

2010

Glenna Stewart v. Charles Bova, M.D. and Pioneer Valley Hospital : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Stewart v. Pioneer Valley Hospital*, No. 20100036 (Utah Court of Appeals, 2010).
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IN THE UTAH COURT OF APPEALS

GLENNA STEWART,

Plaintiff and Appellee,

v.

CHARLES BOVA, M.D. and PIONEER
VALLEY HOSPITAL,

Defendants and Appellants.

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Case No. 20100036
(Third District Case No. 090900273)

BRIEF OF DEFENDANTS/APPELLANTS
CHARLES BOVA, M.D. and PIONEER VALLEY HOSPITAL

Appeal from a Memorandum and Order Denying Motion to Compel Arbitration
and Stay Litigation.
Honorable John Paul Kennedy, Presiding

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FILED

JUN 21 2010

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STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-4-103(2)(j) (2009). Direct appeal of the trial court's denial of Defendant's Motion to Compel Arbitration is taken pursuant to Utah Code Ann. § 78B-11-129(1)(a) (2008).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

I. Whether the trial court erred in denying Defendant/Appellant Charles Bova, M.D.'s ("Dr. Bova") Motion to Compel Arbitration and Stay Litigation ("Dr. Bova's Motion to Compel") by relying on extrinsic evidence in the form of declarations submitted by Plaintiff/Appellee Glenna Stewart ("Plaintiff") to conclude that the unambiguous language of the two Arbitration Agreements (the "Agreements") signed by Plaintiff does not confirm that Plaintiff was verbally encourage to ask questions regarding the Agreements pursuant to Utah Code Ann. § 78B-3-421(1)(c)(ii).

Preservation of Issue: This issue was preserved in the trial court in Plaintiff's Memorandum in Opposition to Dr. Bova's Motion to Compel Arbitration [R. 28-48], Dr. Bova's Reply Memorandum in Support of his Motion to Compel Arbitration and Stay Litigation [R. 52-64], Supplemental Memorandum in Support of Dr. Bova's Motion to Compel Arbitration and Stay Litigation [R. 110-115], Plaintiff's Supplemental Memorandum in Opposition to Dr. Bova's Motion to Compel Arbitration and Stay Litigation [R. 148-152], at the June 15, 2009 Hearing on Dr. Bova's Motion to Compel (the "First Hearing") [R. 336], at the October 19, 2009 Hearing on Dr. Bova's Motion to

Compel (the “Second Hearing”) [R. 337], and at the December 10, 2009 Hearing on Dr. Bova’s Motion to Compel and Dr. Bova’s Motion to Stay Litigation Pending Appeal (the “Third Hearing”) [R. 338].

Standard of Review: A trial court’s interpretation of a written contract is reviewed for correctness, granting no deference to the trial court. *Café Rio, Inc. v Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 21, 207 P.3d 1235.

II. Whether the trial court erred by failing to conclude that the unambiguous language of the arbitration agreements met all statutory and common law requirements for a valid and enforceable contract, and for an arbitration agreement under Utah Code Ann. § 78B-3-421(1)(c)(ii) (2008).

Preservation of Issue: This issue was preserved in the trial court in Plaintiff’s Memorandum in Opposition to Dr. Bova’s Motion to Compel Arbitration [R. 28-48], Dr. Bova’s Reply Memorandum in Support of his Motion to Compel Arbitration and Stay Litigation [R. 52-64], Supplemental Memorandum in Support of Dr. Bova’s Motion to Compel Arbitration and Stay Litigation [R. 110-115], Plaintiff’s Supplemental Memorandum in Opposition to Dr. Bova’s Motion to Compel Arbitration and Stay Litigation [R. 148-152], at the June 15, 2009 Hearing on Dr. Bova’s Motion to Compel (the “First Hearing”) [R. 336], at the October 19, 2009 Hearing on Dr. Bova’s Motion to Compel (the “Second Hearing”) [R. 337], and at the December 10, 2009 Hearing on Dr.

Bova's Motion to Compel and Dr. Bova's Motion to Stay Litigation Pending Appeal (the "Third Hearing") [R. 338].

Standard of Review: A trial court's interpretation of a written contract is reviewed for correctness, granting no deference to the trial court. *Café Rio, Inc. v Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 21, 207 P.3d 1235.

PROVISIONS OF STATUTES AND RULES

The interpretation of Utah Code Ann. § 78B-3-421 is of importance to this appeal, a copy of which is attached hereto as Addendum A.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings Below

This is a medical malpractice case arising out of lumbar nerve root injection procedure (the "Procedure") performed by Dr. Bova on the Plaintiff on April 16, 2008. Prior to the Procedure, Plaintiff signed an arbitration agreement (the "April 16th Agreement") agreeing to arbitrate all claims related to the care and treatment provided by Dr. Bova. The day after the Procedure, on April 17, 2008, Plaintiff was seen by Dr. Bova for a follow-up appointment and signed a second arbitration agreement (the "April 17th Agreement"). The April 16th and 17th Agreements are identical. In response to Plaintiff's Complaint and prior to any other responsive pleadings being filed, Dr. Bova filed his Motion to Compel, joined by Pioneer Valley Hospital, which Plaintiff opposed. Arguments on Dr. Bova's Motion were heard on three different dates: (1) June 15, 2009;

(2) October 19, 2009; and (3) December 10, 2009. Judge Kennedy entered an order on December 10, 2009 denying Dr. Bova's Motion on the basis that Plaintiff's declarations demonstrated that she was not verbally encouraged to ask questions regarding the Agreements in contravention of Utah Code Ann. § 78B-3-421(1)(c)(ii) (2008). This appeal followed.

