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(Related Supreme Court No. 91538-5)

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARY RUSHING as the Administrator and on Behalf of the Estate of
ROBERT COON, and MARY RUSHING, INDIVIDUALLY,

Petitioner,

vs.

FRANKLIN HILLS HEALTH & REHABILITATION CENTER
MELISSA CHARTNEY, R.N., AURILLA POOLE, R.N., JANENE
YORBA, DIRECTOR OF NURSING

Respondents.

RESPONDENTS' ANSWER TO MOTION FOR DISCRETIONARY
REVIEW

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1. Identity of Respondent.

This answer is filed on behalf of respondents, Franklin Hills Health & Rehabilitation Center, Melissa Chartney, Aurilla Poole, and Janene Yorba ("Franklin Hills").

2. Decision Below.

The only decision of which Petitioner seeks review is the superior court's order staying the litigation of Ms. Rushing's wrongful death/consortium claim for **180-days**, subject to the return of the court. (Ex. H)

Contrary to Petitioner's continual claim that the court's refusal to "sequence" the arbitration and the litigation is the basis for its motion for discretionary review, the Petitioner has never sought review of an order or decision denying her motion to stay the arbitration. While Franklin Hills will address that issue, it does not waive the objection to the issue being raised as untimely and not preserved for review.

3. Issues Presented for Review.

Did the superior court commit obvious or probable error, or so far depart from the accepted and usual course of judicial proceedings, by exercising its discretion to stay the litigation of a loss of consortium claim in a "wrongful death" action temporarily for 180-days, while the arbitration of the primary "survival" claim by the estate of the deceased proceeds?

Did the trial court commit obvious or probable error, or so far depart from the accepted and usual course of judicial proceedings, by not ordering that the arbitration of the estate claim must be stayed and could not occur until after the litigation of the consortium claim was completed, because a future court could exercise its discretion to apply collateral estoppel to issues determined in the arbitration proceeding?

4. Statement of the Case.

4.1 Introduction/Nature of the Case.

Robert Coon signed a valid and enforceable Arbitration Agreement with Franklin Hills, a skilled nursing facility, where he was residing at the time of his death. Ms. Rushing brought an action on behalf of Mr. Coon's estate claiming that his death was proximately caused by the negligence of the Franklin Hills parties. The survival claims would include any claim for Mr. Coon's pain and suffering, lost future income, and the expenses incurred as a result of his death. Ms. Rushing also sued for wrongful death as a beneficiary of Mr. Coon's estate, and that claim is limited to Ms. Rushing's loss of consortium.

The Arbitration Agreement which governed Mr. Coon's estate claims provided for specified discovery between the parties, and a hearing within 180-days; as with most arbitration agreements, it is aimed at providing a speedier relief for all parties. Ms. Rushing moved to stay the arbitration, arguing litigation on her loss of consortium claim must occur first; Franklin Hills also moved to stay the litigation for the temporary

period in which the arbitration would occur, since the discovery would be duplicative.

The trial court orally denied Ms. Rushing's motion to stay the litigation, but no order was ever presented on that issue. However, the trial court agreed with Franklin Hills and exercised his discretion to stay Ms. Rushing's loss of consortium claim; he stayed the litigation for only 180-days, noting that it would not be permanent, but that it made sense to avoid duplicative simultaneous discovery for the short time in which the arbitration would be pending. Ms. Rushing seeks discretionary review of the trial court's 180-day stay, asserting that the trial court committed probable error in exercising its discretion to stay the litigation while the pending arbitration proceeded, because the arbitration could potentially have future collateral estoppel effect on issues that will be identical in the two proceedings, and that potential would impact her right to a jury trial.

Ms. Rushing's motion basically requests an advisory ruling on an unripe matter since no court has ruled on the application of collateral estoppel to any arbitration findings, and may never do so. Moreover, it also asks the court to find the trial court erred in utilizing its well settled discretion, and overrule and/or ignore all other precedential and persuasive authorities, which have already affirmed that the important right to trial by jury is not destroyed by the potential utilization of a non-jury forum, which may have some collateral estoppel effect.

4.2 Facts and Procedure.

On April 3, 2011, Robert Coon signed an Alternative Dispute Resolution Agreement ("ADR Agreement") with Franklin Hills Health & Rehabilitation Center ("Franklin Hills") (Ex. A)

The ADR Agreement provided that Mr. Coon agreed to arbitrate any potential claims against Franklin Hills rather than seek court intervention. This was a voluntary agreement to arbitrate all claims, in consideration of the "speed, efficiency, and cost effectiveness" of the ADR process. The ADR Agreement provides that the arbitration must be completed within 180-days of the date a party demands arbitration. (*Id.*)

The Petitioner Mary Rushing is the daughter of Robert Coon. She sued Franklin Hills on November 30, 2011. On June 5, 2012, Franklin Hills moved to stay the litigation and enforce the ADR Agreement and proceed to arbitration. After the Superior Court failed to grant Franklin Hills' motion, appellate review was sought. On January 30, 2014, Division III of the Court of Appeals remanded the matter to the trial court to determine whether the ADR Agreement Mr. Coon had signed was enforceable. (Ex. B)

After a four-day evidentiary hearing on Mr. Coon's competency, the court ruled Mr. Coon was competent to sign the Arbitration Agreement, and that it was valid and enforceable. (Ex. C) On March 30, 2015, Ms. Rushing filed a Notice of Discretionary Review to the Supreme Court and the trial court's decision on the evidentiary hearing on

Mr. Coon's competency and the validity of the Arbitration Agreement.¹
(Ex. D)

Ms. Rushing moved to stay the arbitration until after the jury trial, claiming that her right to trial by jury on her loss of consortium claims would be impacted by a potential collateral estoppel effect of the arbitration. (Ex. E) Franklin Hills also moved to stay litigation so that it was not required to engage in full scale duplicative discovery at the same time the arbitration was to proceed. (Ex. F)

During oral argument on April 10, 2015, Ms. Rushing's counsel argued:

And so our first request to the Court is to stay the arbitration of the survival claims so that the wrongful death claims can be litigated in front of a jury; ...

(Ex. G, pp. 8-9) In considering the plaintiff's motion to stay the arbitration, the trial court stated:

The question then becomes whether or not that statute [RCW 7.04A.070] overrides a person's right to a jury trial. Obviously, constitutional protections afford greater weight than many statutes. However, the Court is compelled by the case of *Robinson* and *Parklane Hosiery*. And the *Robinson*, in citing *Parklane Hosiery*, held that a party's right to a jury trial is not infringed by the application of collateral estoppel based on factual findings in a previous non-jury case.

So it looks like this issue has been addressed by the courts, and the courts have found that it doesn't impede a person's right to a jury trial by going to arbitration. So the Court will deny the plaintiff's motion to stay the arbitration.

¹ This matter is concurrently pending under cause No. 91538-5.

(Ex. G, p. 18) This was a non-final order subject to interlocutory review, which was not pursued.

At the same hearing, the trial court granted Franklin Hills' motion to stay the Rushing litigation for 180-days; the trial court did not permanently stay the litigation pending in the arbitration. Instead, it simply agreed it would be inefficient to have both paths of discovery occurring at the same time, and would overly burden the parties. (Ex. G, pp. 18-19) Franklin Hills proposed a written order granting its Motion to Stay Ms. Rushing's wrongful death claim for 180-days "subject to return to the court," the court signed that day. (Ex. H)

On that same date, the Court issued its formal order that Ms. Rushing's claim for loss of consortium would not be subject to the Arbitration Agreement. (Ex. I)² Ms. Rushing has not filed any demand for jury at any point in this proceeding. Ms. Rushing also did not propose an order denying her motion to stay the arbitration, nor has she timely moved for discretionary review of the court's oral ruling denying her motion to stay the arbitration. Franklin Hills proceeded with the arbitration process in order to complete it in a timely manner; a panel of arbitrators had been chosen, discovery was being conducted, mediation scheduled, and a hearing date being discussed. (Ex. K)

² The trial court had previously issued a letter opinion that Ms. Rushing's loss of consortium claims would not be arbitrable on February 2, 2015. (Ex. J)

On April 14, 2015, Ms. Rushing filed motions to amend her motion for discretionary review of the order compelling the arbitration of Mr. Coon, to now include the order staying the Rushing litigation, and for an extension of time for several weeks to file all the required briefing in support of direct discretionary review.

Over two and one-half months after it had filed its original Notice for Discretionary Review to the Supreme Court, and two months after it had filed its Motion to Amend, Ms. Rushing requested the court rule on the motion for amendment and time extension, attaching for the first time proposed motions for discretionary review and statements for grounds for direct review. The Supreme Court Commissioner ultimately separated the request for discretionary direct review of the order compelling the arbitration of Mr. Coon, from the discretionary review of the trial court's order granting the 180-day stay of Ms. Rushing's loss of consortium claims, and stayed the arbitration pending review of both of these matters. Over three and one-half years has now passed from when Franklin Hills sought to compel arbitration, and over nine months since the trial court originally ordered that Mr. Coon's estate claim be arbitrated.

Ms. Rushing finally filed a Motion for Discretionary Review of the order granting the 180-day stay of her loss of consortium claims, as well as a Statement of Grounds for Direct Review on the issue of the trial court's discretionary stay of the Rushing loss of consortium claim, and Franklin Hills here responds.

5. Argument.

Discretionary review may be accepted only if the superior court has committed an obvious error which would render further proceedings useless; the superior court has committed probable error and its decision substantially alters the status quo or substantially limits the freedom of a party to act; or the superior court has so far departed from the accepted and usual course of judicial proceeding as to call for review by an appellate court. RAP 2.3(b)(1)(2)(3). Ms. Rushing only asserts that Judge Cooney's order staying the litigation of Ms. Rushing's loss of consortium claim for 180-days while arbitration of Mr. Coon's estate claims proceeded was probable error, which substantially limits her freedom to act because the error cannot be remedied on "direct appeal."

Ms. Rushing's argument is that the Washington Constitution provides a right to a jury trial, and that courts are required to "sequence" arbitrable and non-arbitrable claims that come before them by requiring that litigation proceed first, to avoid any potential future use of collateral estoppel on the identical issues determined in an arbitration in order to preserve the right to jury. Franklin Hills agrees that the right to trial by jury is a fundamental one, but Ms. Rushing fails to establish that the trial court's stay improperly impacted that right is probable error.

First, the issue is far from ripe for review, because Ms. Rushing's right to trial by jury has neither been established (she failed to file a jury demand), no collateral estoppel has been applied to prevent her jury trial,

and Ms. Rushing failed to timely appeal any denial of her motion to stay the arbitration. And even if the court chooses to suspend application of these appellate precepts to review this issue for what is in essence a request for an advisory opinion, there is simply nothing new or novel in the concept that a decision made in a non-jury forum can potentially be applied in a later jury proceeding, under the concept of collateral estoppel, without unfairly destroying a party's right to a jury trial. Thus, the trial court's exercise of discretion to issue a temporary stay of litigation was not probable error, but instead just an exercise of well established discretion.

5.1 This matter is not ripe for review.

Advisory opinions are at best "inadvisable." Cooper v. Dept. of Institutions, 63 Wn.2d 722, 724, 388 P.2d 925 (1964). This Court declines to review questions which are not ripe and would require the court to render an advisory opinion based on a future matter. In re Estate of Toland, 180 Wn.2d 836, 846, 329 P.3d 878 (2014).

(a) Ms. Rushing made no timely demand for jury, and until that right is established, she cannot claim its loss.

While the right to trial by jury is constitutionally fundamental, it is a right that must be properly exercised, and is subject to law. The June 15, 2012 Civil Case Schedule Order issued in this matter provided that a jury must be demanded no later than March 11, 2013. (Ex. L) Plaintiff failed to timely demand a jury, and a party can waive the right to trial by jury by inaction. Haywood v. Aranda, 97 Wn.App. 741, 748, 987 P.2d 121

(1999); CR 38(d). The trial court had ruled that Ms. Rushing's loss of consortium claim was non-arbitrable first by a letter ruling on February 2, 2015, yet no jury demand had even been filed prior to the court's stay of litigation on April 10, 2015. Until Ms. Rushing establishes by motion that she has some right to jury trial, this matter is unripe.

(b) No court has yet applied collateral estoppel to any arbitration award, and Ms. Rushing will not be denied any right to jury trial unless and until that occurs.

Ms. Rushing is basically asking for a "sequence" to avoid the **potential** future use of collateral estoppel if issues to which estoppel will apply are decided in the future arbitration, and a court thereafter agrees to apply collateral estoppel. It is not the order in which arbitrable and non-arbitrable claims are litigated that is truly at issue, but rather whether collateral estoppel can apply to findings made in an arbitration to later litigation proceedings. A party asserting collateral estoppel will bear the burden of persuading the court 1) that the issue decided in the prior action was identical to the issue presented in the second action; 2) that the prior action ended in a final judgment on the merits; 3) that the party to estopped was a party or in privity with a party in the prior action; and 4) that application of the doctrine would not work an injustice. State v. Vasquez, 148 Wn.2d 303, 59 P.3d 648 (2002). The essence of the four requirements, particularly the required showing that no "injustice" would occur by its application, boils down to a requirement of a full and fair

opportunity to litigate the issue in the earlier proceeding. See, State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn.App. 299, 57 P.3d 300 (2002).

At best here, some future court will potentially be analyzing the application of collateral estoppel between the arbitration proceeding and the jury proceeding, to determine whether it can be applied. The mere fact that the arbitration proceeds, simultaneous with the litigation, or before the litigation, does not deny any fundamental right to a jury trial. Thus, unless and until a request to apply collateral estoppel by some party is made in a future proceeding, requesting a trial court exercise its discretion, this opinion is advisory at best. The right to jury trial on all of the issues in her loss of consortium claim has not, and will not be denied simply by allowing the arbitration to proceed.

(c) Ms. Rushing failed to seek timely review of the denial of her motion to stay the litigation, and that matter is not before the court.

Despite Ms. Rushing's continued assertion that she is seeking review of the trial court's decision not to "sequence" the litigation before the arbitration, this misstates the status of the record, and the order appealed from. Ms. Rushing did seek a stay of the arbitration, at the same time Franklin Hills sought a stay of the litigation. At a hearing on these motions, the court denied Ms. Rushing's request to stay the arbitration. (See, Ex. G) No formal order was ever proposed or entered denying that motion. The court did enter an order issuing a temporary 180-day stay of the litigation, so that the discovery between the litigation and the

arbitration which would be duplicative would not be proceeding at the same time. (See, Ex. H) He did not rule that he would permanently sequence the arbitration and litigation so that the arbitration occurred first, instead simply staying the matter while the arbitration had the opportunity to proceed, and potentially complete to avoid the duplication. Ms. Rushing has sought review only of the 180-day stay, and no other order is currently before this court.

5.2 The issues on which Ms. Rushing seeks review, even if considered, have been analyzed and decided, and the trial court could not have "probably erred" by following established law.

To find "probable error" for immediate discretionary review, the trial court's decision has to have been contrary to existing law. And the relevant decision has to have "substantially" impacted Ms. Rushing's freedom to act. Neither is true.

(a) It is well established that entry of a stay is within a trial court's discretion, which was not "probably" abused here.

