

No. 91538-5
(Consolidated with Supreme Court No. 91852-0)

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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 CHARTREY, R.N., AURILLA POOLE, R.N., JANENE
YORBA, Director of Nursing,

Defendants/Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State Association
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the right to a jury trial in a civil action pursuant to Washington Const. art. I, § 21.

II. INTRODUCTION AND STATEMENT OF THE CASE

In this appeal, the Court is asked to decide whether a plaintiff's right to a jury trial in a civil action pursuant to Washington Const. art. I, § 21 is jeopardized by a court's order to stay a jury trial and compel arbitration, where fact findings in the arbitration could preclude jury determination of the same facts in the subsequent trial. The facts are drawn from the briefs of the parties and the unpublished Court of Appeals opinion. *See Rushing v. Franklin Hills Health & Rehabilitation*, noted at 179 Wn. App. 1018, 2014 WL 346540 (2014); Rushing Br. at 5-20; Franklin Hills Br. at 4-14; Rushing Reply Br. at 1-6.

For purposes of this brief, the following facts are relevant. Robert Coon voluntarily admitted himself to Franklin Hills Health & Rehabilitation Center, after he was injured in a fall. A representative of Franklin Hills presented Mr. Coon with a packet of admission documents that included an Alternative Dispute Resolution Agreement (Agreement). The Agreement

provided, in part, that “covered disputes” would be resolved exclusively by binding arbitration. “Covered disputes” included all claims arising from tort, negligence, malpractice, and wrongful death. The Agreement further stated that the parties acknowledged they were giving up their constitutional right to have covered disputes decided by a court of law or to appeal any decision or award of damages.

Two months after admission, Coon died of dehydration. His daughter, Mary Rushing, brought a wrongful death action against Franklin Hills in her individual capacity and a survival action in her capacity as the administrator of Coon’s estate. The suit alleged negligent nursing care, failure to properly train and supervise nursing staff and violations of the vulnerable adult statute, RCW 74.34.200. Franklin Hills moved to stay the superior court action and to compel arbitration of all claims. Rushing opposed the motion to compel, arguing, among other things, that Coon lacked the requisite mental capacity to enter into the Agreement.

The parties submitted conflicting evidence and declarations regarding Coon’s mental capacity. The trial court denied Franklin Hills’ motion for stay and motion to compel, and Franklin Hills appealed. In an unpublished opinion, the Court of Appeals held that the trial court was required to determine whether the Agreement was enforceable before denying a motion to compel arbitration, and remanded for the trial court to make that determination. *Rushing*, 2014 WL 346540 at *4.

On remand, the trial court conducted an evidentiary hearing and found: 1) Coon had signed the Agreement; 2) the plaintiff failed to meet her burden to prove by clear, cogent, and convincing evidence that Coon was not competent when he entered into the Agreement; 3) Coon had the cognitive ability to appreciate the nature and effect of the consequences of the Agreement; and 4) the Agreement was enforceable.

Rushing filed a motion to stay arbitration until after the completion of the jury trial, and Franklin Hills filed a cross-motion for a stay of the jury trial pending completion of the arbitration. The trial court entered three separate orders: 1) an order compelling arbitration of the survival claims; 2) an order denying Franklin Hills' motion to compel arbitration of the wrongful death claim; and 3) an order granting Franklin Hills' motion to stay the wrongful death action. The effect of the orders was to sequence the proceedings so that arbitration of the survival claims would occur before the trial of Rushing's wrongful death claim.

Rushing sought direct discretionary review of the order compelling arbitration and the order staying litigation of the wrongful death claim.

Regarding the order to stay, she sought review on the following issue:

Where arbitration proceedings would potentially have collateral estoppel effect in related litigation, does the right to trial by jury require the proceedings to be sequenced so that litigation precedes arbitration?

Motion for Discretionary Review, Supreme Court No. 91852-0, at 1.

