative consequences as the Agreement.

In reviewing the Agreement and Mr. Coon's power of attorney, the Court is unable to accept the distinction provided by Dr. Spar. If Mr. Coon had sufficient insight and judgment to execute both his power of attorney and potentially a will, he certainly possessed the necessary cognitive abilities to enter into the Agreement. The Agreement is a six-page document whereby the parties agree to resolve their disputes through alternative dispute resolution. This process may favor Franklin Hills, but may also favor Mr. Coon as it is an expedient and cost saving manner of resolving disputes.

In the Agreement, Mr. Coon agreed to arbitrate any potential claims against Franklin Hills rather than seek court intervention. This decision is minor compared to executing his power of attorney. A power of attorney delegates authority from one person to another. A power of attorney is used to allow agents to bind the principals in certain affairs. Here, on November 9, 2010, Mr. Coon executed a springing power of attorney appointing Ms. Rushing as his attorney-in-fact. Once the springing power of attorney were to become effective, Ms. Rushing would have absolute power over Mr. Coon's assets and liabilities, all powers necessary to make health care decisions on his behalf (including authorizing surgery, medication and the withholding or withdrawing of life-sustaining treatment), and upon death, authority to control the disposition of his remains.

Similar to a power of attorney, choosing to arbitrate a potential claim against Franklin Hills rather than seek court intervention is minor compared to executing a will. To execute a

will, Mr. Coon would have had to possess testamentary capacity. This means Mr. Coon would have to have sufficient mind and memory to understand the transaction, to comprehend generally the nature and extent of the property which constitutes his estate, and to recollect the natural objects of his bounty. In re Bottger's Estate, 14 Wn.2d 676, 129 P.2d 518. According to Dr. Spar, Mr. Coon possessed this level of executive functioning.

The Court rejects Dr. Spar's conclusion that Mr. Coon had the mental capacity to execute the power of attorney and a will but not the capacity to enter into the Agreement. Dr. Spar's conclusion that Mr. Coon lacked sufficient mental capacity to execute the Agreement is premised on Dr. Spar's perceived negative consequences involved in arbitrating claims. Washington's public policy, however, strongly favors alternative dispute resolution such as arbitration. See Satomi Owners Ass'n v. Satomi, 167 W.2d 781, 810, 225 P.3d 213, 229 (2009). Clearly, appointing another power of attorney over finances, medical treatments, withdrawing or withholding life-sustaining treatments, and the disposition of remains has substantially greater consequences than possibly receiving a reduced monetary award of a potential claim.

If Mr. Coon possessed requisite cognitive ability to make decisions about granting a third party authority over his assets, health care, and termination of life-sustaining treatment (not to mention the final disposition of his estate), he most certainly possessed a reasonable perception and understanding between resolving any potential claims between he and Franklin Hills through alternative dispute resolution or the traditional court process.

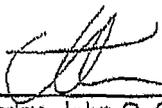
Here, the Defendants have the burden of proving the existence of a contract and Mr. Coon's objective manifestation to be bound. The Defendants have met their burden. The Plaintiffs then have the burden of proving by clear, cogent, and convincing evidence that Mr. Coon was not competent when he entered into the Agreement. After considering all of the evidence, the Court concludes that the Plaintiffs have not met their burden. Rather, the

evidence showed that Mr. Coon did have the cognitive ability to appreciate the nature and effect of the consequences of the Agreement.

CONCLUSION

Based upon the foregoing, the Defendants' motion to compel arbitration is granted.

DATED this 3rd day of March, 2015.



Judge John O. Cooney

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SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

vs.

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

Defendants.

No. 11-2-04875-1

ORDER COMPELLING ARBITRATION
OF CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF
THE ESTATE OF ROBERT COON

THIS MATTER came on for hearing on Defendants' Motion to Compel Arbitration. The Court held an evidentiary hearing on this matter from February 17-20, 2015. After reviewing all the parties' briefing, hearing argument of counsel, and hearing all witnesses and reviewing all admitted exhibits, and being fully advised herein, the Court makes the following Findings, Conclusions, and Order.

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 1

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FINDINGS OF FACT

1
2 1. Robert Coon was diagnosed with mental illness more than three decades ago.

3 2. During a majority of his life, Mr. Coon lived independently as he continually
4 sought treatment for his mental illness. Indeed, Mr. Coon graduated from Gonzaga University
5 School of Law, passed the bar exam, and practiced law for a brief period of time.
6

7 3. At no time during Mr. Coon's life was he ever under a guardianship, deemed
8 incompetent, or granted power of attorney to another.

9 4. During the course of Mr. Coon's life, his mental illness was treated, but his
10 cognition gradually decreased. This was due to aging as well as his diagnosed schizoaffective
11 disorder and dementia.

12 5. Other than temporary mental illness related problems, once Mr. Coon's cognition
13 decreased it would not return to previous levels.
14

15 6. In late 2010, Mr. Coon sought a power of attorney at Gonzaga University Law
16 School's Legal Clinic. He was presented with the option for an immediate power of attorney or a
17 springing power of attorney. After weighing his options, Mr. Coon settled on a springing power
18 of attorney and executed it on November 9, 2010.

19 7. This power of attorney became effective upon Mr. Coon's disability and granted
20 his daughter, Mary Rushing, authority over his finances, his medical treatments, the withdrawal
21 or withholding of life-sustaining treatments for him, and the disposition of his remains.
22
23
24

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 2

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1 8. On February 1, 2011, Dr. Jacob Deakins requested Mr. Coon complete a
2 hemocult test after an initial exam revealed Mr. Coon had an enlarged prostate. After
3 explaining the procedure and cost ^{were explained} to Mr. Coon, as well as the lack of insurance funding for this
4 procedure, Mr. Coon declined the test.

5 9. On March 11, 2011, Mr. Coon met with his psychiatrist, Dr. Robert Mulvihill,
6 who stated in his formal Mental Status Examination that Mr. Coon's "thought process is
7 concrete. Insight and judgment is poor. Concentration is normal." D-9, pp. 273-74.

8 10. On March 25, 2011, Mr. Coon again saw Dr. Mulvihill. Dr. Mulvihill reported in
9 his formal Mental Status Examination that Mr. Coon's "Thought process is concrete. Insight and
10 judgment is fair. Concentration is normal. He is alert and oriented times four." D-9, pp. 276-77.

11 11. On April 1, 2011, Mr. Coon was transported by ambulance from his residence at
12 Cherrywood Place to Holy Family Hospital after he fell while transferring into his wheelchair.
13 Mr. Coon was treated by Dr. Lynn Bergman, who found Mr. Coon interactive and cooperative
14 during his exam.

15 12. On April 1, 2011, Mr. Coon moved from Cherrywood Place to Franklin Hills
16 Health and Rehabilitation Center as he needed greater assistance than Cherrywood Place could
17 offer. Nurse Aurilia Poole admitted Mr. Coon that afternoon, and noted that he was alert and
18 oriented to who he was, where he was, and what date and time it was. D7, p. 311.

19 13. On April 3, 2011, Mr. Coon sat in the dining room of Franklin Hills with Ms.
20 Wujcik and reviewed a number of documents related to his residency at Franklin Hills. During
21 this meeting, Mr. Wujcik did not notice Mr. Coon exhibit any symptoms that would have called
22
23
24

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON --- 3

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EXHIBIT B - Page 3 of 6

1 into question his mental capacity. He reviewed a number of documents, asked questions, and
2 appropriately executed the documents.

3 14. Mr. Coon signed every document presented to him. Of importance, Ms. Wujick
4 provided Mr. Coon with the Alternative Dispute Resolution Agreement. She informed Mr. Coon
5 that it was an agreement to resolve disputes through alternatives to court intervention, that it was
6 optional, not a condition of his residency at Franklin Hills, that he had 30 days to make a
7 decision, and that he could seek the advice of counsel if he desired.
8

9 15. On April 3, 2011, Mr. Coon, after asking a couple of questions, signed the
10 Agreement in the presence of Ms. Wujick.

11 16. The signature on the Agreement is comprised of Mr. Coon's initials, rather than
12 his entire name.

13 17. On April 7, 2011, Mr. Coon was given a cognition test. The conclusion of the
14 evaluation performed on Mr. Coon showed he scored 15 out of 15.
15

16 18. Defendants' expert witnesses, Ronald Klein, Ph.D. and James Winter, MD,
17 concluded that Mr. Coon possessed the requisite level of competence to enter into the
18 Agreement.

19 19. Plaintiffs' expert witness, James Spar, MD, concluded that Mr. Coon possessed
20 enough cognitive functioning on April 3, 2011, to allow him to appreciate the difference between
21 arbitrating a claim versus using traditional court intervention, but lacked the cognitive
22 functioning necessary to appreciate the negative consequences associated with the Agreement
23 (that being a reduced monetary award).
24

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 4

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EXHIBIT B - Page 4 of 6

1 20. Dr. Spar further concluded that Mr. Coon possessed on April 3, 2011, a level of
2 cognitive functioning necessary to execute his power of attorney as well as a will.

3 CONCLUSIONS OF LAW

4 1. Defendants met their burden of establishing the existence of the arbitration
5 contract, and Mr. Coon's objective manifestation of his intent to be bound by that arbitration
6 agreement.

7
8 2. Plaintiffs failed to meet their burden to prove by clear, cogent, and convincing
9 evidence that Mr. Coon was not competent when he entered into the arbitration agreement.

10 3. The entirety of the evidence showed that Mr. Coon had the cognitive ability to
11 appreciate the nature and effect of the consequences of the arbitration agreement.

12 4. The arbitration agreement is valid and enforceable between the Estate of Robert
13 Coon (Mary Rushing as the Administrator and on behalf of the Estate) and the defendants.

14 5. In addition, the court's written decision issued on March 3, 2015, is hereby
15 incorporated by reference in its entirety.

16
17 IT IS HEREBY ORDERED that defendant's motion to compel arbitration is granted as to
18 Mary Rushing, as the Administrator and on behalf of the Estate of Robert Coon; and she is
19 compelled to arbitrate those claims against the defendants in accordance with the arbitration
20 agreement.

21
22 DONE IN OPEN COURT this 10 day of April, 2015.

23
24 

JUDGE JOHN O. COONEY

ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 5

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EXHIBIT B - Page 5 of 6

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Presented by:

Carl Hueber

PATRICK/J. CRONIN, WSBA/No. 28254
CARL E. HUEBER, WSBA No. 12453
CAITLIN E. O'BRIEN, WSBA No. 46476
WINSTON & CASHATT, LAWYERS,
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Attorneys for Defendants

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Collin M. Harper

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COLLIN M. HARPER, WSBA #44251
Attorneys for Plaintiff

AHREND LAW FIRM PLLC

George M. Ahrend

George M. Ahrend, WSBA #25160
Attorney for Plaintiff

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ORDER COMPELLING ARBITRATION OF
CLAIMS OF MARY RUSHING AS
ADMINISTRATOR AND ON BEHALF OF THE
ESTATE OF ROBERT COON -- 6

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SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

No. 11-2-04875-1

vs.

ORDER GRANTING DEFENDANTS'
CROSS MOTION TO STAY MARY
RUSHING'S WRONGFUL DEATH CLAIM
PENDING ARBITRATION

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

Defendants.

THIS MATTER having come before this Court on Defendants' Cross Motion to Stay
Mary Rushing's Wrongful Death Claim Pending Arbitration, and the Court having heard oral
argument of counsel, having considered the files and records herein, and being otherwise fully
advised in the premisses, now, therefore,

IT IS HEREBY ORDERED that Defendants' Cross Motion to Stay Mary Rushing's
Wrongful Death Claim Pending Arbitration is GRANTED.

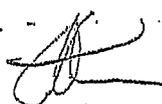
The wrongful death claim shall be stayed for 180 days subject to return to Court.

ORDER GRANTING DEFENDANTS' CROSS
MOTION TO STAY MARY RUSHING'S
WRONGFUL DEATH CLAIM PENDING
ARBITRATION
PAGE 1

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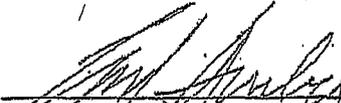
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[Signature]

1
2 DATED this 10 day of April, 2015.