In Washington, a court's determination on a motion to stay litigation proceedings is discretionary, and is reviewed only for abuse of discretion. King v. Olympic Pipeline Co., 104 Wn. App. 338, 16 P.3d 45 (2000). Under an abuse of discretion standard, the burden rests on appellant to establish that denial was manifestly unreasonable. Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 898 P.2d 275 (1995).

When confronted with litigants advancing both arbitrable and non-arbitrable claims, courts have discretion to stay non-arbitrable claims. Klay v. All Defendants, 389 F.3d 1191, 1204 (11th Cir. 2004).³ Expanding the stay to encompass all of the non-arbitrable claims in a case is appropriate where the arbitrable claims predominate, or where the outcome of the non-arbitrable claims will depend upon the arbitrator's decision. Simitar Entertainment, Inc. v. Silva Entertainment, Inc., 44 F.Supp.2d 986, 997 (D.Minn. 1999) [cited in Carey, supra].

The decision whether to stay non-arbitrable claims rests within the sound discretion of the trial court. Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 20-21, n.23 (1983). While courts note that a preference exists for proceeding with the non-arbitrable claims when "feasible," staying the non-arbitrable claims is appropriate when the arbitrable claims predominate, and when the outcome of the non-arbitrable claims will depend upon the arbitrator's decision. United Communications Hub, Inc. v. Qwest Communications, Inc., 46 Fed.Appx. 412, 2002 WL 1963592 (9th Cir. 2002).

If a suit against a non-signatory is based upon the same operative facts and is inherently inseparable from the claims against the signatory, the trial court has discretion to grant a stay if the suit

³ This authority has been cited with approval by Washington courts, although not in published cases, and thus it is not precedential. See, Carey v. Gujral, 2009 WL 807517 (Wash. App. 2009). Moreover, federal precedent on the right to trial by jury is "meaningful and instructive" and "provides insight in interpreting" the state constitutional right. Nielson v. Spanaway Gen. Med. Clinic, Inc., 135 Wn.2d 255, 267-68, 956 P.2d 312 (1996).

would undermine the arbitration proceedings and thwart the federal policy in favor of arbitration.

T-Mobile USA, Inc. v. Montijo, 2012-2 Trade Cases 78, 177, 2012 WL 6194204 at *6 [W.D. Wash. 2012] [citing Amisil Holdings, Ltd. v. Clarium Capital Management, 622 F.Supp.2d 825, 841 (N.D.Cal. 2007)]. The T-Mobile court noted that a stay pending arbitration is exercised in order to avoid inefficient, duplicative litigation, and is based on the inherent power of a court to stay litigation to control the disposition of cases on its docket with an economy of time and effort for itself, for counsel, and for the litigants. Id. at *6 [citing Landis v. North American Co., 299 U.S. 248, 254 (1936)].

The Supreme Court has long recognized that it may be "advisable to stay litigation among the non-arbitrating parties pending the outcome of the arbitration." Moses H. Cone Memorial Hospital, 460 U.S. at 20, n. 23. Ultimately, courts have utilized this discretion to stay proceedings against parties by considering whether the resolution of the civil proceeding would involve a common question of law or fact within the scope of the arbitration agreement, and whether they are grounded in identical facts and legal theories. Anderson v. Corinthian Colleges, Inc., 2006 WL 2380683 (W.D. Wash. 2006).

Clearly, in every instance in which a stay of litigation is granted so that an arbitration of related claims proceeds, the potential for collateral estoppel exists. Collateral estoppel by its nature inherently will always

prevent the re-litigation of issues decided in some forum, be it a previous jury trial, bench trial, administrative proceeding or an arbitration. A party's right to a jury trial is thus often subject to procedural prohibitions without a constitutional violation. The authority clearly gave the trial court the right to enter a stay within his discretion and it is untrue that the exercise of that discretion was in error under the applicable law, giving Ms. Rushing no right to demand immediate discretionary review.

- (b) **Washington has already rejected Ms. Rushing's claim that issue preclusion as applied to a decision made in an arbitration would deprive a party of a right to a jury trial, and the trial court did not "probably err" in granting the temporary stay or in not "sequencing" the litigation 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 jury trial is not "infringed" by the application of collateral estoppel based on a factual finding in a previous non-jury case. The Parklane court found that a party's right to trial by jury is only as to those factual issues which had not been previously decided. Robinson, 62 Wn. App. at 97. Washington applies 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 [citing Benjamin v. Traffic Exec. Assn., 869 F.2d 107 (2nd Cir. 1989)]; see also, Nielson, 135 Wn.2d at 268-69 (holding the potential use of collateral estoppel does not violate a right to trial by jury).

Courts recognize that a party's right to trial by jury is instead protected by a court's exercise of its discretion to utilize collateral estoppel. The trial court is required to find that the party against whom estoppel is to be applied had a "full and fair opportunity" to litigate the matter. See, State Farm, supra; Robinson, 62 Wn.App. at 100-103; Neff v. Allstate Ins. Co., 70 Wn.App. 796, 855 P.2d 1223 (1993) (procedural differences in two proceedings will not prevent the use of collateral estoppel, because the courts will "focus" on whether the party to an earlier proceeding had a full and fair hearing). The court in Robinson thus specifically analyzed the discovery limitations in an arbitration proceeding, and other procedural differences, before finding that a "full and fair" hearing occurred at arbitration, which allowed the use of collateral estoppel without damaging a party's right to trial by jury. See also, Parklane, supra.

Contrary to Ms. Rushing's claim, the Nielson case does not create some uncertainty in this area, and certainly not a basis to claim the trial

court was in probable error in refusing to require related matters be sequenced so litigation would precede the arbitration.

In Nielson, the parents of a brain damaged child sued individual physicians in state court, then sued the United States (owner of the hospital) in federal court under the Tort Claims Act, which by statute is tried without a jury. Once the federal case was concluded, the state defendants moved for partial summary judgment arguing that collateral estoppel applied to preclude re-litigation of the same issues in state court. The Supreme Court affirmed the use of collateral estoppel, despite the Petitioner's claim that its use deprived them of the right to trial by jury. 135 Wn.2d 268-270.

Contrary to Ms. Rushing's assertion, the Nielson court **did not** reason that the use of collateral estoppel hinged on whether the plaintiff **chose** the first forum when the jury was not available. (See, Motion for Discretionary Review, p. 7) Nor did the court suggest that if the non-jury forum proceeded that a party would have waived the right to later object to the use of collateral estoppel. (See, Motion for Discretionary Review, p. 8) The court merely noted it was not reaching that issue because it was unnecessary, since it decided that there was no constitutional right to re-litigate issues decided in the non-jury forum. Id. at 269.

Ultimately, this issue has been well addressed and is **not** contingent on whether it is the **plaintiff** that chooses to first utilize the non-jury forum and is thereafter subject to collateral estoppel in a jury

forum. For example, in Parkland, supra, a defendant corporation was sued by the SEC, which went to a bench trial. The stockholders thereafter filed a class action and asserted the corporation (the prior **defendant**) was subject to collateral estoppel based on the prior action; the corporation asserted it was losing its right to trial by jury. The court disagreed, simply analyzing the "civil litigant's" right to trial by jury of facts already determined. The court did not analyze whether the defendant was unfairly being subject to collateral estoppel because it did not "choose" the non-jury forum.

While Ms. Rushing frames this as a competition between fundamental constitutional rights vs. contract rights, the right to arbitrate the estate claims does not violate the jury trial right at issue here any more than any other potential proceeding which has the potential to preclude a jury trial on the same rights. Collateral estoppel **always** impacts a party's right to a jury trial, and is utilized when the elements are present, not when the plaintiff has controlled the choice of forum.

Ms. Rushing has thus cited no authority for the proposition that application of collateral estoppel to a non-jury forum is limited to instances in which the plaintiff has chosen the non-jury forum. Neither has Ms. Rushing cited any law that there must be a "sequence" allowing litigation to precede arbitration. With no such authority, and in the face of well-settled law affirming the court's discretion to stay the litigation, there could be no "probable error" demanding discretionary review.

- (c) In reality, Ms. Rushing is not asking this court to find probable error, but to issue an advisory opinion changing the law favoring arbitration.

"Washington...has a strong public policy favoring arbitration of disputes." Adler v. Fred Lind Manor, 153 Wn.2d 331, 341, n. 4, 103 P.3d 773 (2004). "Agreements to arbitrate are valid, supported by public policy, and enforceable." Harvey v. University of Washington, 118 Wn.App. 315, 318, 76 P.3d 276 (2003); RCW 7.04.060 (an agreement to arbitrate is valid, enforceable and irrevocable except upon a ground that exists at law or equity for the revocation of a contract). Under the Washington Uniform Arbitration Act, the court is required to stay an action and compel arbitration if the agreement is enforceable. RCW 7.04A.070.

In fact, arbitration agreements should be liberally construed, and any doubt construed in favor of arbitration. See, Mendez v. Palm Harbor Homes, Inc., 111 Wn.App. 446, 456, 45 P.3d 594 (2002).

Ms. Rushing is arguing that arbitration can never proceed before any potential connected litigation, to avoid all potential use of collateral estoppel. This means the end to any speedy and cost effective arbitration to which the parties agreed. Public policy favoring arbitration will be eradicated and meaningless if the lengthy litigation process must precede any arbitration.

(e) **Ms. Rushing has not lost any "freedom to act."**

Nor has Ms. Rushing established that the trial court's alleged "error" substantially affected her freedom to act. The stay of litigation was temporary, and until a court actually rules to apply collateral estoppel to some issue, her right to jury trial remains unaffected.⁴ And in the event a court limits the issues in her future jury trial, a direct appeal would then be appropriate. She has not lost the freedom to have a jury trial, nor has she lost an appeal of that issue in the future. She simply lost the freedom to conduct duplicative discovery while the arbitration proceeded and concluded. No basis exists for review.

6. Conclusion.

For the foregoing reasons, no basis exists for this court to accept discretionary review of the trial court's decisions to stay the litigation for 180-days.

DATED this 7th day of December, 2015.



CARL E. HUEBER, WSBA No. 12453
PATRICK J. CRONIN, WSBA No. 28254
CAITLIN E. O'BRIEN, WSBA No. 46476
WINSTON & CASHATT, LAWYERS
Attorneys for Defendants

⁴ The Nielson court does not suggest that proceeding with arbitration will waive any right to claim there can be no later collateral estoppel effect or right to jury trial; it just noted that the plaintiff had not asked for a stay below, but because it found that applying collateral estoppel did not damage the constitutional right to trial by jury, it did not need to review any potential waiver by failure to request a stay. 135 Wn.2d at 269.

Here, Ms. Rushing did request a stay, and nothing will prevent her from challenging the use of collateral estoppel when appropriate.

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on December 7, 2015, I served the foregoing document on counsel for Petitioner in the manners indicated:

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VIA REGULAR MAIL
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HAND DELIVERED
BY FACSIMILE
VIA FEDERAL EXPRESS

DATED this 7th day of December, 2015, at Spokane, Washington.

Cheryl Hansen

OFFICE RECEPTIONIST, CLERK

To: Cheryl R. Hansen
Cc: 'mark@markamgrp.com'; 'mary@markamgrp.com'; 'collin@markamgrp.com'; 'gahrend@ahrendlaw.com'; 'scanet@ahrendlaw.com'; Linda Lee; Carl E. Hueber; Patrick J. Cronin; Caitlin E. O'Brien
Subject: RE: Supreme Court No. 91852-0, Rushing v. Franklin Hills et al.

Received on 12-07-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Cheryl R. Hansen [mailto:crh@winstoncashatt.com]
Sent: Monday, December 07, 2015 2:25 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: 'mark@markamgrp.com' <mark@markamgrp.com>; 'mary@markamgrp.com' <mary@markamgrp.com>; 'collin@markamgrp.com' <collin@markamgrp.com>; 'gahrend@ahrendlaw.com' <gahrend@ahrendlaw.com>; 'scanet@ahrendlaw.com' <scanet@ahrendlaw.com>; Linda Lee <ll@winstoncashatt.com>; Carl E. Hueber <ceh@winstoncashatt.com>; Patrick J. Cronin <pjc@winstoncashatt.com>; Caitlin E. O'Brien <ceo@winstoncashatt.com>
Subject: Supreme Court No. 91852-0, Rushing v. Franklin Hills et al.

Case Name: Mary Rushing as the Administrator and on Behalf of the Estate of Robert Coon, and Mary Rushing, individually vs. FRANKLIN HILLS HEALTH & REHABILITATION CENTER, et al.

Case Number: 91852-0

Dear Supreme Court Clerk – attached for filing is **Respondents' Answer to Motion for Discretionary Review** (appendix will be mailed to the Court), filed by:

Carl E. Hueber, WSBA No. 12453
Telephone: (509) 838-6131
Email: ceh@winstoncashatt.com

Thank you,

Cheryl Hansen, Paralegal to CARL E. HUEBER, COREY J. QUINN,
LAWRENCE H. VANCE and JAMES E. REED
Phone: (509) 838-6131 | **Fax:** (509) 838-1416 | **Email:** crh@winstoncashatt.com

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Winston & Cashatt

L A W Y E R S

A Professional Service Corporation

*Winston & Cashatt has offices in Spokane, Washington
and Coeur d'Alene, Idaho*

December 7, 2015

Clerk of the Court
Supreme Court of Washington
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Received
Washington State Supreme Court

DEC 14 2015

Ronald R. Carpenter
Clerk

**Re: Supreme Court Case No. 91852-0
Rushing v. Franklin Hills, et al.**

Dear Clerk:

Enclosed is the Appendix for *Respondents' Answer to Motion for Discretionary Review* in the above matter, which was filed by email with your Court today.

Thank you, and please contact me by telephone or email should any questions arise.

Very truly yours,



Cheryl Hansen, Paralegal
Toll free 1-800-332-0534
crh@winstoncashatt.com

ch:782856
enclosure

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Case No. 91852-0

*Received
Washington State Supreme Court*

DEC 14 2015

*Ronald R. Carpenter
Clerk*

Appendix

to

**Respondents' Answer to
Motion for Discretionary Review**

**Alternative Dispute Resolution Agreement
Washington**

**(SIGNING THIS AGREEMENT IS NOT A CONDITION OF ADMISSION TO OR
CONTINUED RESIDENCE IN THE CENTER)**

1. **Parties to the Agreement.** This Alternative Dispute Resolution ("ADR") Agreement (hereinafter referred to as the "Agreement") is entered into by Extendicare Health Services, Inc. on behalf of its parents, affiliates and subsidiaries including Franklin Hills Health and Rehab. Center (hereinafter referred to as the "Center"), a nursing facility, and Robert H Coon, a Resident at the Center (hereinafter referred to as "Resident"). It is the intent of the Parties that this Agreement shall inure to the benefit of, bind, and survive the Parties, their heirs, successors, and assigns.

2. **Definitions.**
 - a. Center as used in this Agreement shall refer to the nursing Center, its employees, agents, officers, directors, affiliates and any parent, affiliate and/or subsidiary of Center and its medical director acting in his/her capacity as medical director.

 - b. Resident as used in this Agreement shall refer to the Resident, all persons whose claim is or may be derived through or on behalf of the Resident, all persons entitled to bring a claim on behalf of the Resident, including any personal representative, responsible party, guardian, executor, administrator, legal representative, agent or heir of the Resident, and any person who has executed this Agreement on behalf of the Resident.

