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NO. 62894-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CLIFFORD WAYNE WOODALL, individually and as representative of the
ESTATE OF HENRY WAYNE WOODALL; and SHARON G. WOODALL
KING,

Respondents,

vs.

AVALON CARE CENTER – FEDERAL WAY, L.L.C.,

Appellant.

OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 2

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 2

IV. ARGUMENT 3

 A. Summary of Argument 3

 B. The Review of the Trial Court's Decision to Compel Arbitration of the Survival Claims in this Case is De Novo 3

 C. The Arbitration Agreement Providing for a Waiver of the Right to Jury Trial is Illegal under Washington Law 3

 1. The Pre-Dispute Signing of an Arbitration Agreement Undermines Residents' Rights 4

 2. The Arbitration Agreement in this Matter Violates RCW 70.129.105 5

 D. The Arbitration Agreement is Procedurally and Substantively Unconscionable Because of the Physical and Mental Disability Of Wayne Woodall 7

 1. The Doctrine of Substantive Unconscionability Applies to Arbitration Agreements Under State Law 7

 2. The Arbitration Agreement Sought to be Enforced by Avalon is Substantively and Procedurally Unconscionable based on the mental and physical condition of Henry Wayne Woodall 8

 3. Alternatively, the Trial Court should have Held a Hearing on the Capacity of Henry Woodall to Contract 10

 4. Alternatively, RCW 7.04A.070(1) is unconstitutional 10

 E. The Trial Court's Order Compelling Arbitration of the Survival Action Should be Reversed Because Plaintiff Cannot Afford Arbitration 14

| | | |
|----|---|----|
| F. | The Trial Court Correctly Decided that a Decedent Cannot Bind the Independent Wrongful Death Claims that Belong to the Individual Wrongful Death Claimants..... | 17 |
| 1. | The Wrongful Death Claimants are not Parties to the Arbitration Agreement and are not Bound by it..... | 17 |
| 2. | Henry Woodall did not have Authority to Bind the Wrongful Death Claimants to an Arbitration Agreement.... | 18 |
| 3. | Authority from Other States Suggests that the Wrongful Death Claims in this Matter are not Governed by an Arbitration Agreement Signed by the Decedent..... | 20 |
| G. | This Court has Jurisdiction to Hear this Appeal Under RAP 2.3(B)(2)..... | 23 |
| 1. | Argument Why Review Should Be Accepted..... | 24 |
| V. | CONCLUSION | 25 |

TABLE OF AUTHORITIES

FEDERAL CASES

| | |
|--|----|
| <i>Callie v. Near</i> , 829 F.2d 888, 890 (9th Cir. 1987) | 12 |
| <i>Cap Gemini Ernst & Yound, U.S., LLC v. Nackel</i> , 346 F.3d 360, 364 (2d Cir. 2003) | 8 |
| <i>Clay v. Permanente Medical Group, Inc.</i> , 540 F.Supp.2d 1101 | 20 |
| <i>Doctor's Assocs., Inc. v. Casarotto</i> , 517 U.S. 681, 687 (1996) | 8 |
| <i>First Options of Chicago, Inc. v. Kaplan</i> , 514 U.S. 938, 944 (1995) | 8 |
| <i>Gatz v. Southwest Bank of Omaha</i> , 836 F.2d 1089, 1095 (8th Cir. 1988) | 12 |
| <i>Glasser v. United States</i> , 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) | 14 |
| <i>Luna v. Household Finance Corp. III</i> , 236 F.Supp. 2d 1166, 1183 (W.D. Wash. 2002) | 4 |
| <i>Murchison v. Grand Cypress Hotel Corp.</i> , 13 F.3d 1483, 1486 (11th Cir. 1994) | 11 |
| <i>RE/MAX Int'l, Inc. v. Realty One, Inc.</i> , 271 F.3d 633, 646 (6th Cir. 2001) | 11 |

STATE CASES

| | |
|---|-----------------|
| <i>Adler v. Fred Lind Manor</i> , 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2005) | 7, 8, 9, 10, 15 |
| <i>Ebsary v. Pioneer Human Services</i> , 796 P.2d 769, 59 Wn.App. 218, 227-28 (Wash. App. 1990) | 23 |
| <i>Gall v. McDonald Industries</i> , 926 P.2d 934, 938, 84 Wn.App. 194 (Wash.App. Div. 2, 1996) | 17 |
| <i>Golberg v. Sanglier</i> , | |