STATEMENT OF FACTS

Dr. Bova is a pain management physician licensed to practice medicine in the State of Utah. [R. 1]. On April 16, 2008, Dr. Bova performed the Procedure on the Plaintiff. [R. 2]. Prior to the Procedure, the Plaintiff signed the April 16th Agreement.¹ [R. 14]. Plaintiff was accompanied by her daughter, a registered nurse who is familiar with health care providers having their patients sign arbitration agreements. [R. 45]. Under the terms of the April 16th Agreement, the Plaintiff agreed to resolve any claim for medical malpractice arising out of the care rendered by Dr. Bova by mediation or arbitration. [Addendum B at Art. 3]. The April 16th Agreement gives the Plaintiff the unilateral right to rescind the Agreement within 10 days of signing. [*Id.* at Art. 7.B]. The Agreement includes Plaintiff's acknowledgment that:

I have received a written explanation of the terms of this Agreement. I have had the right to ask questions and have my questions answered. I understand that any Claims I might have must be resolved through the dispute resolution process

¹ A true and correct copy of the April 16th Agreement is attached hereto as Addendum B.

in this Agreement instead of having them heard by a judge or jury. I understand the role of the arbitrators and the manner in which they are selected. I understand the responsibility for arbitration related costs. I understand that this Agreement renews each year unless cancelled before the renewal date. I understand that I can decline to enter into the Agreement and still receive health care. I understand that I can rescind this Agreement within 10 days of signing it.

[*Id.* at Art. 9]. The Agreement also contains Plaintiff's acknowledgment that "I have received a copy of this document." [*Id.* at Art. 10]. The day after the procedure, on April 17, 2008, Plaintiff was seen by Dr. Bova for a follow-up appointment and signed the April 17th Agreement.² [R. 59]. The April 16th and 17th Agreements are identical. [Compare Addendum B with Addendum C].

By way of Complaint dated January 7, 2009, Plaintiff sued Dr. Bova and Pioneer Valley Hospital claiming medical malpractice for injury allegedly arising out of the April 16, 2008 Procedure. [R. 1-6]. Dr. Bova filed his Motion to Compel on February 18, 2009 requesting that the trial court compel arbitration, joined by Pioneer Valley Hospital, pursuant to the terms of the April 16th Agreement. [R. 10-12]. On March 13, 2009, Plaintiff filed her Memorandum in Opposition to Dr. Bova's Motion. [R. 28-48]. Attached to Plaintiff's Memorandum in Opposition were two declarations—one by the Plaintiff, and the other by her daughter—asserting that the Plaintiff was not verbally encouraged to ask questions regarding the Agreement, and that she did not receive a copy

² A true and correct copy of the April 17th Agreement is attached hereto as Addendum C.

of the Agreement. [R. 40-48]. Based on these declarations, Plaintiff argued that the April 16th Agreement was procedurally unconscionable because she was not verbally encouraged to ask questions as required by Utah Code Ann. § 78B-3-421(1)(c)(ii). [R. 28-37].

Dr. Bova and Pioneer Valley Hospital responded by arguing that Plaintiff's declarations were impermissible parol evidence and should not be considered by the Court because the terms of the April 16th Agreement were unambiguous. [R. 52-60]. Dr. Bova also argued that the execution of the April 16th Agreement was not procedurally unconscionable under common law, and that Plaintiff's unambiguous acknowledgment that she "had the right to ask questions and have my questions answered" demonstrates that the execution of the Agreement was in compliance with Utah Code Ann. § 78B-3-422(1)(c)(ii). [*Id.*] Dr. Bova further argued that Plaintiff executed an identical agreement the day after she executed the April 16th Agreement (*i.e.*, the April 17th Agreement) which further demonstrates Plaintiff's understanding of the terms of the April 16th Agreement, and that the April 16th Agreement was validly executed under Utah Code Ann. § 78B-3-421 and common law principles of procedural unconscionability. [*Id.*]

Arguments on Dr. Bova's Motion to Compel were heard by the Honorable John Paul Kennedy on three different occasions: during the first hearing on June 15, 2009 [R. 336]; during the second hearing on October 19, 2009 [R. 337]; and during the third hearing on December 10, 2009. [R. 338]. The purpose of the second, October 19, 2009

hearing was to hear arguments regarding the dates the Agreements were signed by Plaintiff. [R. 336, p. 33; R. 337, p. 1]. Prior to the second hearing, the parties submitted Supplemental Memoranda regarding when the Agreements were signed by Plaintiff. [R. 110-131; 148-152]. Dr. Bova submitted two declarations with his Supplemental Memorandum for the limited purpose of establishing the dates the Agreements were signed by Plaintiff. [R. 110-131; 337, pp. 22-23; R. 338, p. 6]. Judge Kennedy ultimately declined to issue a ruling on when the Agreements were signed by Plaintiff. [R. 349-353]. The purpose of the third, December 10, 2009 hearing was to: (1) correct the date Judge Kennedy entered his Memorandum and Order denying Dr. Bova's Motion to Compel [R. 338, pp. 1-12]; and (2) hear arguments on Defendant's Joint Motion to Stay Litigation Pending Appeal [R. 338, pp. 12-14]. Judge Kennedy corrected the date he entered his Memorandum and Order denying Dr. Bova's Motion to Compel to reflect its entry on December 10, 2009. [R. 349-353; 358-359]. Judge Kennedy also summarily denied Defendants' Joint Motion to Stay Litigation pending appeal. [R. 338, pp. 12-14; R. 358-359].

