

NO. 62894-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

Avalon Care Center - Federal Way, L.L.C., Petitioner,

v.

Clifford Wayne Woodall, Respondent and Cross-Petitioner,

APPELLEE'S REPLY BRIEF TO APPELLANT'S RESPONSE TO
APPELLEE'S OPENING BRIEF

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I. INTRODUCTION

Clifford Wayne Woodall, as Representative of the Estate of Henry Wayne Woodall (“Plaintiff”) replies to additional authorities and arguments cited by Avalon Care Center - Federal Way, LLC (“Avalon”) in its Reply Brief regarding the wrongful death claims in this matter.

Plaintiff also replies to Avalon’s response regarding the survival claims.

Plaintiff would show the Court that both the wrongful death and survival claims in this matter should not be subject to the arbitration agreement signed by the decedent. Plaintiff would further show that the Court should grant Plaintiff’s motion for discretionary review and reverse the trial court’s order compelling arbitration of the survival claims in this matter.

II. PLAINTIFF AGREES THAT CLIFFORD WAYNE WOODALL AND SHARON KING MUST PURSUE THEIR CLAIMS THROUGH THE PERSONAL REPRESENTATIVE OF THE ESTATE OF HENRY WAYNE WOODALL

Avalon argues that the individual wrongful death claimants must pursue their claims through the personal representative of the estate of Henry Wayne Woodall. Plaintiff agrees that this is true.

III. SUR-REPLY TO AVALON’S REPLY REGARDING THE APPEAL OF THE ORDER DENYING ARBITRATION OF THE WRONGFUL DEATH CLAIMS.

Avalon raises additional authority and argument on the subject of the wrongful death claims. Plaintiff replies to this to these arguments in the following section of this brief.

A. Wrongful death claims in Washington are not derived from the person of the decedent and non-signatory heirs should not be subject to an arbitration agreement not signed by them.

Avalon argues that the wrongful death claims in this matter should be subject to the Arbitration Agreement (CP 32-35) because these claims are derivative. This argument oversimplifies the sense in which wrongful death claims in Washington are derivative. The Washington State Court makes clear that these claims are not derivative of the person of the decedent. A wrongful death claim is derivative “only in the sense that it derives from the wrongful act causing death.” *Johnson v. Ottomeier*, 45 Wash.2d 419, 423, 275 P.2d 723 (1954). Because these claims derive from the wrongful act itself and not from the person of the decedent, non-signatory heirs should not be bound by an arbitration agreement signed by the decedent.

In states where the wrongful death claim is derived from the person of the decedent, courts have generally held that non-signatory heirs are bound by an arbitration agreement signed by the decedent. However, where the wrongful death claim derives from the wrongful act itself, courts in other states have generally found that non-signatory heirs are not bound to an arbitration agreement that they did not sign. This principle is illustrated by the Missouri Supreme Court in *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009).

In *Lawrence*, the Court held that wrongful death claims in Missouri are not derived from claims that the decedent might have had and denied arbitration for those claims. *Id.* at 529. The nature of the wrongful death claim in Missouri is similar to Washington's in that the Missouri wrongful death claim is not derived from the decedent's claim. The Missouri Supreme Court has described the Montana wrongful death claims in terms that are very similar to the description of such claims by Washington courts. The wrongful death claim does not belong to the deceased or even to a decedent's estate. *Id.* at 527. In this respect, the wrongful death claim in Missouri is identical to the wrongful death claim in Washington. In Washington, the wrongful death claim also does not belong to the deceased or the decedent's estate. *Gray v. Goodson*, 61 Wn.2d 319, 378 P.2d 413 (Wash. 1963). The cause of action does not arise until the death, and is purely statutory. *Id.* These pronouncements confirm that the wrongful death action in Washington is similar to that of Missouri in that it is an original cause of action that belongs to the heirs. This court should find that the heirs' cause of action is not subject to an arbitration agreement they did not sign.

B. Under Washington law, an Arbitration Agreement is not an Affirmative Defense that can be Asserted Against a Wrongful Death Claim.

