

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 07, 2015, 12:25 pm
BY RONALD R. CARPENTER
CLERK

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

RECEIVED BY E-MAIL

IN THE 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,

Plaintiff/Petitioner,

vs.

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

Defendants/Respondents.

RESPONDENTS' ANSWER TO MOTION FOR
DISCRETIONARY REVIEW

CARL E. HUEBER
PATRICK J. CRONIN
CAITLIN E. O'BRIEN
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation
601 W. Riverside Ave., Ste. 1900
Spokane, Washington 99201
Telephone: (509) 838-6131

Attorneys for Defendants/Respondents

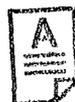
 ORIGINAL

TABLE OF CONTENTS

	<u>PAGE</u>
1. IDENTITY OF RESPONDENTS	1
2. DECISIONS BELOW	1
3. ISSUES PRESENTED FOR REVIEW	1
4. STATEMENT OF THE CASE	1
5. ARGUMENT WHY DISCRETIONARY REVIEW SHOULD NOT BE GRANTED	5
a. Petitioner's fiduciary argument was rejected by the trial court and has been waived by the Petitioner.	5
b. The Petitioner's argument that the Superior Court's orders are not supported by substantial evidence is without merit.	8
c. The Motion for Discretionary Review is without merit and cannot be salvaged by a claim of "judicial economy".	10
6. CONCLUSION	13

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>Bryant v. Palmer Coking Coal Co.</u> , 86 Wn. App. 204, 936 P.2d 1163 (1997)	9
<u>Buck Mountain Owner's Ass'n v. Prestwich</u> , 174 Wn. App. 702, 308 P.3d 644 (2013)	9
<u>Chadwick Farms Owners Assn. v. FHC LLC</u> , 166 Wn.2d 178, 207 P.3d 1251 (2009)	11
<u>Cowiche Canyon Conservancy v. Bosley</u> , 118 Wn.2d 801, 828 P.2d 549 (1992)	9
<u>Department of Natural Resources, State of Washington v. Little John Logging, Inc.</u> , 60 Wn. App. 671, 806 P.2d 779 (1991)	12
<u>Fisher Props., Inc. v. Arden-Mayfair, Inc.</u> , 115 Wn.2d 364, 798 P.2d 799 (1990)	9
<u>In re Estate of Lint</u> , 135 Wn.2d 518, 957 P.2d 755 (1998)	9
<u>Inland Foundry Co. v. Dep't of Labor & Indus.</u> , 106 Wn. App. 333, 24 P.3d 424 (2001)	9
<u>State v. Ortiz</u> , 104 Wn.2d 479, 706 P.2d 1069 (1985)	12
 <u>STATUTES AND RULES</u>	
RAP 2.3(b)	10
RAP 4.2(a)(4)	10
RAP 10.3	10

OTHER

Black's Law Dictionary, 851 (7th Ed. 1999) 11

Discretionary Review Of Trial Court Decisions Under The
Washington Rules Of Appellate Procedure,
61 Wn. Law Review 1541 (1986) 12

1. IDENTITY OF RESPONDENTS

The Respondents are Franklin Hills Health & Rehabilitation Center, Melissa Chartney, Aurilla Poole, and Janene Yorba.

2. DECISIONS BELOW

Petitioner seeks review of the Superior Court orders compelling arbitration of the survival claims of the estate.

3. ISSUES PRESENTED FOR REVIEW

a. Like other contracts with a fiduciary: (1) should the burden of proof that an arbitration agreement is valid and enforceable rest upon a healthcare provider seeking to enforce the agreement? And (2) should the healthcare provider's patient be entitled to a presumption of undue influence?

b. Are the Superior Court's orders compelling arbitration supported by substantial evidence?

4. STATEMENT OF THE CASE

On April 3, 2011, Robert Coon signed an Alternative Dispute Resolution Agreement ("ADR Agreement") with Franklin Hills Health & Rehabilitation Center ("Franklin Hills") (Exhibit A)

The ADR Agreement provided that Mr. Coon agreed to arbitrate any potential claims against Franklin Hills rather than seek court intervention. This was a voluntary agreement to arbitrate all claims, in

consideration of the "speed, efficiency, and cost effectiveness" of the ADR process. The ADR Agreement provides that the arbitration must be completed within 180 days of the date a party demands arbitration.

The Petitioner is the daughter of Robert Coon. She sued the Respondents on November 30, 2011. On June 5, 2012, the Respondents moved to stay the litigation and enforce the ADR Agreement and proceed to arbitration. After the Superior Court failed to grant Respondents' motion, appellate review was sought. On January 30, 2014, Division III of the Court of Appeals remanded the matter to the trial court to determine whether the ADR Agreement Mr. Coon had signed was enforceable. (Exhibit B)

The Superior Court ruled on March 4, 2015 that Mr. Coon was competent and the ADR Agreement that he executed was enforceable. (Exhibit C) The Petitioner next filed her Notice of Discretionary Review on March 30, 2015. (Exhibit D) That Notice was based upon the trial court's written decision of March 4, 2015, making factual and legal findings that Mr. Coon was competent to sign the ADR Agreement. This Court directed that the related Motion be filed within 15 days. RAP 6.2(b).

Following the evidentiary hearing, the Petitioner also moved to stay the arbitration until the litigation could proceed and be completed.

(Exhibit E). Franklin Hills also moved to stay the litigation to avoid the duplicative discovery, and to proceed with the 180-day schedule for the arbitration. The trial court denied the Petitioner's Motion to Stay. (Exhibit F) The trial court granted Franklin Hills' motion to temporarily stay the litigation to avoid the unnecessarily duplicative discovery.

Following the hearing on the motions for stay, the Superior Court was asked to sign several orders. The court signed an Order Compelling Arbitration of Claims of Mary Rushing as Administrator and on Behalf of the Estate of Robert Coon. (Exhibit "G") This Order contained Findings of Fact and Conclusions of Law from the four-day evidentiary hearing and ordered that the Petitioner's claims as the administrator and on behalf of the Estate of Robert Coon proceed to arbitration, pursuant to the ADR Agreement.

The trial court also entered an Order Granting Defendants' Cross Motion to Stay Mary Rushing's Wrongful Death Claim Pending Arbitration. (Exhibit "H") No Order was proposed or signed regarding the Petitioner's Motion to stay the arbitration.

The basis of the Petitioner's original Motion for Discretionary Review was an attack on the findings that Mr. Coon was competent. However, Petitioner moved to amend her Motion to include the direct discretionary review of the trial court's grant of the stay of litigation for

180 days. (Exhibit I) No review was sought of the trial court's refusal to stay the arbitration. Thus, it is only the order staying litigation (not the arbitration) that is being asked to be reviewed by this Court.

On July 8, 2015, a ruling was issued by the Commissioner of this Court which allowed the amendment, reset all of the long passed compliance dates, and assigned new cause numbers for splitting the amended Motions for Discretionary Review. (Exhibit J) The Commissioner ruled that the two Motions for Discretionary Review were "two distinct matters", primarily because of the lack of likelihood that direct discretionary review of the factual determination of Mr. Coon's competency would be appropriate. The Commissioner also issued a stay of the arbitration that had been ordered by the Superior Court on April 10, 2015. Importantly, the stay of the arbitration was the ruling that had been denied by the trial court and not appealed by the Petitioner.

Three and one-half months after the original Notice of Discretionary Review was filed, the Petitioner was granted a stay of the arbitration as well as additional time for briefing. During this time frame of non-activity, an arbitration panel was selected, motions were argued to the arbitrators, and discovery was nearly complete. Now, over four years after Mr. Coon's death and four years after the lawsuit was filed, this Court

stayed the arbitration on a chance that discretionary review might be granted of one of the "distinct" Superior Court's discretionary rulings.

While the stay issues are directly addressed in the companion case, it is critical that the trial court's denial of the Petitioner's motion to stay arbitration is considered in the proper context with the current procedural posture of this case, because Petitioner relies on the "judicial economy" of having the ruling on competency combined with the ruling on the stay of litigation.

5. ARGUMENT WHY DISCRETIONARY REVIEW SHOULD NOT BE GRANTED.

- a. **Petitioner's fiduciary argument was rejected by the trial court and has been waived by the Petitioner.**

The Petitioner engages the practice of failing to seek review of trial court motions while engaging in the fiction that the premise of her argument was not previously considered or ruled on by the trial court throughout the course of this proceeding.

For example, the Petitioner has framed the fiduciary issue in her motion for discretionary review as:

- a. Like other contracts with a fiduciary: (i) should the burden of proof that an arbitration agreement is valid and enforceable rest upon a health care provider seeking to enforce the agreement? And (ii) should the health care provider's patient be entitled to a presumption of undue influence?

(Exhibit K)

The foundation to this issue is that a fiduciary relationship existed between Mr. Coon and Franklin Hills. Noticeably absent from Petitioner's argument is the acknowledgement, or even mention, that this fiduciary argument was made to and rejected by the Superior Court. Just as with the oral ruling on Petitioner's motion to stay the arbitration, Petitioner failed to incorporate this ruling into a written order as well as failed to assign error or seek discretionary review of this ruling.

On January 2, 2015, the Petitioner moved for partial summary judgment on a number of issues, including an argument that a fiduciary relationship existed between Mr. Coon and Franklin Hills:

Undue influence is presumed from the existence of a fiduciary relationship between contracting parties, and renders the contract voidable. *See id; accord Kitsap Bank*, 177 Wn.App. at 570-72 (applying standard from Restatement (Second) of Contracts §177). In this case, the fiduciary relationship between Franklin Hills and Mr. Coon gives rise to a presumption of undue influence. As a result, Franklin Hills must produce admissible evidence of a lack of undue influence in order to avoid summary judgment.

(Exhibit L)

The Respondents resisted Petitioner's motion and argued "None of the authorities cited by the plaintiff establish a fiduciary obligation between defendants and Mr. Coon based solely on the fact that Franklin Hills is a skilled nursing facility, and the other defendants are nurses there,

nor does their relationship establish a presumed undue influence; moreover, there is no evidence of undue influence". (Exhibit M)

In her summary judgment reply, Petitioner again argued the "existence of fiduciary relationship between Franklin Hills and Mr. Coon cannot seriously be disputed." (Exhibit N)

On January 30, 2015, the Superior Court entered an oral ruling on Petitioner's Motion for Summary Judgment. As to the fiduciary argument, the trial court ruled:

The plaintiff asked the Court to switch the burden. The burden of proof has been on the plaintiff to prove by clear, cogent, and convincing evidence that Mr. Coon was not competent when he signed the arbitration agreement. Because of the fiduciary duty, they're asking that the burden be switched.

At this point, the Court is not going to find that there is a fiduciary duty. Obviously, fiduciary duties do arise, even when property is not at stake. A good example of that is a physician-patient relationship. Here, we have a skilled nursing facility. I don't know that it necessarily extends to a whole skilled nursing facility, but that skilled nursing facility also was accountable for his funds.

A fiduciary duty could be bifurcated to some extent, requiring Franklin Hills to act as a fiduciary with respect to his funds, but not necessarily other aspects of his life. **So, at this point, the Court is not going to find that there**

was a fiduciary relationship requiring that burden to shift.

(Exhibit O), oral ruling, pp. 4-5, emphasis added)

Again, the Petitioner has ignored the fact that this issue has been ruled upon by Superior Court and no review was sought of that ruling.

The 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. This argument has been waived.

b. The Petitioner's argument that the Superior Court's orders are not supported by substantial evidence is without merit.

In her Motion for Discretionary Review, the Petitioner boldly states, without any support or argument, that the Superior Court orders are not supported by substantial evidence. In making this assertion, the Petitioner had the burden to establish which particular findings are not supported by substantial evidence. The Petitioner has not even attempted to make this showing. In the absence of such a showing, it is presumed that the Findings of Fact are indeed supported by substantial evidence and are verities before this Court.

There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not

supported by substantial evidence. Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Unchallenged findings of facts are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). "The appellant must present argument to the court which specific findings of fact are not supported by the evidence and must cite to the record to support that argument," or they become verities on appeal. Inland Foundry Co. v. Dep't of Labor & Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001). Such unsupported arguments need not be considered. Bryant v. Palmer Coking Coal Co., 86 Wn. App. 204, 216, 936 P.2d 1163 (1997). Buck Mountain Owner's Ass'n v. Prestwich, 174 Wn.App. 702, 714, 308 P.3d 644, 651 (2013) (appellant "utterly failed to identify which of its arguments relates to its specific challenged findings of fact")

In Inland Foundry, the appellant asserted "that 10 of the Board's 42 findings of fact are not supported by substantial evidence," but "does nothing more than make a mere assertion that these findings are unsupported." 106 Wn. App. at 340. "The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument." Id., citing In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998);

RAP 10.3. The appellate court treated these findings of fact as verities.

Id.

This contention borders on being frivolous. It should be summarily dismissed.

c. The Motion for Discretionary Review is without merit and cannot be salvaged by a claim of "judicial economy".

Petitioner concedes that her Motion for Discretionary Review does not satisfy the requirements for discretionary review under RAP 2.3(b).

The Commissioner of this Court has also ruled that this matter does not raise a fundamental and urgent issue of broad public import which requires prompt and ultimate determination by this Court per RAP 4.2(a)(4). (Exhibit J) The basis for splitting this motion into two separate cause numbers was that they were "two distinct matters" that should be treated separately.

In what can best be described as sleight of hand, the Petitioner is asking that the arbitration be stayed just in case she prevails in her distinct motion concerning a stay of the wrongful death suit. These are isolated and distinct issues, and the Petitioner's jury trial argument cannot be used as a vehicle to stay enforcement of an arbitration agreement that has already been determined to be valid and enforceable following a four-day court hearing. Put another way, the Petitioner is now asking this Court to

rejoin the "two distinct matters" in case she prevails on her jury trial argument. The only manner in which a ruling on the wrongful death motion could impact the arbitration matter would be if this Court is prepared to rule as a matter of law that no arbitration proceeding may proceed if there is any theoretical or hypothetical possibility of related litigation between any of the parties. This is not the law of this state and to make it such turns Washington's long-standing history of favoring arbitration on its head.

Judicial economy is defined as "[e]fficiency in the operation of the courts and the judicial system; esp., the efficient management of litigation so as to minimize duplication of effort and to avoid wasting the judiciary's time and resources." Black's Law Dictionary, 851 (7th Ed. 1999).

The concept of judicial economy is easily tossed around, often to justify an unrelated decision. In support of her judicial economy argument, the Petitioner relies on Chadwick Farms Owners Assn. v. FHC LLC, 166 Wn.2d 178, 185-186, 207 P.3d 1251, 1255 (2009) a case which referenced judicial economy but contained no analysis of that concept. This was multiparty litigation concerning the liability of multiple LLCs involved in a condo project. Chadwick Farms shines no light on the current issues before this Court.

The Petitioner also relies upon Department of Natural Resources, State of Washington v. Little John Logging, Inc., 60 Wn.App. 671, 673, 806 P.2d 779, 780 (1991) to support her judicial economy argument. Again, this case contained no analysis of judicial economy. Rather, it concerned the ability of the State of Washington to recover the costs of fighting a forest fire.

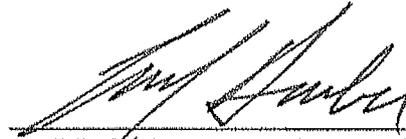
The Petitioner also relies upon Commissioner Crook's Law Review article, Discretionary Review Of Trial Court Decisions Under The Washington Rules Of Appellate Procedure, 61 Wn. Law Review 1541 (1986). There, Commissioner Crooks gave an example of a murder case in State v. Ortiz, 104 Wn.2d 479, 706 P.2d 1069 (1985) in which several issues arose prior to the third trial of this defendant. In Ortiz, the court decided to consider all issues including one that was not ripe for interlocutory review. This discussion is concluded with Commissioner Crooks' statement that "such a compelling appeal to judicial economy is, of course, quite rare".

The 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 challenges or seek review of those rulings.

6. **CONCLUSION**

The Respondents request that the Motion for Discretionary Review be denied and that the stay of the arbitration be lifted.

DATED this 7th day of December, 2015.



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

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on December 7, 2015, I served the foregoing document on counsel for Petitioner in the manners indicated:

Mark D. Kamitomo
The Markam Group, Inc., P.S.
421 W. Riverside, Suite 1060
Spokane, WA 99201

mark@markamgrp.com
mary@markamgrp.com
collin@markamgrp.com

VIA REGULAR MAIL
VIA EMAIL
HAND DELIVERED
BY FACSIMILE
VIA FEDERAL EXPRESS

George M. Ahrend
Ahrend Law Firm PLLC
16 Basin St. S.W.
Ephrata, WA 98823

gahrend@ahrendlaw.com
scanet@ahrendlaw.com

VIA REGULAR MAIL
VIA EMAIL
HAND DELIVERED
BY FACSIMILE
VIA FEDERAL EXPRESS

DATED this 7th day of December, 2015, at Spokane, Washington.

Cheryl Hansen

OFFICE RECEPTIONIST, CLERK

To: Cheryl R. Hansen
Cc: 'mark@markamgrp.com'; 'mary@markamgrp.com'; 'collin@markamgrp.com'; 'gahrend@ahrendlaw.com'; 'scanet@ahrendlaw.com'; Linda Lee; Carl E. Hueber; Patrick J. Cronin; Caitlin E. O'Brien
Subject: RE: Supreme Court No. 91538-5, Rushing v. Franklin Hills et al.

Received on 12-07-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Cheryl R. Hansen [mailto:crh@winstoncashatt.com]
Sent: Monday, December 07, 2015 12:25 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'mark@markamgrp.com' <mark@markamgrp.com>; 'mary@markamgrp.com' <mary@markamgrp.com>; 'collin@markamgrp.com' <collin@markamgrp.com>; 'gahrend@ahrendlaw.com' <gahrend@ahrendlaw.com>; 'scanet@ahrendlaw.com' <scanet@ahrendlaw.com>; Linda Lee <ll@winstoncashatt.com>; Carl E. Hueber <ceh@winstoncashatt.com>; Patrick J. Cronin <pjc@winstoncashatt.com>; Caitlin E. O'Brien <ceo@winstoncashatt.com>
Subject: Supreme Court No. 91538-5, Rushing v. Franklin Hills et al.

Case Name: Mary Rushing as the Administrator and on Behalf of the Estate of Robert Coon, and Mary Rushing, individually vs. FRANKLIN HILLS HEALTH & REHABILITATION CENTER, et al.