The Supreme Court accepted direct discretionary review.¹

¹ Rushing also advances numerous arguments challenging the enforceability of the

Rushing contends that if she is forced to arbitrate Coon's survival claims prior to trial of the wrongful death claim, she may be deprived of her constitutional right to a jury determination of issues of fact in the wrongful death claim as a result of the collateral estoppel effect of findings of fact in the arbitration. *See* Rushing Opening Br. at 47. Franklin Hills argues that Washington's Arbitration Act, ch. 7.04A RCW, requires a court to compel arbitration and does not allow a stay of arbitration to permit an earlier trial of related claims, and Rushing's fear of the potential application of collateral estoppel in her wrongful death claim does not justify depriving the nursing home of the "speedy remedy" which Franklin Hills and Coon agreed to arbitrate. Franklin Hills contends that the constitutional right to a jury trial is not infringed by the collateral estoppel effect of findings from a preceding arbitration. *See* Franklin Hills Br. at 41-50.

III. ISSUE PRESENTED

In an action in which jury and nonjury claims are joined, does a court that stays a trial and orders arbitration abuse its discretion and infringe upon the constitutional right to a jury trial of a litigant who did not agree to arbitration, where findings of fact in the arbitration could preclude jury determination of facts at trial?

IV. SUMMARY OF ARGUMENT

Washington Const. art. I, § 21 protects as "inviolable" the right to trial by jury. This Court looks to the right as it existed at the time of the adoption of the Constitution in 1889 to determine the scope of the right as well as the causes of action to which it applies. Since its inception, the core

Agreement. This brief focuses solely on the issue relating to the order staying litigation.

of the protection afforded by Const. art. I, § 21 has been the right to a jury determination of disputed issues of fact. Because a claim for wrongful death was recognized in 1889, this constitutional guarantee encompasses the right to a jury determination of disputed facts in a wrongful death claim.

Where the same set of facts gives rise to both arbitrable and nonarbitrable claims that are joined in the same action, factual determinations in arbitration may estop a party from relitigating those facts in a subsequent jury trial. A plaintiff who has not consented to arbitration is entitled to a stay of arbitration to preserve the right to a jury trial of the nonarbitrable claims, and a court abuses its discretion by ordering arbitration and staying the jury trial.

V. ARGUMENT

A. Overview Of Washington Const. Art. I, § 21, And The Right To A Jury Trial In A Civil Action In Washington.

In Washington, the right to a jury trial in a civil action is protected solely by Washington Const. art. I, § 21. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644, 771 P.2d 711, 780 P.2d 260 (1989). The federal constitutional right to a jury trial in a civil case guaranteed by the Seventh Amendment to the United States Constitution does not apply to the states. *See id.* (citing *Minneapolis & St. L. R.R. v. Bombolis*, 241 U.S. 211 (1916)). Accordingly, the extent of the right to a jury trial is “based entirely on adequate and independent state grounds.” *Sofie*, 112 Wn.2d at 644.²

² In *Sofie*, the Court further stated that “[e]ven if the federal constitution were to apply in this case, following the nonexclusive criteria set out in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), we would still base our decision on the Washington Constitution.”

Art. I, § 21 states:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

In *Sofie*, this Court discussed this state constitutional right:

The term “inviolate” connotes deserving of the highest protection. *Webster’s Third New International Dictionary* 1190 (1976), defines “inviolate” as “free from change or blemish: pure, unbroken ... free from assault or trespass: untouched, intact ...” Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

112 Wn.2d at 656.

In interpreting art. I, § 21, the Supreme Court looks to the jury trial right as it existed at the time of the Constitution’s adoption in 1889 to determine both the scope of the right and the causes of action to which the right applies. *See id.* at 645. In *Sofie*, the Court looked to *State ex rel. Mullen v. Doherty*, 16 Wash. 382, 47 P. 958 (1897), to provide “contemporary insight” on the scope of the right to trial by jury:

In *Mullen*, we cited section 248 of the Code of 1881, in force at the time of the constitution’s passage, to determine the jury’s role in the constitutional scheme: “either party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury.” *Mullen*, 16 Wash. at 385. Subsequent cases underscore the jury’s fact-finding province is the essence of the right’s scope.

