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,

Petitioners-Petitioners,

vs.

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

Defendants-Respondents.

RESPONDENTS' BRIEF

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1. Introduction.

Robert Coon moved to Franklin Hills Rehabilitation Center (Franklin Hills) after taking a fall at his previous residence, where he lived independently. During the admission process, Mr. Coon agreed to an arbitration provision that required all claims between him and Franklin Hills be submitted to arbitration. Mr. Coon passed away while at Franklin Hills, and his daughter Mary Rushing pursued both a wrongful death and survival action against Franklin Hills. Franklin Hills appealed the trial court's refusal to order arbitration of Mr. Coon's claims. Ms. Rushing asserted that Mr. Coon lacked the mental capacity to enter into the arbitration agreement. The Court of Appeals ruled that the issue of mental capacity was one of fact necessitating an evidentiary hearing, and remanded for that hearing.

The evidentiary hearing was held over a four-day period. Both sides presented expert medical testimony, as well as lay witnesses, medical records, and other evidence. The trial court ruled that Mr. Coon, a former lawyer who had struggled with mental illness, but whom Ms. Rushing's own experts agreed was competent in every other phase of his life, such as executing a will, making a power of attorney, and making medical treatment choices, was competent to sign the arbitration agreement.

In so ruling, the trial court followed the well-established burden of proof, ruling that a party challenging an individual's competence is required to establish the lack of capacity by clear, cogent, and convincing evidence.

Ms. Rushing asks for review of that ruling, challenging not only the finding of competence, but also the burden of proof. She asks the Court to "take the opportunity" to find that a fiduciary relationship existed that is somehow relevant to the finding and burden of proof on a challenge to a party's competence to contract. She also claims that substantial evidence did not exist as to Mr. Coon's competence, and asks this Court to substitute its judgment for that of the trial court and weigh the evidence to find Mr. Coon competent.

Because a party's competence to contract is wholly unaffected by the relationship he or she has with the contracting party, the fiduciary nature of that relationship, which is disputed, is not relevant, nor can it affect the burden of proof. Irrespective of that, however, the overwhelming proof here was that Mr. Coon was competent, and thus not only did substantial evidence exist in support of those findings, any claim of a required shift in the burden of proof constitutes harmless error.

Ms. Rushing also claims that the trial court not only abused its discretion in granting a temporary stay of litigation of her loss of

consortium claim, but that also the trial court should have violated Washington's Arbitration Act, and refused to compel the arbitration, instead staying it until the litigation of the non-arbitrable claims was complete.

The **temporary** stay of litigation issued by the trial court pending arbitration, which should have occurred within 180 days of the claim, was not an abuse of the trial court's broad discretion to control its docket and avoid duplicative pre-trial discovery and other proceedings. And no basis exists for this Court to accept Ms. Rushing's invitation to establish an absolute rule that arbitration cannot proceed as required by the Washington Arbitration Act until after a jury trial occurs on a party's non-arbitrable claims. Ms. Rushing failed to request a jury trial, but even if that right had not been waived, RCW 7.04A.070 requires a court to compel arbitration once a valid agreement is found, and Ms. Rushing's proposed rule violates that command. The law also recognizes that the potential for collateral estoppel effect does not operate to foreclose a plaintiff's right to jury trial because the right to a jury trial presupposes the existence of facts which must be found.

Moreover, the fact that collateral estoppel may or may not be found to apply at some point in the future based on a court's analysis of identity of issues, privity of parties, and fairness, does not require an

absolute "sequencing" of arbitration after trial. Ms. Rushing is in actuality trying to insure the arbitration not occur in accordance with the parties' agreement; she is not seeking some pronouncement on the effect of collateral estoppel. If stayed, the agreement to arbitrate would be rendered meaningless because the parties would be wholly deprived of their speedy remedy in violation of well-developed Washington policy, and this Court should decline to eliminate the agreed upon arbitration remedy.

2. Statement of the case.

This appeal is a challenge to the trial court's factual determination that Mr. Coon was competent when he signed the ADR agreement, along with other tangential issues. The following statement is longer than usual as it is being used in part to set forth the factual basis for that finding.

2.1 Evidence presented at the competency trial supported each Finding of Fact.

Robert Coon graduated from Gonzaga University of School of Law, passed the bar exam, and practiced law for a brief period of time. (Unchallenged Finding of Fact #2; CP 903) At no time during Mr. Coon's life was he ever under a guardianship, deemed incompetent, or granted Power of Attorney to another. (Unchallenged Finding of Fact #3; CP 903) Mr. Coon did suffer from schizoaffective disorder, but at the time relevant to this matter, he was living independently, and medication compliant

under the Least Restrictive Alternative (LRA) noted by Ms. Rushing. An LRA may not create a presumption of incompetence, nor deprive a person of the right to contract. RCW 71.05.360(1)(b), (10)(k).

Mr. Coon's independence included conducting his own business and medical affairs. While at Cherrywood, Mr. Coon managed his own finances, drove his car, and in all other aspects lived independently. (Ex. D2 and D3)

In late 2010, Mr. Coon sought a Power of Attorney at Gonzaga University Law School's legal clinic. He was presented with the option for an immediate Power of Attorney or a springing Power of Attorney. After weighing his options, Mr. Coon settled on a springing Power of Attorney and executed it on November 9, 2010. (Unchallenged Finding of Fact #6; CP 903)

Lawrence Weiser worked for the Gonzaga Legal Clinic. Mr. Coon's Power of Attorney was executed under his supervision. (RP 388) The Legal Clinic has a default form in which the Power of Attorney becomes effective upon signature, however, Mr. Weiser confirmed that Mr. Coon did not want that; he wanted the springing Power of Attorney that would only become effective upon his disability. (RP 392, 406) Mr. Weiser testified that on November 9, 2010, Mr. Coon was competent to sign a Power of Attorney. (RP 405)

On February 1, 2011, Dr. Jacob Deakins requested Mr. Coon complete a hemoccult test after an initial exam revealed Mr. Coon had an enlarged prostate; after the procedure and cost were explained to Mr. Coon, as well as the lack of insurance funding for this procedure, Mr. Coon declined the test. (Finding of Fact #8; CP 904)

On March 11, 2011, Mr. Coon met with his psychiatrist, Dr. Robert Mulvihill, who stated in his formal mental status examination that Mr. Coon's "thought process is concrete. Insight and judgment is poor. Concentration is normal." (Unchallenged Finding of Fact #9; CP 904)

On March 25, 2011, Mr. Coon again saw Dr. Mulvihill. Dr. Mulvihill reported that Mr. Coon's "Thought process is concrete. Insight and judgment is fair. Concentration is normal. He is alert and oriented times four." (Unchallenged Finding of Fact #10; CP 904)

On April 1, 2011, Mr. Coon was transported by ambulance from his residence at Cherrywood Place to Holy Family Hospital after he fell while transferring into his wheelchair. Mr. Coon was treated by Dr. Lynn Bergman who found Mr. Coon interactive and cooperative during his exam. (Unchallenged Finding of Fact #11; CP 904)

Dr. Bergman testified that on April 1, 2011 Mr. Coon was alert and oriented to person, place and time, he recalled events and his speech was

not slurred. (RP 48) Dr. Bergman further testified that Mr. Coon was responding appropriately with regard to issues about why he was there; and that Mr. Coon appeared to be able to make his own medical decisions that day. (RP 66) Dr. Bergman testified on a more probable than not basis that Mr. Coon had normal cognitive function on April 1, 2011. (RP 67)