| | |
|--|--------|
| 27 Wash.App. 179, 616 P.2d 1239 (1980) | 4 |
| <i>Gray v. Goodson</i> , 61 Wash.2d 319, 378 P.2d 413 (1963) | 18, 20 |
| <i>Hederman v. George</i> , 35 Wash.2d 357, 212 P.2d 841 (1949) | 4 |
| <i>Maciejczak v. Bartell</i> , 187 Wash. 113, 60 P.2d 31 (1936) | 18 |
| <i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wash.App. 446, 465, 45 P.3d 594 (2002) | 16 |
| <i>Nelson v. McGoldrick</i> , 127 Wn.2d 124, 131, 896 P.2d 1258 (1995) | 8 |
| <i>Owens v. Kuro</i> , 56 Wn.2d 564, 571, 354 P.2d 696 (Wash. 1960) | 25 |
| <i>Reed v. Johnson</i> , 27 Wash. 42, 67 P. 381 (1901) | 4 |
| <i>Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.</i> , 96 Wn.2d 939, 944, 640 P.2d 1051 (1982) | 17 |
| <i>Scott v. Cingular Wireless</i> , 161 P.3d 1000, 1004-05 (Wash. 2007) | 3 |
| <i>Sienkiewicz v. Smith</i> , 30 Wash.App. 235, 633 P.2d 905 (1981) | 4 |
| <i>Sofie v. Fibreboard Corp.</i> , 112 Wash.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989) | 13 |
| <i>State v. Forza</i> , 70 Wash.2d 69, 422 P.2d 475 (1966) | 14 |
| <i>Warner v. McCaughan</i> , 77 Wash. 2d 178, 179, 460 P.2d 272 (1969) | 18 |
| <i>Wilson v. Horsley</i> , 974 P.2d 316, 137 Wn.2d 500,509 (Wash. 1999) | 14 |
| <i>Wood v. Dunlop</i> , 83 Wn.2d 724, 521 P.2d 1177 (Wash. 1974) | 23 |

OTHER STATE CASES

Brake Masters Sys., Inc. v. Gabbay,
206 Ariz. 360, 78 P.3d 1081, 1084 (App.2003) 11

Buckner v. Tamarin,
98 Cal.App.4th 140, 119 Cal. Rptr.2d 489 (2002) 21

Bybee v. Abdulla,
189 P.3d 40, 46 (Utah 2008) 21

DiFrancesco v. Particle Interconnect Corp.,
39 P.3d 1243, 1247 (Colo. App. 2001) 12

Jack B. Anglin Co. v. Tipps,
842 S.W.2d 266, 269 (Tex.1992) 11

Lawrence v. Beverly Manor,
273 S.W.3d 525 (Mo. 2009) 22

Moran v. Guerreiro,
37 P.3d 603, 620 (Haw. App. 2001) 12

Peters v. Columbus Steel Castings Co.,
873 N.E.2d 1258, 115 Ohio St.3d 134, (Ohio 2007) 21

Rulli v. Fan Co.,
683 N.E.2d 337, 339 (Ohio 1997) 12

STATE STATUTES

RCW 7.04.040..... 11, 13

RCW 7.04A.060(1)..... 8

RCW 7.04A.070(1)..... 11, 13, 14

RCW 18.51..... 7

RCW 70.34.200(3)..... 1

RCW 70.129.005..... 3, 5, 6, 24

RCW 70.129.020..... 5

RCW 70.129.030(1)..... 5

RCW 70.129.105 **1, 2, 3, 5, 6, 7, 24**

RCW 70.129.150(1) **5**

UNITED STATES CONSTITUTION

1 USC § 21 **6, 13**

9 USC § 2 **8**

I. INTRODUCTION

Respondent/Cross-Appellant Clifford Woodall, as Representative of the Estate of Wayne Woodall (“Woodall”) appeals the partial granting of a motion to compel arbitration. The trial court granted Defendant/Appellant Avalon Care Center - Federal Way, LLC’s (“Avalon”) motion to compel arbitration with respect to the survival claims in this case. The trial court denied that same motion with respect to the wrongful death claims, splitting the claim into two actions in two different forums. Woodall appeals that portion of the trial court’s order compelling arbitration with respect to the survival claims.

The Washington State Legislature on many occasions has recognized the particular vulnerability of residents living in long-term care facilities. The Legislature has passed comprehensive laws setting forth residents’ rights, including a provision that said facilities cannot ask residents to waive their rights, RCW 70.129.105, and because care in these facilities has too often been abysmally poor, the Legislature gave residents and other vulnerable adults a powerful statutory cause of action for neglect or abuse, and included in it the practical enforcement mechanism of providing the prevailing plaintiff the right to attorney’s fees and costs, liberally defined to include experts’ fees. RCW 70.34.200(3).

Avalon violated Woodall’s rights by having him sign an arbitration agreement waiving his right to a jury trial and requiring that he arbitrate claims for neglect before an arbitrator. Wayne Woodall suffered from dementia and

complete deafness, and asking him to sign an arbitration agreement waiving his right to jury trial was exactly the sort of scenario that RCW 70.129.105 was designed to prevent. The trial court should have denied Avalon's motion to compel arbitration in its entirety, and this court should reverse that portion of the trial court's decision ordering arbitration of the survival claims and remand this case for a trial on the merits.

II. ASSIGNMENT OF ERROR

The trial court erred when it granted the portion of Avalon's Motion to Compel Arbitration that applied to Woodall's survival claims.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err in its partial granting of Avalon's Motion to Compel Arbitration as to the survival claims where

- (1) Washington statutes broadly prohibit facilities such as Avalon from asking residents to sign a waiver of rights,
- (2) The resident was shown by uncontroverted evidence to be completely deaf and demented, and
- (3) The plaintiff and estate representative presented uncontroverted evidence that he could not afford to pay an arbitrator.

What is the burden of proof on the Plaintiff in showing that

- (1) The arbitration agreement at issue is procedurally unconscionable because Henry Wayne Woodall did not have a meaningful opportunity to understand the terms of the arbitration agreement due to his deafness and dementia; or
- (2) The waiver of Plaintiff's right to jury trial was not knowing, voluntary and intelligent because Plaintiff was deaf and suffered from dementia; or

- (3) Plaintiff did not have the capacity to contract because of his disability.