3
4 
5 HONORABLE JOHN O. COONEY
6 Spokane County Superior Court Judge

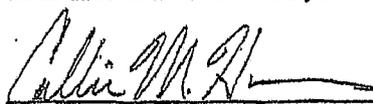
7 Presented by:

8 WINSTON & CASHATT, LAWYERS,
9 a Professional Service Corporation

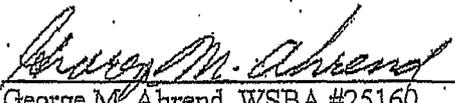
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11 PATRICK J. CRONIN, WSBA No. 28254
12 CARL E. HUEBER, WSBA No. 12453
13 CAITLIN E. O'BRIEN, WSBA No. 46476
14 WINSTON & CASHATT, LAWYERS,
15 a Professional Service Corporation
16 Attorneys for Defendants

17 Approved ^{as to form only} and Notice of Presentment Waived:

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21 COLLIN M. HARPER, WSBA #44251
22 Attorneys for Plaintiff

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24 George M. Ahrend, WSBA #25160
Attorney for Plaintiff

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ORDER GRANTING DEFENDANTS' CROSS
MOTION TO STAY MARY RUSHING'S
WRONGFUL DEATH CLAIM PENDING
ARBITRATION
PAGE 2

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EXHIBIT C - Page 2 of 2

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

vs.

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

Defendants.

No. 11-2-04875-1

ORDER DENYING DEFENDANTS'
MOTION TO COMPEL ARBITRATION
AND GRANTING MARY RUSHING'S
SUMMARY JUDGMENT MOTION RE:
ARBITRATION OF WRONGFUL DEATH
CLAIM

The defendants moved for an Order compelling the arbitration of all claims, and the plaintiff, Mary Rushing, moved for an Order that her wrongful death claim was not subject to arbitration, which the defendants opposed. Argument on the motions was presented on January 30, 2015.

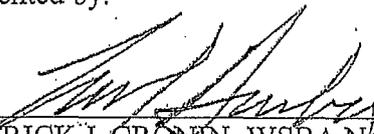
In considering the motion, the court relied on argument of counsel, the files and records herein, and specifically the following:

1. Plaintiff's Motion for Partial Summary Judgment filed on January 5, 2015.

ORDER DENYING DEFENDANTS' MOTION TO
COMPEL ARBITRATION AND GRANTING MARY
RUSHING'S SUMMARY JUDGMENT MOTION RE:
ARBITRATION OF WRONGFUL DEATH CLAIMS
Page 1

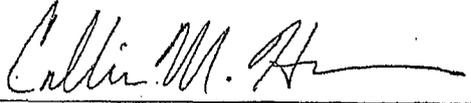
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1 Presented by:

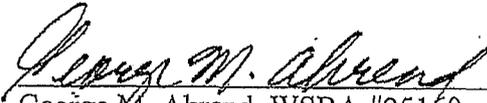
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7 WINSTON & CASHATT, LAWYERS,
8 a Professional Service Corporation
9 Attorneys for Defendants

10 *as to form only GMA*
11 Approved and Notice of Presentment Waived:
12 *^*

13 THE MARKAM GROUP, INC., P.S.

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15 MARK D. KAMITOMO, WSBA #18803
16 COLLIN M. HARPER, WSBA #44251
17 Attorneys for Plaintiff

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George M. Ahrend, WSBA #25160
Attorney for Plaintiff

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ORDER DENYING DEFENDANTS' MOTION TO
COMPEL ARBITRATION AND GRANTING MARY
RUSHING'S SUMMARY JUDGMENT MOTION RE:
ARBITRATION OF WRONGFUL DEATH CLAIMS
Page 3

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

| | | |
|-----------------------------|---|------------------|
| MARY RUSHING as the |) | |
| Administrator and on Behalf |) | |
| of the Estate of ROBERT |) | |
| COON, and MARY RUSHING, |) | |
| individually, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | SPOKANE COUNTY |
| |) | SUPERIOR COURT |
| FRANKLIN HILLS HEALTH & |) | NO. 11-2-04875-1 |
| REHABILITATION CENTER, |) | |
| MELISSA CHARTNEY, R.N., |) | |
| AURILLA POOLE, R.N., and |) | |
| JANNENE YORBA, Director of |) | |
| Nursing, |) | |
| |) | |
| Defendants. |) | |

VERBATIM REPORT OF PROCEEDINGS
HONORABLE JOHN O. COONEY
February 13, 2015 and February 17, 2015
Vol. I of III

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22
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24
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GENERAL INDEX

PAGE NO.

| | |
|--|-----|
| 2/13/15 Preliminary Matters/Motions | 6 |
| 2/13/15 Motions in Limine | 17 |
| 2/17/15 (Morning session reported by Tammy McMaster) | |
| 2/17/15 Defense's Case-in-Chief Continues | 112 |
| Reporter's Certificate | 222 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

WITNESS INDEX

| <u>WITNESS</u> | <u>PAGE NO.</u> |
|---|-----------------|
| DR. JAMES P. WINTER | |
| DIRECT EXAMINATION BY MR. CRONIN | 112 |
| VOIR DIRE EXAMINATION BY MR. KAMITOMO | 119 |
| DIRECT EXAMINATION CONTINUING BY MR. CRONIN | 125 |
| CROSS EXAMINATION BY MR. KAMITOMO | 157 |
| AURILLA POOLE | |
| DIRECT EXAMINATION BY MS. O'BRIEN | 182 |
| CROSS EXAMINATION BY MR. KAMITOMO | 202 |

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBIT INDEX

| <u>NO.</u> | <u>DESCRIPTION</u> | <u>PAGE NO.</u> |
|------------|--|-----------------|
| D2 | Banking Records | 105 |
| D3 | Department of Licensing Records | 106 |
| P200 | Medical Records of Holy Family Hospital | 107 |
| P202 | Residential Records of Cherrywood Place | 107 |
| P203 | Medical Records of The Doctor's Clinic | 107 |
| P205 | Medical Records of Spokane Mental Health | 107 |
| P206 | Medical Records of Franklin Hills | 107 |
| P207 | Robert Coon Power of Attorney | 107 |
| P208 | Franklin Hills Business File | 107 |
| P209 | Alternative Dispute Resolution Agreement | 107 |
| P210 | Care Tracker Documents | 107 |

1 THE COURT: Good afternoon.

2 MR. KAMITOMO: Afternoon, Your Honor.

3 MR. CRONIN: Afternoon.

4 THE COURT: Mr. Kamitomo, if you'd please introduce
5 this matter.

6 MR. KAMITOMO: I will, Your Honor. For the plaintiffs,
7 Mark Kamitomo, and this is the time and place set for
8 several motions, motions in limine, but we also have a
9 motion to stay the evidentiary proceeding we filed as
10 well. The cause number is 11-2-04875-1. And I'm assuming
11 that the Court would take up the first motion, the motion
12 to stay first?

13 THE COURT: Right. Mr. Cronin, are you ready to
14 proceed?

15 MR. CRONIN: Yes, Your Honor. Mr. Hueber will be
16 arguing that particular motion. I'll argue the others.

17 THE COURT: It looks like the first issue in regards to
18 that motion is a motion to shorten time. I see the
19 defendant has had an opportunity to file a response. Is
20 the defense objecting to the motion to shorten time?

21 MR. HUEBER: Well, we are, Your Honor. It's kind of
22 dovetailed into our somewhat substantive preliminary
23 response, is that I don't think there's been any showing
24 of a need or the existence of an emergency that would
25 require this to be heard before our hearing starts next

1 week. So I would object to the motion to shorten time and
2 I submit that it should be denied as can be noted up and
3 argued in due course.

4 THE COURT: Mr. Kamitomo.

5 MR. KAMITOMO: Your Honor, as you know, the reason we
6 filed the motion was as a result of your letter ruling per
7 the summary judgment motions that were heard on the 30th.
8 Even if you had issued ruling then, we wouldn't have been
9 in time for today. The reason for shortening time that we
10 believe there is a need, I wouldn't call it an emergency,
11 is that we do believe, based upon the case law we've
12 cited, that given the fact that the Court hasn't decided
13 that Ms. Rushing's claim will be litigated separately that
14 her Constitutional right to a trial by jury per the
15 Washington Constitution trumps the arbitration at this
16 point. That needs to be decided before the arbitration
17 hearing is started. If the defendants want to kick this
18 over to Monday before the hearing starts and the Court is
19 so inclined, I'm prepared to do that, but it just made
20 good sense to note it at the same time as the motions in
21 limine. So we ask the Court to grant the motion to
22 shorten time.

23 THE COURT: Looks like the issue became somewhat right
24 after the Court's decision regarding the motion for
25 summary judgment, so the Court will grant the motion to

1 shorten time and hear these issues.

2 If you'd like to go ahead with your argument,
3 Mr. Kamitomo.

4 MR. KAMITOMO: Thank you, Your Honor. As the Court
5 will recall, on Friday the 30th it heard a number of
6 motions. The one it took under advisement was the
7 plaintiff's motion to biforate Mary Rushing's claim per
8 the Woodall case. The Court subsequently granted our
9 motion and found that Ms. Rushing had an independent right
10 to have her claim litigated. Her claim would fall then
11 under the Washington State Constitution's right to a jury
12 trial and we've cited the Court for that in our brief.
13 Herein lies the problem, an agreety (phonetic) is the
14 reverse argument of what I understand Mr. Cronin made to
15 you at the time of the motions hearing in an effort to
16 preclude the summary judgment motion. There is a question
17 about what affect an arbitration proceeding, if it was
18 allowed to go ahead, would have on Ms. Rushing's right to
19 a trial by jury. One is a constitutional right. The
20 other is a right where the constitutional right may be
21 waived depending on what the Court finds.

22 So if you take it at its worst, you have an arbitration
23 where the constitutional right has been waived, and on the
24 other side you have Ms. Rushing's competing right that is
25 a constitutional right. Our belief is that worst case

1 scenario, if this Court was to find at the evidentiary
2 hearing that Mr. Coon was competent and the arbitration
3 went ahead, then we believe that the Court loses
4 jurisdiction over the case, and by virtue of the contract
5 itself and the terms and conditions of the arbitration
6 agreement the arbitrator assumes control of that case. If
7 the arbitrator chooses to have the arbitration go ahead,
8 and it's likely that he or she will, because there is an
9 abbreviated discovery schedule under the arbitration
10 agreement, then there is a risk that the arbitration
11 decision would have a collateral estoppel or preclusive
12 affect, an issue of preclusive affect on Ms. Rushing's
13 constitutional right to a trial before she's had an
14 opportunity to litigate her case.

15 We cited for the Court Nielson versus Spanaway General
16 Medical Clinic case. Has the Court had a chance to look
17 at the Court of Appeals' case and the subsequent Supreme
18 Court case?

19 THE COURT: I haven't.

20 MR. KAMITOMO: So, Your Honor, I brought copies for the
21 Court. I brought both, one copy of the Supreme Court
22 case. I brought three copies of the Court of Appeals'
23 case. The reason I feel it was important to look at the
24 Court of Appeals' case that -- whose decision was upheld
25 by the Supreme Court is the issue there was this family

1 had a child that they thought needed medical attention and
2 took it to a private clinic. The private clinic doctor
3 prescribes a treatment. And when the mom left, she didn't
4 trust what the doctor had told her so she took the child
5 to Madigan, a federal institution. While the child was in
6 Madigan, over a period of time the child decompensated and
7 suffered a hypoxic event that left the child permanently
8 brain damaged.

9 The plaintiffs decided to file in two forms. And its
10 suits against the federal government are brought under the
11 Federal Tort Claims Act and are tried to a federal judge.
12 The suit in state court is brought according to the normal
13 tort claims. What happened was the federal tort claim
14 case was decided by the federal judge before the jury
15 trial occurred in the state court case.

16 Importantly, the family never asked the federal judge
17 to stay the proceeding until the jury trial could go
18 ahead. I believe they said they settled for \$2.85 million
19 and then tried to go back to the state court and have the
20 issue of damages relitigated. The Court of Appeals found
21 that in effect, even though there may have been a
22 constitutional right that could have trumped the other
23 one, they had neither asked for a stay, nor had they asked
24 the federal government to exercise its ability to pull the
25 cases together and have them heard together, and under

1 that circumstance they said you waived your right, your
2 constitutional right to a jury trial. The Supreme Court
3 never got to that issue, but the Supreme Court, in its
4 conclusion, notes that they're not getting to that issue
5 because they've decided it on other grounds. But the
6 Court does, in its conclusion, note again that one of the
7 problems was that there was never a request for a stay.