 - c. Party shall refer to the Center or the Resident, and the term Parties shall refer to both the Center and Resident.

 - d. Alternative Dispute Resolution ("ADR") is a specific process of dispute resolution used instead of the traditional court system. Instead of a judge and/or jury determining the outcome of a dispute, a neutral third party ("Mediator"), who is chosen by the Parties, may assist the Parties in reaching settlement. If the matter proceeds to arbitration, the neutral third party "arbitrator" renders a decision, which becomes binding on the Parties. When mandatory the ADR becomes the only legal process available to the Parties.

 - e. State Law shall mean the laws and regulations applicable in the State of Washington.

 - f. Neutral shall mean the Mediator or Arbitrator conducting ADR under this Agreement.

3. **Voluntary Agreement to Participate in ADR.** The Parties agree that the speed, efficiency and cost-effectiveness of the ADR process, together with their mutual undertaking to engage in that process, constitute good and sufficient consideration for the acceptance and enforcement of this Agreement. The Parties voluntarily agree that any disputes covered by



this Agreement (herein after referred to as "Covered Disputes") that may arise between the Parties shall be resolved exclusively by an ADR process that shall include mediation and, where mediation does not successfully resolve the dispute, binding arbitration. The relief available to the Parties under this Agreement shall not exceed that which otherwise would be available to them in a court action based on the same facts and legal theories under the applicable federal, state or local law. All limitations or other provisions regarding damages that exist under Washington law at the time of the request for mediation are applicable to this Agreement.

The Parties' recourse to a court of law shall be limited to an action to enforce a binding arbitration decision and mediation settlement decision entered in accordance with this Agreement or to vacate such a decision based on the limited grounds set forth in RCW §7.04A.010 et. seq.

4. **Covered Disputes.** This Agreement applies to any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law sitting in the State of Washington and shall include, but not be limited to, all claims in law or equity arising from one Party's failure to satisfy a financial obligation to the other Party; a violation of a right claimed to exist under federal, state, or local law or contractual agreement between the Parties; tort; breach of contract; fraud; misrepresentation; negligence; gross negligence; malpractice; death or wrongful death and any alleged departure from any applicable federal, state, or local medical, health care, consumer or safety standards. Covered Dispute shall not include (1) involuntary discharge actions initiated by the Center, (2) guardianship proceedings resulting from Resident's alleged incapacity, and (3) disputes involving amounts less than \$2,000.00.

The Neutral, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to, any claim that all or any part of this Agreement is void or voidable.

Nothing in this Agreement, however, shall prevent the Resident from filing a grievance or complaint with the Center or appropriate government agency, from requesting an inspection of the Center from such agency, or from seeking a review under any applicable federal, state or local law of any decision to discharge or transfer the Resident.

All claims based in whole or in part on the same incident, transaction or related course of care or services provided by the Center to the Resident shall be addressed in a single ADR process. A claim that arose and was reasonably discoverable by the Party initiating the ADR process shall be waived and forever barred if it is not included in the Party's Request for ADR ("Request"). Additionally, any claim that is not brought within the statute of limitations period that would apply to the same claim in a court of law in the State of Washington shall be waived and forever barred. Issues regarding whether a claim was reasonably discoverable shall be resolved in the ADR process by the Neutral.

5. **Governing Law.** Except as may be otherwise provided herein, this Agreement shall be governed by the terms of the Washington Uniform Arbitration Act or such laws in the State of Washington in effect at the time of the Request for ADR, which is currently set forth at RCW §7.04A.010 et. seq. If for any reason there is a finding that Washington law cannot support the enforcement of this Agreement, or any portion thereof, then the Parties agree to resolve their disputes by arbitration (and not by recourse to a court of law) pursuant to the Federal Arbitration Act (9 U.S.C. §§ 1-16) and the Federal Arbitration Act shall apply to this Agreement and all arbitration proceedings arising out of this Agreement, including any action to compel, enforce, vacate or confirm any proceeding and award or order of an arbitrator. The mediation and/or arbitration location shall occur in the State of Washington.
6. **Administration.** ADR under this Agreement shall be conducted by Neutral and administered by an independent, impartial entity that is regularly engaged in providing mediation and arbitration services (hereinafter the "Administrator"). The Request for ADR shall be made in writing and may be submitted to DJS Administrative Services, Inc., ("DJS"), P.O. Box 70324, Louisville, KY 40270-0324, (877) 586-1222, www.djsadministrativeservices.com by regular mail, certified mail, or overnight delivery. If the Parties choose not to select DJS, or if DJS is unable to or unwilling to serve as the Administrator the Parties shall select an alternative independent and impartial entity that is regularly engaged in providing mediation and arbitration services to serve as Administrator.
7. **Process.** Regardless of the entity chosen to be Administrator, unless the Parties mutually agree otherwise in writing, the ADR process shall be conducted in accordance with and governed by the Extendicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure ("Rules of Procedure") then in effect. A copy of the Rules of Procedure may be obtained from the Center's Administrator or from DJS at the address or website listed in Section 6 of this Agreement.
8. **Mediation.** The Parties agree that any claim or dispute relating to this Agreement or to the resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law shall first be subject to mediation. The Parties agree to engage in limited discovery of relevant information and documents before and during mediation, in accord with Rule 3.02 of the Rules of Procedure. Any disputes which the Parties cannot resolve regarding the scope and limits of discovery shall be resolved as described in Rule 3.02 of the Rules of Procedure. The Parties shall cooperate with each other, the mediator and DJS prior to and during the mediation process. Claims where the demand is less than \$50,000 shall not be subject to mediation and shall proceed directly to arbitration, unless one of the Parties requests mediation, in which case, all Parties shall mediate in good faith. Mediation shall convene within one hundred twenty (120) days after the request for mediation. The Mediator shall be selected as described in Rule 2.03 of the Rules of Procedure.
9. **Arbitration.** Any claim or controversy that remains unresolved after the conclusion or termination of mediation (e.g., impasse) shall proceed to binding arbitration in accordance with the terms of this Agreement. Arbitration shall convene not later than sixty (60) days after the conclusion or termination of mediation or as otherwise specified in Rule 5.02 of the

BY SIGNING THIS AGREEMENT, the Parties acknowledge that (a) they have read this Agreement; (b) have had an opportunity to seek legal counsel and to ask questions regarding this Agreement; and (c) they have executed this Agreement voluntarily intending to be legally bound there to this 3 day of April, 2011 (the "Effective Date").

If signed by a Legal Representative, the representative certifies that the Center may reasonably rely upon the validity and authority of the Representative's signature based upon actual, implied or apparent authority to execute this Agreement as granted by the Resident.

FOR THE RESIDENT:

Signature of Resident

Robert H Coon

Print Name of Resident

4/3/11

Date

FOR THE CENTER:

Signature of Center's Representative

Jennifer Warwick

Print Name and Title of Center's Representative

4/3/2011

Date

Signature of Legal Representative for
Healthcare Decisions

Print Name and Relationship or Title
(Guardian, Conservator, Power of Attorney, Proxy)

Date

Signature of Legal Representative for
Financial Decisions

Print Name and Relationship or Title
(Guardian, Conservator, Power of Attorney, Proxy)

Date

If Resident signs with an "x" or mark, two witnesses must also sign.

Signature of Witness

Date

Signature of Witness

Date

Print Name of Witness

Print Name of Witness

FILED
JAN. 30, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MARY RUSHING as the Administrator)	No. 31055-8-III
And on Behalf of the Estate of ROBERT)	
COON, and MARY RUSHING,)	
Individually,)	
)	
Respondent,)	
)	UNPUBLISHED OPINION
v.)	
)	
FRANKLIN HILLS HEALTH &)	
REHABILITATION,)	
)	
Appellant.)	

KULIK, J. — The question here is whether the parties should be compelled to arbitrate their dispute. The trial court refused to order arbitration. We reverse and remand for a hearing to address whether the arbitration agreement is enforceable.

FACTS

Robert Coon, a 63-year-old former attorney with a history of mental illness, voluntarily admitted himself to Franklin Hills Health and Rehabilitation Center after he fell and injured himself. During the admission process, Mr. Coon allegedly signed an alternative dispute resolution (ADR) agreement with Franklin Hills. The ADR applied to



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any and all disputes arising out of or relating to the resident's stay at the center, including tort, breach of contract, fraud, negligence, wrongful death, departure from any applicable consumer or safety standards, and a variety of other causes of action. The agreement stated that the "intent of the Parties" was that the agreement "shall inure to the benefit of, bind, and survive the Parties, their heirs, successors, and assigns." Clerk's Papers (CP) at 45.

Two months later, Mr. Coon died. Mary Rushing, Mr. Coon's daughter, brought a wrongful death action against Franklin Hills in her individual capacity and as the administrator of Mr. Coon's estate. The suit alleged negligence by the nursing staff; failure of Franklin Hills to properly train, instruct, and supervise its employees; and violations by Franklin Hills of the vulnerable adult statute.

Franklin Hills moved to compel arbitration of all Ms. Rushing's claims and produced a copy of the signed arbitration agreement. Ms. Rushing opposed the motion, contending that the arbitration agreement could not be enforced because the signature on the agreement was not that of Mr. Coon and because Mr. Coon did not have the mental capacity to enter into the agreement. As evidence, Ms. Rushing submitted Mr. Coon's power of attorney, the petition to extend Mr. Coon's LRA (least restrictive alternative), Mr. Coon's mental health evaluation, an affidavit of Ms. Rushing, the ADR agreement,

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and Mr. Coon's mental health authorization to release medical information. Ms. Rushing filed an additional affidavit that addressed Mr. Coon's mental state while he was in Eastern State Hospital and what he would have been capable of understanding when he entered Franklin Hills.

In reply, Franklin Hills asserted that Mr. Coon signed the agreement and was not incapacitated at the time of signing. Franklin Hills filed declarations from six Franklin Hills' staff members who interacted with and evaluated Mr. Coon and their accompanying records and notes. Franklin Hills also filed declarations from a medical doctor and a doctor of clinical psychology who both reviewed Mr. Coon's medical records and concluded that Mr. Coon had a reasonable mental capacity for decision making at the time of admission to Franklin Hills.

At the hearing, the trial court declined to make a finding on whether the arbitration agreement was binding or enforceable. It was concerned about the potential facts that may not be in the record. As a result, the court denied the motion to stay and the motion to compel arbitration. The court said that it did not intend to strike the arbitration agreement, but advised the parties that the issue may be raised again in the same format or through a request for an evidentiary hearing. Specifically, the court stated:

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[THE COURT:] Therefore, what ultimately I am doing here is I am going to—I'm denying today the motion to stay. I'm denying that based on the fact that I haven't made a finding as to whether or not the agreement is binding and enforceable or in existence because I do not believe I can do so based on the record provided. That doesn't mean I won't come back in the same format or through a request for evidentiary hearing but I think in either event that it's going to be necessary for me to have the comfort I need to go further with this decision.

Any questions?

[MS. RUSHING]: Just so I understand, Your Honor, you're not clear on either issue, whether it's his signature or the mental competency?

THE COURT: That's true, I have questions on each. No findings one way or the other.

Report of Proceedings (RP) at 31-32.

The trial court did not order an evidentiary hearing. When asked for direction on the scope of discovery, the court's answer was vague:

[FRANKLIN HILLS]: . . . I think we're going to need direction from the Court because we would object to all kinds of discovery that don't go to these issues. That's the very purpose for having an arbitration agreement is to not do certain types of discovery and to move the case forward. So I think we're going to need some direction by the Court or perhaps maybe some suggestions or agreements as to what we could do.

On the other hand, Your Honor, I would think by law we could note this up for [an] evidentiary hearing.

THE COURT: You could do that and that would be fine. In terms of direction from the Court, I don't know exactly what you are asking the Court to give. If in fact the parties enter into some discovery or some process that one or the other thinks is inappropriate, the only way to address that for direction would be to understand each party's position on what direction it should go. But to tell you today which direction to go I think is presumptive. Maybe I'm missing both but you got a denial on your motion so it's not stayed and it's not being compelled. That's kind of where you're

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left and I think your direction now is your basic lawyering instincts on what tactical approach is best suited for your client's best interest. That's vague; I know it.

RP at 32-33. The trial court did not limit the scope of discovery to the issues of whether or not Mr. Coon signed the agreement or was competent. The trial court stated that it was not in a position to put limits on the discovery because it needed to know more about the merits of the argument. The court suggested that the parties come up with their own discovery agreement that the court would resolve any arguments or other issues that arise.

Franklin Hills appeals the denial of its motion to compel arbitration. It contends that the trial court erred in denying the motion because Ms. Rushing failed to establish by clear, cogent, and convincing evidence that Mr. Coon was incapacitated at the time he signed the ADR agreement, or that the signature on the agreement did not belong to Mr. Coon. Franklin Hills also contends that Ms. Rushing is required to arbitrate her individual cause of action according to the terms of the arbitration agreement signed by Mr. Coon.

ANALYSIS

We give de novo review to a trial court's decision to compel or deny arbitration. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213 (2009). "The party opposing arbitration bears the burden of showing that the agreement is not

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enforceable.” *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004). Washington has a strong public policy favoring arbitration. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 341 n.4, 103 P.3d 773 (2004). A trial court’s decision denying a motion to compel arbitration is immediately appealable. *Hill v. Garda CL Nw., Inc.*, ___ Wn.2d ___, 308 P.3d 635, 638 (2013).

Motion to Compel. Courts determine the threshold matter of whether an arbitration agreement is valid and enforceable. See *McKee v. AT&T Corp.*, 164 Wn.2d 372, 383-84, 191 P.3d 845 (2008). An arbitration agreement “is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.” RCW 7.04A.060(1). If a party opposes a motion to compel arbitration, “the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.” RCW 7.04A.070(1).

Standard contract defenses can be used to challenge enforceability of an arbitration agreement. *McKee*, 164 Wn.2d at 383. The person seeking to enforce a contract need only prove the existence of a contract and the other party’s objective manifestation of intent to be bound. *Retail Clerks Health & Welfare Trust Funds v. Shopland*

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Supermarket, Inc., 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). Once a party's objectively manifested intent has been established, the burden then moves to the party seeking to avoid the contract to prove a defense to the contract's enforcement. *Id.*

The signature of a party is evidence of a party's objective intent to be bound. *See id.* The trier of fact has the duty to decide the factual question of whether or not the handwriting in question belongs to the person charged with executing the document. *Mitchell v. Mitchell*, 24 Wn.2d 701, 704, 166 P.2d 938 (1946).

A contract may be invalidated if a person lacks sufficient mental capacity or competence to appreciate the nature and effect of the particular contract at issue. *Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 108-09, 120 P.2d 527 (1942) (quoting 17 C.J.S. *Contracts* § 133, at 479 (1939)). In Washington, a person is presumed competent to enter into an agreement. *Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). A person challenging the enforcement of an agreement can overcome the presumption by presenting clear, cogent, and convincing evidence that the party signing the contract did not possess sufficient mind or reason at the time he entered into the contract to enable him to comprehend the nature, terms, and effect of the contract. *Id.* "What constitutes clear, cogent, and convincing proof necessarily depends upon the character and extent of the evidence considered, viewed in connection with the

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surrounding facts and circumstances.” *Bland v. Mentor*, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

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).