Dr. Bergman also testified that Mr. Coon possessed the requisite amount of capacity to make medical decisions about his care on April 1, 2011, and that Mr. Coon was a "person of normal cognitive ability". (RP 73) Dr. Jacob Deakins treated Mr. Coon at Holy Family Hospital on April 1, 2011, and testified there is nothing in his notes that Mr. Coon could not make medical decisions for himself. (RP 33)

Later that day, Mr. Coon moved from Cherrywood Place to Franklin Hills Health and Rehabilitation Center as he needed greater assistance than Cherrywood Place could offer. (Unchallenged Finding of Fact #12; CP 904) No evidence exists that Mr. Coon was involuntarily relocated; his medical records reflect that his options were discussed with him, and he was amenable to moving to a facility with a higher level of care. (Ex. D6, p. 12) Nurse Aurilla Poole admitted Mr. Coon that afternoon, and noted that he was alert and oriented to who he was, where

he was, and what date and time it was. (Unchallenged Finding of Fact #12; CP 904)

On April 3, 2011, Mr. Coon sat in the dining room of Franklin Hills with Ms. Jennifer Wujick and reviewed a number of documents related to his residency at Franklin Hills. During this meeting, Ms. Wujick did not notice Mr. Coon exhibit any symptoms that would have called into question his mental capacity; he reviewed a number of documents, asked questions, and appropriately executed the documents. (Unchallenged Finding of Fact #13; CP 904 - 905)

Ms. Wujick provided Mr. Coon with the ADR agreement and informed him that it was an agreement to resolve disputes through alternatives to court intervention, that it was optional, not a condition of his residency at Franklin Hills, that he had 30 days to make a decision, and that he could seek the advice of counsel if he desired. (Finding of Fact #14; CP 905) Jennifer Wujick estimates that she had done approximately 500 admissions before Mr. Coon was admitted. (RP 241) She has had instances where the admittee had the form sent to an attorney for review; family members had also come and reviewed it. (RP 270)

Ms. Wujick told Mr. Coon that one feature of the ADR agreement was that he would be foregoing a right to go to court and instead to a process that involved arbitration. Mr. Coon appeared to understand that.

Mr. Coon never said he did not understand what was going on. (RP 274-277)

Ms. Wujick knew that Mr. Coon had a law degree. Mr. Coon said "I know what this is". (RP 271) Mr. Coon said he was familiar with arbitration and that he had a law background. (RP 273) Mr. Coon, after asking a couple of questions, signed the agreement in the presence of Ms. Wujick. (Unchallenged Finding of Fact #15; CP 905) Mr. Coon's longtime friend, Bob Crabb, testified that Mr. Coon understood contracts. (RP 376)

On April 7, 2011, Mr. Coon was given a cognition test. The conclusion of that evaluation of Mr. Coon showed a score of 15 out of 15. (Unchallenged Finding of Fact #17; CP 905)

In addition to the evidence and testimony of those interacting with Mr. Coon in his daily affairs, the defense presented two expert witnesses, Ronald Klein, Ph.D and James Winter, MD, who both concluded that Mr. Coon possessed the requisite level of competence to enter into the agreement. (Finding of Fact #18; CP 905)

Dr. James Spar was a professor from UCLA who served as Ms. Rushing's expert witness. (RP 421) Dr. Spar estimated that his fee for testimony at the competency hearing would be $21,000. (RP 485)

Dr. Spar testified that Mr. Coon had the mental capacity to understand the difference between arbitrating a dispute and taking a dispute to court; he stated that it probably would not have been a novel concept to Mr. Coon on April 3, 2011. (RP 486) Dr. Spar testified that Mr. Coon could understand the words about whether he wished to arbitrate his disputes or take his disputes to court, and Mr. Coon had the mental capacity to understand that concept. (RP 488) Dr. Spar testified that persons with schizoaffective disorder and bipolar diagnoses have the right to enter into contracts and that being under an LRA does not mean that you cannot enter into contracts. (RP 488-489)[1]

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[1] Ms. Rushing primarily based her argument regarding the competency of Mr. Coon on boilerplate diagnoses made pursuant to a Least Restrictive Alternative (LRA), which as previously noted is not an adjudication of incompetency, nor to be realized as a basis for incompetency; instead, the legislature has made every effort to insure the continued civil rights of the mentally ill, including the right to contract freely. This argument was refuted and rejected by the trial court as RCW 71.05.360(1)(b) provides:

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

Further, RCW 71.05.360(10) provides the following concerning the rights of a mentally ill person receiving treatment:

> ...insofar as danger to the person or others is not created, each person involuntarily detained, treated in a less restrictive alternative course of treatment, or committed for treatment and evaluation pursuant to this chapter shall have, in addition to other rights not specifically withheld by law, the following rights: ... ...(k) to dispose of property and sign contracts unless such person has been adjudicated an incompetent in a court proceeding directed to that particular issue.

RCW 71.05.360(10)(k).

However, Dr. Spar said that Mr. Coon lacked the capacity on April 3, 2011 to understand and appreciate the consequences for himself and other affected parties of executing that document or not executing it, or if there were alternatives. (RP 487)

Dr. Spar also testified that Mr. Coon had the ability to understand the essence of the Power of Attorney document that he signed on November 9, 2010. (RP 497) He testified that on April 3, 2011, Mr. Coon was competent to sign a will that day; he also testified that Mr. Coon was probably competent to sign a Power of Attorney that day. (RP 496)

Dr. Spar said that Mr. Coon must be able to understand and appreciate the potential consequences of signing a document, and opined that, concerning the ADR agreement, Mr. Coon would need to understand that if he was damaged by the facility, that he may have a greatly reduced chance of winning his case, and, if he did win his case, he could end up getting substantially less money. Dr. Spar opined that Mr. Coon did not have the ability to understand that concept. (RP 497, 498) No foundational evidence was presented to support Dr. Spar's representation concerning the alleged negative impacts of arbitration.

2.2 The trial court ruled Mr. Coon was competent and the arbitration agreement was valid and enforceable.

The trial commenced with two main issues before the court. First, whether Mr. Coon actually signed the ADR agreement. Second, was Mr. Coon competent when he signed the ADR agreement. After three days of trial on both issues, Ms. Rushing withdrew the portion of her claim that Mr. Coon had not signed the document. (RP 538)

On March 3, 2015, the trial court issued its decision, "After considering all of the evidence," the trial court found that Mr. Coon was competent to sign the arbitration agreement, and compelled arbitration. (CP 817-818) The court incorporated this initial decision into its order compelling arbitration entered on April 10, 2015. (CP 906)

The trial court concluded that Ms. Rushing had failed to meet her burden of proving by clear, cogent, and convincing evidence that Mr. Coon was not competent when he executed the arbitration agreement. (Conclusion of Law, No. 2; CP 906) The trial court also found that Mr. Coon had the cognitive ability to appreciate the nature and effect of the consequences of the arbitration agreement. (Conclusion of Law, No. 3; CP 906) The trial court ruled that the arbitration agreement was valid and enforceable and granted Franklin Hills' motion to compel

arbitration as to Ms. Rushing as administrator of the Estate of Mr. Coon pursuant to RCW 7.04A.070, Washington's Arbitration Act. (CP 906)

2.3 The trial court temporarily stayed the litigation of Ms. Rushing's non-arbitrable loss of consortium claim for 180 days, and denied her request to stay arbitration.