Case Number: 91538-5

Dear Supreme Court Clerk – attached for filing is **Respondents' Answer to Motion for Discretionary Review** (appendix will be mailed to the Court), filed by:

Carl E. Hueber, WSBA No. 12453
Telephone: (509) 838-6131
Email: ceh@winstoncashatt.com

Thank you,

Cheryl Hansen, Paralegal to CARL E. HUEBER, COREY J. QUINN,
LAWRENCE H. VANCE and JAMES E. REED
Phone: (509) 838-6131 | Fax: (509) 838-1416 | Email: crh@winstoncashatt.com

Winston & Cashatt
L A W Y E R S

The preceding message and any attachments contain confidential information protected by the attorney-client privilege or other privilege. This communication is intended to be private and may not be recorded or copied without the consent of the author. If you believe this message has been sent to you in error, reply to the sender and then delete this message. Thank you.

Spokane Office
Bank of America Financial Center
601 W. Riverside, Suite 1900
Spokane, Washington 99201-0695

Phone: (509) 838-6131
Fax: (509) 838-1416
website: www.winstoncashatt.com

Winston & Cashatt

L A W Y E R S

A Professional Service Corporation

Winston & Cashatt has offices in Spokane, Washington
and Coeur d'Alene, Idaho

December 7, 2015

Clerk of the Court
Supreme Court of Washington
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Received
Washington State Supreme Court

DEC 14 2015

Ronald R. Carpenter
Clerk

**Re: Supreme Court Case No. 91538-5
Rushing v. Franklin Hills, et al.**

Dear Clerk:

Enclosed is the Appendix for *Respondents' Answer to Motion for Discretionary Review* in the above matter, which was filed by email with your Court today.

Thank you, and please contact me by telephone or email should any questions arise.

Very truly yours,



Cheryl Hansen, Paralegal
Toll free 1-800-332-0534
crh@winstoncashatt.com

ch:782869
enclosure

C. Matthew Andersen ^{MT}	Scott A. Gingras ^{MT}	Megan E. Marshall ^{MT}	Tyler R. Whitney ^{MT}	Kenneth B. Howard ^{MT}
Beverly L. Anderson	Erika B. Grubbs ^{MT}	Caitlin E. O'Brien ^{MT}		Fred C. Pflanz
Patrick J. Cronin ^{MT}	Jeffrey A. Herbster ^{MT}	Corey J. Quinn ^{MT}	<i>Of Counsel</i>	James E. Reed
Kevin J. Curtis	Michael T. Howard ^{MT}	Benjamin H. Rascoff	Courtney R. Beaudoin ^{MT}	Richard W. Relyea
Greg M. Devlin ^{MT}	Carl E. Hueber ^{MT}	Jeffrey R. Ropp	John F. Bury	Lawrence H. Vance, Jr. ^{MT}
Timothy R. Fischer	Collette C. Leland ^{MT}	Kammi Mencke Smith ^{MT}	Stephen L. Farnell	Lucinda S. Whaley
David P. Gardner ^{MT}	Lisa A. Malpass ^{MT}	Elizabeth A. Tellessen ^{MT}	Timothy M. Higgins	Meriwether D. Williams ^{MT}

All lawyers admitted in WA. Lawyers admitted in ID and MT as indicated.

Case No. 91538-5

Appendix

to

**Respondents' Answer to
Motion for Discretionary Review**

Received
Washington State Supreme Court

DEC 14 2015

Ronald R. Carpenter
Clerk

**Alternative Dispute Resolution Agreement
Washington**

**(SIGNING THIS AGREEMENT IS NOT A CONDITION OF ADMISSION TO OR
CONTINUED RESIDENCE IN THE CENTER)**

1. **Parties to the Agreement.** This Alternative Dispute Resolution ("ADR") Agreement (hereinafter referred to as the "Agreement") is entered into by Extencicare Health Services, Inc. on behalf of its parents, affiliates and subsidiaries including Franklin Hills Health and Rehab. Center (hereinafter referred to as the "Center"), a nursing facility, and Robert H Coon, a Resident at the Center (hereinafter referred to as "Resident"). It is the intent of the Parties that this Agreement shall inure to the benefit of, bind, and survive the Parties, their heirs, successors, and assigns.

2. **Definitions.**
 - a. Center as used in this Agreement shall refer to the nursing Center, its employees, agents, officers, directors, affiliates and any parent, affiliate and/or subsidiary of Center and its medical director acting in his/her capacity as medical director.

 - b. Resident as used in this Agreement shall refer to the Resident, all persons whose claim is or may be derived through or on behalf of the Resident, all persons entitled to bring a claim on behalf of the Resident, including any personal representative, responsible party, guardian, executor, administrator, legal representative, agent or heir of the Resident, and any person who has executed this Agreement on behalf of the Resident.

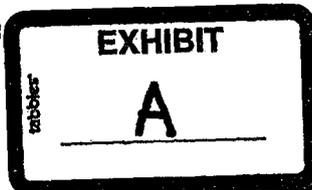
 - c. Party shall refer to the Center or the Resident, and the term Parties shall refer to both the Center and Resident.

 - d. Alternative Dispute Resolution ("ADR") is a specific process of dispute resolution used instead of the traditional court system. Instead of a judge and/or jury determining the outcome of a dispute, a neutral third party ("Mediator"), who is chosen by the Parties, may assist the Parties in reaching settlement. If the matter proceeds to arbitration, the neutral third party "arbitrator" renders a decision, which becomes binding on the Parties. When mandatory the ADR becomes the only legal process available to the Parties.

 - e. State Law shall mean the laws and regulations applicable in the State of Washington.

 - f. Neutral shall mean the Mediator or Arbitrator conducting ADR under this Agreement.

3. **Voluntary Agreement to Participate in ADR.** The Parties agree that the speed, efficiency and cost-effectiveness of the ADR process, together with their mutual undertaking to engage in that process, constitute good and sufficient consideration for the acceptance and enforcement of this Agreement. The Parties voluntarily agree that any disputes covered by



this Agreement (herein after referred to as "Covered Disputes") that may arise between the Parties shall be resolved exclusively by an ADR process that shall include mediation and, where mediation does not successfully resolve the dispute, binding arbitration. The relief available to the Parties under this Agreement shall not exceed that which otherwise would be available to them in a court action based on the same facts and legal theories under the applicable federal, state or local law. All limitations or other provisions regarding damages that exist under Washington law at the time of the request for mediation are applicable to this Agreement.

The Parties' recourse to a court of law shall be limited to an action to enforce a binding arbitration decision and mediation settlement decision entered in accordance with this Agreement or to vacate such a decision based on the limited grounds set forth in RCW §7.04A.010 et. seq.

4. Covered Disputes. This Agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law sitting in the State of Washington and shall include, but not be limited to, all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party; a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; fraud; misrepresentation; negligence; gross negligence; malpractice; death or wrongful death and any alleged departure from any applicable federal, state, or local medical, health care, consumer or safety standards. Covered Dispute shall not include (1) involuntary discharge actions initiated by the Center, (2) guardianship proceedings resulting from Resident's alleged incapacity, and (3) disputes involving amounts less than \$2,000.00.

The Neutral, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable.

Nothing in this Agreement, however, shall prevent the Resident from filing a grievance or complaint with the Center or appropriate government agency, from requesting an inspection of the Center from such agency, or from seeking a review under any applicable federal, state or local law of any decision to discharge or transfer the Resident.

All claims based in whole or in part on the same incident, transaction or related course of care or services provided by the Center to the Resident shall be addressed in a single ADR process. A claim that arose and was reasonably discoverable by the Party initiating the ADR process shall be waived and forever barred if it is not included in the Party's Request for ADR ("Request"). Additionally, any claim that is not brought within the statute of limitations period that would apply to the same claim in a court of law in the State of Washington shall be waived and forever barred. Issues regarding whether a claim was reasonably discoverable shall be resolved in the ADR process by the Neutral.

5. **Governing Law.** Except as may be otherwise provided herein, this Agreement shall be governed by the terms of the Washington Uniform Arbitration Act or such laws in the State of Washington in effect at the time of the Request for ADR, which is currently set forth at RCW §7.04A.010 et. seq. If for any reason there is a finding that Washington law cannot support the enforcement of this Agreement, or any portion thereof, then the Parties agree to resolve their disputes by arbitration (and not by recourse to a court of law) pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1-16) and the Federal Arbitration Act shall apply to this Agreement and all arbitration proceedings arising out of this Agreement, including any action to compel, enforce, vacate or confirm any proceeding and award or order of an arbitrator. The mediation and/or arbitration location shall occur in the State of Washington.
6. **Administration.** ADR under this Agreement shall be conducted by Neutral and administered by an independent, impartial entity that is regularly engaged in providing mediation and arbitration services (hereinafter the "Administrator"). The Request for ADR shall be made in writing and may be submitted to DJS Administrative Services, Inc., ("DJS"), P.O. Box 70324, Louisville, KY 40270-0324, (877) 586-1222, www.djsadministrativeservices.com by regular mail, certified mail, or overnight delivery. If the Parties choose not to select DJS, or if DJS is unable to or unwilling to serve as the Administrator the Parties shall select an alternative independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator.
7. **Process.** Regardless of the entity chosen to be Administrator, unless the Parties mutually agree otherwise in writing, the ADR process shall be conducted in accordance with and governed by the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure ("Rules of Procedure") then in effect. A copy of the Rules of Procedure may be obtained from the Center's Administrator or from DJS at the address or website listed in Section 6 of this Agreement.
8. **Mediation.** The Parties agree that any claim or dispute relating to this Agreement or to the resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law shall first be subject to mediation. The Parties agree to engage in limited discovery of relevant information and documents before and during mediation in accord with Rule 3.02 of the Rules of Procedure. Any disputes which the Parties cannot resolve regarding the scope and limits of discovery shall be resolved as described in Rule 3.02 of the Rules of Procedure. The Parties shall cooperate with each other, the mediator and DJS prior to and during the mediation process. Claims where the demand is less than \$50,000 shall not be subject to mediation and shall proceed directly to arbitration, unless one of the Parties requests mediation, in which case, all Parties shall mediate in good faith. Mediation shall convene within one hundred twenty (120) days after the request for mediation. The Mediator shall be selected as described in Rule 2.03 of the Rules of Procedure.
9. **Arbitration.** Any claim or controversy that remains unresolved after the conclusion or termination of mediation (e.g., impasse) shall proceed to binding arbitration in accordance with the terms of this Agreement. Arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation or as otherwise specified in Rule 5.02 of the

Rules of Procedure. The Arbitrator shall be selected as described in Rule 2.03 of the Rules of Procedure.

10. **Costs and Fees.** The Center shall pay the Neutral's fees and other reasonable costs associated with the mediation process. The Center shall pay the arbitrator's fees and other reasonable costs associated with the arbitration process up to and including five (5) days of arbitration. Absent an agreement by the Parties, or as required by a ruling by the Neutral to the contrary, the Parties shall share equally the Arbitrator's fees and costs associated with arbitration days beyond day five (5). The Parties shall bear their own costs and attorney's fees except in cases where the Neutral awards a successful Party such costs and/or fees under a provision of Washington law, if any, that expressly authorizes such an award.
11. **Severability.** If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable in whole or in part the remainder of this Agreement, including all valid and enforceable parts of the provision in question, shall remain valid, enforceable, and binding on the Parties.
12. **Proof of Agreement.** The Parties agree and stipulate that the original of this Agreement, including the signature page, may be scanned and/or stored in a computer database or similar device, and that any printout or other output readable by sight, the reproduction of which is shown accurately to reproduce the original of this document, may be used for any purpose just as if it were the original, including proof of the content of the original writing.
13. **Right of Rescission.** The Resident may revoke this Agreement by providing notice to the Center within thirty (30) days of signing it; and this Agreement, if not revoked within that time frame, shall remain in effect for all care and services rendered to the Resident at or by the Center regardless of whether the Resident is subsequently discharged and readmitted to the Center without renewing, ratifying, or acknowledging this Agreement. Any notice of rescission of this ADR Agreement may be provided by the Resident either orally or in writing to a member of the management team of the Center.
14. **Resident's Understanding.** The Resident understands that he/she has the right to seek advice of legal counsel and to consult with a Center representative concerning this Agreement. The Resident understands that this Agreement is not a condition of admission to or continued residence in the Center.

THE PARTIES UNDERSTAND, ACKNOWLEDGE, AND AGREE THAT BY ENTERING INTO THIS AGREEMENT THEY ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE THEIR DISPUTES DECIDED BY A COURT OF LAW OR TO APPEAL ANY DECISION OR AWARD OF DAMAGES RESULTING FROM THE ADR PROCESS EXCEPT AS PROVIDED HEREIN. THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. YOUR SIGNATURE BELOW INDICATES YOUR UNDERSTANDING OF AND AGREEMENT TO THE TERMS SET OUT ABOVE. PLEASE READ IT COMPLETELY, THOROUGHLY AND CAREFULLY BEFORE SIGNING. Initial: _____ Resident _____ Center

BY SIGNING THIS AGREEMENT, the Parties acknowledge that (a) they have read this Agreement; (b) have had an opportunity to seek legal counsel and to ask questions regarding this Agreement; and (c) they have executed this Agreement voluntarily intending to be legally bound there to this 2 day of April, 2011 (the "Effective Date").

If signed by a Legal Representative, the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the Resident.

FOR THE RESIDENT:

Signature of Resident

Robert H Coon

Print Name of Resident

4/3/11

Date

FOR THE CENTER:

Signature of Center's Representative

Jennifer Woudick

Print Name and Title of Center's Representative

4/3/11

Date

Signature of Legal Representative for
Healthcare Decisions

Print Name and Relationship or Title
(Guardian, Conservator, Power of Attorney, Proxy)

Date

Signature of Legal Representative for
Financial Decisions

Print Name and Relationship or Title
(Guardian, Conservator, Power of Attorney, Proxy)

Date

If Resident signs with an "x" or mark, two witnesses must also sign.

Signature of Witness

Date

Signature of Witness

Date

Print Name of Witness

Print Name of Witness

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

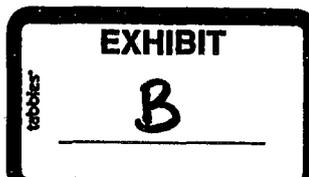
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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

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

FACTS

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



No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

any and all disputes arising out of or relating to the resident's stay at the center, including tort, breach of contract, fraud, negligence, wrongful death, departure from any applicable consumer or safety standards, and a variety of other causes of action. The agreement stated that the "intent of the Parties" was that the agreement "shall inure to the benefit of, bind, and survive the Parties, their heirs, successors, and assigns." Clerk's Papers (CP) at 45.

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

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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

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

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

[THE COURT:] Therefore, what ultimately I am doing here is I am going to—I'm denying today the motion to stay. I'm denying that based on the fact that I haven't made a finding as to whether or not the agreement is binding and enforceable or in existence because I do not believe I can do so based on the record provided. That doesn't mean I won't come back in the same format or through a request for evidentiary hearing but I think in either event that it's going to be necessary for me to have the comfort I need to go further with this decision.

Any questions?

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

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

Report of Proceedings (RP) at 31-32.

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

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

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

THE COURT: You could do that and that would be fine. In terms of direction from the Court, I don't know exactly what you are asking the Court to give. If in fact the parties enter into some discovery or some process that one or the other thinks is inappropriate, the only way to address that for direction would be to understand each party's position on what direction it should go. But to tell you today which direction to go I think is presumptive. Maybe I'm missing both but you got a denial on your motion so it's not stayed and it's not being compelled. That's kind of where you're

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

left and I think your direction now is your basic lawyering instincts on what tactical approach is best suited for your client's best interest. That's vague; I know it.

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

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

ANALYSIS

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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

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

RCW 7.04A.070(1).

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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

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

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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

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

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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

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

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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

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

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

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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

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

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

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

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

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

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

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

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

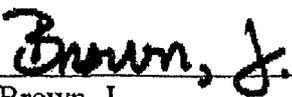
We reverse and remand for a hearing to address whether the arbitration agreement is enforceable.

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

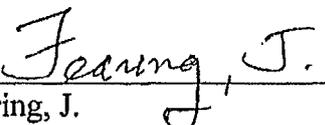


Kulik, J.

WE CONCUR:



Brown, J.



Fearing, J.



SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

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

Plaintiffs,

vs.

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

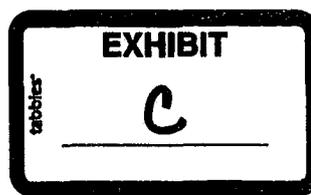
Defendants.

NO. 11-2-04875-1

COURT'S DECISION

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

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



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

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

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

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

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

responsibility to acknowledge the contents of a contract rests upon each party individually. "It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973) *citing* Perry v. Continental Ins. Co., 178 Wash. 24, 33 P.2d 661 (1934).

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

FINDINGS OF FACT

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

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

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

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

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

16. The signature on the Agreement is comprised of Mr. Coon's initials, rather than his entire name.
17. On April 7, 2011, Mr. Coon was given a cognition test. The conclusion of the evaluation performed on Mr. Coon showed he scored 15 out of 15.
18. Defendants' expert witnesses, Ronald Klein, Ph.D. and James Winter, MD, concluded that Mr. Coon possessed the requisite level of competence to enter into the Agreement.
19. Plaintiffs' expert witness, James Spar, MD, concluded Mr. Coon possessed enough cognitive functioning to allow him to appreciate the difference between arbitrating a claim versus using traditional court intervention, but lacked the cognitive functioning necessary to appreciate the negative consequences associated with the Agreement (that being a reduced monetary award).
20. Dr. Spar further concluded that Mr. Coon possessed a level of cognitive functioning necessary to execute his power of attorney as well as a will.

CONCLUSIONS OF LAW

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

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

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

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

Initially, the party seeking to enforce an arbitration agreement must only prove the existence of a contract and the other party's objective manifestation of the intent to be bound. Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). A party's signature on a contract shows an objective manifestation of the signor's intent to be bound to the contract. Retail Clerks, 96 Wn.2d at 944. After the proponent of the contract presents such evidence, the burden then shifts to the opponent to prove a defense to contract enforcement. Id.

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

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

the contractual agreement. See McKee, 164 Wn.2d at 383. One such defense is if the person lacks the mental capacity or competence to appreciate the nature and effect of the contract at issue. Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d 101, 108-9, 120 P.2d 527 (1942). While in Washington there is a presumption that a person is competent to enter into an agreement, the person challenging such agreement may overcome the presumption by presenting "clear, cogent and convincing" evidence that the party signing the contract lacked sufficient mind or reason at the time he entered into the contract. Grannum v. Berdard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). The clear, cogent, and convincing burden has been defined as something greater than a preponderance of the evidence and less than beyond a reasonable doubt. Holmes v. Raffo, 60 Wn.2d 421, 374 P.2d 536 (1962); Matter of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). "Substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." Dalton v. State, 130 Wn.App. 653, 666, 124 P.3d 305, 312 (2005) quoting In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED this 3rd day of March, 2015.



