Cutting Edge Issues in
Nursing Home Litigation

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Stephen Hornbuckle

Avoiding Arbitration in Nursing Home Cases

These materials are written with nursing home arbitration agreements in mind, but the same principles apply to any case in which a defendant seeks to enforce an arbitration agreement against a plaintiff.

Nursing homes increasingly use arbitration agreements as a barrier to recovery in claims for neglect and malpractice. The facilities correctly believe that requiring a plaintiff to pursue the case through an arbitrator reduces the likelihood of a significant recovery. Arbitration contracts may also contain provisions limiting discovery, which is a one-sided advantage for the defendant. Arbitration burdens the plaintiff by shifting the forum from an inexpensive jury trial to an expensive arbitrator or panel of arbitrators. Further, an arbitration panel may be less likely to find statutory neglect under RCW 74.34, further reducing case value.

Arbitration agreements can be challenged under any legal doctrine available to defeat contracts generally. Although Washington has a strong policy favoring arbitration, *Int'l Ass'n. of Fire Fighters, local 46 v. City of Everett,* 146 Wash.2d 29, 51, 42 P.3d 1265 (2002), arbitration agreements are just as vulnerable to generally applicable contract defenses as any other contract. This article will make an effort to mention most of these defenses.

1. Arbitration is not always bad.

These are some cases in which allowing arbitration is the better strategic choice. Arbitration is not always unfavorable for the plaintiff, especially in lower value cases involving negligence that do not have aggravated facts. Avoiding arbitration is time consuming and may require handling an appeal. This effort may not increase the value of some cases.

Depending on the potential damage award and the strength of the liability facts, arbitration has advantages and disadvantages for the plaintiff. In smaller damage cases worth

$300,000 or less, the advantages of arbitration are likely to outweigh the disadvantages. The advantages of arbitration include: (1) quicker resolution of the case from start to finish; (2) lower case expense; (3) a firm hearing date not subject to a judge's schedule; and (4) a less formal, friendlier and more confidential setting. Arbitration reduces the amount of attorney time needed to effectively present a case and prevents standard defense tactics of delay and excessive motion practice. Obfuscation and jury confusion favor the defendant in a jury trial, but these factors are absent when an arbitration panel decides the outcome. If a case has clear liability but limited jury appeal, arbitration is probably the better forum.

If a case has potential damages in the million dollar range, a jury trial is preferable. Those cases justify higher expenses and expert witness costs, more discovery, and more attorney time for the extensive motions, discovery, and potential appellate briefing necessary to void an arbitration clause. An arbitration panel will likely be more conservative on damages than a jury in a case involving aggravated facts. A thoughtful analysis needs to be made before the case is filed because bringing suit waives the right to invoke the arbitration agreement.[1] The same analysis should be made when suit has been filed and the defendant is seeking to compel arbitration. In this circumstance, the defendant may be willing to waive an unfavorable aspect of the arbitration agreement, such as strict limitations on discovery or cost sharing of the arbitrator's fees, if the plaintiff agrees to arbitrate.

Initiation of arbitration is governed by RCW 7.04A. The contract may state how arbitration is initiated; otherwise, the statute sets forth the process. If the defendant does not respond to a written demand to arbitrate, suit can be filed for the limited purpose of compelling compliance. Similarly, a suit can be filed to request that the court appoint an arbitrator if the parties reach an impasse on that issue.

[1] Steele v. Lundgren, 935 P.2d 271, 85 Wash. App. 845 (Wash. App. Div. 1 1997).

State court is almost always the better forum for a really good case. The fight over arbitration is worth it when the facts are such that the damage award should be driven upward by a gross deviation from acceptable conduct. But in cases where the nursing home is merely negligent and their conduct does not provoke outrage, arbitration is the better forum most of the time. The remainder of these materials will focus on arguments that might keep these cases out of arbitration.

2. Woodall v. Avalon – Non signatory heirs in wrongful cases are not bound by arbitration agreements signed by the decedent.

Woodall v. Avalon, 231 P.3d 1252, 155 Wash.App. 919 (2010), is a recent Division I case which I briefed and argued. The trial court granted Defendant's motion to compel arbitration with respect to the survival claims but denied it with respect to the wrongful death claims, which were brought by two children of the decedent who did not sign the arbitration agreement. The statutory wrongful death claim in Washington is an independent cause of action that is brought by the personal representative and belongs to the heirs. *Warner v. McCaughan*, 77 Wash. 2d 178, 179, 460 P.2d 272 (1969). The Appeals Court held that an arbitration agreement signed by the decedent did not bind non-signatory heirs in the absence of an agency relationship. The Appeals Court relied heavily on *Satomi Owners Association v. Satomi, LLC*, 167 Wash.2d 781, 225 P.3d 213 (2009), a Washington Supreme Court case which indicates that non-signatories will be bound by an arbitration agreement only when the non-signatory is an agent or alter ego of the signatory. *Id.* At 230, n.2.

Under *Woodall*, non-signatory heirs are not bound by an arbitration agreement unless there is evidence of an agency relationship such as that between husband and wife. Neither side

appealed this decision, so the opinion is binding in Division I. Also it is well reasoned, persuasive authority in Divisions II and III.

This case may be useful in some courts when trying to avoid arbitration entirely. Some trial courts may be reluctant to compel arbitration with respect to the survival claims when they are required to retain jurisdiction over the wrongful death claim. A trial court may see that it is senseless to divide a case involving one set of facts into two parts, each to be decided in a different forum. It may be discretionary for the trial court to retain the entire case when a portion of the case is not subject to arbitration. *Longenecker v. Brommer,* 59 Wash.2d 552, 564, 368 P.2d 900 (1962)("It is the established policy in this state that litigation between the same parties, arising out of the same transaction, be determined in one action to avoid multiplicity of suits.") *But see Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)(intertwining doctrine not applicable under Federal Arbitration Act).

When applying *Woodall v. Avalon* to an arbitration agreement, it is essential to have a copy of the agreement prior to filing suit and prior to designating the personal representative of the estate. The arbitration agreement is not always obtainable prior to filing suit, but a request should be made for the nursing home admissions documents, arbitration agreements, and all contracts between the resident and the nursing home. If counsel is involved in responding to the initial request for documents and medical records, the defendant's lawyers may produce a copy of the arbitration agreement. This is important because an arbitration agreement may have been signed by one of the decedent's family members. Just as frequently, the agreement will only be signed by one heir and the remaining heirs will not be governed by the agreement.

If possible, a non-signatory heir should be designated as the personal representative of the estate. A trial court is more likely to be persuaded to deny a motion to compel arbitration if the

personal representative did not sign the arbitration agreement on the decedent's behalf. If a non-signatory heir is a desirable plaintiff, naming the non-signatory heir as personal representative of the estate should be considered. In *Woodall*, the personal representative was a non-signatory to the arbitration agreement. But if a signatory heir is the personal representative, the defendant will be able to distinguish *Woodall* and potentially confuse the trial court.

If later disclosure of an arbitration agreement reveals that the personal representative signed the arbitration agreement on behalf of the decedent, then perhaps a non-signatory heir can be substituted as personal representative to increase the likelihood of the trial court of applying the holding in the *Woodall* case. Spouses are probably agents of each other, and one spouse can probably bind the other to an arbitration agreement. For this reason, the personal representative, at least initially, should be one of the children if there is a desirable plaintiff among them.

The appeals court briefing is attached as Appendix A to these materials.

3. Did the signatory to the arbitration agreement have the authority to sign?

In a nursing home case, the decedent will often not have been capable of signing the admissions paperwork prior to becoming a resident of the nursing home. The arbitration agreement is usually presented when the admissions paperwork is signed. This paperwork is usually signed by the child who is most involved in assisting the resident and managing their affairs. A threshold question in analyzing how to resist a particular arbitration agreement is whether the signatory had the resident's power of attorney to contract on their behalf. The signatory to the arbitration agreement may not have actual authority to act on the resident's behalf. A successful brief defeating an arbitration agreement when the signatory child did not have the resident's power of attorney is included at the end of this article in Appendix B. If the signatory to the arbitration agreement did have the resident's power of attorney, it should still be

analyzed to determine whether the POA limited the holder's authority to act. Sometimes an argument can be made that the power of attorney did not grant authority to make litigation decisions on behalf of the resident. For instance, if the only power of attorney possessed by the signatory is over medical decisions, the jury trial waiver contained in an arbitration agreement is probably not part of the POA's authority, and the arbitration agreement can be defeated.

4. Was the resident competent to sign the arbitration agreement?

Nursing homes will sometimes have a resident of questionable competence sign an arbitration agreement. In this instance the arbitration agreement can be resisted on the grounds that the resident did not have capacity to contract. A successful defense on this ground will require a physician affidavit attesting to the resident's lack of competence and inability to understand the arbitration agreement. The declaration should include details demonstrating the resident's incapacity at the time the agreement was signed, and admissible copies of the medical records on which the physician relied should be attached to the declaration. Clear and convincing evidence is necessary to overcome an arbitration contract based on an incapacity defense.

5. Unconscionability.

a. Substantive Unconscionability. The most sophisticated arbitration agreements do not include significant limitations on discovery or remedies. However, an arbitration agreement that limits discovery or attempts to eliminate remedies available under Washington law may be substantively unconscionable. *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 103 P.3d 773, 781 (2005). The arbitration agreement will probably have to contain at least three unconscionable provisions before a court will conclude that the agreement as a whole is unenforceable. *Id*. at 788. The more sophisticated nursing home chains will limit the number of

unconscionable provisions. For example, nursing home arbitration agreements frequently require that each side bear their own costs and attorneys fees. This provision is substantially unconscionable because RCW 74.34 provides for one-way fee shifting in nursing home cases. But a well written arbitration agreement will contain a limited number of such provisions and a clause allowing severance of unenforceable provisions.

b. The prohibitive cost defense.

Arbitration agreements will often require each side to pay their own arbitrator. If the plaintiff has limited assets, this provision gives rise to a prohibitive cost defense under the doctrine of substantive unconscionability. The party resisting arbitration has the burden to come forward with evidence demonstrating the limited finances of the plaintiff and the cost of arbitration. If the arbitration agreement designates a commercial arbitration service as arbitrator, such as WAMS, the fee schedule can be attached as part of the response resisting arbitration. Specific evidence pertaining to the finances of the plaintiff should be included. A sample declaration is attached hereto in Appendix C. In a case brought by the personal representative, the plaintiff's evidence showing prohibitive cost should also address the finances of the estate and show that the estate is insolvent. Once the plaintiff proves prohibitive cost, the burden shifts to the defendant to come forward with evidence in rebuttal. The rebuttal evidence can include an offer to pay the cost of arbitration, which defeats the prohibitive cost defense. But the plaintiff will at least avoid paying of the arbitrator's bill. The primary case discussing the prohibitive cost defense to arbitration is *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 45 P.3d 594 (2002). This case outlines the evidence needed to prove the prohibitive cost defense.

c. Procedural Unconscionability.