Shortly before the trial court issued its initial decision, Ms. Rushing moved to stay arbitration until after the jury trial was complete. (CP 829) Franklin Hills cross-moved for stay of the litigation pending the arbitration, which by its terms was to occur within 180 days of demand. (CP 832) On the same day it issued its final order compelling arbitration, the trial court granted Franklin Hills' motion and stayed litigation as to Ms. Rushing's wrongful death claim for 180 days. (CP 897) The court found this "minimal" stay was to avoid the burden of "going down both roads" - - trial and arbitration - - simultaneously. (RP 19, Hearing Transcript dated 4/10/15)

2.4 This Court accepts direct review.

On March 30, 2015, Ms. Rushing filed her Notice of Discretionary Review, seeking direct review of the trial court's initial ruling; she thereafter was permitted to amend to include the trial court's April 10, 2015 order compelling arbitration; she was also allowed to file a separate motion for discretionary review of the trial court's April 10, 2015 order staying the litigation. (The Supreme Court Commissioner concluded they

would be better as separate issues since only the order on stay potentially presented issues of public import.) This court thereafter accepted direct discretionary review of both issues.

3. Law.

3.1 The existence of any fiduciary duty is irrelevant to the burden of proof on Ms. Rushing's claim that Mr. Coon lacked competency to contract.

Franklin Hills disputes the existence of a fiduciary relationship between admissions personnel and prospective residents of skilled nursing facilities, but will not address that issue at any length because it is ultimately irrelevant. First, Ms. Rushing conceded the appropriate burden of proof at the Court of Appeals, and the trial court properly applied the law of the case as established by the Court of Appeals; moreover, there exists no relationship between a person's own competence and his or her relationship with others, and Ms. Rushing made no claim of undue influence here, nor was any such claim tried at the evidentiary hearing.

Instead, there exists a well-established burden of proof placed on a party asserting that a contract is void because one of the parties lacked capacity, and it was not error for the trial court to apply that standard, irrespective of the claim of fiduciary status. And based on the findings and evidence, any error in the burden of proof was harmless -- the

evidence on which the trial court relied substantially established Mr. Coon's competence.

a. The Court of Appeals dictated the appropriate standard of review for the trial court, and it was not error for the trial court to comply.

On January 30, 2014, the Court of Appeals remanded this case for a hearing to address whether the arbitration agreement was enforceable. The Court of Appeals set forth explicit procedures as to what the role of the trial court would be upon remand. (Court of Appeals Opinion, p. 10-12, Supp. CP ___)

The Court held:

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

(Court of Appeals Opinion, p. 8; Supp. CP ___)

The court further stated:

> The enforceability of the arbitration agreement depends on whether Mr. Coon was competent when he entered into the agreement and whether he signed the agreement. These are both questions of fact to be determined by the trial court. The trial court has the task of weighing the evidence and credibility of the witnesses to determine if Mr. Coon had the mental capacity to

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

(Court of Appeals Opinion, pp. 9-10; Supp. CP ___)

This Opinion became the law of the case and properly governed the scope of the competency hearing.[2] Ms. Rushing previously conceded that the Court of Appeals Opinion is the law of the case. (CP 166) The "law of the case" doctrine provides that once there is an appellate court ruling, its holding must be followed in all subsequent stages of the same litigation. State v. Roy, 147 Wn.App. 309, 195 P.3d 967 (2008). The law of the case doctrine, whereby a legal issue actually decided by an appellate court will not be considered in a later appeal of the same case, applies unless the prior decision is clearly erroneous and not deciding it correctly will result in a manifest injustice. Folsom v. County of Spokane, 111 Wn.2d 256, 759 P.2d 1196 (1988).

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[2] Ms. Rushing has previously acknowledged that the proper burden of proof was utilized by the trial court in this matter:

> The rule relative to mental capacity to contract is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue. Johnson v. Perry, 20 Wn.App. 696, 703, 582 P.2d 886 (1978), citing Page v. Prudential Life Ins. Co. of America, 12 Wn.2d 101, 108, 120 P.2d 527 (1942). In applying this rule, it must be remembered that contractual capacity is a question of fact to be determined at the time the transaction occurred. Johnson v. Perry, 20 Wn.App. 696, 703, 582 P.2d 886 (1978), citing Page v. Prudential Life Ins. Co. of America, 12 Wn.2d 101, 108, 120 P.2d 527 (1942). Everyone is presumed sane and this presumption is overcome only by clear, cogent and convincing evidence. Johnson v. Perry, at 703.

(Brief of Respondent, at Division III, p. 20, Supp. CP ___)

Here, the trial court originally declined to rule on the motion to compel and to make the competency determination. That ruling went on appeal to Division III which set forth the law of the case as to how this case was to proceed, and the trial court appropriately complied. That compliance was not erroneous.

Ms. Rushing attempts to circumvent the law of the case doctrine pursuant to RAP 2.5(c)(2). This is not applicable because this exception to the law of the case doctrine can only be applied where the law has changed between the current and the former proceedings. State v. Roy, supra; Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005). Here, there has been no change in the law since the time the Court of Appeals earlier ruled on and set forth the appropriate procedure to be followed concerning the burdens of proof. The only change is the one that is being sought to be made to settled Washington law presently by Ms. Rushing.

b. Ms. Rushing's claim to avoid the arbitration agreement has always been that Robert Coon lacked mental capacity; a fiduciary or confidential relationship is irrelevant to that claim, and does not impact the established burden of proof.

Ms. Rushing has never made any claim, nor presented any

evidence, that Mr. Coon was subject to undue influence[3] or any overreaching or fraudulent scheme at Franklin Hills; her sole claim is and has always been that Mr. Coon lacked the mental capacity to contract because of his mental illness, which rendered the arbitration provision void. Unlike a claim of "undue influence," there exists no basis to shift the burden of proof as to a party's competency to contract based on the existence of a fiduciary duty; the party challenging an individual's capacity has the burden to do so by clear, cogent and convincing evidence, and the contracting party's relationship to another contracting party is irrelevant.

Much of Ms. Rushing's brief and the authorities cited are arguments on whether there exists a fiduciary relationship between a skilled nursing facility and a resident, analogizing a number of different relationships and situations. However, whether or not a nursing home is akin to a physician, whether DSHS has regulations for the treatment of nursing home patients, or what the Vulnerable Adult Act provides, do not create any basis to establish the burden of proof of the mental capacity to contract. And none of the out-of-state authorities in which courts have

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[3] Tellingly, while Ms. Rushing's identification of issues in her motion for discretionary review included entitlement to a presumption of undue influence, she apparently recognized this was not a claim made, nor an issue addressed at the evidentiary hearing on appeal, and has now restructured her issues.

found a fiduciary duty with a nursing home have done so for the purposes of either establishing or shifting the burden of proof for the determination of the validity of a contract of a resident who is claimed to be incompetent.

Moreover, those courts actually discussing fiduciary relationships and the "shift" of the burden of proof cited by Ms. Rushing are largely limited to claims of "undue influence." Undue influence is "a species of fraud" and vitiates a transaction when properly proven. 25 Wash. Prac. Contract Law §9:18. The 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. See e.g., Mueller v. Wells, 185 Wn.2d 1, 15, 367 P.3d 580 (2016).

As Ms. Rushing concedes, Washington has never applied the presumption or shifted the burden to a claim of incapacity to contract. The evidence necessary to prove mental incapacity has little to do with the relationship the incompetent may or may not have, and is instead based on proof necessary to overcome the concept that we are all free to contract. See, Page v. Prudential Life Ins. Co. of America, 12 Wn.2d 101, 120 P.2d 527 (1942) (to avoid a contract, it is insufficient to show the person is of unsound mind or insane; it must be shown these conditions were of such character that he had no reasonable perception or understanding of the

nature and terms of the contract). Well-established law provides that a party challenging the capacity of a person to contract has the burden to establish incapacity. See e.g., Grannum v. Berlard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). That capacity is all that is relevant, and the relationship the contracting party has with others is simply not at issue. A fiduciary has no more or less access to information relevant to that inquiry, and there exists no public policy reasons to require a fiduciary to establish the capacity of a party to contract.