IV. ARGUMENT

A. Summary of Argument

The arbitration agreement sought to be enforced in this matter is procedurally and substantively unconscionable. The agreement is illegal under the plain language of RCW 70.129.105 prohibiting facilities such as Avalon from asking residents such as Wayne Woodall to sign a waiver of rights. Asking a deaf and demented resident such as Wayne Woodall to give up important rights such as the right to a jury trial is exactly the sort of act that RCW 70.129.105 was designed to prevent. The arbitration agreement in this matter is procedurally and substantively unconscionable based on the physical and mental condition of Wayne Woodall. The trial court applied the incorrect burden of proof with respect to the waiver of the right to jury trial. Plaintiff must merely offer evidence that the waiver was not knowing, voluntary and intelligent.

B. The Review of the Trial Court's Decision to Compel Arbitration of the Survival Claims in this Case is De Novo.

A trial court's decision on a motion to compel arbitration is subject to de novo review. *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004-05 (Wash. 2007).

C. The Arbitration Agreement Providing for a Waiver of the Right to Jury Trial is Illegal under Washington Law.

The arbitration agreement sought to be enforced by Avalon is plainly illegal under Washington law. RCW 70.129.105; 70.129.005. As a general rule,

the courts of this state will not enforce agreements which are illegal or contrary to public policy. *Sienkiewicz v. Smith*, 30 Wash.App. 235, 633 P.2d 905 (1981); *Golberg v. Sanglier*, 27 Wash.App. 179, 616 P.2d 1239 (1980). Rather, the courts will leave the parties where it finds them. *Hederman v. George*, 35 Wash.2d 357, 212 P.2d 841 (1949); *Reed v. Johnson*, 27 Wash. 42, 67 P. 381 (1901).

1. The Pre-Dispute Signing of an Arbitration Agreement Undermines Residents' Rights.

Avalon had Wayne Woodall sign the agreement on the same day as his admission to the facility. CP 34,58. DSHS has addressed this issue in a guidance letter sent to all long term care facilities, stating: "Residents and representatives should not be presented with arbitration agreements at the time of admission because the resident may be too overwhelmed to understand the implications of the agreement, and may erroneously conclude that the agreement needs to be signed in order to be admitted." CP 61.

When evaluating whether an agreement is substantively unconscionable, courts must consider the terms of the agreement in light of the totality of the circumstances existing when the contract was made. *Luna v. Household Finance Corp. III*, 236 F.Supp. 2d 1166, 1183 (W.D. Wash. 2002). In this case, the Plaintiff's status as an elderly vulnerable adult needing facility care must be considered a significant part of the totality of the circumstances.

Long-term care facilities have an obligation to inform residents in writing of their rights *prior* to admission, an obligation to "protect and promote the rights

of each resident,” an obligation to provide an admission contract consistent with the residents’ rights law, and are prohibited from asking residents to waive their rights. RCW 70.129.030(1); 70.129.020; 70.129.150(1); 70.129.105. These statutes reflect the Legislature’s awareness of the vulnerability of residents, of the dynamic between residents and care facilities. The plain language of these statutes must be enforced if they are to have any meaning. Residents are easy prey to strong arm tactics and one-sided or harsh contract language. Avalon’s choice to have residents sign a pre-dispute binding agreement that waives the resident’s right to jury trial constitutes a prohibited waiver of resident’s rights under these statutes.

2. The Arbitration Agreement in this Matter Violates RCW 70.129.105.

RCW 70.129.105 prohibits facilities from requesting residents to “sign waivers of residents’ rights set forth in this chapter or in the applicable licensing or certification laws.” The residents’ right to a jury trial is one of the rights which a resident cannot be asked to waive. This is made clear in RCW 70.129.005, which provides: “(1) The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States and the State of Washington.” And: “It is the intent of the legislature that individuals who resident in long-term care facilities ... continue to enjoy their basic civil and legal rights.” Asking a vulnerable resident to sign an arbitration agreement which gives up the right to jury trial is the same as asking the resident to waive this important

right, in violation of RCW 70.129.105.

Woodall asks the Court to rule that the arbitration agreement in this matter violates RCW 70.129.105. The legislature has in plain language tried to protect against allowing a facility such as Avalon to ask residents to sign any documents containing waivers of rights. It would be appropriate and helpful to this and other vulnerable residents in the state of Washington for the Court to rule that Avalon cannot ask residents or their representatives to sign arbitration agreements that waive residents' rights, including the right to jury trial, and that doing so was in violation of RCW 70.129.105.

Any other conclusion renders the plain language of RCW 70.129.105 and 70.129.005 meaningless. RCW 70.129.005 protects the basic civil and legal rights of a resident such as Wayne Woodall. Although the statute does not define the basic civil and legal rights that are protected, common sense and logic suggest that the right to a jury trial is a basic civil and legal right that is meant to be protected. The plain language of the phrase "basic civil and legal rights" should be read to include the right to a jury trial. The Washington Supreme Court has noted that the right to jury trial is protected by article 1, section 21 of the Washington Constitution and is inviolate. An "inviolable" right to trial by jury is logically a right that it is basic civil and legal right meant to be protected by RCW 70.129.005 and 70.129.105.

