

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

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,

Plaintiffs-Petitioners,

vs.

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

Defendants-Respondents.

RESPONSE TO WASHINGTON STATE ASSOCIATION FOR
JUSTICE AMICUS CURIAE BRIEF

CARL E. HUEBER, WSBA #12453
PATRICK J. CRONIN, WSBA #28254
CAITLIN E. O'BRIEN, WSBA #46476
WINSTON & CASHATT, LAWYERS
a Professional Service Corporation
601 W. Riverside, Ste. 1900
Spokane, Washington 99201
Telephone: (509)838-6131
Attorneys for Respondents

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. DISCUSSION	3
A. WSAJ concedes that Washington courts have indeed established that the use of collateral estoppel does not deprive a party of the right to trial by jury, and fails to explain how this law and policy are not applicable here.	3
B. The Washington Arbitration Act is clear in what it requires, and its requirements are negated if read to allow stay of arbitration.	6
III. CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
<u>Beacon Theatres, Inc. v. Westover</u> , 359 U.S. 500 (1959)	8-10
<u>Dean Witter Reynolds, Inc. v. Byrd</u> , 470 U.S. 213 (1985)	7
<u>In re Moi</u> , 184 Wn.2d 575, 360 P.3d 811 (2015)	3
<u>Lytle v. Household Manf., Inc.</u> , 494 U.S. 545 (1990)	8-10
<u>Nielson v. Spanaway General Medical Clinic</u> , 135 Wn.2d 255, 956 P.2d 312 (1998)	3
<u>Parklane Hosiery Co. v. Shore</u> , 439 U.S. 322 (1979)	9-10
<u>Robinson v. Hamed</u> , 62 Wn. App. 92, 813 P.2d 171 (1991)	3, 9
<u>Smith v. Bates Technical College</u> , 139 Wn.2d 793, 991 P.2d 1135 (2000)	4
<u>USM Corp. v. GKN Fasteners, Ltd.</u> , 574 F.2d 17 (1 st Cir. 1978)	9
<u>Zosky v. Boyer</u> , 856 F.2d 554 (3 rd Cir. 1988)	9
Statutes and Rules	
RCW 7.04A.070(1) and (2)	6

I. INTRODUCTION

The Washington State Association for Justice Foundation (WSAJ), in its amicus curiae brief, argues that a right to jury trial is "jeopardized" by a court's order to compel arbitration, based on future potential use of collateral estoppel. However, it concedes that Washington courts have already rejected the notion that application of collateral estoppel based on a prior arbitration denies a party the right to a jury trial. It is irrelevant that the deceased, Mr. Coon, rather than his beneficiaries, agreed to arbitration, since the collateral estoppel doctrine has safeguards to insure that it would not work an injustice against these beneficiaries in the future; thus, by its terms, if collateral estoppel applies, then the beneficiaries' constitutional right to a jury trial was not infringed. WSAJ also ignores the speculative nature of the application of collateral estoppel at this stage, and ignores the fact that the underlying plaintiffs, were they to prevail at arbitration, would likely take the position that collateral estoppel applies as against respondent, Franklin Hills.

Irrespective of the established authority on the effect of collateral estoppel on the right to a trial by jury, WSAJ is advocating that this Court establish a per se rule in which all courts must stay arbitration until trial or judgment of non-arbitrable claims. While WSAJ asserts that right to trial by jury here is jeopardized by the court's order staying a jury trial and

compelling arbitration, in reality, it is the timing constraints of litigation that would "sequence" the arbitration first, not the short lived stay issued by the trial court that has since lapsed. It is simply a fact that trial takes more than a year in most cases, and a per se rule sequencing trial first would nullify the parties' agreement to swiftly resolve the claims through arbitration, and destroy the State's public policy of promoting arbitration as a faster and less expensive means of dispute resolution. This per se rule could in fact incentivize parties to add non-arbitrable claims as a method of avoiding arbitration.