Ultimately, by Memorandum and Order dated December 10, 2009, Judge Kennedy denied Dr. Bova's Motion to Compel on the bases that: (1) Plaintiff's declarations demonstrated that she was not verbally encouraged to ask questions regarding the Agreement as required by Utah Code Ann. § 78B-3-421(1)(c)(ii); and (2) Plaintiff's acknowledgment in the Agreements that she "had the right to ask questions and have my

questions answered” does not satisfy the requirement that she be verbally encouraged to ask questions pursuant to § 78B-3-421(1)(c)(ii). [R. 349-352]. Judge Kennedy did not find that Plaintiff did not receive a copy of the Agreements. [*Id.*] Judge Kennedy further clarified his ruling in his Memorandum and Order for Hearing on Defendants’ Joint Motion to Stay Litigation Pending Appeal by stating: “[t]he arbitration agreements at issue were not validly executed as a matter of law because the Court finds that the plaintiff was not verbally encouraged as required by Utah Code Ann. § 78B-3-421(1)(c).” [R. 358-359].

SUMMARY OF ARGUMENT

I. The April 16th Agreement is valid and enforceable under both Utah Code Ann. § 78B-3-421, and Utah contract law. First, the Agreement complies with the requirements set forth in Utah Code Ann. § 78B-3-421 (2008) to create a valid and enforceable physician/patient arbitration agreement. Although Plaintiff contends that only one of several requirements set forth in § 78B-3-421 was not met, she cannot dispute that the underlying purpose of the statute was satisfied, namely, that she understood the terms of the April 16th Agreement when she signed it. Second, under well-established Utah contract law, Plaintiff cannot claim ignorance of the Agreement’s terms after she signed it to escape its enforcement. Third, the trial court erred in relying on parol evidence in the form of Plaintiff’s declarations to conclude that a single statutory requirement in § 78B-3-421 was not met. Finally, the execution of the Agreement was

not procedurally unconscionable because Plaintiff: (1) received a copy of the Agreement; (2) had the unrestricted opportunity to rescind it within ten days of signing it; (3) executed an identical Agreement a day later; and (4) was accompanied by her daughter—a nurse with knowledge of and experience with patients signing arbitration agreements—when she executed the April 16th Agreement.

II. The trial court’s interpretation of Utah Code Ann. § 78B-3-421 is incorrect and undermines the purpose of the Utah Health Care Malpractice Act. One of the primary purposes of the Utah Health Care Malpractice Act is to “expedite early evaluation and settlement of claims.” Utah Code Ann. § 78B-3-402 (2008). Arbitration furthers this goal by providing an expeditious inexpensive method to resolve disputes. If, however, health care providers are required to prove by extrinsic evidence that a patient has been verbally encouraged to read and sign an arbitration agreement, the inevitable result will be far fewer arbitrations. This result undermines both the purpose of the statute and long-standing Utah policy in favor of arbitration. Given that Plaintiff has acknowledged that she was given the opportunity to ask questions regarding the agreement and understood its terms and conditions, legislative intent and public policy would best be served by enforcing the Arbitration Agreement.

ARGUMENT

I. THE APRIL 16TH AGREEMENT IS VALID AND ENFORCEABLE UNDER BOTH UTAH CODE ANN. § 78B-3-421, AND UTAH CONTRACT LAW.

Under Utah law, “[a] party claiming unconscionability bears a heavy burden.”

Ryan v. Dan’s Food Stores, Inc., 972 P.2d 395, 402 (Utah 1998); *accord Resource Management Co. v. Weston Ranch*, 706 P.2d 1028, 1041 (Utah 1985). In opposing Dr. Bova’s Motion to Compel, Plaintiff argued that the execution of the April 16th Agreement was procedurally unconscionable because she was not verbally encouraged to ask questions regarding the Agreement prior to signing it in contravention of Utah Code Ann. § 78B-3-421 (2008). [R. 28-48].³ In support of her arguments, Plaintiff submitted two declarations in which Plaintiff and her daughter assert that Plaintiff was not verbally encouraged to ask questions regarding the Agreement. [*Id.*] Plaintiff does not dispute, however, her unambiguous acknowledgments that she understood the Agreement’s terms. [*Id.*] Despite Plaintiff’s unambiguous acknowledgments that she knew what she was signing, the trial court relied on Plaintiff’s declarations to find that the April 16th Agreement was not enforceable because a single requirement of § 78B-3-421 had not been met. [R. 349-352]. The trial court erred in reaching this conclusion because it

³ Significantly, Plaintiff does not claim that the April 16th Agreement is substantively unconscionable. [R. 28-48]. While substantive unconscionability may alone support a finding of unconscionability, “procedural unconscionability without any substantive imbalance will rarely render a contract unconscionable.” *Ryan*, 927 P.2d at 402. Thus, Plaintiff’s already heavy burden to demonstrate unconscionability is greatly increased.

ignored the plain and unambiguous language of the Agreement and well-established Utah contract law directly on point. Accordingly, this Court should reverse the trial court and compel Plaintiff to arbitrate her claims pursuant to the terms of the April 16th Agreement.