112 Wn.2d at 644, n.4.

112 Wn.2d at 645. More recently, in *Davis v. Cox*, 183 Wn.2d 269, 351 P.3d 862 (2015), this Court reiterated the fundamental importance of a jury determination of factual issues under art. I, § 21: “At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts.” 183 Wn.2d at 289.

The Court also uses this historical standard to determine the causes of action to which the right to a jury trial applies. *See Sofie*, 112 Wn.2d at 645. *Sofie* recognized prior holdings which clarified that “...the right attaches to actions in which a jury was available at common law as of 1889 and to actions created by statutes in force at this same time allowing for a jury.” *Id.* at 648. Lord Campbell’s Act was the model for the wrongful death statute that was adopted in the first session of Washington’s territorial legislature in 1854. *See Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 723, 381 P.3d 32 (2016). In 1875, the territorial legislature expanded Washington’s wrongful death statute to substantially the form it has today. *See id.*

This Court has held in a wrongful death case that whether negligence is established by the evidence “is a factual determination reposed exclusively in the jury by the Constitution and laws of this state. Const. art 1, § 21.” *Hawley v. Mellem*, 66 Wn.2d 765, 772-73, 405 P.2d 243 (1965). At common law, “...the determinations of whether a person was at fault and whether that fault was a proximate cause of the plaintiff’s injuries were questions for the jury.” *Edgar v. City of Tacoma*, 129 Wn.2d 621, 627, 919

P.2d 1236 (1996). Thus, issues of fact relevant to negligence in a wrongful death claim would be within the scope of the jury trial right under art. I, § 21. That right to a jury trial may not be impaired by judicial action. *See Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993).

B. The Trial Court Abused Its Discretion In Compelling Arbitration And Staying Litigation Of Rushing's Wrongful Death Claim, Because Determination Of Factual Issues In Arbitration May Extinguish Rushing's Right To A Jury Determination Of Facts In Her Wrongful Death Claim, And Franklin Hills' Contractual Right To Arbitration With Coon Should Not Override Rushing's Constitutional Right To Trial By Jury.

1. If arbitration is compelled and litigation stayed, Rushing's right to a jury determination of disputed facts in her wrongful death claim will be jeopardized because collateral estoppel may operate to bar relitigation of these issues after they are resolved in arbitration.

Collateral estoppel bars relitigation of a factual issue when parties or their privities have obtained a factual determination in a prior proceeding. *See Christensen v. Grant Co. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). A party seeking to employ this doctrine must establish four elements: (1) the factual issues are identical in both actions; (2) the prior adjudication ended in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party or was in privity with the party to the prior adjudication; and (4) application of the doctrine will not work an injustice. *See Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 262-63, 956 P.2d 312 (1998).

In *Rushing*, if the survival action proceeds to arbitration, it will likely result in a determination of disputed facts regarding Franklin Hills'

negligence in causing Mr. Coon's death, and could bar Rushing from subsequently litigating these facts before a jury. In *Nielson*, this Court was asked to determine whether plaintiffs could be precluded from relitigating the amount of damages after that issue had been litigated in a previous bench trial. The plaintiffs, relying on *Sofie*, argued that collateral estoppel would work an injustice by depriving them of their constitutional right to have a jury determine the issue of damages. 135 Wn.2d at 265. The Supreme Court noted that the inquiry as to whether the doctrine would work an injustice focuses on whether the parties to the earlier adjudication were provided a full and fair hearing. *Id.* at 264-65. The Court held the plaintiffs were precluded from relitigating the amount of damages: "Although the factual issue of damages is a jury question in Washington, there must be an issue of fact to resolve in order for that right to arise. Where the issue has been resolved in a prior proceeding, no factfinding duty remains for a jury on that issue." *Id.* at 269.³