8 In both cases they do go through an analysis citing to
9 the United States Supreme Court case of the problem when
10 you have two competing interest in two competing venues.
11 In our particular case, we have a jury trial issue versus
12 an arbitration issue. And, again, it's our belief that by
13 requesting the stay we have preserved our right that
14 they've talked about in the Nielson-Spanaway case and that
15 if the Court doesn't stay the proceeding until we can get
16 the jury trial issue taken care of and the arbitration
17 goes ahead, then effectively we would at least have a good
18 argument that its nullity, that Ms. Rushing's right to a
19 jury trial was violated because it wasn't a stay granted.

20 I have the cases. I've highlighted if the Court would
21 like to see it, but we believe under that circumstance
22 that a stay should be issued. And as much as we're ready
23 to go ahead, the Court's got all the briefing. We do
24 believe until Ms. Rushing's claim is resolved that it
25 would be detrimental to her in the worst case scenario to

1 proceed. Thank you.

2 THE COURT: Thank you. Mr. Hueber.

3 MR. HUEBER: Thank you, Your Honor. Court of Appeals
4 ordered this case to proceed to the evidentiary hearing on
5 the enforceability of the ADR agreement. We all know that
6 starts next week. The court of Appeals also directed that
7 the evidentiary hearing shall be conducted before ruling
8 on the motions to compel arbitration. So we need to have
9 that hearing and then you can rule on the motions to
10 compel on any of these other issues, but none of those
11 things changed the fact that we have to have this
12 evidentiary hearing as ordered by the Court of Appeals and
13 whatever motion practice or whatever issues wish to be
14 litigated at that time, we can do that. But there's no
15 need at this point for the Court to be issuing an advisory
16 ruling on what it might do on a preclusion argument some
17 time down the road.

18 I think when you cut through everything in the brief,
19 what you're being asked to do sort of, oh, by the way, the
20 week before our hearing we'd like you to declare the
21 Washington Arbitration Act unconstitutional and let's do
22 that on shortened time. And I just submit, Your Honor,
23 that's inappropriate. The plaintiff's argument is built
24 on positions that we have taken that the results of the
25 survival claim arbitration will have a preclusive affect

1 on the wrongful death claim. That issue is not before
2 you, and it's not before you today. That issue hasn't
3 been fully briefed or noted for hearing, but you're being
4 asked to assume that you're going to rule in our favor on
5 that and that somehow that's going to deny the plaintiff
6 her right to a jury trial. Again, Judge, that can all be
7 litigated after we get through the evidentiary hearing.

8 RCW 7.24.110 requires the Attorney General to be
9 given notice when the constitutionality of a statute is
10 challenged. That's exactly what has happened here and
11 there's -- no notice has been given. And the case law is
12 clear, without that notice, this Court has no jurisdiction
13 to even entertain the argument.

14 And going the next step, even if we assume that there
15 is this implicit right to a jury trial, the plaintiffs
16 waived it. No jury's been demanded. No jury fee has been
17 paid. We've had all of these scheduling conferences.
18 We've had all of these setting and now a week before the
19 hearing, oh, by the way, we think, one, the Washington
20 Arbitration Act is unconstitutional and, two, we've got a
21 right to a jury trial. And, Judge, I just submit they've
22 waived this argument. I ask that you deny this motion and
23 we move forward as the Court of Appeals told us to do.
24 Thank you.

25 THE COURT: Thank you. Mr. Kamitomo.

1 MR. KAMITOMO: Judge, first off, we agreed the Court of
2 Appeals handed back. The Court didn't imply or state what
3 timeframe that it should be in and the issue of whether or
4 not Ms. Rushing has a separate claim under a right to a
5 jury trial was not decided by the Court. That issue has
6 not been decided until the Court sent us the letter ruling
7 just a few days ago. And I'm not -- I saw this in their
8 response, but I'm baffled.

9 We're not asking for any declaration of
10 unconstitutionality. In fact, on page three of our
11 briefing we point out that the arbitration statute of
12 7.04(a) particularly provides that the Court has the
13 discretion to delay or stay the proceedings if it deems
14 appropriate. We believe in this particular case that the
15 Court should and must delay the proceedings until
16 Ms. Rushing has had a chance to litigate her underlying
17 claim and had the right to the trial by jury. And, again,
18 I have copies of the case if the Court would like to see
19 those cases.

20 We also cited to the best case and Judge Wiggins'
21 descent in that, but Judge Wiggins, in the descent, refers
22 Nielson-Spanaway case again and actually his comment in
23 that regard is entirely consistent with what the Court did
24 in Nielson versus Spanaway and that is recognizing again
25 that if you have two separate forums where something is

1 going to go ahead and you don't raise and get a stay, you
2 waive the right to do so. But if you do raise the right
3 to a stay and the proceeding goes ahead, then there is a
4 question whether or not that person's right to a trial by
5 jury has been affected. We're not asking for any advisory
6 opinion. I think all we can do at this point is point out
7 to the Court that worst case scenario here if the Court
8 decides arbitration is appropriate, then the Court loses
9 jurisdiction over the case and no ability to control it.
10 The arbitrator is not bound to stay the proceeding. The
11 time to stay the proceeding is now and allow Ms. Rushing
12 to continue on with her litigation. The arbitration can
13 continue at a later date when she's had an opportunity to
14 do so. And we will -- if we prevail, we will certainly be
15 in front of the Court arguing collateral estoppel on any
16 underlying issues that might exist.

17 I would assume that the same would be true if you
18 decided to go ahead with the arbitration I think we would
19 be back in front of a judge at some point with Mr. Cronin
20 and Mr. Hueber arguing that the arbitrator's decision is
21 binding on Ms. Rushing, and therein lies the problem.
22 That's what the Spanaway court said was improper.

23 THE COURT: Thank you. This issue is to continue
24 and/or stay the evidentiary hearing based upon, I guess,
25 the competing ways these matters may be adjudicated, that

1 being between Ms. Rushing and Mr. Coon's estate. I guess
2 as far as the -- the way I read the briefing as well was
3 the request for a jury for the evidentiary hearing. I'm
4 not sure if that's the motion or not, but if that is the
5 motion, that motion will be denied. The Court of Appeals
6 sent this back to the Court to make a determination as to
7 whether or not Mr. Coon was competent when he signed the
8 arbitration agreement. I don't think that's within the
9 purview of the jury. I think that's a decision that the
10 Court's required to make. That is a pretrial or
11 pre-arbitration issue. So the Court will deny a request
12 to have a jury consider whether or not Mr. Coon was
13 competent when he signed the arbitration agreement. In
14 addition to that, the case scheduling order had a jury
15 demand cutoff date for March 11, 2013. So regardless of
16 whether or not a jury may hear that issue, the case
17 scheduling order hadn't been complied with.

18 The second issue is the motion to stay or continue the
19 evidentiary hearing. At this point it would be
20 presumptuous to think that the arbitration is going to go
21 forward. The Court hasn't heard any evidence as to
22 whether or not Mr. Coon was competent when he entered into
23 that agreement or if it was even his signature on that
24 agreement. Essentially, if the Court were to stay the
25 evidentiary hearing, Ms. Rushing would go forward with her

1 claims, possibly in front of a jury, and if the Court
2 later found the arbitration wasn't enforceable, there'd be
3 a second trial regarding Mr. Coon's estate. We'd end up
4 trying these issues possibly twice, as there are two
5 different claims. So I think that the plaintiff's motion
6 may be valid, but it is premature as the Court hasn't made
7 a decision yet as to whether or not the arbitration
8 agreement is even enforceable.

9 So, Mr. Kamitomo, you're welcome to renew your motion
10 at a later date depending on the Court's ruling, but,
11 frankly, if the Court finds that the arbitration agreement
12 isn't enforceable, it would be a moot point and these
13 claims would be tried together. So the plaintiff's motion
14 for a jury for continuance or for a stay of the
15 evidentiary hearing is denied.

16 Turning to the plaintiff's motions in limine, there's
17 been about three different separate pleadings that are
18 filed with the motions. We'll start with the plaintiff's
19 motions. And, Mr. Kamitomo, I'll ask you which ones you'd
20 like to start with.

21 MR. KAMITOMO: Your Honor, we filed a number of them
22 together that start with the defendant's expert and lay
23 witnesses should be precluded from referencing or relying
24 upon the psych records. If it's okay, I'll start there --

25 THE COURT: That'd be fine.

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

Plaintiff(s),

vs.

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

Defendant(s).

No. 11-2-04875-1

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION RE: RIGHT
TO TRIAL BY JURY

Plaintiff submits this memorandum in support of her motion re: right to trial by jury:

I. The court should delay the upcoming evidentiary hearing and any potential arbitration of Plaintiff's survival claims pending jury trial of her wrongful death claims in order to avoid infringing on her constitutional right to trial by jury.

The court recently granted summary judgment that Plaintiff's wrongful death claims are non-arbitrable pursuant to the Court of Appeals decision in *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010). See Letter from Hon. John O. Cooney, dated Feb. 2, 2015. At oral argument on the

1 foregoing motion, counsel for Defendants contended that findings of fact in the
2 upcoming evidentiary hearing and potential arbitration would give rise to collateral
3 estoppel/issue preclusion in any trial of Plaintiff's wrongful death claims. On this basis,
4 counsel urged that the court should defer ruling on the summary judgment motion. (A
5 copy of the transcript has been requested, but is not yet available.)

6 If there is any potential for collateral estoppel, then the fact that the evidentiary
7 hearing is imminent and any arbitration of Plaintiff's survival claims would likely be
8 completed before the jury trial of her wrongful death claims, Plaintiff would be
9 deprived of her right to trial by jury with respect to issues decided at the evidentiary
10 hearing and/or arbitration. This would result from nothing more than scheduling, and
11 should not be allowed to occur.¹

12 Washington Constitution, Article I, § 21 provides in pertinent part that "[t]he
13 right of trial by jury shall remain inviolate[.]" The doctrine of collateral estoppel is
14 consistent with the constitutional right to jury trial if the plaintiff chooses to litigate
15 his/her/its claim first in a forum where a jury is not available. *See, e.g., Nielson v.*
16 *Spanaway Gen. Med. Clinic*, 135 Wn. 2d 255, 265, 956 P.2d 312 (1998) (addressing
17 collateral estoppel effect of federal tort claims act judgment, where no jury was
18 available, with respect to subsequent state court action); *see also Bird v. Best*
19 *Plumbing Group, LLC*, 175 Wn. 2d 756, 786, 287 P.3d 551 (2012) (Wiggins, J.,
20 dissenting, discussing *Nielson*). However, the appellate courts recognize that a stay of
21 proceedings in the non-jury forum may be requested to avoid the potential for waiving
22 or mooting the right to trial by jury. *See Nielson*, 135 Wn. 2d at 269 (declining to reach

23 ¹ Plaintiff does not concede that the evidentiary hearing and/or arbitration would necessarily have collateral estoppel effect.

1 issue where plaintiffs had already litigated in the non-jury forum). Here, Plaintiff is
2 requesting a delay of the upcoming evidentiary hearing and potential arbitration
3 regarding her survival claims in order to preserve her right jury trial regarding her
4 wrongful death claims.

5 The court has the authority to delay arbitration under Ch. 7.04A RCW. In
6 particular, the court has discretion to manage the scheduling of arbitration and parallel
7 judicial proceedings. RCW 7.04A.060(4) provides:

8 If a party to a judicial proceeding challenges the existence of, or claims
9 that a controversy is not subject to, an agreement to arbitrate, the
10 arbitration proceeding *may* continue pending final resolution of the issue
11 by the court, *unless the court otherwise orders*.

12 (Emphasis added.)

13 Moreover, motions to compel arbitration are subject to the normal rules for
14 scheduling of motions. RCW 7.04A.050(1) provides in pertinent part:

15 an application for judicial relief under this chapter must be made by
16 motion to the court and heard in the manner and upon the notice
17 provided by law or rule of court for making and hearing motions.

18 As with other motions, the court has discretion to enlarge the time for hearing a
19 motion to compel arbitration for good cause under CR 6(b), and to enter scheduling
20 orders that govern the disposition of the action under CR 16(a)(5) & (b). The court
21 should exercise its discretion to delay the upcoming hearing and any arbitration in
22 order to preserve Plaintiff's right to trial by jury.
23

1 **II. Alternatively, the Court should empanel a jury for the upcoming**
2 **evidentiary hearing.**

3 RCW 7.04A.060(1) recognizes challenges to the validity and enforceability of
4 arbitration agreements, and subsection (2) provides that “[t]he court [as distinguished
5 from the arbitrator] shall decide whether an agreement to arbitrate exists or a
6 controversy is subject to an agreement to arbitrate. However, the statute does not
7 indicate whether questions of fact may or must be resolved by a jury. Former RCW
8 7.04.040(3) provided for a right to trial by jury, but no similar provision is contained
9 in Ch. 7.04A RCW. Nonetheless, Ch. 7.04A retains the right to trial by jury, if only
10 implicitly. As noted above, motions to compel arbitration are subject to the same rules
11 as other motions. RCW 7.04A.050(1). Motions involving judicial examination of
12 factual issues are deemed to be “trials” under CR 38. *See also* CR 43(e)(1) (regarding
13 motions based on oral testimony). The rules preserve the constitutional right to trial by
14 jury for all such factual issues. CR 38(a) & 39(a)(1).

