

2007

Gloria Soriano v. Elizabeth A. Gaul : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

GLORIA SORIANO,

Plaintiff and Appellee,

v.

ELIZABETH A. GRAUL, M.D., an
individual,

Defendant and Appellant.

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Case No. 20070347-CA
(Third District Case No.
060915141)

BRIEF OF DEFENDANT/APPELLANT ELIZABETH A. GRAUL, M.D.

Appeal from a Memorandum Decision of the Third Judicial District Court
Denying Motion to Stay Litigation and Compel Arbitration,
Honorable Kate Toomey, Presiding

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APPELLATE COURT

AUG 27 2007

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(j) (2001). Direct appeal of the trial court's denial of Defendant's Motion to Compel Arbitration is taken pursuant to Utah Code Ann. § 78-31a-129(1)(a) (2002).

STATEMENT OF ISSUE AND STANDARD OF REVIEW

I. Whether the 2004 Amendments to Utah Code Ann. § 78-14-17 should be applied retroactively.

Preservation of Issue: This issue was preserved in the trial court in Plaintiff/Appellee Gloria Soriano's ("Plaintiff") Memorandum in Opposition to Defendant's Motion to Compel Arbitration [R. 21-41], Defendant/Appellant Elizabeth S. Graul, M.D.'s, ("Dr. Graul") Reply Memorandum in Support of Motion to Stay Litigation and Compel Arbitration [R. 45-57], and at the hearing on Dr. Graul's Motion to Stay Litigation and Compel Arbitration [R. 91].

Standard of Review: The issue of whether a statute can or should be applied retroactively is reviewed for correctness, giving no deference to the trial court's conclusions. Goebel v. Salt Lake City Southern R.R. Co., 2004 UT 80, ¶ 39, 104 P.3d 1185 (citing Evans & Sutherland Computer Corp. v. Utah State Tax

Comm'n, 953 P.2d 435, 437 (Utah 1997); Brown & Root Indus. Serv. v. Indus. Comm'n, 947 P.2d 671, 675 (Utah 1997)).

PROVISIONS OF STATUTES AND RULES

The interpretation of Utah Code Annotated § 78-14-17 (2004), Utah Code Ann. § 68-3-3 (2000), U.S. Const. art. I, § 10, cl. 1 and Utah Const. Art. I, § 18 are of importance to this appeal, copies of which are attached hereto as Addenda A through D respectively.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings Below

This is a medical malpractice case arising out of the care and treatment Plaintiff received from Dr. Gaul in May of 2004. Prior to Plaintiff receiving medical care from Dr. Gaul, Plaintiff and Dr. Gaul entered into an Arbitration Agreement agreeing to arbitrate all claims related to the care and treatment provided by Dr. Gaul. In response to Plaintiff's Complaint and prior to any other responsive pleadings being filed, Dr. Gaul filed a Motion to Stay Litigation and Compel Arbitration ("Dr. Gaul's Motion") which Plaintiff opposed. Dr. Gaul's Motion was heard on March 16, 2007, by the Honorable Kate Toomey. Judge Toomey entered an order on March 27, 2007, denying Dr. Gaul's Motion on the basis that the 2004 Amendments to Utah Code Ann. § 78-14-17 apply

retroactively rendering the Arbitration Agreement unenforceable. This appeal followed.

Statement of Facts

Dr. Graul is a obstetric/gynecologic physician licensed to practice medicine in the State of Utah. [R. 1]. On April 28, 2004, Plaintiff Gloria Soriano presented at Dr. Graul's office and was evaluated for gynecologic complaints including an enlarged uterus. [R. 2]. On that same date, Ms. Soriano signed an Arbitration Agreement (the "Agreement"). [R. 16]. Article 1 of the Agreement provides that the parties:

agree to submit to binding arbitration all disputes and claims for damages of any kind for injuries and losses arising from the medical care rendered . . . after the date of this agreement. All claims for monetary damages against any physician . . . must be arbitrated including, without limitation, claims for personal injury, loss of consortium . . . emotional distress

[R. 16].

Utah Code Ann. § 78-14-17 sets forth the requirements arbitration agreements between physician and their patients must meet in order to be valid and enforceable. [R. 23]. Section 78-14-17 was amended in 2004 (the "2004 Amendments") with the Amendments becoming effective on May 3, 2004. [R. 24; 47].

On May 10, 2004, Dr. Gaul performed a vaginal hysterectomy and bilateral salpingo-oophorectomy on Ms. Soriano. [R. 2]. By Complaint dated September 11, 2006, Ms. Soriano sued Dr. Gaul alleging medical malpractice for injury allegedly arising out of Dr. Gaul's surgery of May 10, 2004, and related medical treatment. [R. 1-5]. On October 12, 2006, Dr. Gaul filed her Motion requesting that the trial court compel arbitration pursuant to the terms of the Agreement. [R. 12-14].

