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

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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.

REPLY IN SUPPORT OF DISCRETIONARY REVIEW

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 ORIGINAL

Petitioner, Mary Rushing, submits this reply to the answer to her motion for discretionary review submitted by Respondents:

I. REPLY

A. This review is “ripe.”

Respondents make several arguments based on what they describe as “ripeness.” First, they argue that this review is not ripe because no jury demand has been filed. *See* Resp. Ans., at 9-10. Second, they argue that it is not ripe because the arbitration award has not yet been given collateral estoppel effect to claims that would otherwise be subject to trial by jury. *See id.* at 10-11. Third, they argue that the lack of a formal written order denying Ms. Rushing’s request for a stay of arbitration entered at the same time as the formal written order granting Respondents’ self-described cross motion to stay litigation precludes review. *See id.* at 11-12. None of these arguments has any merit.

- 1. Ms. Rushing has made her intent to demand a jury trial plain, the time for demanding a jury trial has not passed, and, to the extent necessary, a formal demand for jury trial will be filed.**

The record is replete with evidence of Ms. Rushing’s intent to have her claims tried by jury. Respondents wrongly suggest that the time for requesting a jury has expired, based on a scheduling order

that was issued before the first appeal of this case. The appeal was filed by Respondents before the deadline for requesting a jury had passed. *See* Resp. Ans., Exhibit L. Under CR 38(b), a jury demand is timely if made “[a]t or prior to the time the case is called to be set for trial[.]” (Brackets added.) To the extent necessary, Ms. Rushing will file a jury demand.

2. **Ms. Rushing should not have to wait to seek review until after an arbitration award is given collateral estoppel effect with respect to claims that would otherwise be subject to trial by jury, and she would be foreclosed from doing so by *Nielson v. Spanaway Gen. Med. Clinic*.**

Although Respondents suggest that Ms. Rushing should have to wait until collateral estoppel is applied to seek review, the right to review would be lost at that point under *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn. 2d 255, 269, 956 P.2d 312 (1998). In *Nielson*, the Court of Appeals held that the plaintiff waived the right to jury trial by not seeking a stay of non-jury proceedings under the Federal Tort Claims Act, and the Supreme Court declined to address the issue where the plaintiffs had already litigated in the non-jury forum. *See id.* at 269. Ms. Rushing should not have to wait, nor should she bear the risk of losing the right to review by waiting.

3. Respondents exalt form over substance and ignore the relevant Rules of Appellate Procedure when they argue that the lack of a formal written order denying Ms. Rushing's request to stay arbitration precludes review, when the superior court granted their cross motion seeking the opposite relief.

Respondents repeat an argument made in their motion to modify the Commissioner's prior ruling in this case. *See* Motion to Modify Commissioner's Ruling, at 8. The argument is flawed because a written order is not necessary for discretionary review, and the denial of Ms. Rushing's motion to stay arbitration of her survival claims pending litigation of her wrongful death claims is encompassed within review of the superior court order granting Respondents' cross motion for the opposite relief. Respondents cite no authority to support their argument, and do not acknowledge or address the arguments made in response to their motion to modify. *See* Petitioner's Response to Respondents' Motion to Modify Commissioner's Ruling, at 11-13.

A written order is not necessary for discretionary review. "[A] party may seek discretionary review of any act of the superior court not appealable as a matter of right." RAP 2.3(a). The term *act* is broader in scope than order, decision or judgment. *See* Washington Appellate Practice Deskbook, § 6.4(1) (3d ed.). "It

would include, for example, an oral decision, or even the court's refusal to enter a decision." 2A Wash. Pract., Rules Practice RAP 2.3 (7th ed.).

Ms. Rushing's motion to amend her notice of discretionary review makes it clear that she is seeking review of the sequencing of litigation of her wrongful death claims and arbitration of her survival claims to preserve her right to trial by jury. *See* Motion to Amend Notice of Discretionary Review, at 4 & n.2. The fact that the superior court did not enter a separate order denying Rushing's motion at the same time that it entered an order granting Respondents' cross motion should pose no impediment to review of its decision regarding the sequencing of litigation and arbitration.

Moreover, the denial of Ms. Rushing's motion to stay arbitration is encompassed within review of the order granting Respondents' cross motion. The scope of review includes an "order or ruling not designated in the notice ... if (1) the order or ruling prejudicially affects the decision designated in the notice[.]" RAP 2.4(b) (ellipses & brackets added). The jury trial issue arising from the sequencing of litigation and arbitration in this case has been preserved under this rule.

The denial of Rushing's motion to stay arbitration of her survival claim pending litigation of her wrongful death claim prejudicially affects Respondents' cross motion for the opposite relief. The requisite prejudicial effect exists if the grant of a motion would have precluded the entry of an order identified in a notice of discretionary review. *See Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn. 2d 370, 377-81, 46 P.3d 789 (2002). Here, the grant of Rushing's motion would have precluded the entry of the order granting Respondents' motion. Accordingly, the superior court's ruling on Rushing's motion is within the scope of review.

This result is entirely consistent with, if not mandated by, the provision requiring the RAPs to "be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a).

B. The superior court probably erred.

Respondents argue that the superior court did not probably err because the decision to stay litigation is discretionary and this Court has already ruled that giving collateral estoppel effect to non-jury proceedings does not violate the right to trial by jury. *See Resp. Ans.*, at 12-18. Ms. Rushing does not contest these general

propositions. However, the exercise of discretion must be based on a correct view of the law, and in cases where collateral estoppel has been applied, the estopped party has chosen to litigate first in the non-jury forum. This case is unique because it raises the issue highlighted but not addressed in *Nielson*.

In the final analysis, this case presents a conflict between one party's right to jury trial of nonarbitrable claims and another party's right to enforce an arbitration agreement, which should be resolved by the highest court of this state. Respondents characterize Ms. Rushing's position as an attempt to obtain an advisory opinion changing the law of arbitration in the state, *see* Resp. Ans., at 19, but in actuality it presents the question of how these competing rights should be balanced.

Ms. Rushing suggests that, given the contractual nature of arbitration, one party arbitration should not be able to obtain more than they bargained for—i.e., giving an arbitration award collateral estoppel effect to preclude litigation of related but nonarbitrable claims—when the other party asserts their constitutional right to trial by jury of those claims. This Court has recently described the right to trial by jury as “deserving of the highest protection” and stated that it “must be protected from all assaults to its essential

guarantees.” *Davis v. Cox*, 183 Wn. 2d 269, 288-89, 351 P.3d 862 (2015) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)). Ms. Rushing’s request to sequence litigation and arbitration so as to preserve the right to trial by jury does not represent an attack on arbitration, but rather an attempt to properly balance these competing rights.

C. The superior court decision limits Ms. Rushing’s freedom to act.

Respondents argue that the decision below does not limit Ms. Rushing’s freedom to act because she has the ability to pursue a direct appeal. *See* Resp. Ans., at 20. However, as *Nielson* demonstrates, this entails the risk of losing the right to review. The only way to ensure effective review is at this stage of proceedings.

Respectfully submitted this 31st day of December, 2015.

s/George M. Ahrend

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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:

On December 31, 2015, I served the document to which this is annexed by email and First Class Mail, postage prepaid, as follows:

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and via email to co-counsel for Plaintiffs/Petitioners pursuant to prior agreement to:

Mark Kamitomo at mark@markamgrp.com
Collin Harper at collin@markamgrp.com

Signed on December 31, 2015 at Moses Lake, Washington.

s/George M. Ahrend

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Dear Mr. Carpenter,

Attached is a reply in support of discretionary review for filing in the above-referenced case. A certificate of service is included in the reply.

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