15 In any event, the Legislature cannot abrogate the constitutional right to trial by
16 jury. *See Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 771 P.2d 711, 780 P.2d 260 (1989).
17 Issues regarding the validity and enforceability of an arbitration agreement are
18 questions of fact to which the right to trial by jury attaches. *See, e.g.*, WPI 301.01-
19 301.11 (jury instructions regarding contract formation, interpretation and
20 enforceability). While the Defendants’ affirmative defense seeks equitable relief in the
21 form of specific performance of the arbitration agreement, to which the right to trial by
22 jury would not normally attach, the underlying issues regarding the validity and
23 enforceability of the agreement predominate and the other issues in the case counsel in

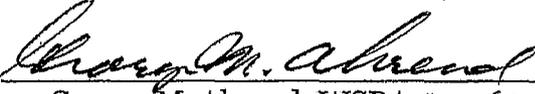
1 favor of the right to trial by jury. As stated in *Auburn Mech., Inc. v. Lydig Const., Inc.*,
2 89 Wn. App. 893, 898, 951 P.2d 311 (1998):

3 Where an action is neither purely legal nor purely equitable in nature, the
4 trial court must determine whether it is primarily legal or equitable in
5 nature, and has wide discretion in this exercise. *Any doubt should be
resolved in favor of a jury trial, in deference to the constitutional nature
of the right.*

6 (Footnote omitted; emphasis added); accord *Waltz v. Tanager Estates Homeowner's*
7 *Ass'n*, 183 Wn. App. 85, 92, 332 P.3d 1133 (2014) (citing *Auburn* for this proposition).²

8 DATED February 6, 2015.

9 AHREND LAW FIRM PLLC
10 Co-Attorney for Plaintiffs

11 By: 
12 George M. Ahrend, WSBA #25160

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22 ² To the extent necessary, Plaintiff seeks leave to amend her amended complaint in order to allege a
23 claim for declaratory judgment that the arbitration agreement is invalid and unenforceable in order to
claim the entitlement to jury trial under CR 57. Plaintiff has not filed a formal motion, however, because
the substance of her response to the arbitration defense is the same as a declaratory judgment claim.

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by [X] personal delivery, [] email and/or [] First Class Mail, postage prepaid, as follows:

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
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Email: pjc@winstoncashatt.com
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Signed at Spokane, Washington on February 6, 2015.

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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

Plaintiff(s),

vs.

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

Defendant(s).

No. 11-2-04875-1

DECLARATION RE ELECTRONIC
FILING (GR-17)

Pursuant to the provisions of GR 17, I declare as follows:

1. I am the person who received the foregoing electronic transmission for filing.
2. My work address is 421 W. Riverside Ave., Ste. 1060, Spokane, WA 99201.
3. My work phone number is (509) 747-0902.
4. I received the document via electronic transmission at mary@markamgrp.com.
5. I have examined the foregoing document entitled **PLAINTIFF'S**

MEMORANDUM IN SUPPORT OF MOTION RE: RIGHT TO TRIAL BY

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JURY, determined that it consists of eight (8) pages (including any exhibits), including this Declaration, and it is complete and legible.

I certify under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Signed at Spokane, Washington this 6th day of February, 2015.

(Print Name)

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SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

No. 11-2-04875-1
PLAINTIFF'S REPLY RE: JURY
TRIAL AND STAY

Plaintiff(s),

vs.

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

Defendant(s).

Plaintiff Mary Rushing submits this reply brief in support of her renewed motion re: right to trial by jury and in opposition to Defendants' cross motion to stay litigation of her wrongful death claim pending arbitration of her survival claim:

I. The court should exercise its authority to stay arbitration in order to preserve Ms. Rushing's right to jury trial of her wrongful death claims.

Ms. Rushing acknowledged in her opening brief that "[t]he doctrine of collateral estoppel is consistent with the constitutional right to jury trial if the plaintiff chooses to litigate his/her/its claim first in a forum where a jury is not available." Plf.'s Memo. In

1 Supp't of Mot. Re: Right to Trial by Jury, at 2:13-18 (citing *Nielson v. Spanaway Gen.*
2 *Med. Clinic*, 135 Wn. 2d 255, 265, 956 P.2d 312 (1998)). However, Ms. Rushing is not
3 seeking two bites of the apple, once in arbitration and a second time in front of a jury.
4 She merely seeks to have the potentially overlapping claims resolved in the first
5 instance by a jury.

6 The *Nielson* case involved a federal court proceeding conducted pursuant to the
7 Federal Tort Claims Act—where no jury is available—and a subsequent state court
8 proceeding arising from the same facts. Under these circumstances, the Court held that
9 giving the federal court proceeding collateral estoppel effect in the state court
10 proceeding is consistent with the right to trial by jury because once an issue has been
11 determined, there is no right to have it re-determined in another proceeding,
12 regardless of whether it has been determined by a jury. *See* 135 Wn. 2d at 265-69.

13 Nonetheless, *Nielson* contemplates that the plaintiff may request a stay of
14 proceedings in the non-jury forum to avoid the potential for waiving or mooted the
15 right to trial by jury in a related proceeding. The Court of Appeals held that the
16 plaintiff in *Nielson* waived the right to trial by jury by failing to request a stay of the
17 federal court proceeding pending litigation in the state court. *See* 135 Wn. 2d at 259-
18 60. The Supreme Court did not have to reach this issue because there is nothing to be
19 waived if the plaintiff voluntarily chooses to submit an issue for determination in a
20 non-jury forum, and then seeks to relitigate the issue before a jury. *See id.* at 269.

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1 Unlike the plaintiff in *Nielson*, Ms. Rushing does not voluntarily submit her
2 wrongful death claims to arbitration, but rather she seeks to preserve her right to trial
3 by jury by requesting a stay of arbitration.¹

4 The court has authority to stay arbitration in order to preserve Ms. Rushing's
5 right to trial by jury. The question at this point is not *whether* the Estate's survival
6 claims must be arbitrated, but instead *when* must they be arbitrated. There is no
7 provision of the Uniform Arbitration Act, Ch. 7.04A RCW (UAA), that addresses the
8 sequencing or timing of arbitration and related, albeit non-arbitrable, court
9 proceedings. Nothing prohibits a stay of arbitration pending litigation of related
10 claims. Language in the UAA indicating that arbitration is mandatory if the court finds
11 an enforceable agreement to arbitration does not address the sequencing or timing.
12 See RCW 7.04A.070(1), (2). Language in the UAA authorizing a stay of proceedings
13 relates only court proceedings involving claims subject to arbitration. See RCW
14 7.04A.070(5), (6). The court has an obligation to interpret and apply the UAA, as is
15 true of any other law, in a manner that is consistent with the constitution. See, e.g.,
16 *Buecking v. Buecking*, 179 Wn. 2d 438, 454, 316 P.3d 999 (2013) (noting "obligation to
17 construe statutes consistently with the constitution"). In order to fulfill this obligation,
18 the Court should stay arbitration pending litigation of Ms. Rushing's wrongful death
19 claims.²

20
21 ¹ The case cited by Defendants, *Robinson v. Hamed*, 62 Wn. App. 92, 96-97, 813 P.2d 171, *rev. denied*,
118 Wn. 2d 1002 (1991), is inapplicable here because the plaintiff in *Robinson* had already litigated his
22 claim, unsuccessfully, in a non-jury forum (a labor arbitration), and he sought to avoid the application of
collateral estoppel in a subsequent civil suit.

23 ² In at least one case, the court has stayed arbitration in order to resolve non-arbitrable issues. *Cf.*
Nationwide Ins. v. Williams, 71 Wn. App. 336, 858 P.2d 516 (1993) (involving stay of UIM arbitration to
resolve coverage issues, presumably under former Arbitration Act, Ch. 7.04 RCW), *rev. denied*, 123 Wn.
2d 1022 (1994).

1 **II. The court should deny Defendants' request to stay litigation of Ms.**
2 **Rushing's wrongful death claims pending arbitration.**

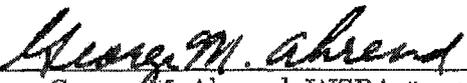
3 The practical concerns about efficiency raised by Defendants cut both ways. *See*
4 Defs.' Resp. In Opp. To Plf.'s Renewed Mot. Re: Right to Jury Trial, at 6:7-9:23. A stay
5 of either arbitration of survival claims or litigation of wrongful death claims will be
6 more efficient than simultaneous prosecution of both. In this sense, the concerns
7 raised by Defendants support Ms. Rushing's request for a stay of arbitration just as
8 much as they support Defendants' own request for a stay of court proceedings. In the
9 final analysis, the Court will have to balance the Defendants' interest in arbitration
10 against Ms. Rushing's right to trial by jury. Because the right to trial by jury is of
11 constitutional magnitude, it should prevail.

12 **III. Conclusion**

13 The court should grant Ms. Rushing's motion to stay arbitration of the Estate's
14 survival claims and deny Defendants' motion to stay litigation of Ms. Rushing's
15 wrongful death claims.

16 DATED April 3, 2015.

17 AHREND LAW FIRM PLLC
18 Co-Attorney for Plaintiffs

19 By: 
George M. Ahrend, WSBA #25160

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by [X] personal delivery, [] email and/or [] First Class Mail, postage prepaid, as follows:

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
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Signed at Spokane, Washington on April 3, 2015.



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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

Plaintiff(s),

vs.

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

Defendant(s).

No. 11-2-04875-1

DECLARATION RE ELECTRONIC
FILING (GR-17)

Pursuant to the provisions of GR 17, I declare as follows:

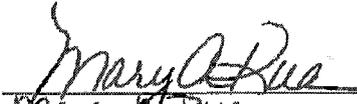
1. I am the person who received the foregoing electronic transmission for filing.
2. My work address is 421 W. Riverside Ave., Ste. 1060, Spokane, WA 99201.
3. My work phone number is (509) 747-0902.
4. I received the document via electronic transmission at mary@markamgrp.com.

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5. I have examined the foregoing document entitled **PLAINTIFF'S REPLY**
RE: JURY TRIAL AND STAY, determined that it consists of seven (7) pages
(including any exhibits), including this Declaration, and it is complete and legible.

I certify under penalty of perjury under the laws of the State of Washington that
the above is true and correct.

Signed at Spokane, Washington this 3rd day of April, 2015.


Mary A. Rua (Print Name)

Hon. Judge John O. Cooney
Hearing Date: Apr. 10, 2015
Time: 4:00 p.m.

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MAR 12 2015

SPOKANE COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

Plaintiff(s),

vs.

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

Defendant(s).

No. 11-2-04875-1

PLAINTIFF'S RENEWED MOTION
RE: RIGHT TO TRIAL BY JURY

I. MOTION

Plaintiff moves the Court for the following relief:

1. Stay of the arbitration of Plaintiff's survival claim until after jury trial of her wrongful death claim because:

a. Defendants have argued that the arbitration may give rise to collateral estoppel/issue preclusion with respect to the wrongful death claims, which the court held were non-arbitrable pursuant to *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010); and

No. 11-2-04875-1
PLAINTIFF'S RENEWED MOTION RE:
RIGHT TO TRIAL BY JURY
Page 1 of 3

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FILED
JAN. 30, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---------------------------------------|---|---------------------|
| MARY RUSHING as the Administrator |) | No. 31055-8-III |
| And on Behalf of the Estate of ROBERT |) | |
| COON, and MARY RUSHING, |) | |
| Individually, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | UNPUBLISHED OPINION |
| |) | |
| FRANKLIN HILLS HEALTH & |) | |
| REHABILITATION, |) | |
| |) | |
| Appellant. |) | |

KULIK, J. — The question here is whether the parties should be compelled to arbitrate their dispute. The trial court refused to order arbitration. We reverse and remand for a hearing to address whether the arbitration agreement is enforceable.