“When disputes exist as to the circumstances surrounding an agreement, we remand to the trial court to make additional findings.” *Alder*, 153 Wn.2d at 350. In *Alder*, Mr. Alder sought to void an arbitration agreement for procedural unconscionability, claiming that he lacked meaningful choice in entering the contract and that he did not have a reasonable opportunity to understand the terms of the contract because of his limited ability to comprehend the English language. *Id.* at 348-49. The Washington Supreme Court determined that the circumstances suggested that Fred Lind Manor provided Mr. Alder with a reasonable opportunity to understand the terms of the agreement. *Id.* at 350-51. However, because both parties offered different facts

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pertaining to the manner in which the contract was entered into, the Supreme Court determined that it could not make a determination of procedural unconscionability without further factual findings. *Id.* The court remanded the case for the entry of additional findings. *Id.*

Here, we cannot review the trial court's denial of the motion to compel without a decision on enforceability of the arbitration agreement. Two reasons support this conclusion. First, under RCW 7.04A.070, the trial court was required to determine whether the agreement was enforceable before denying a motion to compel arbitration. The trial court expressly stated that it did not know whether the agreement was enforceable. Without such a determination, the trial court could not deny the motion to compel. Remand is necessary for the court to make the appropriate determination regarding enforceability of the arbitration agreement.

Second, much like *Alder*, unresolved factual disputes must be decided by the trial court before we can engage in review. 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

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factual findings are made can this court give de novo review to the trial court's decision on Franklin Hills' motion to compel arbitration.¹

On remand, discovery must be limited to the issues surrounding the validity of the arbitration agreement. "If a party files a motion with the court to order arbitration under this section, the court shall on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section." RCW 7.04A.070(5). The threshold question of arbitrability must be resolved without inquiry into the merits of the dispute. *Heights at Issaquah Ridge Owners Ass'n v. Burton Landscape Grp., Inc.*, 148 Wn. App. 400, 403, 200 P.3d 254 (2009).

However, a full evidentiary hearing may not be required. Whether an agreement is enforceable is to be summarily decided by the trial court. RCW 7.04A.070(1). The trial court may decide the issue of enforceability if the affidavits and evidence in the record are sufficient to summarily make a determination. If needed, the trial court should allow the parties to produce additional evidence regarding the enforceability of the arbitration agreement. *See Alder*, 153 Wn.2d at 353-54 (where the court set forth the procedure on remand for the introduction of evidence regarding costs of arbitration).

¹ *But see Weiss v. Lonquist*, 153 Wn. App. 502, 513 n.8, 224 P.3d 787 (2009) (the appellate court determined that the absence of findings and conclusions was of no consequence because the trial court did not receive testimony in relation to the motion).

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

Findings are needed in order to review the trial court's reasoning in denying the motion to compel. The matter must be remanded for the trial court to determine whether the arbitration agreement is enforceable. Discovery must be limited to the issues surrounding the validity of the arbitration agreement.

The parties also dispute whether the declarations of Franklin Hills' employees are inadmissible under the deadman's statute, RCW 5.60.030, and whether Mr. Coon's power of attorney precluded him from contracting with Franklin Hills. These issues were argued at the motion hearing but not decided by the trial court. The issues may be raised again on remand.

Individual Claims. Franklin Hills contends that Ms. Rushing's individual claims are subject to arbitration even though she did not sign the agreement because Ms. Rushing's claims arise out of the admission contract, which therefore binds her to all of its terms, including the arbitration agreement. The arbitration agreement expressly provides that it applies to all disputes that arise out of the agreement or the resident's stay at the center, and that heirs of the parties were bound by the agreement.

Generally, a nonsignatory party is not subject to an arbitration agreement signed by another. *Satomi Owners Ass'n*, 167 Wn.2d at 810. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not

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Rushing v. Franklin Hills Health & Rehab.

agreed so to submit.’” *Id.* (internal quotation marks omitted) (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)).

However as an exception, equitable estoppel “‘precludes a party from claiming the benefits from a contract while simultaneously attempting to avoid the burdens that contract imposes.’” *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 461, 268 P.3d 917 (2012) (internal quotation marks omitted) (quoting *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045-46 (9th Cir. 2009)); *see also Townsend*, 173 Wn.2d at 464 (Stephens, J., concurring/dissenting).

Again, the trial court did not make a decision on whether Ms. Rushing was bound by the arbitration agreement. Also, it is possible that this issue is irrelevant if the trial court determines that the arbitration agreement is not enforceable because Mr. Coon did not have the capacity to enter into the agreement. Therefore, even though Ms. Rushing’s obligation to arbitrate is an issue of law, remand is necessary for a resolution of the underlying factual issues that may affect this court’s decision.

Attorney Fees. Franklin Hills requests attorney fees on appeal as the prevailing party. Neither party prevailed. Thus, we decline an award of attorney fees.

No. 31055-8-III

Rushing v. Franklin Hills Health & Rehab.

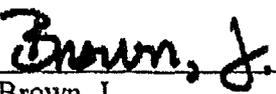
We reverse and remand for a hearing to address whether the arbitration agreement is enforceable.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

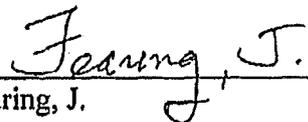


Kulik, J.

WE CONCUR:



Brown, J.



Fearing, J.



SUPERIOR COURT OF WASHINGTON
COUNTY OF SPOKANE

MARY RUSHING as the Administrator and on Behalf of
the Estate of ROBERT COON, and MARY RUSHING,
individually,

Plaintiffs,

vs.

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

Defendants.

NO. 11-2-04875-1

COURT'S DECISION

The Court held an evidentiary hearing on this matter from February 17 through February 20, 2015. The only question before the Court is whether the Alternative Dispute Resolution Agreement (hereinafter "Agreement") is valid and enforceable in light of disputes as to whether Mr. Coon was competent at the time he signed the agreement. The Plaintiffs are represented by Mark Kamitomo and Collin Harper, of the Markam Group, Inc., and George Ahrend of the Ahrend Law Firm, PLLC. The Defendants are represented by Patrick Cronin, Carl Hueber, and Caitlin O'Brien, of Winston & Cashett.

Procedurally, the Honorable Jerome Leveque previously denied the Defendant's motion to compel arbitration. Among other issues, the Defendants appealed the denial of the motion to



compel arbitration. The Court of Appeals, in an unpublished opinion, reversed and remanded for an evidentiary hearing as to whether the arbitration agreement is enforceable.

At the evidentiary hearing, testimony was offered by Jacob Deakins, MD, Lynn Bergman, MD, Janenne Yorba, Aurilla Poole, Jennifer Wujick, Ronald Klein, Ph.D., James Winter, MD, Larry Weiser, Bob Crabb, Naomi Lungstrom, RN, James Spar, MD, and Mary Rushing Green. Both parties also offered numerous exhibits.

As a preliminary matter, during the evidentiary hearing the Plaintiffs' brought a motion to dismiss the motion to compel arbitration. The Plaintiffs' motion is grounded in Franklin Hills not providing Mr. Coon the Extencicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure as referenced on page three of the Agreement. Based upon this fact, the Plaintiffs claim the parties lacked mutual assent. The Plaintiffs' filed a memorandum in support of their motion to dismiss. At the evidentiary hearing, the Court inquired as to whether the Defendants desired an opportunity to respond in writing. The Defendants declined, stating they would address the motion in their closing argument. The Defendants subsequently filed a response to the motion to dismiss. In relying on Defendants earlier assertion, the Court did not consider their written response in deciding this matter.

It is undisputed that Franklin Hills did not provide Mr. Coon with the Extencicare Health Services, Inc. Alternative Dispute Resolution Rules of Procedure referenced in the Agreement. This, however, is not fatal to the enforcement of the Agreement. As stated in the Agreement, the Extencicare Health Services, Inc., Alternative Dispute Resolution Rules of Procedure "may be obtained from the Center's Administrator or from DJS at the address or website listed in Section 6 of this Agreement." *Plaintiffs' Motion to Dismiss*, Ex. 2, Pg. 3, Sec. 7.

Ms. Wujick informed Mr. Coon that he had the opportunity to take the Agreement with him to be either signed or rejected within 30 days. Ms. Wujick also informed Mr. Coon that he had the right to seek advice from an attorney prior to entering into the Agreement. The

responsibility to acknowledge the contents of a contract rests upon each party individually. "It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents." National Bank of Washington v. Equity Investors, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973) *citing* Perry v. Continental Ins. Co., 178 Wash. 24, 33 P.2d 661 (1934).

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 912-13. The Plaintiffs' motion to dismiss the motion to compel arbitration is therefore denied.

FINDINGS OF FACT

After reviewing the evidence and being mindful of the arguments of the parties, the Court hereby enters the following findings facts:

1. Robert Coon was diagnosed with mental illness more than three decades ago.
2. During a majority of his life, Mr. Coon lived independently as he continually sought treatment for his mental illness. Indeed, Mr. Coon graduated from Gonzaga University School of Law, passed the bar exam, and practiced law for a brief period of time.

3. At no time during Mr. Coon's life was he ever under a guardianship, deemed incompetent, or granted power of attorney to another.
4. During the course of Mr. Coon's life, his mental illness was treated, but his cognition gradually decreased. This was due to aging as well as his diagnosed schizoaffective disorder and dementia.
5. Other than temporary mental illness related problems, once Mr. Coon's cognition decreased it would not return to previous levels.
6. 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.
7. This power of attorney became effective upon Mr. Coon's disability and granted his daughter, Mary Rushing, authority over his finances, his medical treatments, the withdrawal or withholding of life-sustaining treatments for him, and the disposition of his remains.
8. On February 1, 2011, Dr. Jacob Deakins requested Mr. Coon complete a hemocult test after an initial exam revealed Mr. Coon had an enlarged prostate. After explaining the procedure and cost to Mr. Coon, as well as the lack of insurance funding for this procedure, Mr. Coon declined the test.
9. 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." D-9, pp. 273-74.
10. On March 25, 2011, Mr. Coon again saw Dr. Mulvihill. Dr. Mulvihill reported in his formal Mental Status Examination that Mr. Coon's "Thought process is

concrete. Insight and judgment is fair. Concentration is normal. He is alert and oriented times four." D-9, pp. 276-77.

11. 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.
12. On April 1, 2011, Mr. Coon moved from Cherrywood Place to Franklin Hills Health and Rehabilitation Center as he needed greater assistance than Cherrywood Place could offer. 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. D7, p. 311.
13. On April 3, 2011, Mr. Coon sat in the dining room of Franklin Hills with Ms. Wujick and reviewed a number of documents related to his residency at Franklin Hills. During this meeting, Mr. 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.
14. Mr. Coon signed every document presented to him. Of importance, Ms. Wujick provided Mr. Coon with the Agreement. She informed Mr. Coon 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.
15. On April 3, 2011, Mr. Coon, after asking a couple of questions, signed the Agreement in the presence of Ms. Wujick.

16. The signature on the Agreement is comprised of Mr. Coon's initials, rather than his entire name.
17. On April 7, 2011, Mr. Coon was given a cognition test. The conclusion of the evaluation performed on Mr. Coon showed he scored 15 out of 15.
18. Defendants' expert witnesses, Ronald Klein, Ph.D. and James Winter, MD, concluded that Mr. Coon possessed the requisite level of competence to enter into the Agreement.
19. Plaintiffs' expert witness, James Spar, MD, concluded Mr. Coon possessed enough cognitive functioning to allow him to appreciate the difference between arbitrating a claim versus using traditional court intervention, but lacked the cognitive functioning necessary to appreciate the negative consequences associated with the Agreement (that being a reduced monetary award).
20. Dr. Spar further concluded that Mr. Coon possessed a level of cognitive functioning necessary to execute his power of attorney as well as a will.

CONCLUSIONS OF LAW

After considering the evidence and being mindful of the arguments of counsel, the Court enters the following conclusion of law:

The Defendants' filed a motion to compel arbitration. Once such motion is filed, it then becomes the court's obligation to determine whether the arbitration agreement is valid and enforceable. See McKee v. AT&T Corp., 164 Wn.2d 372, 383-84, 191 P.3d 845 (2008). If the other party opposes the motion to compel arbitration, "the court shall proceed summarily to decide the issue." RCW 7.04A.07(1). Here, the Court of Appeals directed the trial court to summarily decide the issues surrounding the enforceability of the arbitration agreement. In doing so, the Court of Appeals allowed the trial court to decide the issue of enforceability on affidavits and evidence in the record alone. A full evidentiary hearing may not have been

required. Given the nature of the Plaintiffs' assertions that the Agreement is not enforceable, the Court authorized a four day evidentiary hearing.

Under both Washington law as well as federal law, a strong public policy favoring arbitration is recognized. Satomi Owners Ass'n v. Satomi, LLC, 167 Wn.2d 781, 810, 225 P.3d 213, 229 (2009). It is the courts duty to determine whether an arbitration agreement is valid and enforceable, and the party who seeks to avoid arbitration bears the burden of showing that the agreement is not enforceable. McKee v. AT&T Corp., 164 Wn.2d 372, 383, 191 P.3d 845, 851 (2008). An arbitration agreement is enforceable unless the court finds a legal or equitable basis for revocation of contract. RCW 7.04A.060(1).

Initially, the party seeking to enforce an arbitration agreement must only prove the existence of a contract and the other party's objective manifestation of the intent to be bound. Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc., 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). A party's signature on a contract shows an objective manifestation of the signor's intent to be bound to the contract. Retail Clerks, 96 Wn.2d at 944. After the proponent of the contract presents such evidence, the burden then shifts to the opponent to prove a defense to contract enforcement. Id.

On April 3, 2011, Jennifer Wujick, Franklin Hills' admission assistant, witnessed Mr. Coon sign, among other documents, the Agreement. After she witnessed Mr. Coon sign the Agreement, Ms. Wujick signed it. Based upon the Plaintiffs' concession that Mr. Coon signed the agreement, as well as the direct evidence provided by Ms. Wujick, the Court concludes the signature on the Agreement is that of Mr. Coon. Therefore, the Defendant (proponent of the enforceability of the Agreement) has met its burden of establishing the existence of a contract and of Mr. Coon's objective manifestation of his intent to be bound by it.

After the proponent of arbitration establishes the party's objectively manifested intent to be bound, the burden shifts to the opponent of the arbitration agreement to prove a defense to

the contractual agreement. See McKee, 164 Wn.2d at 383. One such defense is if the person lacks the mental capacity or competence to appreciate the nature and effect of the contract at issue. Page v. Prudential Life Ins. Co. of Am., 12 Wn.2d 101, 108-9, 120 P.2d 527 (1942).

While in Washington there is a presumption that a person is competent to enter into an agreement, the person challenging such agreement may overcome the presumption by presenting "clear, cogent and convincing" evidence that the party signing the contract lacked sufficient mind or reason at the time he entered into the contract. Grannum v. Berdard, 70 Wn.2d 304, 307, 422 P.2d 812 (1967). The clear, cogent, and convincing burden has been defined as something greater than a preponderance of the evidence and less than beyond a reasonable doubt. Holmes v. Raffo, 60 Wn.2d 421, 374 P.2d 536 (1962); Matter of McLaughlin, 100 Wn.2d 832, 676 P.2d 444 (1984). "Substantial evidence must be 'highly probable' where the standard of proof in the trial court is clear, cogent, and convincing evidence." Dalton v. State, 130 Wn.App. 653, 666, 124 P.3d 305, 312 (2005) quoting In re Marriage of Schweitzer, 132 Wn.2d 318, 329, 937 P.2d 1062 (1997).

