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Supreme Court No. 91538-5
(Consolidated with 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.

PETITIONERS' REPLY BRIEF

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This brief is submitted on behalf of Mary Rushing, individually and as personal representative of the estate of Robert Coon ("Rushing"), in reply to the brief submitted on behalf of Franklin Hills Health & Rehabilitation Center, et al. ("Franklin Hills"):

I. REPLY STATEMENT OF THE CASE

A. Contrary to Franklin Hills, Mr. Coon was not "living independently" when he was presented with the arbitration agreement after his admission to the facility.

Without citation to the record, Franklin Hills claims "at the time relevant to this matter, [Mr. Coon] was living independently[.]" Resp. Br., at 4 (brackets added). Franklin Hills does not specify what is meant by "the relevant time," but presumably the phrase refers to the time when Mr. Coon was presented with Franklin Hills' arbitration agreement, two days after his admission to the facility. Contrary to Franklin Hills' claim, Mr. Coon was admitted to Franklin Hills precisely because he could not live independently. He was gravely disabled from schizophrenia coupled with bipolar disorder and dementia, and subject to involuntary treatment under a less restrictive alternative ("LRA") to commitment. *See* Pet. Br., at 5-8. He also suffered from significant cognitive limitations at the time of his admission to Franklin Hills.

See id. at 8-9. Mr. Coon was transferred to Franklin Hills via ambulance after he suffered a fall and needed a higher level of care than his assisted-living facility could provide. Pet. Br., at 9-10.[1] Franklin Hills managed his money, and developed a round-the-clock care plan that covered all aspects of daily living, *see id.* at 14-16, from going to the bathroom to "help ... with decision making," Ex. D7, pp. 156 & 198 (ellipses added). Under these circumstances, it cannot be fairly said that Mr. Coon was "living independently."

B. Franklin Hills gives an incomplete recitation of evidence from Mr. Coon's treating psychiatrist.

Franklin Hills refers to the fact that Dr. Robert Mulvihill, Mr. Coon's psychiatrist, stated that his "[i]nsight and judgment is poor" during a visit in the month preceding his admission to Franklin Hills, and that his "[i]nsight and judgment is fair" during a second visit in the same month. Resp. Br., at 6 (brackets added). Franklin Hills fails to acknowledge the rest of the evidence from Dr. Mulvihill during those visits apart from fair-to-poor insight and judgment, including: "ongoing disorganized thought," and "auditory hallucinations and vivid visual hallucinations due to schizoaffective disorder." Ex. D9, p. 619. Shortly before Mr. Coon's

[1] The assisted living facility, known as Cherrywood, was adjacent to and affiliated with Franklin Hills. *See* Ex. P202.

admission to Franklin Hills, Dr. Mulvihill concluded that Mr. Coon is "gravely disabled" with "severe deterioration in routine functioning," and he "continues with disorganized behavior and hallucinations which impair his ability to care for himself." *Id.*, p. 621. Viewed in context and as a whole, the evidence from Dr. Mulvihill does not support contractual capacity.

C. Contrary to Franklin Hills, Mr. Coon's refusal of a colorectal cancer screening test does not support contractual capacity.

Franklin Hills refers to the fact that Mr. Coon declined a colorectal cancer screening (hemoccult) test offered by Dr. Jacob Deakins approximately two months before his admission as evidence of contractual capacity. *See* Resp. Br., at 6. However, Franklin Hills does not acknowledge Dr. Deakins' testimony that he was unable to draw any conclusions about Mr. Coon's contractual competency from this or other actions with him. *See* Pet. Br., at 39 (citing RP 36:4-6 (Feb. 17, 2015)). Specifically, Dr. Deakins testified:

> Q. (By Mr. Kamitomo) Is it fair to say, Doctor, based on your visit you can't draw any conclusions from that visit as to whether or not Mr. Coon had the requisite insight and judgment to enter into a complex agreement?
>
> [Objection overruled.]

> THE WITNESS [Dr. Deakins]: I would not be able to make any determination one way or the other as far as his insight and judgment are concerned based on my records.
>
> Q. (By Mr. Kamitomo) And isn't it fair to say that would be the same answer to every visit you had with him?
>
> A. That would be the same answer, yes.