The arbitration agreement should also be attacked under the doctrine of procedural unconscionability. This requires an analysis and possible discovery into the circumstances under which the agreement was signed. If the signatory of the agreement remembers signing the admissions paperwork, this may allow an argument that the agreement was not entered into knowingly, intelligently or voluntarily and is therefore procedurally unconscionable. Any circumstances that indicate unfairness signing the agreement should be included in a response resisting arbitration. Attached in Appendix D is a sample declaration containing the type of evidence necessary to overcome an arbitration agreement based on the doctrine of procedural unconscionability.

6. No waiver of rights under RCW 70.129.005.

An argument can be made that arbitration agreements are illegal under Washington law. RCW 70.129.105; 70.129.005. As a general rule, the courts of this state will not enforce agreements which are illegal or contrary to public policy. *Sienkiewicz v. Smith*, 30 Wash.App. 235, 633 P.2d 905 (1981); *Golberg v. Sanglier*, 27 Wash.App. 179, 616 P.2d 1239 (1980). Rather, the courts will leave the parties where it finds them. *Hederman v. George*, 35 Wash.2d 357, 212 P.2d 841 (1949); *Reed v. Johnson*, 27 Wash. 42, 67 P. 381 (1901).

DSHS has addressed this issue in a guidance letter sent to long term care facilities, stating: "Residents and representatives should not be presented with arbitration agreements at the time of admission because the resident may be too overwhelmed to understand the implications of the agreement, and may erroneously conclude that the agreement needs to be signed in order to be admitted." See Appendix E.

Long-term care facilities have an obligation to inform residents in writing of their rights *prior* to admission, an obligation to "protect and promote the rights of each resident," an obligation to provide an admission contract consistent with the residents' rights law, and are prohibited from asking residents to waive their rights. RCW 70.129.030(1); 70.129.020; 70.129.150(1); 70.129.105. These statutes may prohibit enforcement of a pre-dispute binding agreement that waives the resident's right to jury trial.

RCW 70.129.105 prohibits facilities from requesting residents to "sign waivers of residents' rights set forth in this chapter or in the applicable licensing or certification laws." The residents' right to a jury trial is arguably one of the rights which a resident cannot be asked to waive. This argument is supported by RCW 70.129.005, which provides: "(1) The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States and the State of Washington." And: "It is the intent of the legislature that individuals who resident in long-term care facilities ... continue to enjoy their basic civil and legal rights." Asking a resident to sign an arbitration agreement which gives up the right to jury trial is arguably the same as asking the resident to waive this important right, in violation of RCW 70.129.105.

There is no case law interpreting these statutes, and the statute does not define the basic civil and legal rights that are protected. But common sense and logic suggest that the right to a jury trial is a basic civil and legal right that is meant to be protected. The plain language of the phrase "basic civil and legal rights" may be read to include the right to a jury trial. The Washington Supreme Court has noted that the right to jury trial is protected by article 1, section 21 of the Washington Constitution and is inviolate. An "inviolate" right to trial by jury is

logically a right that it is basic civil and legal right meant to be protected by RCW 70.129.005 and 70.129.105.

The defendant may argue that these statutes are preempted by the Federal Arbitration Act, which preempts state law that treats arbitration agreements differently from any other contract. But they have the burden to show that the transaction involves interstate commerce. If they fail to come forward with this evidence, a trial court may be persuaded that the jury trial waiver in the arbitration agreement is an unenforceable waiver of resident rights.

7. Delegation clauses under *Rent-A-Center, West, Inc. v. Jackson.*

The U.S. Supreme Court has addressed the issue of whether the trial court or the arbitration panel itself decides the validity of an arbitration contact in the face of contract defenses such as fraud, duress or unconscionability. If the arbitration agreement contains a clause providing that the enforceability of the agreement is to be decided by the arbitrator, then the plaintiff must specifically attack the enforceability of the delegation clause in order to resist arbitration. Of course it is much more difficult to show that the delegation clause itself is procedurally or substantively unconscionable. At this point many arbitration agreements written by nursing homes do not yet include a delegation clause of the type contained in the agreement before the US Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*.

8. Does the arbitration named in the agreement accept pre-dispute arbitrations in healthcare cases?

Nursing homes sometimes designate a particular arbitrator in the agreement. A designated arbitrator should be contacted to see if they are still arbitrating healthcare disputes. For instance, the American Arbitration Association and the American Health Lawyers Association are no longer arbitrating healthcare disputes that arose after the agreement was

signed. If either of these entities are designated as the arbitrator the contract defense of impossibility arises because the case cannot be arbitrated in the manner agreed to by the parties. See *Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co.,* 607 P.2d 856, 93 Wn.2d 199, 202 (Wash. 1980) ("[A] person can be compelled to arbitrate a dispute only . . . in the manner in which, he has agreed so to do.") Successful briefing resisting arbitration on the ground that the arbitrator is no longer available is included under Appendix E of this paper.

9. Related entities are not parties to the arbitration agreement and cannot enforce it.

Nursing homes frequently are operated by an insolvent LLC which holds the facility license and has no other assets. The profits from the nursing home are then funneled through a management company and various holding companies that own the shares of the LLC and control the nursing home. These related entities should be identified and sued for strategic reasons.

The joinder of these entities creates another argument that may help avoid an arbitration agreement. The arbitration agreement will usually not name the parent company as a party, nor will representatives of related entities have signed the agreement. These entities do not have standing to enforce the arbitration agreement. The plaintiff may have viable claims against related entities that are not subject to arbitration.

NO. 62894-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

CLIFFORD WAYNE WOODALL, individually and as representative of the ESTATE OF HENRY WAYNE WOODALL; and SHARON G. WOODALL KING,

Respondents,

vs.

AVALON CARE CENTER – FEDERAL WAY, L.L.C.,

Appellant.

OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

Respondent/Cross-Appellant Clifford Woodall, as Representative of the Estate of Wayne Woodall ("Woodall") appeals the partial granting of a motion to compel arbitration. The trial court granted Defendant/Appellant Avalon Care Center - Federal Way, LLC's ("Avalon") motion to compel arbitration with respect to the survival claims in this case. The trial court denied that same motion with respect to the wrongful death claims, splitting the claim into two actions in two different forums. Woodall appeals that portion of the trial court's order compelling arbitration with respect to the survival claims.

The Washington State Legislature on many occasions has recognized the particular vulnerability of residents living in long-term care facilities. The Legislature has passed comprehensive laws setting forth residents' rights, including a provision that said facilities cannot ask residents to waive their rights, RCW 70.129.105, and because care in these facilities has too often been abysmally poor, the Legislature gave residents and other vulnerable adults a powerful statutory cause of action for neglect or abuse, and included in it the practical enforcement mechanism of providing the prevailing plaintiff the right to attorney's fees and costs, liberally defined to include experts' fees. RCW 70.34.200(3).

Avalon violated Woodall's rights by having him sign an arbitration agreement waiving his right to a jury trial and requiring that he arbitrate claims for neglect before an arbitrator. Wayne Woodall suffered from dementia and

complete deafness, and asking him to sign an arbitration agreement waiving his right to jury trial was exactly the sort of scenario that RCW 70.129.105 was designed to prevent. The trial court should have denied Avalon's motion to compel arbitration in its entirety, and this court should reverse that portion of the trial court's decision ordering arbitration of the survival claims and remand this case for a trial on the merits.

II. ASSIGNMENT OF ERROR

The trial court erred when it granted the portion of Avalon's Motion to Compel Arbitration that applied to Woodall's survival claims.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court err in its partial granting of Avalon's Motion to Compel Arbitration as to the survival claims where

(1) Washington statutes broadly prohibit facilities such as Avalon from asking residents to sign a waiver of rights,

(2) The resident was shown by uncontroverted evidence to be completely deaf and demented, and

(3) The plaintiff and estate representative presented uncontroverted evidence that he could not afford to pay an arbitrator.

What is the burden of proof on the Plaintiff in showing that

(1) The arbitration agreement at issue is procedurally unconscionable because Henry Wayne Woodall did not have a meaningful opportunity to understand the terms of the arbitration agreement due to his deafness and dementia; or

(2) The waiver of Plaintiff's right to jury trial was not knowing, voluntary and intelligent because Plaintiff was deaf and suffered from dementia; or

(3) Plaintiff did not have the capacity to contract because of his disability.

IV. ARGUMENT

A. Summary of Argument

The arbitration agreement sought to be enforced in this matter is procedurally and substantively unconscionable. The agreement is illegal under the plain language of RCW 70.129.105 prohibiting facilities such as Avalon from asking residents such as Wayne Woodall to sign a waiver of rights. Asking a deaf and demented resident such as Wayne Woodall to give up important rights such as the right to a jury trial is exactly the sort of act that RCW 70.129.105 was designed to prevent. The arbitration agreement in this matter is procedurally and substantively unconscionable based on the physical and mental condition of Wayne Woodall. The trial court applied the incorrect burden of proof with respect to the waiver of the right to jury trial. Plaintiff must merely offer evidence that the waiver was not knowing, voluntary and intelligent.

B. The Review of the Trial Court's Decision to Compel Arbitration of the Survival Claims in this Case is De Novo.

A trial court's decision on a motion to compel arbitration is subject to de novo review. *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004-05 (Wash. 2007).

C. The Arbitration Agreement Providing for a Waiver of the Right to Jury Trial is Illegal under Washington Law.

The arbitration agreement sought to be enforced by Avalon is plainly illegal under Washington law. RCW 70.129.105; 70.129.005. As a general rule,

the courts of this state will not enforce agreements which are illegal or contrary to public policy. *Sienkiewicz v. Smith*, 30 Wash.App. 235, 633 P.2d 905 (1981); *Golberg v. Sanglier*, 27 Wash.App. 179, 616 P.2d 1239 (1980). Rather, the courts will leave the parties where it finds them. *Hederman v. George*, 35 Wash.2d 357, 212 P.2d 841 (1949); *Reed v. Johnson*, 27 Wash. 42, 67 P. 381 (1901).

1. The Pre-Dispute Signing of an Arbitration Agreement Undermines Residents' Rights.

Avalon had Wayne Woodall sign the agreement on the same day as his admission to the facility. CP 34,58. DSHS has addressed this issue in a guidance lettter sent to all long term care facilities, stating: "Residents and representatives should not be presented with arbitration agreements at the time of admission because the resident may be too overwhelmed to understand the implications of the agreement, and may erroneously conclude that the agreement needs to be signed in order to be admitted." CP 61.

When evaluating whether an agreement is substantively unconscionable, courts must consider the terms of the agreement in light of the totality of the circumstances existing when the contract was made. *Luna v. Household Finance Corp. III*, 236 F.Supp. 2d 1166, 1183 (W.D. Wash. 2002). In this case, the Plaintiff's status as an elderly vulnerable adult needing facility care must be considered a significant part of the totality of the circumstances.