And contrary to Ms. Rushing's assertions, the cases she cites simply do not stand for the proposition that the burden of proof as to any fact or claim **automatically shifts** to any party deemed a fiduciary. (See, Petitioners' Opening Brief, pp. 30-32) In each of the cases that actually address the burden of proof to invalidate a will, or a gift, or a contract, undue influence was indeed the claim. See e.g., Mueller v. Wells, supra. Courts recognize a distinction between the burdens of proof applicable to the presumption of capacity as opposed to a claim of undue influence and gifts. See, In re Estate of Palmer, 145 Wn.App. 249, 261, 187 P.3d 758 (2008). Outside of the realm of undue influence, none of the remaining cases cited in the Petitioners' brief address the "shift" of the burden of proof at all.

Instead, these cases merely set an initial burden of proof based on the claims made or duties that existed. See e.g., In re Estate of Little, 127 Wn.App. 915, 113 P.3d 505 (2005) (the relevant statute required an executor to notify heirs and distributees whose addresses are known to him; the fact he was a fiduciary did not "shift" the burden already required by statute); Saviano v. Westport Amusements, Inc., 144 Wn.App. 72, 180 P.3d 874 (2008) (a loan from a director to a corporation must be characterized with the utmost good faith; director seeking repayment of loan has the burden to establish the elements of his right to repayment, including good faith); Schmidt v. Coogan, 181 Wn.2d 661, 335 P.3d 424 (2014) (uncollectability of an underlying potential judgment is an affirmative defense in a malpractice case as opposed to an element of a client's malpractice case; court established a burden of proof as a matter of first impression in Washington, but did not require a "shift" in an established burden of proof solely on the basis of a fiduciary relationship); Austin v. U.S. Bank, 73 Wn. App. 293, 869 P.2d 404 (1994) (court recognized the established burden of proof that beneficiaries of a trust are required to prove every element of their prima facie case that a trustee improperly paid out trust funds; however, once a plaintiff beneficiary establishes its prima facie case, the trustee has the burden of proving its defense that there was no causal connection between the trustee default

and the loss); Wilkins v. Lansater, 46 Wn. App. 766, 733 P.2d 221 (1987) (in financial self-dealing, the burden of proving the propriety of challenged financial transactions rests with the trustee in an accounting).

In fact, in Easton v. Chaffee, 16 Wn.2d 183, 132 P.2d 1006 (1943) (Petitioners' Opening Brief, p. 31), a client sued his lawyer for fraudulent inducement, and argued on appeal the established burden of proof for fraud should have "shifted" simply because of the fiduciary relationship, **which the court rejected.** The court instead noted the burden of proof may initially be placed on an attorney in only specific circumstances in which the attorney financially profits from "overreaching," in transactions in which the attorney conducts business with a client. Thus, the court did **not** find as a rule of law that the established burden of proof as to all claims shifts if one of the parties is a fiduciary, but simply recognized circumstances in which the existence of a fiduciary relationship **may** create a different burden of proof. The same concept is true here. The existence of a fiduciary relationship does not automatically shift the established burden of proof as to a claim of mental competency, nor should this Court establish a new rule of law requiring such.

The level of trust or dependence placed on a fiduciary simply does not impact the question at bar here - - did Mr. Coon have the mental capacity to contract? Here, the lack of undue influence, a breach of trust,

or self-dealing with finances simply renders the fiduciary nature of the relationship irrelevant.

At least one court has properly addressed the argument that the burden of proof shifts to the fiduciary to "disprove" the fact of competency and rejected such notion:

> The difficulty with plaintiff's argument is that he made no allegations of undue influence or fraud. He alleges only that he was not competent to execute the conveyance and that there was a lack of consideration. We do not, as does the plaintiff, interpret the principle he sets forth to apply in this situation to shift the burden of proof regarding competency. Plaintiff has alleged incompetency and has the burden of proving the allegation. A contracting party whose mental capacity is questionable may be more susceptible to undue influence or fraudulent inducement derived from an intimate or confidential relationship. However, in the absence of an allegation of undue influence or fraud a confidential relationship has little relevance to the issue of competence. The capacity the law requires in order to execute a conveyance relates to the condition of the individual and would exist or not apart from any confidential relationship.

Dillin v. Alexander, 576 P.2d 1248, 1251 (Or. 1978).

The evidence presented throughout this case by Ms. Rushing has been limited to Mr. Coon's mental capacity — his medical diagnosis, his institutionalizations, his history of medication and mental illness; both parties presented expert medical witnesses on which they primarily relied. Ms. Rushing submitted hundreds of pages of medical records. She did not assert that Franklin Hills' personnel defrauded Mr. Coon, exerted influence to obtain his assets, or cheated him in any way. She simply claims the

arbitration agreement was void because Mr. Coon had a history of mental illness. This does not present any situation in which the burden of proof shifted to Franklin Hills to prove Mr. Coon was competent.

c. Moreover, Ms. Rushing overstates the effect of the "shift" of the burden of proof, even in an undue influence situation.

The "shifting" burden of proof relates primarily to the creation of rebuttable presumptions, which can be overcome based on the evidence at trial. As explained by the court in Mueller v. Wells, 185 Wn.2d at 15 (relied on to establish the burden of proof, Petitioners' Opening Brief, p. 30), normally, a party challenging a will for undue influence has the burden to prove the will's illegality by clear, cogent and convincing evidence. The existence of a fiduciary duty, along with the circumstances that the beneficiary participates in the preparation of the document **and** receives unusually large portions of the estate, gives rise to a presumption which the proponent of the will now must overcome, i.e. the "shifting" burden. However, the Mueller court explains:

> If the facts raise a presumption of undue influence, the burden of production shifts to the will proponent, who must then rebut the presumption with evidence sufficient to balance the scales and restore the equilibrium of evidence touching the validity of the will. [cite omitted] However, the will contestant retains the ultimate burden of proving undue influence by "clear, cogent and convincing" evidence.

185 Wn.2d at 15 (court affirmed appellate court's role to review findings

supporting the conclusions the trial court reached, and not to reweigh the evidence).

As a result, those cases on which Ms. Rushing relies to argue a "shift" in the burden of proof do not actually require that "shift"; instead they require only some evidence rebutting the presumption, which Franklin Hills provided at trial, and thus no error occurred.

d. The conduct of the competency hearing was such that its hybrid nature allowed both sides to present competency evidence which was resolved by the trial court's findings of fact; any error in concluding that Ms. Rushing bore the burden of proof was thus harmless at best.

Even had the trial court ruled that the burden of proof had shifted to Franklin Hills, the evidence presented by the defendants, and that presented by Ms. Rushing was sufficient for the court to find mental competency, rendering any burden of proof error harmless. See, Kennedy v. Clausing, 74 Wn.2d 483, 491, 445 P.2d 637 (1968) (court found that even though incorrect burden of proof instruction given to the trier of fact, the result would have been the same even under a correct placement of the burden, and thus any error was harmless and no justification for new trial).

This is particularly true when, as here, the trier of fact was the court, and the evidence was presented by the parties without strict compliance with the relative burdens of proof. The competency hearing

was conducted by the court in a manner which allowed both sides to present whatever competency evidence they deemed best. Towards the end of testimony, the trial court stated:

> The Court: This is procedurally a little bit different than most matters and we've talked about that even before this hearing started. Because of the timeline, the defense put on some of their witnesses with respect to competency prior to the plaintiff challenging competency. So my question, Mr. Hueber, is do you have any witnesses that you were going to put on to defend competency after the plaintiff rests?
>
> Mr. Hueber: It does not appear we will. As of this point we do not.