Avalon argues that the arbitration agreement should bind non-signatory heirs because defendants are allowed to assert other types of

affirmative defenses against wrongful death claimants. Avalon relies heavily on *Ginocchio v. Hesston Corp.*, 46 Wash.App. 843, 847-48, 733 P.2d 551 (1987), which contains language that a wrongful death claim is “essentially derivative.” *Id.* at 846. The court in *Ginocchio* held that a defendant can assert the defense of contributory negligence in a wrongful death case, and Avalon argues that an arbitration agreement can be asserted against a non-signatory heir in the same way that contributory negligence can be asserted in a wrongful death case.

This argument is not supported by the Washington State Supreme Court analysis of the statutory basis for recognizing affirmative defenses such as contributory negligence in wrongful death claims. The court has set forth a test to determine when an affirmative defense can be asserted in a wrongful death case:

The statutory bases for recognizing defenses of this character is to be found in the word ‘wrongful,’ as used in the statute. If the tortfeasor breached no duty owing to decedent, or if decedent proximately contributed, through consent, negligence, or unlawful acts, to his own injury, it is reasonable to say that his death was not wrongful in the contemplation of the statute. See *Ostheller v. Spokane & Inland Empire R. Co.*, *supra*, 107 Wash, at page 681, 182 P. at pages 631, 362.

Johnson, 45 Wash.2d at 422. The Washington Supreme Court also recognizes affirmative defenses in which, after receiving the injuries which later resulted in death, the decedent pursued a course of conduct which makes it inequitable to maintain a cause of action for wrongful

death. *Id.* at 422-23.

Arbitration agreements do not fall into either category of affirmative defenses to wrongful death claims allowed by the Washington Supreme Court. An arbitration agreement is not akin to a defense which would make the death not “wrongful,” such as contributory negligence. Nor is it an action by the decedent that took place after injury, but before death, which would make it inequitable to recognize a cause of action for wrongful death. There is no basis in the wrongful death statute for application of an arbitration agreement to non-signatory heirs.

The wrongful death act, RCW 4.24.010, gives the heirs a new right of action. *Id.* at 423. There is no statutory basis for applying an arbitration agreement as a defense to the heirs’ personal claim based on a agreement they did not sign. The defenses of no duty and contributive negligence are not comparable to a defense based on an arbitration agreement. In no way does signing an arbitration agreement make the death not wrongful as would a circumstance in which the defendant had no duty to the decedent or the decedent had caused his own death through his actions. Similarly, the signing of an arbitration agreement is not an action, such as signing a release, which took place after the claim arose but before death, and which would make it inequitable to allow a claim for wrongful death. There is no basis in the wrongful death statute to apply an arbitration agreement to claims made by non-signatory heirs. Here, the equities do not favor

enforcing an agreement against non-signatories. When a decedent signs a release, the defendant has an expectation that the claim is forever barred. This action takes place after all the facts regarding the injury and claim are known to all the parties, and the decedent chose to act in a manner inconsistent with bringing a wrongful death claim. However, signing an arbitration agreement in no way makes the death not “wrongful,” and it is inequitable to enforce such an agreement against individuals who did not sign the contract. With other types of affirmative defenses, the Supreme Court has found a statutory basis for the enforcement of affirmative defenses in the term “wrongful.” This is not the case with respect to an arbitration agreement that was not signed by the heirs, and there is no basis in the statute or in equity to enforce a contract against a person not a party to it.

All wrongful death claims are in some sense “derivative.” But Washington wrongful death claims are derivative of the wrongful act and not from the person of the decedent. Under Johnson, signing an arbitration agreement does not in any sense make the death not “wrongful,” and there is no basis in RCW 4.24.010 for enforcing such an agreement against an heir who did not sign it.

Avalon is similarly misguided in its discussion of *West v. Zeibell*, 87 Wash.2d 198, 550 P.2d 522 (1976), and *Meyer v. Burger King Corp.*, 144 Wash.2d 160, 26 P.3d 925 (2001). Those cases involve the question

of whether the Worker's Compensation Act bars a wrongful death claim.

The express language of the statute bars wrongful death claims where the

Worker's Compensation Act applies:

The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and **to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished**, except as in this title provided.

In these cases, it is the express language of the legislature which led to the court's holdings. This defense to a wrongful death claim is a statutory creation. Arbitration agreements are not comparable to the worker's compensation bar, and a defense based on such an agreement should be analyzed under the categories set forth by the Washington State Supreme Court in *Johnson*.