A facility such as Avalon cannot ask a resident such as Wayne Woodall to waive the basic civil and legal right to a jury trial under RCW 70.129.105. "No

long-term care facility or nursing facility licensed under chapter 18.51 RCW shall not require or request residents to sign waivers of potential liability for losses of personal property or injury, or to sign waivers of residents' rights set forth in this chapter....” The arbitration agreement that is the subject of this appeal does exactly what is prohibited by RCW 70.129.105. It asked Woodall to sign a waiver of his rights. This waiver is explicit: “We expressly understand and waive all rights to pursue any legal action to seek damages or any other remedies, including the constitutional right to have any claim decided in a court of law before a judge and a jury....” CP 32. This waiver is the heart of the arbitration agreement sought to be enforced in this appeal. The requested waiver of Wayne Woodall’s rights violates Washington law and should not be enforced by this Court.

The trial court’s order compelling arbitration of the survival claims in this matter, CP 141-42, should be reversed, and this case should be remanded for trial on the merits.

D. The Arbitration Agreement is Procedurally and Substantively Unconscionable Because of the Physical and Mental Disability of Wayne Woodall.

The arbitration agreement is further unconscionable because of the mental and physical disability of Wayne Woodall. Because of this disability, the arbitration agreement is not enforceable under the doctrines of procedural and substantive unconscionability, as recognized by Washington courts in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2005).

1. The Doctrine of Substantive Unconscionability Applies to

Arbitration Agreements Under State Law.

Under federal and state law, arbitration provisions in contracts are deemed to be “valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.” 9 USC § 2; RCW 7.04A.060(1). The purpose of Congress in enacting the federal law “was to make arbitration agreements as enforceable as other contracts, *but not more so.*” *Cap Gemini Ernst & Young, U.S., LLC v. Nackel*, 346 F.3d 360, 364 (2d Cir. 2003)(emphasis original). In determining the validity of an arbitration provision, courts “should apply ordinary state-law principles that govern the formation of contract.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). “Thus, generally applicable defenses, such as ... unconscionability, may be applied to invalidate arbitration agreements.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Whether a contract is unconscionable, “is a question of law for the courts.” *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995); *see also* RCW 7.04A.060(2).

Washington courts recognize two categories of unconscionability: procedural and substantive. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2005). Substantive unconscionability involves cases where a clause or term in the contract is alleged to be one-sided or overly harsh. *Fred Lind Manor, id.* Substantive unconscionability alone can support a finding of unconscionability. *Fred Lind Manor, id.* at 347.

2. The Arbitration Agreement Sought to be Enforced by Avalon is

Substantively and Procedurally Unconscionable based on the mental and physical condition of Henry Wayne Woodall.

"Procedural unconscionability is the lack of a meaningful choice, considering all the circumstances surrounding the transaction including [t]he manner in which the contract was entered, whether the party had a reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print." *Adler*, 153 Wn.2d at 345 (internal quotations and citations omitted).

Henry Wayne Woodall did not have a meaningful opportunity to understand the terms of the arbitration agreement because he was deaf and suffered from dementia. CP 68-69; 58; 86-87. The arbitration agreement contains 3 pages of dense legalese. CP 32-34. Because of his dementia, Mr. Woodall could not possibly have understood the arbitration agreement. CP 86-87. The facility took advantage of Mr. Woodall's condition in inducing him to sign the arbitration agreement. The declarations of Clifford Wayne Woodall and Dr. George Glass, MD, made it clear that Henry Woodall could not have understood the arbitration agreement and that it could not have been explained to him because he was deaf. CP 68-69; 86-87. The facility admission record shows that Mr. Woodall had a diagnosis of dementia on October 6, 2006, when the arbitration agreement was signed. CP 58. Under these facts, the trial court should have found that the arbitration agreement was not enforceable under the doctrines of procedural and substantive unconscionability, or should have held an evidentiary hearing to

resolve the fact question on that issue.

Plaintiff demonstrated to the trial court that Woodall did not have the ability to understand complex concepts. Henry Woodall therefore did not have a “reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 345, 103 P.3d 773, 781 (2005). This is the test for procedural unconscionability, and it is clear that an 84 year old resident of a nursing home with dementia, who could not understand who his own nephew was, did not have a “reasonable opportunity to understand the terms of the contract.”

3. Alternatively, the Trial Court should have Held a Hearing on the Capacity of Henry Woodall to Contract.

Alternatively, Henry Woodall raised a fact question on whether Woodall had have the capacity to contract and give up his right to jury trial as provided in the arbitration agreement. The declarations of Dr. George Glass and Clifford Woodall, CP 86-87; 68-69, establish that Henry Woodall was completely deaf, had dementia and could not possibly have understood the arbitration agreement at issue in this case. The declaration of George Glass demonstrated that Henry Woodall could not possibly have understood the arbitration agreement under this test. Dr. Glass is a medical doctor and psychiatrist and is qualified to assess Henry Woodall’s mental capacity. CP 86-87.

This evidence raised a fact question that should have been decided by the Court following an evidentiary hearing. The relevant portion of the statute

governing this question provides:

(1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. **If the refusing party opposes the motion, 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). Woodall has been unable to locate a Washington case interpreting this statute. RCW § 7.04.040 formerly governed this issue and provided for a jury trial to resolve substantial issues of fact related to a motion to compel arbitration.