A. The Agreement Complies with Utah Code Ann. § 78B-3-421.

The Utah Supreme Court has long recognized “the strong public policy in favor of arbitration as an approved, practical and inexpensive means of settling disputes and easing court congestion.” *Robinson & Wells v. Warren*, 669 P.2d 844, 846 (Utah 1983); accord *Chandler v. Blue Cross Blue Shield*, 833 P.2d 356, 368 (Utah 1992). Indeed, according to the Utah Supreme Court, “if there is any question as to whether the parties agreed to resolve their disputes through arbitration or litigation . . . we interpret the agreement keeping in mind our policy of encouraging arbitration.” *Central Florida Investments, Inc. v. Parkwest Associates*, 2002 UT 3, ¶ 16, 40 P.3d 599.

One of the stated purposes of the Utah Health Care Malpractice Act is to “provide other procedural changes to expedite early evaluation and settlement of claims.” Utah Code Ann. § 78B-3-402(3) (2008). Consistent with this purpose, in 1999 the Utah legislature amended the Utah Health Care Malpractice Act and codified the enforceability of physician-patient arbitration agreements as favored public policy. The statute specifies agreement terms and includes the information that must be provided to the patient regarding arbitration, how that information is to be provided to the patient, and an acknowledgment by the patient that she received the information. See Utah Code Ann. §

78B-3-421(1) (2008). The level of detail embodied in the statute reveals the legislature's intent to ensure the validity and enforcement of arbitration agreements entered into between physicians and their patients that meet the requirements of the statute. Indeed, the purpose of the statute is to avoid the very claims of procedural unconscionability asserted by Plaintiff.

Comparison of the Agreement with the requirements of Utah Code Ann. §§ 78B-3-421(1)(a) and (b) demonstrates that the Agreement complies with the legislatively-established requirements to create a presumptively valid and enforceable physician-patient arbitration agreement. (Compare Addendum A, with Addendum B). The only deviations from the statutory requirements alleged by Plaintiff are that: (1) she was not verbally encouraged to read the Agreement and ask questions about it, and (2) she did not receive a copy of the Agreement.⁴ [R. 28-48]. Plaintiff's allegations are specious at best.

As an initial matter, Plaintiff's allegations are directly contradicted by her own unambiguous acknowledgments that she received a copy of the Agreement, understood its terms and was given the opportunity to ask questions. [Addendum B at Art. 9]. These acknowledgments plainly demonstrate that the underlying purpose of the statutory requirements were met, namely, that she be given an opportunity to understand what she

⁴ Regarding the second allegation, the trial court did not address whether Plaintiff received a copy of the April 16th Agreement. Instead, the trial court's decision was based solely on the issue of whether she was verbally encouraged to read and ask questions regarding the Agreement.

was signing to avoid any issues of procedural unconscionability. Indeed, Plaintiff does not contradict any of her other, more significant acknowledgments that she understood her claims would be arbitrated, and understood the role of the arbitrators and how they would be selected. [R. 28-48]. It is simply nonsensical to hold an agreement unenforceable on the basis that only one of many statutory requirements designed to prevent misunderstanding of the terms of an Agreement was not met, when the Plaintiff clearly acknowledges that she understood the terms of the Agreement.

The trial court, however, concluded that the lack of evidence that the Plaintiff be verbally encouraged to ask questions regarding the Agreement rendered the entire Agreement unenforceable. [R.349-352]. The trial court's conclusion not only ignores the underlying purpose of the statute and the policy favoring arbitration, it disregards well-established contract law.⁵

B. Utah Contract Law Prohibits Plaintiff's After-the-Fact Attempt to Undo Her Agreement.

In 1996 the Utah Supreme Court made clear that arbitration agreements are valid and enforceable in the physician-patient context, stating:

We emphasize preliminarily that arbitration agreements are favored in Utah and that no public policy requires such agreements to be subject to a different analysis when they are between physicians and patients. They are enforceable if they meet the standards applicable to all contracts.

⁵ The purpose of the Utah Health Care Malpractice Act and Utah policy favoring arbitration are discussed in more detail in Section II.

Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996). Under well-established Utah contract law, a party to a contract is bound to all contract provisions and, absent fraud or mistake, cannot assert lack of understanding to avoid the contract. *Semenov v. Hill*, 1999 UT 58, ¶ 12, 982 P.2d 578. Specifically, “a signatory cannot, with hindsight, claim ignorance of the contract and thereby escape liability.” *Western Properties v. Southern Utah Aviation, Inc.*, 776 P.2d 656, 658 (Utah Ct. App. 1989). “Each party has the burden to understand the terms of a contract before he affixes his signature to it and may not thereafter assert his ignorance as a defense.” *Resource Management Co. v. Weston Ranch & Livestock Co.*, 706 P.2d 1028, 1047 (Utah 1985). “In Utah, contracts mean what they say, and parties will be bound by them.” *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 906 n.1 (Utah 1995); *John Call Engineering, Inc. v. Manti City Corp.*, 743 P.2d 1205, 1207-1208 (Utah 1987). In other words, “a person who signs a contract must be presumed to have read, understood and assented to it” C.J.S. Contracts § 705 (2010). “The fact that a contracting party fails to read papers or does not have someone else read them to him or her does not rebut the presumption.” *Id.*

Overlaid on these axioms of Utah contract law are Plaintiff’s unambiguous acknowledgments that:

I have received a written explanation of the terms of this Agreement. I have had the right to ask questions and have my questions answered. I understand that any Claims I might have must be resolved through the dispute resolution process in this Agreement instead of having them heard by a judge or jury. I understand the role of the arbitrators and the manner in

which they are selected. I understand the responsibility for arbitration related costs. I understand that this Agreement renews each year unless cancelled before the renewal date. I understand that I can decline to enter into the Agreement and still receive health care. I understand that I can rescind this Agreement within 10 days of signing it.

[Addendum B at Art. 9]. Plaintiff does not dispute that she signed the April 16th

Agreement, she does not contend the terms are ambiguous, and she does not allege fraud or mistake relating to this Agreement. [R. 28-48]. Thus, under well-established Utah law and the plain language of the Agreement, Plaintiff is deemed to have understood the terms of the Agreement and any claim of procedural unconscionability is without merit. Plaintiff's claims of ignorance are not a valid defense; she is bound by the terms of the Agreement that she signed on two occasions and is estopped from claiming otherwise.

C. Plaintiff's Declarations Are Inadmissible Parol Evidence and Should Not Be Applied to Contradict Plaintiff's Unambiguous Acknowledgments.

The purpose of the parol evidence rule is "to limit the ability of the finder of fact (the jury) to believe testimony contradicting integrated writings." *Ward v. Intermountain Farmers Ass.*, 907 P.2d 264, 269 (Utah 1995) (quoting 3 Arthur L. Corbin, *Corbin on Contracts* § 572C (Supp. 1994)). Consistent with this axiom of contract law, this Court has long held that "parol evidence is . . . not admissible to vary or contradict the clear and unambiguous terms of the contract." *DCH Holdings, LLC v. Nielson*, 2009 UT App 269, ¶ 8, 220 P.3d 178 (citing *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326).

A trial court may not consider parol evidence without first finding an ambiguity in the language of the contract. *Flores v. Earnshaw*, 2009 UT App 90, ¶ 12, 209 P.3d 428. “A contractual term or provision is ambiguous if it is capable of more than one reasonable interpretation because of uncertain meanings of terms, missing terms or other facial deficiencies.” *Park v. Stanford*, 2009 UT App 307, ¶ 10, 221 P.3d 877 (quoting *Daines v. Vincent*, 2008 UT 51, ¶ 25, 1490 P.3d 1269). If the contract is unambiguous, the trial court may not consider parol evidence and must interpret the contract solely from the plain meaning of the contractual language. *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235. Indeed, “[o]nly if the language of the contract is ambiguous will [the Court] consider extrinsic evidence.” *Id.*

The sole basis of the trial court’s determination that Plaintiff was not verbally encouraged to ask questions regarding the Agreement is Plaintiff’s self serving, after-the-fact declaration that she was not verbally encouraged to ask questions. [R. 349-352]. Based on this parol evidence (and the lack of contradicting parol evidence submitted by Dr. Bova), the trial court found that “there is no proof that defendant ‘verbally encouraged’ the patient as required by statute” and ruled that the April 16th Agreement was unenforceable. [R. 351]. The trial court’s reliance on Plaintiff’s declaration to find the Agreement unenforceable is reversible error.

As an initial matter, the trial court failed to find any ambiguity in the language of the April 16th Agreement. [R. 349-352]. That is because it could not do so. There is no

ambiguity in the terms of the Agreement, or in Plaintiff's acknowledgment that she understood those terms. Indeed, a cursory reading of the plain language of the Agreement illustrates that Plaintiff knew what she was signing. As a result, the trial court should not have even considered Plaintiff's declaration, let alone relied on it, in determining whether the April 16th Agreement satisfied the requirements of Utah Code Ann. § 78B-3-421. *Flores*, 2009 UT App at ¶12. The trial court should be reversed for this reason alone.

In addition, it is undisputable that Plaintiff submitted her declarations to contradict her unambiguous acknowledgments that she understood the terms of the Agreement. [R. 28-48]. Indeed, the underlying premise of her procedural unconscionability claim is that she did not understand what she was signing. Ostensibly recognizing that all of the other requirements of § 78B-3-421 were met, Plaintiff submitted her declarations in the hope that the trial court would focus on the single requirement that she be verbally encouraged to ask questions, and ignore her unambiguous acknowledgments that she understood what she was signing. And that is exactly what the trial court did. Although veiled in the failure to satisfy strict statutory mandate, the trial court's reliance on Plaintiff's parol evidence resulted in eviscerating the plain, unambiguous language of the Agreement demonstrating that Plaintiff understood the terms of the Agreement. Consistent with this Court's long standing precedent, the trial court's reliance on parol evidence should not be condoned. *DCH Holdings, LLC*, 2009 UT App at ¶ 8.