Avalon's reliance on *Boyce v. West*, 71 Wn. App. 657, 862 P.2d 592 (1993), and *Hewitt v. Miller*, 11 Wash.App. 72, 521 P.2d 244 (1974), is similarly misplaced. Neither case even mentions the authority of the decedent to release the wrongful death claim at issue. Both cases concern themselves solely with whether a release can be enforced as a matter of public policy. There is no indication in either opinion that the issue of whether a decedent can contract away a wrongful death claim was raised

by the parties or considered by the appellate court. Avalon's Brief only makes it appear so by inserting a parenthetical reference to the decedent and the wrongful death claim. *Avalon's Reply Brief*, at p. 6. Read in context, it is clear that the Court only considers whether the release in that case violated public policy. *Id.* at 75. Further, the enforcement of an assumption of risk defense based on a release of liability falls into the category of defenses allowed by the Supreme Court in *Johnson*, 45 Wash.2d at 422 (stating that a death is not wrongful when the decedent contributed to the death through consent). When the decedent assumes the risk of a dangerous activity and release liability for it, the death is not "wrongful" under RCW 4.24.010. Such is not the case with respect to an arbitration agreement, and there is nothing about signing such an agreement by the decedent that makes a death not "wrongful" under RCW 4.24.010. Because there is no statutory basis for enforcement of an arbitration agreement against a non-signatory heir, this Court should apply the analysis used by the Supreme Court in *Johnson* and decline to enforce the arbitration agreement in this case against heirs who did not sign it. Wrongful death defendants in Washington have access only to defenses based on the wrongful death statute or on conduct of the decedent after the injury occurred.

IV. PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR DISCRETIONARY REVIEW

The Court should grant discretionary review of the trial court's order on the survival claims. If left in place, the order will force an impoverished plaintiff into an arbitration proceeding he cannot afford and effectively extinguish the claim. The order compelling arbitration of the survival claims is clear error and should be reversed. The plain language of RCW 70.129.005 and 70.129.105 protects the right to jury trial, and a waiver of the right to jury trial is barred by that statute.

A. The court should accept review and reverse the order compelling arbitration of the survival claims.

The Plaintiff in this matter has shown probable error and an alteration of the status quo under RAP 2.3(b).

1. Clifford Wayne Woodall is the Plaintiff in this matter, not the estate of Wayne Woodall.

Clifford Wayne Woodall clearly demonstrated his inability to afford arbitration. CP 68-69. The Trial Court committed clear error in disregarding this evidence. Avalon's only response to this argument is to claim that the evidence is somehow not sufficient because Mr. Woodall did not present evidence of the finances of persons who are not parties to this lawsuit. The estate of Wayne Woodall is not a party to this suit and cannot pursue an action, which must be brought by the personal representative. The estate does not even benefit from the wrongful death action and the survival action under RCW 4.20.060. *Warner v. McCaughan*, 77 Wash. 2d 178, 179, 460 P.2d 272 (1969). These claims

are brought by the personal representative for the benefit of the heirs. The estate of Wayne Woodall by statute is not the plaintiff in the wrongful death action, and plaintiff's evidence of inability to afford arbitration is not deficient because the finances of the non-party estate was not presented. The estate is also not a party to and does not benefit from the survival claim under RCW 4.20.060. Proceeds derived from the settlement of the RCW 4.20.060 survival action, specifically all funds relating to decedent's pain and suffering, do not go through the estate, but are distributed directly to the statutory beneficiaries. *Parrish v. Jones*, 722 P.2d 878, 44 Wn.App. 449, 455 (1986). Because the Estate of Wayne Woodall does not benefit from the wrongful death and survival action under RCW 4.20.060, the Estate is logically not the Plaintiff in those claims. In fact, it would arguably be a breach of fiduciary duty for the personal representative of an estate to deplete the funds of an estate, if any, in pursuit of a lawsuit that does not benefit the estate. See *Estate of Larson, Matter of*, 694 P.2d 1051, 103 Wn.2d 517, 521 (1985). In all other contexts, the plaintiff is always the person who stands to benefit from the lawsuit; a plaintiff who cannot benefit from a lawsuit typically lacks standing to pursue it. See *Saucier v. Employment Sec. Dept. of State of Wash.*, 954 P.2d 285, 90 Wn.App. 46, 465-66 (Wash. App. Div. 3 1998). Here, the estate of Wayne Woodall does not benefit from the claims made in this case and is not the plaintiff. Clifford Woodall is the wrongful death and RCW 4.20.060 plaintiff in this