However, Woodall has located authority from federal and state courts that address the issue of whether the trial court should hold an evidentiary hearing when a fact question exists regarding the enforceability of an arbitration agreement. Where the facts necessary to determine a motion to compel arbitration are controverted, the trial court must hold an evidentiary hearing to determine the disputed material facts. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex.1992). When a genuine issue of material fact exists on the existence or terms of an arbitration agreement, numerous state and federal courts have held that the trial court should hold an evidentiary hearing. *Brake Masters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 78 P.3d 1081, 1084 (App.2003). *RE/MAX Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 646 (6th Cir. 2001) (evidentiary hearing required if facts material to agreement are disputed); *Murchison v. Grand Cypress Hotel*

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Corp., 13 F.3d 1483, 1486 (11th Cir. 1994) (summary enforcement of alleged settlement agreement improper when substantial factual dispute exists on terms of agreement); *Gatz v. Southwest Bank of Omaha*, 836 F.2d 1089, 1095 (8th Cir. 1988) (district court must hold evidentiary hearing when substantial factual dispute exists on existence or terms of settlement agreement); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987) (“[W]here material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing.”); *DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1247 (Colo. App. 2001) (if terms or existence of settlement agreement are in dispute, evidentiary hearing is required); *Moran v. Guerreiro*, 37 P.3d 603, 620 (Haw. App. 2001) (motion to enforce settlement agreement may not be decided summarily if there is any question of fact on whether mutual, valid, and enforceable settlement agreement exists); *Rulli v. Fan Co.*, 683 N.E.2d 337, 339 (Ohio 1997) (when parties dispute meaning of terms of settlement agreement or existence of settlement agreement, trial court must conduct evidentiary hearing before enforcing agreement).

The trial court erred in applying a burden of “clear, cogent and convincing evidence” to Plaintiff’s evidence of incapacity. CP 212. Rather, Plaintiff needed only to raise a fact question, which the trial court should have resolved by evidentiary hearing. The trial court itself evidently believed that Plaintiff’s evidence raised a fact question regarding Wayne Woodall’s capacity. CP 91. The trial court asked the parties for briefing on “The procedural means by which the

Court should resolve a significant factual dispute upon which this question of law may depend (i.e., was there a patent incapacity that renders the arbitration agreement procedurally unconscionable?).” *Id.* Plaintiff’s evidence raised a fact question on capacity, and whether this evidence was “clear, cogent and convincing” should have been resolved following an evidentiary hearing. This court should set aside the order compelling arbitration of the survival claims in this matter and remand for an evidentiary hearing on the capacity of Wayne Woodall to contract.

4. Alternatively, RCW 7.04A.070(1) is unconstitutional.

RCW 7.04A.070(1) violates Plaintiff’s constitutional right to a jury trial on the issue of whether an arbitration agreement is enforceable. Art. I §21 protects the right to a jury trial and provides for waiver only “where the consent of the parties interested is given thereto.” Where evidence suggests that a party did not have the capacity to consent to a waiver of the right to jury trial, Plaintiff believes that the Washington constitution requires a jury trial on that question. This is a question of first impression because the former RCW § 7.04.040 provided for a jury trial to resolve substantial issues of fact regarding an arbitration.

The Washington State Constitution unequivocally guarantees that “[t]he right of trial by jury shall remain inviolate....” Const. Art. I, § 21. An inviolate right “must not diminish over time and must be protected from all assaults to its essential guaranties.” *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d

711, 780 P.2d 260 (1989). Moreover, any waiver of a right guaranteed by a state's constitution should be narrowly construed in favor of preserving the right. *Wilson v. Horsley*, 974 P.2d 316, 137 Wn.2d 500,509 (Wash. 1999). A waiver of that right must be voluntary, knowing, and intelligent. *State v. Forza*, 70 Wash.2d 69, 422 P.2d 475 (1966). Additionally, a court must indulge every reasonable presumption against waiver of fundamental rights. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). The trial court applied the incorrect burden on Plaintiff when it required presentation of clear, cogent and convincing evidence, CP 212, before setting aside the arbitration agreement. The evidence of the physical and mental disability of Henry Woodall, CP 68-69, 86-87, demonstrated that the waiver of the jury trial right contained in the arbitration agreement could not have been knowing, voluntary, and intelligent. The Washington State Constitution protected Henry Woodall's right to jury trial on the question of his capacity to waive his right to jury trial. RCW 7.04A.070(1) is an unconstitutional invasion of the right to jury trial, and the trial court erred in deciding the issue of Henry Woodall's capacity without an evidentiary hearing or a jury trial.

E. The Trial Court's Order Compelling Arbitration of the Survival Action Should be Reversed Because Plaintiff Cannot Afford Arbitration.

The trial court erred in granting Avalon's motion to compel arbitration of the survival claims because the evidence demonstrated that the Plaintiff cannot afford to pay an arbitrator. The plaintiff Clifford Woodall has very limited means

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and cannot afford to pay an arbitrator \$350 per hour to consider this case. Mr Woodall states in his declaration:

My only means of support is the following: social security, which is currently \$1358 per month; and a disability pension of \$1683 per month through the state of Washington. ... I cannot afford to pay an arbitrator's fees in the matter. I use the entirety of my limited income for my support and medical bills and there is nothing left over to pay an arbitrator. Requiring me to arbitrate this case prevents me from bringing the case at all because I cannot pay an arbitrator's fees.