D. The Utah Supreme Court's Holding in *Sosa* Compels Enforcement of the April 16th Agreement.

In *Sosa v. Paulos*, the plaintiff argued that the execution of an arbitration agreement was procedurally unconscionable because she was presented with the agreement less than an hour prior to surgery when she was in an apprehensive and nervous condition. *Sosa*, 924 P.2d at 362. Like the instant case, the plaintiff in *Sosa* also argued that no one undertook to explain the document to her, and that she felt “rushed and hurried” by the manner of its presentation. *Id.*

The majority of the *Sosa* court concluded that the execution of the agreement would not be procedurally unconscionable if: (1) the plaintiff was given a signed copy of the agreement following her surgery, and (2) she was not precluded from revoking the agreement within the fourteen day revocation period. *Id.* at 365. The majority reasoned that if the plaintiff was aware of complications immediately following the surgery, “fourteen days was sufficient time for her to read and understand the agreement’s unconditional revocation clause. During this fourteen day period, she would not have been forced to make a decision in a hurried, rushed, or anxious state, and her decision to revoke or not would have been a meaningful choice.” *Id.* at 364. Indeed, the majority in *Sosa* made clear that the facts and circumstances surrounding the execution of the agreement did not demonstrate that “the whole transaction was tainted with procedural unconscionability so as to render the entire agreement null and void.” *Id.* at 365.

Like the majority of the Supreme Court in *Sosa*, this Court should find that Plaintiff's execution of the April 16th Agreement was not procedurally unconscionable. Plaintiff specifically acknowledged receiving a signed copy of the Agreement. [Addendum B at Art. 10]. Moreover, in specific compliance with Utah Code Ann. § 78B-3-421, the Agreement gave Plaintiff the unfettered and unilateral right to revoke the Agreement within ten days of signing it. [Addendum B at Art. 9]. Thus, under *Sosa*, Plaintiff's acknowledgment that she received a copy of the Agreement and that it contained an easily understandable clause affording her the right to unilaterally revoke the Agreement within ten days precludes a determination that it is void because of alleged defects in procedure in forming the Agreement. *Sosa*, 924 P.2d at 365.

In addition to the facts outlined in *Sosa*, there are other facts present in this case which demonstrate that the execution of the April 16th Agreement was not procedurally unconscionable. Plaintiff's execution of an identical agreement a day later (*i.e.*, the April 17th Agreement) provided her with yet another opportunity to understand the terms of the April 16th Agreement, and if she chose not to enter into it, she could have rescinded it. [Addendum C]. Further, Plaintiff's multiple acknowledgments in a two day period of understanding the Agreement's terms renders her allegations to the contrary hollow. A second fact weighing against a finding of procedural unconscionability is that Plaintiff was accompanied by her daughter when she executed the April 16th Agreement. [R. 29]. Her daughter is a nurse and is familiar with health care providers such as Dr. Bova having

their patients sign documents, including arbitration agreements, prior to rendering care.

[*Id.*] Thus, not only was there another person present to aid Plaintiff in understanding what she was signing, this person had specific knowledge and experience with the very documents Plaintiff was signing. These facts, coupled with the fact that Plaintiff received a copy of the April 16th Agreement (and the April 17th Agreement) and had the ability to rescind it within ten days, negate Plaintiff's claim of procedural unconscionability.

II. THE TRIAL COURT'S INTERPRETATION OF UCA §78B-3-421 IS INCORRECT AND UNDERMINES THE PURPOSE OF THE HEALTH CARE MALPRACTICE ACT.

The trial court requires that Dr. Bova prove through extrinsic evidence that Plaintiff was verbally encouraged to read the Arbitration Agreement and ask questions. Yet, other than the suggestion that Dr. Bova could have filed an affidavit, the trial court did not explain how Dr. Bova could have, or should have, proved verbal encouragement. The reality is that it is nearly impossible for Dr. Bova, by extrinsic evidence, to prove that a verbal exchange took place in which Plaintiff was encouraged to read and sign the Arbitration Agreement. The problem is not unique to this case. The trial court sets up a scenario in which health care providers are saddled with a burden of proof that is simply impossible to meet. If health care providers are required to prove by extrinsic evidence that a patient has been verbally encouraged to read and sign an arbitration agreement, the inevitable result will be that far fewer arbitration agreements will be enforced. This result

undermines both the purpose of the statute and long-standing Utah policy in favor of arbitration.

The provision requiring verbal encouragement must be reviewed within the context of the overall purpose of the statute. The Legislature clearly intended to encourage arbitration agreements in the health care context; at the same time, the Legislature wanted to ensure that patients have the opportunity to read and understand such agreements. Here, the Plaintiff has acknowledged on two occasions that she understood the terms of the Arbitration Agreement and was given the opportunity to ask questions. While there is no specific extrinsic evidence that Plaintiff was verbally encouraged, it is clear that the purpose of the statute has been fulfilled in this case. Requiring extrinsic evidence of verbal encouragement after a plaintiff has admitted that she understood the arbitration agreement and was given the opportunity to ask questions is simply nonsensical.