Long-term care facilities have an obligation to inform residents in writing of their rights *prior* to admission, an obligation to "protect and promote the rights

of each resident," an obligation to provide an admission contract consistent with the residents' rights law, and are prohibited from asking residents to waive their rights. RCW 70.129.030(1); 70.129.020; 70.129.150(1); 70.129.105. These statutes reflect the Legislature's awareness of the vulnerability of residents, of the dynamic between residents and care facilities. The plain language of these statutes must be enforced if they are to have any meaning. Residents are easy prey to strong arm tactics and one-sided or harsh contract language. Avalon's choice to have residents sign a pre-dispute binding agreement that waives the resident's right to jury trial constitutes a prohibited waiver of resident's rights under these statutes.

2. The Arbitration Agreement in this Matter Violates RCW 70.129.105.

RCW 70.129.105 prohibits facilities from requesting residents to "sign waivers of residents' rights set forth in this chapter or in the applicable licensing or certification laws." The residents' right to a jury trial is one of the rights which a resident cannot be asked to waive. This is made clear in RCW 70.129.005, which provides: "(1) The resident has the right to exercise his or her rights as a resident of the facility and as a citizen or resident of the United States and the State of Washington." And: "It is the intent of the legislature that individuals who resident in long-term care facilities ... continue to enjoy their basic civil and legal rights." Asking a vulnerable resident to sign an arbitration agreement which gives up the right to jury trial is the same as asking the resident to waive this important

right, in violation of RCW 70.129.105.

Woodall asks the Court to rule that the arbitration agreement in this matter violates RCW 70.129.105. The legislature has in plain language tried to protect against allowing a facility such as Avalon to ask residents to sign any documents containing waivers of rights. It would be appropriate and helpful to this and other vulnerable residents in the state of Washington for the Court to rule that Avalon cannot ask residents or their representatives to sign arbitration agreements that waive residents' rights, including the right to jury trial, and that doing so was in violation of RCW 70.129.105.

Any other conclusion renders the plain language of RCW 70.129.105 and 70.129.005 meaningless. RCW 70.129.005 protects the basic civil and legal rights of a resident such as Wayne Woodall. Although the statute does not define the basic civil and legal rights that are protected, common sense and logic suggest that the right to a jury trial is a basic civil and legal right that is meant to be protected. The plain language of the phrase "basic civil and legal rights" should be read to include the right to a jury trial. The Washington Supreme Court has noted that the right to jury trial is protected by article 1, section 21 of the Washington Constitution and is inviolate. An "inviolate" right to trial by jury is logically a right that it is basic civil and legal right meant to be protected by RCW 70.129.005 and 70.129.105.

A facility such as Avalon cannot ask a resident such as Wayne Woodall to waive the basic civil and legal right to a jury trial under RCW 70.129.105. "No

long-term care facility or nursing facility licensed under chapter 18.51 RCW shall not require or request residents to sign waivers of potential liability for losses of personal property or injury, or to sign waivers of residents' rights set forth in this chapter...." The arbitration agreement that is the subject of this appeal does exactly what is prohibited by RCW 70.129.105. It asked Woodall to sign a waiver of his rights. This waiver is explicit: "We expressly understand and waive all rights to pursue any legal action to seek damages or any other remedies, including the constitutional right to have any claim decided in a court of law before a judge and a jury...." CP 32. This waiver is the heart of the arbitration agreement sought to be enforced in this appeal. The requested waiver of Wayne Woodall's rights violates Washington law and should not be enforced by this Court.

The trial court's order compelling arbitration of the survival claims in this matter, CP 141-42, should be reversed, and this case should be remanded for trial on the merits.

D. The Arbitration Agreement is Procedurally and Substantively Unconscionable Because of the Physical and Mental Disability of Wayne Woodall.

The arbitration agreement is further unconscionable because of the mental and physical disability of Wayne Woodall. Because of this disability, the arbitration agreement is not enforceable under the doctrines of procedural and substantive unconscionability, as recognized by Washington courts in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2005).

1. The Doctrine of Substantive Unconscionability Applies to

Arbitration Agreements Under State Law.

Under federal and state law, arbitration provisions in contracts are deemed to be "valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract." 9 USC § 2; RCW 7.04A.060(1). The purpose of Congress in enacting the federal law "was to make arbitration agreements as enforceable as other contracts, *but not more so*." *Cap Gemini Ernst & Yound, U.S., LLC v. Nackel,* 346 F.3d 360, 364 (2d Cir. 2003)(emphasis original). In determining the validity of an arbitration provision, courts "should apply ordinar state-law principles that govern the formation of contract." *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995). "Thus, generally applicable defenses, such as ... unconscionability, may be applied to invalidate arbitration agreements." *Doctor's Assocs., Inc. v. Casarotto,* 517 U.S. 681, 687 (1996). Whether a contract is unconscionable, "is a question of law for the courts." *Nelson v. McGoldrick,* 127 Wn.2d 124, 131, 896 P.2d 1258 (1995); *see also* RCW 7.04A.060(2).

Washington courts recognize two categories of unconscionability: procedural and substantive. *Alder v. Fred Lind Manor,* 153 Wn.2d 331, 344, 103 P.3d 773 (2005). Substantive unconscionability involves cases where a clause or term in the contract is alleged to be one-sided or overly harsh. *Fred Lind Manor, id.* Substantive unconscionability alone can support a finding of unconscionability. *Fred Lind Manor, id* at 347.

2. The Arbitration Agreement Sought to be Enforced by Avalon is

Substantively and Procedurally Unconscionable based on the mental and physical condition of Henry Wayne Woodall.

"Procedural unconscionability is the lack of a meaningful choice, considering all the circumstances surrounding the transaction including [t]he manner in which the contract was entered, whether the party had a reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print." *Adler*, 153 Wn.2d at 345 (internal quotations and citations omitted).

Henry Wayne Woodall did not have a meaningful opportunity to understand the terms of the arbitration agreement because he was deaf and suffered from dementia. CP 68-69; 58; 86-87. The arbitration agreement contains 3 pages of dense legalese. CP 32-34. Because of his dementia, Mr. Woodall could not possibly have understood the arbitration agreement. CP 86-87. The facility took advantage of Mr. Woodall's condition in inducing him to sign the arbitration agreement. The declarations of Clifford Wayne Woodall and Dr. George Glass, MD, made it clear that Henry Woodall could not have understood the arbitration agreement and that it could not have been explained to him because he was deaf. CP 68-69; 86-87. The facility admission record shows that Mr. Woodall had a diagnosis of dementia on October 6, 2006, when the arbitration agreement was signed. CP 58. Under these facts, the trial court should have found that the arbitration agreement was not enforceable under the doctrines of procedural and substantive unconscionability, or should have held an evidentiary hearing to

resolve the fact question on that issue.

Plaintiff demonstrated to the trial court that Woodall did not have the ability to understand complex concepts. Henry Woodall therefore did not have a "reasonable opportunity to understand the terms of the contract, and whether the important terms [were] hidden in a maze of fine print." *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 345, 103 P.3d 773, 781 (2005). This is the test for procedural unconscionability, and it is clear that an 84 year old resident of a nursing home with dementia, who could not understand who his own nephew was, did not have a "reasonable opportunity to understand the terms of the contract."

3. Alternatively, the Trial Court should have Held a Hearing on the Capacity of Henry Woodall to Contract.

Alternatively, Henry Woodall raised a fact question on whether Woodall had have the capacity to contract and give up his right to jury trial as provided in the arbitration agreement. The declarations of Dr. George Glass and Clifford Woodall, CP 86-87; 68-69, establish that Henry Woodall was completely deaf, had dementia and could not possibly have understood the arbitration agreement at issue in this case. The declaration of George Glass demonstrated that Henry Woodall could not possibly have understood the arbitration agreement under this test. Dr. Glass is a medical doctor and psychiatrist and is qualified to assess Henry Woodall's mental capacity. CP 86-87.

This evidence raised a fact question that should have been decided by the Court following an evidentiary hearing. The relevant portion of the statute

governing this question provides:

> (1) On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. **If the refusing party opposes the motion, 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). Woodall has been unable to locate a Washington case interpreting this statute. RCW § 7.04.040 formerly governed this issue and provided for a jury trial to resolve substantial issues of fact related to a motion to compel arbitration.

However, Woodall has located authority from federal and state courts that address the issue of whether the trial court should hold an evidentiary hearing when a fact question exists regarding the enforceability of an arbitration agreement. Where the facts necessary to determine a motion to compel arbitration are controverted, the trial court must hold an evidentiary hearing to determine the disputed material facts. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex.1992). When a genuine issue of material fact exists on the existence or terms of an arbitration agreement, numerous state and federal courts have held that the trial court should hold an evidentiary hearing. *Brake Masters Sys., Inc. v. Gabbay*, 206 Ariz. 360, 78 P.3d 1081, 1084 (App.2003). *RE/MAX Int'l, Inc. v. Realty One, Inc.*, 271 F.3d 633, 646 (6th Cir. 2001) (evidentiary hearing required if facts material to agreement are disputed); *Murchison v. Grand Cypress Hotel*

Corp., 13 F.3d 1483, 1486 (11th Cir. 1994) (summary enforcement of alleged settlement agreement improper when substantial factual dispute exists on terms of agreement); *Gatz v. Southwest Bank of Omaha*, 836 F.2d 1089, 1095 (8th Cir. 1988) (district court must hold evidentiary hearing when substantial factual dispute exists on existence or terms of settlement agreement); *Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987) ("[W]here material facts concerning the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing."); *DiFrancesco v. Particle Interconnect Corp.*, 39 P.3d 1243, 1247 (Colo. App. 2001) (if terms or existence of settlement agreement are in dispute, evidentiary hearing is required); *Moran v. Guerreiro*, 37 P.3d 603, 620 (Haw. App. 2001) (motion to enforce settlement agreement may not be decided summarily if there is any question of fact on whether mutual, valid, and enforceable settlement agreement exists); *Rulli v. Fan Co.*, 683 N.E.2d 337, 339 (Ohio 1997) (when parties dispute meaning of terms of settlement agreement or existence of settlement agreement, trial court must conduct evidentiary hearing before enforcing agreement).

The trial court erred in applying a burden of "clear, cogent and convincing evidence" to Plaintiff's evidence of incapacity. CP 212. Rather, Plaintiff needed only to raise a fact question, which the trial court should have resolved by evidentiary hearing. The trial court itself evidently believed that Plaintiff's evidence raised a fact question regarding Wayne Woodall's capacity. CP 91. The trial court asked the parties for briefing on "The procedural means by which the

Court should resolve a significant factual dispute upon which this question of law may depend (i.e., was there a patent incapacity that renders the arbitration agreement procedurally unconscionable?)." *Id.* Plaintiff's evidence raised a fact question on capacity, and whether this evidence was "clear, cogent and convincing" should have been resolved following an evidentiary hearing. This court should set aside the order compelling arbitration of the survival claims in this matter and remand for an evidentiary hearing on the capacity of Wayne Woodall to contract.