FACTS

Robert Coon, a 63-year-old former attorney with a history of mental illness, voluntarily admitted himself to Franklin Hills Health and Rehabilitation Center after he fell and injured himself. During the admission process, Mr. Coon allegedly signed an alternative dispute resolution (ADR) agreement with Franklin Hills. The ADR applied to

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

any and all disputes arising out of or relating to the resident's stay at the center, including tort, breach of contract, fraud, negligence, wrongful death, departure from any applicable consumer or safety standards, and a variety of other causes of action. 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." Clerk's Papers (CP) at 45.

Two months later, Mr. Coon died. Mary Rushing, Mr. Coon's daughter, brought a wrongful death action against Franklin Hills in her individual capacity and as the administrator of Mr. Coon's estate. The suit alleged negligence by the nursing staff; failure of Franklin Hills to properly train, instruct, and supervise its employees; and violations by Franklin Hills of the vulnerable adult statute.

Franklin Hills moved to compel arbitration of all Ms. Rushing's claims and produced a copy of the signed arbitration agreement. Ms. Rushing opposed the motion, contending that the arbitration agreement could not be enforced because the signature on the agreement was not that of Mr. Coon and because Mr. Coon did not have the mental capacity to enter into the agreement. As evidence, Ms. Rushing submitted Mr. Coon's power of attorney, the petition to extend Mr. Coon's LRA (least restrictive alternative), Mr. Coon's mental health evaluation, an affidavit of Ms. Rushing, the ADR agreement,

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

and Mr. Coon's mental health authorization to release medical information. Ms. Rushing filed an additional affidavit that addressed Mr. Coon's mental state while he was in Eastern State Hospital and what he would have been capable of understanding when he entered Franklin Hills.

In reply, Franklin Hills asserted that Mr. Coon signed the agreement and was not incapacitated at the time of signing. Franklin Hills filed declarations from six Franklin Hills' staff members who interacted with and evaluated Mr. Coon and their accompanying records and notes. Franklin Hills also filed declarations from a medical doctor and a doctor of clinical psychology who both reviewed Mr. Coon's medical records and concluded that Mr. Coon had a reasonable mental capacity for decision making at the time of admission to Franklin Hills.

At the hearing, the trial court declined to make a finding on whether the arbitration agreement was binding or enforceable. It was concerned about the potential facts that may not be in the record. As a result, the court denied the motion to stay and the motion to compel arbitration. The court said that it did not intend to strike the arbitration agreement, but advised the parties that the issue may be raised again in the same format or through a request for an evidentiary hearing. Specifically, the court stated:

[THE COURT:] Therefore, what 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. That doesn't mean I won't come back in the same format or through a request for evidentiary hearing but I think in either event that it's going to be necessary for me to have the comfort I need to go further with this decision.

Any questions?

[MS. RUSHING]: Just so I understand, Your Honor, you're not clear on either issue, whether it's his signature or the mental competency?

THE COURT: That's true, I have questions on each. No findings one way or the other.

Report of Proceedings (RP) at 31-32.

The trial court did not order an evidentiary hearing. When asked for direction on the scope of discovery, the court's answer was vague:

[FRANKLIN HILLS]: . . . I think we're going to need direction from the Court because we would object to all kinds of discovery that don't go to these issues. That's the very purpose for having an arbitration agreement is to not do certain types of discovery and to move the case forward. So I think we're going to need some direction by the Court or perhaps maybe some suggestions or agreements as to what we could do.

On the other hand, Your Honor, I would think by law we could note this up for [an] evidentiary hearing.

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. If in fact the parties enter into some discovery or some process that one or the other thinks is inappropriate, the only way to address that for direction would be to understand each party's position on what direction it should go. But to tell you today which direction to go I think is presumptive. 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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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. That's vague; I know it.

RP at 32-33. The trial court did not limit the scope of discovery to the issues of whether or not Mr. Coon signed the agreement or was competent. The trial court stated that it was not in a position to put limits on the discovery because it needed to know more about the merits of the argument. The court suggested that the parties come up with their own discovery agreement that the court would resolve any arguments or other issues that arise.

Franklin Hills appeals the denial of its motion to compel arbitration. It contends that the trial court erred in denying the motion because Ms. Rushing failed to establish by clear, cogent, and convincing evidence that Mr. Coon was incapacitated at the time he signed the ADR agreement, or that the signature on the agreement did not belong to Mr. Coon. Franklin Hills also contends that Ms. Rushing is required to arbitrate her individual cause of action according to the terms of the arbitration agreement signed by Mr. Coon.

ANALYSIS

We give de novo review to a trial court's decision to compel or deny arbitration. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). "The party opposing arbitration bears the burden of showing that the agreement is not

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

enforceable.” *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). Washington has a strong public policy favoring arbitration. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 341 n.4, 103 P.3d 773 (2004). A trial court’s decision denying a motion to compel arbitration is immediately appealable. *Hill v. Garda CL Nw., Inc.*, ___ Wn.2d ___, 308 P.3d 635, 638 (2013).

Motion to Compel. Courts determine the threshold matter of whether an arbitration agreement is valid and enforceable. See *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383-84, 191 P.3d 845 (2008). An arbitration agreement “is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.” RCW 7.04A.060(1). If a party opposes a motion to compel arbitration, “the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.”

RCW 7.04A.070(1).

Standard contract defenses can be used to challenge enforceability of an arbitration agreement. *McKee*, 164 Wn.2d at 383. The person seeking to enforce a contract need only prove the existence of a contract and the other party’s objective manifestation of intent to be bound. *Retail Clerks Health & Welfare Trust Funds v. Shopland*

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

Supermarket, Inc., 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). Once a party's objectively manifested intent has been established, the burden then moves to the party seeking to avoid the contract to prove a defense to the contract's enforcement. *Id.*

The signature of a party is evidence of a party's objective intent to be bound. *See id.* The trier of fact has the duty to decide the factual question of whether or not the handwriting in question belongs to the person charged with executing the document. *Mitchell v. Mitchell*, 24 Wn.2d 701, 704, 166 P.2d 938 (1946).

A contract may be invalidated if a person lacks sufficient mental capacity or competence to appreciate the nature and effect of the particular contract at issue. *Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 108-09, 120 P.2d 527 (1942) (quoting 17 C.J.S. *Contracts* § 133, at 479 (1939)). In Washington, a person is presumed competent to enter into an agreement. *Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). A person challenging the enforcement of an agreement can overcome the presumption by presenting clear, cogent, and convincing evidence that the party signing the contract did not possess sufficient mind or reason at the time he entered into the contract to enable him to comprehend the nature, terms, and effect of the contract. *Id.* "What constitutes clear, cogent, and convincing proof necessarily depends upon the character and extent of the evidence considered, viewed in connection with the

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

surrounding facts and circumstances.” *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

The question of contractual capacity or competence is a question of fact. *Grannum*, 70 Wn.2d at 307. It is the responsibility of the trial court to determine whether the evidence meets the clear, cogent, and convincing standard because the determination requires weighing and evaluating evidence and credibility determinations that are best suited for the trier of fact. *Bland*, 63 Wn.2d at 154. “Thus, the appellate court’s role is limited to determining whether substantial evidence supports the trial court’s findings of fact.” *Endicott v. Saul*, 142 Wn. App. 899, 910, 176 P.3d 560 (2008).

“When disputes exist as to the circumstances surrounding an agreement, we remand to the trial court to make additional findings.” *Alder*, 153 Wn.2d at 350. In *Alder*, Mr. Alder sought to void an arbitration agreement for procedural unconscionability, claiming that he lacked meaningful choice in entering the contract and that he did not have a reasonable opportunity to understand the terms of the contract because of his limited ability to comprehend the English language. *Id.* at 348-49. The Washington Supreme Court determined that the circumstances suggested that Fred Lind Manor provided Mr. Alder with a reasonable opportunity to understand the terms of the agreement. *Id.* at 350-51. However, because both parties offered different facts

pertaining to the manner in which the contract was entered into, the Supreme Court determined that it could not make a determination of procedural unconscionability without further factual findings. *Id.* The court remanded the case for the entry of additional findings. *Id.*

Here, we cannot review the trial court's denial of the motion to compel without a decision on enforceability of the arbitration agreement. Two reasons support this conclusion. First, under RCW 7.04A.070, the trial court was required to determine whether the agreement was enforceable before denying a motion to compel arbitration. The trial court expressly stated that it did not know whether the agreement was enforceable. Without such a determination, the trial court could not deny the motion to compel. Remand is necessary for the court to make the appropriate determination regarding enforceability of the arbitration agreement.

Second, much like *Alder*, unresolved factual disputes must be decided by the trial court before we can engage in review. The enforceability of the arbitration agreement depends on whether Mr. Coon was competent when he entered into the agreement and whether he signed the agreement. These are both questions of fact to be determined by the trial court. The trial court has the task of weighing the evidence and credibility of the witnesses to determine if Mr. Coon had the mental capacity to contract. Only after such

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

factual findings are made can this court give de novo review to the trial court's decision on Franklin Hills' motion to compel arbitration.¹

On remand, discovery must be limited to the issues surrounding the validity of the arbitration agreement. "If a party files a motion with the court to order arbitration under this section, the court shall on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section." RCW 7.04A.070(5). The threshold question of arbitrability must be resolved without inquiry into the merits of the dispute. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 403, 200 P.3d 254 (2009).

However, a full evidentiary hearing may not be required. Whether an agreement is enforceable is to be summarily decided by the trial court. RCW 7.04A.070(1). The trial court may decide the issue of enforceability if the affidavits and evidence in the record are sufficient to summarily make a determination. If needed, the trial court should allow the parties to produce additional evidence regarding the enforceability of the arbitration agreement. *See Alder*, 153 Wn.2d at 353-54 (where the court set forth the procedure on remand for the introduction of evidence regarding costs of arbitration).

¹ *But see Weiss v. Lonquist*, 153 Wn. App. 502, 513 n.8, 224 P.3d 787 (2009) (the appellate court determined that the absence of findings and conclusions was of no consequence because the trial court did not receive testimony in relation to the motion).

Findings are needed in order to review the trial court's reasoning in denying the motion to compel. The matter must be remanded for the trial court to determine whether the arbitration agreement is enforceable. Discovery must be limited to the issues surrounding the validity of the arbitration agreement.

The parties also dispute whether the declarations of Franklin Hills' employees are inadmissible under the deadman's statute, RCW 5.60.030, and whether Mr. Coon's power of attorney precluded him from contracting with Franklin Hills. These issues were argued at the motion hearing but not decided by the trial court. The issues may be raised again on remand.

Individual Claims. Franklin Hills contends that Ms. Rushing's individual claims are subject to arbitration even though she did not sign the agreement because Ms. Rushing's claims arise out of the admission contract, which therefore binds her to all of its terms, including the arbitration agreement. The arbitration agreement expressly provides that it applies to all disputes that arise out of the agreement or the resident's stay at the center, and that heirs of the parties were bound by the agreement.

Generally, a nonsignatory party is not subject to an arbitration agreement signed by another. *Satomi Owners Ass'n*, 167 Wn.2d at 810. “[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

agreed so to submit.’” *Id.* (internal quotation marks omitted) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)).

However as an exception, equitable estoppel “precludes a party from claiming the benefits from a contract while simultaneously attempting to avoid the burdens that contract imposes.’” *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012) (internal quotation marks omitted) (quoting *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045-46 (9th Cir. 2009)); *see also Townsend*, 173 Wn.2d at 464 (Stephens, J., concurring/dissenting).

Again, the trial court did not make a decision on whether Ms. Rushing was bound by the arbitration agreement. Also, it is possible that this issue is irrelevant if the trial court determines that the arbitration agreement is not enforceable because Mr. Coon did not have the capacity to enter into the agreement. Therefore, even though Ms. Rushing’s obligation to arbitrate is an issue of law, remand is necessary for a resolution of the underlying factual issues that may affect this court’s decision.

Attorney Fees. Franklin Hills requests attorney fees on appeal as the prevailing party. Neither party prevailed. Thus, we decline an award of attorney fees.

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

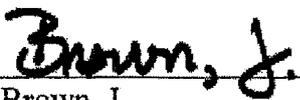
We reverse and remand for a hearing to address whether the arbitration agreement is enforceable.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

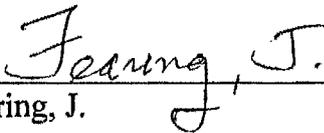


Kulik, J.

WE CONCUR:



Brown, J.



Fearing, J.

Hon. John O. Cooney
Hearing Date: 4/10/2015
Hearing Time: 3:00 p.m.

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

No. 11-2-04875-1

vs.

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

Defendants.