On November 6, 2006, Plaintiff filed her Memorandum in Opposition to Dr. Gaul's Motion arguing that the Agreement is unenforceable because it fails to comply with the requirements set forth in the 2004 Amendments. [R. 23-26]. In response, Dr. Gaul asserted—and Plaintiff did not dispute—that the Agreement complies with the 2003 version of Utah Code Ann. § 78-14-17, the version of the statute in effect at the time the Agreement was signed by Plaintiff. [R. 47]. Dr. Gaul did not dispute Plaintiff's contention that the Agreement failed to comply with the 2004 Amendments. [R. 75]. Dr. Gaul did, however, argue that the provisions of the 2004 Amendments do not apply retroactively to the Agreement. [R. 47-49].

Dr. Gaul's Motion was heard by the Honorable Kate Toomey on March 16, 2007. [R. 91]. By Memorandum Decision dated March 27, 2007, Judge Toomey

denied Dr. Graul's Motion on the basis that the 2004 Amendments are retroactive, and because the Agreement does not comply with the requirements set forth in the 2004 Amendments, the Agreement is unenforceable. [R. 75]. Specifically, Judge Toomey concluded that the plain language of § 78-14-17 indicates that the Legislature intended for the 2004 Amendments to apply to all arbitration agreements executed after May 2, 1999. [R. 74].

SUMMARY OF ARGUMENT

I. The 2004 Amendments to § 78-14-17 should not be applied retroactively because the Legislature did not expressly declare that the 2004 Amendments are to be applied retroactively. In Utah, there exists a strong presumption against the retroactive application of statutes. Consistent with this presumption, Utah statutory mandate and well-established Utah jurisprudence make clear that a statute cannot be given retroactive effect unless the Legislature expressly declares such an intent in the statute itself. Nowhere in the 2004 Amendments does the Legislature expressly declare that the 2004 Amendments are to be applied retroactively. In the absence of an express declaration of retroactive application, the trial court's strained reading of § 78-14-17 violates the strong presumption against the retroactive application of statutes.

II. The 2004 Amendments affect the substantive rights and obligations of parties to physician/patient arbitration agreements and, thus, should not be applied retroactively. A statutory amendment that merely alters the procedure by which substantive rights are adjudicated can be retroactively applicable. On the other hand, if a statutory amendment changes the contractual rights and obligations of the parties, it is substantive and should not be applied retroactively. The 2004 Amendments directly affect the contractual rights and obligations of Dr. Gaul and Plaintiff—and indeed all parties to physician/patient arbitration agreements entered into prior to the Amendments taking effect—by rendering the Agreement unenforceable. Thus, the 2004 Amendments are substantive and should not be applied retroactively.

III. Retroactive application of the 2004 Amendments violates the contract clauses of the Utah and United States Constitutions. It is a well-established rule of statutory construction that if a legislative act is susceptible of two constructions, one conformable to the constitutional provision on the subject, and the other not, the Court should adopt the one that is conformable, and reject the other that is not. A violation of the contract clause will be found when the application of a new statute to an existing contract changes the meaning of the contract and deprives parties of a contractual right which they would have had under the prior statutory

scheme. The trial court's retroactive application of the 2004 Amendments violates the contract clauses of the Utah and United States Constitutions because it changes the meaning of the Agreement and deprives Dr. Graul of her right to compel Plaintiff to arbitrate her claims, a right that Dr. Graul would have had under the 2003 version of § 78-14-17. Accordingly, this Court should confirm the constitutionality of § 78-14-17 by rejecting the retroactive application of the 2004 Amendments.

IV. The trial court's failure to give meaning to all of the provisions of Subsection (1) of § 78-14-17 renders its conclusion that the 2004 Amendments apply retroactively incorrect. The language of Subsection (1) provides two alternatives regarding the application of the statute's requirements: 1) apply the requirements of Subsection (1) to all newly executed agreements; or 2) apply any new requirements in Subsection (1) (*i.e.*, following any amendments) to a renewed agreement that previously met the requirements of Subsection (1) on at least one occasion. In ignoring the language in Subsection (1) that provides for these alternatives, the trial court incorrectly determined that the 2004 Amendments apply retroactively to all physician/patient arbitration agreements validly executed under prior versions of § 78-14-17.

ARGUMENT

I. THE 2004 AMENDMENTS SHOULD NOT BE APPLIED RETROACTIVELY BECAUSE THE LEGISLATURE DID NOT EXPRESSLY DECLARE THEM TO BE RETROACTIVE.

It is a fundamental principle of jurisprudence that retroactive application of new statutes is usually unfair. 2 Sutherland Statutory Construction § 41:2 (6th ed.). Indeed, “the hackneyed maxim that everyone is held to know the law, itself a principle of dubious wisdom, nevertheless presupposes that the law is at least susceptible of being known. But this is not possible concerning a law that has yet to exist.” Id. Accordingly, the Utah Supreme Court has made clear that as a general rule, “[r]etroactivity is not favored in the law.” Goebel v. Salt Lake City Southern R.R. Co., 2004 UT 80, ¶ 39, 104 P.3d 1185 (citing Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)).

Consistent with these principles, both the Utah Legislature and Judiciary recognize a strong presumption against the retroactive application of statutes. Thomas v. Color Country Management, 2004 UT 12, ¶ 30, 84 P.3d 1201 (j. Durham concurring). The Utah Legislature expressly codified this presumption by clearly stating “[n]o part of these revised statutes is retroactive, unless expressly so declared.” Utah Code Ann. § 68-3-3 (2000). Reinforcing this legislative mandate is the well-established Utah jurisprudence that a statute cannot be given retroactive

effect unless the legislature expressly declares such an intent in the statute itself.