A. The Trial Court's Interpretation of UCA § 78B-3-421 is Unreasonable and Would Result in Fewer Arbitrations

The rules of statutory interpretation “require the court to give effect to the intent of the legislature in light of the purpose the statute was meant to achieve.” *State v. Miller*, 2008 UT 61, ¶ 18, 193 P.3d 92. Specific language of statutory provisions should not be interpreted in a manner that would “undermine the purpose of the statute.” *R&R Indus. Park, L.L.C. v. Utah Property and Cas. Ins. Guar. Ass’n*, 2008 UT 80, ¶ 36, 199 P.3d 917. Additionally, statutes “must be interpreted in a reasonable way, with an eye toward

the construction that will achieve the best results in practical application, will avoid unacceptable consequences, and will be consistent with sound public policy.” *Derbridge v. Mutual Protective Ins. Co.*, 963 P.2d 788, 791 (Utah Ct. App. 1998)(internal citations and quotations omitted). *See also Wasatch County v. Tax Com’n*, 2009 UT App. 221, ¶ 13 217 P.3d 270 (noting that statutes should be interpreted with any eye toward “the effect it will have in practical application”). “When the court finds a statutory provision that causes doubt or uncertainty in its application, the court must analyze the act in its entirety and harmonize its provisions in accordance with the legislative intent and purpose.” *Miller*, 2008 UT at ¶ 19 (quoting *State v. Bluff*, 2002 UT 66, ¶34, 52 P.3d 1210 (2003)).

One of the primary purposes of the Utah Health Care Malpractice Act is to “expedite early evaluation and settlement of claims.” UCA § 78B-3-402. Arbitration furthers this goal by “providing a method more expeditious and less expensive than the court system for the resolution of disputes.” *Buckner v. Kennard*, 2004 UT 78, ¶ 17, 99 P.3d 842 (internal citations and quotations omitted). *See also Giannopoulos v. Pappas*, 15 P.2d 353, 356 (1932) (“[A]rbitration is favored in the law as a speedy and inexpensive method of adjudicating difference.”) Indeed, the Legislature’s desire to encourage arbitration in the medical malpractice context is evidenced by the inclusion of § 78B-3-421 in the Utah Health Care Malpractice Act.

The nature of the statute itself evidences the Legislature's desire to encourage arbitration. Utah Code Ann. § 78B-3-421 specifies mandatory agreement terms and includes the information that must be provided to the patient regarding arbitration, how that information is to be provided to the patient, and an acknowledgment by the patient that she received the information. *See* Utah Code Ann. § 78B-3-421(1) (2008). Rather than discouraging arbitration agreements between health care providers and patients, the level of detail found in the statute displays the Legislature's intent to ensure the enforceability of arbitration agreements that meet the requirements of the statute. Indeed, the statute is designed to prevent patients from nullifying valid agreements through claims of ignorance. *See* Utah Code Ann. § 78B-3-421(4) (2008).

The trial court's interpretation of Utah Code Ann. § 78B-3-421 (2008) undermines the purpose of the Utah Health Care Malpractice Act by making it much more difficult for health care providers to enforce arbitration agreements. The trial court interprets the statute as requiring a health care provider to prove, by extrinsic evidence, that he verbally encouraged the patient to ask questions. [R. 231]. The statute, however, places no such affirmative burden on the health care provider. The statute is similarly silent as to how a health care provider could prove that such a verbal exchange occurred. Nonetheless, the trial court reads into the statute the requirement of extrinsic evidence to prove verbal encouragement. Absent extrinsic proof of verbal encouragement, the trial court reasons that an arbitration agreement is invalid and unenforceable. [R. 349-52].

The burden of proving verbal encouragement by extrinsic evidence is nearly impossible to meet. Absent a recording of the conversation, which is certainly not feasible, there is no way to positively prove that such a verbal exchange occurred.⁶ The only conceivable extrinsic evidence that could be offered is an affidavit by the health care provider. However, the patient could simply counter with her own affidavit. The unavoidable result of the trial court's analysis would be dueling affidavits. [R. 230-34]. This would put the trial court in the untenable position of weighing the credibility of testimony in a game of he said she said. [R. 228-29]. This is just the type of factual dispute that Utah Code Ann. § 78B-3-421 was designed to avoid.

Moreover, given the number of patients that pass through physicians' offices and hospitals, it would be unlikely that a health care provider would remember giving a specific patient verbal encouragement. In most cases, at best, the health provider would only be able to provide an affidavit stating that it is his policy or practice to provide such verbal encouragement. This affidavit of policy or practice would then be weighed against a plaintiff's affidavit specifically denying verbal encouragement. The trial court would likely give more weight to the plaintiff's more specific affidavit. The result would be a system in which an otherwise statutorily compliant and binding arbitration agreement

⁶ Under the trial court's analysis, even a provision in the arbitration agreement specifically stating that the patient acknowledges that she was verbally encouraged to ask questions is not sufficient because the patient could simply deny that she ever read the agreement. [R. 231]. Thus, under the Trial Court's analysis, there would be no way for health care providers to provide verbal encouragement absent a recording.

could be easily invalidated by a simple affidavit by the patient. The result would be far fewer arbitrations, thus undermining one of the key purposes of the Health Care Malpractice Act.