RP 35:23-36:9 (brackets added). This testimony from Dr. Deakins both recognizes the distinction between contractual capacity and capacity to consent to medical treatment, and establishes that declining a medical test does not establish contractual capacity.

D. Contrary to Franklin Hills, the doctor who examined Mr. Coon in the emergency room after his fall does not support contractual capacity.

Franklin Hills contends "Dr. Bergman testified on a more probable than not basis that Mr. Coon had normal cognitive function on April 1, 2011," and that he was "a person of normal cognitive ability" when she examined him in the emergency room after he fell, just prior to his admission to the facility. Resp. Br. at 7 (citing RP 67 & 73). However, Franklin Hills does not acknowledge Dr. Bergman's testimony that Mr. Coon was experiencing visual hallucinations during the emergency room visit. *See* Pet. Br., at 10 (citing Ex. D7, p. 63; RP 52:7-11 & 56:21-57:10 (Feb. 17, 2015)). More importantly, Franklin Hills does not acknowledge Dr.

Bergman's testimony that she did nothing to determine whether Mr. Coon had contractual capacity:

> Q. Is there anything in your visit that you can point to on April 1st, 2011, that tells you that you engaged in a cognitive evaluation of Mr. Coon such that you could determine whether or not he was competent to enter into something more complex than just a visit, such as a contract?
>
> A. No.

RP 70:22-71:2.

> Q. What do you mean by "normal cognitive ability" in the context of this exam?
>
> A. That means that if you walked into the room to hold a conversation him [sic], maybe excusing yourself if you wanted to stock the shelves, would it seem like a normal person to you as opposed to somebody strange or bizarre.
>
> Q. It doesn't mean or you're not intending to convey to the Court or any of us that the conversation itself is sufficient enough, could you draw any conclusions as to the degree of insight or judgment this many may or may not have as a result of any formal cognitive testing?
>
> A. I don't do formal cognitive testing.

RP 74:3-14. Similar to the testimony from Dr. Deakins, this testimony from Dr. Bergman both recognizes the distinction between contractual capacity and capacity to receive medical treatment, and establishes that Mr. Coon's emergency room visit does not support contractual capacity.

E. Franklin Hills ignores the evidence of Mr. Coon's cognitive limitations bearing on contractual capacity.

Franklin Hills does not address the evidence of Mr. Coon's results on the Allen Cognition Level ("ACL") test, which was the only detailed, in-depth assessment capable of measuring the extent of his cognitive impairments. *See* Pet. Br., at 8-9. The results of the test revealed a "moderate cognitive deficit characterized by poor planning and problem solving, and an inability to anticipate consequences to actions." Ex. P204, p. 1110. The superior court properly found that these deficits worsened between the time the ACL test was administered in 2008 and Mr. Coon's admission to Franklin Hills in 2011. CP 810 & 903.

Although Franklin Hills states that Mr. Coon was given an unspecified "cognition test" that "showed a score of 15 out of 15," Resp. Br., at 9, the test to which Franklin Hills refers simply asked him to provide the date and remember three words, Ex. D7, p. 75. It is a gross measure of rudimentary cognition that does not contradict the results on the ACL test, nor does it support contractual capacity. *See* Pet. Br., at 41-42.

II. REPLY ARGUMENT

A. The law of the case doctrine does not preclude placing the burden of proof of competency on Franklin Hills because the issue was not raised or decided in Franklin Hills' prior appeal.

Franklin Hills contends that the burden of proof of competency falls on Rushing based on language in the prior Court of Appeals decision reciting that the burden of proof is normally placed on the party raising incapacity as a defense. *See* Resp. Br. at 15-17. However, placement of the burden of proof and the effect of Franklin Hills' status as a fiduciary were not raised by the parties or decided by the appellate court in Franklin Hills' prior appeal. *See Rushing ex rel. Estate of Coon v. Franklin Hills Health & Rehab. Ctr.*, *noted at* 179 Wn. App. 1018, 2014 WL 346540 (Wn. App., Div. III, Jan. 30, 2014). The court simply remanded the case for an evidentiary hearing because Franklin Hills appealed in the absence of a reviewable decision, stating "[t]he trial court expressly stated that it did not know whether the [arbitration] agreement [with Franklin Hills] was enforceable[,]" and had not made "a decision on whether Ms. Rushing was bound by the arbitration agreement." *See id.*, 2014 WL 346540, at *4 & 5 (brackets added). The court further stated "we cannot review the trial court's denial of the motion to

compel [arbitration] without a decision on enforceability of the arbitration agreement." *Id.* at *4 (brackets added).