CP 68. This evidence demonstrates by itself that the arbitration Agreement is unconscionable. The arbitration agreement requires the Plaintiff to pay the cost of their arbitrator and one-half of the cost of a neutral arbitrator. This agreement provides that: "Each party shall equally share in the expenses of the neutral arbitrator. ... The Resident and Facility shall pay the fees and expenses of their own selected arbitrator." CP 32-33. Woodall proved the cost of arbitration through the Declaration of Patricia Willner, which demonstrated that an arbitrator's fees in this matter would be in excess of of \$350.00 per hour. CP 70. Because the plaintiff in this matter has no extra income to pay an arbitrator as established by the undisputed evidence, and the arbitration agreement in this matter is unconscionable and should not have been enforced by the trial court.

Requiring the plaintiff to pay \$350 per hour to an arbitrator to decide this case effectively prevents the case from being litigated. The cost sharing provisions of the arbitration agreement render the agreement unconscionable. In *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 353, 103 P.3d 773, 781 (2005), the Washington Supreme Court held that evidence of the Plaintiff's finances and the

cost of arbitration was sufficient to show that an arbitration agreement was unconscionable based on a cost sharing provision. Woodall offered exactly this sort of evidence to the trial court, which was disregarded in the order granting Avalon's motion to compel arbitration with respect to the survival claims. CP 141-42. The order compelling arbitration should be set aside based on this uncontroverted evidence, and the arbitration agreement should be held to be unconscionable just as the agreement in *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 465, 45 P.3d 594 (2002), was shown to be unconscionable. "[O]nce the plaintiff has shown the likelihood of incurring prohibitive arbitration costs, the onus is on the party seeking arbitration to provide contrary evidence." *Id.* at 603.

The evidence presented to the trial court is very similar to that considered by the court in *Mendez*, which found the arbitration agreement to be unconscionable. The Plaintiff in *Mendez* presented evidence of his limited finances, *Id.* at 465, just as the plaintiff in this case has. CP 68-69. The plaintiff's evidence of the cost in arbitration in this case gives greater detail regarding the cost of arbitration that the Plaintiff in *Mendez*, CP 70-71, who offered only evidence of the \$2000 filing fee. *Mendez*, 111 Wash.App. at 465. Just as in the *Mendez* case, the Defendants in this case have not disputed Plaintiff's claim to be unable to afford arbitration, nor did the Defendant in this case offer offsetting evidence to enforce arbitration. *Id.* at 470. The evidence of prohibitive costs in *Mendez* showed that the plaintiff in that case could not afford even a \$500 filing

fee, and this evidence was sufficient to find that the arbitration agreement in that case was unconscionable. *Id.* The plaintiff in this matter, Clifford Woodall, has provided very similar evidence of a fixed, limited income and lack of disposable income such that he cannot afford arbitrator's fees. CP 68-69. The trial court in this matter should have come to the same conclusion that the trial court and appeals court in *Mendez* did - that the arbitration agreement was unconscionable and should not be enforced due to prohibitive costs to the plaintiff. The order compelling arbitration of the survival claims should be set aside on this basis, and these claims should be remanded for trial on the merits.

F. The Trial Court Correctly Decided that a Decedent Cannot Bind the Independent Wrongful Death Claims that Belong to the Individual Wrongful Death Claimants.

1. The Wrongful Death Claimants are not Parties to the Arbitration Agreement and are not Bound by it.

Most contracts bind only those who bargain for them. Restatement (Second) of Contracts § 17(1) (1981). A contract cannot reduce or diminish the legal rights of those not a party to it. *Gall v. McDonald Industries*, 926 P.2d 934, 938, 84 Wn.App. 194 (Wash.App. Div. 2, 1996). Avalon had the burden to show the existence of a contract between Avalon and the wrongful death claimants. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). The record contains no evidence that the wrongful death claimants, Sharon King and Clifford Wayne Woodall entered into

a contract with Avalon. Avalon had the burden to offer this evidence and did not do so.

2. Henry Woodall did not have Authority to Bind the Wrongful Death Claimants to an Arbitration Agreement.

Washington law is unequivocal on the nature of a wrongful death action.

A wrongful death action does not derive from the decedent and does not belong to him:

The second claim for damages springs from the wrongful-death statutes which create a new cause of action for the benefit of decedent's heirs or next of kin, in accordance with the terms of the statute, based upon the death itself. Although originating in the same wrongful act, **the wrongful-death action is for the alleged wrong to the statutory beneficiary.** The estate of decedent does not benefit by the action; **the claim of damages for the wrongful death is not one that belonged to decedent.** *Gray v. Goodson*, 61 Wash.2d 319, 378 P.2d 413 (1963), quoting *Maciejczak v. Bartell*, 187 Wash. 113, 60 P.2d 31 (1936).

Warner v. McCaughan, 77 Wash. 2d 178, 179, 460 P.2d 272 (1969). Woodall suggests that only one conclusion can be drawn from this discussion. The claim for wrongful death did not belong to Henry Woodall. Henry Woodall therefore did not have the authority to waive, release, or agree to arbitrate a claim for his wrongful death, just as the undersigned does not have the authority to sign a release for his neighbor's car accident case. The fact that the wrongful death claim derives from the wrongful act causing death does not grant Henry Woodall authority over a claim that does not belong to him. The trial court correctly concluded, and basic principles of contract law show that an individual has no authority to bind third parties with respect to claims that are not his.

Washington law favoring arbitration generally does not create authority for a signatory to an arbitration agreement to bind third parties with respect to claims that do not belong to him. The wrongful death claims do not belong to Henry Woodall or to his estate. There is no contract between Avalon and the wrongful death claimants, and those claims are not governed by an arbitration agreement which the beneficiaries of the claim for wrongful death did not sign. The trial court correctly decided based on principles of contract law and the nature of the wrongful death action that the decedent did not have authority to bind heirs to an arbitration agreement which they did not sign.