In *Robinson v. Hamed*, 62 Wn. App. 92, 813 P.2d 171 (1991), the court of appeals arrived at a similar outcome. The defendant in a civil action was collaterally estopped from relitigating the issues concerning his termination, which had been the subject of an earlier arbitration between his union and employer. The court held: "[I]t is well settled that in an appropriate case the decision in an arbitration proceeding may be the basis

³ The Court of Appeals also held that the plaintiffs waived their right to a jury trial in state court by electing to proceed in the federal forum without seeking a stay. *See Nielson v. Spanaway Gen. Med. Clinic*, 85 Wn. App. 249, 255, 931 P.2d 931 (1997). The Supreme Court did not address the question of waiver. 135 Wn.2d at 269.

for collateral estoppel or issue preclusion in a subsequent judicial trial. Hamed's assertion that doing so deprives him of his right to trial by jury is totally without merit." 62 Wn. App. at 96-97. The Court rejected Hamed's argument that he was not a party or in privity with the party in the arbitration: "Having invoked the arbitration proceeding to vindicate his rights, he cannot now claim that he was not in privity with his union and bound by the results." *Id.* at 100.

While Seventh Amendment jurisprudence is inapplicable to the states, this Court has looked to federal analysis as "educational." *Sofie*, 112 Wn.2d at 648. In *Nielson, supra*, this Court considered *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), instructive regarding whether the application of collateral estoppel infringes upon a litigant's state constitutional right to a jury trial. *See Nielson*, 135 Wn. 2d at 267. In *Parklane*, a class action defendant was collaterally estopped from relitigating whether a proxy statement was false and misleading, because that issue had already been decided in a bench trial brought by the SEC against the corporation. The Supreme Court held that a litigant in a civil case is not entitled to a trial by jury "unless and except so far as there are issues of fact to be determined," 439 U.S. at 336 (quoting *Ex Parte Peterson*, 253 U.S. 300, 310 (1920)), and that application of collateral estoppel does not violate a civil litigant's Seventh Amendment right to a jury trial, because "once an issue has been resolved in a prior proceeding,

there is no further factfinding function to be performed.” 439 U.S. at 336, n. 23.

Should the arbitration of the Franklin Hills/Coon dispute occur before Rushing’s wrongful death trial, Rushing will have valid arguments for challenging application of collateral estoppel. The cases applying collateral estoppel promoted by Franklin Hills are distinguishable and inapplicable to *Rushing v. Franklin Hills*. In *Nielson*, the plaintiffs did not move to stay the bench trial, tried that case to a verdict, and only then sought to avoid the collateral estoppel effect of findings in that case from their later jury trial. In *Robinson*, the defendant invoked the arbitration to vindicate his rights, and then in the later civil trial claimed he was not in privity with his union and should not be bound by the arbitration results. In *Parklane*, the corporation’s conduct subjected it to the SEC action, and there is no indication that the corporation sought to stay the SEC action in order to preserve its right to a jury trial. In contrast, Rushing was not a signatory to the arbitration agreement, has not “invoked the arbitration proceeding,” did nothing to subject herself to an arbitration proceeding, and sought to stay the arbitration until after the jury trial rather than arguing against collateral estoppel after the nonjury proceeding has already been completed.

However, despite these significant distinctions, Rushing cannot be assured that if the arbitration precedes her jury trial she will not be collaterally estopped by fact findings in the arbitration. Given the outcomes in *Nielson* and *Robinson*, it was imperative for Rushing to seek a stay of the

arbitration until the conclusion of her jury trial, rather than await the outcome of the arbitration and then hope to successfully challenge the application of collateral estoppel in her jury trial.