4. Alternatively, RCW 7.04A.070(1) is unconstitutional.

RCW 7.04A.070(1) violates Plaintiff's constitutional right to a jury trial on the issue of whether an arbitration agreement is enforceable. Art. I §21 protects the right to a jury trial and provides for waiver only "where the consent of the parties interested is given thereto." Where evidence suggests that a party did not have the capacity to consent to a waiver of the right to jury trial, Plaintiff believes that the Washington constitution requires a jury trial on that question. This is a question of first impression because the former RCW § 7.04.040 provided for a jury trial to resolve substantial issues of fact regarding an arbitration.

The Washington State Constitution unequivocally guarantees that "[t]he right of trial by jury shall remain inviolate...." Const. Art. I, § 21. An inviolate right "must not diminish over time and must be protected from all assaults to its essential guaranties." *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d

711, 780 P.2d 260 (1989). Moreover, any waiver of a right guaranteed by a state's constitution should be narrowly construed in favor of preserving the right. *Wilson v. Horsley*, 974 P.2d 316, 137 Wn.2d 500,509 (Wash. 1999). A waiver of that right must be voluntary, knowing, and intelligent. *State v. Forza*, 70 Wash.2d 69, 422 P.2d 475 (1966). Additionally, a court must indulge every reasonable presumption against waiver of fundamental rights. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). The trial court applied the incorrect burden on Plaintiff when it required presentation of clear, cogent and convincing evidence, CP 212, before setting aside the arbitration agreement. The evidence of the physical and mental disability of Henry Woodall, CP 68-69, 86-87, demonstrated that the waiver of the jury trial right contained in the arbitration agreement could not have been knowing, voluntary, and intelligent. The Washington State Constitution protected Henry Woodall's right to jury trial on the question of his capacity to waive his right to jury trial. RCW 7.04A.070(1) is an unconstitutional invasion of the right to jury trial, and the trial court erred in deciding the issue of Henry Woodall's capacity without an evidentiary hearing or a jury trial.

E. The Trial Court's Order Compelling Arbitration of the Survival Action Should be Reversed Because Plaintiff Cannot Afford Arbitration.

The trial court erred in granting Avalon's motion to compel arbitration of the survival claims because the evidence demonstrated that the Plaintiff cannot afford to pay an arbitrator. The plaintiff Clifford Woodall has very limited means

and cannot afford to pay an arbitrator $350 per hour to consider this case. Mr Woodall states in his declaration:

> My only means of support is the following: social security, which is currently $1358 per month; and a disability pension of $1683 per month through the state of Washington. ... I cannot afford to pay an arbitrator's fees in the matter. I use the entirety of my limited income for my support and medical bills and there is nothing left over to pay an arbitrator. Requiring me to arbitrate this case prevents me from bringing the case at all because I cannot pay an arbitrator's fees.

CP 68. This evidence demonstrates by itself that the arbitration Agreement is unconscionable. The arbitration agreement requires the Plaintiff to pay the cost of their arbitrator and one-half of the cost of a neutral arbitrator. This agreement provides that: "Each party shall equally share in the expenses of the neutral arbitrator. ... The Resident and Facility shall pay the fees and expenses of their own selected arbitrator." CP 32-33. Woodall proved the cost of arbitration through the Declaration of Patricia Willner, which demonstrated that an arbitrator's fees in this matter would be in excess of of $350.00 per hour. CP 70. Because the plaintiff in this matter has no extra income to pay an arbitrator as established by the undisputed evidence, and the arbitration agreement in this matter is unconscionable and should not have been enforced by the trial court.

Requiring the plaintiff to pay $350 per hour to an arbitrator to decide this case effectively prevents the case from being litigated. The cost sharing provisions of the arbitration agreement render the agreement unconscionable. In *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 353, 103 P.3d 773, 781 (2005), the Washington Supreme Court held that evidence of the Plaintiff's finances and the

cost of arbitration was sufficient to show that an arbitration agreement was unconscionable based on a cost sharing provision. Woodall offered exactly this sort of evidence to the trial court, which was disregarded in the order granting Avalon's motion to compel arbitration with respect to the survival claims. CP 141-42. The order compelling arbitration should be set aside based on this uncontroverted evidence, and the arbitration agreement should be held to be unconscionable just as the agreement in *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash.App. 446, 465, 45 P.3d 594 (2002), was shown to be unconscionable. "IO]nce the plaintiff has shown the likelihood of incurring prohibitive arbitration costs, the 'onus is on the party seeking arbitration to provide contrary evidence." Id. at 603.

The evidence presented to the trial court is very similar to that considered by the court in *Mendez*, which found the arbitration agreement to be unconscionable. The Plaintiff in *Mendez* presented evidence of his limited finances, *Id.* at 465, just as the plaintiff in this case has. CP 68-69. The plaintiff's evidence of the cost in arbitration in this case gives greater detail regarding the cost of arbitration that the Plaintiff in *Mendez*, CP 70-71, who offered only evidence of the $2000 filing fee. *Mendez*, 111 Wash.App. at 465. Just as in the *Mendez* case, the Defendants in this case have not disputed Plaintiff's claim to be unable to afford arbitration, nor did the Defendant in this case offer offsetting evidence to enforce arbitration. *Id.* at 470. The evidence of prohibitive costs in *Mendez* showed that the plaintiff in that case could not afford even a $500 filing

fee, and this evidence was sufficient to find that the arbitration agreement in that case was unconscionable. *Id.* The plaintiff in this matter, Clifford Woodall, has provided very similar evidence of a fixed, limited income and lack of disposable income such that he cannot afford arbitrator's fees. CP 68-69. The trial court in this matter should have come to the same conclusion that the trial court and appeals court in *Mendez* did - that the arbitration agreement was unconscionable and should not be enforced due to prohibitive costs to the plaintiff. The order compelling arbitration of the survival claims should be set aside on this basis, and these claims should be remanded for trial on the merits.

F. The Trial Court Correctly Decided that a Decedent Cannot Bind the Independent Wrongful Death Claims that Belong to the Individual Wrongful Death Claimants.

1. The Wrongful Death Claimants are not Parties to the Arbitration Agreement and are not Bound by it.

Most contracts bind only those who bargain for them. Restatement (Second) of Contracts § 17(1) (1981). A contract cannot reduce or diminish the legal rights of those not a party to it. *Gall v. McDonald Industries*, 926 P.2d 934, 938, 84 Wn.App. 194 (Wash.App. Div. 2, 1996). Avalon had the burden to show the existence of a contract between Avalon and the wrongful death claimants. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket, Inc.*, 96 Wn.2d 939, 944, 640 P.2d 1051 (1982). The record contains no evidence that the wrongful death claimants, Sharon King and Clifford Wayne Woodall entered into

a contract with Avalon. Avalon had the burden to offer this evidence and did not do so.

2. Henry Woodall did not have Authority to Bind the Wrongful Death Claimants to an Arbitration Agreement.

Washington law is unequivocal on the nature of a wrongful death action. A wrongful death action does not derive from the decedent and does not belong to him:

> The second claim for damages springs from the wrongful-death statutes which create a new cause of action for the benefit of decedent's heirs or next of kin, in accordance with the terms of the statute, based upon the death itself. Although originating in the same wrongful act, **the wrongful-death action is for the alleged wrong to the statutory beneficiary.** The estate of decedent does not benefit by the action; **the claim of damages for the wrongful death is not one that belonged to decedent.** *Gray v. Goodson*, 61 Wash.2d 319, 378 P.2d 413 (1963), quoting *Maciejczak v. Bartell*, 187 Wash. 113, 60 P.2d 31 (1936).

Warner v. McCaughan, 77 Wash. 2d 178, 179, 460 P.2d 272 (1969). Woodall suggests that only one conclusion can be drawn from this discussion. The claim for wrongful death did not belong to Henry Woodall. Henry Woodall therefore did not have the authority to waive, release, or agree to arbitrate a claim for his wrongful death, just as the undersigned does not have the authority to sign a release for his neighbor's car accident case. The fact that the wrongful death claim derives from the wrongful act causing death does not grant Henry Woodall authority over a claim that does not belong to him. The trial court correctly concluded, and basic principles of contract law show that an individual has no authority to bind third parties with respect to claims that are not his.

Washington law favoring arbitration generally does not create authority for a signatory to an arbitration agreement to bind third parties with respect to claims that do not belong to him. The wrongful death claims do not belong to Henry Woodall or to his estate. There is no contract between Avalon and the wrongful death claimants, and those claims are not governed by an arbitration agreement which the beneficiaries of the claim for wrongful death did not sign. The trial court correctly decided based on principles of contract law and the nature of the wrongful death action that the decedent did not have authority to bind heirs to an arbitration agreement which they did not sign.

This is true regardless of who the nominal plaintiff in this action is. The fact that this action is brought by the personal representative of the estate on behalf of the wrongful death beneficiaries does not change the nature of the claim. It makes no difference whether Sharon King and Clifford Woodall are named individually as plaintiffs. The claim belongs to those individuals and not to Wayne Woodall. The representative of the estate merely brings the claim as agent for the wrongful death claimants. The claim does not belong to the representative of the estate any more than it belongs to the decedent. Because the wrongful death claim belongs to individuals who did not agree to arbitration, the trial court correctly decided that the owners of the wrongful death claim could not be bound by a contract they did not sign. Appellant's Motion to Dismiss, Opening Brief of Appellee, pp. 18-19, has no bearing on whether the wrongful death claimants should be forced to arbitrate under an agreement they never signed.

Under Washington law, the wrongful death claim is an action brought on behalf of the beneficiaries, who themselves have been injured by the death. And it is akin to a property right for these beneficiaries. *Gray v. Goodson*, 61 Wn.2d 319 (1963). Basic principles of contract law suggest that Henry Woodall cannot give up a claim that is not his. Since the claim for wrongful death is a property right that belongs to non-signatories to the arbitration agreement, then that property right cannot be bargained away by someone to whom the right does not belong. This court should affirm the decision of the trial court with respect to the claim for wrongful death in this matter.

3. Authority from Other States Suggests that the Wrongful Death Claims in this Matter are not Governed by an Arbitration Agreement Signed by the Decedent.

Avalon cites a California case holding that wrongful death claimants are bound by an arbitration agreement signed by the decedent and asks that this court follow that decision. Opening Brief of Appellant, p. 17; *Clay v. Permanente Medical Group, Inc.*, 540 F.Supp.2d 1101. This case contains a survey of California cases on whether non-signatory heirs can be bound by arbitration agreement signed by the decedent. A careful review of California law in fact shows that under these facts, California courts would not compel non-signatory heirs to arbitrate under an agreement which they did not sign.