This is true regardless of who the nominal plaintiff in this action is. The fact that this action is brought by the personal representative of the estate on behalf of the wrongful death beneficiaries does not change the nature of the claim. It makes no difference whether Sharon King and Clifford Woodall are named individually as plaintiffs. The claim belongs to those individuals and not to Wayne Woodall. The representative of the estate merely brings the claim as agent for the wrongful death claimants. The claim does not belong to the representative of the estate any more than it belongs to the decedent. Because the wrongful death claim belongs to individuals who did not agree to arbitration, the trial court correctly decided that the owners of the wrongful death claim could not be bound by a contract they did not sign. Appellant's Motion to Dismiss, Opening Brief of Appellee, pp. 18-19, has no bearing on whether the wrongful death claimants should be forced to arbitrate under an agreement they never signed.

Under Washington law, the wrongful death claim is an action brought on behalf of the beneficiaries, who themselves have been injured by the death. And it is akin to a property right for these beneficiaries. *Gray v. Goodson*, 61 Wn.2d 319 (1963). Basic principles of contract law suggest that Henry Woodall cannot give up a claim that is not his. Since the claim for wrongful death is a property right that belongs to non-signatories to the arbitration agreement, then that property right cannot be bargained away by someone to whom the right does not belong. This court should affirm the decision of the trial court with respect to the claim for wrongful death in this matter.

3. Authority from Other States Suggests that the Wrongful Death Claims in this Matter are not Governed by an Arbitration Agreement Signed by the Decedent.

Avalon cites a California case holding that wrongful death claimants are bound by an arbitration agreement signed by the decedent and asks that this court follow that decision. Opening Brief of Appellant, p. 17; *Clay v. Permanente Medical Group, Inc.*, 540 F.Supp.2d 1101. This case contains a survey of California cases on whether non-signatory heirs can be bound by arbitration agreement signed by the decedent. A careful review of California law in fact shows that under these facts, California courts would not compel non-signatory heirs to arbitrate under an agreement which they did not sign.

The court in *Clay* summarized California law dealing with the issue of whether non-signatory wrongful death claimants can be bound by an arbitration agreement. The Court noted that one of the claimants was a spouse, who could be

bound to arbitrate by her spouse based on an agency relationship; and that the wrongful death action was an indivisible claim that could not be split across different forums. *Id.* at 1111. However, under California law in *Buckner v. Tamarin*, 98 Cal.App.4th 140, 119 Cal. Rptr.2d 489 (2002), the Court noted that absent an agency relationship, California courts have refused to hold non-signatories to arbitration agreements. *Id.* at 143. The Court noted that the decedent had no authority to bind his adult children to arbitration even though the agreement plainly and unambiguously purported to bind the decedent's heirs. *Id.* at 144. Similarly, the Court in this case should decline to bind the adult children of Clifford Woodall to a contract which they never signed. There is no evidence of an agency relationship between Henry Woodall and his adult children. In the absence of an agency relationship, Henry Woodall could not contract on behalf of his children and could not bargain with respect to claims that do not belong to him.

Courts of several states have reached the same result as the trial court in this case with respect to wrongful death claims of non-signatory heirs. *Bybee v. Abdulla*, 189 P.3d 40, 46 (Utah 2008)(holding that non-signatory heirs were not bound to arbitrate claims for wrongful death). Ohio courts have reached the same conclusion based on principles of contract law and the nature of the wrongful death claim; that is, the wrongful death action belongs to the heirs who did not sign the arbitration agreement and are not bound by it. *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 115 Ohio St.3d 134, (Ohio 2007). This reasoning

was followed by the Missouri Supreme Court in *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009), which held that the decedent could not agree to arbitrate wrongful death claims that were not his; and that the wrongful death claims that could not have been brought by the decedent could not be subject to an arbitration agreement signed by the decedent. *Id.* at 528-29.

The nature of the wrongful death claim in Washington suggests that the above cited authorities should govern the outcome of this question under Washington law. The wrongful death claim in Washington does not belong to the decedent, it belongs to the heirs. The damages that can be claimed in a wrongful death action, such as a claim for a loss of consortium, are damages to the heirs and not to the decedent. The claim for wrongful death is not an asset of the estate although it is brought by the personal representative as agent for the wrongful death claimants. These characteristics indicate that the wrongful death claim is a separate and distinct action from the survival claim which is a claim that the decedent could have brought if he were alive.

Avalon suggests that Henry Woodall could bind the wrongful death claimants to arbitrate just as he could bind his heir's ability to sell his property. Appellant's Opening Brief, at p. 8. It is indeed the case that Henry Woodall could make decisions regarding the disposal of his property after his death. However, it is not logically the case that Henry Woodall could bind his heirs with respect to a property right that belonged to the heirs and not to him. The wrongful death statute creates in the beneficiary a new and original cause of action upon the

wrongful death of one to whom he has the necessary statutory relationship. *Wood v. Dunlop*, 83 Wn.2d 724, 521 P.2d 1177 (Wash. 1974). This right, however, can be exercised only in the specific manner authorized by statute, i.e., by the personal representative of the deceased. *Id.* It would be incorrect to say that a cause of action for wrongful death 'vests' in the personal representative, to the exclusion of the beneficiaries, until recovery of a judgment or its equivalent. Rather, '(t)he right of action 'vests' in the personal representative only in a nominal capacity since the right is to be asserted in favor of the beneficiaries.' *Id.* At the time of the wrongful death when the cause of action accrues, the beneficiaries are then 'vested' with the right to the benefit of the cause of action. *Id.* The Washington Supreme Court in *Wood* made clear the nature of the wrongful death action as vesting in the heirs at the time of the wrongful death.