Goebel, 2004 UT at ¶ 39 (citing Utah Code Ann. § 68-3-3 (2000)); see also

Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1988); Stephens v. Henderson, 741 P.2d 952, 953 (Utah 1987).

In the instant case, the trial court incorrectly held that the 2004 Amendments apply retroactively because the Legislature did not expressly declare that the 2004 Amendments are to be applied retroactively. The provisions of § 78-14-17 cited by trial court in reaching its decision are:

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed, or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed . . .

. . .

(5) The requirements of Subsection (1) do not apply to a claim governed by a binding arbitration agreement that was executed or renewed before May 3, 1999.

Utah Code Ann. § 78-14-17(1) and (5) (2004).

Upon an analysis of these provisions, the trial court specifically reasoned that:

[t]he plain language of § 78-14-17 indicates that the Legislature intended for the amended requirements of Subsection (1) to apply to all arbitration agreements

executed “[a]fter May 2, 1999” Notably, the language “[a]fter May 2, 1999” has appeared in the statute since it was enacted on May 3, 1999. By preserving this language in the 2004 amendment to the statute, the Legislature evidenced its intent to apply the amendment retroactively.

Likewise, Subsection (5) indicates that “[t]he requirements of Subsection (1) do not apply to a claim governed by a binding arbitration agreement that was executed or renewed before May 3, 1999.” This language reinforces the notion that the Legislature intended to apply the amended requirements of Subsection (1) only to arbitration agreements executed after May 2, 1999. Otherwise, the Legislature would have modified Subsection (5) in 2004 to indicate that the amendments apply only prospectively from the date of the amendment. Accordingly, the Court determines that the 2004 amendment to § 78-14-17 applies retroactively.

[R. 74-75].

A review of the trial court’s reasoning reveals that it never specifically identified where in the statute that the Legislature expressly declared the 2004 Amendments to be retroactive. That is because no such express declaration exists in § 78-14-17. Instead, the court engages in a strained reading of the statute to arrive at its conclusion. The trial court’s use of the language “indicates that the Legislature intended” and “the Legislature evidenced its intent” reveals the derivative nature of the trial court’s reasoning. The court is required to piece together the Legislature’s intent from various subsections of the statute to apply it

retroactively because the statute lacks a clear and express declaration by the Legislature that it is to be applied retroactively.

The Utah Legislature knows how to expressly declare that a statute is to be applied retroactively, and it did not do so in § 78-14-17. For example, under the Environmental Quality Code, the Legislature expressly stated:

(3)(a) It is the intent of the Legislature that liability as determined under this act applies retroactively to any release of a hazardous substance or material subject to or currently in the process of investigation, abatement, or corrective action under this part as of the effective date of this act.

Utah Code Ann. § 19-6-302.5 (1995) (emphasis added). In addition, in the Utah Code of Criminal Procedure, the Legislature expressly stated: “[t]he provisions of Sections 77-18-9 through 77-18-17 apply retroactively to all arrests and convictions regardless of the date on which the arrests were made or convictions entered.”

Utah Code Ann. § 77-18-17 (1994) (emphasis added). A plain reading of § 78-14-17 reveals that the statute is void of any similar language expressly declaring the Legislature’s intent to apply 2004 Amendments retroactively.

In the absence of an express declaration of retroactive application, the trial court’s strained reading of § 78-14-17 violates the strong presumption against the

retroactive application of statutes. The trial court should be reversed for this reason alone.

II. THE 2004 AMENDMENTS SHOULD NOT BE APPLIED RETROACTIVELY BECAUSE THEY AFFECT THE SUBSTANTIVE RIGHTS OF PARTIES TO PHYSICIAN-PATIENT ARBITRATION AGREEMENTS.

One exception to the strong presumption against the retroactive application of statutes is the “procedural” exception. Thomas, 2004 UT at ¶ 33. Under this exception, a statutory amendment that merely alters the procedure by which substantive rights are adjudicated, is retroactively applicable. Id. An amendment is merely procedural if it “does not ‘enlarge, eliminate, or destroy vested or contractual rights.’” Ball v. Peterson, 912 P.2d 1006, 1009 (Utah Ct. App. 1996) (quoting Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick, 890 P.2d 1017, 1020 (Utah 1995)). On the other hand, “[i]f a statutory amendment changes the contractual rights and obligations of the parties, it is substantive.” Washington Nat’l Ins. Co. v. Sherwood Assoc., 795 P.2d 665, 667 (Utah Ct. App. 1990) (citing Petty v. Clark, 192 P.2d 589, 593 (Utah 1948)). Further, “[e]very amendment not expressly characterized as a clarification [of existing law] carries the rebuttable presumption that it is intended to change existing legal rights and liabilities.” State v. Amador, 804 P.2d 1233, 1234 (Utah Ct. App. 1990).

