

Supreme Court No. 91538-5
(Consolidated with Supreme Court No. 918520-0)

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

v.

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

Defendants-Respondents

ON PETITION FOR REVIEW FROM
SPOKANE COUNTY CAUSE NO. 11-2-04875-1

AMICUS CURIAE BRIEF OF THE
WASHINGTON HEALTH CARE ASSOCIATION

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I. INTRODUCTION

The Washington Health Care Association (WHCA) submits this brief in support of the trial court's rulings compelling arbitration of Petitioner Rushing's survival claim and refusing to stay such arbitration pending litigation of Petitioner's non-arbitrable wrongful death claim.

After a four-day trial, the trial court found that Robert Coon was competent when he voluntarily signed an arbitration agreement, among other admission documents, in connection with his admission to Franklin Hills Health and Rehabilitation Center. Rushing tacitly recognizes that the trial court's findings are unassailable on appeal and, thus, she seeks to circumvent the court's order compelling arbitration in two ways.

First, Rushing argues that Franklin Hills owed a fiduciary duty to Mr. Coon at the time of his admission, and that the trial court therefore misplaced the burden of proof on the issue of competency. *Second*, Rushing argues that, even though her survival claims are arbitrable, the trial court was required to stay arbitration until she first litigated her non-arbitrable claims to ensure that the former does not collaterally estop the latter.

This Court should reject both arguments.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WHCA is a Washington non-profit organization that represents over 400 assisted living and skilled nursing facilities in the State of Washington.

WHCA's members provide health and personal care, social support and housing to more than 25,000 Washingtonians each day. WHCA's mission is to promote quality long-term health care and services by acting as an advocate for its members, as well as their staff and residents.

WHCA serves the interests of its members by, among many other things, representing members in proceedings before state agencies; encouraging state and federal legislation that enables members to provide high quality care; promoting reasonable and fair compensation for members participating in publicly-funded health and residential care programs; and, when necessary, engaging in litigation or participating as *amicus curiae* on behalf of members to advance and protect member interests.

Many of WHCA's skilled nursing and assisted living facility members are party to voluntary and lawful arbitration agreements with their residents and families. WHCA is interested in this matter because the issues on appeal relate to the enforceability and/or effect of such agreements. WHCA believes its perspective will be of assistance to the Court.

III. ISSUES ADDRESSED

WHCA addresses two issues:

1. Whether a fiduciary relationship exists as a matter of law between a nursing facility or similar long-term care provider and prospective residents at the time of admission to the facility. **No.**

2. Whether a trial court has discretion to stay arbitration of arbitrable claims pending the litigation of non-arbitrable claims in order to avoid collateral estoppel and/or preserve the right to a jury trial. **No.**

IV. ARGUMENT

A. There Is No Fiduciary Relationship Between Nursing Homes Or Other Long-Term Care Providers And Prospective Residents At The Time Of Admission To The Facility.

Rushing argues that, as a matter of law, a nursing home shares a fiduciary relationship with prospective residents before or at the time of admission when the resident (or, more commonly, his or her POA or guardian) signs admission documents that may include an arbitration agreement. Rushing Op. Br. at 22-27. For the reasons set forth in Franklin Hills's brief, it is irrelevant whether a fiduciary relationship existed between Mr. Coon and Franklin Hills because, unlike undue influence or fraud, one's capacity to contract has nothing to do with the relationship between contracting parties. Franklin Hills Br. at 14-27. However, even if the existence of fiduciary relationship were relevant to the issue of competency, Rushing's argument that such a relationship exists as a matter of law has no support, in Washington or elsewhere, and should be rejected.

No Washington court has recognized fiduciary duties between nursing homes and residents as a matter of law, and certainly not prior to or at the time of admission. In fact, no authority exists *anywhere* for such a

proposition. *See Owens v. Nat'l Health Corp.*, 263 S.W.3d 876, 890 (Tenn. 2007) (“plaintiff has cited no authority for the finding that a fiduciary duty is owed to a *potential* patient of a nursing home”). Every court to consider the issue has held the opposite: there is no fiduciary relationship during the nursing home admission process that would apply to the resident’s signing of an arbitration agreement. *Id.*; *THI of N.M. at Hobbs Ctr., LLC v. Spradlin*, 532 F. App’x 813, 818–19 (10th Cir. 2013); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 351 n.30 (N.D. Ill. 1997); *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278, 288–89 (Fla. Dist. Ct. App. 2003); *Reagan v. Kindred Healthcare Operating, Inc.*, 2007 WL 4523092 at *11 (Tenn. Ct. App. Dec. 20, 2007). This Court should do the same.