This vested right cannot be released by the decedent or settled without the consent of the wrongful death claimants. *Ebsary v. Pioneer Human Services*, 796 P.2d 769, 59 Wn.App. 218, 227-28 (Wash. App. 1990). Just as the wrongful death claim could not be released by the decedent, the decedent has no authority to bind the wrongful death claimants to arbitration. The trial court correctly decided that the arbitration agreement did not apply to the wrongful death claims in this case, and that finding should be upheld in this appeal.

G. This Court has Jurisdiction to Hear this Appeal Under RAP 2.3(B)(2).

The Commissioner's Ruling on Appealability, March 24, 2009, deferred to

the panel the decision on whether to accept review of the court's order compelling arbitration of the survival claims in this case. Woodall would show this court that this order, CP 141-42, should be the subject of discretionary review.

1. Argument Why Review Should Be Accepted

The trial court has committed probable error which substantially alters the status quo. As briefed above, the trial court disregarding uncontroverted evidence of inability to afford arbitration. This decision is probable error for the reasons set forth above. Further, this decision clearly is a substantial alteration of the status quo. As proved in the declaration of Clifford Woodall, the plaintiff is unable to proceed with the case if it is arbitrated because of the prohibitive cost of arbitration. CP 68-69. This is a clear alteration of the status quo because it shifts the survival claims from a low-cost forum, which plaintiff can afford, to a high-cost arbitration which plaintiff cannot afford.

The order compelling arbitration of the survival claims in this case is probable error for the reasons set forth above. As argued above, waivers of resident rights are prohibited under RCW 70.129.105; 70.129.005, and a waiver of the right to jury trial is one of the rights protected by RCW 70.129.005. The arbitration agreement should not have been enforced by the trial court for this reason alone. Additionally, the trial court erred in application of the burden of proof to plaintiff's claim that Henry Woodall could not have understood what he was signing when he signed the arbitration agreement. The trial court's order compelling arbitration altered the status quo because it split the claim into two

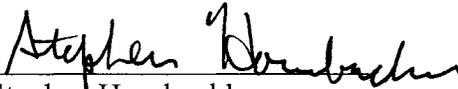
parts, each proceeding in different forums. A stay of the survival claims filed in state court alters the status quo because it forces the plaintiff to litigate in a forum not chosen by him. This order should be addressed on discretionary review.

Addressing the order on the survival claims further makes sense because the benefits of arbitration are already lost because the parties are drawn into the appellate process by the portion of the Court's denying arbitration with respect to the wrongful death claims. The court's order with respect to wrongful death is already being appealed by Avalon. Not accepting the order regarding the survival claims on discretionary review would subject to the case to unnecessary piecemeal appeals. *Owens v. Kuro*, 56 Wn.2d 564, 571, 354 P.2d 696 (Wash. 1960) ("Piecemeal appeal of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business.").

V. CONCLUSION

This court should accept review for the reasons stated in Part E and reverse the trial court's ruling that the survival claims in this matter shall be arbitrated.

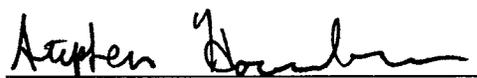
Respectfully Submitted,


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 5th day of October, 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 | <input checked="" type="checkbox"/> |
| | VIA CERTIFIED MAIL | <input type="checkbox"/> |
| | HAND DELIVERED | <input type="checkbox"/> |
| | BY FACSIMILE | <input type="checkbox"/> |
| | VIA OVERNIGHT MAIL | <input type="checkbox"/> |



Stephen Hornbuckle

APPENDIX

RCW 70.129.005 - Intent - Basic rights.

The legislature recognizes that long-term care facilities are a critical part of the state's long-term care services system. It is the intent of the legislature that individuals who reside in long-term care facilities receive appropriate services, be treated with courtesy, and continue to enjoy their basic civil and legal rights.

It is also the intent of the legislature that long-term care facility residents have the opportunity to exercise reasonable control over life decisions. The legislature finds that choice, participation, privacy, and the opportunity to engage in religious, political, civic, recreational, and other social activities foster a sense of self-worth and enhance the quality of life for long-term care residents.

The legislature finds that the public interest would be best served by providing the same basic resident rights in all long-term care settings. Residents in nursing facilities are guaranteed certain rights by federal law and regulation, 42 U.S.C. 1396r and 42 C.F.R. part 483. It is the intent of the legislature to extend those basic rights to residents in veterans' homes, boarding homes, and adult family homes.

The legislature intends that a facility should care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life. A resident should have a safe, clean, comfortable, and homelike environment, allowing the resident to use his or her personal belongings to the extent possible.

RCW 70.129.105 - Waiver of Liability and Resident Rights Limited.

No long-term care facility or nursing facility licensed under chapter 18.51 RCW shall require or request residents to sign waivers of potential liability for losses of personal property or injury, or to sign waivers of residents' rights set forth in this chapter or in the applicable licensing or certification laws.