Under these circumstances, there is no decision of the trial court or the appellate court that would give rise to law of the case. "[T]he judgment on a former appeal does not become the 'law of the case' as to such questions as were presented but were not decided and were not necessarily involved in that appeal." *Buob v. Feenaughty Mach. Co.*, 4 Wn. 2d 276, 282, 103 P.2d 325 (1940) (brackets added).[2] Language in the prior Court of Appeals decision regarding placement of the burden of proof can only be considered dicta, and does not establish the law of the case. *See State ex rel. Northeast Transp. Co. v. Superior Court,* 194 Wash. 262, 284, 77 P.2d 1012 (1938) (applying law of the case doctrine to paragraph in prior decision that "cannot properly be classified as mere dicta"); *General Mercantile Co. v. Waters*, 127 Wash. 481, 484, 221 P.2d 299 (1923) (recognizing that dicta does not establish law of the case in subsequent appeal).

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[2] *See also* 1 Wash. St. Bar Ass'n, *Washington Appellate Practice Deskbook* § 11.10(2) (4th ed.) (stating "[w]hen the precise legal issue was not directly at issue in a prior appeal, the law of the case doctrine does not bar the appellate court from considering it in a subsequent appeal"; brackets added; citing *Roberson v. Perez,* 119 Wn. App. 928, 932, 83 P.3d 1026 (2004), *aff'd*, 156 Wn. 2d 33, 123 P.3d 844 (2005)).

Even if there were a prior decision of the trial or appellate court establishing the law of the case regarding the placement of the burden of proof, the effect is limited by RAP 2.5(c). Under subsection (1) of RAP 2.5(c), "[i]f a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case." (Brackets added.) This rule limits application of the law of the case doctrine "if the trial court, on remand, exercised its independent judgment, reviewed and ruled again" on an "issue or decision which was not raised in an earlier appeal." *State v. Barberio,* 121 Wn. 2d 48, 50, 846 P.2d 519 (1993). Under these circumstances, the issue "become[s] an appealable question" on subsequent review. *Id.*, 121 Wn. 2d at 50; *see also State v. Wheeler,* 183 Wn. 2d 71, 78, 349 P.3d 820 (2015) (quoting *Barberio*). In this case, the superior court exercised independent judgment on remand and ruled, albeit for the first time, regarding placement of the burden of proof. *See* CP 814, 817, 906; RP 4:14-5:13 (Jan. 30, 2015).

Furthermore, under subsection (2) of RAP 2.5(c), "[t]he appellate court may at the instance of a party review the propriety

of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." (Brackets added.) This rule limits application of the law of the case doctrine when the determination of applicable law in a prior appeal is clearly erroneous and would result in a manifest injustice. *See Folsom v. County of Spokane,* 111 Wn. 2d 256, 759 P.2d 1196 (1988); *see also Eserhut v. Heister,* 62 Wn. App. 10, 812 P.2d 902 (1991) (following *Folsom* and declining to apply law of the case doctrine to legal proposition that was "uncritically accepted" in a prior appeal), *rev. denied,* 118 Wn. 2d 1009 (1992); *Gaffney v. Scott Pub. Co.*, 41 Wn. 2d 191, 195, 248 P.2d 390 (1952) (Hamley, J., dissenting; contrasting "law of the case" with "dictum of no controlling force"). For the reasons argued in Rushing's opening brief and in this reply, placement of the burden of proof of competency on Rushing meets this standard.[3]

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[3] Franklin Hills states that RAP 2.5(c)(2) "can only be applied where the law has changed between the current and the former proceedings." Resp. Br., at 17 (citing *See Roberson v. Perez,* 156 Wn. 2d 33, 123 P.3d 844 (2005)). However, the authority cited by Franklin Hills reveals that this statement is incorrect. *See Roberson,* 156 Wn. 2d at 42 (stating law of the case "doctrine where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party," independent of whether "there has been an intervening change in controlling precedent").

The law of the case doctrine does not preclude this Court from determining the proper placement of the burden of proof on the issue of competency. Even if the doctrine were applicable, review would nonetheless be warranted under RAP 2.5(c).