In a similar context, this Court has commented on a party's avoidance of a nonjury proceeding in order to prevent the possible collateral estoppel effect on a later jury trial. In *Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000), the Court held the plaintiff was not required to exhaust her administrative remedies before pursuing her wrongful termination claim in superior court, because the right to be free from wrongful termination in violation of public policy is independent of any statute. 139 Wn.2d at 809. This Court discussed the possible collateral estoppel effects of requiring exhaustion of administrative remedies after examining its decision in *Reninger v. Dep't of Corrections*, 134 Wn.2d 437, 951 P.2d 782 (1998), and noted that *Reninger* made it "even more compelling" to hold that Smith did not have to exhaust her administrative remedies:

Under *Reninger* an employee who loses in an administrative proceeding will be collaterally estopped from attempting to prove the distinct tort of wrongful discharge in violation of public policy. Thus, if employees are required to exhaust all available administrative remedies in order to bring a civil suit for wrongful termination, the administrative remedy could be the *only* available remedy. Such a rule goes beyond the usual understanding of exhaustion as a *prerequisite* to seeking judicial relief, ... and ignores the fundamental distinction between contract and tort actions.

139 Wn.2d at 811 (citation omitted); *see also Piel v. City of Federal Way*, 177 Wn.2d 604, 615, 306 P.3d 879 (2013).

2. Washington's Arbitration Act, Ch. 7.04A RCW, does not apply to a party who has not agreed to submit a dispute to arbitration, and does not require a court to stay a trial of nonarbitrable claims in favor of arbitration.

Washington has a strong public policy favoring arbitration of disputes. *See Scott v. Cingular Wireless*, 160 Wn.2d 843, 858, 161 P.3d 1000 (2007); *Zuver v. Airtouch Communications, Inc.* 153 Wn.2d 293, 301 n.2, 103 P.3d 753 (2004). A party who knowingly and voluntarily agrees to arbitration implicitly waives his or her right to a jury trial by agreeing to an alternate forum, arbitration. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 360-61, 103 P.3d 773 (2004).

However, "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 810, 225 P.3d 213 (2009) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). This principle was the basis for the decision in *Woodall v. Avalon Care Center*, 155 Wn. App. 919, 933, 231 P.3d 1252 (2010). There, the court held that a resident's arbitration agreement with a nursing home compelled arbitration of the decedent's survival claims, but did not apply to the wrongful death claims of the decedent's heirs who did not sign the arbitration agreement. *See* 155 Wn. App. at 931-32, 936. The court held: "The strong policy favoring arbitration does not overcome the policy that one who is not a party to an agreement to arbitrate cannot generally be required to arbitrate." *Id.* at 935.⁴

⁴ *Woodall* was the basis for the trial court's order denying Franklin Hills' motion to

Franklin Hills cites *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985), for the proposition that a court must grant a motion to compel arbitration, despite a request to stay arbitration to allow nonarbitrable claims to proceed to a jury trial. Franklin Hills Br. at 45. In that case, Dean Witter and Byrd signed an arbitration agreement and the U.S. Supreme Court held that the Federal Arbitration Act mandates that a court order parties to arbitrate the issues subject to an arbitration agreement. 470 U.S. at 217. The Court considered the language of the Act and reviewed Congressional history, and found that "...passage of the Act was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered, and we must not overlook this principal objective when construing the statute..." *Id.* at 220. The Court rejected the suggestion that the overriding goal of the Arbitration Act was to promote the speedy resolution of claims, and emphasized that the "preeminent" concern of Congress in passing the Act was to enforce the parties' agreement to arbitrate. *See id.* at 219-21.

The Court held that when a motion to compel arbitration is made, a court should not stay arbitration for fear of its preclusive effect because collateral estoppel rules provide adequate protection for federal interests in a federal trial court proceeding. The Court further held that the collateral estoppel effect of any arbitration proceeding is not an issue until after the arbitration is completed, stating "... it is far from certain that arbitration

compel arbitration of Rushing's wrongful death claim. Franklin Hills did not appeal that order.

proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims.” *See* 470 U.S. at 222-23.