Judge John O. Cooney

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

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

Plaintiff(s),

v.

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

Defendant(s).

NO. 11-2-04875-1

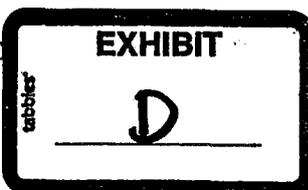
NOTICE OF DISCRETIONARY REVIEW
TO THE SUPREME COURT

Plaintiff, Mary Rushing, through undersigned counsel, seeks review by the
Supreme Court of the Court's Decision entered on March 3, 2015. A copy of the decision
is attached to this notice.

DATED this 30th March day of April, 2015.

AHREND LAW FIRM PLLC

George M. Ahrend
George M. Ahrend, WSBA #25160
Co-Attorneys for Plaintiff



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

Counsel for Plaintiffs:

Mark D. Kamitomo, WSBA #18803
Collin M. Harper, WSBA #44251
Markam Group, Inc., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
Co-Counsel for Plaintiffs

George M. Ahrend, WSBA #25160
Ahrend Law Firm PLLC
16 Basin St. SW
Ephrata, WA 98823
Co-Counsel for Plaintiffs

Counsel for Defendant:

Patrick J. Cronin, WSBA #28254
Carl E. Hueber, WSBA #12453
Caitlin E. O'Brien, WSBA #46476
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695
Counsel for Defendants

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

DECLARATION OF SERVICE

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

On the date set forth below, I served the document to which this is appended via First Class Mail, postage prepaid, and/or email, as follows:

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pjc@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

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

Mark Kamitomo at mark@markamgrp.com

Collin Harper at collin@markamgrp.com

Signed at Ephrata, Washington on ^{Mar.} April 30, 2015.



Shazi M. Canet, Paralegal

RECEIVED
MAR 04 2015
The Markam Group, P.C., P.S.
Attorneys at Law

 <p>SUPERIOR COURT OF WASHINGTON COUNTY OF SPOKANE</p>	
<p>MARY RUSHING as the Administrator and on Behalf of the Estate of ROBERT COON, and MARY RUSHING, individually,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>FRANKLIN HILLS HEALTH & REHABILITATION CENTER, MELISSA CHARTNEY, R.N., AURILLA POOLE, R.N., and JANENE YORBA, Director of Nursing,</p> <p style="text-align: center;">Defendants.</p>	<p>NO. 11-2-04875-1</p> <p>COURT'S DECISION</p>

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

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

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

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

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

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

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

responsibility to acknowledge the contents of a contract rests upon each party individually. "It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973) *citing* Perry v. Continental Ins. Co., 178 Wash. 24, 33 P.2d 661 (1934).

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

FINDINGS OF FACT

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

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

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

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

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

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

13. On April 3, 2011, Mr. Coon sat in the dining room of Franklin Hills with Ms. Wujick and reviewed a number of documents related to his residency at Franklin Hills. During this meeting, Mr. Wujick did not notice Mr. Coon exhibit any symptoms that would have called into question his mental capacity. He reviewed a number of documents, asked questions, and appropriately executed the documents.

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

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

16. The signature on the Agreement is comprised of Mr. Coon's initials, rather than his entire name.
17. On April 7, 2011, Mr. Coon was given a cognition test. The conclusion of the evaluation performed on Mr. Coon showed he scored 15 out of 15.
18. Defendants' expert witnesses, Ronald Klein, Ph.D. and James Winter, MD, concluded that Mr. Coon possessed the requisite level of competence to enter into the Agreement.
19. Plaintiffs' expert witness, James Spar, MD, concluded Mr. Coon possessed enough cognitive functioning to allow him to appreciate the difference between arbitrating a claim versus using traditional court intervention, but lacked the cognitive functioning necessary to appreciate the negative consequences associated with the Agreement (that being a reduced monetary award).
20. Dr. Spar further concluded that Mr. Coon possessed a level of cognitive functioning necessary to execute his power of attorney as well as a will.

CONCLUSIONS OF LAW

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

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

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

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

Initially, the party seeking to enforce an arbitration agreement must only prove the existence of a contract and the other party's objective manifestation of the intent to be bound. Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). A party's signature on a contract shows an objective manifestation of the signor's intent to be bound to the contract. Retail Clerks, 96 Wn.2d at 944. After the proponent of the contract presents such evidence, the burden then shifts to the opponent to prove a defense to contract enforcement. Id.

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

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

the contractual agreement. See McKee, 164 Wn.2d at 383. One such defense is if the person lacks the mental capacity or competence to appreciate the nature and effect of the contract at issue. Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d 101, 108-9, 120 P.2d 527 (1942). While in Washington there is a presumption that a person is competent to enter into an agreement, the person challenging such agreement may overcome the presumption by presenting "clear, cogent and convincing" evidence that the party signing the contract lacked sufficient mind or reason at the time he entered into the contract. Grannum v. Berdard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). The clear, cogent, and convincing burden has been defined as something greater than a preponderance of the evidence and less than beyond a reasonable doubt. Holmes v. Raffo, 60 Wn.2d 421, 374 P.2d 536 (1962); Matter of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). "Substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." Dalton v. State, 130 Wn.App. 653, 666, 124 P.3d 305, 312 (2005) quoting In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

DATED this 3rd day of March, 2015.



Judge John O. Cooney

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

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

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

No. 11-2-04875-1

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

Plaintiff(s),

vs.

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

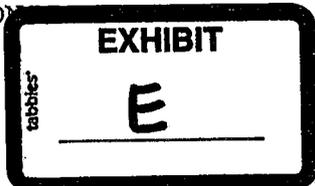
Defendant(s).

I. MOTION

Plaintiff moves the Court for the following relief:

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

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



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

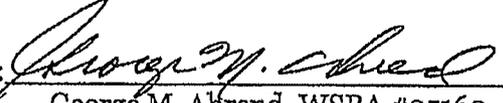
b. Such preclusive effect would violate Plaintiff's right to trial by jury under the Washington Constitution, Article I, § 2, which provides that "[t]he right of trial by jury shall remain inviolate[.]"

II. BASIS

This motion is based on the memorandum in support of Plaintiff's motion re: right to trial by jury, filed previously herein.

DATED March 9, 2015.

AHREND LAW FIRM PLLC
Co-Attorney for Plaintiffs

By: 
George M. Ahrend, WSBA #25160

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

CERTIFICATE OF SERVICE

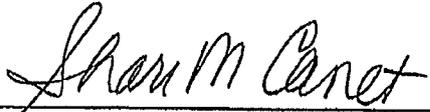
The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pjc@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

Signed at Ephrata, Washington on March 9, 2015.



Shari M. Canet, Paralegal

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

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

MARY RUSHING, as the)
Administrator and on)
Behalf of the Estate of)
ROBERT COON, and MARY) No. 11-2-04875-1
RUSHING, individually,)
Plaintiff,)
v.)
FRANKLIN HILLS HEALTH &)
REHABILITATION CENTER,)
MELISSA CHARTNEY, R.N.,)
AURILLA POOLE, R.N.,)
JANENE YORBA, Director of)
Nursing,)
Defendants.)

COPY

HONORABLE JOHN O. COONEY
VERBATIM REPORT OF PROCEEDINGS
APRIL 10, 2015

APPEARANCES:

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

 COLLIN M. HARPER
 Attorney at Law
 421 W. Riverside Ave., Suite 1060
 Spokane, Washington 99201

FOR THE DEFENDANTS: CARL E. HUEBER
 PATRICK J. CRONIN
 Attorneys at Law
 601 W. Riverside Ave., Suite 1900
 Spokane, Washington 99201

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

tabbies
EXHIBIT
F

1 circumstances.

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

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

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

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

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

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

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

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

COPY
ORIGINAL FILED
APR 10 2015

SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

vs.

No. 11-2-04875-1

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

Defendants.

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

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

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

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
Bank of America Financial Center
601 West Riverside Avenue, Suite 1900
Spokane, Washington 99201-0695
(509) 838-6131



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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Presented by:



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

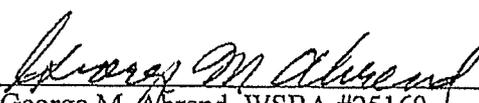
as to form only bmt
Approved and Notice of Presentment Waived:

THE MARKAM GROUP, INC., P.S.



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

AHREND LAW FIRM PLLC



George M. Ahrend, WSBA #25160
Attorney for Plaintiff

657126.doc

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

COPY
ORIGINAL FILED

APR 10 2015

SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

No. 11-2-04875-1

vs.

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

Defendants.

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

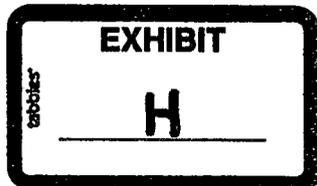
THIS MATTER having come before this Court on Defendants' Cross Motion to Stay
Mary Rushing's Wrongful Death Claim Pending Arbitration, and the Court having heard oral
argument of counsel, having considered the files and records herein, and being otherwise fully
advised in the premises, now, therefore,

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

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

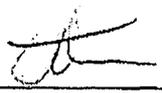
ORDER GRANTING DEFENDANTS' CROSS
MOTION TO STAY MARY RUSHING'S
WRONGFUL DEATH CLAIM PENDING
ARBITRATION
PAGE 1

Winston & Bashatt
A PROFESSIONAL SERVICE CORPORATION
Bank of America Financial Center
801 West Riverside Avenue, Suite 1900
Spokane, Washington 99201-0885
(509) 838-6131



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

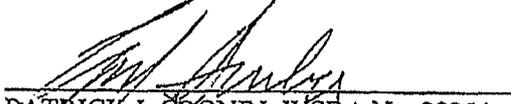
DATED this 10 day of April, 2015.



HONORABLE JOHN O. COONEY
Spokane County Superior Court Judge

Presented by:

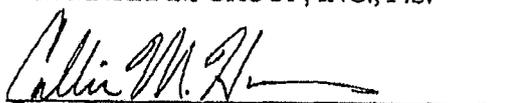
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation



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

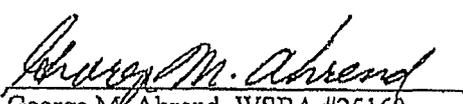
^{as to form only}
Approved and Notice of Presentment Waived:

THE MARKAM GROUP, INC., P.S.



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

AHREND LAW FIRM PLLC



George M. Ahrend, WSBA #25160
Attorney for Plaintiff

668982.doc

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

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
Bank of America Financial Center
601 West Riverside Avenue, Suite 1800
Spokane, Washington 99201-0895
(509) 838-6131

Supreme Court No. 91538-5
Spokane Co. Superior Court Cause No. 11-2-04875-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiff-Petitioner,

vs.

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

Defendants-Respondents.

MOTION TO AMEND NOTICE OF DISCRETIONARY REVIEW
AND MOTION FOR EXTENSION FOR TIME TO FILE MOTION
FOR DISCRETIONARY REVIEW AND STATEMENT OF
GROUNDS FOR DIRECT REVIEW

George M. Ahrend, WSBA #25160
AHREND LAW FIRM PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Mark D. Kamitomo, WSBA #18803
Collin M. Harper, WSBA #44251
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902



I. IDENTITY OF MOVING PARTY

This motion is filed on behalf of Mary Rushing, petitioner, through undersigned counsel.

II. RELIEF REQUESTED

Pursuant to RAP 5.3(h), Ms. Rushing asks the Court to permit amendment of her notice of discretionary review to include the following related decisions: (1) Order Compelling Arbitration of Claims of Mary Rushing as Administrator and on Behalf of the Estate of Robert Coon, entered April 10, 2015; and (2) Order Granting Defendants' Cross Motion to Stay Mary Rushing's Wrongful Death Claim Pending Arbitration, entered April 10, 2015.

Pursuant to RAP 18.8(a), Ms. Rushing also asks the Court to grant an extension of time to file her motion for discretionary review and statement of grounds for direct review until 15 days after ruling on the foregoing motion to amend or May 22, 2015, whichever is later.

III. REFERENCE TO RECORD

A. Regarding amendment.

On March 3, 2015, following an evidentiary hearing, the superior court issued a written decision, including findings of fact and conclusions of law, compelling arbitration of survival claims

brought by Ms. Rushing, in her capacity as Administrator of the Estate of Robert Coon. A copy of the decision is attached as *Exhibit A*.

On April 1, 2015, Ms. Rushing filed a notice of discretionary review to the Supreme Court of the foregoing decision. A copy of the notice of discretionary review is attached as *Exhibit B*.

On April 10, 2015, the superior court entered a further order compelling arbitration of the survival claims. A copy of this order is attached as *Exhibit C*.

At the same time, the superior court entered two additional orders. One of the orders provided that wrongful death claims brought by Ms. Rushing were not subject to arbitration. A copy of the wrongful death order is attached as *Exhibit D*. However, the second order provided that the wrongful death claims would be stayed pending arbitration of the survival claims. A copy of the stay order is attached as *Exhibit E*.

Ms. Rushing seeks to amend her notice of discretionary review, and the proposed amended notice is attached as *Exhibit F*.

B. Regarding extension of time.

The undersigned is scheduled to take a personal vacation during April 15-24, 2015, for a long-planned trip to Spain to hike

portions of the Camino de Santiago Compostela with his son. In light of this vacation, and other matters pending before the appellate courts, the undersigned will need until May 22, 2015, to complete the motion for discretionary review and statement of grounds for direct review in this case. Other matters include:

- Amicus curiae briefing in three cases pending before the Washington Supreme Court, *Becker v. Community Health Sys., Inc.*, Cause No. 90946-6, *Rose v. Anderson Hay & Grain Co.*, Cause No. 90975-0, and *Rickman v. Premera Blue Cross*, Cause No. 91040-5, which are due on April 28, 2015;

- Oral argument in *Lee v. Jasman*, Washington Supreme Court, Cause No. 90827-3, on May 14, 2015; and

- Appellant's opening brief in *Hieber v. Spokane Country Club*, Washington Court of Appeals, Division III, Cause No. 315134, subject to motion for extension of time that would provide for a due date of May 18, 2015.

The requested extension of time is not sought for the purposes of delay, but to accommodate the undersigned's schedule, and enable counsel to carefully, concisely and effectively complete petitioner's briefing. The undersigned does not believe that the requested extension will prejudice the respondents.

IV. GROUNDS FOR RELIEF REQUESTED

A. Regarding amendment.

RAP 5.3(h) authorizes the court to permit an amendment of the notice of discretionary review, as follows:

In order to do justice, the appellate court may, on its own initiative or on the motion of a party, permit an amendment of a notice to include (i) additional parts of a trial court decision, or (ii) subsequent acts of the trial court that relate to the act designated in the original notice of discretionary review.

Ms. Rushing's original notice of discretionary review was timely filed after the superior court's original written decision compelling arbitration of the survival claims, on the assumption that no further order was required. The subsequent order compelling arbitration relates to the prior written decision because it simply recapitulates the findings and conclusions and grants the same relief.¹

The order staying non-arbitrable wrongful death claims pending arbitration of the survival claims relates to the decision compelling arbitration because it dictates the sequence of such arbitration. *See* RAP 5.3(h).² The Court should grant leave to amend the notice of discretionary review to include both of these decisions.

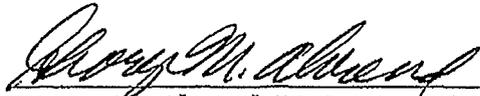
¹ To the extent the original notice of discretionary review was premature, it is deemed to be filed on the day after the April 10, 2015, order was formally entered. *See* RAP 5.2(g).

² Independently, the order staying wrongful death claims should be subject to review under RAP 2.4(b), which provides that "[t]he appellate court will review a

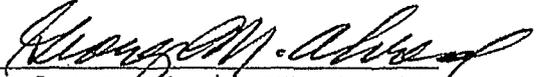
B. Regarding extension of time.

RAP 18.8(a) authorizes the Court to enlarge the time to act under the rules in order to serve the ends of justice. The undersigned counsel submits, for the reasons stated herein, that the ends of justice require the extension of time requested in this case.

Respectfully submitted this 14th day of April, 2015.



George M. Ahrend, WSBA #25160
AHREND LAW FIRM PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000
Co-Attorneys for Petitioner



Mark D. Kamitomo, WSBA #18803
Collin M. Harper, WSBA #44251
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902
Co-Attorneys for Petitioner

trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review."

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 April 14, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

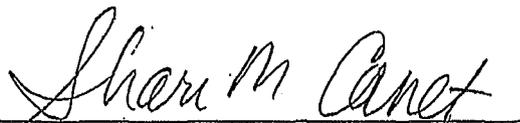
Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pjc@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

and via email to co-counsel for Plaintiff/Petitioner pursuant to prior agreement to:

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

Signed on April 14, 2015 at Ephrata, Washington.



Shari M. Canet, Paralegal

Filed
Washington State Supreme Court

JUL - 7 2015

Ronald R. Carpenter
Clerk

E

by h

IN THE 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,

Petitioners,

v.

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

Respondents.

NO. 91538-5

RULING

Mary Rushing, individually and as the representative of the estate of her father Robert Coon, brought this wrongful death and survival action against Franklin Hills Health & Rehabilitation Center and individual nurses and the nursing director employed by Franklin Hills. At an earlier point in the litigation, Franklin Hills moved to compel arbitration of all Ms. Rushing's claims based on an alternative dispute resolution agreement that Mr. Coon had signed when he voluntarily admitted himself to Franklin Hills after he was injured in a fall. Ms. Rushing opposed the motion, contending that the arbitration agreement could not be enforced because the signature on the agreement was not that of Mr. Coon and because Mr. Coon did not have the mental capacity to enter into the agreement. The superior court denied the motion to

715/66



order arbitration, and Franklin Hills sought review in Division Three of the Court of Appeals. The Court of Appeals reversed the superior court and remanded for a hearing to address whether the arbitration agreement is enforceable. *Rushing ex rel. Estate of Coon v. Franklin Hills Health & Rehab. Ctr.*, noted at 179 Wn. App. 1018, 2014 WL 346540 (2014). On remand, the superior court held a four-day evidentiary hearing and concluded that the evidence showed that Mr. Coon had the cognitive ability to appreciate the nature and effect of the consequences of the arbitration agreement. In a March 3, 2015, written decision the court found the arbitration agreement valid and enforceable between Franklin Hills and the estate, and Ms. Rushing as the administrator of the estate, and granted the motion to compel arbitration of the estate's claims. Ms. Rushing filed a notice for discretionary review directed to this court on April 1, 2015. After this notice was filed, the superior court entered an April 10, 2015, "Order Compelling Arbitration of Claims of Mary Rushing as Administrator and on Behalf of the Estate of Robert Coon." The superior court issued two other orders on April 10, 2015: an "Order Denying Defendants' Motion to Compel Arbitration and Granting Mary Rushing's Summary Judgment Motion re: Arbitration of Wrongful Death Claim" and an "Order Granting Defendants' Cross Motion to Stay Mary Rushing's Wrongful Death Claim Pending Arbitration." The wrongful death action was stayed for 180 days.¹

Shortly after these orders were entered, Ms. Rushing filed a motion to amend her notice for discretionary review of the March 3, 2015, written decision to include the superior court's order compelling arbitration of the estate's claims and the order staying her wrongful death claim pending arbitration of the estate's claims. Subsequently, Ms. Rushing filed a motion to expedite consideration of the pending

¹ This timeframe apparently reflects the position of Franklin Hills that under the relevant arbitration provisions the arbitration must occur within 180 days of the superior court's order to arbitrate, which would be September 8, 2015.

motion to amend the notice for discretionary review or, in the alternative, a motion for a stay of arbitration of the survival claims until the motions are determined. Franklin Hills has taken no position on the motion to amend the notice for discretionary review, states that it has no objection to expediting the motion to amend the notice for discretionary review, observes that the motion for discretionary review and statement of grounds for direct review should not be filed until a ruling on the motion to amend, and asks the court to deny the motion for a stay or the arbitration.