When a person possesses sufficient mental capacity to understand the nature of the contract, it is not invalidated because the person is aged, mentally weak, or insane. Page, 12 Wn.2d at 108. Incidents remote in time are irrelevant to the mental capacity of the party at the time of the contract; therefore, the party disputing competence must show that a mental unsoundness or insanity both occurred at the time of the transaction and were of such character that he had no reasonable perception or understanding of the nature and terms of the contract. See Page, 12 Wn.2d at 109-10. The trial court determines whether the evidence meets the clear, cogent, and convincing standard because the determination requires weighing and evaluating evidence and credibility determinations, viewed in connection with the surrounding facts and circumstances. Bland v. Mentor, 63 Wn.2d 150, 154, 385 P.2d 727 (1963).

It is undisputed that Mr. Coon suffered from schizoaffective disorder with a bi-polar component. The diagnosis did not render Mr. Coon incompetent, but did impact his cognitive abilities. Certainly, this cognitive deficit can be seen in the records from Mr. Coon's numerous visits with his psychiatrist, Dr. Mulvihill. In fact, on both March 11, 2011 and March 25, 2011, Dr. Mulvihill noted Mr. Coon's cognitive functioning as "thought process is concrete. Insight and judgment is fair. Concentration is normal. He is alert and oriented."

Of all the expert testimony presented, this Court affords the greatest weight to that of Dr. Spar. Dr. Spar was the only board certified psychiatrist to testify at the evidentiary hearing. The opinions rendered by Dr. Spar were based on his vast experience working in the psychiatric field at UCLA. Dr. Spar's testimony provided that cognitional deficiencies related to schizoaffective disorder and/or dementia present at various ranges conditioned on a number of factors. The range of the continuum would show Mr. Coon's capacity to accomplish day to day tasks while also indicating his inability to appreciate the potential negative consequences of his decisions.

In reviewing the evidence, the Court finds it compelling that Mr. Coon did not agree to everything presented to him. Rather, Mr. Coon was able to process certain situations and make decisions based upon the information before him. An example of this can be found in his decision to forego a medical test recommended by his physician. On February 1, 2011, Dr. Deakins requested Mr. Coon complete a hemocult test after an initial exam revealed Mr. Coon had an enlarged prostate. After explaining the procedure and cost to Mr. Coon, as well as the lack of insurance funding for this procedure, Mr. Coon declined test.

After reviewing numerous records related to Mr. Coon's mental illness, Dr. Spar concluded that Mr. Coon possessed sufficient cognitive functioning to understand the difference between arbitrating any potential claims against Franklin Hills versus using traditional court intervention to resolve any potential claims against Franklin Hills. However, according to Dr.

Spar, Mr. Coon would not have been able to understand the negative aspects of the Agreement (that being the potential for a reduced award). Dr. Spar further opined that Mr. Coon possessed an appropriate level of cognitive functioning to execute both his power of attorney and a will, but lacked the level of cognitive functioning necessary to enter into the Agreement. According to Dr. Spar, this conclusion was based upon the power of attorney and will not have the same negative consequences as the Agreement.

In reviewing the Agreement and Mr. Coon's power of attorney, the Court is unable to accept the distinction provided by Dr. Spar. 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 Agreement. The Agreement is a six-page document whereby the parties agree to resolve their disputes through alternative dispute resolution. This process may favor Franklin Hills, but may also favor Mr. Coon as it is an expedient and cost saving manner of resolving disputes.

In the Agreement, Mr. Coon agreed to arbitrate any potential claims against Franklin Hills rather than seek court intervention. This decision is minor compared to executing his power of attorney. A power of attorney delegates authority from one person to another. A power of attorney is used to allow agents to bind the principals in certain affairs. Here, on November 9, 2010, Mr. Coon executed a springing power of attorney appointing Ms. Rushing as his attorney-in-fact. Once the springing power of attorney were to become effective, Ms. Rushing would have absolute power over Mr. Coon's assets and liabilities, all powers necessary to make health care decisions on his behalf (including authorizing surgery, medication and the withholding or withdrawing of life-sustaining treatment), and upon death, authority to control the disposition of his remains.

Similar to a power of attorney, choosing to arbitrate a potential claim against Franklin Hills rather than seek court intervention is minor compared to executing a will. 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 Agreement. Dr. Spar's conclusion that Mr. Coon lacked sufficient mental capacity to execute the Agreement is premised on Dr. Spar's perceived negative consequences involved in arbitrating claims. Washington's public policy, however, strongly favors alternative dispute resolution such as arbitration. See Satomi Owners Ass'n v. Satomi, 167 W.2d 781, 810, 225 P.3d 213, 229 (2009). Clearly, appointing another power of attorney over finances, medical treatments, withdrawing or withholding life-sustaining treatments, and the disposition of remains has substantially greater consequences than possibly receiving a reduced monetary award of a potential claim.

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.

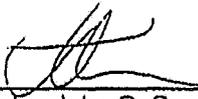
Here, the Defendants have the burden of proving the existence of a contract and Mr. Coon's objective manifestation to be bound. The Defendants have met their burden. The Plaintiffs then have the burden of proving by clear, cogent, and convincing evidence that Mr. Coon was not competent when he entered into the Agreement. After considering all of the evidence, the Court concludes that the Plaintiffs have not met their burden. Rather, the

evidence showed that Mr. Coon did have the cognitive ability to appreciate the nature and effect of the consequences of the Agreement.

CONCLUSION

Based upon the foregoing, the Defendants' motion to compel arbitration is granted.

DATED this 3rd day of March, 2015.



Judge John O. Cooney

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SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

MARY RUSHING as the Administrator
and on Behalf of the Estate of ROBERT
COON, and MARY RUSHING,
individually,

Plaintiff(s),

v.

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

Defendant(s).

) NO. 11-2-04875-1

) NOTICE OF DISCRETIONARY REVIEW
) TO THE SUPREME COURT

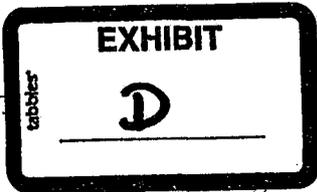
Plaintiff, Mary Rushing, through undersigned counsel, seeks review by the
Supreme Court of the Court's Decision entered on March 3, 2015. A copy of the decision
is attached to this notice.

DATED this 30th day of March, 2015.

AHREND LAW FIRM PLLC

George M. Ahrend

George M. Ahrend, WSBA #25160
Co-Attorneys for Plaintiff



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Counsel for Plaintiffs:

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Counsel for Defendants

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DECLARATION OF SERVICE

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

On the date set forth below, I served the document to which this is appended via First Class Mail, postage prepaid, and/or email, as follows:

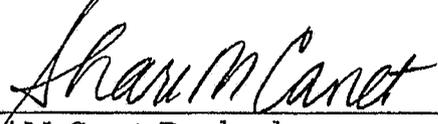
Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pjc@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

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

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

Signed at Ephrata, Washington on ^{Mar.} April 30, 2015.



Shari M. Canet, Paralegal

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Hon. Judge John O. Cooney
Hearing Date: Apr. 10, 2015
Time: 4:00 p.m.

SUPERIOR COURT OF WASHINGTON FOR SPOKANE COUNTY

MARY RUSHING as the Administrator
and on Behalf of the Estate of ROBERT
COON, and MARY RUSHING, individually

No. 11-2-04875-1
PLAINTIFF'S RENEWED MOTION
RE: RIGHT TO TRIAL BY JURY

Plaintiff(s),

vs.

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

Defendant(s).

I. MOTION

Plaintiff moves the Court for the following relief:

1. Stay of the arbitration of Plaintiff's survival claim until after jury trial of her wrongful death claim because:

a. Defendants have argued that the arbitration may give rise to collateral estoppel/issue preclusion with respect to the wrongful death claims, which the court held were non-arbitrable pursuant to *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 231 P.3d 1252 (2010); and



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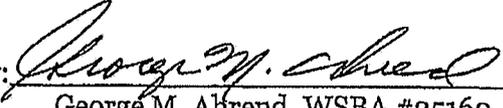
b. Such preclusive effect would violate Plaintiff's right to trial by jury under the Washington Constitution, Article I, § 2, which provides that "[t]he right of trial by jury shall remain inviolate[.]"

II. BASIS

This motion is based on the memorandum in support of Plaintiff's motion re: right to trial by jury, filed previously herein.

DATED March 9, 2015.

AHREND LAW FIRM PLLC
Co-Attorney for Plaintiffs

By: 
George M. Ahrend, WSBA #25160

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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 the date set forth below, I served the document to which this is annexed by [] personal delivery, [X] email and/or [X] First Class Mail, postage prepaid, as follows:

Patrick J. Cronin, Carl E. Hueber, & Caitlin E. O'Brien
Winston & Cashatt
601 W. Riverside Ave., Ste. 1900
Spokane, WA 99201-0695

Email: pjc@winstoncashatt.com
Email: ceh@winstoncashatt.com
Email: ceo@winstoncashatt.com

Signed at Ephrata, Washington on March 9, 2015.



Shari M. Canet, Paralegal

MAR 13 2015

GRAND COUNTY CLERK

RECEIVED

MAR 13 2015

DEPT. #9

Hon. John O. Cooney
Hearing Date: 4/10/2015
Hearing Time: 3:00 p.m.

RECEIVED
MAR 13 2015
The Markam Group, Inc., P.S.
Attorneys at Law

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

MARY RUSHING as the Administrator and
on Behalf of the Estate of ROBERT COON,
and MARY RUSHING, individually,

Plaintiff,

No. 11-2-04875-1

vs.

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

Defendants.

DEFENDANTS' CROSS MOTION TO
STAY MARY RUSHING'S WRONGFUL
DEATH CLAIM PENDING ARBITRATION

Defendants move the Court for an order staying the non-arbitrable wrongful death claim of plaintiff Mary Rushing pending the outcome of arbitration on Mr. Coon's estate claim. This motion is based on defendants' memorandum filed in support, and the files and records herein.

DATED this 13th day of March, 2015.


PATRICK J. CRONIN, WSBA No. 28254
CARL E. HUEBER, WSBA No. 12453
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DEFENDANTS' CROSS MOTION TO STAY MARY
RUSHING'S WRONGFUL DEATH CLAIM
PENDING ARBITRATION
PAGE 1

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EXHIBIT
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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 the 13th day of March, 2015, at Spokane, Washington, the foregoing was caused to be served on the following person(s) in the manner indicated:

Mark D. Kamitomo
The Markam Group, Inc., P.S.
421 W. Riverside, Suite 1060
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VIA REGULAR MAIL
VIA CERTIFIED MAIL
HAND DELIVERED
BY FACSIMILE
VIA FEDERAL EXPRESS

Attorney for Plaintiff

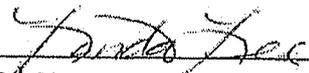
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DATED at Spokane, Washington, this 13th day of March, 2015.



Linda Lee

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

MARY RUSHING, as the)
 Administrator and on)
 Behalf of the Estate of)
 ROBERT COON, and MARY) No. 11-2-04875-1
 RUSHING, individually,)
 Plaintiff,)
)
 v.)
)
 FRANKLIN HILLS HEALTH &)
 REHABILITATION CENTER,)
 MELISSA CHARTNEY, R.N.,)
 AURILLA POOLE, R.N.,)
 JANENE YORBA, Director of)
 Nursing,)
 Defendants.)

 COPY

HONORABLE JOHN O. COONEY
 VERBATIM REPORT OF PROCEEDINGS
 APRIL 10, 2015

APPEARANCES:

FOR THE PLAINTIFF: GEORGE M. AHREND
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 Spokane County Superior Court, Dept. 2

EXHIBIT
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1 VERBATIM REPORT OF PROCEEDINGS

2 APRIL 10, 2015

3 THE COURT: Good afternoon. Mr. Ahrend, based upon
4 where you're sitting, maybe I'll have you introduce these
5 matters.

6 MR. AHREND: Sure. I'd be happy to. So this case
7 is Mary Rushing, individually and on behalf of the Estate of
8 Robert Coon, against Franklin Hills Health and
9 Rehabilitation Center and certain individual defendants,
10 Cause No. 11-2-04875-1. I'm George Ahrend for Ms. Rushing,
11 and with me at counsel table is Collin Harper.

12 We've got three motions, as I count them, on the
13 table today. One is to correct the record of the
14 evidentiary hearing that was held previously in this matter.
15 The second is a motion filed by Ms. Rushing to stay
16 arbitration pending trial of the wrongful death claims of
17 Mary Rushing in her individual capacity; and the third
18 motion is a motion to stay -- kind of the converse of that,
19 to stay litigation of the wrongful death claims pending
20 arbitration of the survival claims of the estate, filed by
21 the defendants.

22 THE COURT: Thank you. In addition to the motions,
23 it appears that there's also a request for presentments on a
24 couple of orders, one being that of the evidentiary hearing,
25 and the second being the Court's order regarding

1 Ms. Rushing's right to trial. I saw there was some proposed
2 orders.

3 MR. HUEBER: I have the originals, Judge.

4 THE COURT: And Mr. Harper, Mr. Ahrend, have you had
5 a chance to review those orders?

6 MR. AHREND: We have. We have no objection to the
7 order on the -- the order on summary judgment finding that
8 Ms. Rushing's claims are not subject to arbitration. And
9 the only comment, really -- we have filed some objections to
10 the proposed findings, but really the primary objection to
11 the findings is that the Court's prior order, I thought,
12 complied with the requirements of the rule, and no further
13 order would be necessary.

14 THE COURT: I think an order is still required even
15 though the Court did present that. I also noted your
16 objections and the plaintiff's objections to the Court's
17 findings. There's a number of objections. In reviewing
18 those objections, I think there is one correction that needs
19 to be made to the Court's findings.

20 Mr. Hueber, I can insert that correction.

21 MR. HUEBER: May I approach, Your Honor?

22 THE COURT: Yes. Thank you.

23 I note the plaintiff's objections to the findings of
24 fact; and, as I indicated, I have reviewed those. The one
25 finding that I think the Court may have made that isn't

1 supported by the evidence is the third objection of the
2 plaintiff. That's in regards to finding No. 8.

3 Finding No. 8 is on February 1, 2011, Dr. Jacob
4 Deakins, D-E-A-K-I-N-S, requested Mr. Coon to complete a
5 hemoccult test after an initial exam revealed Mr. Coon had
6 an enlarged prostate. After explaining the procedure and
7 cost, Mr. Coon -- as well as a lack of insurance pending
8 before this procedure -- Mr. Coon declined the test.

9 There's an issue about whether or not Dr. Deakins
10 provided that information to Mr. Coon. Someone provided it
11 to him. Whether or not it was specifically Dr. Deakins, I
12 can't recall. So the Court's going to change that finding.
13 The second sentence will read: "After the procedure and
14 costs were explained to Mr. Coon." So I just left out that
15 Dr. Deakins explained that. So otherwise, I will note the
16 plaintiff's objections to the other findings, and that order
17 will be entered.