And in making its ultimate policy arguments, WSAJ fails to recognize or meaningfully refute Washington's Arbitration Act which demands that parties who have consented to arbitration be compelled to do so, and fails to meaningfully distinguish those courts that have addressed these issues, either in Washington or federally; those courts have found that potential future collateral estoppel effect does not violate any right to jury trial by compelling an agreed to arbitration.

II. DISCUSSION

- A. WSAJ concedes that Washington courts have indeed established that the use of collateral estoppel does not deprive a party of the right to trial by jury, and fails to explain how this law and policy are not applicable here.**

Recognizing the holdings in Nielson v. Spanaway General Medical Clinic, 135 Wn.2d 255, 956 P.2d 312 (1998) and Robinson v. Hamed, 62 Wn. App. 92, 813 P.2d 171 (1991), WSAJ concedes that it is settled that a non-jury arbitration proceeding can be the basis for collateral estoppel without depriving the parties against whom that estoppel is asserted of the right to a jury trial. WSAJ further concedes that Rushing will have "valid arguments for challenging application of collateral estoppel," not based on the deprivation of a right to trial by jury because the arbitration went first, but rather by the very terms of the collateral estoppel doctrine; that doctrine includes the necessity of privity, and the requirement that the court find that application of collateral estoppel would not work an injustice. See, In re Moi, 184 Wn.2d 575, 580, 360 P.3d 811 (2015). It is thus irrelevant that Mr. Coon, rather than the beneficiaries, agreed to arbitration, since the collateral estoppel doctrine has safeguards to insure that it would not work an injustice on them; by definition, if collateral estoppel applies, a constitutional right to a jury trial was not infringed.

While apparently agreeing that the mere existence of the doctrine of collateral estoppel does not deprive a party of a right to trial by jury, WSAJ believes that Ms. Rushing is somehow entitled to an assurance the doctrine will not be applied in the future. WSAJ asks for a per se rule that the court must stay an arbitration to avoid application of collateral estoppel, without explaining why the concept of collateral estoppel and its effect on the right to a jury trial does not apply to Appellant any more than any other party which may have to eventually argue against the application of the doctrine. The risk that a well-settled legal doctrine will apply to it does not establish a basis for the per se rule which would in essence gut the right to arbitration when parties have agreed to it (in this case Mr. Coon and Franklin Hills) simply because there may be some non-arbitrable claims by beneficiaries; such a result would deprive the parties to the arbitration agreement of their right to swiftly resolve claims through alternative dispute resolution, while litigation, which can take years, is sequenced first.

It is unclear why WSAJ believes that the exhaustion of administrative remedies cases, such as in Smith v. Bates Technical College, 139 Wn.2d 793, 991 P.2d 1135 (2000), somehow apply to demand such a per se sequencing rule between arbitration to which parties have agreed, and the right to trial by jury. Here, Mr. Coon agreed to

arbitrate claims against Franklin Hills; if Mr. Coon was concerned that his or his beneficiaries' non-arbitrable claims might be affected by an arbitration and the potential impact of collateral estoppel, then he should not have signed the agreement, and factually it is undisputed he was not required to do so. However, once he agreed to arbitrate claims, there arose the possibility of collateral estoppel. No such chain of events occurs when parties are required to utilize administrative remedies prior to recourse to the courts; administrative remedies are most often a precursor to further relief, and are often ignored in the event they are deemed "futile." This is not the same situation as agreed in Alternative Dispute Resolution.

Ultimately, WSAJ simply ignores the fact that Mr. Coon and Franklin Hills have agreed to arbitrate. That Mr. Coon's beneficiaries did not agree to arbitrate does not create a situation in which arbitration somehow trumps the parties' rights to trial by jury. The potential future use of collateral estoppel does not necessitate a "sequencing rule" between arbitration and jury trial, when such a rule would in essence deprive parties who have agreed to arbitrate of their remedy, and effectively reverse well-settled and well-reasoned bases to uphold arbitration as a remedy. If the parties' agreement to swiftly resolve their claims is denied whenever a non-arbitrable claim exists, anyone attempting to avoid arbitration will be given a clear path to tactically include non-arbitrable

claims. There is simply nothing currently at issue in this case which would demand that result.