In my view, the better procedural course in this matter would be to have separate cause numbers and, if review is ultimately granted, separate briefing on (1) the decision and order compelling arbitration, and (2) the order staying the wrongful death claim pending arbitration of the survival claims. This procedural conclusion follows the preview of the different nature of the issues raised as to each of the challenged orders.² As to the superior court written decision compelling arbitration and the resulting "Order Compelling Arbitration of Claims of Mary Rushing as Administrator and on Behalf of the Estate of Robert Coon," ordinarily the Court of Appeals would be the appropriate court to conduct any discretionary review in the first instance. Division Three of the Court of Appeals remanded the matter to the superior court for the hearing, and I anticipate resolution of this matter will be fact-driven and based on the evidentiary record. Further, this matter does not raise a fundamental and urgent issue of broad public import which requires prompt and ultimate determination by this court. RAP 4.2(a)(4). Ms. Rushing recognizes that this issue may not meet the criteria for direct review, but will urge that this court's direct

² The clerk of this court temporarily stayed the requirement to serve and file a motion for discretionary review and a statement of grounds for direct review. Thereafter, Ms. Rushing filed a "Motion for Discretionary Review and Statement of Grounds for Direct Review," whereupon the clerk informed her the Rules of Appellate Procedure do not provide for the motion and statement to be combined into one document. She then filed a proposed motion for discretionary review and a statement of grounds for direct review, which has provided the referenced preview.

review of the issues raised by the “Order Granting Defendants’ Cross Motion to Stay Mary Rushing’s Wrongful Death Claim Pending Arbitration” is warranted and that judicial economy would be served by also accepting direct review of the written decision and order compelling arbitration. Of course, if Ms. Rushing’s challenge to the order compelling arbitration is successful, the issues she contends warrant this court’s review presumably would become moot.

Whether the superior court erred in staying the wrongful death claim pending arbitration of the survival claims is a distinct issue that could prove to raise issues appropriate for direct review by this court. Ms. Rushing contends review of this order would raise unresolved questions regarding the potential collateral estoppel effect of an arbitration of survival claims in a subsequent trial of a wrongful death claim, and how such a sequencing comports with the state constitutional right to a jury. Further, she notes that some courts have held that plaintiffs waived their constitutional right to a jury trial by not seeking a stay of the prior nonjury proceeding in which the factual issues were decided. *See Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998) (holding plaintiffs who were awarded damages in a federal court bench trial did not have a state constitutional right to have a jury redetermine the amount of their damages issue in a subsequent state court action, and finding it unnecessary to address the Court of Appeals determination that the plaintiffs had impliedly waived their constitutional right to a jury trial by failing to ask for a stay of the federal court proceeding). Franklin Hills counters that the potential application of collateral estoppel in the adjudication of the wrongful death claim is based on established Washington law. It quotes *Robinson v. Hamed*, 62 Wn. App. 92, 97, 813 P.2d 171 (1991), where the Court of Appeals agreed with federal decisions that “preclusion may not be defeated simply by showing that there was no right to trial by jury in the first action and that there is a constitutional right to trial by

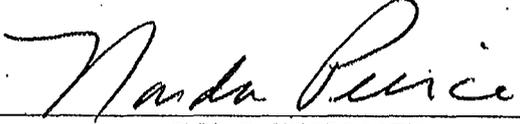
jury in the second action, no matter what anguish that may cause to those who believe in juries.” (Internal citations and quotations omitted.) And it argues that staying arbitration while nonarbitrable claims proceed to a jury trial would deprive the parties of their contractual agreement to employ a chosen dispute resolution process.

An initial procedural approach that maintains separate notices for discretionary review of these two distinct matters will facilitate a broader range of options upon the filing and consideration of the motions for discretionary review. By way of example, if discretionary review is granted and this court decides to transfer the case to the Court of Appeals rather than grant direct review, this procedural approach would allow the Court of Appeals to determine to first review the superior court decision and order compelling arbitration and then consider certification or a motion to transfer to this court review of the order staying the wrongful death claim pending arbitration. RAP 4.4. Although piecemeal appeals generally are disfavored, an appellate court has the authority to determine what steps are necessary or appropriate to secure the fair and orderly review of a case. RAP 7.3.

Accordingly, the motion to amend the notice for discretionary review is granted in part. Ms. Rushing may file an amended notice of discretionary review under this cause number that designates for review only the March 3, 2015, written decision and the April 10, 2015, superior court “Order Compelling Arbitration of Claims of Mary Rushing as Administrator and on Behalf of the Estate of Robert Coon.” The amended notice for discretionary review shall be filed within 14 days after this ruling is final, and an amended motion for discretionary review and statement of grounds for direct review shall be filed within 15 days after filing the notice for discretionary review. Any response to the motion for discretionary review and answer to the statement of grounds for direct review, and any reply, shall be filed as provided in the Rules of Appellate Procedure. Ms. Rushing’s motion to amend the

notice for discretionary review of the March 3, 2015, written decision is denied insofar as it seeks to include the "Order Granting Defendants' Cross Motion to Stay Mary Rushing's Wrongful Death Claim Pending Arbitration." The clerk of the court has assigned a new cause number, No. 91852-0, for the filing of a separate notice for discretionary review of the "Order Granting Defendants' Cross Motion to Stay Mary Rushing's Wrongful Death Claim Pending Arbitration" as provided in a ruling in that matter. The clerk of the court is requested to place the related motions for discretionary review in Nos. 91538-5 and 91852-0 on the same commissioner's calendar for consideration when ready for determinations.

Ms. Rushing also moves for a stay of arbitration pending this court's decision on whether to grant review. She contends a stay of the nonjury proceedings is needed to avoid the potential for waiving or mooted the claimed right to a jury trial. The court has authority to issue stays, before or after acceptance of review, where necessary to insure effective and equitable review. RAP 8.3. A temporary stay pending decisions on review in Nos. 91538-5 and 91852-0 is appropriate in these circumstances. The arbitration of Ms. Rushing's claims as the administrator of the Mr. Coon's estate based on an alternative dispute resolution agreement that he signed when admitted to Franklin Hills is temporarily stayed pending further order of the court.


COMMISSIONER

July 7, 2015

Supreme Court No. 91538-5)
(Related Supreme Court No. 91852-0)
Spokane Co. Superior Court Cause No. 11-2-04875-1

SUPREME COURT OF THE STATE OF WASHINGTON

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

Plaintiffs-Petitioners,

vs.

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

Defendants-Respondents.

MOTION FOR DISCRETIONARY REVIEW

George M. Ahrend, WSBA #25160
AHREND LAW FIRM PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000

Mark D. Kamitomo, WSBA #18803
Collin M. Harper, WSBA #44251
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902



TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

IDENTITY OF PETITIONER 1

DECISIONS BELOW 1

ISSUES PRESENTED FOR REVIEW..... 1

STATEMENT OF THE CASE 1

ARGUMENT IN SUPPORT OF DISCRETIONARY REVIEW 3

 a. In the interests of judicial economy, the Court should
 address the superior court’s order compelling arbitration
 of the Estate’s survival claims, along with the related
 order staying litigation of wrongful death claims..... 3

CONCLUSION AND RELIEF REQUESTED..... 4

CERTIFICATE OF SERVICE..... 5

APPENDIX

1. IDENTITY OF PETITIONER

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

2. DECISIONS BELOW

The decisions subject to review are the superior courts orders compelling arbitration of the survival claims of the Estate, attached as Exhibits A and B.¹

3. ISSUES PRESENTED FOR REVIEW

- a. Like other contracts with a fiduciary: (i) should the burden of proof that an arbitration agreement is valid and enforceable rest upon a health care provider seeking to enforce the agreement? and (ii) should the health care provider's patient be entitled to a presumption of undue influence?
- b. Are the superior court's orders compelling arbitration supported by substantial evidence?

4. STATEMENT OF THE CASE

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

¹ An order staying litigation of the non-arbitrable wrongful death claims of Ms. Rushing pending arbitration of the survival claims is the subject of a separate motion for discretionary review in related Cause No. 91852-0, pursuant to the Commissioner's rulings in this case and the related cause, dated July 7, 2015. A copy of the order staying litigation of the wrongful death claims is attached to this motion as Exhibit C.

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

The superior court below determined that Mr. Coon was competent and signed a valid and enforceable arbitration agreement as part of his admissions paperwork at Franklin Hills, and compelled arbitration of the *survival* claims of his estate on this basis. *See Exs. A & B.* In accordance with *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010), the lower court properly declined to compel arbitration of the *wrongful death* claims of Ms. Rushing. However, the court stayed litigation of the wrongful death claims pending arbitration of the survival claims. *See Ex. C.*

Ms. Rushing sought direct discretionary review of both the superior court's orders compelling arbitration of the survival claims and the order staying litigation of the wrongful death claims pending arbitration of the survival claims. The Commissioner split

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

the review into two causes, and this motion for discretionary review relates to the decisions compelling arbitration.³

In resolving Franklin Hills' motion to compel arbitration, the superior court placed the burden of proof on Ms. Rushing to establish by clear and convincing evidence that Mr. Coon was not competent, or lacked the capacity, to enter into the arbitration agreement, and found that she failed to meet that burden. *See Ex. C*, at 5:7-9. Ms. Rushing contends that Franklin Hills was a fiduciary, and that, as a result, the burden of proof should be placed on the facility to establish that Mr. Coon was competent. Ms. Rushing also contends that the superior court's decision is not supported by substantial evidence, regardless of who bears the burden of proof.

5. ARGUMENT IN SUPPORT OF DISCRETIONARY REVIEW

- a. In the interests of judicial economy, the Court should address the superior court's orders compelling arbitration of the Estate's survival claims, along with the related order staying litigation of wrongful death claims.**

Ms. Rushing acknowledges that the superior court's orders compelling arbitration of the survival claims of the estate (as

³ The procedural history is complex, and is described in detail in Ms. Rushing's motion for discretionary review of the order staying litigation of the wrongful death claims pending arbitration of the survival claims filed in Cause No. 91852-0.

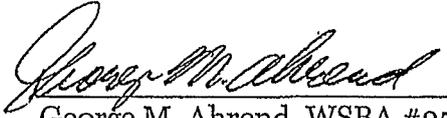
distinguished from the stay order) would not normally satisfy the requirements for discretionary review. *See* RAP 2.3(b). However, the interests of judicial economy militate in favor of reviewing the order at the same time as the jury trial issue arising from the sequencing of arbitration and litigation in this case. While judicial economy does not constitute an independent basis for obtaining discretionary review, it is nonetheless a proper consideration for enlarging the scope of issues subject to review when a case is otherwise properly before the Court.⁴ The Court should review the orders compelling arbitration as well as the order staying litigation.

6. CONCLUSION AND RELIEF REQUESTED

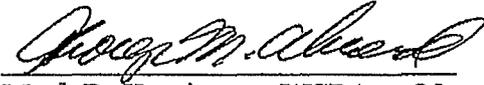
The Court should grant discretionary review of the superior court decisions compelling arbitration of the survival claims of the estate as well as the order staying litigation of the wrongful death claims of Ms. Rushing pending completion of arbitration.

⁴ *See Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn. 2d 178, 185-86, 207 P.3d 1251, 1255 (2009) (stating “[t]he Court of Appeals granted discretionary review of the trial court’s ruling denying Colonial’s motion for summary judgment and, in the interests of judicial economy, also granted review of the summary judgment dismissing the individual members and entities that formed Colonial”); *Dep’t of Natural Res. State of Wash. v. Littlejohn Logging, Inc.*, 60 Wn. App. 671, 673, 806 P.2d 779, 780 (1991) (stating “[f]or reasons of judicial economy, we also granted DNR’s cross motion for discretionary review of the court’s denial of its motion for summary judgment on the issue of damages”); *see generally* Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1549-50 (1986).

Respectfully submitted this 5th day of November, 2015.



George M. Ahrend, WSBA #25160
AHREND LAW FIRM PLLC
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000



Mark D. Kamitomo, WSBA #18803
for Collin M. Harper, WSBA #44251
MARKAM GROUP, INC., P.S.
421 W. Riverside Ave., Ste. 1060
Spokane, WA 99201-0406
(509) 747-0902

CERTIFICATE OF SERVICE

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

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

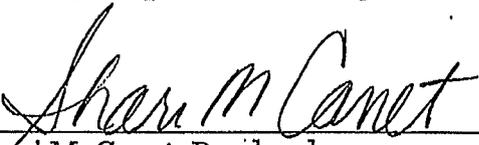
Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pjc@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

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

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

Signed on November 5, 2015 at Ephrata, Washington.



Shari M. Canet, Paralegal

Hon. Judge John O. Cooney
Hearing Date: Jan. 30, 2015
Hearing Time: 9:30 a.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

Plaintiffs,

No. 11-2-04875-1

PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT

vs.

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

Defendants.

I. INTRODUCTION

The Court of Appeals remanded this case for a determination regarding the enforceability of Franklin Hills Health and Rehabilitation Center's Alternative Dispute Resolution Agreement, including whether the agreement was signed by Robert Coon, and, if so, whether Mr. Coon had the mental capacity to comprehend the nature, terms and effect of the agreement. *See Rushing ex rel. Estate of Coon v. Franklin Hills Health & Rehab.*, noted at 179 Wash. App. 1018, slip op. at *3-5 (2014).¹ The appellate court contemplated that these issues may be resolved on summary judgment, stating:

¹ The Court of Appeals decision is law of the case, although it is unpublished. Page citations in this brief are based on the Westlaw pagination of the Court of Appeals slip opinion. A copy of the Westlaw report of the decision is attached as Exhibit A to the declaration of George Ahrend, filed contemporaneously herewith.

RECEIVED
9 45 am Fed Ex
JAN 05 2015

AHREND LAW FIRM, P.C.
16 Basin St. SW
Ephrata, WA 98823
(509) 764-9000 • (509) 464-629



1 a full evidentiary hearing may not be required. Whether an agreement is
2 enforceable is to be summarily decided by the trial court. The trial court may
3 decide the issue of enforceability if the affidavits and evidence in the record are
4 sufficient to summarily make a determination. If needed, the trial court should
allow the parties to produce additional evidence regarding the enforceability of
the arbitration agreement.

5 *Id.*, slip op. at *5 (citations omitted). Plaintiff, Mary Rushing, individually and as the
6 administrator of the Estate of Robert Coon, seeks summary judgment that a valid and
7 enforceable arbitration agreement does not exist in this case, and that any such agreement
8 would not apply to individual or wrongful death claims brought by Ms. Rushing in any event.

9 **II. STATEMENT OF UNDISPUTED MATERIAL FACTS**

10 1. On November 18, 2010, the Spokane County Superior Court found:

11 As a result of a mental disorder, the Respondent [Robert Coon] is gravely
12 disabled because:

13 the Respondent manifests severe deterioration in routine functioning as
14 evidenced by recent repeated and escalating loss of cognitive or volitional
15 control over his/her actions; is not receiving, or would not receive if released,
16 such care as is essential for his/her health or safety; and is unable, because of a
17 severe deterioration of mental functioning, to make a rational decision with
18 respect to his/her need for treatment.

19 the Respondent evidences a prior history or pattern of decompensation and
20 discontinuation of treatment resulting in repeated hospitalizations or repeated
21 peace officer interventions resulting in juvenile offenses, criminal charges,
22 diversion programs, or jail admissions.

23 G. Ahrend Decl., Ex. B (Findings of Fact & Conclusions of Law, ¶ I, *In re the Involuntary*
24 *Treatment of Robert Coon*, Spokane County Superior Court, Cause No. 09-6-00754-2 (Nov. 18,
25 2010) (formatting in original; brackets added).) These findings were based on stipulation and
deemed to be proven by clear, cogent and convincing evidence. *See id.* (internal ¶ IX). They
were also supported by a declaration of Robert L. Mulvihill, M.D., stating under oath that:

26 "Mr. Coon has been diagnosed with schizoaffective disorder with symptoms of
27 auditory hallucinations, disorganized thought and behaviors"; and
28

1 "Mr. Coon in addition to experiencing hallucinations and delusions/thought, has
2 dementia with impaired cognitive ability manifested as poor executive function,
memory and insight/judgment".

3 See G. Ahrend Decl., Ex. C (Physician/ARNP/Mental Health Professional Declaration, pp. 1 &
4 3, *In re the Involuntary Treatment of Robert Coon*, Spokane County Superior Court, Cause No.
5 09-6-00754-2 (Oct. 12, 2010)).

6 2. On the basis of the foregoing, the court ordered that Mr. Coon "be subject to
7 involuntary treatment for a period not to exceed one hundred eighty (180) days." G. Ahrend
8 Decl., Ex. D (Order of Involuntary Treatment, p. 1, *In re the Involuntary Treatment of Robert*
9 *Coon*, Spokane County Superior Court, Cause No. 09-6-00754-2 (Nov. 18, 2010)). The court
10 further ordered Spokane Mental Health to investigate and seek less restrictive alternative
11 (LRA) treatment, subject to a number of specified conditions. See *id.* (internal pp. 2-4). By its
12 terms, the order would not expire until May 17, 2011. See *id.*

13 4. The foregoing order was a continuation of a prior order for an involuntary LRA.
14 See G. Ahrend Decl., Ex. E (Petition for 180-Day LRA, p. 1, *In re the Involuntary Treatment of*
15 *Robert Coon*, Spokane County Superior Court, Cause No. 09-6-00754-2 (Nov. 5, 2010)).