(RP 530)

In discussing closing argument, the following colloquy occurred:

> The Court: I'll give you an opportunity, once again, for rebuttal argument since you carried the burden on the one issue. So go ahead, Mr. Hueber.
>
> Mr. Hueber: Judge, my only thoughts on closing is we've sort of combined everything because this is a bench trial. I anticipate I will make all the arguments I intend to make. After Mr. Kamitomo goes, if there's something I feel the need to respond to, I might. But as far as following burden, burden, burden, burden, I think we can just proceed as we have. At least that'd be my thought.

(RP 573)

In this bench trial, the court afforded both sides the opportunity to fully present evidence in support of their positions, without strict adherence to the order of proof based on the respective burdens. At the

close, the trial court found Mr. Coon to be competent. This finding was not the result of which party had the burden. Assuming arguendo that the burden should have shifted to Franklin Hills, the end result would be the same: Mr. Coon was competent when he signed the agreement.

3.2 The trial court properly found that Franklin Hills did not have a fiduciary duty as to the admission/ arbitration contracts.

While not necessarily relevant to this Court's determination, Franklin Hills disputes the existence of a fiduciary relationship with a potential resident signing admission documents, including the arbitration provision. As noted by Ms. Rushing, no Washington court has found that a skilled nursing facility is in a fiduciary relationship with its residents for all purposes. And as noted by the trial court, while a fiduciary relationship may exist for some issues between such a 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. (RP 4, Ruling on Summary Judgment 1/30/15)

And none of the out-of-state cases cited by Ms. Rushing establish a fiduciary relationship as to the admissions process; in fact, she concedes that several courts reject the existence of a fiduciary duty in relation to the commercial aspects or the admission process. (Petitioner's Opening Brief, pp. 28-29, n. 29) Washington law similarly recognizes that relevant

fiduciary obligation must be specifically in relation to the issue; a fiduciary obligation may apply to some, but not all, aspects of a relationship. See e.g., Kitsap Bank v. Denley, 177 Wn.App. 559, 574, 312 P.3d 711 (2013) (not sufficient for a fiduciary relationship to exist to establish undue influence; the relationship "must exist in relation to the asset" which is the subject of the claim).

The existence of regulations relating to the care of patients, or the Vulnerable Adult Act do not relate to the admission/arbitration agreement phase, and had the legislature wanted to regulate that process, it could have done so, but has not. Had the legislature intended to broadly regulate fiduciary duties of a health care facility, it would have so specified. No basis exists in Washington law to create fiduciary duties of a facility as to arbitration agreements at the admissions process relating to arbitration agreements.

Moreover, Washington courts have previously had occasion to analyze the enforcement of an arbitration contract by a resident of a nursing home, and no such fiduciary duty was established; instead, Washington's public policy strongly favoring arbitration of disputes was upheld. See, Estate of Eckstein v. Life Care Centers of America, Inc., 623 F.Supp.2d 1235, 1240 (E.D.Wash. 2009); Nail v. Consol. Resources Heath Care Fund, 155 Wn.App. 227, 229 P.3d 885 (2010); Woodall v. Avalon

Care Center-Federal Way, LLC, 155 Wn.App. 919, 231 P.3d 1252 (2010) (enforcing arbitration agreement for claims of resident despite claim that resident lacked mental capacity to sign agreement based on a diagnosis of "dementia w Behavior Dist." because there was not clear, cogent and convincing evidence of lack of capacity).

The trial court properly rejected this fiduciary relationship argument:

> The [petitioner] asked the Court to switch the burden. The burden of proof has been on the [petitioner] to prove by clear, cogent, and convincing evidence that Mr. Coon was not competent when he signed the arbitration agreement. Because of the fiduciary duty, they're asking that the burden be switched.
>
> At this point, the Court is not going to find that there is a fiduciary duty. Obviously, fiduciary duties do arise, even when property is not at stake. A good example of that is a physician-patient relationship. Here, we have a skilled nursing facility. I don't know that it necessarily extends to a whole skilled nursing facility, but that skilled nursing facility also was accountable for his funds.
>
> A fiduciary duty could be bifurcated to some extent, requiring Franklin Hills to act as a fiduciary with respect to his funds, but not necessarily other aspects of his life. So, at this point, the Court is not going to find that there was a fiduciary relationship requiring that burden to shift.
>
> Therefore, the [petitioner] does have the burden to prove by clear, cogent, and convincing evidence that Mr. Coon was not competent when he signed the arbitration agreement. There is a genuine issue of material fact as to his competency on that date. The Court is going to deny the motion for summary judgment with respect to whether he was competent or I guess, as phrased by the [petitioner], was not competent.

(RP 4-5, Ruling on Summary Judgment 1/30/15)

3.3 The trial court's finding that Mr. Coon was competent when he signed the ADR agreement is supported by substantial evidence, and is a verity on appeal.

After entering its Findings of Fact, the trial court concluded that Ms. Rushing failed to meet her burden to prove by clear, cogent and convincing evidence that Mr. Coon was not competent when he entered into the arbitration agreement. (Conclusion of Law #2; CP 906) The entirety of the evidence showed that Mr. Coon had the cognitive ability to appreciate the nature and effect of the consequences of the arbitration agreement. (Conclusion of Law #3; CP 906) Judging the weight and credibility of evidence is a matter within the sound discretion of the trial court. Kintz v. Read, 28 Wn.App. 731, 736, 626 P.2d 52 (1981).

In reviewing the evidence, the appellate court does not reweigh the evidence, draw its own inferences, or substitute its judgment for the trier of fact. Westmark Devel. Corp. v. City of Burien, 140 Wn.App. 540, 557, 166 P.3d 813 (2007). The trial court weighed the evidence, but did not commit error in its finding of competency. Accordingly, the arbitration agreement is valid and enforceable between the Estate of Robert Coon and the defendants. (Conclusion of Law #4; CP 906)

a. The trial court was entitled to analyze all the evidence and did not err in its analysis of Ms. Rushing's own expert testimony, Franklin Hills' expert testimony, or the combined other elements of evidence the parties presented.

As set forth in the Statement of the Case and further discussed below, the trial court's factual findings are fully supported by the record.[4] Ms. Rushing's claim of error is apparently based on taking each isolated piece of evidence proffered and suggesting that, standing alone, it does not "constitute substantial evidence" of contractual capacity. However, the trial court is entitled to hear and consider **the entirety** of the evidence to determine threshold contractual competency, which it did.

In determining whether evidence in a bench trial meets the "clear, cogent and convincing" standard of persuasion, the trial court must make credibility determinations and weigh and evaluate all the evidence; Endicott v. Saul, 142 Wn.App. 899, 910, 176 P.3d 560 (2008) (in making a determination of incapacity in a guardianship, the trial court considers evidence from all sources, not just experts). The relevant medical and lay testimony proffered from both parties, as weighed and considered by the trial court, was substantial evidence of Mr. Coon's competency, which

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[4] Those findings that are unchallenged are verities on appeal. Davis v. Dept. of Labor, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980) (unchallenged finding of fact became a verity on appeal and it is then unnecessary for the Supreme Court to search the record to determine whether there is substantial evidence to support them).

included, but was not limited to, the testimony of Drs. Winter and Klein, as well as others providing health care or otherwise interacting with Mr. Coon.