DEFENDANTS' CROSS MOTION TO
STAY MARY RUSHING'S WRONGFUL
DEATH CLAIM PENDING ARBITRATION

Defendants move the Court for an order staying the non-arbitrable wrongful death claim of plaintiff Mary Rushing pending the outcome of arbitration on Mr. Coon's estate claim. This motion is based on defendants' memorandum filed in support, and the files and records herein.

DATED this 13th day of March, 2015.


PATRICK J. CRONIN, WSBA No. 28254
CARL E. HUEBER, WSBA No. 12453
CAITLIN E. O'BRIEN, WSBA No. 46476
WINSTON & CASHATT, LAWYERS
Attorneys for Defendants

DEFENDANTS' CROSS MOTION TO STAY MARY
RUSHING'S WRONGFUL DEATH CLAIM
PENDING ARBITRATION
PAGE 1

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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 13th day of March, 2015, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

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DATED at Spokane, Washington, this 13th day of March, 2015.


Linda Lee

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DEFENDANTS' CROSS MOTION TO STAY MARY
RUSHING'S WRONGFUL DEATH CLAIM
PENDING ARBITRATION
PAGE 2

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1 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**

2 **IN AND FOR THE COUNTY OF SPOKANE**

3 MARY RUSHING, as the)
4 Administrator and on)
5 Behalf of the Estate of)
6 ROBERT COON, and MARY) No. 11-2-04875-1
7 RUSHING, individually,)
8 Plaintiff,)
9)
10 v.)
11)
12 FRANKLIN HILLS HEALTH &)
13 REHABILITATION CENTER,)
14 MELISSA CHARTNEY, R.N.,)
15 AURILLA POOLE, R.N.,)
16 JANENE YORBA, Director of))
17 Nursing,)
18 Defendants.)

12)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)
HONORABLE JOHN O. COONEY
VERBATIM REPORT OF PROCEEDINGS
APRIL 10, 2015

15 APPEARANCES:

16 FOR THE PLAINTIFF: GEORGE M. AHREND
17 Attorney at Law
18 16 Basin St. S.W.
19 Euphrata, Washington 98823

20 COLLIN M. HARPER
21 Attorney at Law
22 421 W. Riverside Ave., Suite 1060
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24 FOR THE DEFENDANTS: CARL E. HUEBER
25 PATRICK J. CRONIN
 Attorneys at Law
 601 W. Riverside Ave., Suite 1900
 Spokane, Washington 99201

 Allison R. Stovall, CCR No. 2006
 Spokane County Superior Court, Dept. 2

1 Ms. Rushing's right to trial. I saw there was some proposed
2 orders.

3 MR. HUEBER: I have the originals, Judge.

4 THE COURT: And Mr. Harper, Mr. Ahrend, have you had
5 a chance to review those orders?

6 MR. AHREND: We have. We have no objection to the
7 order on the -- the order on summary judgment finding that
8 Ms. Rushing's claims are not subject to arbitration. And
9 the only comment, really -- we have filed some objections to
10 the proposed findings, but really the primary objection to
11 the findings is that the Court's prior order, I thought,
12 complied with the requirements of the rule, and no further
13 order would be necessary.

14 THE COURT: I think an order is still required even
15 though the Court did present that. I also noted your
16 objections and the plaintiff's objections to the Court's
17 findings. There's a number of objections. In reviewing
18 those objections, I think there is one correction that needs
19 to be made to the Court's findings.

20 Mr. Hueber, I can insert that correction.

21 MR. HUEBER: May I approach, Your Honor?

22 THE COURT: Yes. Thank you.

23 I note the plaintiff's objections to the findings of
24 fact; and, as I indicated, I have reviewed those. The one
25 finding that I think the Court may have made that isn't

1 supported by the evidence is the third objection of the
2 plaintiff. That's in regards to finding No. 8.

3 Finding No. 8 is on February 1, 2011, Dr. Jacob
4 Deakins, D-E-A-K-I-N-S, requested Mr. Coon to complete a
5 hemoccult test after an initial exam revealed Mr. Coon had
6 an enlarged prostate. After explaining the procedure and
7 cost, Mr. Coon -- as well as a lack of insurance pending
8 before this procedure -- Mr. Coon declined the test.

9 There's an issue about whether or not Dr. Deakins
10 provided that information to Mr. Coon. Someone provided it
11 to him. Whether or not it was specifically Dr. Deakins, I
12 can't recall. So the Court's going to change that finding.
13 The second sentence will read: "After the procedure and
14 costs were explained to Mr. Coon." So I just left out that
15 Dr. Deakins explained that. So otherwise, I will note the
16 plaintiff's objections to the other findings, and that order
17 will be entered.

18 Secondly, the order regarding the right to trial of
19 Ms. Rushing will be entered. It looks like we'll need the
20 parties to sign off on both of these orders. We can do that
21 at the end of today's hearing.

22 As far as the three remaining motions are concerned,
23 I don't know which motion would like to go first. Is there
24 any preference?

25 MR. HUEBER: I don't have a preference, Judge.

1 MR. AHREND: Neither do we, Your Honor.

2 THE COURT: Mr. Ahrend, we'll take your motion
3 first, that being the motion to stay arbitration or the
4 motion to allow Ms. Rushing proceed to trial, whenever
5 you're ready.

6 MR. AHREND: Thank you, Your Honor. May it please
7 the Court. For the record, I'm George Ahrend on behalf of
8 the plaintiff. And I should say I have bilateral ear
9 infections so I'm having a bit of difficulty hearing. So if
10 I seem not to hear, that's the reason why.

11 We have filed a motion -- or really, we've renewed a
12 motion that was filed shortly before the evidentiary hearing
13 was heard in this matter. And the substance of the motion
14 is to seek a stay of arbitration of the estate's survival
15 claims pending litigation of Ms. Rushing's wrongful death
16 claims.

17 And the reason for this request for a stay is the
18 potential -- and at this point in time, I don't want to be
19 heard to say that collateral estoppel will necessarily arise
20 as a result of the arbitration proceeding because we really
21 don't know what's going to happen in the course of those
22 arbitration proceedings.

23 And there's questions about whether, as we know,
24 collateral estoppel is an inequitable doctrine that
25 precludes re-litigation of certain factual issues under

1 certain circumstances. But the equitable constraints on
2 that doctrine might come into play where we've got an
3 arbitration like this that is limited in scope; it's limited
4 in length of time; it's limited in the discovery that's
5 available; and there are other factors that being here in
6 this arbitration that may make it adjust to collateral
7 estoppel.

8 So we come to the Court at this juncture where the
9 posture of the case is at least the defendants have
10 announced their intention to claim collateral estoppel as a
11 result of the arbitration proceedings, and we face a risk of
12 that even if we don't necessarily agree that collateral
13 estoppel is appropriate. And so in the face of collateral
14 estoppel, Ms. Rushing seeks to have the arbitration stayed
15 so she can be sure and get the constitutional right to jury
16 trial to which our constitution provides to her.

17 Now, it is, of course, true that the doctrine of
18 collateral estoppel, equitable though it is, does not
19 necessarily implicate the right to trial by jury so that the
20 application of collateral estoppel in any given case doesn't
21 violate the right to trial by jury simply because the
22 initial form in which litigation took place did not have an
23 entitlement to a right to jury trial. However, in the
24 *Nielson v. Spanaway* case, I think we've got some language
25 from the Supreme Court suggesting, at least -- not holding,

1 and I admit that -- but suggesting that that might be
2 limited to situations where the plaintiff chooses to
3 litigate.

4 In that case, it was a federal tort claims act case.
5 There's another case that's cited by the defendants in their
6 materials that involves administrative proceedings, where
7 the plaintiff chooses to litigate first in a form to which
8 no right of jury trial attaches. Then the subsequent
9 application of collateral estoppel to preclude re-litigation
10 of those matters that were decided factually in a subsequent
11 jury trial context did not violate -- it did not violate the
12 jury trial to apply collateral estoppel in that context.

13 But *Nielson* seems to contemplate that a party can --
14 in order to preserve and not essentially waive by pursuing
15 this alternative remedy first, in order preserve the
16 constitutional right to jury trial, requests a stay of the
17 non-jury proceedings. So based on that authority, that is
18 what we are asking for in this case.

19 So then the question is, well, does the Court have
20 the authority to stay arbitration pending litigation of the
21 wrongful death claims? And it's not -- it's one of those
22 situations where you have to decide, really, in the absence
23 of clear guidance whether the lack of expressed permission
24 must be equated with a prohibition against a stay or whether
25 it allows the Court freedom to act under these

1 circumstances.

2 We've both gone through, both sides, and I think
3 there is general agreement when I see the reply brief from
4 the defendants that there's no controlling authority in the
5 text of the arbitration act that says you can or cannot do
6 this. And so then we're left with, okay, how do we
7 interpret and imply the statute properly in the absence of
8 more specific guidance from the language of the statute
9 itself?

10 We fall back -- the plaintiffs fall back on the rule
11 of what we call constitutional construction, which is that
12 in the absence of any more explicit guidance, the Court
13 should choose the construction of the statute that most --
14 is most protective of constitutional rights, construes the
15 statute in a way that is protective and promoting of those
16 constitutional rights we've cited.

17 That's a fairly well-settled principle. Generally,
18 it's applied with ambiguous statutes as opposed to a statute
19 that just doesn't speak to this issue, but I would submit
20 that the absence of clear guidance in the text of the
21 statute creates an ambiguity in this regard.

22 And so our first request to the Court is to stay the
23 arbitration of the survival claims so that the wrongful
24 death claims can be litigated in front of a jury; and then
25 if there's any collateral estoppel implications of that

1 determination that's made by a jury, that can be applied by
2 the arbitrator in the course of arbitration and be
3 subsequent to the jury trial. So it's not a matter of
4 resisting arbitration at this point. It's just a matter of
5 sequencing the arbitration.

6 Now, if the Court is inclined to -- I don't know if
7 you want me to respond to their motion. It's kind of all
8 part of the same issue because we get the cross motion,
9 essentially, from the defendants to do the reverse. And the
10 general -- the gist of the argument there is, again, we
11 don't have explicit guidance.

12 We would admit that certainly the Court has
13 discretion to stay the litigation of the wrongful death
14 claims just like I believe it has discretion to stay the
15 arbitration. But the question is a matter of efficiency or
16 economy or of having litigation proceed on two tracks. And
17 what I would say in this regard is arbitration is a matter
18 of contract and honoring agreements to arbitrate.

19 Sometimes that is expressed in terms of a policy in
20 favor of expeditious resolutions of disputes. But really,
21 the economy and efficiency that purports to, in here and
22 arbitration, is subordinate to the principle of contract.
23 And this Court has already ruled that the contract does not
24 obligate Ms. Rushing to arbitrate her wrongful death claims
25 even though it obligates her, according to the Court's

1 ruling, to arbitrate the survival claims.

2 That contract basis for arbitration has to take
3 precedence over any policy considerations about efficiency
4 or economy. So if the Court is not willing to grant our
5 motion, we ask that the Court would at least not grant the
6 defendant's motion to stay litigation because the principle
7 of contract that underlies arbitration takes precedence over
8 any issues of economy or efficiency. Do you have any
9 questions for me, Your Honor?

10 THE COURT: I don't. Thank you.

11 MR. AHREND: Thank you.

12 THE COURT: Mr. Hueber, if you'd like to respond his
13 motion and also make your motion at the same time.

14 MR. HUEBER: Sure, Judge. There are basically cross
15 motions; and I think my argument, I've tried to incorporate
16 both positions. So I don't intend to argue them separately.

17 Judge, why are we here? Well, the Court of Appeals
18 directed that you conduct a hearing on whether Mr. Coon was
19 competent when he signed the ADR agreement. If he's
20 competent, we go to arbitration. If he wasn't competent, we
21 go to court. You've ruled that Mr. Coon was competent; we
22 go to arbitration.

23 This is where we've been trying to go since we filed
24 our motion to compel on June 5th, 2012, which was nearly
25 three years ago. The ADR provides that the arbitration will

1 be complete within 180 days. Had it not been opposed, it
2 would've been completed over two years ago. After today, it
3 should be completed within 180 days. We've already
4 initiated that process. As required by statute, Title 7,
5 and our directive from the Court of Appeals, if Mr. Coon is
6 competent, you compel arbitration, which you've done. We
7 get to go to arbitration now.

8 Once you've compelled arbitration, the arbitrator,
9 pursuant to the parties' contract, takes over the case.
10 Now, we argued the same motion on February 3rd, which I
11 believe was the Friday before our hearing started; and at
12 that hearing, at Page 14, Mr. Kamitomo argued: If the Court
13 decides arbitration is appropriate, then the Court loses
14 jurisdiction over the case and has no ability to control it.
15 And that was a proper statement of the law.