16 5. On May 3, 2011, a petition to continue Mr. Coon's LRA was filed, based on the
17 persistence of what the relevant court documents describe as a "grave mental disability." See G.
18 Ahrend Decl., Ex. F (Petition for 180-Day LRA, *In re the Involuntary Treatment of Robert*
19 *Coon*, Spokane County Superior Court, Cause No. 09-6-00754-2 (May 3, 2011)).

20 6. The petition to keep the LRA in place was supported by another declaration of
21 Dr. Mulvihill, who examined Mr. Coon on March 11 and 25, 2011. See G. Ahrend Decl., Ex. G
22 (Physician/ARNP/Mental Health Professional Declaration, p. 1, *In re the Involuntary*
23 *Treatment of Robert Coon*, Spokane County Superior Court, Cause No. 09-6-00754-2 (Apr. 22,
24 2011)). Among other things, Dr. Mulvihill stated under oath that:

25 "The Respondent [Mr. Coon] is currently on a commitment as a result of mental
26 disorder which includes symptoms of: ongoing disorganized thought, auditory
27 hallucinations and vivid visual hallucinations due to schizoaffective disorder";
28

1 "Mr. Coon continues with disorganized behavior and hallucinations which
2 impair his ability to care for himself";

3 "Mr. Coon has been hospitalized at least nine times at Eastern State Hospital or
4 Sacred Heart Medical Center after decompensating after stopping his
5 medications"; and

6 "There is a less restrictive treatment available as an alternative to hospital
7 detention for the respondent which is that of ongoing close case management
8 and psychiatric medication management to ensure compliance with
9 therapy/medications to help avoid another lengthy hospitalization."

10 *Id.* (internal pp. 1 & 3-4 (brackets added)).

11 7. In the meantime, around April 1, 2011, Mr. Coon was admitted to Franklin
12 Hills. Approximately two days later, on April 3, 2011, he was allegedly asked to sign at least
13 five separate documents: an "Admission Agreement"²; a "Payor Confirmation" document; a
14 "Medicare Denial of Benefits Notice"; a "Resident Trust Fund Authorization"; and an
15 "Alternative Dispute Resolution Agreement". At the time, Mr. Coon had a durable power of
16 attorney in place, appointing his daughter Mary Rushing as his attorney-in-fact. *See* Durable
17 Power of Attorney, dated Nov. 9, 2010. *See* G. Ahrend Decl., Exs. H-L (attaching documents).

18 8. The 7-page, single-spaced "Admission Agreement" describes the nature and
19 extent of health care provided by Franklin Hills, along with payment terms and an assignment
20 of health care benefits to Franklin Hills. *See* G. Ahrend Decl., Ex. H. The Admission
21 Agreement also contains an acknowledgment of receipt of six additional documents: a
22 "Resource Guide"; a "Bill of Resident Rights—General"; a "Notice of Privacy Practices"; a
23 document entitled "Personal Funds—Your Rights"; "Advance Directives Policy and Record";
24 and a Washington-specific "Notice of Discharge Planning System." *See id.* (internal p. 6).

25 9. The 1-page, single-spaced "Resident Trust Fund Authorization," authorizes
26 Franklin Hills to "hold, safeguard, and account for [a resident's] personal funds." G. Ahrend
27 Decl., Ex. K (brackets added).³

28 ² The Admissions Agreement indicates that it consists of 12 pages, but only 7 pages have been produced.

³ Another Resident Trust Fund Authorization for Mr. Coon was dated April 11, 2011. *See* G. Ahrend Decl., Ex. M. Forms permitting Franklin Hills to manage Mr. Coon's Social Security benefits as a "representative payee" were dated May 6 and 10, 2011. *See* G. Ahrend Decl., Ex. N.

1 10. The 5-page, single-spaced "Alternative Dispute Resolution Agreement"⁴
2 contains detailed provisions relating to mandatory mediation and arbitration of disputes
3 between Franklin Hills and its residents. *See* G. Ahrend Decl., Ex. L. The Alternative Dispute
4 Resolution Agreement incorporates by reference "Extendicare Health Services, Inc.,
5 Alternative Dispute Resolution Rules of Procedure," which is available from Franklin Hills or a
6 website upon request, but which is apparently not provided at the time of signing the
7 Alternative Dispute Resolution Agreement. *See id.* (internal ¶ 7). The Rules of Procedure
8 comprise a 14-page single-spaced document. Among other things, the Rules of Procedure
9 provide:

10 "There must be a written agreement between the parties to engage in the dispute
11 resolution process. The agreement should be knowing and voluntary."

12 "The parties must have capacity both at the time of execution of the agreement
13 and at the time of initiation of the dispute resolution process or be represented
14 by a surrogate or agent with capacity."

14 G. Ahrend Decl., Ex. O (Rules of Procedure, ¶¶ I-II).

15 11. The signatures on all five of the intake documents are illegible and do not appear
16 to belong to Mr. Coon. *See* G. Ahrend Decl., Ex. P (Affidavit of Mary Rushing, previously
17 filed herein, ¶ 8).

18 12. Franklin Hills has declined to admit or deny whether the involuntary LRA for
19 Mr. Coon was in effect on April 3, 2011, the date of the ostensible signatures on the foregoing
20 documents. In response to requests for admission on the subject, Franklin Hills objected on
21 grounds that the requests called for a "legal conclusion," but otherwise answered that:

22 Without waiving said objection, defendant cannot admit or deny the request for
23 admission as defendant does not know what was in effect on April 3, 2011.
24 Defendant has made a reasonable inquiry and the information known by
25 defendant is insufficient to enable to defendant to admit or deny the request.

26
27
28 ⁴ The Alternative Dispute Resolution Agreement indicates that it consists of six pages, but the sixth page appears to be blank.

1 G. Ahrend Decl., Ex. Q (Plaintiffs' First Requests for Admissions Propounded to Defendants
2 with Responses, Request for Admission No. 1, Dec. 8, 2014.)

3 13. At the time of his admission to Franklin Hills, Mr. Coons had executed a durable
4 power of attorney in favor of his daughter, Mary Rushing. *See* G. Ahrend Decl., Ex. P
5 (Affidavit of Mary Rushing, ¶ 7); *id.*, Ex. S (Durable Power of Attorney).

6 14. Franklin Hills seeks to enforce the Alternative Dispute Resolution Agreement,
7 and to compel arbitration.⁵

8 **III. ARGUMENT AND AUTHORITY**

9 **A. Franklin Hills has the burden of coming forward with admissible evidence**
10 **sufficient to create a genuine issue of material fact for trial regarding all**
11 **elements of its arbitration defense.**

12 Summary judgment is warranted when the admissible evidence shows that there is no
13 genuine issue of material fact for trial, and that the moving party is entitled to judgment as a
14 matter of law. CR 56(c), (e). The moving party bears the initial burden of showing the absence
15 of a genuine issue of material fact. *See Young v. Key Pharm., Inc.*, 112 Wn. 2d 216, 225, 770
16 P.2d 182 (1989). If the moving party satisfies this burden, then the inquiry shifts to the party
17 with the burden of proof at trial to produce admissible evidence creating a genuine issue of
18 material fact regarding each essential element of its claim or defense. *See id.*, 112 Wn. 2d at
19 225. In this case, Franklin Hills cannot satisfy its burden and partial summary judgment should
20 be granted, dismissing its arbitration defense.

21
22
23
24
25 ⁵ Franklin Hills alleged an affirmative defense based on arbitration in its answer to the complaint, and has sought
26 to compel arbitration on its own behalf. Although the individual defendants are represented by the same counsel,
27 the individual defendants have never asserted an affirmative defense based on arbitration in their own right, nor
28 have they joined the motion to compel arbitration. On the contrary, Defendant Janenne Yorba testified that she has
never waived her constitutional right to have a jury determine the claims against her, and it appears that her
informed consent to such waiver has never been obtained. *See* G. Ahrend Decl., Ex. R (Continued Deposition of
Janenne Yorba, Dec. 19, 2014, at 75:19-21).

1 **B. There is no admissible evidence that Robert Coon signed the Alternative**
2 **Dispute Resolution Agreement.**

3 As recognized by the Court of Appeals, Franklin Hills has the burden to prove that Mr.
4 Coon signed the arbitration agreement. *See Rushing*, slip op., at *4; *accord Paschke v. Jensen*,
5 169 Wash. 171, 174, 13 P.2d 435 (1932) (approving jury instruction placing burden of proof of
6 signature on party seeking to enforce contract). Here, the relevant signature is illegible and does
7 not match the signature of Mr. Coon. In the absence of any admissible evidence to the contrary,
8 Franklin Hills cannot meet its burden of proof and the motion to compel arbitration must be
9 denied on this basis.

10 **C. There is no admissible evidence that Mr. Coon had the requisite mental**
11 **capacity to comprehend the nature, terms and effect of the Alternative**
12 **Dispute Resolution Agreement.**

13 Regarding the issue of mental capacity, the Court of Appeals stated:

14 A contract may be invalidated if a person lacks sufficient mental capacity or
15 competence to appreciate the nature and effect of the particular contract at issue.
16 *Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 108-09, 120 P.2d 527
17 (1942) (quoting 17 C.J.S. *Contracts* § 133, at 479 (1939)). In Washington, a
18 person is presumed competent to enter into an agreement. *Grannum v. Berard*,
19 70 Wn.2d 304, 307, 422 P.2d 812 (1967). A person challenging the enforcement
20 of an agreement can overcome the presumption by presenting clear, cogent, and
21 convincing evidence that the party signing the contract did not possess sufficient
22 mind or reason at the time he entered into the contract to enable him to
23 comprehend the nature, terms, and effect of the contract. *Id.*

24 *Rushing*, slip op. at *3. Although the court seems to indicate that the burden of proof is on Ms.
25 Rushing, as the party challenging the arbitration agreement on grounds of incompetence, the
26 court did not have occasion to consider the effect that the fiduciary relationship between
27 Franklin Hills and Mr. Coon has on the placement of the burden of proof.

28 It cannot be seriously disputed that Franklin Hills was a fiduciary, based on its status as
 a health care provider and its handling of Mr. Coon's personal funds. As recently described by
 one court:

1 In Washington, a fiduciary relationship arises in one of two situations: (a) when
2 the nature of the relationship between the parties has historically been
3 considered fiduciary in character, such as that of attorney and client, doctor and
4 patient, and partner and partner (fiduciary relationship as a matter of law), or (b)
special circumstances exist in which one party justifiably relies on another to
look after the former's financial interests (fiduciary relationship arise in fact).

5 *In re Consol. Meridian Funds*, 485 B.R. 604, 618 (Bankr. W.D. Wash. 2013). The effect of a
6 fiduciary relationship should be to reverse the normal burden of proof, placing it on the
7 fiduciary. *Cf. Kitsap Bank v. Denley*, 177 Wn. App. 559, 570-72, 312 P.3d 711 (2013)
8 (recognizing that presumption of undue influence arises from fiduciary relationship); *see also*
9 Restatement (Second) of Contracts § 173 (1981) (providing contract with fiduciary is voidable
10 unless it is "it is on fair terms" and "all parties beneficially interested manifest assent with full
11 understanding of their legal rights and of all relevant facts that the fiduciary knows or should
12 know").

13 Regardless of who bears the burden of proof, however, the continuing LRA establishes
14 Mr. Coon's incapacity. In *Roberts v. Pacific Tel. & Tel. Co.*, 93 Wash. 274, 285, 160 P. 965
15 (1916), the Court held that "commitment papers" in an "insanity proceeding" were admissible
16 and sufficient to establish incompetency for the duration of the commitment. The Court further
17 approved an instruction that "[i]f insanity has once been established then the presumption is
18 that insanity continues until the contrary is established by a preponderance of the evidence[.]"
19 stating that such an instruction "is proper where the allegation and the facts under the allegation
20 show that the insanity is continuous and existing." *Id.*, 93 Wash. at 285.⁶ In a similar way, the
21 LRA petitions, supporting declarations and orders pertaining to Mr. Coon establish his
22 continuing incapacity. In the absence of any admissible evidence to the contrary, Franklin Hills
23 cannot meet its burden of proof and the motion to compel arbitration must be independently
24 denied on this basis.

25
26
27 ⁶ *Roberts* is admittedly distinguishable on the facts because the plaintiff had alleged and proved that his incapacity
28 ceased upon discharge from the asylum, rendering the instruction improper in that case, at least in the absence of
further qualification. *See* 93 Wash. at 285.

1 **D. There is no admissible evidence sufficient to overcome the presumption of**
2 **undue influence on the part of Franklin Hills.**

3 As stated in 25 Wash. Prac., Contract Law And Practice § 9:18 (3d ed.):

4 In contracts, undue influence is a generally broad concept that affords protection
5 in situations where duress and misrepresentation do not. The essence of undue
6 influence is unfair persuasion, and it exists where one party is under the
7 influence or domination of another or, by virtue of the relation between them, is
8 justified in assuming that the other party will not act in a manner inconsistent
 with his welfare but then does. Essentially, undue influence involves unfair
 persuasion that seriously impairs the free and competent exercise of judgment of
 a person.

9 (Footnotes omitted). Undue influence is presumed from the existence of a fiduciary relationship
10 between contracting parties, and renders the contract voidable. *See id.*; accord *Kitsap Bank*,
11 177 Wn. App. at 570-72 (applying standard from Restatement (Second) of Contracts § 177). In
12 this case, the fiduciary relationship between Franklin Hills and Mr. Coon gives rise to a
13 presumption of undue influence. As a result, Franklin Hills must produce admissible evidence
14 of a lack of undue influence in order to avoid summary judgment.

15 **E. Wrongful death claims brought by Mary Rushing are not subject to**
16 **arbitration.**

17 In the absence of a decision on review, the Court of Appeals declined to reach the
18 question of whether Franklin Hills' Alternative Dispute Resolution Agreement required
19 arbitration of wrongful death claims brought by Mary Rushing. *See Rushing*, slip op., at *5.
20 Nonetheless, in *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231
21 P.3d 1252 (2010), the court held that wrongful death claims brought on behalf of statutory
22 beneficiaries, as distinguished from survival claims brought on behalf of the decedent's estate,
23 are *not* subject to arbitration. This decision from Division I is binding on all superior courts.
24 *See, e.g., Marley v. Dep't of Labor & Indus.*, 72 Wn. App. 326, 330, 864 P.2d 960 (1993)
25 (recognizing trial court was bound by decision of another division of the Court of Appeals),
26 *aff'd*, 125 Wn. 2d 533 (1994). In light of *Woodall*, the effect of the arbitration agreement in this
27 case would be limited to survival claims brought on behalf of Mr. Coon's estate as a matter of
28

1 law, even if the agreement had been signed by Mr. Coon and he had the requisite mental
2 capacity to understand the nature, terms and effect of the agreement.⁷

3 IV. CONCLUSION

4 Based on the foregoing, Plaintiff, Mary Rushing, individually and as administrator of
5 the Estate of Robert Coon, respectfully asks the court to grant partial summary judgment as
6 follows:

7 1. Dismissing Defendant Franklin Hills Health & Rehabilitation Center's
8 Affirmative Defense #5 that "[a]ll of Plaintiffs' [sic] claims are subject to the provisions of an
9 Alternative Dispute Resolution Agreement requiring mediation and/or binding arbitration," as
10 alleged in Defendant's Answer to Complaint with Affirmative Defenses, dated December 22,
11 2011.

12 2. Entering an order pursuant to CR 56(d), specifying that the following facts exist
13 without substantial controversy and cannot be controverted in good faith:

14 2.1. That an agreement to arbitrate does not exist within the meaning of
15 RCW 7.04A.060(2), either because Robert Coon had been adjudicated as mentally
16 incompetent and did not possess sufficient mind or reason to comprehend the nature,
17 terms and effect of the Alternative Dispute Resolution Agreement, or because he did not
18 sign the agreement, or both; and

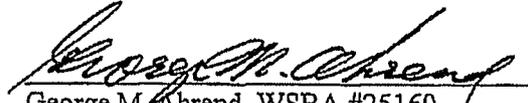
19 2.2 That the wrongful death claims brought by Mary Rushing (as
20 distinguished from survival claims brought on behalf of the estate) are not subject to the
21 Alternative Dispute Resolution Agreement within the meaning of RCW 7.04A.060(2).

22
23
24
25
26 ⁷ The U.S. Supreme Court recently denied a petition for review by Franklin Hill's parent company of a
27 Pennsylvania decision to the same effect as *Woodall*, holding that a resident's arbitration agreement with the
28 company did not bind non-signatory wrongful death claimants. See *Pisano v. Extendicare Homes, Inc.*, 77 A.3d
651 (Pa. Super. 2013), *appeal denied*, 86 A.3d 233 (Pa. 2014), *cert. denied*, 134 S. Ct. 2890 (2014); see also G.
Ahrend Decl., Ex. T (attaching copy of *Pisano* decision).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DATED this 2nd day of January, 2015.

AHREND LAW FIRM PLLC
Co-Attorneys for Plaintiffs


George M. Ahrend, WSBA #25160

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

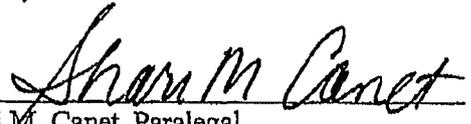
THE UNDERSIGNED, declares under penalty of perjury of the laws of the State of Washington, as follows:

On January 2, 2015, I served a copy of the document to which this is appended by [] hand delivery, [X] email, and/or [X] First Class Mail, postage prepaid, as follows:

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pic@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

Signed at Ephrata, Washington on January 2, 2015.



Shari M. Canet, Paralegal

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

Plaintiffs,

vs.

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

Defendants.

No. 11-2-04875-1

DECLARATION OF FACSIMILE
FILING (GR-17)

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

1. I am the person who received the foregoing facsimile transmission for filing.
2. My work address is 1201 N. Ash #100, Spokane, WA 99201.
3. My work phone number is (509) 325-0001.
4. I received the document via electronic transmission at gsauerland@comcast.net.
5. I have examined the foregoing document entitled **PLAINTIFF'S MEMOANDUM**

IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT, determined that
it consists of fourteen (14) pages (including any exhibits), including this Declaration, and it is
complete and legible.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Signed at Spokane, Washington this 2nd day of January, 2015.

(Print Name)
Eastern Washington Attorney Services, Inc.
1201 N. Ash #100
Spokane, WA 99201
Tel: (509) 325-0001

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

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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

Plaintiff,

vs.

No. 11-2-04875-1

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

Defendants.

DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

1. INTRODUCTION

Plaintiff's assertion that Mr. Coon lacked capacity to sign an Arbitration Agreement is based on an evaluation and treatment procedure which provided Mr. Coon with a "Less Restrictive Alternative" (LRA); however, the plaintiff neglects to tell the court that by statute, no person shall be presumed incompetent as a consequence of receiving such an evaluation, and that competency shall not be determined or withdrawn under such provisions. Nor does the plaintiff tell the court that a person that is treated under an LRA continues to have the right to dispose of property and sign contracts (again by statute). Plaintiff further asserts, without applicable

DEFENDANTS' RESPONSE TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT -- 1



Winston & Cashatt
PROFESSIONAL SERVICE CORPORATION
Bank of America Financial Center
601 West Riverside Avenue, Suite 1900
Spokane, Washington 99201-0685
(509) 838-6131

1 authority, that a fiduciary relationship exists, which somehow as a matter of law establishes that
2 the Arbitration Agreement was signed under undue influence, based solely on the fact that the
3 defendants are a skilled nursing facility (and its employees). The law neither establishes a
4 fiduciary relationship under this circumstance, nor is there any basis to assert undue influence to
5 void the contract as a matter of law.
6

7 Plaintiff also makes the statement that Mr. Coon's signature is "illegible," and does not
8 match his other signatures. However, defendants have presented direct evidence by a witness
9 who saw Mr. Coon sign the agreement, and no basis exists to establish plaintiff's right to relief as
10 a matter of law.

11 Further, plaintiff's assertion that the wrongful death claims brought by Ms. Rushing are
12 not arbitrable is subject to this court's determination, and has not been absolutely decided by
13 previous law; this determination can await the decision on the arbitration of the estate claims, but
14 ultimately are so interrelated they should also be subject to arbitration.
15

16 2. FACTS

17 2.1 Robert H. Coon was a 63 year old man who had a history of mental illness with a
18 primary diagnosis of schizoaffective disorder and bipolar disorder; he was under a physician's
19 care as well as a psychiatrist's care for treatment of his physical and mental health throughout his
20 lifetime.
21

22 2.2 Mr. Coon was prescribed various anti-psychotic drugs throughout his life,
23 including Lithium, Depakote, Risperdal and Seroquel; he had periods of non-compliance with his
24 medications that led to hospitalizations.

1 2.3 After Mr. Coon's last hospitalization at Eastern State Hospital in November 2008,
2 he was released on a Less Restrictive Alternative (LRA) plan to the Carlyle Care Center in
3 Spokane, Washington. (Ex. A ¹) (Mr. Coon did not return to Eastern State Hospital after 2008,
4 nor was he ever involuntarily treated thereafter.)

5 2.4 The purpose of the LRA was to keep Mr. Coon out of extended hospitalization by
6 providing Mr. Coon with a stable living environment, medication monitoring, and mental health
7 treatment.
8

9 2.5 Competency "shall not" be adjudicated and no person is presumed to be
10 incompetent as a consequence of being evaluated or treated under an LRA.
11 RCW 71.05.360(1)(b). (Ex. B)

12 2.6 In fact, a person treated subject to an LRA retains rights to dispose of property
13 and sign contracts. RCW 71.05.360(10)(k). (Ex. B)

14 2.7 As part of the LRA, Mr. Coon signed a Notice of Rights which included the right
15 to be presumed competent and not lose any civil rights as a consequence of receiving evaluation
16 and treatment for a mental disorder. (Ex. C)

17 2.8 Mr. Coon moved to Cherrywood Place Assisted Living on June 26, 2009, where
18 he lived independently in his own apartment; staff members monitored his medication
19 compliance and provided meals in a cafeteria like setting. (Ex. D)
20
21
22

23 _____
24 ¹ All exhibits are attached to the Decl. of Patrick J. Cronin filed herewith.

1 2.9 In August 2009, Mr. Coon stopped taking prescribed medication, and agreed to
2 voluntary admission on August 26, 2009 to Sacred Heart Medical Center psychiatric care.

3 (Ex. E)

4 2.10 On September 2, 2009, Mr. Coon was placed under a new LRA so that he could
5 return to Cherrywood Place. (Ex. F)

6 2.11 Mr. Coon was released back to Cherrywood Place on September 2, 2009 under
7 his new LRA after he had restarted his medications and stabilized. (Ex. G)

8 2.12 Mr. Coon's LRA was continued from September 2009 through the end of his life
9 in order to provide ongoing close outpatient case management and psychiatric follow-up to
10 ensure medication compliance and to prevent any further episodes that would necessitate
11 additional treatment. (Ex. H)

12 2.13 Mr. Coon was medication compliant from September 2009 until he died in 2011,
13 and had no further psychiatric episodes that necessitated inpatient treatment.

14 2.14 Mr. Coon was never adjudged incompetent nor had a guardian appointed.

15 2.15 Mr. Coon suffered from Parkinson's like symptoms in 2011, making it difficult
16 for him to fill out and sign checks and paperwork. (Ex. I)

17 2.16 Mr. Coon also became very unsteady on his feet and suffered several falls in the
18 spring of 2011. (Ex. J)

19 2.17 On April 1, 2011, Mr. Coon suffered a fall and went to Holy Family Hospital for
20 evaluation; he was not accompanied by anyone else. (Ex. K)

1 2.18 Mr. Coon was seen by Dr. Lynn Bergman at Holy Family who believed he needed
2 more support than Cherrywood Place offered and suggested to Mr. Coon that he be discharged to
3 Franklin Hills Health & Rehabilitation Center, to which Mr. Coon agreed. (Ex. K)

4 2.19 Mr. Coon was admitted to Franklin Hills on April 1, 2011 and was evaluated by
5 nurse Aurilla Poole, who noted Mr. Coon was alert and oriented x 3, meaning he was oriented to
6 person, place and time at admission. (Ex. L)

7 2.20 As a new resident, Mr. Coon was placed on 72 hour alert charting meaning that he
8 was checked and charted on routinely for 72 hours. (Ex. M)

9 2.21 At each chart note from April 1 through April 4, 2011, Mr. Coon was alert and
10 oriented x 3. (Ex. M)

11 2.22 On April 3, 2011, Mr. Coon met with Jennifer Wujick, an admissions assistant at
12 Franklin Hills in order to fill out and sign the Franklin Hills admissions paperwork.

13 2.23 Mr. Coon told Ms. Wujick that he was an attorney, and she was impressed with
14 how well he could answer questions about his financials. She also remembers that Mr. Coon
15 asked her a lot of questions and seemed to know a lot of information. (Ex. N, Wujick Dep., p.
16 31, l. 17 – p. 32, l. 18)

17 2.24 Mr. Coon read through various documents and signed the admissions paperwork
18 in Ms. Wujick's presence. (Ex. o)

19 2.25 As part of the admissions paperwork, Mr. Coon signed an Alternative Dispute
20 Resolution Agreement (ADRA). Ms. Wujick explained the ADRA to Mr. Coon and explained
21
22
23
24

1 that he did not have to sign the ADRA as a prerequisite to his admission. (Exs. N, O, Wujick
2 Dep., p. 31, ll. 17 -18; p. 36, l. 3 - l. 13)

3 2.26 Ms. Wujick recalls that Mr. Coon asked her several questions about the ADRA
4 before agreeing to sign it. (Ex. N, Wujick Dep., p. 31, l. 17 - p. 32, l. 18)

5 2.27 Ms. Wujick recalls watching Mr. Coon sign all of the admissions documents and
6 that his hands shook really bad while he signed them. (Ex. N, Wujick Dep., p. 50, l. 9 - l. 17)

7 2.28 Other various staff members at Franklin Hills interacted with Mr. Coon over the
8 days surrounding his admission, and they all stated that he was alert and oriented when they
9 spoke with him, and he was capable of understanding his condition, his surroundings, current
10 news events, and control his own conduct. These interactions are detailed in the Declarations of
11 Kori Martin, Aurilla Poole, Melissa Chartrey, Erika Ramirez, Jennifer Wujick and Linda Lane,
12 filed initially in support of the Defendants' Motion to Compel Arbitration and will not be
13 repeated in detail here.
14

15
16 **3. ARGUMENT**

17 Plaintiff misconstrues mental illness for mental incompetence, and attempts to use as
18 evidence an evaluation and treatment procedure which is statutorily precluded from being
19 utilized as an adjudication of competency. Evaluation and treatment for mental illness does not
20 deprive an individual of his right to contract, nor does it render every contract subject to a
21 presumption of invalidity. None of the authorities cited by the plaintiff establish a fiduciary
22 obligation between defendants and Mr. Coon based solely on the fact that Franklin Hills is a
23
24

1 skilled nursing facility, and the other defendants are nurses there,² nor does their relationship
2 establish a presumed undue influence; moreover, there is no evidence of undue influence. The
3 burden that exists here is for plaintiff to present clear, cogent and convincing evidence that
4 Mr. Coon was incompetent to contract, which they have not done. See, Anderson v. Liberty
5 Lobby, 477 U.S. 242, 254 (1986) (in ruling on a plaintiff's motion for summary judgment, the
6 court considers the evidentiary burden that plaintiff must meet at trial, including a clear, cogent
7 and convincing burden of proof).

9 The parties' burdens have also been well established by the Court of Appeals in this
10 matter, which is the law of the case, and the fact that plaintiff has moved for summary judgment
11 does not alter these burdens. Defendants "need only prove the existence of a contract and the
12 other party's objective manifestation of intent to be bound," which exists with the direct proof
13 that there was a witness to Mr. Coon's signature on the Arbitration Agreement. See, Rushing v.
14 Franklin Hills Health & Rehabilitation, 2014 WL 346540 at *3 (Wash. App. 2014). Plaintiff
15 must present "clear, cogent, and convincing evidence that the party signing the contract" lacked
16 capacity to do so. Id. Plaintiff has not done so, and summary judgment may not be granted.

20 ² Plaintiff asserts that not all of the defendants have made the motion to enforce the arbitration agreement.
21 Originally, the plaintiff sued only Franklin Hills, and the action was removed to federal court; to avoid federal court
22 diversity jurisdiction, plaintiff moved to amend to add individual nurse employees of Franklin Hills as defendants.
23 This motion to compel arbitration was made prior to Franklin Hills counsel appearing on behalf of the individual
24 defendants; unfortunately, thereafter, the term "defendant" and "defendants" were used somewhat interchangeably,
but it was recognized that all defendants were making the motion—for example the Court's original order denying
the motion to compel was titled "Order Denying Defendants' Motion to stay Proceedings and Compel Arbitration."
Melissa Chartrey, Aurilla Poole, and Janene Yorba have now filed a joinder to the Motion to Compel Arbitration
and Stay this Proceeding, to avoid any confusion.

1 **3.1 Defendants have established that the Arbitration Agreement was signed by**
2 **Mr. Coon with direct proof, precluding summary judgment.**

3 The party seeking to enforce a contract need only prove the existence of the contract and
4 the other party's objective manifestation of intent to be bound. Rushing, 2014 WL 346540 at *3.
5 The signature of a party is evidence of a party's objective intent to be bound. Id. The trier of
6 fact has the duty to decide the **factual question** of whether or not the handwriting in question
7 belongs to the person charged with signing the document. Id.

8 Defendants have presented evidence of both the existence of the Arbitration Agreement
9 and Mr. Coon's signature on it. In fact, there is undisputed direct evidence from Ms. Wujick
10 who visually witnessed Mr. Coon sign the Arbitration Agreement. (Exs. N, O) Ms. Rushing
11 was not present at Mr. Coon's admission to Franklin Hills and cannot dispute the direct
12 testimony of Ms. Wujick, other than to simply make the statement it is not her father's signature.
13 This does not provide a basis for judgment as a matter of law for plaintiff, and summary
14 judgment must be denied.

15
16 **3.2 The plaintiff improperly asserts that Mr. Coon's evaluation and treatment**
17 **under an LRA establishes his incompetence and precluded his continued**
18 **right to contract.**

19 Plaintiff asserts in her summary judgment on several occasions that "the continuing LRA
20 establishes Mr. Coon's incapacity"; "the LRA petitions, supporting declarations and orders
21 pertaining to Mr. Coon establishes continuing incapacity"; "...an agreement to arbitrate does not
22 exist...because Robert Coon had been adjudicated as mentally incompetent." (Plaintiff's
23 Memorandum in Support of Motion for Partial Summary Judgment, pp. 8, 10.) This
24

1 misrepresents the law, and fails to provide the court with the applicable law which precludes
2 using evaluation and treatment pursuant to an LRA as any adjudication of competency, or any
3 basis to deprive an individual of the right to contract. The law in this regard is clear:

4 No person shall be presumed incompetent as a consequence of receiving an
5 evaluation or voluntary or involuntary treatment for a mental disorder, under this
6 chapter or any prior laws of this state dealing with mental illness. Competency
7 shall not be determined or withdrawn except under the provision of Ch. 10.77
[criminal insanity] or 11.88 RCW [guardianship].

8 RCW 71.05.360(b).

9 The legislature went on to insure the rights of a mentally ill person receiving treatment:

10 ...Insofar as danger to the person or others is not created, each person
11 involuntarily detained, treated in a less restrictive alternative course of treatment,
12 or committed for treatment and evaluation pursuant to this chapter shall have, in
addition to other rights not specifically withheld by law, the following rights: ...

13 (k) to dispose of property and sign contracts unless such person has been
14 adjudicated an incompetent in a court proceeding directed to that particular
issue.

15 RCW 71.05.360(k). This law was followed when Mr. Coon signed, as part of the LRA
16 proceeding, a "Notice of Rights," which established his right to be "presumed competent."

17 (Ex. D)

18 Plaintiff primarily bases her entire argument regarding the competency of Mr. Coon on
19 boilerplate diagnoses made pursuant to an LRA, which by statute is not an adjudication of
20 incompetency, nor to be utilized as a bases for incompetency; instead, the legislature has made
21 every effort to ensure the continued civil rights of the mentally ill, including the right to contract
22
23
24

1 freely.³ Yet of plaintiff's 14 "undisputed facts," half of them are based wholly on documents and
2 pleadings regarding his LRA. (Although plaintiff fails to include the pleading Mr. Coon signed
3 titled "Notice of Rights.") There exists no legal basis to utilize that information to establish
4 Mr. Coon's alleged incompetency.

5
6 **3.3 The burden of proof is on the plaintiff to prove by clear, cogent and**
7 **convincing evidence that Mr. Coon did not have capacity to sign the**
8 **arbitration agreement; no evidence of a legal fiduciary relationship exists,**
9 **nor is any undue influence presumed to invalidate the contract.**

10 A person is presumed competent to enter into an agreement. Rushing, 2014 WL 346540
11 at *3. A person challenging the enforcement of an agreement can overcome the presumption by
12 presenting clear, cogent, and convincing evidence that the party signing the contract did not
13 possess sufficient mind or reason at the time he entered into the contract to enable him to
14 comprehend the nature, terms and effect of the contract. Id. What constitutes clear, cogent and
15 convincing proof necessarily depends upon the character and extent of the evidence considered,
16 viewed in connection with the surrounding facts and circumstances. Id. The question of
17 contractual capacity or competence is a question of fact. Id. The trial court's responsibility is to
18 determine whether the evidence meets the clear, cogent and convincing standard, because the
19 determination requires weighing and evaluating evidence and credibility determinations that are
20 best suited for the trier of facts. Id.

21
22
23 ³ Defendants have moved to strike the LRA pleadings as irrelevant under the statute, and based wholly on hearsay;
24 defendants further request that the court strike all consideration of these pleadings in the scheduled hearing on
Mr. Coon's competency for the same reasons.

DEFENDANTS' RESPONSE TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT -- 10

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
Bank of America Financial Center
601 West Riverside Avenue, Suite 1800
Spokane, Washington 99201-0695
(509) 838-6131

1 Plaintiff apparently disputes the law of the case as outlined above, and instead argues for
2 the first time that as a matter of law, a resident of a skilled nursing facility and the facility (along
3 with its employees) are in a "fiduciary" relationship, which also as a matter of law creates a
4 presumption that any arbitration agreement entered into is the result of undue influence and is
5 void. No law or facts support this position.
6

7 First, Washington courts have previously had occasion to analyze the enforcement of an
8 arbitration contract by a resident of a nursing home, and no such fiduciary duty was established;
9 instead, Washington's public policy strongly favoring arbitration of disputes was upheld. See,
10 Estate of Eckstein v. Life Care Centers of America, Inc., 623 F.Supp.2d 1235, 1240 (E.D.Wash.
11 2009); Nail v. Consol. Resources Health Care Fund, 155 Wn.App. 227, 229 P.3d 885 (2010);
12 Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn.App. 919, 231 P.3d 1252 (2010)
13 (enforcing arbitration agreement for claims of resident despite claim that resident lacked mental
14 capacity to sign agreement based on a diagnosis of "dementia w Behavior Dist." because there
15 was not clear cogent and convincing evidence of lack of capacity).
16

17 Nowhere do these courts suggest that an automatic fiduciary duty exists in such situations
18 to alter either the burden of proof or the enforceability of an arbitration agreement. The
19 authorities cited by the plaintiff similarly do not establish the existence of a fiduciary obligation,
20 or a basis to void an arbitration agreement. In both In re Consol. Meridian Funds, 485 B.R. 604,
21 618 (Bankr. W.D. Wash. 2013), and Kitsap Bank v. Denley, 177 Wn. App. 559, 312 P.2d 711
22 (2013), the court was analyzing the financial relationships between parties to determine whether
23 undue influence in relation to assets arose. In Meridian, as noted by the plaintiff, the court noted
24

1 some typical fiduciary relationships: attorney /client, doctor/ patient, and partner/ partner; other
2 than that, special circumstances have to exist in which one party justifiably relies on another to
3 look after its financial interests. Here, defendants were not Mr. Coon's physicians, and the
4 enforcement of the arbitration agreement is not tied to distribution of Mr. Coon's assets. For
5 example in Kitsap Bank, a checking account owner held an account for which she had designated
6 a bank teller at a different bank as a beneficiary to her account sued claiming undue influence by
7 the teller. The court outlined the necessary factors for a finding of undue influence, which
8 required some improper conduct in relation to assets; these included the existence of a
9 confidential or fiduciary relationship between the beneficiary and the testator; the beneficiary's
10 active participation in the transaction; and whether the beneficiary received an unusually large
11 part of the estate. 177 Wn. App. At 570-571. The "presumption of undue influence" established
12 in Kitsap required the existence of each of these factors, and the party asserting them bears a
13 clear cogent and convincing burden of proof on each. 177 Wn. App. at 578. The Kitsap court
14 further clarified that the concepts of a fiduciary duty and resulting undue influence apply in
15 which a party's financial assets are abused:

18 Therefore, it is not sufficient for a fiduciary relationship to exist between the
19 parties; the fiduciary relationship must exist in relation to the asset which is the
20 subject of the undue influence claim.