B. Franklin Hills appears to misapprehend the basis for placement of the burden of proof, which includes: (1) the intimate and intrusive nature of the relationship between a nursing home and its residents, which is characterized by trust and dependence, and which is susceptible to abuse; (2) the nature of fiduciary duties, which require a nursing home to place its residents' interests ahead of its own; and (3) the fact that the nursing home is in the best position to establish whether the resident is competent.

In objecting to placement of the burden of proof of competency on a fiduciary, Franklin Hills contends that "[t]he basis for the burden shift, if it exists, is based on the fact the fiduciary influences the party into divesting himself or herself of their assets to the fiduciary." Resp. Br., at 19 (citing *Mueller v. Wells*, 185 Wn. 2d 1, 15, 367 P.3d 580 (2016)). This attempt to synthesize the case law confuses the context in which the burden shifting occurs, such as the will contest in *Mueller*, with the rationale for burden shifting. It also represents a reductionist view of the rationale for burden shifting, which is based on "the totality of the circumstances,"

including "the age or condition of health and mental vigor" of the beneficiary of the fiduciary relationship. *Mueller*, 185 Wn. 2d at 11.

Residents of nursing homes such as Franklin Hills are, by definition, "vulnerable adults." RCW 74.34.020(6) & (21)(d). Franklin Hills has the obligation to promote the dignity of residents such as Mr. Coon, including "the resident's right to exercise decision making and self-determination to the fullest extent possible, taking into consideration his or her ability to understand and respond." WAC 388-97-0240(6); *see also* RCW 74.42.050(1); WAC 388-97-0180(2) & (3). Given the nature of this relationship, it should be incumbent upon Franklin Hills to establish that Mr. Coon had contractual competency to enter into a transaction such as the arbitration agreement.

Franklin Hills tries to distinguish a number of the cases cited by Rushing on grounds that they did not involve burden *shifting* in the fiduciary context, but rather "merely set an initial burden of proof." Resp. Br., at 21. This is a distinction without a difference. Regardless of whether it is characterized as a "shift" or "initial placement," the burden of proof should be placed on a fiduciary under circumstances analogous to those present in this case, given: (1) the intimate and intrusive nature of the relationship, which is

characterized by trust and dependence, and which is susceptible to abuse; (2) the nature of fiduciary duties, which require fiduciaries to place their beneficiaries' interests ahead of their own; and (3) the fact that fiduciaries are in a better position to provide the necessary proof. *See* Pet. Br., at 30-33.

For example, in *In re Estate of Little,* 127 Wn. App. 915, 925, 113 P.3d 505 (2005), *rev. denied,* 156 Wn. 2d 1019 (2006), the court imposed the burden of proving due diligence and compliance with statutory notice provisions on executor of estate because:

> Allocating the burden of proof to the executor is more consistent with the executor's role as an "officer of the court and a fiduciary for the heirs". Because the executor has the fiduciary duty to identify and notify those who are statutorily entitled to receive notice, it logically follows that in the event of a later challenge based on lack of notice, the executor will have the burden of showing that he used reasonable diligence to discharge his duty. Otherwise, and especially where the executor of an estate has a beneficial interest in it, the sense of fiduciary duty might easily give way to a temptation to conduct a superficial search or none at all.

(Citation omitted.) Placing the burden of proof of competency on a nursing home such as Franklin Hills will similarly deter abuse.

In *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 79, 180 P.3d 874 (2008), the court imposed the burden of proving good faith on a corporate officer seeking repayment of a loan to the corporation because:

> As a fiduciary, the officer or director has a strong influence on how the corporation conducts its affairs, and a correspondingly strong duty not to conduct those affairs to the unfair detriment of others, such as minority shareholders or creditors, who also have legitimate interests in the corporation but lack the power of the fiduciary.

(Quotation omitted.) Placing the burden of proof of competency on a nursing home similarly reflects the duties owed to its residents.