16 You have ordered and compelled arbitration. I think
17 by operation of law, you no longer have jurisdiction to stay
18 that. I think the plaintiff has attempted to portray this
19 issue as merely being one of sequencing; who gets to go
20 first. And the plaintiff wants to go first to preserve her
21 right to a jury trial. And the problem with this argument
22 is that the case law is clear that the preclusive effect of
23 arbitration does not impact the right to a jury trial.

24 The arbitration, again, is going to be decided
25 within six months. The arbitrator will decide whether the

1 defendants were negligent and whether such negligence caused
2 Mr. Coon's death. If no negligence is found, the derivative
3 wrongful death claim is moot. If negligence is found, then
4 liability may be established, and the only issue for the
5 jury will be the issue of damages.

6 The argument that the operation of an arbitration
7 decision as collateral estoppel somehow deprives Ms. Rushing
8 of her right to a jury trial, I'd submit, is disingenuous,
9 at best. The law here, unlike many areas, is crystal clear.
10 It does not violate her right to a jury trial. In fact, the
11 *Robinson v. Hamed* case addressed the specific argument, and
12 it said, and I quote, "is totally without merit," end quote.

13 So, Judge, I submit now that you've compelled
14 arbitration, you have the discretion to stay Ms. Rushing's
15 wrongful death court action. There's no shortage of cases
16 that talk about your discretion in making that decision.
17 But the law is clear; non-arbitrable claims may be stayed
18 while the arbitration proceeds.

19 Now, as Mr. Ahrend has suggested you should let them
20 both just go forward at the same time, this would result in
21 tremendously inefficient and duplicative litigation. Both
22 claims are based on identical allegations that the
23 defendants caused Mr. Coon's death. The parties agreed to
24 arbitrate this claim. They agreed to follow the rules that
25 control that arbitration, and arbitration is favored. To

1 allow both to proceed will result in an extraordinary waste
2 of not only judicial resources, but also time and money to
3 the parties.

4 The argument that you can or should stay the
5 contractually-agreed arbitration while Ms. Rushing pursues a
6 derivative claim in court to verdict, apparently through
7 appeal as well, is novel. There's no support for this
8 argument. In fact, the law is contrary. To stay the
9 arbitration now, even assuming you had jurisdiction to do
10 so, would deprive the parties of their contractually-agreed
11 upon mechanism to resolve disputes.

12 The parties did not agree to wait for years to
13 arbitrate their claim while some of the issues may be
14 decided in a separate court proceeding. So, Judge, we're
15 asking you to stay the litigation. Let us go to
16 arbitration. We'll have a decision in six months. At that
17 point, we can sort out what, if anything, that means to the
18 derivative action that Ms. Rushing has. Thank you.

19 THE COURT: Thank you. Mr. Ahrend?

20 MR. AHREND: The idea that this motion is totally
21 without merit comes from this *Robinson v. Hamed* case where
22 the party had already not only just submitted first to
23 arbitration in a non-jury form, but initiated, as I recall
24 the case, the litigation in the non-jury form.

25 And the reason that case is distinguishable and the

1 reason that we fall within what we believe is a safe harbor
2 in the *Nielson v. Spanaway* case and the reason that this
3 motion is not totally without merit, but is meritorious, is
4 because we're asking for this in advance. That's why the
5 cases that defense relies on aren't applicable to the motion
6 as it comes before the Court in this context.

7 And I hear Mr. Hueber say something slightly
8 different in his oral argument with respect to the Court's
9 authority than I hear or see in the defendant's reply brief,
10 and that is an argument now that the Court has lost
11 jurisdiction. And I wasn't present at the hearing where
12 Mr. Kamitomo was quoted as speaking, and I'm assuming that
13 Mr. Hueber is accurately attributing those remarks to him.
14 That -- that -- obviously, Mr. Kamitomo's remarks are not
15 controlling.

16 I think the briefing reveals there's no controlling
17 authority either way, and so the Court has to exercise its
18 discretion. If the Court truly believes it has lost
19 jurisdiction to stay arbitrable proceedings, then I think it
20 would be important to note that for the record and in the
21 order so that the question of stay of the arbitrable
22 proceedings could be brought to the arbitrator without fear
23 or an argument coming from the other side that -- if the
24 Court here is stepping back, not having to face an argument
25 in front of the arbitrator that the Court has already

1 decided the issue.

2 I think it's different to say the Court is deciding
3 the issue and not staying it. That's a separate question
4 from whether the Court is saying, "I'm not going to decide
5 that because I've lost jurisdiction. I'm going to let the
6 arbitrator decide that." Because if the Court truly does
7 believe it doesn't have jurisdiction, we would like to have
8 the option to make that motion in front of the arbitrator
9 that the jury trial right should be prioritized over the
10 contractual agreement to arbitrate a subset of the claims
11 that are here.

12 I don't hear much disagreement -- the last thing
13 I'll say -- over the fact that contract is the basis for
14 arbitration. And the reason -- you know, we may be a long
15 ways down the road. But the reason we're a long ways down
16 the road is the defendants were trying to force arbitration
17 of claims that this Court has not found arbitrable. We
18 contested, certainly, the arbitrability of all claims. They
19 sought the arbitration of all claims and were partially
20 successful.

21 I don't think that the fact that it has taken some
22 time, including a resort to the Court of Appeals by the
23 defense in this case, I don't think the time -- the fact
24 that some time has elapsed is a reason to deny the motion
25 for stay of arbitration at this point or a legally

1 cognizable reason why, if the Court is not inclined to deny
2 a stay of arbitration, that somehow litigation should be
3 stayed.

4 The fact is there are claims here that are not
5 arbitrable, and there's no -- if it weren't for the
6 arbitration, they wouldn't have to be stayed. And so
7 because they're not arbitrable, we should treat them as if
8 there is no arbitration and at least allow them to go
9 forward. Thank you, Your Honor.

10 THE COURT: Thank you.

11 You have an opportunity to reply to your motion.

12 MR. HUEBER: Judge, I just have two comments. One
13 is apparently we're going to relitigate all of these issues
14 again before the arbitrator. If we are, so be it; let's go
15 do it. Second, there's a statement that there's no
16 controlling authority, and I'd submit there is. The Court
17 of Appeal's opinion, which is the law of this case, said if
18 Mr. Coon is competent, you go to arbitration. Title 7 says
19 if there's a valid arbitration agreement, the parties shall
20 go to arbitration. Thank you.

21 THE COURT: Thank you. These are somewhat competing
22 motions, although I guess the Court could deny both motions
23 and not stay anything, allow both claims to go forward
24 separately.

25 Maybe to begin, I'll begin by indicating what I have

1 reviewed, and that has been the plaintiff's renewed motion
2 for a right to trial by jury, the defendant's response in
3 opposition to plaintiff's renewed motion regarding right to
4 a jury trial, and motion in support of cross motion to stay
5 litigation pending arbitration. The Court also reviewed the
6 plaintiff's reply regarding jury trial and a stay, and the
7 defendant's reply brief in support of motion to stay the
8 litigation.

9 There's a couple of things that are compelling here.
10 One is the constitutional right to a jury trial. The second
11 is the statutory requirements for arbitration. Those tend
12 to be, to some extent, conflicting at this point because
13 Ms. Rushing does have her right to a jury trial and the
14 parties have contracted to arbitration. There has been a
15 motion to enforce the arbitration agreement. The Court has
16 found it's valid and has granted that motion.

17 So I'm looking at RCW 7.04A.070. Three different
18 parts of that statute say the same thing, and the quote is
19 "shall order the parties to arbitrate." I think only one
20 section applies to this case, but that is language that's
21 used consistently in that statute. That statute doesn't say
22 the Court loses jurisdiction. It just indicates that it
23 shall order the parties to arbitrate if certain requirements
24 are met. So there is a directive for the Court to do that
25 if there is a valid arbitration agreement.

1 The question then becomes whether or not that
2 statute overrides a person's right to a jury trial.
3 Obviously, constitutional protections afford greater weight
4 than many statutes. However, the Court is compelled by the
5 case of *Robinson* and *Parklane Hosiery*. And the *Robinson*, in
6 citing *Parklane Hosiery*, held that a party's right to a jury
7 trial is not infringed by the application of collateral
8 estoppel based on factual findings in a previous non-jury
9 case.

10 So it looks like this issue has been addressed by
11 the courts, and the courts have found that it doesn't impede
12 a person's right to a jury trial by going to arbitration.
13 So the Court will deny the plaintiff's motion to stay the
14 arbitration. I don't know that the Court has authority to
15 stay the arbitration, given the plain language of 7.04A.070.
16 I'm also not finding that the Court loses jurisdiction under
17 that statute.

18 The second question is whether or not to stay trial.
19 I think the Court has a lot -- there's more gray area on
20 that issue. At this point, though, the Court will grant the
21 motion to stay the trial, and the Court will do that for two
22 reasons. First is it seems somewhat inefficient to have
23 litigation proceeding while the parties are arbitrating some
24 of the claims. Ms. Rushing's claim is -- I don't know if
25 the word "derivative" of Mr. Coon's claim is necessarily

1 appropriate, but it does derive from his claims.

2 But I think what's most compelling is we're talking
3 about a six-month stay. There's 180 days in which
4 arbitration will be completed. I think that 180 days is
5 somewhat minimal given the length of time this litigation
6 has proceeded. I think the parties would be tremendously
7 burdened going down both roads at the same time over the
8 next six months. So the Court will stay the trial for
9 180 days while arbitration goes forward.

10 Mr. Ahrend, I'll start with you. Do you have any
11 questions?

12 MR. AHREND: I don't. I think -- I think Your
13 Honor's order is clear. And if I'm hearing you right, this
14 means you're deciding that the arbitration shouldn't be
15 stayed; so we would not have the latitude to present that
16 motion to the arbitrator.

17 THE COURT: Correct.

18 MR. AHREND: Okay.

19 THE COURT: Mr. Hueber, do you have any questions?

20 MR. HUEBER: I do not, Judge. I do have a proposed
21 order here on the stay.

22 THE COURT: If you want to save that until the end.

23 MR. HUEBER: Okay.

24 THE COURT: We'll bring up both of these remaining
25 orders at the end. The next motion was the motion to

1 correct the record.

2 Mr. Harper, is that your motion?

3 MR. HARPER: That is, Your Honor.

4 THE COURT: Maybe before you begin -- you're welcome
5 to go to the podium. But because I'll do it anyhow, while
6 you're approaching the podium, I did have an opportunity
7 prior to this hearing to review the motion to correct the
8 record, the defendant's response in opposition to the motion
9 to correct the record, and the plaintiff's reply to the
10 motion to correct the record. If you'd like to go ahead
11 with your argument.

12 MR. HARPER: Thank you, Your Honor. May it please
13 the Court; Collin Harper, on behalf of the plaintiffs. As
14 Your Honor noted, the plaintiffs have moved for admission of
15 the Eastern State Hospital records, which were plaintiff's
16 Exhibit 204, and the Sacred Heart Medical Center medical
17 records, which were plaintiff's Exhibit 201.

18 In the briefing, the defendants correctly noted that
19 the Court has the ability to admit these records at this
20 time but was incorrect that the issue turns on whether or
21 not the records -- on the nature as to why the records are
22 not currently part of the record. The question for the
23 Court is not whether or not there's been technicality of
24 procedure but whether admitting the records into evidence at
25 this time will assist in the determination of this matter on

1 its merits and further the interests of justice.

2 I think the Court's ruling in this matter on the
3 arbitration agreement demonstrates that the records are
4 important to a determination of this matter on its merits.
5 The Court's ruling indicates that the Court afforded great
6 weight to the testimony of Dr. Spar, plaintiff's expert;
7 that Dr. Spar in turn testified that he relied heavily on
8 the entirety of Mr. Coon's medical records, which includes
9 the Eastern State and Sacred Heart Medical Center records.

10 In fact, he cited to several records contained
11 within those records specifically and on multiple occasions,
12 and I believe the Court took note of those page numbers
13 during the hearing. The Court's findings of fact were based
14 upon testimony of Dr. Spar, again, which relied heavily upon
15 those records.

16 In defendant's response, there was an argument that
17 they would be prejudiced by the entry of these records at
18 this time. Even if the Court were to consider whether or
19 not such would be prejudicial or unfair, it's not relevant
20 to the evaluation of whether or not to admit the records at
21 this time. That issue should be determined based upon
22 whether or not it was necessary to a determination of the
23 matter on its merits and whether or not admitting the
24 records furthers the interests of justice.