The court in *Clay* summarized California law dealing with the issue of whether non-signatory wrongful death claimants can be bound by an arbitration agreement. The Court noted that one of the claimants was a spouse, who could be

bound to arbitrate by her spouse based on an agency relationship; and that the wrongful death action was an indivisible claim that could not be split across different forums. *Id.* at 1111. However, under California law in *Buckner v. Tamarin*, 98 Cal.App.4th 140, 119 Cal. Rptr.2d 489 (2002), the Court noted that absent an agency relationship, California courts have refused to hold non-signatories to arbitration agreements. *Id.* at 143. The Court noted that the decedent had no authority to bind his adult children to arbitration even though the agreement plainly and unambiguously purported to bind the decedent's heirs. *Id.* at 144. Similarly, the Court in this case should decline to bind the adult children of Clifford Woodall to a contract which they never signed. There is no evidence of an agency relationship between Henry Woodall and his adult children. In the absence of an agency relationship, Henry Woodall could not contract on behalf of his children and could not bargain with respect to claims that do not belong to him.

Courts of several states have reached the same result as the trial court in this case with respect to wrongful death claims of non-signatory heirs. *Bybee v. Abdulla*, 189 P.3d 40, 46 (Utah 2008)(holding that non-signatory heirs were not bound to arbitrate claims for wrongful death). Ohio courts have reached the same conclusion based on principles of contract law and the nature of the wrongful death claim; that is, the wrongful death action belongs to the heirs who did not sign the arbitration agreement and are not bound by it. *Peters v. Columbus Steel Castings Co.*, 873 N.E.2d 1258, 115 Ohio St.3d 134, (Ohio 2007). This reasoning

was followed by the Missouri Supreme Court in *Lawrence v. Beverly Manor*, 273 S.W.3d 525 (Mo. 2009), which held that the decedent could not agree to arbitrate wrongful death claims that were not his; and that the wrongful death claims that could not have been brought by the decedent could not be subject to an arbitration agreement signed by the decedent. *Id.* at 528-29.

The nature of the wrongful death claim in Washington suggests that the above cited authorities should govern the outcome of this question under Washington law. The wrongful death claim in Washington does not belong to the decedent, it belongs to the heirs. The damages that can be claimed in a wrongful death action, such as a claim for a loss of consortium, are damages to the heirs and not to the decedent. The claim for wrongful death is not an asset of the estate although it is brought by the personal representative as agent for the wrongful death claimants. These characteristics indicate that the wrongful death claim is a separate and distinct action from the survival claim which is a claim that the decedent could have brought if he were alive.

Avalon suggests that Henry Woodall could bind the wrongful death claimants to arbitrate just as he could bind his heir's ability to sell his property. Appellant's Opening Brief, at p. 8. It is indeed the case that Henry Woodall could make decisions regarding the disposal of his property after his death. However, it is not logically the case that Henry Woodall could bind his heirs with respect to a property right that belonged to the heirs and not to him. The wrongful death statute creates in the beneficiary a new and original cause of action upon the

wrongful death of one to whom he has the necessary statutory relationship. *Wood v. Dunlop*, 83 Wn.2d 724, 521 P.2d 1177 (Wash. 1974). This right, however, can be exercised only in the specific manner authorized by statute, i.e., by the personal representative of the deceased. *Id.* It would be incorrect to say that a cause of action for wrongful death 'vests' in the personal representative, to the exclusion of the beneficiaries, until recovery of a judgment or its equivalent. Rather, '(t)he right of action 'vests' in the personal representative only in a nominal capacity since the right is to be asserted in favor of the beneficiaries.' *Id.* At the time of the wrongful death when the cause of action accrues, the beneficiaries are then 'vested' with the right to the benefit of the cause of action. *Id.* The Washington Supreme Court in *Wood* made clear the nature of the wrongful death action as vesting in the heirs at the time of the wrongful death.

This vested right cannot be released by the decedent or settled without the consent of the wrongful death claimants. *Ebsary v. Pioneer Human Services*, 796 P.2d 769, 59 Wn.App. 218, 227-28 (Wash. App. 1990). Just as the wrongful death claim could not be released by the decedent, the decedent has no authority to bind the wrongful death claimants to arbitration. The trial court correctly decided that the arbitration agreement did not apply to the wrongful death claims in this case, and that finding should be upheld in this appeal.

G. This Court has Jurisdiction to Hear this Appeal Under RAP 2.3(B)(2).

The Commissioner's Ruling on Appealability, March 24, 2009, deferred to

the panel the decision on whether to accept review of the court's order compelling arbitration of the survival claims in this case. Woodall would show this court that this order, CP 141-42, should be the subject of discretionary review.

1. Argument Why Review Should Be Accepted

The trial court has committed probable error which substantially alters the status quo. As briefed above, the trial court disregarding uncontroverted evidence of inability to afford arbitration. This decision is probable error for the reasons set forth above. Further, this decision clearly is a substantial alteration of the status quo. As proved in the declaration of Clifford Woodall, the plaintiff is unable to proceed with the case if it is arbitrated because of the prohibitive cost of arbitration. CP 68-69. This is a clear alteration of the status quo because it shifts the survival claims from a low-cost forum, which plaintiff can afford, to a high-cost arbitration which plaintiff cannot afford.

The order compelling arbitration of the survival claims in this case is probable error for the reasons set forth above. As argued above, waivers of resident rights are prohibited under RCW 70.129.105; 70.129.005, and a waiver of the right to jury trial is one of the rights protected by RCW 70.129.005. The arbitration agreement should not have been enforced by the trial court for this reason alone. Additionally, the trial court erred in application of the burden of proof to plaintiff's claim that Henry Woodall could not have understood what he was signing when he signed the arbitration agreement. The trial court's order compelling arbitration altered the status quo because it split the claim into two

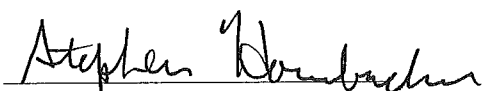
parts, each proceeding in different forums. A stay of the survival claims filed in state court alters the status quo because it forces the plaintiff to litigate in a forum not chosen by him. This order should be addressed on discretionary review.

Addressing the order on the survival claims further makes sense because the benefits of arbitration are already lost because the parties are drawn into the appellate process by the portion of the Court's denying arbitration with respect to the wrongful death claims. The court's order with respect to wrongful death is already being appealed by Avalon. Not accepting the order regarding the survival claims on discretionary review would subject to the case to unnecessary piecemeal appeals. *Owens v. Kuro,* 56 Wn.2d 564, 571, 354 P.2d 696 (Wash. 1960) ("Piecemeal appeal of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business.").

V. CONCLUSION

This court should accept review for the reasons stated in Part E and reverse the trial court's ruling that the survival claims in this matter shall be arbitrated.

Respectfully Submitted,



Stephen Hornbuckle
WSBA#: 39065
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 5th day of October, 2009, at Bellevue, Washington, the foregoing was caused to be served in the following person(s) in the manner indicated:

Christopher H. Howard Mary Jo Newhouse SCHWABE, WILLIAMSON & WYATT US Bank Center 1420 5th Avenue, Suite 3010 Seattle, WA 98101 Attorneys for Defendant, Avalon Care Center - Federal Way, LLC	VIA REGULAR MAIL ✓ VIA CERTIFIED MAIL ____ HAND DELIVERED ____ BY FACSIMILE ____ VIA OVERNIGHT MAIL ____

Stephen Hornbuckle

APPENDIX

RCW 70.129.005 - Intent - Basic rights.

The legislature recognizes that long-term care facilities are a critical part of the state's long-term care services system. It is the intent of the legislature that individuals who reside in long-term care facilities receive appropriate services, be treated with courtesy, and continue to enjoy their basic civil and legal rights.

It is also the intent of the legislature that long-term care facility residents have the opportunity to exercise reasonable control over life decisions. The legislature finds that choice, participation, privacy, and the opportunity to engage in religious, political, civic, recreational, and other social activities foster a sense of self-worth and enhance the quality of life for long-term care residents.

The legislature finds that the public interest would be best served by providing the same basic resident rights in all long-term care settings. Residents in nursing facilities are guaranteed certain rights by federal law and regulation, 42 U.S.C. 1396r and 42 C.F.R. part 483. It is the intent of the legislature to extend those basic rights to residents in veterans' homes, boarding homes, and adult family homes.

The legislature intends that a facility should care for its residents in a manner and in an environment that promotes maintenance or enhancement of each resident's quality of life. A resident should have a safe, clean, comfortable, and homelike environment, allowing the resident to use his or her personal belongings to the extent possible.

RCW 70.129.105 - Waiver of Liability and Resident Rights Limited.

No long-term care facility or nursing facility licensed under chapter 18.51 RCW shall require or request residents to sign waivers of potential liability for losses of personal property or injury, or to sign waivers of residents' rights set forth in this chapter or in the applicable licensing or certification laws.

The Honorable Michael Heavey

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

RICK RECTOR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DELORES PAYNE, Plaintiff, v. EVERGREEN WASHINGTON HEALTHCARE AUBURN, LLC d/b/a CANTERBURY HOUSE CARE CENTER, Defendant.	Cause No.: 08-2-23463-1 KNT PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT EVERGREEN WASHINGTON HEALTHCARE AUBURN, LLC'S MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

A. Relief Requested.

Plaintiff asks that the Court reconsider the order of January 12, 2009, granting Defendant Evergreen Washington Healthcare Auburn, LLC's Motion to Compel Arbitration and Stay Litigation. Plaintiff asks that the Court consider clear case authority showing that Rick Rector was not the agent of Delores Payne and did not have authority to enter into an arbitration agreement on Delores Payne's behalf. Plaintiff asks that the Court enter an Order denying Defendant's motion to compel arbitration.

B. Statement of Facts

The Court granted Defendant's Motion to Compel Arbitration on January 12, 2009. A copy of this order is attached hereto as Exhibit "A." The Court indicated the following reasons for this order: (1) the fact that Rick Rector signed the agreement as Resident's Legal

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Representative/Responsible Party/Agent Signature ; (2) the notarized letter of Teresa Lewis, the attorney-in-fact for Delores Payne, authorizing Rick Rector to make any decisions, financial or medical, regarding Delores Payne; and (3) the inference from this record that Rick Rector believed that he was the agent for Delores Payne and acted in conformity with that belief.

On July 15, 2007, Delores Payne was admitted to Canterbury House, a nursing home operated by Evergreen Washington Healthcare Auburn, LLC ("Canterbury House"). On that date, Rick Rector, the son of Delores Payne, signed an arbitration agreement that is the subject of the Court's order. A copy of the arbitration agreement is attached hereto as Exhibit "A" for the Court's convenience in reviewing this motion.