Ms. Rushing challenges as insufficient various pieces of evidence presented of Mr. Coon's functioning, interactions with others, decision making abilities and perceptions. She claims that the evidence that Mr. Coon made significant medical decisions regarding potential cancer treatment, that he participated in his treatment on the day he was transferred to Franklin Hills, and interacted appropriately and independently, with no sign of incompetence at the emergency room or at Franklin Hills during the admission process, with appropriate orientation and responses is not "substantial evidence" of contractual capacity. (See, Petitioner's Opening Brief, pp. 39-41) Ms. Rushing apparently asserts that the witnesses presenting the evidence were required to actually offer a legal conclusion that Mr. Coon was competent to contract. However, appropriate evidence of competency includes a variety of information; personal observations of the person in question, how they functioned in life, how they communicated, other decisions they may have made, as well as medical testimony in their abilities, all may be considered by the trial court in the determination of capacity. See e.g., Page, 12 Wn.2d 102-109. The trial court properly found such evidence relevant because he was

"able to process certain situations and make decisions based on the information before him." (CP 815) And no single piece of this testimony was utilized by the trial court; it reviewed and based its ruling on **all** the evidence presented. (CP 807-818; CP 902-907)

Similarly, Ms. Rushing's challenge to the expert testimony of Drs. Klein and Winter also fails to recognize that in the entirety, both proffered appropriate and admissible opinions on Mr. Coon's competency.

Dr. Winter testified that as of March 11, 2011, according to Dr. Mulvihill, Mr. Coon had adequate cognition for a man of his age. (RP 136) Dr. Winter testified that from April 1, 2011 through April 8, 2011, Mr. Coon was cognitive enough and of cognitive mind to sign contracts. (RP 138)

Dr. Winter opined that Mr. Coon was making his own medical decisions on April 1, 2011. He states this was important because it goes to the level of cognition that the staff, including the admission staff, have him sign into the hospital. If a person is not functioning from a cognition standpoint and having an episode, Emergency Rooms have the ability to place them on a hold. (RP 145)

The nurse's notes from April 1, 2011 indicate that Mr. Coon had no loss of consciousness, that he was alert and his affect was normal. Mr. Coon obeyed commands. The report also says that no neurodeficits

were noted at this time, and that Mr. Coon was responding appropriately to questions. These nurse's notes support Dr. Winter's opinion that Mr. Coon's cognition was good that day. (RP 148-49)

Dr. Winter states that Mr. Coon had cognition throughout the eight or nine day period starting on April 1, 2011 and that Mr. Coon had sufficient cognition to make reasonable decisions about his affairs during this time period, including financial affairs. (RP 156) Dr. Winter opines that on April 3, 2011, Mr. Coon had sufficient cognitive ability to sign the ADR documents despite medication and his mental health history. (RP 181)

And contrary to Ms. Rushing's assertion, Dr. Klein's testimony in its entirety was relevant and appropriately considered in the trial court's ruling on Mr. Coon's competency. Dr. Klein opined that Mr. Coon had the requisite capacity on April 3, 2011 to understand what he was signing to make a choice to enter into an arbitration agreement. (RP 306) Dr. Klein noted that Mr. Coon was interacting appropriately with persons who were trying to be of assistance to him. He was not agitated or saying irrational things. (RP 307)

Dr. Klein further equated cognition to thinking. That process is the taking in of a stimuli from the outside world and being able to sort out that information, assign priorities to that information, store in short term

memory what is being said and spoken about. (RP 316) Dr. Klein stated that on April 3, 2011, Mr. Coon understood what he was signing. (RP 338)

And the trial court also had the benefit of Ms. Rushing's experts to provide substantial evidence of Mr. Coon's competency. Evidence, whether presented by the plaintiff or the defendant must be considered by the trial court; all parties benefit or suffer from all evidence, irrespective of the burden of proof. Kenna v. Griffen, 4 Wn.App. 363, 365, 481 P.2d 450 (1971). Dr. Spar testified that the symptoms of schizoaffective disorder wax and wane. (RP 441) Mr. Crabb testified that Mr. Coon had times that were worse than others, agreeing Mr. Coon had lucid times. There were times when he did not appear to have any effect of bipolar disorder or schizoaffective disorder; there were good days and there were bad days. (RP 368) By all accounts, Mr. Coon signed the ADR on a good day. The trial court noted that Dr. Spar concluded that Mr. Coon indeed possessed sufficient cognitive functioning to understand the difference between arbitrating potential claims and pursuing them in traditional court. (CP 815)

Ultimately, substantial evidence was presented that Mr. Coon had lived independently, handled finances, driven his car, agreed to or denied medical treatment, agreed to pay for medical treatment, and chose where

he wanted to move. He was free to decide in the event he became incapacitated or incompetent that his daughter could make those decisions, an occurrence which was never exercised. Both shortly before and after signing the arbitration agreement, Mr. Coon was cognitively appropriate.

The trial court heard all of this conflicting testimony as to Mr. Coon's mental competency on April 3, 2011, and factually decided that he was competent. That finding is supported by the record, and the trial court did not err in its consideration of the evidence.

b. The trial court did not err by reviewing Mr. Coon's testamentary capacity as an element of contractual capacity.

In addition to generally requesting that this Court disagree with the trial court's findings of fact based on the evidence the court heard and weighed, Ms. Rushing also suggests the court erred in its consideration of evidence of Mr. Coon's testamentary capacity. However, 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.

The trial court instead reviewed Mr. Coon's ability to have sufficient cognition to analyze and agree to **both** a power of attorney and a will as evidence of contractual capacity. And in actuality, the trial court did not emphasize the testamentary capacity, but instead analyzed

Mr. Coon's cognitive ability to execute a power of attorney, since that document in essence grants a third party authority and decision making over assets, health care, and termination of life-sustaining medical treatment. (CP 817) The fact that different standards may apply does not preclude the evidence of the capacity to execute various other forms of contracts from being considered. See, Page, supra (court considered execution of other contracts relevant to issue of capacity for specific transaction).

3.4 The trial court's denial of Ms. Rushing's motion to dismiss based on "mutual assent" is not on appeal, but presents no basis for reversal of the trial court's order compelling arbitration.

Ms. Rushing has not requested, nor has the Court granted, discretionary review regarding her motion to dismiss based on lack of evidence of mutual assent. A notice of appeal must designate the decision or part of the decision which the party wants reviewed. RAP 2.4(a).

Even were the Court to consider it, it offers no basis for reversal. Ms. Rushing argues that the arbitration agreement was invalid because no evidence was presented that Mr. Coon knew about the "restrictions" on his constitutional rights in the arbitration rules referenced in the agreement.[5]

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[5] Ms. Rushing attaches the rules as an appendix to her brief, although this exhibit was not admitted; the trial court's refusal to admit this exhibit is also not on appeal, and underscores that this issue should not be considered.

(Petitioner's Opening Brief, p. 43)

Ms. Rushing made this same argument to the trial court. The trial court ruled:

> Mr. Coon was provided the Agreement, informed of his right to seek the advice of an attorney, and informed of his right to either sign or reject it within 30 days. Further, even though the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure was not provided to him, the Agreement did provide Mr. Coon information on how it could be obtained. Given the 30 day acceptance or rejection period, Mr. Coon had ample opportunity to obtain and review the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure prior to execution or rejection of the Agreement. As is the case here, "One cannot, in the absence of fraud, deceit or coercion be heard to repudiate his own signature voluntarily and knowingly fixed to an instrument whose contents he was in law bound to understand." National Bank of Washington at 912-913. The Plaintiffs' motion to dismiss the motion to compel arbitration is therefore denied.