The 2004 Amendments affect the substantive rights and obligations of Dr. Gaul and Plaintiff and, thus, should not be applied retroactively. As established in Section I. above, the Legislature did not expressly declare the 2004 Amendments to be retroactive. See § I. supra. Nor did the Legislature expressly characterize the 2004 Amendments as a clarification of existing law. See Utah Code Ann. § 78-14-17 (2004). As a result, the 2004 Amendments are presumed to be substantive and should not be applied retroactively. Amador, 804 P.2d at 1234.

In addition, the trial court's decision in the instant case clearly demonstrates the substantive nature of the 2004 Amendments. The trial court concluded that because the Agreement does not comply with the requirements set forth in the 2004 Amendments, the Agreement is unenforceable. [R. 75]. The obvious result of the retroactive application of the 2004 Amendments is to eliminate Dr. Gaul's contractual right to compel Plaintiff to arbitrate her medical malpractice claims, and Plaintiff's corresponding contractual obligation to arbitrate her claims. [R. 71-76]. Thus, the trial court's own decision makes clear that the 2004 Amendments are substantive because when applied retroactively, they "change the contractual rights and obligations of the parties." Washington Nat'l Ins. Co., 795 P.2d at 667.

Not only does the retroactive application of the 2004 Amendments affect Dr. Graul's and Plaintiff's contractual rights and obligations, it affects the rights of all parties to physician/patient arbitration agreements entered into prior to May 3, 2004. Indeed, the retroactive application of the 2004 Amendments will directly interfere with the contractual rights of parties to hundreds, if not thousands, of physician/patient arbitration agreements. This result is untenable under the Utah and United States Constitutions.

III. RETROACTIVE APPLICATION OF THE 2004 AMENDMENTS VIOLATES THE CONTRACT CLAUSES OF THE UTAH AND UNITED STATES CONSTITUTIONS.

It is a fundamental rule of statutory construction that “if a legislative act is susceptible of two constructions, one conformable to the constitutional provision on the subject, and the other not, [the Court] will adopt the one that is conformable, and reject the other that is not. Thurnwald v. A.E., 2007 UT 38, ¶ 42, —P.3d— (citing Pleasant Grove City v. Holman, 202 P. 1096, 1098 (Utah 1921)). Further, the Utah Supreme Court has stated that “we have a duty to construe a statute whenever possible so as to effectuate legislative intent and avoid and/or save it from constitutional conflicts or infirmities.” State v. Bell, 785 P.2d 390, 397 (Utah 1989).

The contract clause of the Utah State Constitution provides:

[n]o bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

Utah Const. art. I, § 18. The contract clause of the United States Constitution similarly provides:

[n]o state shall . . . pass any bill of attainder, as ex post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

U.S. Const. art. I, § 10, cl. 1.

In giving meaning to the contract clause, the Utah Supreme Court has held that:

[i]t has long been recognized that the “impairment of obligation” provision of the United States Constitution (and similarly that of Utah’s Constitution) is not to protect future contracts but rather those existing prior to the enactment of the challenged statute. These provisions do not establish a right of parties to make contracts that are illegal and against public policy. They merely prevent “impairment” by a changing of the laws after the contract has been made.

Beehive Medical Electronics, Inc. v. Industrial Comm’n, 583 P.2d 53, 60 (Utah 1978) (emphasis added). A violation of the contract clause will be found when the application of a new statute to an existing contract “changes the meaning of [the] contract and deprives [defendants] of a contractual right which [they] would have had under the prior statutory scheme.” Washington Nat’l Ins. Co. v. Sherwood

Associates, 795 P.2d 665, 670 (Utah Ct. App. 1990). Fundamentally, “a later statute or amendment should not be applied in a retroactive manner to deprive a party of his rights or impose greater liability upon him.” Oakland Constr. Co. v. Industrial Comm’n, 520 P.2d 208, 210 (Utah 1974).

The retroactive application of the 2004 Amendments violates the contract clauses of the Utah and United States Constitutions by substantially impairing—indeed invalidating—existing physician/patient arbitration validly executed under prior versions of § 78-14-17. As established in Section III. supra, the trial court’s retroactive application of the 2004 Amendments to the Agreement fundamentally changes the contractual rights and obligations of Dr. Graul and Plaintiff. See § III. supra. Plainly, the trial court’s decision changes the meaning of the Agreement and deprives Dr. Graul of her right to compel Plaintiff to arbitrate her claims, a right that Dr. Graul would have had under the 2003 version of § 78-14-17. See Washington Nat’l Ins. Co., 795 P.2d at 670.

In addition to affecting the contractual rights of the parties to the instant appeal, the consequences of the retroactive application of the 2004 Amendments are far reaching. Hundreds, if not thousands, of physician/patient arbitration agreements have been entered into since May 2, 1999 and prior to May 3, 2004. Many, if not all of these agreements were made to conform with the prior versions

of § 78-14-17 in an effort to render them valid and enforceable. Because the 2004 Amendments change the requirements these agreements must meet in order to be enforceable, retroactive application of the 2004 Amendments will, like in the instant case, render all of these agreement unenforceable. This result is simply unacceptable under the contract clauses of the Utah and United States Constitutions. Accordingly, this Court should confirm the constitutionality of § 78-14-17 by rejecting the retroactive application of the 2004 Amendments.

IV. THE TRIAL COURT FAILED TO GIVE MEANING TO ALL OF THE PROVISIONS OF § 78-14-17 RENDERING ITS CONCLUSION THAT THE 2004 AMENDMENTS ARE RETROACTIVE INCORRECT.