Mr. Rector informed the staff at Canterbury House that he did not have Power of Attorney over his mother, Delores Payne. Declaration of Rick Rector, p. 3, lines 6-9, attached hereto as Exhibit "B." Mr. Rector provided them with a copy of the only Power of Attorney signed by his mother. Exhibit "C" herto. Mr. Rector informed the staff at Canterbury House that he did not have Power of Attorney for Delores Payne. Mr. Rector was not his mother's power of attorney on July 15, 2007, and the staff at Canterbury House was fully aware of this. Decl. Rector, at p. 3, lines 11-12. Mr. Rector was only designated by Ms. Payne as a Special Attorney-in-Fact for the purpose of making gifts to the Attorneys-in-Fact. Ex. C, p. 3, ¶ 3.13.2. This role was Mr. Rector's only authority under the power of attorney signed by Delores Payne and Canterbury House was aware of this. Decl. Rector, Ex. B, p. 3, lines 13-14. Ms. Teresa Lewis, who held the power of attorney for Ms. Payne, provided the staff at Canterbury House with a letter indicating that she wanted Mr. Rector to make financial and medical decisions for Delores Payne, Exhibit "D" hereto, but Ms. Payne did not execute a new Power of Attorney and Mr. Rector was never appointed by a Court as his mother's guardian. Decl. Rector, Ex. B, p. 3, lines 14-17.

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C. Statement of Issues

The issue before the Court in this motion is whether there was an agency relationship between Rick Rector and his mother, Delores Payne. If there was not an agency relationship between Mr. Rector and his mother, then he could not have entered into an arbitration agreement on her behalf. Plaintiff respectfully suggests that the evidence shows as a matter of law that Mr. Rector was not the agent of Delores Payne, and that the arbitration agreement is not enforceable.

D. Evidence Relied Upon

Plaintiff relies on the declaration of Rick Rector, the power of attorney of Delores Payne, and the letter of Teresa Lewis dated July 12, 2007, and the pleadings and documents on file in this matter.

E. Legal Authority

Plaintiff would show the court that arbitration agreements are subject to the same defenses to a contract as any other type of agreement. RCW 7.04A.060(1) states: "An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable **except upon a ground that exists at law or in equity for the revocation of contract.**" (Emphasis added.) In this case, the arbitration agreement signed by Rick Rector is not enforceable because the evidence shows that Mr. Rector was not the agent of Delores Payne. Further, Delores Payne's Attorney-in-Fact, Ms. Teresa Lewis, could not delegate her authority to Rick Rector and thereby create an agency relationship between Rick Rector and Delores Payne. Finally, the doctrine of apparent authority does not create an agency relationship between Rick Rector and Delores Payne under the facts presented to the court. Because the evidence shows that Rick Rector was not the agent of Delores Payne, the arbitration agreement signed by Mr. Rector is not enforceable and Defendant's motion to compel arbitration should have been denied by the Court.

I.

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1. The evidence before the Court demonstrates that Rick Rector was not the agent of Delores Payne.

The evidence in this matter shows that Rick Rector was not the agent of Delores Payne and could not contract on her behalf, enter into an arbitration agreement on her behalf, or waive her right to jury trial. The burden of establishing an agency rests upon the party who asserts it. Moss v. Vadman, 77 Wash.2d 396, 402-3, 463 P.2d 159 (1969). Agency is a legal concept whose existence depends upon the establishment of the specific factual elements of consent and control. Moss v. Vadman, supra. An agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control. Matsumura v. Eilert, 74 Wash.Dec.2d 369, 444 P.2d 806 (1968); Turnbull v. Shelton, 47 Wash.2d 70, 286 P.2d 676 (1955); Coombs v. R. D. Bodle Co., 33 Wash.2d 280, 205 P.2d 888 (1949); McCarty v. King County Medical Service Corp.. Consent and control are the essential elements of an agency. The relationship is created by law, but if no factual pattern exists which gives rise to an agency, then no agency exists despite the intent of either or both of the parties. Because of this, one may believe that he has created an agency when in fact the relationship is that of seller to buyer. Moss, 77 Wash.2d at 403.

Regardless of where the burden to show agency lies, Washington law is clear that it is the manifestations of the principal that show agency. Mullen v. North Pac. Bank, 610 P.2d 949, 25 Wn.App. 864 (Wash. App. 1980). Agency does not exist unless the facts establish mutual consent and control by the principal of the agent. Uni-Com Northwest, Ltd. v. Argus Publ'g Co., 47 Wn. App. 787, 796, 737 P.2d 304 (1987). Consent is an essential element of agency. McCombs Const., Inc. v. Barnes, 645 P.2d 1131, 32 Wn.App. 70, 73 (Wash. App., 1982). The undisputed facts of this matter show that Delores Payne did not consent to her son, Rick Rector, acting as her agent. Ms. Payne signed a power of attorney naming Teresa Lewis as her agent. Exhibit "B." Rick Rector was only designated by Ms. Payne as a Special

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Attorney-in-Fact Mr. Rector was only designated by Ms. Payne as a Special Attorney-in-Fact for the purpose of making gifts to the Attorneys-in-Fact. Ex. C, p. 3, ¶ 3.13.2. Rick Rector's subjective belief that he was the agent of Delores Payne is not any evidence of consent on the part of Delores Payne to Mr. Rector acting as her agent. Further

Because the required element of consent is absent in this case, there is no agency relationship between Rick Rector and Delores Payne, and the arbitration agreement signed by Rick Rector is not enforceable.

II.

Theresa Louis cannot create an agency relationship between Rick Rector and Delores Payne by appointing Rick Rector as a subagent.

It is well settled that power of attorney must be strictly construed. "a power of attorney may will be held to grant only those powers which are specified, and the agent may neither go beyond or deviate from the expressed provisions," Bryant v. Bryant, 125 Wn.2d 113, 882 P.2d 169 (Wash., 1994) .

The power of attorney it is the sole evidence of any agency relationship does not provide authority to Theresa Louis to appoint anyone as a subagent. Because Theresa Louis's authority is strictly limited set forth by the power of attorney, she could not by letter, attached hereto as Exhibit "B," appoint Rick Rector as her subagent to act on Ms. Payne's behalf.

Nor does the strict construction of the power of attorney in this matter allow for Ms. Payne's agent to waive her right to jury trial. The power of attorney is explicit with respect to lawsuits [ ]

III.

The doctrine of apparent authority does not apply to this case and cannot create an agency relationship between Rick Rector and Delores Payne. Apparent authority can only be based upon the acts of the principle. dlsv maiden, 121 p 3rd, 1210.

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F. Conclusion

For the foregoing reasons, plaintiff respectfully requests that the Court reconsider the order compelling arbitration of January 12, 2008, and enter an order denying Defendant's motion to compel arbitration.

DATED this 21th day of January, 2009

Respectfully Submitted,

Stephen Hornbuckle
WSBA#: 39065
THE HORNBUCKLE FIRM
11033 NE 24th Street, STE 200
Bellevue, WA 98004
Phone: 425-451-1202
Fax: 425-454-4289

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the _____ day of _____, 2009, at Bellevue, Washington, the foregoing was caused to be served in the following person(s) in the manner indicated:

David L. Tift 1201 Third Avenue, Suite 3400 Seattle, WA 98101-3034 Fax: 206-583-0359 Attorney for Defendant, Evergreen Washington et al.	VIA REGULAR MAIL _____ VIA CERTIFIED MAIL _____ HAND DELIVERED _____ BY FACSIMILE _____ VIA OVERNIGHT MAIL _____

_____

Stephen Hornbuckle

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Honorable Michael Heavey
January 12, 2009
Oral Argument Requested

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

RICK RECTOR, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF DELORES PAYNE, deceased Plaintiff, v. EVERGREEN WASHINGTON HEALTHCARE AUBURN, LLC D/B/A CANTERBURY HOUSE CARE CENTER Defendants.	No.: 08 2 23463 1 KNT DECLARATION OF RICK RECTOR IN RESPONSE TO MOTION TO COMPEL ARBITRATION

Rick Rector declares as follows:

1. I am the son of Delores Payne, who is deceased. I am of legal age, and competent to testify to the matters herein. I make this declaration in response to Defendant EVERGREEN WASHINGTON HEALTHCARE AUBURN, LLC D/B/A CANTERBURY HOUSE CARE CENTER's ("Canterbury House") Motion to Enforce Arbitration Agreement.

2. I am sometimes called "Ricki Rector."

3. I cannot afford to pay an arbitrator's fees in the matter. I use the entirety of my income for my support and there is nothing left over to pay an arbitrator. Requiring me to arbitrate this case prevents me from bringing the case at all because I cannot pay an arbitrator's

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fees. In 2007 I had after tax income of $56,265 according to my tax return for that year. I have not yet filed my tax return for 2008 but I earned approximately $10,000 less in 2008 than in 2007. My entire income comes from my job as a longshoreman. I have no net savings or net assets after liabilities and live entirely off the income I earn at my job as a longshoreman. I spend the entire amount of my income every month to support myself with nothing left over. I make payments on substantial debt every month, including an automobile loan and credit card debt. My most recent bank statement shows a balance of $1428.73. This small amount of excess money is needed to pay my auto insurance, which is billed every six months, and my rent check of approximately $650 per month, which is always cashed after the first of the month. Further, I am currently ill with Hepatitis C and have been off work since October 30, 2008. I am living off disability payments of $842 per week. This is my sole income at present and limits my ability to pay an arbitrator even further. With this illness and the decline in the economy, I expect to make less than $45,000 after tax in 2009.

4. I am the sole living child of Delores Payne. My mother was admitted to Canterbury House Care Center on July 11, 2007. She died on December 27, 2007.

5. I was appointed personal representative of the estate of Delores Payne on June 26, 2008.

6. I have reviewed the Arbitration Agreement signed by me on July 15, 2007 (the "Arbitration Agreement"). On that date I admitted my mother to the Canterbury House. This was a very stressful day for me, and I signed a more than 12 documents on that date as part of the admissions process, including the arbitration agreement. Each of these documents, including the arbitration agreement, was handed to me for signature in a very hasty process. None of the documents were explained to me, including the arbitration agreement. The only thing I was told about the documents signed during the admissions process was that they were all "standard." I

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feel that the facility mislead me by having me sign the arbitration agreement without explaining it to me and just telling me the Arbitration Agreement was "standard." I had no idea in signing the arbitration agreement that I was being asked to give up my mother's right to a jury trial in the event she was neglected at Canterbury House. If I had been informed of this I would not have signed the Arbitration Agreement.

6. I told the staff at Canterbury House that I did not have Power of Attorney over my mother, Delores Payne. I provided them with a copy of the only Power of Attorney signed by my mother, which is attached hereto as Exhibit "1" to this Declaration, and I informed them that I did not have Power of Attorney for my mother Delores Payne. Exhibit "1" is a true and correct copy of my mother's Power of Attorney, which names my brother, Chester Bowman and his wife, Teresa Lewis, as Attorneys-in-Fact. I was not my mother's Power of Attorney on July 15, 2007, or at any other time, and the staff at the Canterbury House was fully aware of this. I was only designated by my mother as a Special Attorney-in-Fact under Exhibit "1" for the purpose of making gifts to the Attorneys-in-Fact. My mother's Power of Attorney gave me no other authority and the staff at the Canterbury House were fully aware of this situation. Teresa Lewis informed the staff at the Canterbury House that she wanted me to make financial and medical decisions for Delores Payne but my mother did not execute a new Power of Attorney and I was never appointed by a Court as my mother's guardian.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this ____ day of_____, 2009, at Bellevue, Washington.