(CP 809)

This is a valid statement of Washington law, and no error exists in the court's ruling. First, Ms. Rushing's argument is based on her assumption that Franklin Hills had this duty as a fiduciary. As previously discussed, Franklin Hills was not a fiduciary. Irrespective of the existence of that duty, however, the reference to the procedural rules in the arbitration agreement did not render the agreement invalid for lack of mutual assent. Documents can be incorporated by reference, as stated in the authority cited by Ms. Rushing, so long as the document referenced is

"clear and unequivocal." W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wn.App. 488, 7 P.3d 861 (2000). In Western Washington, the documents to be incorporated were ambiguously referred to as "contract documents" of which there were many different potential inclusions.

Contrary to the plaintiff's interpretation, there is no requirement that a party attempting to enforce incorporated documents establish evidence they were attached or delivered to the signing party. See, Ferrellgas, 102 Wn.App. at 498-99. So long as clearly identified, a party's failure to read it does not excuse the party from being bound by its terms. Williston on Contracts, §30:25 (4th ed.); PaineWebber, Inc. v. Bybyk, 81 F.3d 1193 (2nd Cir. 1996). Here, there was no ambiguity in what was to be incorporated; the procedural rules to be followed were also explicitly set forth, with instructions on how to obtain such rules in three different manners: from the administrator of the facility, from a written address, or online. Thus, the ADR agreement establishes that the terms were "made available to or could be accessed by Mr. Coon," and evidence established that Ms. Wujick went through that document with him, which he reviewed before signing.

In fact, in Washington, a contract can incorporate an entire arbitration clause by reference, without it even being contained in any

detail in the contract signed by the parties. See, Todd v. Venwest Yachts, Inc., 127 Wn.App. 393, 111 P.3d 282 (2005). Moreover, in Nail v. Consolidated Resources Health Care Fund 1, 155 Wn.App. 227, 229 P.3d 885 (2010), a nursing home's arbitration agreement provided that the arbitration hearing must be before three arbitrators, "selected from the American Arbitration Association," applying the applicable "rules of procedure of the AAA." There, the court confirmed that the parties incorporated by reference the AAA's applicable rules of procedure (although they may not have incorporated a specific AAA health care policy statement that is not a rule of procedure).

And Ms. Rushing's assertion that the procedural rules unknowingly waived constitutional protections is an overstatement. The relevant arbitration rules limited the amount of discovery, but so do the Washington State District Court rules, and the United States Eastern District of Washington rules. The mere limits to discovery do not **deprive** a party of discovery.

And the cases cited by Ms. Rushing on "material facts" which must be disclosed do not relate to the mere procedure by which a proceeding will be governed, but the actual substance of the transactions, such as the nature and location of property. The substance of the parties' agreement

was to arbitrate, to which Mr. Coon agreed, and the trial court did not err as a matter of law in refusing to dismiss based on lack of "mutual assent."

3.5 The temporary stay of litigation was within the trial court's discretion, and this Court should not "sequence" arbitrable and non-arbitrable claims in violation of the Washington Arbitration Act and public policy.

Ms. Rushing argues that the trial court erred in staying the litigation of her wrongful death claims pending arbitration of her survival claims. (Petitioner's Opening Brief, p. 46) However, her primary request is that this Court ignore Washington's Arbitration Act, which requires a court to compel arbitration and stay litigation of arbitrable claims, and "sequence" the non-arbitrable claims so that they would be litigated prior to arbitration. Ms. Rushing's wrongful death claim cannot be used as a vehicle to stay enforcement of a distinct arbitration agreement that has already been determined to be valid and enforceable; her claim that allowing the arbitration to proceed would violate her right to trial by jury is based wholly on the fear of the potential future application of collateral estoppel. While it is incorrect that collateral estoppel would so operate, requiring a broad stroke "sequence" rule throws the right to arbitration out with the bath water. Ms. Rushing does not seek an advisory ruling on application of the future use of collateral estoppel, she wants to deprive parties to an arbitration agreement of their speedy remedy.

a. The trial court did not abuse its discretion in ordering a temporary stay of litigation.

Mr. Coon agreed to arbitrate any claims against Franklin Hills rather than go to court. The trial court found the agreement to be enforceable, and compelled arbitration, while entering a 180-day temporary stay of the litigation.

In Washington, a court's determination on a motion to stay litigation proceedings is discretionary, and thus reversed only for an abuse of discretion. In re Marriage of Herridge, 169 Wn.App. 290, 279 P.3d 956 (2012). The trial court abuses its discretion when its decision is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons; the burden rests on the appellant to establish the abuse. Anfison v. FedEx. Group Package System, Inc., 174 Wn.2d 851, 281 P.3d 289 (2012); Port of Seattle v. Equitable Capital Group, 127 Wn.2d 202, 898 P.2d 275 (1995).

This standard is time honored and workable. It recognizes that the trial court is given great discretion in managing its docket, particularly in relation to the mandatory stay of litigation required by the arbitration provision as to arbitrable claims. See, RCW 7.04A.070. The stay issued here was not permanent, but was limited to 180 days; had Ms. Rushing not engaged in appeal, her jury trial may have proceeded because the stay is

long since expired.[6] The trial court did not order the stay to permanently sequence the non-arbitrable claims, but recognized that proceeding with both arbitration and litigation simultaneously would result in potentially repetitive discovery, motions, and other pre-trial proceedings which may have been resolved in the arbitration. Avoiding that potential duplication did not abuse the trial court's discretion in issuing the stay.

b. The Washington Arbitration Act requires the court to compel arbitration, and a stay would violate that law.

As is apparent from Ms. Rushing's frame of the issues, and her argument, it is not the trial court's temporary stay of litigation of the non-arbitrable claims that she actually challenges, but rather it is the order compelling arbitration that she claims deprives her of her constitutional right to jury trial, since by "accident of scheduling," an arbitration will likely occur first. (See, Petitioner's Brief, p. 47) However, agreements to arbitrate are valid, long supported by public policy, and enforceable; the Washington Uniform Arbitration Act **requires** the court to stay an action, and compel arbitration, if the agreement is enforceable. RCW 7.04A.070(6). If the court orders arbitration, the court "shall" on just terms stay any judicial proceeding that involves a claim subject to the

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[6] In actuality, Ms. Rushing never made a jury demand in this case; by not timely demanding a jury, Ms. Rushing waived her right to a jury, and all of her arguments

arbitration. Id. If a claim subject to arbitration is severable, the court may sever it and limit the stay to that claim. Id.

Thus, the trial court could not refuse to compel the arbitration to proceed under the Act. The trial court must determine whether the parties have agreed to arbitrate a dispute by looking to whether a valid agreement to arbitrate exists; if the trial court determines that an arbitration agreement creates a duty to arbitrate, it must order the parties to do so. See, In re Marriage of Pascale, 173 Wn.App. 836, 295 P.3d 805 (2013) ("if it can be fairly said that the arbitration agreement covers the dispute, arbitration is required").

Here, Ms. Rushing is asking for a per se rule that any time a trial court is faced with arbitrable and non-arbitrable claims, it **must** stay the arbitrable claims until the non-arbitrable claims are fully litigated. Her proposed new rule will vitiate the Arbitration Act provision which requires that arbitration be compelled, and prohibit a court from compelling arbitration to proceed. Contrary to Ms. Rushing's characterizations, such a rule not only "attacks" arbitration, it voids the statute requiring it.[7]

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relative to denial of that right are moot. See, Ford Motor Co. v. Barrett, 115 Wn.2d 556, 563, 800 P.2d 367(1990).

[7] Ms. Rushing has not provided the notice to the Attorney General as required to declare a statute unconstitutional. RCW 7.24.110.