In *Dean Witter*, the Court based its holding on its analysis of the language and legislative history of the Federal Arbitration Act, finding that the “principal objective” of the Act was to require parties to an arbitration agreement to arbitrate. *Dean Witter* implicitly waived its right to a jury trial by agreeing to arbitration (*see Adler, supra*, 153 Wn.2d at 360-61). Here, Rushing did not enter into an arbitration agreement, and did not waive her right to a jury trial.

Franklin Hills argues that Washington’s Arbitration Act “requires the trial court to compel arbitration, which as a matter of course precludes the stay of such proceeding.” Franklin Hills Br. at 45. RCW 7.04A.070(1) provides that on a motion showing an agreement to arbitrate, “the court shall order the parties to arbitrate,” and section (2) provides that if a party disputes an agreement to arbitrate and the court finds that there is an enforceable agreement to arbitrate, “it shall order the parties to arbitrate.”

Section (6) provides:

If the court orders arbitration, the court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may sever it and limit the stay to that claim.

Notably, ch. 7.04A RCW does *not* provide that if the court orders arbitration, the court shall stay any judicial proceeding that involves *nonarbitrable* claims arising out of the same facts as the arbitrable claims.

Nor does the Washington Arbitration Act provide that a court ordering arbitration lacks the power to stay that arbitration until the conclusion of a judicial proceeding that involves nonarbitrable claims arising out of the same facts as the arbitrable claims. The Act merely requires courts to enforce contracting parties' agreements to arbitrate; it neither applies to non-contracting parties nor speaks to the question of sequencing jury and nonjury proceedings.

3. The trial court abused its discretion by compelling arbitration and staying litigation because Franklin Hills' statutory and contractual arbitration rights should not override Rushing's constitutional right to have disputed issues of fact resolved in a jury trial.

This Court has not had the opportunity to address the circumstances under which courts should sequence jury and nonjury claims joined in the same action in order to protect the constitutional right to trial by jury. Other Washington courts have recognized a trial court's authority to stay proceedings that may affect a party's rights in a parallel proceeding.

In *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000), *review denied*, 143 Wn.2d 1012 (2001), the court granted discretionary review to consider whether the trial court abused its discretion in denying a motion for a stay where a civil action may have implications for a party's right against self-incrimination in parallel criminal proceedings. The court stated that a trial court "has inherent power to stay its proceedings where the interest of justice so requires," 104 Wn. App. at 350, and quoted Justice Cardozo:

[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket ... How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance. True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

Id. (brackets added; quoting *Landis v. North Am. Co.*, 299 U.S. 248, 254-55 (1936) (citations omitted)); see also *State v. Longo*, 185 Wn. App. 804, 812, 343 P.3d 378 (2015) (noting a court “may order a stay if [it is] convinced the stay is necessary to avoid undue prejudice to a party’s prosecution or defense of a matter”; brackets added).

While the U.S. Supreme Court has stated that collateral estoppel may bar jury determination of facts when a prior adjudication has already resolved the same facts in a nonjury proceeding, it has also clarified that when jury and nonjury claims are joined in the same action, a court should sequence the claims to preserve the right to trial by jury, and “only under the most imperative circumstances... can the right to a jury trial of legal issues be lost[.]” *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959). In *Beacon*, the Supreme Court found that a trial court abused its discretion in adjudicating nonjury before jury claims because this sequence could result in collateral estoppel denying a party’s right to a jury trial. The parties filed legal and equitable claims in the same suit, and the federal district court ordered the equitable claims tried to the court before a jury

determination of the legal claims. The Supreme Court noted that the judge's ruling on the equitable claims could operate by collateral estoppel to deny Beacon a jury determination of issues common to the legal and equitable claims. 359 U.S. at 504. The Court stated that the trial court's exercise of its discretion to deprive Beacon of a jury determination of its legal claims could not be justified. *Id.* at 508. The Court held:

If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, whenever possible, be exercised to preserve jury trial... [O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.

