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Supreme Court No. 91538-5
(Related Supreme Court No. 91852-0)
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.

REPLY IN SUPPORT OF DISCRETIONARY REVIEW

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ORIGINAL

Petitioner, Mary Rushing, submits this reply to the answer to her motion for discretionary review submitted by Respondents:

I. REPLY

A. Ms. Rushing's notice and motion for discretionary review of the superior court order compelling arbitration properly raise the issue of whether Respondents have the burden of proving that Robert Coon was competent to sign the arbitration agreement.

Respondents note that the superior court below denied Ms. Rushing's motion for summary judgment, seeking a determination that they were fiduciaries of Robert Coon and that the burden of proof should therefore be placed upon them to establish that Mr. Coon was competent to enter into an arbitration agreement. *See* Respondents' Answer to Motion for Discretionary Review, at 6-8 (hereafter "Resp. Ans."). Respondents also note that the denial of Ms. Rushing's motion for summary judgment on this issue was not reduced to writing, nor was it the subject of a separate notice of discretionary review. *See id.* On this basis, Respondents argue that "Petitioner did not preserve her fiduciary argument by her failure to obtain a written ruling on her argument and to include that written ruling as part of her motion for discretionary review." *Id.* at 8.

Respondents' argument is flawed because, while it would have been permissible to seek discretionary review of an order denying Petitioner's motion for summary judgment, it was not required. *See Douchette v. Bethel Sch. Dist.*, 117 Wn. 2d 805, 808, 818 P.2d 1362 (1991) (stating "[g]enerally, denial of a summary judgment motion is not an appealable order under RAP 2.2(a), and discretionary review is not ordinarily granted"). Respondents cite no authority, and provide no explanation why they believe Ms. Rushing was required to seek discretionary review of the denial of summary judgment. *See Resp. Ans.*, at 8.¹

The superior court's Order Compelling Arbitration of Claims of Mary Rushing as Administrator and On Behalf of the Estate of Robert Coon, dated April 10, 2015, placed the burden of proof on Ms. Rushing. Specifically, the order states: "Plaintiffs failed to meet their burden to prove by clear, cogent, and convincing evidence that Mr. Coon was not competent when he entered into the arbitration agreement." (Page 5, Conclusion of Law #2); *accord* Court's Decision, Mar. 4, 2015, at 12 (stating "the Court concludes that the

¹ The lack of a written order is irrelevant because "a party may seek discretionary review of any act of the superior court not appealable as a matter of right." RAP 2.3(a). The term *act* is broader in scope than order, decision or judgment. *See* Washington Appellate Practice Deskbook, § 6.4(1) (3d ed.). "It would include, for example, an oral decision, or even the court's refusal to enter a decision." 2A Wash. Pract., Rules Practice RAP 2.3 (7th ed.).

Plaintiffs have not met their burden”).² Discretionary review of this order adequately presents the question of placement of the burden of proof.³

B. In arguing that review should be denied because Ms. Rushing has not yet assigned error or provided argument regarding the lack of substantial evidence to support the superior court’s findings, Respondents improperly focus on the merits rather than the grounds for review.

Respondents contend that the superior court’s findings are presumed to be correct, and that “Petitioner had the burden to establish which particular findings are not supported by substantial evidence.” Resp. Ans., at 8. This contention conflates the merits of the case with the grounds for review. If review is accepted, Ms. Rushing will assign error to findings of fact and providing supporting argument, in light of the correct placement of the burden of proof. However, at this stage of proceedings, it would be premature.

² The order and decision are both attached to Ms. Rushing’s amended notice of discretionary review on file herein.

³ The scope of review of the superior court’s order compelling arbitration would be deemed to include the denial of summary judgment in any event under RAP 2.4(b)(1), because the denial of summary judgment prejudicially affects the designated order.

C. Respondents do not dispute that judicial economy is an appropriate basis to expand the scope of review when a case is otherwise properly before the Court.

Respondents complain that “[t]he concept of judicial economy is easily tossed around” and that the cases on which Ms. Rushing relies do not provide extended analysis of the concept. Resp. Ans., at 11-12 (brackets added). However, they do not take issue with the fact that the cited cases expanded the scope of review on grounds of judicial economy.

Ultimately, Respondents argue that “[t]he issues being raised by the Petitioner in these motions for discretionary review do not rise to the level of being appropriate for review at this time, particularly when the Petitioner failed to obtain a written order of the rulings she now changes or seek review of those rulings.” Resp. Ans., at 12. To the extent the argument is based on the lack of a written order or a prior notice of discretionary review, it has been addressed above. Otherwise, Respondents’ argument merely states a conclusion rather than providing any analysis as to why review should be denied.

Ms. Rushing has previously acknowledged that discretionary review of the superior court’s order compelling arbitration is not independently warranted. However, if the Court grants review of

the order staying litigation pending arbitration, then judicial economy militates in favor of reviewing both orders at the same time. The factual background for both orders is the same, and, while resolution of the stay issue would not resolve the burden of proof or substantial evidence issues arising from the order compelling arbitration, reversal of the order compelling arbitration might render it unnecessary to reach the stay issue.

The Court should grant discretionary review in this case and the related case (Cause No. 91852-0).

Respectfully submitted this 31st day of December, 2015.

s/George M. Ahrend

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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 December 31, 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 December 31, 2015 at Moses Lake, Washington.

s/George M. Ahrend

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Subject: Rushing v. Franklin Hills, SC #91538-5

Dear Mr. Carpenter,

Attached is a reply in support of discretionary review for filing in the above-referenced case. A certificate of service is included in the reply.

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