21 Kitsap, 177 Wn. App. at 574.

22 Similarly, the portions of the Restatement plaintiff cites relate to contracts which a
23 fiduciary makes "with his beneficiary." See, Restatement (Second), Contracts, §173. Here, the
24 defendants were not beneficiaries of Mr. Coon's assets, nor is the enforcement of the Arbitration

1 agreement tied to any financial asset control. (Plaintiff notes that Mr. Coon signed "Payer
2 Confirmation and Resident Trust Fund Authorization," but has no claim that undue influence
3 was exerted over any of his funds.) "Undue influence" also is generally based on the concept
4 that a party acts in a fashion which is contrary to his own best interests, based on lack of free
5 will. See, Williston on Contracts, §71:50. Underlying plaintiff's argument then, is the concept
6 that arbitration is against the best interests of a claimant, which is contrary to the stated
7 Washington public policy favoring arbitration of disputes.
8

9 Thus, plaintiff has failed to establish (by its burden of clear cogent and convincing) that
10 any fiduciary relationship exists, nor is tied to "an asset which is the subject of any claim of
11 "undue influence." Moreover, there exists no evidence of undue influence as a matter of law,
12 irrespective of any burden. Instead, the facts as presented by the Defendants establish that the
13 arbitration agreement was discussed with Mr. Coon a couple of days after he had first been
14 admitted to Franklin Hills. Mr. Coon, an attorney, asked questions about it. Mr. Coon was told
15 his admission was not contingent upon him agreeing. He signed it. There is actually no
16 evidence of undue influence to void an arbitration agreement in this regard, and summary
17 judgment is improper.
18

19 **3.4 Mary Rushing's claims do not apply until a determination on negligence has**
20 **been made.**

21 While Mary Rushing was not a signator to the ADR Agreement which her father
22 executed, her individual claims are ones which were anticipated by the parties to be included in
23 arbitration. Moreover, the underlying contractual relationship forms the basis for Franklin Hills'
24

1 duty of care to Mr. Coon, and all claims interrelated to that relationship should equitably be
2 arbitrated.

3 The United States District Court for the Eastern District of Washington has previously
4 ruled that a wrongful death action in Washington is among the claims that must be arbitrated
5 pursuant to an agreement entered on behalf of a nursing home resident, despite an assertion that a
6 wrongful death action belongs to non-signator "statutory beneficiaries." See, Eckstein, 623
7 F.Supp.2d at 1239. Basically, the District Court held that the long term care provider's
8 contractual rights to include a wrongful death claim of the resident in an ADR agreement is
9 binding on the beneficiaries. Id. at 1239-40. Subsequently, the Washington Supreme Court also
10 required the arbitration of claims made by the children of parents who had signed an arbitration
11 clause based on equitable grounds. See, Townsend v. Quadrant Corp., 173 Wn.2d 451, 561, 268
12 P.3d 917 (2012). In Townsend, the Supreme Court found that when non-signator children's tort
13 claims are in essence based on the underlying contract which contains the arbitration provision,
14 the children are bound to arbitrate such claims. In that instance, the court found that a party
15 cannot claim the benefits of a contract while simultaneously "attempting to avoid the burdens
16 that contract imposes." Id. Thus, despite never having signed the agreement, the children's
17 claims for personal injury were arbitrable.

18 The same is true here. The wrongful death claims of Mr. Coon's beneficiaries were, like
19 Eckstein, anticipated by the ADR contract signed by Mr. Coon. And like Townsend, the claims
20 for injuries are based on the contractual relationship between Mr. Coon and Franklin Hills, since
21 the lawsuit is based on a claim that Franklin Hills breached its duties of care as a health care
22
23
24

1 provider. The Court of Appeals specifically cited the exception noted in Townsend as
2 potentially applicable here, and noted that remand was necessary for a resolution of the
3 underlying factual issues which may affect this court's decision.

4 Thus, while the plaintiff relies solely on Woodall, Woodall does not end the inquiry here.
5 While Division I in Woodall, supra, did reject the Eckstein decision to find that wrongful death
6 claims were not subject to arbitration, it pre-dated the Supreme Court decision in Townsend,
7 supra, and incorrectly relieved the resident's heirs of their obligation to arbitrate. In Woodall,
8 supra, Division I summarily dismissed the holding in Eckstein, simply by choosing to apply
9 differing out-of-state authority which found wrongful death claims segregable from the
10 obligations to arbitrate the primary resident's claims. While better reasoning would adopt the
11 Eckstein opinion, Woodall also failed to address the equitable basis on which the Townsend
12 court required non-signators to an arbitration agreement to arbitrate tort claims. The Supreme
13 Court in Townsend, supra, while not a wrongful death action, established an equitable basis to
14 require arbitration of non-signator children's tort claims, because they were in essence based on
15 the contractual relationship the signing parents had with the defendant. The same equitable basis
16 exists here. Mr. Coon's relationship with Franklin Hills was based on his contract with the
17 facility. He agreed to arbitrate all claims, including specifically those which ultimately would
18 benefit his heirs, such as wrongful death. The claims for violation of health care obligations
19 made by his heirs are based on the existence of that contractual relationship; but for the contract,
20 Mr. Coon would not have been a resident of Franklin Hills. Equitably, such claims should be
21 subject to Mr. Coon's ADR agreement.
22
23
24

1 Moreover, as noted by the Court of Appeals, any decision prior to the ruling on the
2 enforcement of the arbitration agreement based on plaintiff's allegations of incompetency would
3 be premature. Rushing, 2014 WL 346540 at *5. Because defendants do not believe this matter
4 will be resolved by plaintiff's summary judgment motion, any ruling on the arbitrability of
5 Ms. Rushing's wrongful death claims should await the ultimate outcome at the hearing to
6 determine arbitrability.

7
8 **4. CONCLUSION**

9 Based on the foregoing, defendants respectfully request the court to deny plaintiff's
10 motion for partial summary judgment as a matter of law.

11 DATED this 2nd day of January, 2015.

12
13
14 
15 PATRICK J. CRONIN, WSBA No. 28254
16 CARL E. HUEBER, WSBA No. 12453
17 CAITLIN E. O'BRIEN, WSBA No. 46476
18 WINSTON & CASHATT, LAWYERS,
19 a Professional Service Corporation
20 Attorneys for Defendants
21
22
23
24

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

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on the 20th day of January, 2015, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

Mark D. Kamitomo
The Markam Group, Inc., P.S.
421 W. Riverside, Suite 1060
Spokane, WA 99201

VIA REGULAR MAIL
VIA CERTIFIED MAIL
HAND DELIVERED
BY FACSIMILE
VIA FEDERAL EXPRESS

Attorney for Plaintiff

George M. Ahrend
Ahrend Law Firm PLLC
16 Basin St. S.W.
Ephrata, WA 98823

VIA REGULAR MAIL
VIA CERTIFIED MAIL
HAND DELIVERED
BY FACSIMILE
VIA EMAIL

Attorney for Plaintiff

gahrend@ahrendlaw.com
scanet@ahrendlaw.com

DATED at Spokane, Washington, this 20th day of January, 2015.


Beverly Briggs

636849

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

Hon. Judge John O. Cooney
Hearing Date: Jan. 30, 2015
Time: 9:30 a.m.

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

No. 11-2-04875-1

PLAINTIFF'S REPLY IN SUPPORT OF
PARTIAL SUMMARY JUDGMENT

Plaintiff(s),

vs.

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

Defendant(s).

I. INTRODUCTION

Plaintiff Mary Rushing submits this reply memorandum in support of her motion for partial summary judgment and in reply to Defendants' response memorandum. See Plf.'s Memo. In Supp't of Mot. For Partial Summ. Jdgmt., Jan. 2, 2015 (hereafter "Plf.'s Memo."); Def.'s Resp. to Plf.'s Mot. For Summ. Jdgmt., Jan. 20, 2015 (hereafter "Def.'s Resp.").

Defendants cannot not satisfy their burden to establish that Robert Coon had sufficient mental capacity or competence to comprehend the nature, terms and effect of the lengthy and detailed arbitration agreement he allegedly signed after being



1 admitted to Franklin Hills Health & Rehabilitation Center (Franklin Hills). Franklin
2 Hills relies on the opinion testimony of admittedly unqualified employees who made
3 no effort to determine contractual capacity. Moreover, it is undisputed that Mr. Coon
4 was diagnosed with schizoaffective disorder and bipolar disorder and that he was
5 subject to court-ordered involuntary treatment (described as a less restrictive
6 alternative to inpatient treatment, or LRA). On this basis, the court should rule that the
7 arbitration agreement is unenforceable.¹

8 II. UNDISPUTED MATERIAL FACTS²

9 1. Defendants do not dispute that, on November 18, 2010, the Spokane
10 County Superior Court found by clear and convincing evidence that Robert Coon was
11 "gravely disabled" due to "severe deterioration in routine functioning as evidenced by
12 recent repeated and escalating loss of cognitive or volitional control over [his]
13 actions"³; nor do they dispute that the foregoing finding was supported by a
14 declaration of Robert L. Mulvihill, M.D., who testified that Mr. Coon has "ongoing
15 disorganized thought, auditory hallucinations and vivid visual hallucinations due to
16 schizoaffective disorder[.]" Declaration of George M. Ahrend Re: Plf.'s Mot. for Partial
17 Summ. Judgmt. Jan. 2, 2015, Exs. B & C (brackets added; hereinafter "G. Ahrend
18 Decl.").

19 2. Defendants admit that Mr. Coon was continuously subject to court-
20 ordered involuntary treatment for his mental illness from before November 18, 2010,

21 _____
22 ¹ For purposes of summary judgment, Ms. Rushing admits there is a question of fact regarding whether
23 the signature on the arbitration agreement belongs to Robert Coon, based on the testimony of Jennifer
Wujick, but she reserves the right to require Franklin Hills to meet its burden of proof on that issue in
the event that an evidentiary hearing is required.

² Paragraph numbers correspond to the statement of undisputed facts in Plf.'s Memo.

³ The findings are included in P. Cronin Decl., Ex. H.

1 until after May 17, 2011. *See* Def.'s Resp., at p. 4, ¶ 2.12; Declaration of Patrick J.
2 Cronin, Jan. 20, 2015, Ex. H (hereinafter "P. Cronin Decl."); G. Ahrend Decl., Ex. D.

3 4.⁴ Defendants admit that the involuntary treatment order/LRA entered on
4 November 18, 2010, was a continuation of a prior order. *See* Def.'s Resp., at pp. 3-4,
5 ¶¶ 2.3, 2.10 & 2.12; P. Cronin Decl., Exs. A, F & H; G. Ahrend Decl., Ex. E.

6 5. Defendants do not dispute that, on May 11, 2011, a petition to continue
7 the court-ordered involuntary treatment/LRA was filed, based on Mr. Coon's "grave
8 mental disability." G. Ahrend Decl., Ex. F.

9 6. Defendants do not dispute that the May 11, 2011, petition was supported
10 by another declaration of Dr. Mulvihill, based on examinations of Mr. Coon that he
11 performed on March 11 and 25, 2011. *See* G. Ahrend Decl., Ex. G. (The last examination
12 occurred within a week of Mr. Coon's admission to Franklin Hills.) Nor do Defendants
13 dispute that Dr. Mulvihill stated in his declaration that Mr. Coon had "ongoing
14 disorganized thought, auditory hallucinations and visual hallucinations due to
15 schizoaffective disorder"; and "continues with disorganized behavior and
16 hallucinations which impair his ability to care for himself"; among other things. *Id.*

17 7. Defendants do not dispute that Mr. Coon was asked to sign at least five
18 separate documents upon his admission to Franklin Hills. *See* G. Ahrend Decl., Ex. H-
19 L.

20 8. Defendants do not dispute that the 7-page single-spaced "Admission
21 Agreement" that Mr. Coon was asked to sign created a health care provider
22 relationship with Franklin Hills. *See* G. Ahrend Decl., Ex. H.

23

⁴ Due to a typographical error, there is no ¶ 3 in Plf.'s Memo.

1 9. Defendants do not dispute that the 1-page single-spaced "Resident Trust
2 Fund Authorization" Mr. Coon was asked to sign authorized Franklin Hills to "hold,
3 safeguard, and account for [his] personal funds." G. Ahrend Decl., Ex. K (brackets
4 added).

5 10. Defendants admit that the 5-page single spaced "Alternative Dispute
6 Resolution Agreement" Mr. Coon was asked to sign purports to require him to
7 arbitrate all disputes with Frankdin Hills. See G. Ahrend Decl., Ex. L. Defendants do
8 not dispute that the arbitration agreement incorporates rules of procedure that were
9 not provided to Mr. Coon, nor do they dispute that the rules require a person to "have
10 capacity ... at the time of execution of the agreement[.]" *Id.*, Ex. O (ellipses & brackets
11 added).

12 11. Defendants do not dispute that the signatures on all five of the intake
13 documents are illegible. However, based on the testimony of Jennifer Wujick, Ms.
14 Rushing acknowledges that there is a question of fact regarding whether the signatures
15 belong to Mr. Coon.

16 12. Defendants admit that an involuntary treatment order/LRA for Mr. Coon
17 was in effect on April 3, 2011, when he signed the intake documents. See Def.'s Resp.,
18 at p. 4, ¶ 2.12; P. Cronin Decl., Ex. H.

19 13. Defendants do not dispute that Mr. Coon had a durable power of
20 attorney in place when he was moved to Franklin Hills. See G. Ahrend Decl., Ex. S.

21 14. Defendants admit that they seek to enforce the arbitration agreement
22 and compel arbitration.

23

1 **III. RESPONSE TO DEFENDANTS' STATEMENT OF FACTS, INCLUDING**
2 **EVIDENTIARY OBJECTIONS⁵**

3 2.1 Ms. Rushing admits that Robert Coon was a 63-year old man with a
4 history of mental illness and a primary diagnosis of schizoaffective disorder and
5 bipolar disorder, for which he received medical and psychiatric treatment.

6 2.2 Ms. Rushing admits that Robert Coon was prescribed various anti-
7 psychotic drugs throughout his life, and that he had periods of non-compliance with
8 his medications that led to hospitalizations.

9 2.3 Ms. Rushing admits that, on November 7, 2008, the Spokane County
10 Superior Court entered one of several orders providing for or continuing involuntary
11 treatment for Mr. Coon's mental illness. *See* P. Cronin Decl., Ex. A. The November 7,
12 2008, order was based on findings that:

13 Mr. Coon "[c]ontinues to be gravely disabled." *Id.*, Ex. A (internal p. 2,
14 ¶ I, brackets added).

15 "As a result of a mental disorder it is highly probable that respondent
16 [Mr. Coon] is in danger of serious physical harm resulting from a failure
17 to provide for his/her essential human needs of health or safety
18 manifested by: (1) failure or inability to provide or obtain nourishment.
19 (2) failure or inability to provide or obtain clothing or shelter. (3) failure
20 to obtain and/or participate in medical treatment." *Id.*, Ex. A (internal
21 p. 3, ¶ VII, brackets added).

22 "Respondent [Mr. Coon] has manifested his/her deterioration in routine
23 functioning evidenced by loss of cognitive or volitional control over
his/her actions." *Id.*, Ex. A (internal p. 3, ¶ VIII(1)).

Defendants' characterization of the foregoing order as being "*released on a Less*
Restrictive Alternative (LRA) plan to the Carlyle Care Center in Spokane, Washington"

⁵ Paragraph numbers correspond to the statement of facts in Def.'s Resp.

1 is incorrect. Def.'s Resp. to Plf.'s Mot. For Summ. Jdgmt., ¶ 2.3 (emphasis added). The
2 order provides that:

3 Mr. Coon "is subject to involuntary treatment";

4 He is "remanded to the custody of the Department of Social and Health
5 Services" with "monitoring" and "aftercare" provided by Spokane Mental
6 Health;

6 He is required to reside at the Carlyle Care Center and abide by house
7 rules and regulations and other specified conditions; and

7 He would be subject to arrest by law enforcement officers "in the case of
8 the respondent *escaping* from the evaluation and treatment facility[.]"

9 P. Cronin Decl., Ex. A (internal pp. 5-6, brackets & emphasis added). The involuntary
10 treatment order/LRA does not describe itself as a "release," and cannot be considered
11 a "release" in any conventional sense of the word.

12 Defendant's statement that Mr. Coon was never "involuntarily treated" after the
13 foregoing order was entered in 2008 is wrong. Def.'s Resp. to Plf.'s Mot. For Summ.
14 Jdgmt., ¶ 2.3. This statement is made *without citation to the record*, and it is contrary
15 to the documents submitted by both parties in this case, which establish that Mr. Coon
16 was continuously subject to involuntary treatment thereafter, up to and including the
17 period of time he was moved to Franklin Hills. *See* P. Cronin Decl., Exs. A, F & H; G.
18 Ahrend Decl., Exs. B-G.

19 2.4 Ms. Rushing admits that the purposes of the involuntary treatment
20 order/LRA *include* keeping Mr. Coon out of extended hospitalization, providing him
21 with a stable living environment, medication monitoring and mental health treatment,
22 but the purposes are *not limited* to these items. For example, the order places
23 restrictions on Mr. Coon's freedom to protect himself and others, prohibits him from

1 possessing firearms, and subjects him to arrest for escaping from the designated
2 treatment facility. See P. Cronin Decl., Ex. A (internal pp. 5-6).

3 2.5 Ms. Rushing admits that RCW 71.05.360(1)(b) provides:

4 (b) No person shall be presumed incompetent as a consequence of
5 receiving an evaluation or voluntary or involuntary treatment for a
6 mental disorder, under this chapter or any prior laws of this state dealing
with mental illness. Competency shall not be determined or withdrawn
except under the provisions of chapter 10.77 or 11.88 RCW.

7 Under this statutory provision, court-ordered involuntary treatment for serious mental
8 illness is not itself an adjudication of incompetency, nor does it give rise to a
9 presumption of incompetency. However, nothing in the statute precludes court-
10 ordered treatment for serious mental illness from being considered in a proceeding
11 where competency is at issue or supporting an inference of incompetency.

12 2.6 Ms. Rushing admits that RCW 71.05.360(10)(k) provides:

13 (10) Insofar as danger to the person or others is not created, each person
14 involuntarily detained, treated in a less restrictive alternative course of
15 treatment, or committed for treatment and evaluation pursuant to this
chapter shall have, in addition to other rights not specifically withheld by
law, the following rights

16 (k) To dispose of property and sign contracts unless such person has
17 been adjudicated an incompetent in a court proceeding directed to that
particular issue.

18 (Ellipses added.) Under this statutory provision, court-ordered involuntary treatment
19 for serious mental illness does not, ipso facto, render a person incompetent to sign
20 contracts. However, the proviso ("unless such person has been adjudicated an
21 incompetent in a court proceeding directed to that particular issue") indicates that
22 challenges to competency are preserved. It would be perverse if the statute were

23

1 interpreted so that court-ordered involuntary treatment for serious mental illness
2 prevented challenges to competency.