This Court has consistently recognized that “the best evidence of the legislature’s intent and purpose [in enacting statutes] is the plain language of the statute.” Eastern Utah Broadcasting and Worker’s Compensation Fund v. Labor Comm’n, 2007 UT App 99, ¶ 8, 158 P.3d 1115. Further, “the well-established principle of statutory construction requires [the Court] to give meaning, where possible, to all provisions of a statute.” Lund v. Brown, 2000 UT 75, ¶ 23, 11 P.3d 277.

In reaching its conclusion, the trial court violated these fundamental tenets of statutory construction by failing to give meaning to all provisions of the statute.

Indeed, the trial court ignored the plain and significant language in Subsection (1) of § 78-14-17 that indicates the Legislature's intent to not apply the 2004 Amendments retroactively. The trial court concluded that the following language in Subsection (1) of § 78-14-17 is evidence of the Legislature's intent to apply the statute retroactively:

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed, or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed . . .

Utah Code Ann. § 78-14-17(1) (2004). The trial court reasoned that “by preserving the language ‘[a]fter May 2, 1999’ in the 2004 Amendments, the Legislature evidenced its intent to apply the amendment retroactively.” [R. 74].

Notably, the second portion of the first sentence in Subsection (1) is simply missing from the trial court's analysis. The trial court ignored the language: “or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed” Utah Code Ann. § 78-14-17(1) (2004) (emphasis added). The trial court's failure to give meaning to this language not only violates fundamental principles of statutory construction, it renders the court's interpretation of the statute incorrect.

The word “or” is inherently disjunctive and is typically “used to link alternatives.” Oxford English Dictionary, (rev. 10th ed. 2002). The presence of the word “or” in the first sentence of Subsection (1) reveals the disjunctive nature of the provision, and that the Subsection provides two alternatives regarding the application of the statute’s requirements: 1) apply the requirements of Subsection (1) to all newly executed agreements; or 2) apply any new requirements in Subsection (1) (*i.e.*, following any amendments) to a renewed agreement that previously met the requirements of Subsection (1) on at least one occasion. See Utah Code Ann. § 78-14-17(1) (2004). In other words, all arbitration agreements entered into after May 2, 1999, must meet the present requirements (2004 Amendments) of Subsection (1), unless the physician-patient arbitration agreement previously met the requirements of Subsection (1) under a previous version of the statute. See id.

The facts of the instant case illustrate the application of the second alternative in Subsection (1), and the inaccuracy of the trial court’s conclusion that the 2004 Amendments are retroactive. In the instant case, neither Plaintiff, nor the trial court, disputes the fact that the Agreement complies with the requirements set forth in the 2003 version of § 78-14-17. [R. 47; 71-77]. As a result, the Agreement met the requirements of Subsection (1) on at least one occasion: when

it was executed by the parties in April of 2003 prior to the 2004 Amendments taking effect.

[R. 47]. Thus, the Agreement falls under the second alternative of Subsection (1) rendering it valid and enforceable until the Agreement was to be renewed. See Utah Code Ann. § 78-14-17(1) (2004). Moreover, because Plaintiff did not seek any further treatment from Dr. Gaul beyond the May 10, 2003 surgery, there was no need, or opportunity, to renew the Agreement and bring it into compliance with the 2004 Amendments. [R. 91, pp. 14-16]. Therefore, the Agreement is valid and enforceable because it met the requirements of Subsection (1) under the 2003 version of the statute, the version of the statute that was in effect at the time the Agreement was executed.

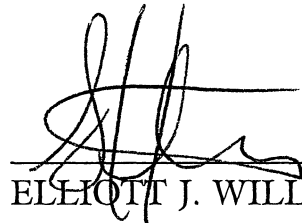
CONCLUSION

For the foregoing reasons, Dr. Gaul respectfully requests that this Court reverse the trial court and hold that the 2004 Amendments to § 78-14-17 should not be applied retroactively.

Respectfully submitted this 27 day of August, 2007.

WILLIAMS & HUNT

By

A handwritten signature in black ink, appearing to be 'EJ Williams', written over a horizontal line.

ELLIOTT J. WILLIAMS

STEPHEN T. HESTER

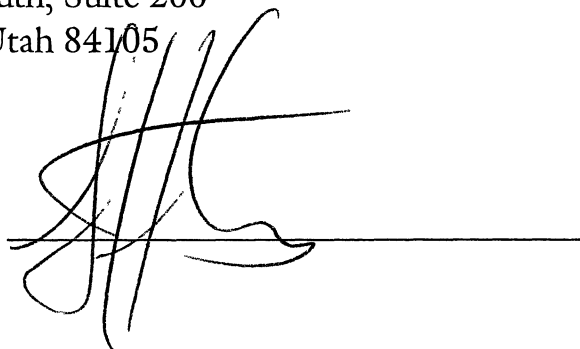
Attorneys for Defendant and
Appellant Elizabeth S. Gaul, M.D.