B. The Washington Arbitration Act is clear in what it requires, and its requirements are negated if read to allow stay of arbitration.

In addition to the practical implications of precluding parties from arbitrating as outlined above, WSAJ's attempt to parse the Washington Arbitration Act to establish a premise that it does not deny a court the power to stay arbitration ignores the terms of the statute. WSAJ concedes that RCW 7.04A.070(1) and (2) **require** that the court "shall order the parties to arbitrate" in the event an arbitration agreement exists. It further agrees that the Act specifies that if the court orders an arbitration, it "shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration". This statute very clearly does two things: (1) it requires a court to compel arbitration upon motion; and (2) it gives the court discretion to stay non-arbitrable claims. By the only negative implication possible, the Washington Arbitration Act does not give a court discretion to stay arbitrable claims; any other interpretation would nullify the word "shall," and add words that do not exist into the stay provision. As noted by WSAJ "the Act merely requires courts to enforce contracting parties' agreement to arbitrate"; this is exactly true, and WSAJ's reading of the

statute would render that concept useless. The statute should not be read so.

And as outlined in the opening brief of the Respondent and the amicus curiae brief for the Washington Health Care Association, such statutory interpretation is bolstered by the statutory interpretation of the companion Federal Arbitration Act, which has similarly been interpreted as leaving no place for such exercise of discretion and instead mandates the District Court shall direct the parties to proceed to arbitration on issues to which an arbitration agreement has been signed. See, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) (amicus curiae brief of the Washington Healthcare Association, pp. 7-8). WSAJ cannot meaningfully distinguish Dean Witter, which is premised on the same plain language and policy arguments that apply to our Washington Arbitration Act; WSAJ's suggestion that it was premised on one's waiver of a right to jury trial is simply incorrect. By definition, if there are arbitrable and non-arbitrable claims, the contracting party did not waive any rights with respect to the latter. In addition, the waiver analysis played no role in Dean Witter's holding, and its analysis remains relevant that no damage is done to the right to jury trial by simply enforcing an arbitration agreement between parties, which may have collateral estoppel effect on arbitrable or non-arbitrable claims.

Conversely, the authorities WSAJ cites which sequence equitable bench trials with legal claims subject to jury trials are inapplicable because they are narrowly limited to their specific facts. See, Lytle v. Household Manf., Inc., 494 U.S. 545, 500 (1990) ("**when legal and equitable claims are joined in the same action**, the right to jury trial – on the legal claim...remains intact") (Emphasis added). And this authority does not address an instance in which a per se "sequencing rule" would do damage to a party's contractual and statutory right to arbitrate.

Citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), and Lytle, WSAJ asserts that Mr. Coon's survival claims, which he agreed to arbitrate, and the beneficiaries' wrongful death claims should be sequenced in order to preserve a right to trial by jury. However, in both Lytle and Beacon, the claims being sequenced were equitable claims subject to a bench trial between the parties and thereafter jury trial on legal claims between the same parties. Such sequencing would not interfere with any concomitant right to arbitrate and would not nullify the contracting parties' contractual and statutory rights to arbitrate; nor does it address either the Washington Arbitration Act's or the Federal Arbitration Act's plain language requiring the court to compel arbitration.

Courts analyzing application of the Beacon and Lytle concept have recognized it has no application when the first proceeding is an agreed to arbitration:

USM, citing Beacon Theatres v. Westover, 359 U.S. 500, ... claims that, by submitting to arbitration, it is denied the right to jury trial on its contract claim...USM's reliance is misplaced. The district court's stay in the instant case does not permit the trial of equitable claims ahead of legal ones; rather it allows the parties to engage in previously agreed upon non-judicial arbitration proceedings. The statute is clear: once the district court is satisfied that the issue is subject to arbitration, it "shall" stay the action until arbitration is complete. 9 U.S.C. §3...