3 2.7 Ms. Rushing admits that Mr. Coon signed a Notice of Rights on
4 December 4, 2008, after he was ordered to receive treatment for his mental illness. *See*
5 P. Cronin Decl., Ex. C.

6 2.8 Ms. Rushing admits that Mr. Coon was moved pursuant to court order to
7 Cherrywood Place Assisted Living on or about June 26, 2009.

8 2.9 Ms. Rushing admits that Mr. Coon was admitted to Sacred Heart Medical
9 Center for psychiatric care on or about August 26, 2009. The medical record submitted
10 by Defendants in support of this fact states: “[h]e [Mr. Coon] has a longstanding
11 history of psychiatric illness”; “[h]e appears somewhat thought disordered”; He has
12 “some grandiose and persecutory themes to his thoughts”; he “has had 6 prior
13 psychiatric hospitalizations”; his “[t]hought form was mildly tangential”; his “[i]nsight
14 was moderate and judgment impaired”; and he has “schizoaffective disorder.” P.
15 Cronin Decl., Ex. E (internal p. 1, brackets added).

16 2.10 Ms. Rushing admits that Mr. Coon was placed on another involuntary
17 treatment order/LRA on or about September 2, 2009. The order is based on findings
18 and contains provisions similar to those in the involuntary treatment order/LRA
19 entered on November 7, 2008, discussed above. *See* P. Cronin Decl., Ex. F.

20 2.11 Ms. Rushing admits that the involuntary treatment order/LRA entered
21 on September 2, 2009, required Mr. Coon to reside at Cherrywood Place Assisted
22 Living.⁶

23

⁶ Defendants again mischaracterize the involuntary treatment order/LRA as a “release.”

1 2.12 Ms. Rushing admits that the involuntary treatment order/LRA continued
2 from September 2009 through the end of Mr. Coon's life. See P. Cronin Decl., Ex. H.

3 2.13 Defendants phrase this paragraph carefully and it must be parsed with
4 equal care. Defendants contend, *without any citation to the record*, that:

5 Mr. Coon was medication compliant from September 2009 until he died
6 in 2011, and had no further psychiatric episodes that necessitated
inpatient treatment.

7 Def.'s Resp., at p. 4, ¶ 2.13. Defendants' statement that Mr. Coon was "medication
8 compliant" from September 2009 until his death is false and misleading in several
9 respects. *First*, there is no evidence in the record of continuous compliance, and there
10 are documented instances of non-compliance. See Declaration of Collin Harper, filed
11 contemporaneously herewith (hereinafter "C. Harper Decl."). *Second*, there are
12 documented efforts to adjust Mr. Coon's medication because it was ineffective even
13 when he was compliant. See *id.* *Third*, there is no evidence before the court that
14 compliance with prescribed medication regimens rendered Mr. Coon competent to
15 comprehend the nature, terms and effect of the arbitration agreement.

16 Defendants' statement that Mr. Coon "had no further psychiatric episodes that
17 necessitated inpatient treatment" after September 2009 is similarly false and
18 misleading. *First*, there is no evidence in the record of continuous absence of
19 "psychiatric episodes" and there are a number of documented instances of what could
20 fairly be described as "psychiatric episodes," including hallucinations and impaired
21 insight and judgment. See C. Harper Decl. *Second*, the involuntary treatment
22 orders/LRAs all required Mr. Coon to reside at facilities such as Franklin Hills, and

23

1 stated that he was subject to arrest if he tried to escape. See P. Cronin Decl., Ex. A.
2 While this is not technically the same as inpatient treatment, Mr. Coon was
3 constrained by court order from living on his own as a result of his mental illness.

4 2.14 Ms. Rushing admits that Mr. Coon was never formally adjudged
5 incompetent nor was a guardian appointed before his death.

6 2.15 *For purposes of summary judgment only*, Ms. Rushing admits that Mr.
7 Coon suffered from tremors/Parkinson's-like symptoms that made it difficult for him
8 to write.

9 2.16 Ms. Rushing admits that Mr. Coon was unsteady on his feet and suffered
10 several falls in the Spring of 2011.

11 2.17 Ms. Rushing admits that Mr. Coon fell and was taken by ambulance to
12 the Holy Family Hospital Emergency Center on or about April 1, 2011. See P. Cronin
13 Decl., Ex. K. During the hospital visit he admitted to visual hallucinations. See *id.*

14 2.18 Ms. Rushing admits that Mr. Coon was discharged from Holy Family
15 Hospital and taken by ambulance to Franklin Hills. See P. Cronin Decl., Ex. K (internal
16 p. 2); *id.*, Ex. L (re transport via ambulance).

17 2.19 Ms. Rushing admits that Aurilla Poole admitted Mr. Coon to Franklin
18 Hills on or about April 1, 2001, and that she documented he appeared to be aware of
19 person (who he was), place (where he was) and time. See P. Cronin Decl., Ex. L.

20 2.20 & 2.21 Ms. Rushing admits that Franklin Hills staff checked on Mr. Coon
21 six times during the 72 hours after he was admitted, and on five of those occasions, he
22 appeared to be aware of person, place and time. See P. Cronin Decl., Ex. M.

23

1 2.22, 2.23, 2.24, 2.25, 2.26 & 2.27 For purposes of summary judgment
2 only, Ms. Rushing does not dispute that, on or about April 3, 2011, Franklin Hills
3 admissions assistant Jennifer Wujick met with Mr. Coon to fill out paperwork, or the
4 substance of Ms. Wujick's conversations and transactions with Mr. Coon. However, it
5 is important to note what Ms. Wujick *does not and cannot say*; namely, that Mr. Coon
6 had sufficient mental capacity or competence to comprehend the nature, terms and
7 effect of the lengthy and detailed arbitration agreement he allegedly signed. Ms.
8 Wujick does not have personal knowledge of Mr. Coon's contractual capacity. See ER
9 601. She is not qualified to opine whether he had contractual capacity, and she does
10 not have adequate foundation for any opinions regarding his contractual capacity. See
11 ER 702-703. Accordingly, Ms. Wujick's testimony regarding her conversations with
12 Mr. Coon cannot establish that he had contractual capacity.⁷

13 2.28 Defendants contend that five Franklin Hills staff in addition to Ms.
14 Wujick — Kori Martin, Aurilla Poole, Melissa Chartrey, Erika Ramirez and Linda Lane
15 — all state that Mr. Coon "was alert and oriented when they spoke with him, and he
16 was capable of understanding his condition, his surroundings, current news events,
17 and control his own conduct," referring to declarations they previously filed in this
18 matter. The phrasing of this contention and the cited declarations is significant for

19 ⁷ Defendants only cite four pages from the deposition transcript of Ms. Wujick, but they submit the
20 entire deposition transcript. The court should only consider the portions specifically brought to the
attention of the court and counsel, and plaintiffs should not be obligated to scour the entire transcript to
lodge all possible objections that could be made to the testimony.

21 In addition to the evidentiary objections discussed in the main text, the court should decline to
22 consider the testimony of Ms. Wujick under the deadman's statute, RCW 5.60.030. Counsel recognizes
that the court is bound by the decision in *May v. Triple C Convalescent Centers*, 19, Wn. App. 794, 799,
23 578 P.2d 541 (1978), which finds the statute inapplicable to non-party employees of a corporate
defendant. Nonetheless, *May* is incorrectly decided because it is based on a misreading of the
deadman's statute and ignores the reality that a corporation can only speak through its agents. It is also
harmful because it allows admission of testimony that the decedent is no longer able to rebut, and
should be overruled by the Court of Appeals.

1 what is *not* said: that Mr. Coon was competent to understand the nature, terms and
2 effect of the arbitration agreement. As with Ms. Wujick discussed above, none of these
3 declarants has personal knowledge of Mr. Coon's contractual capacity. *See* ER 601.
4 None of them is qualified to opine regarding his contractual capacity, and none of
5 them attempted to determine contractual capacity as would be necessary to establish
6 an adequate foundation for such opinions. *See* ER 702-703. Furthermore, the
7 declarations of Ms. Poole and Ms. Chartrey regarding conversations and transactions
8 with Mr. Coon are inadmissible under the deadman's statute because they are parties.
9 *See* RCW 5.60.030.

10 IV. ARGUMENT

11 A. **The existence of fiduciary relationship between Franklin Hills 12 and Mr. Coon cannot seriously be disputed.**

13 It is undisputed that Franklin Hills and its staff provided health care to Mr.
14 Coon, received funds on his behalf, and managed his personal funds. Nonetheless,
15 Defendants argue that they were not fiduciaries because they "were not Mr. Coon's
16 physicians, and the enforcement of the arbitration agreement is not tied to distribution
17 of Mr. Coon's assets." Def.'s Resp., at 12:3-5. A health care provider's status as a
18 fiduciary should not hinge on his or her particular credential — whether physician or
19 nurse, hospital or rehabilitation facility — but rather upon the nature of the
20 relationship. The reference to distribution of Mr. Coon's assets is beside the point, and
21 does not change the fact that Franklin Hills and its staff are fiduciaries who stand to
22 benefit from the arbitration agreement that Mr. Coon's heirs desire to avoid. *See*
23 *Foster v. Brady*, 198 Wash. 13, 18, 86 P.2d 760 (1939) (indicating "the very

1 relationship itself imposes upon the physician the duty to exercise the highest degree
2 of good faith in dealing with his patient, not only in professional matters, but in all
3 other relationships”).

4 **B. The effect of a fiduciary relationship on the burden of proving**
5 **contractual competency follows from the position of trust and**
6 **responsibility that the fiduciary holds.**

7 Defendants cite three cases for the proposition that “Washington courts have
8 previously had occasion to analyze the enforcement of an arbitration contract by a
9 resident of a nursing home, and no such fiduciary duty was established; instead,
10 Washington’s public policy strongly favoring arbitration of disputes was upheld.” Def.’s
11 Memo., at 11:6-16 (citing *Estate of Eckstein ex rel. Luckey v. Life Care Centers of Am.,*
12 *Inc.*, 623 F. Supp. 2d 1235, 1240 (E.D. Wash. 2009); *Nail v. Consolidated Resources*
13 *Health Care Fund I*, 155 Wn. App. 227, 229 P.3d 885 (2010); *Woodall v. Avalon Care*
14 *Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010)). None of these
15 cases specifically address the effect of a fiduciary relationship on the burden of proving
16 contractual capacity, and, as a result, they cannot foreclose consideration of the issue
17 in this case.

18 Ms. Rushing acknowledges that no case squarely holds that a fiduciary seeking
19 to enforce an arbitration agreement has the burden of proving competency. However,
20 it is a direct corollary of the rule that a fiduciary holds a special position of trust and
21 responsibility and is therefore obligated to place the interests of the beneficiary of that
22 relationship ahead of his/her/its own interests. It is supported by the myriad of special
23 rules that govern a fiduciary’s conduct. The most analogous rule shifts the burden of
proof regarding undue influence in the fiduciary context. Defendants do not quibble

1 with the rule, only its application in this factual context involving an arbitration
2 agreement.

3 **C. Defendants have produced no admissible evidence that Mr.
4 Coon had contractual competency to enter the arbitration
agreement.**

5 None of the evidence submitted by Defendants actually states that Mr. Coon was
6 competent, and all of the Defendants and defense witnesses lack qualifications and
7 foundation to opine regarding his contractual competency. All the admissible evidence
8 in the record suggests that Mr. Coon lacked the requisite capacity. *See* C. Harper Decl.

9 **D. There can be no legitimate dispute that *Woodall* precludes
10 arbitration of Ms. Rushing's wrongful death claims.**

11 Defendants do not dispute that *Woodall*, 155 Wn. App. at 931-32, precludes
12 arbitration of wrongful death claims, as distinguished from survival claims, nor do they
13 dispute that *Woodall* is mandatory authority for this court. Instead, they argue that the
14 clear holding of *Woodall* should be ignored based on the decision of the U.S. District
15 Court for the Eastern District of Washington in *Eckstein, supra*, and the Washington
16 Supreme Court's decision in *Townsend v. Quadrant Corp.*, 173 Wn. 2d 451, 268 P.3d
17 917 (2011). *See* Def.'s Resp., at 14:3-19. *Eckstein* is obviously not binding on this court,
18 and does not alter this court's obligation to follow *Woodall*, which explicitly declined to
19 follow *Eckstein*. *See* 155 Wn. App. at 927-28.

20 Moreover, in arguing that *Townsend* undermines *Woodall*, Defendants
21 improperly rely on the four-Justice lead opinion for the proposition that children of
22 signatories to an arbitration agreement are bound to arbitrate in a non-wrongful death
23 context, when the precedential opinion in the case, the five-Justice

1 concurrence/dissent by Justice Stephens, held the opposite. Rather than undermining
2 *Woodall*, the concurrence/dissent cites it with approval. See *Townsend*, 173 Wn. 2d at
3 464 (Stephens, J., dissenting, citing *Woodall*).

4 V. CONCLUSION

5 The court should grant Plaintiff Mary Rushing's motion for partial summary
6 judgment.

7 DATED January 26, 2015.

8 AHREND LAW FIRM PLLC
9 Co-Attorney for Plaintiffs

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

12
13
14
15
16
17
18
19
20
21
22
23

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

CERTIFICATE OF SERVICE

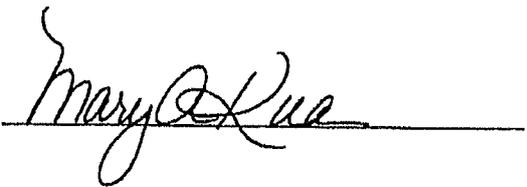
The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pjc@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

Signed at Spokane, Washington on January 26, 2015.



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

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

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

No. 11-2-04875-1

DECLARATION RE ELECTRONIC
FILING (GR-17)

Plaintiff(s),

vs.

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

Defendant(s).

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

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

1 consists of eighteen (18) pages (including any exhibits), including this Declaration,
2 and it is complete and legible.

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

5 Signed at Spokane, Washington this 26th day of January, 2015.

6
7 
8 Mary A. Rua (Print Name)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

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

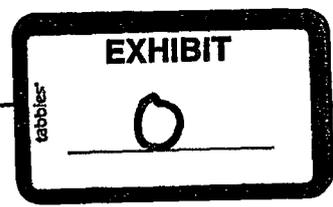
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

MARY RUSHING as the)	
Administrator and on behalf)	
of the Estate of ROBERT COON,)	
and MARY RUSHING,)	
individually,)	
)	
Plaintiff,)	Sup. Ct. Cause
)	No. 11-2-04875-1
v.)	
)	
FRANKLIN HILLS HEALTH &)	
REHABILITATION CENTER,)	
MELISSA CHARTREY, R.N.,)	
AURILLA POOLE, R.N., JANENE)	
YORBA, Directory of Nursing,)	
)	
Defendants.)	

HONORABLE JOHN O. COONEY
EXCERPT OF VERBATIM REPORT OF PROCEEDINGS
(January 30, 2015 - Ruling on Summary Judgement)

Crystal L. Hicks, CCR No. 2955
Official Court Reporter
1116 W. Broadway, Department No. 5
Spokane, Washington 99260



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

APPEARANCES :

FOR THE PLAINTIFF: GEORGE AHREND
 Ahrend Law Firm
 Basin Street SW
 Ephrata, Washington 98823

 COLLIN HARPER
 The Markam Group
 421 West Riverside Avenue
 Suite 1060
 Spokane, Washington 99210

FOR THE DEFENDANTS: PATRICK CRONIN
 CAITLIN O'BRIEN
 KEVIN CURTIS
 Winston & Cashatt
 601 West Riverside Avenue
 Suite 1900
 Spokane, Washington 99210

1 don't necessarily deal with competency.

2 It appears also that Mr. Coon's -- I don't want to
3 say competency, I'll say mental health condition, is somewhat
4 of a moving target, depending on whether he's on medication or
5 off his medication. That tended to be some of the reasons why
6 he's been admitted and released at different times.

7 Here, there's at least one witness, that being
8 Ms. Wujick, who testified as to his appearance when looking at
9 the contract, his inquiring under certain provisions of the
10 contract. Taking that, coupled with Mr. Coon's history of
11 having some legal knowledge, it does appear that there is a
12 genuine issue of material fact as to whether Mr. Coon was
13 competent.

14 The plaintiff asked the Court to switch the burden.
15 The burden of proof has been on the plaintiff to prove by
16 clear, cogent, and convincing evidence that Mr. Coon was not
17 competent when he signed the arbitration agreement. Because
18 of the fiduciary duty, they're asking that the burden be
19 switched.

20 At this point, the Court is not going to find that
21 there is a fiduciary duty. Obviously, fiduciary duties do
22 arise, even when property is not at stake. A good example of
23 that is a physician-patient relationship. Here, we have a
24 skilled nursing facility. I don't know that it necessarily
25 extends to a whole skilled nursing facility, but that skilled

1 nursing facility also was accountable for his funds.

2 A fiduciary duty could be bifurcated to some extent,
3 requiring Franklin Hills to act as a fiduciary with respect to
4 his funds, but not necessarily other aspects of his life. So,
5 at this point, the Court is not going to find that there was a
6 fiduciary relationship requiring that burden to shift.

7 Therefore, the plaintiff does have the burden to
8 prove by clear, cogent, and convincing evidence that Mr. Coon
9 was not competent when he signed the arbitration agreement.
10 There is a genuine issue of material fact as to his competency
11 on that date. The Court is going to deny the motion for
12 summary judgment with respect to whether he was competent or I
13 guess, as phrased by the plaintiff, was not competent.

14 With respect to the undue influence allegation,
15 turning more to the undue influence, again, citing back to
16 Mr. Coon's knowledge, being an attorney, I don't know what his
17 mental capacity was at the time. That's in dispute. But
18 also, to the statements that Mr. Ahrend read from documents
19 that were provided regarding the arbitration clause, many of
20 those statements are simply Washington's public policy in
21 favor of arbitration. I don't believe that creating those
22 statements provides undue influence on Mr. Coon. Also,
23 ultimately, it is his decision. The Court will not find that
24 Franklin Hills engaged in undue influence in persuading
25 Mr. Coon to sign the arbitration agreement.

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

At this point, the plaintiff's motions for summary judgment, with respect to everything except Ms. Rushing's wrongful death claim, will be denied.

Obviously, they reserved their issue for trial as to whether Mr. Coon even signed the arbitration agreement.

(End of requested portion.)

C E R T I F I C A T E

I, CRYSTAL L. HICKS, do hereby certify:

That I am an Official Court Reporter for the Spokane
County Superior Court, Department No. 5, at Spokane,
Washington;

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

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

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

*The Court's ruling was read and approved by Judge
John O. Cooney, pursuant to LCR 80.

DATED this 10th day of September, 2015.

CRYSTAL L. HICKS, CCR
Official Court Reporter
Spokane, Washington