136933

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of August, 2007, I caused two (2) true and correct copies of the foregoing **BRIEF OF DEFENDANT/APPELLANT ELIZABETH S. GRAUL, M.D.** to be mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

Fred R. Silvester
SILVESTER & CONROY
1371 East 2100 South, Suite 200
Salt Lake City, Utah 84105



ADDENDUM A

(Utah Code Ann. § 78-14-17(2004))

78-14-12. Division to provide panel — Exemption — Procedures — Statute of limitations tolled — Composition of panel — Expenses — Division authorized to set license fees.

NOTES TO DECISIONS

ANALYSIS

Application of savings provision.
Prerequisite to filing complaint.
—Prelitigation panel review.
Tolling of limitation period.
—Federal claims.

Application of savings provision.

Filing of complaint within the limitations period of this chapter commenced an action under Utah R. Civ. P. 3, so that parties' error in failing to comply with the required prelitigation procedures did not prevent them from starting anew under the savings provision, § 78-12-40, granting a one-year extension of the filing time after dismissal for noncompliance with the prelitigation procedures. *McBride-Williams v. Huard*, 2004 UT 21, 494 Utah Adv. Rep. 28, 94 P.3d 175.

Dismissal of a case for failure to satisfy the prelitigation requirements of this chapter did not prevent application of the savings provision of § 78-12-40, which allowed the plaintiff to commence a new action within one year after the failure of his original action. (Unpublished decision.) *Cline v. Associated Clinical & Counseling Psychologists*, 2005 UT App 15.

Prerequisite to filing complaint.

—Prelitigation panel review.

Because mailing the request for prelitigation

panel review is not part of the proceedings, as that term is used in this section, failure to comply with the mailing requirement does not affect the district court's subject matter jurisdiction. *Labelle v. McKay Dee Hosp. Ctr.*, 2004 UT 15, 493 Utah Adv. Rep. 19, 89 P.3d 113.

Summary judgment was properly granted in favor of defendant medical center as the plaintiff did not bring his claim before a prelitigation panel review. *Smith v. Four Corners Mental Health Ctr., Inc.*, 2003 UT 23, 473 Utah Adv. Rep. 50, 70 P.3d 904.

Tolling of limitation period.

—Federal claims.

In actions under the federal Emergency Medical Treatment and Liability Act (EMTALA), 42 USCS § 1395dd, because a potential direct conflict exists between the pre-litigation claim screening requirements of this section and EMTALA's statute of limitations, EMTALA preempts state law on this point. As a result, the pre-litigation screening requirements and delayed-discovery provisions are not "incorporated" into EMTALA and do not toll EMTALA's two-year limitations period. *Merce v. Greenwood*, 348 F. Supp. 2d 1271 (D. Utah 2004).

78-14-17. Arbitration agreements.

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed:

- (a) the patient shall be given, in writing, the following information on:
 - (i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;
 - (ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;
 - (iii) the patient's responsibility, if any, for arbitration-related costs under the agreement;
 - (iv) *the right of the patient to decline to enter into the agreement and still receive health care if Subsection (3) applies;*
 - (v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date;
 - (vi) the right of the patient to have questions about the arbitration agreement answered;

- (vii) the right of the patient to rescind the agreement within ten days of signing the agreement; and
- (viii) the right of the patient to require mediation of the dispute prior to the arbitration of the dispute;
- (b) the agreement shall require that:
 - (i) except as provided in Subsection (1)(b)(ii), a panel of three arbitrators shall be selected as follows:
 - (A) one arbitrator collectively selected by all persons claiming damages;
 - (B) one arbitrator selected by the health care provider; and
 - (C) a third arbitrator:
 - (I) jointly selected by all persons claiming damages and the health care provider; or
 - (II) if both parties cannot agree on the selection of the third arbitrator, the other two arbitrators shall appoint the third arbitrator from a list of individuals approved as arbitrators by the state or federal courts of Utah; or
 - (ii) if both parties agree, a single arbitrator may be selected;
 - (iii) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;
 - (iv) the patient be given the right to rescind the agreement within ten days of signing the agreement;
 - (v) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date;
 - (vi) the patient has the right to retain legal counsel;
 - (vii) the agreement only apply to:
 - (A) an error or omission that occurred after the agreement was signed, provided that the agreement may allow a person who would be a proper party in court to participate in an arbitration proceeding;
 - (B) the claim of:
 - (I) a person who signed the agreement;
 - (II) a person on whose behalf the agreement was signed under Subsection (6); and
 - (III) the unborn child of the person described in this Subsection (1)(b)(vii)(B), for 12 months from the date the agreement is signed; and
 - (C) the claim of a person who is not a party to the contract if the sole basis for the claim is an injury sustained by a person described in Subsection (1)(b)(vii)(B); and
- (c) the patient shall be verbally encouraged to:
 - (i) read the written information required by Subsection (1)(a) and the arbitration agreement; and
 - (ii) ask any questions.
- (2) When a medical malpractice action is arbitrated, the action shall:
 - (a) be subject to Chapter 31a, Utah Uniform Arbitration Act; and
 - (b) include any one or more of the following when requested by the patient before an arbitration hearing is commenced:
 - (i) mandatory mediation;
 - (ii) retention of the jointly selected arbitrator for both the liability and damages stages of an arbitration proceeding if the arbitration is bifurcated; and

(iii) the filing of the panel's award of damages as a judgement against the provider in the appropriate district court.