case and filed the lawsuit in this matter, CP 3, and his finances are at issue. His inability to afford arbitration was clearly demonstrated to the trial court, and the order compelling arbitration in face of this evidence was error.

Avalon further claims that the plaintiff should have presented evidence of the finances of Sharon King. This is ironic, since Avalon has moved to dismiss her from this appeal because she is clearly not a proper party to the case. Opening Brief of Avalon, pp. 18-19. As a non-party to this litigation, Sharon King's finances are not at issue. Plaintiff's evidence of inability to afford arbitration is not defective because it does not address the finances of Sharon King.

Finally, Avalon has waived the opportunity to split hairs over who the plaintiff is in this case by not making this argument at the trial court. The finances of non-parties could have easily been addressed at that level, and making this argument for the first time on appeal prejudices the plaintiff greatly. This argument could have easily been rebutted at the trial court level by the plaintiff, and Avalon should be held to have waived the argument by not presenting at that stage of the litigation. Avalon was charged with the burden of presenting evidence to rebut plaintiff's evidence that he could not afford arbitration. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 462, 45 P.3d 594 (2002). Avalon did not do so, and plaintiff's evidence should be accepted. There is no

question that Clifford Woodall is a plaintiff in this matter, and his inability to afford arbitration has been established. The burden therefore fell to Avalon to rebut this evidence, and the mere claim that other individuals might be able to pay for the arbitration does not controvert the evidence offered by the plaintiff.

2. Severance of the Fee-Splitting Clause will not cure the error of the order compelling arbitration.

Avalon also claims that the clause regarding fee-splitting could be severed from the arbitration agreement. This is not a provision that can be severed because the contract will then make no provision for the payment of the arbitrators. This provision is integral to the purpose of the agreement. Severance of the provision but enforcing the arbitration agreement leaves the parties before an arbitration panel with no method to fund the arbitration so that the dispute can be decided. An unfunded arbitration cannot proceed and mere severance will not make the arbitration agreement enforceable. As the Court noted in *Mendez*, 111 Wash.App. at 465, an arbitration agreement may be stricken when the party opposing arbitration reasonably shows in law or equity that prohibitive costs are likely to render the arbitral forum inaccessible.

Even if Avalon is correct that the fee-splitting clause can be severed, in order to do so, the Court must accept review, which Avalon argues the Court should deny. Avalon's argument that review should be

denied leaves the plaintiff without a remedy because it forces him into an expensive forum which he has demonstrated he cannot afford. Avalon argues that the court should deny review because the plaintiff has not demonstrated error because the fee-splitting clause could be severed from the arbitration agreement. But the trial court's order compelling arbitration did not sever the fee-splitting clause. CP 141-42. If left in place, the plaintiff will be put before an arbitration panel with no way to fund the arbitration. In order to cure this error, this court must accept review under RAP 2.3(b).

Finally, the court in *Mendez* set forth the procedure when the plaintiff demonstrates that arbitration costs were prohibitive. Once the plaintiff has shown the likelihood of incurring prohibitive arbitration costs, the 'onus is on the party seeking arbitration to provide contrary evidence.' *Mendez*, 111 Wash.App. at 465. This approach was approved by the Supreme Court in *Zuver v. Airtouch Communications, Inc.*, 153 Wash.2d 293, 309, 103 P.3d 753 (2004). The plaintiff has met his burden of proving the prohibitive cost defense recognized in *Mendez*, and this Court should refuse to enforce the arbitration agreement here just as the *Mendez* Court refused to enforce the arbitration agreement in that case.

B. Reply to Avalon's Argument Regarding the Necessity of an Evidentiary Hearing.

Avalon makes little effort to address Plaintiff's argument that the

trial court should have granted an evidentiary hearing to resolve the issue of whether it is substantively and procedurally unconscionable to have a deaf, demented nursing home resident sign a complex contract when he could not understand simple ideas such as who his nephew was. CP 68-69; 86-87.