Rushing ignores this law and, instead, compares an incipient nursing home-resident relationship to an ongoing physician-patient relationship. This inapt analogy has been uniformly rejected too. The Tenth Circuit, for example, held that the relationship between nursing homes and prospective residents was similar to buyer and seller, not physician and patient. *THI*, 532 F. App’x at 818–19. The court “would not recognize a fiduciary duty between a nursing home and a prospective patient during negotiations over an admission contract,” because it relates to care and services “*after* contract formation.” *Id.* Tennessee courts likewise hold that the dealings between nursing homes and potential residents during the admission process do not

reflect the same level of trust and confidence inherent in a physician and patient relationship—and, thus, create no fiduciary relationship. *Reagan*, 2007 WL 4523092, at *11 (discussing *Owens*, 263 S.W.3d at 890).

Indeed, only a handful of cases have recognized the possibility of a fiduciary relationship between nursing homes and residents regarding care and services rendered *after* admission. See *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 93 (W. Va. 2014) (noting “the small number of jurisdictions who have expressly recognized” such a duty). And these cases have been clear that to the extent such a relationship can arise at all, it would be a case-by-case basis depending on the facts—not as a matter of law. *Id.*; *Rohlfing*, 172 F.R.D. at 350-51; *Petre v. Living Centers-East, Inc.*, 935 F. Supp. 808, 812 (E.D. La. 1996); *Schenck v. Living Centers-East, Inc.*, 917 F. Supp. 432, 437-38 (E.D. La. 1996); *Zaborowski v. Hospital Care Center of Hermitage, Inc.*, 60 Pa. D. & C.4th 474, 489 (Pa. Com. Pl. 2002).

Washington law is the same. In a fiduciary relationship, one party “occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for.” *Liebergessell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980) (quotation marks and citation omitted). Such a relationship depends in each case on “factual proof.” *Id.* at 891. Thus, a contracting party owes a general duty of good faith, but not a fiduciary duty, absent evidence of an already existing position of trust and

confidence. *Id.* at 890-91. As one court noted, a nursing home resident cannot show “a breach of fiduciary duty based on the events surrounding the signing of a residency agreement” because at the time “no confidence or influence could have been present since the parties were still dealing at arm’s length.” *Rohlfing*, 172 F.R.D. at 351 n.30. The same is true here.

In sum, no court has recognized a fiduciary relationship between a nursing home and resident in connection with the signing of admission documents and/or arbitration agreements. This Court likewise should refuse to hold that any such relationship exists as a matter of law.

B. The Washington Arbitration Act Requires Trial Courts To Compel Arbitration And Forbids Them From Staying Arbitration Pending Litigation Of Non-Arbitrable Claims.

Rushing argues that the trial court abused its discretion or otherwise erred when it denied her motion to stay arbitration of the survival claims because arbitration might have a preclusive effect on the litigation of her non-arbitrable wrongful death claims. *Rushing Op. Br.* at 48-49. She contends that, absent a stay, her right to a jury trial on the wrongful death claims might be impaired if Franklin Hills prevails at arbitration and then “seeks to invoke collateral estoppel” to moot the wrongful death claims. *Id.*

This Court must reject Rushing’s argument for two reasons. *First*, if a valid arbitration agreement covers a particular dispute, the Washington Uniform Arbitration Act (WAA) requires trial courts to compel arbitration

and forbids them from staying arbitration out of a concern that collateral estoppel might apply to related non-arbitrable claims. *Second*, application of collateral estoppel based on an arbitration does not violate a party's right to a jury trial and, in any event, the court can require re-litigation if it finds that arbitration did not afford either party a full and fair hearing.

In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), the United States Supreme Court held that the Federal Arbitration Act (FAA) gives district courts no discretion to stay arbitration or sequence litigation of arbitrable and non-arbitrable claims to avoid infringing on the court's or a jury's authority to decide "intertwined" non-arbitrable claims:

By its terms, the [FAA] leaves no place for the exercise of discretion by the district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues to which an arbitration agreement has been signed.

Id. at 218 citation omitted). The Court recognized that Congress' purpose in enacting the FAA was to "ensure judicial enforcement of privately made agreements to arbitrate," even if the result is inefficient or "piecemeal" litigation of related arbitrable and non-arbitrable claims. *Id.* at 219-21.

Importantly, the Court addressed and rejected the same arguments Rushing makes here regarding the possible effect of collateral estoppel:

Other courts have held that [arbitrable and non-arbitrable] claims should be separately resolved, but that this preclusive effect warrants a stay of arbitration proceedings pending resolution of the [non-arbitrable] claim. . . . We conclude

that neither a stay of proceedings, nor joined proceedings, is necessary to protect the federal interest in the federal court proceeding, and that the formulation of collateral-estoppel rules affords adequate protection to that interest.

* * *

As a result, there is no reason to require that district courts decline to compel arbitration, or manipulate the ordering of the resulting bifurcated proceedings, simply to avoid an infringement of federal interests.

Id. at 222-23. Justice White’s concurrence noted that the “opinion makes clear that a district court should not stay arbitration . . . for fear of its preclusive effect.” *Id.* at 225 (White, J., concurring).