25 The defendants raised two objections to the

1 admission of these records in their ER 904, and those
2 objections were not changed, altered, or added to in
3 defendant's response. Those objections were relevancy and
4 hearsay. As to relevancy, I think that based upon the
5 Court's ruling, it's clear that those records were relevant
6 to the issues that were before the Court, which were
7 Mr. Coon's mental capacity and medical history.

8 As for hearsay, as we've indicated, the records fell
9 into multiple exceptions to the hearsay rule, including
10 business records and statements made for the purpose of
11 medical diagnoses. And when defendant waived -- sorry.
12 When the defendant stipulated to the admission -- or to the
13 authenticity of the medical records, the defendant waived
14 any issues as to whether or not those records were
15 admissible as business records because they were stipulated
16 as to their authenticity.

17 So, Your Honor, we feel that it's important that the
18 records are contained in the evidence of this matter because
19 they were considered by the Court and relied upon and that
20 it's important for the furtherance of justice and that this
21 matter be determined on its merits, not just at this level,
22 but at any other level where the matter is considered; that
23 whatever court that might be, that that court is able to see
24 all of the evidence that was before this Court and was
25 considered by this court.

1 We feel like it's important that these records be
2 admitted into the evidence and contained within the record
3 as it moves up, if it does, which, if the Court is aware or
4 not, there already has been a submission for interlocutory
5 appeal on this matter. Therefore, we respectfully request
6 that the Court admit the Eastern State and Sacred Heart
7 medical records into evidence at this time. Does Your Honor
8 have any questions?

9 THE COURT: I don't. Thank you.

10 MR. HARPER: Thank you, Your Honor.

11 THE COURT: Mr. Hueber?

12 MR. HUEBER: Thank you, Judge. This motion is
13 misnamed. There's nothing to correct. We're talking about
14 the Eastern State records and the Sacred Heart records; 337
15 pages. They include chart notes, correspondence from a
16 multitude of providers dating back to 1971. There are
17 petitions for a least restrictive alternative. There are
18 mental health evaluations. Many of the authors are deceased
19 or unavailable.

20 And granted, there may be some portion of these
21 records that could be admissible. In other words, if
22 Mr. Coon says, "I'm having hallucinations and I'd like some
23 help," well, that's probably going to fall within the
24 hearsay exceptions. But everything else in here does not
25 fall within that exception. Everything else is tied up in

1 layers of hearsay.

2 Counsel just argued that because we stipulated to
3 authenticity, that means we've stipulated to admissibility,
4 and that's just not true, Your Honor. We did stipulate
5 these are what they say they are. But in our motions in
6 limine, we specifically asked you to rule that they're not
7 admissible based on relevance and foundation.

8 The key here, though, Judge, they were never
9 offered. They never said, "I move for the admission of the
10 Eastern State and the Sacred Heart records." Had that been
11 done, we could've argued; we could've voir dired the
12 witness; we could have gone through page by page and
13 determined what portion of those records is admissible.
14 They never moved; they've waived this.

15 As far as exceptions that apply, they may; they may
16 not. But they didn't move to admit the exhibits. We were
17 unable to voir dire the witness. We were unable to argue
18 the exceptions. You were not able to rule on them. And now
19 after you've decided this, Oh, let's just bring them in in
20 bulk and pad the appellate record with things that we never
21 even offered to have admitted during the trial.

22 The fact that Dr. Spar says he read these 337 pages
23 doesn't make them admissible. He can rely on inadmissible
24 evidence, but the fact that he says he read them doesn't
25 mean that we get these reports from 1971 about somebody

1 jumping off a bridge or something else. It's not admissible
2 evidence, and, again, it was never offered.

3 We made our closing arguments. You took the case
4 under advisement. The plaintiffs sent you a letter asking
5 that you wholesale admit all of these records. I guess I
6 can just say that's a rather unusual procedural move, but
7 you denied it. Since that time, you've issued your ruling.
8 You entered a formal order today.

9 And the plaintiff has filed a motion for
10 discretionary review at the Supreme Court. It's another
11 unusual procedural move in light of the fact that we don't
12 even have an order until today, but I guess they can engage
13 in appellate practice any way they so choose.

14 But the filing of that pleading at the Supreme Court
15 has no bearing on our proceedings today. It doesn't trigger
16 an automatic stay. And at some time, the Court of Appeals
17 or the Supreme Court is going to decide whether you
18 committed obvious error in making your factual findings and
19 ruling that Mr. Coon was competent.

20 Now with this backdrop, they want you, after the
21 fact, after you've compelled arbitration, to bring in
22 another 337 pages of documents into this record. Do we get
23 to recall Dr. Spar to the stand? Do they have to bring him
24 up here? Are you going to reopen the hearing? Do we get to
25 voir dire Dr. Spar? Do we all sit down and go through 337

1 pages of documents looking for nuggets that might be
2 admissible? Do we get to offer rebuttal testimony?

3 Judge, this isn't a matter of correcting the record.
4 The record is clear. The exhibits were not offered. They
5 were not admitted. They weren't ruled upon. It's clear
6 waiver. Your Honor has already ruled on this once. Nothing
7 has changed, and this motion should be denied again. Thank
8 you.

9 THE COURT: Thank you. Mr. Harper?

10 MR. HARPER: I'll be brief, Your Honor. Thank you.
11 I'd like to address a few points, and I'll start with the
12 issue as to whether or not the evidentiary hearing would
13 need to be reopened and new testimony be taken and new
14 arguments be made. And I think it's critical to understand
15 or to recognize that the testimony has already been taken,
16 and the records were provided to the defendants in the ER
17 904 -- or with ER 904. They had them at that time, and they
18 had them at the time of the hearing. So we know what the
19 records are, and we know what the testimony will be.

20 And as to any objections that the defendants might
21 raise, they would know what those would be right now. But
22 we haven't heard any change as to what those objections
23 would be. And further -- and this goes to the issue of
24 whether or not prejudice is relevant or unfairness of
25 admitting the records at these times is relevant.

1 The case cited to by the plaintiffs, which was also
2 cited by the defendants, *Ankeny v. Pomeroy Grain Growers*,
3 was a case where it wasn't simply evidence and testimony
4 that was already given at a hearing or trial that was
5 admitted, but new information, new testimony, new evidence.
6 And in that case, the Court said that the relevant inquiry
7 was whether or not admitting the new evidence assisted in
8 the determination of the matter on its merits and furthered
9 the interest of justice. In this case, Your Honor, we
10 believe it does.

11 As for the objections that were raised, hearsay and
12 relevancy, I believe Mr. Hueber said, "We maintained our
13 objection as to relevance and foundation prior to the
14 hearing." I've already addressed as to why I believe these
15 are relevant. And I believe based on the Court's ruling,
16 the records are relevant. And Mr. Hueber said, "We agreed
17 that these records are what they purport to be." And in
18 that case, if the records are what they purport to be, they
19 fall into the business records exception of the hearsay
20 rule, and they're admissible.

21 And just to -- just to make sure it's part of the
22 record and clear at this time, I'd like to go over the
23 timeline of events that happened. It is correct that
24 plaintiffs sent a letter to the judge requesting that the
25 records be admitted, but I think it's also important to note

1 that plaintiffs requested a hearing date for this motion at
2 that time, which was prior to the court issuing its ruling.

3 So because it's important that this material be
4 considered, either -- well, it was considered by this Court,
5 but by any appellate court that reviews this matter, that
6 this material is important to the determination of this
7 matter on its merits and it would further the interest of
8 justice, Your Honor, we do ask that the records be admitted
9 at this time. Thank you, Your Honor.

10 THE COURT: Thank you. I think the Court has a
11 broad amount of discretion on this issue. Obviously, a
12 matter can be reopened and allow other exhibits to be
13 admitted after the hearing. Here we have two exhibits, 204
14 and, I believe, 201. The Court didn't review all those
15 exhibits because they weren't admitted. The Court also
16 relied heavily on the testimony of Dr. Spar, who relied on
17 those exhibits.

18 ER 703 allows an expert to rely on otherwise
19 inadmissible information in forming an opinion. Just
20 because they rely on that information doesn't make it
21 admissible. Experts also rely on a vast amount of
22 information that, if all that were to be admitted, would
23 probably be overwhelming; so it's useful to have an expert
24 that can go through this information and condense it down.

25 The problem or difficulty I see with introducing all

1 of Exhibit 204 and 201 would be -- well, a lot of that would
2 be new information for the Court. I'm sure Dr. Spar didn't
3 testify about a number of documents that were contained
4 within those exhibits, and the Court didn't review those.
5 So it would leave the Court in the position of having to
6 look at the evidence once again. Also, the defense didn't
7 have an opportunity to question Dr. Spar about specific
8 exhibits that he didn't otherwise testify to.

9 So to somewhat reach some middle ground here, I
10 think some of those exhibits aren't relevant. They -- I
11 don't even know what they are, but they may have nothing to
12 do with his competency, especially since they date back so
13 far.

14 So Mr. Harper, you're probably not going to enjoy
15 this, but what the Court will do is grant the motion on a
16 limited basis, and being that the Court will introduce any
17 portions of ER 204 or 201 that Dr. Spar testified about. So
18 the difficulty is you'll have to look at his testimony and
19 see specifically which documents he referred to.

20 In doing that, he did give defense an opportunity to
21 question him about those documents. I think to wholesale
22 let in all these documents would deprive the defense of
23 their opportunity to cross-examine the witness with respect
24 to those documents. So if you choose to have some of
25 Exhibit 204 and 201 admitted, it will take a little bit of

1 work on your part, but you're welcome to do that.

2 MR. HARPER: Thank you, Your Honor.

3 MR. AHREND: Would it be efficient, Your Honor, if
4 we'll just -- I think we ordered the transcript. We either
5 have it or it's on its way. We'll identify those to the
6 other side and hopefully come up with an agreed order as to
7 which ones were specifically referred to in his testimony.

8 THE COURT: That would be fine. You'll have to
9 somehow compile them, and then we can have them admitted at
10 that time.

11 MR. HUEBER: You want to set a time frame on that to
12 be done?

13 MR. HARPER: I don't think that we've received it.
14 Why don't we say within two weeks of when we receive the
15 transcript of the hearing. I don't think we've received it
16 yet. I don't want to commit us to a specific date until we
17 do.

18 THE COURT: That's fine. If you think you can
19 accomplish it within two weeks of receiving the transcript,
20 that'd be fine. Hopefully, his testimony is clear enough
21 that everyone knows what documents he's referring to; and if
22 not, I guess you'll end up back in here to talk about it.

23 MR. HUEBER: Judge, I'll try to interlineate that on
24 my proposed order.

25 (Off the record.)

1 MR. CRONIN: Your Honor, Pat Cronin on behalf of
2 Franklin Hills. We have initiated arbitration, and the
3 clock is running on 180 days. Given the kind of litigation
4 that has occurred already in this case, I would not be
5 surprised if it took a little longer than 180 days. So
6 based on plaintiff's counsel Mr. Ahrend's request that we
7 interlineate and specifically say that the other matter is
8 stayed for 180 days, I would suggest that it makes more
9 sense to say "stayed until completion of the arbitration."

10 MR. AHREND: And I would just say let's review it in
11 180 days.

12 THE COURT: At this point, the Court didn't want
13 this to go on forever; so we can put 180 days. I guess the
14 other problem is if this is appealed and the decision to
15 enforce the arbitration is stayed, 180 days is meaningless
16 but may still need to be enforced. So why don't we put
17 180 days on there; and if it becomes an issue, you can bring
18 it to the attention of the Court.

19 MR. CRONIN: Thank you.

20 MR. HUEBER: Judge, I think I've got them. There's
21 four orders here. One's an order compelling arbitration,
22 one order denying motion to compel arbitration, order
23 granting cross motion to stay, and order denying plaintiff's
24 motion to correct the record.

25 THE COURT: Would you like to hand those up?

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MR. HUEBER: Some have been signed by everyone; some have not yet.

THE COURT: I have signed off on all those orders. Thank you.

(End of proceedings.)

C E R T I F I C A T E

I, ALLISON R. STOVALL, do hereby certify:

That I am an Official Court Reporter for the Spokane County Superior Court, sitting in Department No. 2, at Spokane, Washington;

That the foregoing proceedings were taken on the date and place as shown on the cover page hereto;

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 20th day of April, 2015.

ALLISON R. STOVALL, CCR No. 2006
Official Court Reporter
Spokane County, Washington