Avalon merely asserts without citation to authority that Plaintiff was required to prove incompetency by “clear cogent, and convincing evidence” in order to show procedural unconscionability. This is not the law, and the trial court committed clear error in holding Plaintiff to that burden. The burden on the Plaintiff to show procedural unconscionability is set forth in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 345, 103 P.3d 773 (2005). The plaintiff is merely required to show a lack of a meaningful choice under the circumstances to support a finding of procedural unconscionability. *Id.* There is no requirement that the Plaintiff prove incapacity in order to set aside an arbitration agreement. There was no evidence of incapacity whatsoever before the Court in *Adler*, but the Court did not hesitate to remand to the trial court to consider the Plaintiff’s evidence that the circumstances under which the arbitration agreement was signed made the agreement unenforceable. *Id.* at 349-50.

Avalon in its response did not address the *Adler* case or procedural unconscionability, but instead insists that a finding of incapacity is necessary to set aside an arbitration agreement. They cite no authority for

this claim and it is at odds with the plain language of the *Adler* case. The trial court erred in holding plaintiff to this burden of proof.

Finally, Avalon claims that the plaintiff has not shown that the order compelling arbitration of the survival claims altered the status quo under RAP 2.3(b). But if the trial court's order is left to stand, the impoverished plaintiff will be left without a remedy because he cannot afford arbitration. Avalon argues that the fee-splitting clause of the agreement could be severed. Even if this is true, the trial court's order left the fee-splitting clause in place. Only acceptance of review of the order compelling arbitration can cure this error. The order compelling arbitration does have an effect outside the courtroom because it puts the plaintiff in the position of having to write a check to the arbitrators when he has no funds to do so.

Under similar circumstances, the Washington Supreme Court granted discretionary review, *Adler*, 153 Wn.2d at 340-41, and remanded to the trial court to reconsider the issue of fee-splitting, procedural unconscionability, and whether the plaintiff could afford arbitration. *Id.* at 351. This court should do the same. The order compelling arbitration splits this case into two parts and forces the parties to go through an expensive process before a decision can be made on the validity of the arbitration claim. Denying review under these circumstances is senseless because the parties are already before the court with respect to the

wrongful death claims.

C. Nothing in RAP 2.3(b) Implies that this Court should not Consider All of Plaintiff's Arguments that the Arbitration Agreement should be Set Aside as Procedurally and Substantively Unconscionable.

Avalon makes the argument that the court should not consider allegedly new issues that were not included in the Motion for Discretionary Review. Avalon cites no authority for this argument. Nor does it make any sense for the court not to consider all grounds on which the arbitration agreement might be set aside if the court accepts review. Plaintiff timely filed a Motion for Discretionary Review and named the order challenged. See Motion for Discretionary Review, pp. 1-2. Plaintiff also asked in the brief on the Motion for Discretionary Review that the court set aside the arbitration agreement as procedurally and substantively unconscionable. *Id.* at pp. 4-5.

Plaintiff has raised no true new issues in his Opening Brief. Plaintiff has merely made additional arguments with respect to the procedural and substantive unconscionability of the arbitration agreement at issue. Not every argument regarding procedural and substantive unconscionability of the arbitration agreement was included in the Motion for Discretionary Review, nor is there any indication in RAP 2.3(b) that this is required. Avalon takes the position that Plaintiff was required to make every possible argument for setting aside the order compelling

arbitration in the motion for discretionary review. This argument is not supported by any case authority. It would expand the the scope of the Motion for Discretionary Review and would force movants to write a full brief on the merits rather than a concise statement of why review should be granted.

Case law establishes that the petition for discretionary review does not limit the appeal. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). While RAP 2.4 was revised following this opinion, the rule still does not require the court to limit the review to the issues on which discretionary review was granted. There is no case authority nor argument based on law or logic that would prevent the court from considering all arguments in favor of reversing the orders complained of in the Notice of Discretionary Review and the Motion for Discretionary Review. The issue in the Motion for Discretionary Review is whether the trial court erred in compelling arbitration despite the Plaintiff's argument that the arbitration agreement was procedurally and substantively unconscionable. See Motion for Discretionary Review, pp. 4-5. This court can and should consider all arguments that support this contention.