Ordinarily, *Byrd* would control, as it is accepted that nursing home arbitration agreements are governed by the FAA. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 381, 759 S.E.2d 727 (2014) (“many—if not all—federal and state courts have held that nursing home residency contracts . . . implicate interstate commerce and the FAA.”). Here, however, the parties agreed that the WAA would govern, which they were free to do. *Volt Info. Sciences, Inc. v. Bd. of Trustees*, 489 U.S. 468, 477 (1989). It makes no difference. For all the reasons articulated in *Byrd*, the WAA equally forbids trial courts from staying arbitrable claims.

The relevant provision of the WAA is the same as the FAA. If the court finds that there is an enforceable agreement to arbitrate, it “*shall* order the parties to arbitrate.” RCW 7.04A.070(1) (emphasis added); *see* 9 U.S.C. § 4 (“the court shall make an order directing the parties to proceed to

arbitration”). Indeed, the WAA specifically prescribes the procedure when cases involve both arbitrable and non-arbitrable claims; courts “shall” stay litigation of arbitrable claims and “may” stay litigation of non-arbitrable claims pending arbitration. RCW 7.04A.070(6). But nothing in the WAA gives the court discretion to stay arbitration pending litigation, regardless of whether the arbitrable and non-arbitrable claims are related or severable.

Thus, like the FAA, “by its terms” the WAA forbids courts from delaying a ruling on arbitrability or staying arbitration once it is compelled in an effort to promote earlier resolution of any non-arbitrable claims. Not only is this outcome compelled by the plain language of the WAA, such a rule comports with Washington’s equally strong public policy favoring arbitration of disputes. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 341 n.1, 103 P.3d 773 (2004); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002). Staying arbitration thwarts that policy because it interferes and potentially nullifies the parties’ express agreement without a statutory basis to do so. If the rule were otherwise, parties would plead non-arbitrable claims simply as a means of avoiding arbitration.

Not surprisingly, post-*Byrd*, state courts with arbitration acts substantially identical to the WAA consistently hold that trial courts have no discretion to ignore a valid arbitration agreement, and must immediately compel arbitration of arbitrable claims notwithstanding the assertion of non-

arbitrable claims, even if it would lead to parallel proceedings or inconsistent results. *See Ingold v. Aimco/Bluffs, LLC Apartments*, 159 P.3d 116 (Colo. 2007); *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 620 S.E.2d 86 (Ct. App. 2005); *Hallmark Indus., LLC v. First Systech Int'l, Inc.*, 203 Ariz. 243, 52 P.2d 812 (Ct. App. 2002). This Court should do the same.

Finally, there is no merit to Rushing's implicit suggestion that courts must or may disregard the WAA and Washington public policy because, absent a stay, arbitration *might* have a collateral estoppel effect on parallel or later litigation of non-arbitrable claims, thereby infringing on the right to a jury trial. As Franklin Hills correctly points out and Rushing does not refute, it is well-settled that arbitration can serve as a basis for collateral estoppel, and doing so does not violate the right to a jury trial. *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 267-69, 956 P.2d 312 (1998) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)); *Robinson v. Hamed*, 62 Wn. App. 92, 96-97, 813 P.2d 171 (1991).

And, in any event, as the Court explained in *Byrd*, it is not necessary to stay arbitration in order to protect a party's rights as to non-arbitrable claims. "The collateral-estoppel effect of an arbitration proceeding is at issue only after arbitration completed," and that effect is not a given. *Byrd*, 470 U.S. at 222-23. Of course, collateral estoppel can work both ways, but *if* arbitration of the survival action reaches conclusion first, and *if* Franklin

Hills prevails, Rushing can ask the court to permit re-litigation if, among other reasons, she believes issue preclusion would work an injustice because she was not afforded a full and fair hearing. *Robinson*, 62 Wn. App. at 100. To be sure, she cannot ask this Court—as she does for the first time on reply—to preemptively and speculatively “hold that collateral estoppel is inapplicable under these circumstances.” Rushing Reply Br. at 25. The issue simply is not ripe. *See Byrd*, 470 U.S. at 223. For this reason too, this Court should affirm the trial court’s refusal to stay arbitration.

V. CONCLUSION

This Court should reject Rushing’s argument that a fiduciary relationship exists as a matter of law between a nursing home and a prospective resident (or his or her representative) prior to or at the time the resident signs admission documents containing an arbitration agreement. The Court should also reject Rushing’s argument that the WAA permits trial courts to stay arbitration pending the litigation of non-arbitrable claims.

RESPECTFULLY SUBMITTED this 3rd day of April, 2017.

LANE POWELL PC

By



Ryan P. McBride, WSBA No. 33280

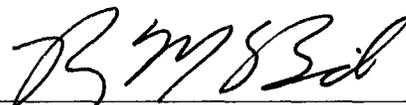
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CERTIFICATE OF SERVICE

I, Ryan McBride hereby certify under penalty of perjury of the laws of the State of Washington that on April 3, 2017, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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