USM Corp. v. GKN Fasteners, Ltd., 574 F.2d 17, 19-20 (1st Cir. 1978).

See also, Zosky v. Boyer, 856 F.2d 554, 561 (3rd Cir. 1988) (misplaced reliance on Beacon Theatres, "which emphasized the very limited discretion of district judges to foreclose jury trial of legal issues through the prior determination of equitable ones"; no such legal/equitable claims at issue, and party agreed to resolution of her claim before an arbitrator).

Interestingly, in arguing that Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979)¹ does not apply, but instead asking this Court to apply the holdings in Beacon and Lytle, WSAJ attempts to distinguish Petitioners'

¹ The Supreme Court in Parklane held a party's right to trial by jury is not infringed by the application of collateral estoppel based on factual findings in previous non-jury proceedings; Washington adopted the reasoning specifically as to arbitrations. See, Robinson v. Hamed, 62 Wn.App. 92, 813 P.2d 171 (1991).

situation by asserting that Parklane is inapplicable because in that case "the jury and non-jury claims were brought by different plaintiffs in front of different judges." However, Petitioners' argument as to the impact of collateral estoppel is based on the alleged separation between Petitioners' and Mr. Coon's claims, arguing that these are different parties with different contractual obligations and different rights to trial by jury which should not be affected by an arbitration agreement signed by Mr. Coon. One of the litigants here is the Estate of Robert Coon and his survival action against Franklin Hills; Mr. Coon's action is subject to arbitration, and the court has held that Petitioner's derivative loss of consortium wrongful death claim is not. This presents, by Petitioners' arguments, separate, non-derivative actions, which are in two separate proceedings: the arbitration to which Mr. Coon agreed, and the trial of the beneficiaries' non-arbitrable claims. Parklane's holding (as well as Washington authority citing Parklane) controls: no Seventh Amendment violation occurs because the trial court invokes collateral estoppel made in a non-jury proceeding, such as arbitration.

Thus, WSAJ's arguments that Beacon and Lytle somehow control fail, and the reasoning of cases actually addressing arbitrable and non-arbitrable claims, as well as Washington's Arbitration Act, instead control here. This Court should not alter either Washington statute, or the

solid reasoning that provides parties with all the remedies to which they are entitled. Namely, Franklin Hills and Mr. Coon are entitled to their contractual remedies, the Washington court is required to compel that arbitration and uphold the remedy in which they agreed; the "sequencing rule" requested would eliminate those rights unnecessarily, and certainly speculatively at this point.

III. CONCLUSION

For the foregoing reasons, respondent Franklin Hills requests that the Court affirm the trial court's order that Mr. Coon had capacity to execute the arbitration agreement, and compel arbitration.

DATED this 3rd day of May, 2017.



CARL E. HUEBER
WINSTON & CASHATT
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 May 3, 2017, I served the foregoing document on the following counsel in the manners indicated:

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

mary@markamgrp.com
collin@markamgrp.com

Attorneys for Petitioners

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

George M. Ahrend
Ahrend Law Firm PLLC
100 East Broadway
Moses Lake, WA 98837

gahrend@ahrendlaw.com
scanet@ahrendlaw.com

Attorneys for Petitioners

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

Daniel Huntington
422 West Riverside, Ste. 1300
Spokane, WA 99201

danhuntington@richter-
wimberley.com

Attorney for WSAJ

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

Valerie D. McOmie
4549 NW Aspen St.
Camas, WA 98607

valeriemcomie@gmail.com

Attorney for WSAJ

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

Ryan McBride
Lane Powell PC
P.O. Box 91302
Seattle, WA 98111

mcbriider@lanepowell.com

Attorney for Washington Health
Care Association

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

DATED this 3rd day of May, 2017, at Spokane, Washington.

Cheryl Hansen

997772