In the similar federal setting, the Supreme Court has confirmed that based upon the congressional intent of ensuring judicial enforcement of private arbitration agreements in the Federal Arbitration Act, "a court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made," despite a request to stay arbitration so non-arbitrable claims could proceed to trial. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985). In so doing, the Supreme Court virtually rendered "invalid" the previous "intertwining" doctrine practiced by some circuits which allowed courts to decline to compel arbitration if "intertwined" with non-arbitrable claims, to avoid the potential collateral estoppel effect. Dimenstien v. Whiteman, 759 F.2d 1514, 1517 (11th Cir. 1985).

The Washington Arbitration Act similarly requires the trial court to compel arbitration, which as a matter of course precludes the stay of such proceeding, and the trial court did not err in so doing.

c. Ms. Rushing is not deprived of a constitutional right to jury trial by the enforcement of an arbitration agreement, or the failure to stay arbitration proceedings.

Even if the trial court had authority to stay the arbitration, compelling arbitration pursuant to a valid agreement is neither unconstitutional nor unfair to a party with non-arbitrable claims. It is

undisputed that Ms. Rushing's non-arbitrable claims could proceed to jury trial if so requested. Thus, the only assertion Ms. Rushing is making is that, since arbitration is a speedier remedy, the **potential** for eventual collateral estoppel effect of findings in the arbitration could preclude re-litigation of some issues at the trial, which she claims infringes on her Seventh Amendment right. However, there is a long-standing precedent that the right to a jury trial is not destroyed by the potential utilization of a non-jury forum which may have some collateral estoppel affect. Moreover, Ms. Rushing's remedy is simply to argue one of the many defenses to collateral estoppel, if or when it is argued, not to declare that arbitration must be delayed, which in essence destroys the efficacy of the remedy.

First, Ms. Rushing's assertion that using a decision in an arbitration proceeding as the basis for collateral estoppel (issue preclusion) deprives a party of a right to trial by jury "is totally without merit". See, Robinson v. Hamed, 62 Wn.App. 92, 96-97, 813 P.2d 171 (1991). Washington has adopted the United States Supreme Court's specific rejection of this claim in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), which held that a party's right to a jury trial is not "infringed" by the application of collateral estoppel based on a factual finding in a previous non-jury case. Robinson, 62 Wn. App. at 97. This is because the

right to trial by jury exists only if there are facts to be resolved. Id. If there are no such facts, the right to trial is not denied. Washington has applied this specific reasoning to an arbitration proceeding:

> We agree with the court in Benjamin that "([P]reclusion may not be defeated simply by showing that there was no right to trial by jury in the first action and that there is a constitutional right to trial by jury in the second action, no matter what anguish that may cause to those who believe in juries."

Robinson, 62 Wn. App. at 97; see also, Nielson v. Spanaway General Medical Clinic, Inc., 135 Wn.2d 255, 268-69, 956 P.2d 312 (1998) (holding the potential use of collateral estoppel does not violate a right to trial by jury).

Ms. Rushing's argument is that, unlike these instances, she did not **choose** the initial arbitration forum, and thus the potential use of collateral estoppel in essence requires her to arbitrate and infringes on her right to jury trial. However, collateral estoppel is a doctrine applied to not only the parties choosing the first forum, but to their "privies," and thus impacts the right to a subsequent trial, irrespective of whether the "privy" had the opportunity to **choose** the first forum. In fact, collateral estoppel is often applied in circumstances in which the party against whom it is utilized did not agree to the initial forum. See e.g., Parklane Hosiery, supra (party was collaterally estopped from re-litigating an issue litigated when the SEC brought a declaratory action against them). Whether the

party is in privity, and whether it is "just" to apply the collateral estoppel doctrine are discretionary issues which will be addressed by the court being asked to do so. See, In re Moi, 184 Wn.2d 575, 580, 360 P.3d 811 (2015) (elements required for collateral estoppel are identity of issue, final judgment on the merits, party or privity, and lack of injustice in application). Whether the party against whom the doctrine is being applied **chose** the first forum, non-jury or not, does not render it violative of the right to trial by jury.

Moreover, Washington has approved rules which **require** parties to arbitrate, irrespective of choice, and which thereafter places certain impingements on their right to proceed to jury trial. See, RCW 7.06.010.[8] Under the MARs, a party must arbitrate, and then face the hurdle of potential fees for failing to improve its position if it proceeds to jury trial. The fact that, as Mr. Coon's personal representative, Ms. Rushing is being required to arbitrate claims which Mr. Coon agreed to arbitrate, which may thereafter create some hurdles to jury trial, does not offend constitutional protections.

Most importantly, however, it must be understood that Ms.

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[8] Mandatory Arbitration Rules are not construed to abridge the right to trial by jury, and have withstood claims of unconstitutionality. RCW 7.06.070; Colarusso v. Peterson, 61 Wn. App. 767, 812 P.2d 862 (1991).

Rushing is not seeking as relief any ruling on the use of collateral estoppel as to arbitrated claims in a later trial of non-arbitrable claims. She is seeking a stay of the arbitration, so that her trial will be first, most likely for a myriad of reasons; but to obtain this relief, she must suggest this blanket rule to apply to "sequence" all future arbitrable and non-arbitrable claims. This is a scorched earth request to a very narrow issue that has not yet arisen.

The creation of any such stay would immediately deprive the parties who agree to arbitration of their chosen remedy. As noted by Justice White in his concurring opinion in Dean Witter:

> The Court's opinion makes clear that a District Court should not stay arbitration, or refuse to enforce it at all, for fear of its preclusive effect. And I can perceive few, if any, other possible reasons for staying the arbitration pending the outcome of the lawsuit. Belated enforcement of an arbitration clause ...significantly disappoints the expectations of the parties and frustrates the clear purpose of the agreement.

Dean Witter, 407 U.S. at 225.

And any rule relative to the potential for collateral estoppel or a stay based on the "fear" of future use would be advisory at best; there has been no arbitration, no judgment and no request for application of collateral estoppel. The Supreme Court does not render advisory opinions.

See, State v. Kramer, 73 Wn.2d 85, 87, 436 P.2d 786 (1968).[9] Any grant of Ms. Rushing's request would constitute an advisory ruling that establishes as a matter of law that no arbitration can ever proceed if there are pending non-arbitrable claims until a jury trial is held on those claims. This would directly contravene current Washington law and policy for no reason other than to insure that at any subsequent trial, Ms. Rushing does not face a **potential** argument regarding collateral estoppel, presuming she does not prevail at arbitration.

Franklin Hills submits that the trial court is in the best position to exercise its discretion, control its docket, determine sequencing, and apply collateral estoppel as is just. The exercise of that discretion is reviewed under the abuse of discretion standard, and its refusal to stay the arbitration was not an abuse.

4. Conclusion.

Franklin Hills requests that the court affirm the trial court's ruling finding Mr. Coon competent and compelling arbitration.

[signature to follow]

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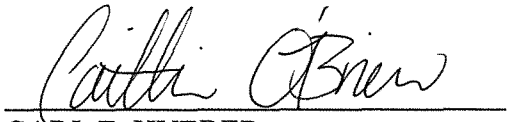
[9] In DeanWitter, the Supreme Court stated that because the collateral estoppel effect of an arbitration proceeding is at issue only after the arbitration is completed, it would not address the issue; while declining to rule, the Court noted there was no reason to "manipulate the ordering" of the bifurcated proceedings, simply to avoid the infringement of federal interests. 470 U.S. 223.

DATED this 13th day of February, 2017.



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DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on February 13, 2017, I served the foregoing document on counsel for petitioners in the manners indicated:

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DATED this 13th day of February, 2017, at Spokane, Washington.

Cheryl Hansen

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