18 Secondly, the order regarding the right to trial of
19 Ms. Rushing will be entered. It looks like we'll need the
20 parties to sign off on both of these orders. We can do that
21 at the end of today's hearing.

22 As far as the three remaining motions are concerned,
23 I don't know which motion would like to go first. Is there
24 any preference?

25 MR. HUEBER: I don't have a preference, Judge.

1 MR. AHREND: Neither do we, Your Honor.

2 THE COURT: Mr. Ahrend, we'll take your motion
3 first, that being the motion to stay arbitration or the
4 motion to allow Ms. Rushing proceed to trial, whenever
5 you're ready.

6 MR. AHREND: Thank you, Your Honor. May it please
7 the Court. For the record, I'm George Ahrend on behalf of
8 the plaintiff. And I should say I have bilateral ear
9 infections so I'm having a bit of difficulty hearing. So if
10 I seem not to hear, that's the reason why.

11 We have filed a motion -- or really, we've renewed a
12 motion that was filed shortly before the evidentiary hearing
13 was heard in this matter. And the substance of the motion
14 is to seek a stay of arbitration of the estate's survival
15 claims pending litigation of Ms. Rushing's wrongful death
16 claims.

17 And the reason for this request for a stay is the
18 potential -- and at this point in time, I don't want to be
19 heard to say that collateral estoppel will necessarily arise
20 as a result of the arbitration proceeding because we really
21 don't know what's going to happen in the course of those
22 arbitration proceedings.

23 And there's questions about whether, as we know,
24 collateral estoppel is an inequitable doctrine that
25 precludes re-litigation of certain factual issues under

1 certain circumstances. But the equitable constraints on
2 that doctrine might come into play where we've got an
3 arbitration like this that is limited in scope; it's limited
4 in length of time; it's limited in the discovery that's
5 available; and there are other factors that being here in
6 this arbitration that may make it adjust to collateral
7 estoppel.

8 So we come to the Court at this juncture where the
9 posture of the case is at least the defendants have
10 announced their intention to claim collateral estoppel as a
11 result of the arbitration proceedings, and we face a risk of
12 that even if we don't necessarily agree that collateral
13 estoppel is appropriate. And so in the face of collateral
14 estoppel, Ms. Rushing seeks to have the arbitration stayed
15 so she can be sure and get the constitutional right to jury
16 trial to which our constitution provides to her.

17 Now, it is, of course, true that the doctrine of
18 collateral estoppel, equitable though it is, does not
19 necessarily implicate the right to trial by jury so that the
20 application of collateral estoppel in any given case doesn't
21 violate the right to trial by jury simply because the
22 initial form in which litigation took place did not have an
23 entitlement to a right to jury trial. However, in the
24 *Nielson v. Spanaway* case, I think we've got some language
25 from the Supreme Court suggesting, at least -- not holding,

1 and I admit that -- but suggesting that that might be
2 limited to situations where the plaintiff chooses to
3 litigate.

4 In that case, it was a federal tort claims act case.
5 There's another case that's cited by the defendants in their
6 materials that involves administrative proceedings, where
7 the plaintiff chooses to litigate first in a form to which
8 no right of jury trial attaches. Then the subsequent
9 application of collateral estoppel to preclude re-litigation
10 of those matters that were decided factually in a subsequent
11 jury trial context did not violate -- it did not violate the
12 jury trial to apply collateral estoppel in that context.

13 But *Nielson* seems to contemplate that a party can --
14 in order to preserve and not essentially waive by pursuing
15 this alternative remedy first, in order preserve the
16 constitutional right to jury trial, requests a stay of the
17 non-jury proceedings. So based on that authority, that is
18 what we are asking for in this case.

19 So then the question is, well, does the Court have
20 the authority to stay arbitration pending litigation of the
21 wrongful death claims? And it's not -- it's one of those
22 situations where you have to decide, really, in the absence
23 of clear guidance whether the lack of expressed permission
24 must be equated with a prohibition against a stay or whether
25 it allows the Court freedom to act under these

1 circumstances.

2 We've both gone through, both sides, and I think
3 there is general agreement when I see the reply brief from
4 the defendants that there's no controlling authority in the
5 text of the arbitration act that says you can or cannot do
6 this. And so then we're left with, okay, how do we
7 interpret and imply the statute properly in the absence of
8 more specific guidance from the language of the statute
9 itself?

10 We fall back -- the plaintiffs fall back on the rule
11 of what we call constitutional construction, which is that
12 in the absence of any more explicit guidance, the Court
13 should choose the construction of the statute that most --
14 is most protective of constitutional rights, construes the
15 statute in a way that is protective and promoting of those
16 constitutional rights we've cited.

17 That's a fairly well-settled principle. Generally,
18 it's applied with ambiguous statutes as opposed to a statute
19 that just doesn't speak to this issue, but I would submit
20 that the absence of clear guidance in the text of the
21 statute creates an ambiguity in this regard.

22 And so our first request to the Court is to stay the
23 arbitration of the survival claims so that the wrongful
24 death claims can be litigated in front of a jury; and then
25 if there's any collateral estoppel implications of that

1 determination that's made by a jury, that can be applied by
2 the arbitrator in the course of arbitration and be
3 subsequent to the jury trial. So it's not a matter of
4 resisting arbitration at this point. It's just a matter of
5 sequencing the arbitration.

6 Now, if the Court is inclined to -- I don't know if
7 you want me to respond to their motion. It's kind of all
8 part of the same issue because we get the cross motion,
9 essentially, from the defendants to do the reverse. And the
10 general -- the gist of the argument there is, again, we
11 don't have explicit guidance.

12 We would admit that certainly the Court has
13 discretion to stay the litigation of the wrongful death
14 claims just like I believe it has discretion to stay the
15 arbitration. But the question is a matter of efficiency or
16 economy or of having litigation proceed on two tracks. And
17 what I would say in this regard is arbitration is a matter
18 of contract and honoring agreements to arbitrate.

19 Sometimes that is expressed in terms of a policy in
20 favor of expeditious resolutions of disputes. But really,
21 the economy and efficiency that purports to, in here and
22 arbitration, is subordinate to the principle of contract.
23 And this Court has already ruled that the contract does not
24 obligate Ms. Rushing to arbitrate her wrongful death claims
25 even though it obligates her, according to the Court's

1 ruling, to arbitrate the survival claims.

2 That contract basis for arbitration has to take
3 precedence over any policy considerations about efficiency
4 or economy. So if the Court is not willing to grant our
5 motion, we ask that the Court would at least not grant the
6 defendant's motion to stay litigation because the principle
7 of contract that underlies arbitration takes precedence over
8 any issues of economy or efficiency. Do you have any
9 questions for me, Your Honor?

10 THE COURT: I don't. Thank you.

11 MR. AHREND: Thank you.

12 THE COURT: Mr. Hueber, if you'd like to respond his
13 motion and also make your motion at the same time.

14 MR. HUEBER: Sure, Judge. There are basically cross
15 motions; and I think my argument, I've tried to incorporate
16 both positions. So I don't intend to argue them separately.

17 Judge, why are we here? Well, the Court of Appeals
18 directed that you conduct a hearing on whether Mr. Coon was
19 competent when he signed the ADR agreement. If he's
20 competent, we go to arbitration. If he wasn't competent, we
21 go to court. You've ruled that Mr. Coon was competent; we
22 go to arbitration.

23 This is where we've been trying to go since we filed
24 our motion to compel on June 5th, 2012, which was nearly
25 three years ago. The ADR provides that the arbitration will

1 be complete within 180 days. Had it not been opposed, it
2 would've been completed over two years ago. After today, it
3 should be completed within 180 days. We've already
4 initiated that process. As required by statute, Title 7,
5 and our directive from the Court of Appeals, if Mr. Coon is
6 competent, you compel arbitration, which you've done. We
7 get to go to arbitration now.

8 Once you've compelled arbitration, the arbitrator,
9 pursuant to the parties' contract, takes over the case.
10 Now, we argued the same motion on February 3rd, which I
11 believe was the Friday before our hearing started; and at
12 that hearing, at Page 14, Mr. Kamitomo argued: If the Court
13 decides arbitration is appropriate, then the Court loses
14 jurisdiction over the case and has no ability to control it.
15 And that was a proper statement of the law.

16 You have ordered and compelled arbitration. I think
17 by operation of law, you no longer have jurisdiction to stay
18 that. I think the plaintiff has attempted to portray this
19 issue as merely being one of sequencing; who gets to go
20 first. And the plaintiff wants to go first to preserve her
21 right to a jury trial. And the problem with this argument
22 is that the case law is clear that the preclusive effect of
23 arbitration does not impact the right to a jury trial.

24 The arbitration, again, is going to be decided
25 within six months. The arbitrator will decide whether the

1 defendants were negligent and whether such negligence caused
2 Mr. Coon's death. If no negligence is found, the derivative
3 wrongful death claim is moot. If negligence is found, then
4 liability may be established, and the only issue for the
5 jury will be the issue of damages.

6 The argument that the operation of an arbitration
7 decision as collateral estoppel somehow deprives Ms. Rushing
8 of her right to a jury trial, I'd submit, is disingenuous,
9 at best. The law here, unlike many areas, is crystal clear.
10 It does not violate her right to a jury trial. In fact, the
11 *Robinson v. Hamed* case addressed the specific argument, and
12 it said, and I quote, "is totally without merit," end quote.

13 So, Judge, I submit now that you've compelled
14 arbitration, you have the discretion to stay Ms. Rushing's
15 wrongful death court action. There's no shortage of cases
16 that talk about your discretion in making that decision.
17 But the law is clear; non-arbitrable claims may be stayed
18 while the arbitration proceeds.

19 Now, as Mr. Ahrend has suggested you should let them
20 both just go forward at the same time, this would result in
21 tremendously inefficient and duplicative litigation. Both
22 claims are based on identical allegations that the
23 defendants caused Mr. Coon's death. The parties agreed to
24 arbitrate this claim. They agreed to follow the rules that
25 control that arbitration, and arbitration is favored. To

1 allow both to proceed will result in an extraordinary waste
2 of not only judicial resources, but also time and money to
3 the parties.

4 The argument that you can or should stay the
5 contractually-agreed arbitration while Ms. Rushing pursues a
6 derivative claim in court to verdict, apparently through
7 appeal as well, is novel. There's no support for this
8 argument. In fact, the law is contrary. To stay the
9 arbitration now, even assuming you had jurisdiction to do
10 so, would deprive the parties of their contractually-agreed
11 upon mechanism to resolve disputes.

12 The parties did not agree to wait for years to
13 arbitrate their claim while some of the issues may be
14 decided in a separate court proceeding. So, Judge, we're
15 asking you to stay the litigation. Let us go to
16 arbitration. We'll have a decision in six months. At that
17 point, we can sort out what, if anything, that means to the
18 derivative action that Ms. Rushing has. Thank you.

19 THE COURT: Thank you. Mr. Ahrend?

20 MR. AHREND: The idea that this motion is totally
21 without merit comes from this *Robinson v. Hamed* case where
22 the party had already not only just submitted first to
23 arbitration in a non-jury form, but initiated, as I recall
24 the case, the litigation in the non-jury form.

25 And the reason that case is distinguishable and the

1 reason that we fall within what we believe is a safe harbor
2 in the *Nielson v. Spanaway* case and the reason that this
3 motion is not totally without merit, but is meritorious, is
4 because we're asking for this in advance. That's why the
5 cases that defense relies on aren't applicable to the motion
6 as it comes before the Court in this context.

7 And I hear Mr. Hueber say something slightly
8 different in his oral argument with respect to the Court's
9 authority than I hear or see in the defendant's reply brief,
10 and that is an argument now that the Court has lost
11 jurisdiction. And I wasn't present at the hearing where
12 Mr. Kamitomo was quoted as speaking, and I'm assuming that
13 Mr. Hueber is accurately attributing those remarks to him.
14 That -- that -- obviously, Mr. Kamitomo's remarks are not
15 controlling.

16 I think the briefing reveals there's no controlling
17 authority either way, and so the Court has to exercise its
18 discretion. If the Court truly believes it has lost
19 jurisdiction to stay arbitrable proceedings, then I think it
20 would be important to note that for the record and in the
21 order so that the question of stay of the arbitrable
22 proceedings could be brought to the arbitrator without fear
23 or an argument coming from the other side that -- if the
24 Court here is stepping back, not having to face an argument
25 in front of the arbitrator that the Court has already

1 decided the issue.

2 I think it's different to say the Court is deciding
3 the issue and not staying it. That's a separate question
4 from whether the Court is saying, "I'm not going to decide
5 that because I've lost jurisdiction. I'm going to let the
6 arbitrator decide that." Because if the Court truly does
7 believe it doesn't have jurisdiction, we would like to have
8 the option to make that motion in front of the arbitrator
9 that the jury trial right should be prioritized over the
10 contractual agreement to arbitrate a subset of the claims
11 that are here.

12 I don't hear much disagreement -- the last thing
13 I'll say -- over the fact that contract is the basis for
14 arbitration. And the reason -- you know, we may be a long
15 ways down the road. But the reason we're a long ways down
16 the road is the defendants were trying to force arbitration
17 of claims that this Court has not found arbitrable. We
18 contested, certainly, the arbitrability of all claims. They
19 sought the arbitration of all claims and were partially
20 successful.

21 I don't think that the fact that it has taken some
22 time, including a resort to the Court of Appeals by the
23 defense in this case, I don't think the time -- the fact
24 that some time has elapsed is a reason to deny the motion
25 for stay of arbitration at this point or a legally

1 cognizable reason why, if the Court is not inclined to deny
2 a stay of arbitration, that somehow litigation should be
3 stayed.

4 The fact is there are claims here that are not
5 arbitrable, and there's no -- if it weren't for the
6 arbitration, they wouldn't have to be stayed. And so
7 because they're not arbitrable, we should treat them as if
8 there is no arbitration and at least allow them to go
9 forward. Thank you, Your Honor.

10 THE COURT: Thank you.

11 You have an opportunity to reply to your motion.

12 MR. HUEBER: Judge, I just have two comments. One
13 is apparently we're going to relitigate all of these issues
14 again before the arbitrator. If we are, so be it; let's go
15 do it. Second, there's a statement that there's no
16 controlling authority, and I'd submit there is. The Court
17 of Appeal's opinion, which is the law of this case, said if
18 Mr. Coon is competent, you go to arbitration. Title 7 says
19 if there's a valid arbitration agreement, the parties shall
20 go to arbitration. Thank you.

21 THE COURT: Thank you. These are somewhat competing
22 motions, although I guess the Court could deny both motions
23 and not stay anything, allow both claims to go forward
24 separately.

25 Maybe to begin, I'll begin by indicating what I have

1 reviewed, and that has been the plaintiff's renewed motion
2 for a right to trial by jury, the defendant's response in
3 opposition to plaintiff's renewed motion regarding right to
4 a jury trial, and motion in support of cross motion to stay
5 litigation pending arbitration. The Court also reviewed the
6 plaintiff's reply regarding jury trial and a stay, and the
7 defendant's reply brief in support of motion to stay the
8 litigation.