_____
Rick Rector

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STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

ESTATE OF WILLIAM KURTH,
ELAINE KURTH,
KIM ZIMMERMAN,
JAMES KURTH, and
DAVID KURTH

Plaintiffs,

Case Number 07 CV 1111
Case Code: 30107

MICHAEL O. LEAVITT, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, and COUNTY OF RACINE

Involuntary Plaintiffs,

v.

KINDRED HEALTHCARE, INC.,
KINDRED HEALTHCARE OPERATING, INC.,
KINDRED NURSING CENTERS LIMITED PARTNERSHIP
d/b/a Mount Carmel Medical and Rehabilitation Center,
ABC CORPORATION,
DEF CORPORATION,
JOHN DOE 1-50,
JANE DOE 1-50,
ABC INSURANCE COMPANY, and
DEF INSURANCE COMPANY,

Defendants.

FILED
2007 JUN 29 AM 11:19
TARAESA L. WHEARY
CLERK OF COURTS
CLERK

AFFIDAVIT OF ELAINE KURTH

STATE OF WISCONSIN)
) SS
COUNTY OF RACINE)

Elaine Kurth, being of lawful age, and being first duly sworn, states as follows that:

1. I am a competent adult and my date of birth is December 20, 1921.

2. I was William Kurth's (hereinafter "William") wife until the date of his death on

June 25, 2005.

3. William and I were married for 62 years.

4. For years I took care of William in our apartment in Burlington, Wisconsin.

5. William's needs increased and I was becoming concerned that I could not meet his needs.

6. In 2004, William fell in our apartment and I called emergency personnel.

7. One of the emergency personnel told me that I should not be taking care of William at home because of my age and because I was much smaller than William and I may not be able to pick him up if he fell.

8. Emergency personnel instructed me that if William fell again that I should not try to assist him in getting up because I could injure myself.

9. Emergency personnel told me that they were concerned about the frequency of my calls for help with William.

10. In the Fall of 2004, I was seeing my doctor for depression, anxiety, and panic attacks.

11. I believe I was experiencing the foregoing health problems because of stress related to caring for William at home.

12. My doctor prescribed multiple medications for me for depression and anxiety.

13. In the Fall of 2004, my doctor told me I should no longer be caring for William at home due to my age, physical condition, depression, and anxiety.

14. In the Fall of 2004, my children asked me to stop caring for William in our home because they were concerned that if I continued to care for him at home I would get injured or die.

15. I spoke with William about going to a nursing home where he could get more care than I could provide at home and initially he said he did not want to go to a nursing home.

16. Eventually, William said he would go to a nursing home as a last resort, but he wanted to go a nursing home in Burlington.

17. Burlington was our home for many years and William wanted to be close to me, family, and friends.

18. William told me many times and I witnessed that he was a social person who liked to be with me, family, and friends.

19. When we checked for an opening at Mount Carmel Medical and Rehabilitation Center (hereinafter "Mount Carmel") in Burlington, we were told that there was no opening for William, but that someone from the facility would contact us as soon as there was an opening.

20. Because there was no opening at Mount Carmel, William agreed to go to Lakeview Nursing Home (hereinafter "Lakeview") in Waterford, Wisconsin, the nursing home closest to our apartment that had an opening.

21. William and I were upset about his going to Lakeview because I did not have a car and I would not be able to arrange for daily transportation from our apartment in Burlington to the nursing home in Waterford.

22. William and I agreed that he would go to Lakeview, but that we would transfer him to Mount Carmel when there was an opening for him there.

23. We especially wanted William to be at Mount Carmel because it is within walking distance of our apartment and I would be able to walk to see him daily without arranging for transportation and it would be easier for family and friends to visit.

24. After a short stay at Lakeview, I was informed that Mount Carmel had an opening for William.

25. I told William about the opening and he was excited that he could move back to Burlington.

26. William was to be transferred from Lakeview to Mount Carmel on October 29, 2004.

27. I arrived at the Mount Carmel business office on October 29, 2004.

28. In advance of arriving at Mount Carmel on October 29, 2004, I had not received copies of an admissions agreement, arbitration agreement, or other documents that I would be expected to sign.

29. On October 29, 2004, I met with a Mount Carmel representative to discuss William's admission.

30. William was not present for this meeting.

31. At the meeting, Mount Carmel's representative told me there were some documents that I needed to sign before they could admit William to Mount Carmel.

32. At the meeting she put a lot of documents in front of me to sign and said that signing was necessary so that William could become a resident at Mount Carmel.

33. I did not have time to read the documents that were put in front of me.

34. I simply signed where the Mount Carmel representative told me to sign.

35. I did not have an opportunity to discuss these documents with William prior to signing them.

36. The Mount Carmel representative did not tell me that signing any of these documents was optional.

37. I believed that it was necessary to sign all documents the Mount Carmel representative presented to me for William to be admitted to Mount Carmel.

38. The Mount Carmel representative did not say that in signing any of these documents that William, I, or our children were waiving our right to go to court if Mount Carmel injured or killed William, that we could cancel such an agreement, or that signing the agreement was optional.

39. I believe my meeting with the Mount Carmel representative lasted for less than one hour.

40. William was not present for this meeting.

41. It is my practice to keep and file important documents, and I do not have a copy in my files of the admissions documents, including an arbitration agreement, I signed on October 29, 2004, at Mount Carmel.

42. I never received a copy of the documents that I signed at Mount Carmel at this meeting until my attorney in this case provided copies to me.

43. With rare exceptions, I visited William every day at Mount Carmel and I never found a copy of these documents I signed in his room.

44. I did not know that I signed an arbitration agreement at this meeting until my attorney talked to me about such an agreement after filing a lawsuit in this case.

A. Before talking with my attorney, I do not believe I ever heard the word "arbitration."

B. Before discussing arbitration with my attorney, I had no idea what arbitration was.

45. I would not knowingly and voluntarily sign a document that would waive any rights that William, I, or our children might have if Mount Carmel injured or killed William.

46. I would not sign a document forcing me, William, or our children to live by rules that were not provided to me, such as the JAMS arbitration rules.

47. If I had mistakenly signed an arbitration agreement and a copy had been provided to me, I would have cancelled the arbitration agreement.

48. William did not give me permission to sign documents for him at the meeting at Mount Carmel on October 29, 2004.

49. It was William's practice to insist on signing documents calling for his signature.

50. I simply signed the documents I was told were necessary to sign for William to become a resident at Mount Carmel.

51. Mount Carmel representatives never discussed with me any documents that I signed at the October 29, 2004 meeting after that meeting.

52. I did not discuss with William the documents I signed at Mount Carmel on October 29, 2004.

FURTHER, your affiant sayeth not.

Elaine O. Kurth 6/27/07
Elaine Kurth

Subscribed and sworn to before me
this 27 day of June, 2007.

TAMMY S. STANTON NOTARY PUBLIC STATE OF WISCONSIN

Tammy S. Stanton
Tammy S. Stanton
Notary Public, State of Wisconsin
My Commission: 9-27-09

AGING AND DISABILITY SERVICES ADMINISTRATION

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2006 BH "Dear Provider" Letters

March 1, 2006

ADSA: BH #2006-004
ARBITRATION AGREEMENTS

Dear Boarding Home Provider:

As you probably know the use of arbitration agreements in long-term care boarding homes has been challenged in courts around the country. In August 2005, the Department convened a workgroup of resident advocates and provider representatives to discuss the use of arbitration agreements in long-term care facilities.

The following state requirements are relevant to the use of arbitration agreements in boarding homes:

- Boarding homes are required to encourage and assist residents in the exercise of their rights as residents of the boarding home and as citizens or residents of the United States. RCW 70.129.020 and WAC 388-78A-2660.
- Boarding homes must not request or require residents to sign waivers of their rights. RCW 70.129.105
- Boarding homes must not request or require residents to sign waivers of potential liability for injuries or losses of personal property. RCW 70.129.105
- Vulnerable adults who have been abused, neglected, abandoned or financially exploited while residing in long-term care boarding homes may sue the provider for damages for injuries, pain and suffering, and lost property. If the suit is successful, the vulnerable adult will be entitled to payment of attorney fees and other costs. When adopting these provisions the legislature encouraged parties involved in a dispute about the care or treatment of a vulnerable adult, to use the least formal means available to try to resolve the dispute. RCW 74.34.200

After reviewing the law and considering feedback from the workgroup, the Department has identified the following information related to the use of arbitration agreements:

- Arbitration agreements are legal in Washington State.
- Boarding homes may provide a copy of arbitration agreements to residents or their representatives for information purposes, but, if the agreement includes a waiver of a jury trial, attorney's fees and related costs, or other rights, the boarding home may not ask or require the residents or their representatives to sign it.
- Residents and representatives should not be presented with arbitration agreements at the time of admission because the resident may be too overwhelmed to understand the implications of the agreement, and may erroneously conclude that the agreement needs to be signed in order to be admitted.
- At the time a resident signs any arbitration agreement, the individual must be able to understand what he or she has signed and must understand the agreements potential impact.
- Courts around the country have issued conflicting decisions when asked to decide whether certain individuals, such as children and durable powers of attorney for health care decision making, can sign arbitration agreements on behalf of a resident.

If Department staff review a boarding home's arbitration agreement or the circumstances surrounding the execution of such an agreement, DSHS staff may use questions along the following lines to determine whether a deficient practice exists.

- Did the boarding home ask or require a resident or representative to sign an agreement waiving any resident rights (including the right to a jury trial or the right to attorneys' fees)?
- Did the boarding home ask or require a resident or representative to sign a waiver of potential liability for injury or loss of personal property?
- Did the boarding home allow a resident to sign an arbitration agreement when the resident did not have the capacity to understand what he or she was signing?
- When did the boarding home present the arbitration agreement to the resident or the representative?
- Did the boarding home refuse to admit an individual or discharge a resident for refusing to sign or to comply with an arbitration agreement?
- Did the boarding home retaliate against a resident who

refused to sign or comply with an arbitration agreement?

- Did the boarding home allow an individual to sign an arbitration agreement on behalf of the resident when that individual did not have the legal authority to waive the resident's rights?
- Did the boarding home offer an arbitrator selection process that would not result in the selection of neutral arbitrators?

If you intend to use arbitration agreements in your boarding home and have any legal questions, you may want to consult with your attorney and you should encourage residents to consult with their attorneys or the state long-term care ombudsman before they sign an arbitration agreement.

Sincerely,

Joyce Pashley Stockwell, Director
Residential Care Services

Further, the arbitration agreement only names one of the defendants in this case as a party to the contract. The agreement provides: "The following is an agreement to arbitrate any dispute that might arise between Frank Rickenbacker (the "Resident") and Garden Terrace (the "Facility"). ("Facility" includes the particular facility where the Resident resides and Life Care Centers of America, Inc)." Ex. "A," p.1. This agreement does not mention Federal Way Medical Investors, LLC or Martha Bol, two of the Defendants in this case, and there is no evidence before the Court of an arbitration agreement between the Plaintiff and those defendants.