(3) Notwithstanding Subsection (1), a patient may not be denied health care on the sole basis that the patient or a person described in Subsection (6) refused to enter into a binding arbitration agreement with a health care provider.

(4) A written acknowledgment of having received a written explanation of a binding arbitration agreement signed by or on behalf of the patient shall be a defense to a claim that the patient did not receive a written explanation of the agreement as required by Subsection (1) unless the patient:

(a) proves that the person who signed the agreement lacked the capacity to do so; or

(b) shows by clear and convincing evidence that the execution of the agreement was induced by the health care provider's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(5) The requirements of Subsection (1) do not apply to a claim governed by a binding arbitration agreement that was executed or renewed before May 3, 1999.

(6) A legal guardian or a person described in Subsection 78-14-5(4), except a person temporarily standing in loco parentis, may execute or rescind a binding arbitration agreement on behalf of a patient.

(7) This section does not apply to any arbitration agreement that is subject to the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq.

History: C. 1953, 78-14-17, enacted by L. 1999, ch. 278, § 1; 2003, ch. 207, § 3; 2004, ch. 83, § 1.

Amendment Notes. — The 2003 amendment, effective May 5, 2003, added "if Subsection (2) applies" at the end of Subsection (1)(a)(iv); added Subsection (1)(a)(vii); and inserted "from the emergency department of a general acute hospital, as defined in Section 26-21-2" in Subsection (2).

The 2004 amendment, effective May 3, 2004, added Subsection (1)(a)(viii), the introductory clause in Subsection (1)(b)(i), and Subsections (1)(b)(ii) and (1)(b)(vi) to (2), making stylistic

and related changes; deleted "and by verbal explanation" after "in writing" in Subsection (1)(a); substituted "ten days" for "30 days" in Subsections (1)(a)(vii) and (1)(b)(iv); added the language beginning "if both parties" and ending "third arbitrator" in Subsection (1)(b)(i)(C)(II); deleted "of any kind from the emergency department of a general acute hospital, as defined in Section 26-21-2" after "denied health care" in Subsection (3); and deleted "and verbal" before "explanation" twice in the introductory clause in Subsection (4).

Sunset. — See Section 63-55-278 for the repeal date of this section.

COLLATERAL REFERENCES

Utah Law Review. — Recent Legislative Developments — Medical Malpractice Amendments, 2004 Utah L. Rev. 325.

ADDENDUM B

(Utah Code Ann. § 68-3-3(2000))

Am. Jur. 2d. — 73 Am. Jur. 2d Statutes §§ 101, 190 et seq.

C.J.S. — 82 C.J.S. Statutes § 350.

68-3-3. Retroactive effect.

No part of these revised statutes is retroactive, unless expressly so declared.

History: R.S. 1898 & C.L. 1907, § 2490; C.L. 1917, § 5840; R.S. 1933 & C. 1943, 88-2-3.

Meaning of “these revised statutes.” — The term “these revised statutes” apparently

means Revised Statutes of Utah, 1933. See § 68-2-1 and notes thereto.

Cross-References. — Ex post facto law or law impairing obligation of contract prohibited, Utah Const., Art. I, Sec. 18.

NOTES TO DECISIONS

ANALYSIS

Application to particular areas of law.
Construction and application.
Contingent fee agreement.
Cited.

Application to particular areas of law.

See *Union Pac. R.R. v. Trustees, Inc.*, 8 Utah 2d 101, 329 P.2d 398 (1958) (corporations); *People v. Clayton*, 5 Utah 598, 18 P. 628 (1888) (fees); *In re Ingraham's Estate*, 106 Utah 337, 148 P.2d 340 (1944) (inheritance tax); *Stephens v. Henderson*, 741 P.2d 952 (Utah 1987) (joint and several liability); *Petty v. Clark*, 113 Utah 205, 192 P.2d 589 (1948) (pending actions); *In re Anthony*, 71 Utah 501, 267 P. 789 (1928) (pensions); *Salt Lake Child & Family Therapy Clinic, Inc. v. Frederick*, 890 P.2d 1017 (Utah 1995) (privileged communications); *First Sec. Bank v. Styler*, 147 Bankr. 248 (D. Utah 1992) (recorded documents); *Industrial Comm'n v. Agee*, 56 Utah 63, 189 P. 414 (1911) (worker's compensation); *Silver King Coalition Mines Co. v. Industrial Comm'n*, 2 Utah 2d 1, 268 P.2d 689 (1954) (worker's compensation).

Construction and application.

This section is merely a statement of well-settled rules of statutory construction. *Farrel v. Pingree*, 5 Utah 443, 16 P. 843 (1888).

This section is largely declaratory of pre-existing rules of statutory construction. *Mercur Gold Mining & Milling Co. v. Spry*, 16 Utah 222, 52 P. 382 (1898).

In seeking to arrive at legislative intent, statutes should be construed in light of existing

circumstances. *Industrial Comm'n v. Agee*, 56 Utah 63, 189 P. 414 (1911).

This rule of construction has been recognized and adopted by the federal courts. *Kansas City Life Ins. Co. v. Bowns*, 129 F.2d 287 (10th Cir. 1942).