9 There's a couple of things that are compelling here.
10 One is the constitutional right to a jury trial. The second
11 is the statutory requirements for arbitration. Those tend
12 to be, to some extent, conflicting at this point because
13 Ms. Rushing does have her right to a jury trial and the
14 parties have contracted to arbitration. There has been a
15 motion to enforce the arbitration agreement. The Court has
16 found it's valid and has granted that motion.

17 So I'm looking at RCW 7.04A.070. Three different
18 parts of that statute say the same thing, and the quote is
19 "shall order the parties to arbitrate." I think only one
20 section applies to this case, but that is language that's
21 used consistently in that statute. That statute doesn't say
22 the Court loses jurisdiction. It just indicates that it
23 shall order the parties to arbitrate if certain requirements
24 are met. So there is a directive for the Court to do that
25 if there is a valid arbitration agreement.

1 The question then becomes whether or not that
2 statute overrides a person's right to a jury trial.
3 Obviously, constitutional protections afford greater weight
4 than many statutes. However, the Court is compelled by the
5 case of *Robinson and Parklane Hosiery*. And the *Robinson*, in
6 citing *Parklane Hosiery*, held that a party's right to a jury
7 trial is not infringed by the application of collateral
8 estoppel based on factual findings in a previous non-jury
9 case.

10 So it looks like this issue has been addressed by
11 the courts, and the courts have found that it doesn't impede
12 a person's right to a jury trial by going to arbitration.
13 So the Court will deny the plaintiff's motion to stay the
14 arbitration. I don't know that the Court has authority to
15 stay the arbitration, given the plain language of 7.04A.070.
16 I'm also not finding that the Court loses jurisdiction under
17 that statute.

18 The second question is whether or not to stay trial.
19 I think the Court has a lot -- there's more gray area on
20 that issue. At this point, though, the Court will grant the
21 motion to stay the trial, and the Court will do that for two
22 reasons. First is it seems somewhat inefficient to have
23 litigation proceeding while the parties are arbitrating some
24 of the claims. Ms. Rushing's claim is -- I don't know if
25 the word "derivative" of Mr. Coon's claim is necessarily

1 appropriate, but it does derive from his claims.

2 .But I think what's most compelling is we're talking
3 about a six-month stay. There's 180 days in which
4 arbitration will be completed. I think that 180 days is
5 somewhat minimal given the length of time this litigation
6 has proceeded. I think the parties would be tremendously
7 burdened going down both roads at the same time over the
8 next six months. So the Court will stay the trial for
9 180 days while arbitration goes forward.

10 Mr. Ahrend, I'll start with you. Do you have any
11 questions?

12 MR. AHREND: I don't. I think -- I think Your
13 Honor's order is clear. And if I'm hearing you right, this
14 means you're deciding that the arbitration shouldn't be
15 stayed; so we would not have the latitude to present that
16 motion to the arbitrator.

17 THE COURT: Correct.

18 MR. AHREND: Okay.

19 THE COURT: Mr. Hueber, do you have any questions?

20 MR. HUEBER: I do not, Judge. I do have a proposed
21 order here on the stay.

22 THE COURT: If you want to save that until the end.

23 MR. HUEBER: Okay.

24 THE COURT: We'll bring up both of these remaining
25 orders at the end. The next motion was the motion to

1 correct the record.

2 Mr. Harper, is that your motion?

3 MR. HARPER: That is, Your Honor.

4 THE COURT: Maybe before you begin -- you're welcome
5 to go to the podium. But because I'll do it anyhow, while
6 you're approaching the podium, I did have an opportunity
7 prior to this hearing to review the motion to correct the
8 record, the defendant's response in opposition to the motion
9 to correct the record, and the plaintiff's reply to the
10 motion to correct the record. If you'd like to go ahead
11 with your argument.

12 MR. HARPER: Thank you, Your Honor. May it please
13 the Court; Collin Harper, on behalf of the plaintiffs. As
14 Your Honor noted, the plaintiffs have moved for admission of
15 the Eastern State Hospital records, which were plaintiff's
16 Exhibit 204, and the Sacred Heart Medical Center medical
17 records, which were plaintiff's Exhibit 201.

18 In the briefing, the defendants correctly noted that
19 the Court has the ability to admit these records at this
20 time but was incorrect that the issue turns on whether or
21 not the records -- on the nature as to why the records are
22 not currently part of the record. The question for the
23 Court is not whether or not there's been technicality of
24 procedure but whether admitting the records into evidence at
25 this time will assist in the determination of this matter on

1 its merits and further the interests of justice.

2 I think the Court's ruling in this matter on the
3 arbitration agreement demonstrates that the records are
4 important to a determination of this matter on its merits.
5 The Court's ruling indicates that the Court afforded great
6 weight to the testimony of Dr. Spar, plaintiff's expert;
7 that Dr. Spar in turn testified that he relied heavily on
8 the entirety of Mr. Coon's medical records, which includes
9 the Eastern State and Sacred Heart Medical Center records.

10 In fact, he cited to several records contained
11 within those records specifically and on multiple occasions,
12 and I believe the Court took note of those page numbers
13 during the hearing. The Court's findings of fact were based
14 upon testimony of Dr. Spar, again, which relied heavily upon
15 those records.

16 In defendant's response, there was an argument that
17 they would be prejudiced by the entry of these records at
18 this time. Even if the Court were to consider whether or
19 not such would be prejudicial or unfair, it's not relevant
20 to the evaluation of whether or not to admit the records at
21 this time. That issue should be determined based upon
22 whether or not it was necessary to a determination of the
23 matter on its merits and whether or not admitting the
24 records furthers the interests of justice.

25 The defendants raised two objections to the

1 admission of these records in their ER 904, and those
2 objections were not changed, altered, or added to in
3 defendant's response. Those objections were relevancy and
4 hearsay. As to relevancy, I think that based upon the
5 Court's ruling, it's clear that those records were relevant
6 to the issues that were before the Court, which were
7 Mr. Coon's mental capacity and medical history.

8 As for hearsay, as we've indicated, the records fell
9 into multiple exceptions to the hearsay rule, including
10 business records and statements made for the purpose of
11 medical diagnoses. And when defendant waived -- sorry.
12 When the defendant stipulated to the admission -- or to the
13 authenticity of the medical records, the defendant waived
14 any issues as to whether or not those records were
15 admissible as business records because they were stipulated
16 as to their authenticity.

17 So, Your Honor, we feel that it's important that the
18 records are contained in the evidence of this matter because
19 they were considered by the Court and relied upon and that
20 it's important for the furtherance of justice and that this
21 matter be determined on its merits, not just at this level,
22 but at any other level where the matter is considered; that
23 whatever court that might be, that that court is able to see
24 all of the evidence that was before this Court and was
25 considered by this court.

1 We feel like it's important that these records be
2 admitted into the evidence and contained within the record
3 as it moves up, if it does, which, if the Court is aware or
4 not, there already has been a submission for interlocutory
5 appeal on this matter. Therefore, we respectfully request
6 that the Court admit the Eastern State and Sacred Heart
7 medical records into evidence at this time. Does Your Honor
8 have any questions?

9 THE COURT: I don't. Thank you.

10 MR. HARPER: Thank you, Your Honor.

11 THE COURT: Mr. Hueber?

12 MR. HUEBER: Thank you, Judge. This motion is
13 misnamed. There's nothing to correct. We're talking about
14 the Eastern State records and the Sacred Heart records; 337
15 pages. They include chart notes, correspondence from a
16 multitude of providers dating back to 1971. There are
17 petitions for a least restrictive alternative. There are
18 mental health evaluations. Many of the authors are deceased
19 or unavailable.

20 And granted, there may be some portion of these
21 records that could be admissible. In other words, if
22 Mr. Coon says, "I'm having hallucinations and I'd like some
23 help," well, that's probably going to fall within the
24 hearsay exceptions. But everything else in here does not
25 fall within that exception. Everything else is tied up in

1 layers of hearsay.

2 Counsel just argued that because we stipulated to
3 authenticity, that means we've stipulated to admissibility,
4 and that's just not true, Your Honor. We did stipulate
5 these are what they say they are. But in our motions in
6 limine, we specifically asked you to rule that they're not
7 admissible based on relevance and foundation.

8 The key here, though, Judge, they were never
9 offered. They never said, "I move for the admission of the
10 Eastern State and the Sacred Heart records." Had that been
11 done, we could've argued; we could've voir dired the
12 witness; we could have gone through page by page and
13 determined what portion of those records is admissible.
14 They never moved; they've waived this.

15 As far as exceptions that apply, they may; they may
16 not. But they didn't move to admit the exhibits. We were
17 unable to voir dire the witness. We were unable to argue
18 the exceptions. You were not able to rule on them. And now
19 after you've decided this, Oh, let's just bring them in in
20 bulk and pad the appellate record with things that we never
21 even offered to have admitted during the trial.

22 The fact that Dr. Spar says he read these 337 pages
23 doesn't make them admissible. He can rely on inadmissible
24 evidence, but the fact that he says he read them doesn't
25 mean that we get these reports from 1971 about somebody

1 jumping off a bridge or something else. It's not admissible
2 evidence, and, again, it was never offered.

3 We made our closing arguments. You took the case
4 under advisement. The plaintiffs sent you a letter asking
5 that you wholesale admit all of these records. I guess I
6 can just say that's a rather unusual procedural move, but
7 you denied it. Since that time, you've issued your ruling.
8 You entered a formal order today.

9 And the plaintiff has filed a motion for
10 discretionary review at the Supreme Court. It's another
11 unusual procedural move in light of the fact that we don't
12 even have an order until today, but I guess they can engage
13 in appellate practice any way they so choose.

14 But the filing of that pleading at the Supreme Court
15 has no bearing on our proceedings today. It doesn't trigger
16 an automatic stay. And at some time, the Court of Appeals
17 or the Supreme Court is going to decide whether you
18 committed obvious error in making your factual findings and
19 ruling that Mr. Coon was competent.

20 Now with this backdrop, they want you, after the
21 fact, after you've compelled arbitration, to bring in
22 another 337 pages of documents into this record. Do we get
23 to recall Dr. Spar to the stand? Do they have to bring him
24 up here? Are you going to reopen the hearing? Do we get to
25 voir dire Dr. Spar? Do we all sit down and go through 337

1 pages of documents looking for nuggets that might be
2 admissible? Do we get to offer rebuttal testimony?

3 Judge, this isn't a matter of correcting the record.
4 The record is clear. The exhibits were not offered. They
5 were not admitted. They weren't ruled upon. It's clear
6 waiver. Your Honor has already ruled on this once. Nothing
7 has changed, and this motion should be denied again. Thank
8 you.

9 THE COURT: Thank you. Mr. Harper?

10 MR. HARPER: I'll be brief, Your Honor. Thank you.
11 I'd like to address a few points, and I'll start with the
12 issue as to whether or not the evidentiary hearing would
13 need to be reopened and new testimony be taken and new
14 arguments be made. And I think it's critical to understand
15 or to recognize that the testimony has already been taken,
16 and the records were provided to the defendants in the ER
17 904 -- or with ER 904. They had them at that time, and they
18 had them at the time of the hearing. So we know what the
19 records are, and we know what the testimony will be.

20 And as to any objections that the defendants might
21 raise, they would know what those would be right now. But
22 we haven't heard any change as to what those objections
23 would be. And further -- and this goes to the issue of
24 whether or not prejudice is relevant or unfairness of
25 admitting the records at these times is relevant.

1 The case cited to by the plaintiffs, which was also
2 cited by the defendants, *Ankeny v. Pomeroy Grain Growers*,
3 was a case where it wasn't simply evidence and testimony
4 that was already given at a hearing or trial that was
5 admitted, but new information, new testimony, new evidence.
6 And in that case, the Court said that the relevant inquiry
7 was whether or not admitting the new evidence assisted in
8 the determination of the matter on its merits and furthered
9 the interest of justice. In this case, Your Honor, we
10 believe it does.

11 As for the objections that were raised, hearsay and
12 relevancy, I believe Mr. Hueber said, "We maintained our
13 objection as to relevance and foundation prior to the
14 hearing." I've already addressed as to why I believe these
15 are relevant. And I believe based on the Court's ruling,
16 the records are relevant. And Mr. Hueber said, "We agreed
17 that these records are what they purport to be." And in
18 that case, if the records are what they purport to be, they
19 fall into the business records exception of the hearsay
20 rule, and they're admissible.

21 And just to -- just to make sure it's part of the
22 record and clear at this time, I'd like to go over the
23 timeline of events that happened. It is correct that
24 plaintiffs sent a letter to the judge requesting that the
25 records be admitted, but I think it's also important to note

1 that plaintiffs requested a hearing date for this motion at
2 that time, which was prior to the court issuing its ruling.

3 So because it's important that this material be
4 considered, either -- well, it was considered by this Court,
5 but by any appellate court that reviews this matter, that
6 this material is important to the determination of this
7 matter on its merits and it would further the interest of
8 justice, Your Honor, we do ask that the records be admitted
9 at this time. Thank you, Your Honor.

10 THE COURT: Thank you. I think the Court has a
11 broad amount of discretion on this issue. Obviously, a
12 matter can be reopened and allow other exhibits to be
13 admitted after the hearing. Here we have two exhibits, 204
14 and, I believe, 201. The Court didn't review all those
15 exhibits because they weren't admitted. The Court also
16 relied heavily on the testimony of Dr. Spar, who relied on
17 those exhibits.

18 ER 703 allows an expert to rely on otherwise
19 inadmissible information in forming an opinion. Just
20 because they rely on that information doesn't make it
21 admissible. Experts also rely on a vast amount of
22 information that, if all that were to be admitted, would
23 probably be overwhelming; so it's useful to have an expert
24 that can go through this information and condense it down.

25 The problem or difficulty I see with introducing all

1 of Exhibit 204 and 201 would be -- well, a lot of that would
2 be new information for the Court. I'm sure Dr. Spar didn't
3 testify about a number of documents that were contained
4 within those exhibits, and the Court didn't review those.
5 So it would leave the Court in the position of having to
6 look at the evidence once again. Also, the defense didn't
7 have an opportunity to question Dr. Spar about specific
8 exhibits that he didn't otherwise testify to.

9 So to somewhat reach some middle ground here, I
10 think some of those exhibits aren't relevant. They -- I
11 don't even know what they are, but they may have nothing to
12 do with his competency, especially since they date back so
13 far.

14 So Mr. Harper, you're probably not going to enjoy
15 this, but what the Court will do is grant the motion on a
16 limited basis, and being that the Court will introduce any
17 portions of ER 204 or 201 that Dr. Spar testified about. So
18 the difficulty is you'll have to look at his testimony and
19 see specifically which documents he referred to.

20 In doing that, he did give defense an opportunity to
21 question him about those documents. I think to wholesale
22 let in all these documents would deprive the defense of
23 their opportunity to cross-examine the witness with respect
24 to those documents. So if you choose to have some of
25 Exhibit 204 and 201 admitted, it will take a little bit of

1 work on your part, but you're welcome to do that.

2 MR. HARPER: Thank you, Your Honor.

3 MR. AHREND: Would it be efficient, Your Honor, if
4 we'll just -- I think we ordered the transcript. We either
5 have it or it's on its way. We'll identify those to the
6 other side and hopefully come up with an agreed order as to
7 which ones were specifically referred to in his testimony.