III. Evidence Relied Upon

Plaintiff relies on the declarations of Stephen Hornbuckle, Margaret Rickenbacker, Carin Marney and the exhibits attached thereto, and the pleadings and documents on file in this matter.

IV. Authority and Argument

A. There is arbitration agreement in this matter is not a valid agreement to arbitrate because it is impossible to arbitrate this case before the parties' agreed upon arbitrator.

The arbitration clause provides that disputes shall be "shall be held in the county where the Facility is located before a board of three arbitrators, selected from the American Arbitration Association ("AAA")." Ex. "A," p.1. Moreover, the provision dictates that the rules of procedure of the AAA will govern the arbitration. However, the AAA has amended their rules to provide that it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate. Effective January 1, 2003, the American Arbitration Association (AAA) determined: "As a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept the administration of cases involving individual patients without a post-dispute agreement to arbitrate." See <http://www.adr.org/sp.asp?id=32192>, which is attached as Ex. 1 to Hornbuckle Decl. The arbitration clause at issue is a "pre-dispute" clause,

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because it was entered into before the injury made the basis of this suit. *Rickenbacker Decl.*, p. 2, l. *1-7.* The parties have not agreed to conduct the arbitration before any body except the AAA, and only agreed to conduct the arbitration under the rules of procedure of the AAA. Ex. "A," p. 1. Unquestionably, the arbitration agreement was executed prior to any dispute related to his care. Moreover, the AAA is specifically designated as the sole forum of choice in the contract.

Defendants admit that the arbitration agreement cannot be conducted in accordance with the terms of the agreement to arbitrate. *Marney Decl.*, p. 1, l. 21-23. ("It is my understanding and experience that the American Arbitration Association ("AAA") is no longer hearing matters involving pre-dispute arbitration agreements.") Defendants instead claim that the arbitration agreement in this case can be rewritten by the Court to confer a general right to arbitrate disputes; and that the agreement of the parties to arbitrate before the AAA and under the AAA's procedures can be ignored.

Plaintiff submits that the parties' choice of a particular arbitrator and a particular set of arbitration procedures is a term so material to the contract that failure of either term makes the agreement invalid. Defendants chose to limit the contractual right to arbitrate to a specific forum. They apparently now regret that choice, claim a general right to arbitrate without regard to forum, and attempt to coerce the other party down a different road. The arbitration agreement, however, creates no such right. "(A) person can be compelled to arbitrate a dispute only . . . in the manner in which, he has agreed so to do." Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co., 607 P.2d 856, 93 Wn.2d 199, 202 (Wash. 1980). Plaintiff suggests that the opinion of the Washington Supreme Court in Balfour is instructive. In that case, the Court found that the trial court lacked authority to change even the agreed upon location in which the arbitration would be held. Id. at 202. The Court held that the agreement of the parties required that the rules of the American Arbitration Association be followed; and that those rules did not allow for consolidation of proceedings without an agreement of the parties.

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Id. at 202-03. The agreement of the parties to follow the rules of the American Arbitration Association was not something that could be set aside by a court. Id. at 203.

The reasoning of the Washington Supreme Court in Balfour applies to the arbitration agreement before the Court in this case. Defendants seek to compel an arbitration before a forum to which plaintiff has not agreed. Defendant's Motion to Compel Arb. and Stay Proceedings, pp. 11-12. Plaintiff suggests that the parties' chosen forum is every bit as material to the contract as the location chosen by the parties in Balfour. Just as the Washington Supreme Court declined to ignore the parties' chosen location to arbitrate, the trial court in this case should decline the Defendants' invitation to ignore the provision of the arbitration agreement designating the arbitrator selected by the parties. If Defendants had wanted to make their arbitration agreement refer to arbitration in general and not to arbitration before a particular arbitrator, they could have employed simple English words to do so. Instead, Defendants now want the Court to rewrite the arbitration agreement and require Plaintiffs to arbitrate in a manner to which they have not agreed.

Under the arbitration agreement in this case, the right to arbitrate is unambiguously confined to the AAA. Accordingly, the policy of the AAA that this type of agreement will not be accepted for arbitration demands that this Court declare that the arbitration agreement is not a valid agreement to arbitrate. The Mississippi Supreme Court recently declined to enforce an arbitration agreement on exactly these grounds. In Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby, 2008 WL 3101737, 2 -3 (Miss.), the Mississippi Supreme Court held that because the American Health Lawyer's Association has announced a policy refusing to enforce pre-dispute arbitration agreements in the health-care context, where a pre-dispute arbitration agreement with a health-care provider incorporates the rules of the American Health Lawyers Association, there is no valid agreement to arbitrate.

Defendants chose to limit the applicable arbitral forum and rules under its agreement to rules enforced by the AAA. The AAA's rules do not permit an arbitration under this provision because the agreement was entered into before health-care services were rendered

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and before a dispute arose. This Court must enforce the agreement as written. As written, there is no valid agreement to arbitrate.

Defendants cite the court to Owens v. National Health Corp., 263 SW 3rd 876 (Penn. 2007), and contends that this case stands for the proposition that the parties selection of an arbitrator in an arbitration agreement is not a material term to the contract. Defendants' Motion to Compel Arbitration pg. 11, ln. 20-22. The Owens case is easily distinguished from the arbitration agreement at issue before the court. In Owens, the arbitration agreement provided for the selection of AAA or the American Health Lawyers Association as arbitrators. The American Health Lawyers Association allows arbitrations in the health care context if it is ordered by a court. Id. at 886. ("The plaintiff's argument is based upon the false factual premise that neither organization is available to conduct an arbitration in this case. It appears that the [American Health Lawyer's Association] will conduct the arbitration if ordered by a court to do so.")

The arbitration contract in this case does not name the American Health Lawyers Association as an alternate arbitrator. The arbitration agreement in this matter provides only for the use of the AAA as an arbitrator, and requires that the arbitration be conducted by the rules of the AAA, which does not allow arbitrations based on a pre-dispute arbitration agreement. *Hornbuckle Decl.*, Ex. 1.

The arbitration agreement sought to be enforced by the Defendants selects both the arbitrator, the AAA and the rules by which the arbitration shall be conducted. Exhibit A, pg. 1. Plaintiff did not agree to arbitrate the case before any entity except the AAA. Nor did Plaintiff agree to arbitrate the case except under the rules of procedures of the AAA, which do not allow arbitrations to be conducted in disputes of this type. Here, if the court disregards the parties' choice of arbitrator and the rules under which the arbitration is to be conducted, the court is essentially rewriting the agreement of the parties. Plaintiffs did not agree to arbitrate in front of any other entity, in the absence of an agreement should not be compelled to do so. The court should reject the Defendant's reliance on Owens because it is clearly

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distinguishable. The parties in Owens agreed to arbitrate in front of either the AAA or the American Health Lawyers Association, and the American Health Lawyers Association will accept arbitrations when there is a court order to arbitrate. This is not the case with the AAA, which is the sole arbitrator before whom the parties have agreed to arbitrate.

Defendants would have the Court believe that the selection of the arbitrator and the rules of the arbitration are not "material" terms to the contract and can be disregarded or severed. Washington case law provides for the severance of unconscionable terms under some circumstances. Zuver v. Airtouch Commc'ns, Inc., 153 Wash.2d 293, 302, 320 103 P.3d 753 (2004). Plaintiffs do not contend that the selection of the AAA and its procedural rules is unconscionable. Rather, the selection of the AAA and its procedural rules is the fundamental agreement of the parties. If the court strikes out the parties' agreement that requires that the procedural rules of the AAA be followed, the result is a completely different agreement and one that the Plaintiff did not sign. The Plaintiff in this matter agreed to an arbitration conducted by the AAA under the procedural rules of the AAA. Defendants admit this is impossible but ask the Court to rewrite the agreement to state that Plaintiffs agree generally to arbitration of claims and not to arbitration before a specific arbitrator and under specific rules. The Court should decline Defendants' invitation to rewrite the terms of the parties' agreement.

Further, Defendants' reliance on RCW 7.04A.110 is misplaced. This statute provides for Court appointment of an arbitrator where the method for selecting an arbitrator has failed. The method for selecting an arbitrator has not failed in this instance. Rather, the parties agreed to conduct the arbitration with an arbitrator and under rules that do not allow for arbitrations of this type of dispute. This is not a failure of the method for selecting the arbitrator. The parties chose a particular arbitrator and a particular set of rules by which the arbitration should be governed. RCW 7.04A.110 cannot be used to rewrite the agreement of the parties. The parties did not agree on a "method" for selecting an arbitrator that has somehow failed in this case, and RCW 7.04A.110 does not apply to these facts.

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For the foregoing reasons, Defendants' Motion should be denied. Plaintiff can only be compelled to arbitrate before the parties' chosen forum, which Defendants admit is impossible. The Court should not create a general right to arbitrate where none exists.

B. The Statutory Rights of a Wrongful Death Beneficiary Cannot be Waived by the Decedent.

Washington law is unequivocal on the nature of a wrongful death action. A wrongful death action does not derive from the decedent and does not belong to him:

> The second claim for damages springs from the wrongful-death statutes which create a new cause of action for the benefit of decedent's heirs or next of kin, in accordance with the terms of the statute, based upon the death itself. Although originating in the same wrongful act, **the wrongful-death action is for the alleged wrong to the statutory beneficiary.** The estate of decedent does not benefit by the action; **the claim of damages for the wrongful death is not one that belonged to decedent.** Gray v. Goodson, 61 Wash.2d 319, 378 P.2d 413 (1963), quoting Maciejczak v. Bartell, 187 Wash. 113, 60 P.2d 31 (1936).

Warner v. McCaughan,77 Wash. 2d 178, 179, 460 P.2d 272 (1969). Plaintiff would suggest to the Court that only one conclusion can be drawn from this discussion. The claim for wrongful death in this matter did not belong to Frank Rickenbacker. Frank Rickenbacker and/or his agent, Margaret Rickenbacker, therefore did not have the authority to waive, release, or agree to arbitrate a claim for wrongful death by the non-signatory heirs, just as the undersigned does not have the authority to sign a release for his neighbor's car accident case.

Each of the statutory beneficiaries under Washington law has an individual claim for wrongful death. This claim is brought by the personal representative on behalf of all the beneficiaries. The sons of Frank Rickenbacker, Michael Rickenbacker and Jimmie Rickenbacker are not parties to the arbitration agreement and did not sign it. Exhibit "A," p. 2. Their individual claims are brought by the personal representative as agent for the heirs, but the decedent and his agent did not have authority to bind the sons' claims.

Courts of several states have reached different conclusions about whether wrongful death claimants are third-party beneficiaries to an arbitration agreement. The outcome in each state has largely turned on the nature of the state's wrongful death action. When the wrongful death action is derivative of the claim of the decedent, courts have held that the decedent

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