Lastly, in *Schmidt v. Coogan,* 181 Wn. 2d 661, 667, 335 P.3d 424 (2014), the Court imposed the burden on the lawyer sued for malpractice to prove judgment in the underlying case would be uncollectible in part because "the attorney is in a better position than the client to establish uncollectibility"[4]; and in *Wilkins v. Lasater,* 46 Wn. App. 766, 777-78, 733 P.2d 221 (1987), the burden to prove no breach of loyalty and propriety of challenged transactions on fiduciary in part because the fiduciary was in possession of the necessary records. Placing the burden of proof of competency on a nursing home similarly reflects the fact that it will frequently be the primary, if not the only, source of information regarding the circumstances involved in a transaction with a

[4] This aspect of the lead opinion in *Schmidt* was joined by a majority of the Court. *See* 181 Wn. 2d at 686 n.1 (Stephens, J., dissenting in part).

resident. All of the rationales for placing the burden of proof on a fiduciary are applicable in this case. *See* Pet. Br., at 32-33.[5]

C. Franklin Hills seems to acknowledge that it has a fiduciary relationship with Mr. Coon for some purposes, but not for others, and its attempt to parse the relationship in this way is contrary to the law and the facts.

While nominally disputing that a fiduciary relationship existed between Franklin Hills and Mr. Coon, Franklin Hills states that "a fiduciary relationship may exist for some issues between [a nursing] facility and its residents as to their financial affairs or other care, the admissions process, which includes an arbitration agreement, is not such a circumstance." Resp. Br., at 27 (brackets added). This parsing of the relationship between a nursing home and its residents is not warranted by the laws governing nursing homes, which regulate admissions as well as other aspects of the relationship with residents. "[T]he terms of any admission contract ... must be consistent with the requirements of this chapter [74.42] and chapter 18.51 RCW[,]" including the nursing home's obligations to promote residents' dignity and self-determination, noted above.

---

[5] Franklin Hills cites an Oregon case holding that the fiduciary relationship between a husband and wife does not shift the burden of proof of capacity in a case where the husband later sought to rescind a deed of property to the wife's children by a prior marriage. *See* Resp. Br., at 23 (citing *Dillin v. Alexander,* 281 Or. 679, 576 P.2d 1248 (1978)). *Dillin* is factually distinguishable, and does not reflect the rationales for placing the burden of proof on a fiduciary under Washington law. *See* 576 P.2d at 1250-51.

RCW 74.42.030 (brackets & ellipses added). The nursing home is obligated to provide residents with a statement of their rights "before admission, or at the time of admission in case of emergency[.]" *Id.* (brackets added); *see also* RCW 74.42.430(2) (requiring written guidelines governing admission).

Moreover, in *Moon v. Phipps,* 67 Wn. 2d 948, 955, 411 P.2d 157 (1966), the Court recognized that the existence of a fiduciary relationship is viewed from the point of view of the beneficiary of the relationship, and that the beneficiary does not typically make a distinction between different aspects of the relationship. Thus, the Court recognized fiduciary duties imposed upon a real estate agent who was referred by a doctor to his patient based on "a vicarious transfer of that trust and confidence through the doctor's psychotherapy and advice." *Id.*, 67 Wn. 2d at 955; *see also* Pet. Br., at 29 n.29 (discussing *Moon*). The approach of *Moon* is consistent with the laws governing nursing homes. It is also consistent with the facts of this case. Mr. Coon was transported from the emergency room to Franklin Hills after he suffered a fall and it was clear that he needed a higher level of care than his prior facility could provide. He was presented with the admissions packet including the arbitration agreement two days after his admission. There is

nothing in the record suggesting that Franklin Hills or Mr. Coon treated the admissions process any differently than the rest of his care.

Franklin Hills quotes *Kitsap Bank v. Denley*, 177 Wn. App. 559, 574, 312 P.3d 711 (2013), for the proposition that a fiduciary relationship "must exist in relation to the asset" which is the subject of a claim of undue influence. Resp. Br., at 28. This statement appears to be limited to fiduciary relationships arising as a matter of fact, rather than those arising as a matter of law. *See id.*, 177 Wn. App. at 574. To the extent that the relationship between nursing homes and their patients arises as a matter of law, *Kitsap* is inapplicable. *See* Pet. Br., at 20-27 (discussing analogy to physician-patient relationship). *Kitsap* is also distinguishable on the facts. The relationship between Franklin Hills and Mr. Coon, involved going to the bathroom, "help ... with decision making," and everything in between. Ex. D7, pp. 156 & 198 (ellipses added). In contrast, the plaintiff in *Kitsap* alleged a fiduciary relationship with an employee of his bank, even though the bank employee did not manage his accounts or even work at the same branch that he used. 177 Wn. App. at 574-75. Lastly, to the extent *Kitsap* is read as creating a bright-line rule segregating fiduciary and non-fiduciary aspects of

relationships between fiduciaries and their beneficiaries, it would be contrary to *Moon*, which holds that "[w]hether a fiduciary relationship emanates ... or grows out of" a particular arrangement "depends in each case on the particular circumstances." 67 Wn. 2d at 955 (brackets & ellipses added).