The required inquiry is whether, in the abstract, a new law affects the amount of punishment an existing law can impose, as opposed to whether a new law affects the likelihood that a particular defendant will be sentenced to the greater of possible alternative punishments. *State v. Daniels*, 2002 UT 2, 40 P.3d 611.

Contingent fee agreement.

The State Tax Commission's retroactive application of § 59-2-703(2)(c) was erroneous because that section contains no language reflecting an intent that the subsection should apply retroactively, and this section requires that it must be clear that the legislature intended the statute to operate retrospectively. *Cache County v. State Tax Comm'n*, 922 P.2d 758 (Utah 1996).

Cited in *Madsen v. Borthick*, 769 P.2d 245 (Utah 1988); *State v. Lavoto*, 776 P.2d 912 (Utah 1989); *Worthington & Kimball Constr. Co. v. C & A Dev. Co.*, 777 P.2d 475 (Utah 1989); *Rocky Mt. Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459 (Utah 1989); *Rees v. Inter-mountain Health Care, Inc.*, 808 P.2d 1069 (Utah 1991); *Stillman v. Teachers Ins. & Annuity Ass'n College Ret. Equities Fund*, 343 F.3d 1311 (10th Cir. 2003); *State v. Marshall*, 2003 UT App 381, 486 Utah Adv. Rep. 55, 81 P.3d 775.

COLLATERAL REFERENCES

Journal of Contemporary Law. — Comment, *The Liability Reform Act: An Approach to Equitable Application*, 13 J. Contemp. L. 89 (1987).

Am. Jur. 2d. — 73 Am. Jur. 2d Statutes §§ 244 to 248.

C.J.S. — 82 C.J.S. Statutes § 407 et seq.

A.L.R. — *Retrospective operation of state statutes or rules of court conferring in personam jurisdiction over nonresidents or foreign corporations on the basis of isolated acts or transactions*, 19 A.L.R.3d 138.

ADDENDUM C

(U.S. Constitution, Article I § 10)

CONSTITUTION OF THE UNITED STATES OF AMERICA

PREAMBLE

Article

- I. [Legislative Department].
- II. [Executive Department].
- III. [Judicial Department].
- IV. [State And Territorial Relations].
- V. [Amendment].
- VI. [Miscellaneous Provisions].
- VII. [Adoption].

Amendments

ARTICLE I
[Legislative Department]

Section

1. [Legislative powers vested in Congress.]
2. [House of Representatives.]
3. [Senate.]
4. [Election of members - Sessions.]
5. [Organization - Proceedings - Adjournment.]
6. [Compensation - Privileges - Holding other office.]
7. [Bills and resolutions - Veto.]
8. [Powers of Congress.]
9. [Powers denied Congress.]
10. [Powers denied the states.]

Sec. 10. [Powers denied the states.]

[1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, as post facto law, or law impairing the obligations of contracts, or grant any title of nobility.

[2.] No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

[3.] No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreements or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ADDENDUM D

(Utah Constitution, Article I § 18)

CONSTITUTION OF UTAH

PREAMBLE

Article

- I. Declaration of Rights.
- II. State Boundaries.
- III. Ordinance.
- IV. Elections and Right of Suffrage.
- V. Distribution of Powers.
- VI. Legislative Department.
- VII. Executive Department.
- VIII. Judicial Department.
- IX. Congressional and Legislative Apportionment.
- X. Education.
- XI. Local Governments.
- XII. Corporations.
- XIII. Revenue and Taxation.
- XIV. Public Debt.
- XV. Militia.
- XVI. Labor.
- XVII. Water Rights.
- XVIII. Forestry.
- XIX. Public Buildings and State Institutions.
- XX. Public Lands.
- XXI. Salaries.
- XXII. Miscellaneous.
- XXIII. Amendment and Revision.
- XXIV. Schedule.

ARTICLE I DECLARATION OF RIGHTS

Section

1. [Inherent and inalienable rights.]
2. [All political power inherent in the people.]
3. [Utah inseparable from the Union.]
4. [Religious liberty.]
5. [Habeas corpus.]
6. [Right to bear arms.]
7. [Due process of law.]
8. [Offenses bailable.]
9. [Excessive bail and fines - Cruel punishments.]
10. [Trial by jury.]
11. [Courts open - Redress of injuries.]
12. [Rights of accused persons.]
13. [Prosecution by information or indictment - Grand jury.]
14. [Unreasonable searches forbidden - Issuance of warrant.]
15. [Freedom of speech and of the press - Libel.]
16. [No imprisonment for debt - Exception.]
17. [Elections to be free - Soldiers voting.]
18. [Attainder - Ex post facto laws - Impairing contracts.]
19. [Treason defined - Proof.]
20. [Military subordinate to the civil power.]
21. [Slavery forbidden.]
22. [Private property for public use.]
23. [Irrevocable franchises forbidden.]
24. [Uniform operation of laws.]
25. [Rights retained by people.]
26. [Provisions mandatory and prohibitory.]
27. [Fundamental rights.]
28. [Declaration of the rights of crime victims.]
29. [Marriage.]

Sec. 18. [Attainder - Ex post facto laws - Impairing contracts.]

No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed.

History: Const. 1896.