D. Avalon does not address the plain language of RCW 70.129.005.

Avalon claims that a plain reading of Title 70.129 shows that the

right to jury trial is not one of the rights protected from waiver by RCW 70.129.105. But Avalon makes no effort to explain the plain meaning of the following: “It is the intent of the legislature that individuals who reside in long-term care facilities ... continue to enjoy **their basic civil and legal rights.**” RCW 70.129.005 Plaintiff suggests to the court that this sentence means exactly what it says.

Avalon’s sole argument is that Title 70.129 provides only those rights that are specifically enumerated in the statute and no other rights. If this interpretation is correct, then the legislators’ statement that nursing home residents should continue to enjoy their basic civil and legal rights has no meaning whatsoever. Avalon’s argument would rewrite the statute from protecting basic legal and civil rights to only protecting the limited rights specifically enumerated in the chapter. The plain language of the statute does not support this argument. This conclusion is confirmed by the failure by Avalon to even attempt to address the meaning of this language.

Plaintiff suggests to the court that a statute protecting basic civil and legal rights of nursing home residents is meant to do just that. Basic civil and legal rights are fundamental rights under the law. Protection of fundamental rights has no meaning if it is limited to the specifically delineated rights mentioned in the statute. Avalon does not attempt to argue that the right to jury trial is not basic civil and legal right. This is

demonstrated by well settled case authority. *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). This conclusion is further confirmed by protection of residents from a waiver of liability contained in RCW 70.129.105. This type of protection is akin to protection from waiver of a basic right such as the right to jury trial. Avalon is simply wrong in claiming that the right to a jury trial is not one of the basic civil and legal rights protected under Title 70.129.

E. The capacity of Wayne Woodall to contract is a legal issue and should be the subject of a jury trial.

The Washington State Constitution, Art. 1, § 21 provides that the right to a jury trial shall remain inviolate. This provision has been consistently interpreted as guaranteeing those rights which existed at the time of the adoption of the constitution. *In re Marriage of Firchau*, 88 Wash.2d 109, 558 P.2d 194 (1977). Accordingly, there is a right to a jury trial where a civil action is purely legal in nature and no such right where the action is purely equitable. *Peters v. Dulien Steel Products, Inc.*, 39 Wash.2d 889, 239 P.2d 1055 (1952), *Dexter Horton Bldg. Co. v. King County*, 10 Wash.2d 186, 116 P.2d 507 (1941). The overall nature of the action is determined by considering all the issues raised by all the pleadings.

If the nature of a case is doubtful, deference should be given to the constitutional nature of the right and a jury trial should be allowed. *Brown*

v. Safeway Stores Inc., 94 Wash.2d 359, 617 P.2d 704 (1980). The issue of the decedent's capacity to contract is legal in nature, and the right to a jury trial on that issue should be protected under the Washington constitution. When a court has been called upon to construe a contract, determine if a breach has occurred, and determine what damages, if any, flow therefrom. It is well settled that these are legal issues. *Durand v. Heney*, 33 Wash. 38, 73 P. 775 (1903). The issue of the decedent's capacity to contract is akin to the decision made on capacity in civil commitment proceedings. In that context, the right to a jury trial is protected by Art. 21. *Quesnell v. State*, 517 P.2d 568, 83 Wn.2d 224 (1973).

The pleadings in this matter, CP 3-6, establish that this is an action for personal injury. It is well settled that the right to jury trial is protected in such an action. The same is true with respect to contract claims. The former RCW § 7.04.040 provided for a jury trial to resolve substantial issues of fact regarding an arbitration, and the right to a jury trial on Henry Woodall's capacity should be protected in this case.

F. Plaintiff did raise the issue of the burden of proof at the trial court level.

Avalon argues that Plaintiff did not raise the issue of the evidentiary standard required to show procedural and substantive unconscionability of the arbitration agreement at the trial court level.