Whether the Court finds a fiduciary relationship as a matter of law between nursing homes and their residents, or as a matter of fact between Franklin Hills and Mr. Coon, Franklin Hills should not be allowed to disclaim its fiduciary duties with respect to its admissions packet or arbitration agreement.

D. Contrary to Franklin Hill's characterization of the record, the superior court placed the burden of proof of competency on Rushing, which requires reversal.

Franklin Hills contends that placement of the burden of proof of competency on Rushing was harmless error because "the competency hearing was such that its hybrid nature allowed both sides to present competency evidence," and "evidence was presented by the parties without strict compliance with the relative burdens of proof." Resp. Br., at 25. While it is unclear what Franklin Hills means by a "hybrid" proceeding or "relative burdens of proof," it appears to refer to the order of witnesses rather than the placement of the burden of proof. *See id.* at 25-26. In any event, the

superior court unquestionably imposed the burden of proof of competency on Rushing. In particular, the court stated:

> 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.*

CP 817 (emphasis added); *accord* CP 906 (stating "Plaintiffs failed to meet their burden to prove by clear, cogent, and convincing evidence that Mr. Coon was not competent when he entered into the arbitration agreement").

Franklin Hills cites *Kennedy v. Clausing*, 74 Wn. 2d 483, 491, 445 P.2d 637 (1968), for the proposition that improper placement of the burden of proof is harmless error. *See* Resp. Br., at 25. However, the result in *Kennedy* appears to be based on the facts, where "there can be no question under this record and the other instructions given but what the result would have been the same." 74 Wn. 2d at 491. Franklin Hills does not address the normal rule requiring reversal and remand when the burden of proof is placed on the wrong party. Pet. Br., at 34 (quoting *Nissen v. Obde,* 55 Wn. 2d 527, 529-30, 348 P.2d 421 (1960); brackets added). In any event, under the record of this case, the Court should

reverse, but decline to remand, given the lack of substantial evidence that Mr. Coon was competent.

E. Franklin Hills tries to sidestep the superior court's conflation of contractual and testamentary capacity with an incorrect characterization of the record.

In her opening brief, Rushing pointed out that the superior court equated testamentary and contractual capacity, and found testamentary capacity on the part of Mr. Coon sufficient to enforce the arbitration agreement. *See* Pet. Br., at 19 (citing CP 812, 815-17 & 905-06). She assigned error to the conflation of contractual and testamentary capacity, and the associated findings and conclusions. *See id.* at 3 (assignment of error 1(d)). She provided argument and authority supporting this assignment of error. *See id.* at 42 & nn.35-36. In sum, arm's length contracts require sufficient understanding to protect one's interest that is not necessary for testamentary disposition of property. *See id.* at 42 n.36 (citing *Hackett v. Whitley,* 150 Wash. 529, 540-41, 273 P. 752 (1929)).[6]

In response to this argument, Franklin Hills acknowledges that "different standards may apply" to the capacity required to enter a contract versus the capacity required to make a will or

[6] *Compare Page v. Prudential Life Ins. Co.,* 12 Wn. 2d 101, 109, 120 P.2d 527 (1942) (contractual capacity requires understanding nature, terms and effect of the contract); *with In re Estate of Bottger*, 14 Wn. 2d 676, 685, 129 P.2d 518 (1942) (testamentary capacity requires understanding of the nature and extent of testator's property and the natural objects of his bounty).

power of attorney. Resp. Br., at 37. However, Franklin claims that "contrary to Ms. Rushing's suggestion, the trial court did not find that as a matter of law, Mr. Coon's testamentary capacity automatically 'equated' to contractual capacity" and that the court "did not emphasize the testamentary capacity." *Id.* at 36. This characterization of the record is contrary to the superior court's written decision, which unequivocally equated contractual and testamentary capacity. In particular, the superior court stated:

> 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 [arbitration] Agreement.