Id. at 510-11. In *Parklane, supra*, the Court described *Beacon* as establishing "no more than a general prudential rule" that "the trial judge has only limited discretion in determining the sequence of trial and 'that discretion ... must whenever possible, be exercised to preserve jury trial.'" 439 U.S. at 334.

Subsequently, in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), the Court clarified its holdings in both *Beacon* and *Parklane*. In *Parklane*, the jury and nonjury claims were brought in separate actions, and the bench trial occurred first. In contrast, *Beacon* involved legal and equitable claims

joined in the same suit. *Lytle*, 494 U.S. at 550-51. The Court in *Lytle* deemed this distinction critical:

The Court in *Beacon Theatres* emphasized the importance of the order in which legal and equitable claims joined in one suit would be resolved because it “thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel.”

Lytle, 494 U.S. at 550 (quoting *Parklane*, 439 U.S. at 334). The Court found that *Lytle*’s case was governed by *Beacon*: “When legal and equitable claims are joined in the same action, ‘the right to jury trial on the legal claim, including all issues common to both claims, remains intact.’” 494 U.S. at 550 (quoting *Curtis v. Loether*, 415 U.S. 189, 196 n. 11 (1974)).

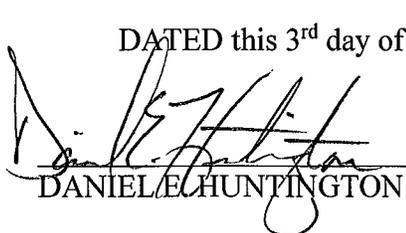
Rushing is distinguishable from *Parklane*, and should be governed by the “prudential rule” of *Beacon*. In *Parklane*, the jury and nonjury claims were brought by different plaintiffs in front of different judges, and there is no indication that *Parklane* sought to stay the nonjury proceeding, so the resolution of the SEC action before the class action was fortuitous rather than the result of an exercise of judicial discretion. The issue in *Parklane* was whether the fact findings from the nonjury proceeding precluded relitigation of those issues in the subsequent jury proceeding. Here, like *Beacon*, the issue is whether constitutional considerations should lead the court to sequence the proceedings in a particular order, and here the trial court’s discretion in sequencing the proceedings “must ... be exercised to preserve jury trial.” *Beacon*, 359 U.S. at 510.

In considering Rushing's motion to stay the arbitration and Franklin Hills' motion to stay the trial, the trial court seemed to improperly rely on *Robinson* and *Parklane* to conclude that no constitutional violation occurs if the Court proceeds with arbitration and potentially bars a subsequent jury determination of common facts. *Robinson* and *Parklane* are inapposite, however, and this Court should instead adopt the reasoning in *Beacon Theatres* and *Lyle*, and hold that when a litigant has joined jury and nonjury claims in the same action, and taken proper measures to preserve her right to a jury trial, a court abuses its discretion by sequencing the claims in an order that may deny the litigant's constitutional guarantee. Franklin Hills' contractual and statutory interest in a "speedy remedy" should not override Rushing's constitutional right to a jury trial, and the trial court abused its discretion in denying Rushing's motion to stay the arbitration and in granting Franklin Hills' motion to stay the wrongful death trial.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief, and hold that the trial court abused its discretion in denying Rushing's motion to stay the arbitration and granting Franklin Hills' motion to stay the trial.

DATED this 3rd day of April, 2017.


DANIEL E. HUNTINGTON


for VALERIE D. MCOMIE

On Behalf of WSAJ Foundation

APPENDIX

RCW 7.04A.060**Validity of agreement to arbitrate.**

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

[2005 c 433 § 6.]