Avalon also claims that this argument should not be considered because it allegedly was not raised in the Motion for Discretionary Review. The later argument has been addressed in Section IV.C. of this brief. *Supra*, at pp. 18-19. Plaintiff did raise the standard of proof at the trial court level. See CP 47-48. The plaintiff cited the court to the *Adler* case and to the evidence supporting procedural unconscionability, and made the claim that the agreement was procedurally unconscionable based on the *Adler* test and the evidence presented. The trial court chose to require a showing of incapacity by clear and convincing evidence. CP 212.

The clear and convincing standard preferred by Avalon is not the law as previously noted in Section IV.B., pp. 16-17, of this brief. The Washington Supreme Court in *Adler*, 153 Wn.2d at 345, only required the plaintiff to show that plaintiff lacked a meaningful choice under the facts and circumstances. Plaintiff offered this proof in this case, and the trial court erred in requiring proof of lack of capacity and proof by clear, cogent and convincing evidence. There is no evidence whatsoever of lack of capacity of the plaintiff in the *Adler* case, and no was no need for the Plaintiff here to show a lack of capacity in order to set aside an arbitration agreement based on the doctrine of procedural unconscionability.

G. The trial court erred in setting aside the Affidavit of George Glass, M.D.

Avalon argues that the issue of the admissibility of the Declaration

of Dr. George Glass is not before the court because it was not appealed. The issue regarding the declaration of Dr. Glass is properly before the court. The Plaintiff filed a motion for discretionary review of the order compelling arbitration of the survival claims, CP 141-42, and asked the court to grant discretionary review with respect to the later rejection of the declaration of Dr. Glass. See Motion for Discretionary Review, pp. 1-2. RAP 2.4(b) allows review of the order setting aside the Avalon here. This order prejudicially affects the decision designated in the notice because it contains an evidentiary ruling on admissibility of evidence that impacts the record on appeal. The order was further entered on February 4, 2009, before the court accepted review. CP 212.

Avalon claims that the decision of the trial court not to consider the Declaration of Dr. Glass should be a reviewed for abuse of discretion. This is not the standard of review on decisions pertaining to an arbitration agreement, which are reviewed under the de novo standard. *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004-05 (Wash. 2007). Avalon also states that Dr. Glass did not state the basis and foundation for his opinion. This is incorrect. Dr. Glass stated the basis and foundation for his opinion as records review and review of the Declaration of Clifford Wayne Woodall. CP 86-87.

Avalon cites the court to FRE 703 and claims that the trial court was correct in stating that “the facts contained in the document were not

before the court in admissible form...” FRE 703 does not require that the facts or data relied on by an expert be admissible into evidence.

Avalon does not cite to any authority that supports the claim that Dr. Glass’s Affidavit lacks sufficient foundation. The declaration sets forth the foundation based on record review and based on the sworn declaration of Clifford Wayne Woodall. Dr. Glass could hardly have interviewed the decedent in this matter. It is difficult to conceive what other foundation Dr. Glass’s declaration could have contained. The records he reviewed were not required to be admitted under FRE 703. Records review is the standard method for providing expert testimony. In this case, the Plaintiff merely needed to establish that the decedent lacked a meaningful choice under the circumstances. *Adler*, 153 Wn.2d at 345. The evidence presented regarding Clifford Woodall’s condition did just that, and the trial court erred in declining to consider the declaration of Dr. Glass.

V. CONCLUSION

This court should accept review for the reasons above and reverse the trial court’s ruling that the survival claims in this matter shall be arbitrated. The trial court should affirm the portion of the trial court’s order denying arbitration with respect to the wrongful death claims.

Respectfully Submitted,

Stephen Hornbuckle

Stephen Hornbuckle

WSBA#: 39065

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 30th day of December, 2009, at Bellevue, Washington, the foregoing was caused to be served in the following person(s) in the manner indicated:

Christopher H. Howard Mary Jo Newhouse SCHWABE, WILLIAMSON & WYATT US Bank Center 1420 5 th Avenue, Suite 3010 Seattle, WA 98101 Attorneys for Defendant, Avalon Care Center - Federal Way, LLC	VIA REGULAR MAIL _____ VIA CERTIFIED MAIL _____ HAND DELIVERED <input checked="" type="checkbox"/> BY FACSIMILE _____ VIA OVERNIGHT MAIL _____
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Stephen Hornbuckle

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