8 THE COURT: That would be fine. You'll have to
9 somehow compile them, and then we can have them admitted at
10 that time.

11 MR. HUEBER: You want to set a time frame on that to
12 be done?

13 MR. HARPER: I don't think that we've received it.
14 Why don't we say within two weeks of when we receive the
15 transcript of the hearing. I don't think we've received it
16 yet. I don't want to commit us to a specific date until we
17 do.

18 THE COURT: That's fine. If you think you can
19 accomplish it within two weeks of receiving the transcript,
20 that'd be fine. Hopefully, his testimony is clear enough
21 that everyone knows what documents he's referring to; and if
22 not, I guess you'll end up back in here to talk about it.

23 MR. HUEBER: Judge, I'll try to interlineate that on
24 my proposed order.

25 (Off the record.)

1 MR. CRONIN: Your Honor, Pat Cronin on behalf of
2 Franklin Hills. We have initiated arbitration, and the
3 clock is running on 180 days. Given the kind of litigation
4 that has occurred already in this case, I would not be
5 surprised if it took a little longer than 180 days. So
6 based on plaintiff's counsel Mr. Ahrend's request that we
7 interlineate and specifically say that the other matter is
8 stayed for 180 days, I would suggest that it makes more
9 sense to say "stayed until completion of the arbitration."

10 MR. AHREND: And I would just say let's review it in
11 180 days.

12 THE COURT: At this point, the Court didn't want
13 this to go on forever; so we can put 180 days. I guess the
14 other problem is if this is appealed and the decision to
15 enforce the arbitration is stayed, 180 days is meaningless
16 but may still need to be enforced. So why don't we put
17 180 days on there; and if it becomes an issue, you can bring
18 it to the attention of the Court.

19 MR. CRONIN: Thank you.

20 MR. HUEBER: Judge, I think I've got them. There's
21 four orders here. One's an order compelling arbitration,
22 one order denying motion to compel arbitration, order
23 granting cross motion to stay, and order denying plaintiff's
24 motion to correct the record.

25 THE COURT: Would you like to hand those up?

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MR. HUEBER: Some have been signed by everyone; some have not yet.

THE COURT: I have signed off on all those orders. Thank you.

(End of proceedings.)

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C E R T I F I C A T E

I, ALLISON R. STOVALL, do hereby certify:

That I am an Official Court Reporter for the Spokane County Superior Court, sitting in Department No. 2, at Spokane, Washington;

That the foregoing proceedings were taken on the date and place as shown on the cover page hereto;

That the foregoing proceedings are a full, true and accurate transcription of the requested proceedings, duly transcribed by me or under my direction.

I do further certify that I am not a relative of, employee of, or counsel for any of said parties, or otherwise interested in the event of said proceedings.

DATED this 20th day of April, 2015.

] COPY

ALLISON R. STOVALL, CCR No. 2006
Official Court Reporter
Spokane County, Washington

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APR 10 2015

SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

MARY RUSHING as the Administrator and
on Behalf of the Estate of ROBERT COON,
and MARY RUSHING, individually,

Plaintiff,

No. 11-2-04875-1

vs.

ORDER GRANTING DEFENDANTS'
CROSS MOTION TO STAY MARY
RUSHING'S WRONGFUL DEATH CLAIM
PENDING ARBITRATION

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

Defendants.

THIS MATTER having come before this Court on Defendants' Cross Motion to Stay
Mary Rushing's Wrongful Death Claim Pending Arbitration, and the Court having heard oral
argument of counsel, having considered the files and records herein, and being otherwise fully
advised in the premises, now, therefore,

IT IS HEREBY ORDERED that Defendants' Cross Motion to Stay Mary Rushing's
Wrongful Death Claim Pending Arbitration is GRANTED.

The wrongful death claim shall be stayed for 180 days subject to return to Court. GMB

ORDER GRANTING DEFENDANTS' CROSS
MOTION TO STAY MARY RUSHING'S
WRONGFUL DEATH CLAIM PENDING
ARBITRATION
PAGE 1

to return to Court,

Winston & Cashatt
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Bank of America Financial Center
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DATED this 10 day of April, 2015.



HONORABLE JOHN O. COONEY
Spokane County Superior Court Judge

Presented by:

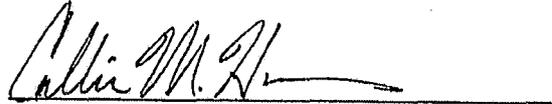
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation



PATRICK J. CRONIN, WSBA No. 28254
CARL E. HUEBER, WSBA No. 12453
CAITLIN E. O'BRIEN, WSBA No. 46476
WINSTON & CASHATT, LAWYERS,
a Professional Service Corporation
Attorneys for Defendants

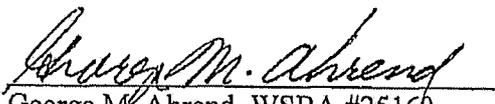
as to form only
Approved and Notice of Presentment Waived:

THE MARKAM GROUP, INC., P.S.



MARK D. KAMITOMO, WSBA #18803
COLLIN M. HARPER, WSBA #44251
Attorneys for Plaintiff

AHREND LAW FIRM PLLC



George M. Ahrend, WSBA #25160
Attorney for Plaintiff

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APR 10 2015

SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

MARY RUSHING as the Administrator and
on Behalf of the Estate of ROBERT COON,
and MARY RUSHING, individually,

Plaintiff,

No. 11-2-04875-1

vs.

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

Defendants.

ORDER DENYING DEFENDANTS'
MOTION TO COMPEL ARBITRATION
AND GRANTING MARY RUSHING'S
SUMMARY JUDGMENT MOTION RE:
ARBITRATION OF WRONGFUL DEATH
CLAIM

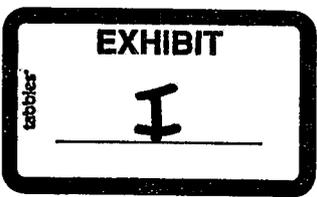
The defendants moved for an Order compelling the arbitration of all claims, and the plaintiff, Mary Rushing, moved for an Order that her wrongful death claim was not subject to arbitration, which the defendants opposed. Argument on the motions was presented on January 30, 2015.

In considering the motion, the court relied on argument of counsel, the files and records herein, and specifically the following:

- 1. Plaintiff's Motion for Partial Summary Judgment filed on January 5, 2015.

ORDER DENYING DEFENDANTS' MOTION TO
COMPEL ARBITRATION AND GRANTING MARY
RUSHING'S SUMMARY JUDGMENT MOTION RE:
ARBITRATION OF WRONGFUL DEATH CLAIMS
Page 1

Winston & Cashatt
A PROFESSIONAL SERVICE CORPORATION
Bank of America Financial Center
601 West Riverside Avenue, Suite 1900
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1 Presented by:

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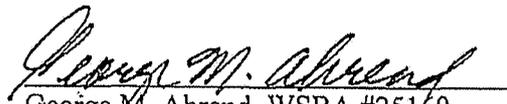
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Approved and Notice of Presentment Waived:
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THE MARKAM GROUP, INC., P.S.



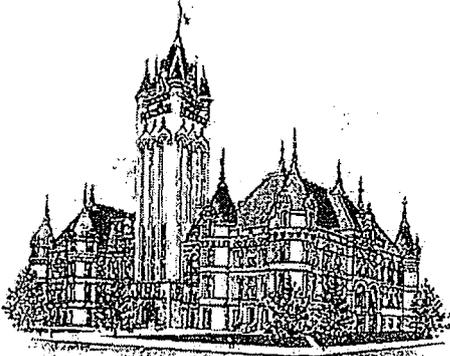
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George M. Ahrend, WSBA #25160
Attorney for Plaintiff

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SPOKANE COUNTY COURT HOUSE

Superior Court of the State of Washington
for the County of Spokane

Department No. 9

John D. Cooney

Judge

1116 W. Broadway
Spokane, Washington 99260-0350
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February 2, 2015

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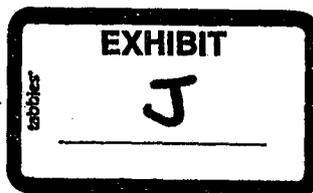
Re: *Mary Rushing, et.al. v Franklin Hills Health & Rehabilitation Center, et.al.*
Case No 2011-02-04875-1

Dear Counsel;

On January 30, 2015, the plaintiffs brought a number of summary judgment motions and discovery motions. At the conclusion of the hearing, the Court ruled on all but one of Plaintiffs' motions. The final summary judgment motion was taken under advisement. This correspondence constitutes the Court's decision on the Plaintiffs' remaining summary judgment motion. The Court requests the Plaintiffs prepare written findings of fact and conclusions of law that comport with this correspondence.

In preparation for the motion, the Court reviewed the Plaintiffs' Memorandum in Support of Motion for Partial Summary Judgment (along with the declaration and accompanying exhibits), the Defendants' Response to Plaintiffs' Motion for Summary Judgment (along with declaration and exhibits), and the Plaintiffs' Reply in Support of Partial Summary Judgment.

The summary judgment motion taken under advisement is in regards as to whether the wrongful death claims brought by Mary Rushing are subject to arbitration or arise independent of the arbitration agreement. Ms. Rushing is the decedent's heir and is asserting claims against a Franklin Hills both in her capacity as the administrator of the decedent's estate as well as in her individual capacity

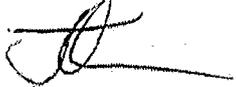


This issue was squarely addressed in Woodall v. Avalon Care Center-Federal Way, LLC, 155 Wn.App. 919, 231 P.3d 1252 (2010), wherein the court held that the heirs of a decedent who signed an arbitration agreement with a nursing home facility were not bound by the arbitration agreement inasmuch as the heirs were asserting wrongful death claims. The court distinguished survival claims and wrongful death claims, because unlike the survival claims, the wrongful death claims "never belonged to the decedent, and a favorable ruling will not benefit the decedent's estate." Id. at 932, 231 P.3d at 1258.

Additionally, the court addressed the exceptions to the general rule that a non-party to an arbitration agreement could be forced to arbitrate as stated in Townsend v. Quadrant Corp., 153 Wn.App. 870, 224 P.3d 818 (2009), *aff'd on other grounds* Townsend v. Quadrant Corp., 173 Wn.2d 451, 268 P.3d 917 (2012) (noting that limited exceptions to the rule including equitable estoppel are not available if the nonsignatory knowingly exploits the contract in which the arbitration agreement was contained.) This Court distinguishes the Townsend cases from the Woodall case, because in Townsend the issue was whether two defendant parent corporations that were nonsignatories to an arbitration agreement executed by a subsidiary could enforce the arbitration clause. Woodall, 155 Wn.App. at 929-30, 231 P.2d at 1257.

Based upon the holding in Woodall, the Court concludes that the arbitration agreement is not binding on Ms. Rushing's wrongful death claim. Therefore, the Plaintiffs' motion for summary judgment on this issue is granted.

Sincerely,



John O. Cooney

PATRICK J. CRONIN
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Telephone: (509) 838-6131
Attorneys for Defendants/Respondents

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,

Plaintiff/Petitioner,

vs.

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

Defendants/Respondents.

NO. 91538-5

AFFIDAVIT OF CAITLIN E.
O'BRIEN

STATE OF WASHINGTON)

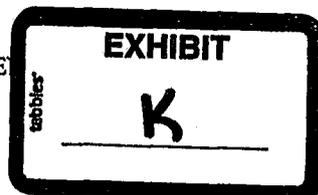
: ss.

County of Spokane)

CAITLIN E. O'BRIEN, being first duly sworn, on oath deposes

and says:

AFFIDAVIT OF CAITLIN E. O'BRIEN
PAGE 1



1. I am one of the attorneys representing Franklin Hills Health & Rehabilitation Center.

2. This matter was ordered to arbitration on March 3, 2015, based on the ADR requirement for the arbitration of disputes for any claims made on behalf of the Estate of Robert Coon.

3. The ADR commencement date for the Estate of Robert Coon's claims was March 30, 2015.

4. Three arbitrators were empaneled in May 2015 to preside over this matter.

5. Pursuant to the ADR contract, discovery must be completed within one hundred and eighty days of the date a party demands arbitration.

6. Written discovery began on April 29, 2015, and still continues.

7. Two depositions occurred on June 17, 2015, with additional depositions scheduled for July 2015.

8. The ADR contract provides that the parties may choose to mediate the matter, but mediation must occur within one hundred and twenty days of the date a party demands arbitration.

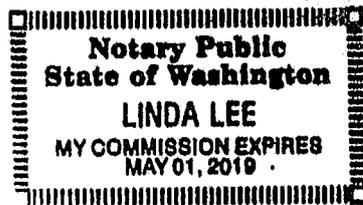
9. Mediation is currently set for July 23, 2015, based on the mediator's schedule.

10. If mediation is unsuccessful, the parties must arbitrate the matter within sixty days of the conclusion or termination of mediation.

11. The parties and arbitrators are currently collaborating to set a 5-day arbitration to occur in September 2015.


CAITLIN E. O'BRIEN

SUBSCRIBED AND SWORN to before me this 25th day of June, 2015.




NOTARY PUBLIC in and for the
State of Washington, residing at
Spokane Valley
My Appointment Expires: 5-1-19

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(Copy Receipt)

Clerk's Date Stamp



SUPERIOR COURT OF WASHINGTON

Spokane County

CASE NO. 2011-02-04875-1

RUSHING, MARY ETAL

vs.

Plaintiff(s)

Civil Case Schedule Order

FRANKLIN HILLS HEALTH

Defendant(s)

(ORSCS)

I. BASIS

Pursuant to LAR 0.4.1 IT IS ORDERED that all parties shall comply with the following schedule:

II. SCHEDULE

DUE DATE

- | | |
|--|----------------------|
| 1. Last Date for Joinder of Additional Parties, Amendment of Claims or Defenses | 10/01/2012 ✓ |
| 2. Plaintiff's Disclosure of Lay and Expert Witnesses | 11/05/2012 ✓ |
| 3. Defendant's Disclosure of Lay and Expert Witnesses | 01/14/2013 ✓ |
| 4. Disclosure of Plaintiff Rebuttal Witnesses | 02/11/2013 ✓ |
| 5. Disclosure of Defendant Rebuttal Witnesses | 03/11/2013 ✓ |
| 6. Last Date for Filing: Motions to Chng Trial Date, Note for Arbitration, Jury Demand | 03/11/2013 ✓ |
| 7. Discovery Cutoff | 04/01/2013 |
| 8. Last Date for Hearing Dispositive Pretrial Motions | 05/06/2013 ✓ |
| 9. Exchange of Witness List, Exhibit List and Documentary Exhibits | 05/06/2013 ✓ |
| 10. Last Date for Filing and Serving Trial Mgmt Joint Rpt, including Jury Instructions | 05/06/2013 |
| 11. Trial Memoranda, Motions in Limine | 05/20/2013 |
| 12. Pretrial Conference | 9:00 AM 05/24/2013 |
| 13. Trial Date | 9:00 AM 06/03/2013 ✓ |

III. ORDER

IT IS ORDERED that all parties comply with the foregoing schedule pursuant to Local Rules 0.4.1 and 16.

DATED: 06/15/2012

JEROME J. LEVEQUE
JUDGE