CP 816 (brackets added).

> 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 [arbitration] Agreement.

CP 816-17 (brackets added).

> 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.

CP 817 (parens. in original). It is apparent from the relevant passages in its decision that the court treated contractual and testamentary capacity as interchangeable. These passages were expressly incorporated by reference in the court's final order. CP 906.

This should be an independently sufficient basis to reverse the superior court's order compelling arbitration. While such a reversal would normally entail remand for another evidentiary hearing conducted in accordance with the proper legal standard for capacity, no remand is necessary here because there is insufficient evidence of contractual capacity to warrant another hearing.

F. Rushing's argument based on a lack of mutual assent to Franklin Hills' arbitration agreement is properly before the Court on review of the superior court's order compelling arbitration, and the failure to make full and fair disclosure of the substance of arbitration rules ostensibly incorporated into the agreement should preclude enforcement of the agreement, given the fiduciary relationship between the parties.

Franklin Hills argues that Rushing's argument based on a lack of mutual assent to the arbitration agreement is not properly before the Court on discretionary review of the superior court order

compelling arbitration. Resp. Br., at 37. This is incorrect because the scope of review of that order includes "failure to establish facts upon which relief can be granted." RAP 2.5(a)(2).

In responding to the merits of Rushing's argument based on a lack of mutual assent, Franklin Hills solely focuses on incorporation by reference and does not address the effect of its fiduciary relationship with Mr. Coon, or the need to make a full and fair disclosure of all material facts in order to obtain such consent. *See* Pet. Br., at 44-45; Resp. Br., at 38. Because Franklin Hills did not make a full and fair disclosure of the substance of the arbitration rules ostensibly incorporated into the arbitration agreement, it should not be allowed to enforce the arbitration agreement. This should be an independently sufficient basis to reverse the superior court's order compelling arbitration, regardless of the evidence of competency.

G. Franklin Hills' argument regarding the superior court's stay of litigation pending arbitration only serves to confirm the Catch-22 facing Rushing, which the Court could solve by conditioning the stay or holding that offensive collateral estoppel cannot be asserted against a party who is forced to arbitrate claims that overlap with nonarbitrable claims to which the right to trial by jury would otherwise attach.

Franklin Hills does not dispute that arbitration is a matter of contract, and that there is no contract to arbitrate Rushing's wrongful death claims, as distinguished from the related survival claims of Mr. Coon's estate. *See* Resp. Br., at 41-50. Franklin Hills also does not dispute that the right to trial by jury would normally attach to Rushing's wrongful death claims.[7]

Franklin Hills acknowledges that arbitration of the survival claims will potentially give rise to offensive use of collateral estoppel against Rushing's wrongful death claims. *See* Resp. Br., at 46-48. Franklin Hills also acknowledges that Rushing will lose the right to contest application of collateral estoppel to her wrongful death claims if she waits to raise the issue until appeal of the wrongful death claims, thereby giving Franklin Hills more than it bargained for in the arbitration agreement and jeopardizing

[7] Franklin Hills' wrongly contends that Rushing has waived the right to jury trial of the wrongful death claims because she did not demand a jury trial by the date in the first superior court scheduling order, even though Franklin Hills appealed the case before the date expired and no new scheduling order was entered following remand. *See* Resp. Br., at 43-44 n.6.

Rushing's right to trial by jury. *See id.* at 47 (citing *Nielson v. Spanaway General Med. Clinic, Inc.*, 135 Wn. 2d 255, 268-69, 956 P.2d 312 (1998)).

As an alternative to reversing the superior court's order staying litigation of Rushing's wrongful death claims pending arbitration of the estate's survival claims, the Court could preclude offensive use of collateral estoppel by Franklin Hills as a condition of the stay, or hold that offensive collateral estoppel is inapplicable under these circumstances. *See Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001) ("Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice"). Such a result would respect both the contractual nature of arbitration and the constitutional right to trial by jury.

III. CONCLUSION

Based on the foregoing, Rushing asks the Court to reverse the superior court order compelling arbitration of the estate's survival claim. In the alternative, she asks the Court to either reverse the superior court order staying litigation of her wrongful death claim or preclude offensive use of collateral estoppel as a condition of the stay.

Respectfully submitted this 20th day of March, 2017.

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CERTIFICATE OF SERVICE

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

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