B. Legislative Intent Would Best be Served by Enforcing the Arbitration Agreement.

The trial court denied Dr. Bova's Motion to Compel Arbitration on the basis that "neither of the arbitration agreements signed by Plaintiff are enforceable because Dr. Bova failed to present evidence that he verbally encouraged Plaintiff to ask questions about the arbitration agreement." [R. 349-52]. The trial court's analysis, however, ignores the fact that the purpose of § 78B-3-421, indeed the purpose of the verbal encouragement provision, was already fulfilled in this case.

The statute states that "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." Utah Code Ann. § 78B-3-421(1)(c) (2008). The purpose of the verbal encouragement provision is obvious, the legislature intended that a patient be given an opportunity to read and understand the arbitration agreement.

In this case, Plaintiff signed an Agreement affirming that she was given the opportunity to ask questions and that she understood the terms of the Agreement.

I have received a written explanation of the terms of this Agreement. I have had the right to ask questions and have my questions answered. I understand that any Claims I might have must be resolved through the dispute resolution process in this Agreement instead of having them heard by a judge or jury. I understand the role of the arbitrators and the manner in

which they are selected. I understand the responsibility for arbitration related costs. I understand that this Agreement renews each year unless cancelled before the renewal date. I understand that I can decline to enter into the Agreement and still receive health care. I understand that I can rescind this Agreement within 10 days of signing it.

[Addendum B at Art. 9]. These acknowledgments plainly demonstrate that the purpose of the verbal encouragement provision was met, namely, that Plaintiff was given an opportunity to understand what she was signing, thereby avoiding any issues of procedural unconscionability. Indeed, Plaintiff expressly acknowledged that she understood the terms of the arbitration agreement. It is simply nonsensical to hold the agreement unenforceable on the basis that there is no extrinsic evidence of verbal encouragement to ask questions when the Plaintiff clearly acknowledges in writing that she was given the opportunity to ask questions and, more importantly, that she understood the terms of the Agreement.

Under Utah contract construction policy, this arbitration agreement, including the acknowledgments quoted above, should be construed in favor of arbitration. *See Central Florida Investments Inc. v Parkwest Associates*, 2002 UT 3, ¶16. According to the Utah policy favoring arbitration, and viewing the statutory language as a whole, the Agreement in this case was validly executed, and the parties are bound by its terms to submit to arbitration.

CONCLUSION

The April 16th Agreement is valid and enforceable under both Utah statutory mandate, and Utah contract law. Plaintiff's unambiguous acknowledgments clearly

demonstrate that she understood the terms of the Agreement negating her claims of procedural unconscionability. Plaintiff also received a copy of the Agreement and could have rescinded it within ten days of signing it if she disagreed with its terms.

Fundamentally, Plaintiff had a meaningful choice in entering into the Agreement. The trial court erred when it disregarded these plain facts, the policy favoring arbitration, and Utah contract law when it relied on Plaintiff's declarations to find the Agreement unenforceable. Indeed, the trial court's strict interpretation of Utah Code Ann. § 78B-3-421 undermines the purpose of the statute and the Utah Healthcare Malpractice Act. Accordingly, this Court should reverse the trial court and order Plaintiff to arbitrate her claims pursuant to the terms of the April 16th Agreement.

Respectfully submitted this 21 day of June, 2010.

WILLIAMS & HUNT

By

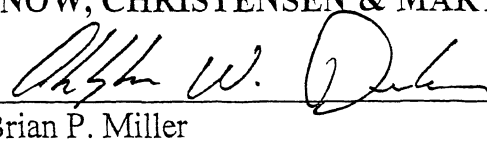

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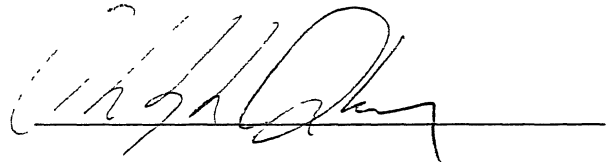
Attorneys for Appellant and Defendant

Pioneer Valley Hospital

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June, 2010, I caused two (2) true and correct copies of the foregoing to be mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

Counsel for Plaintiff
Clark Newhall
57 West 200 South, Suite 101
Salt Lake City, Utah 84101

A handwritten signature in black ink, appearing to read "Clark Newhall", is written over a horizontal line.

ADDENDUM

1. Utah Code Annotated § 78B-3-421 (2008)
2. April 16th Arbitration Agreement
3. April 17th Arbitration Agreement
4. Memorandum and Order on Defendant Bova's Motion to Stay Proceedings and Compel Arbitration

ADDENDUM

1

78B-3-421. 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 10 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 78B-3-416 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 10 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 78B-3-406(6), 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.

ADDENDUM

2

ARBITRATION AGREEMENT

Article 1 Dispute Resolution

By signing this Agreement ("Agreement") we are agreeing to resolve any Claim for medical malpractice by the dispute resolution process described in this Agreement. Under this Agreement, you can pursue your Claim and seek damages; you are waiving your right to have it decided by a judge or jury.

Article 2 Definitions

- A. The term "we," "parties" or "us" means you, (the Patient), and the Provider.
- B. The term "Claim" means one or more Malpractice Actions defined in the Utah Health Care Malpractice Act (Utah Code 78-14-3(15)). Each party may use any legal process to resolve non-medical malpractice claims.
- C. The term "Provider" means the physician, group or clinic and their employees, partners, associates, agents, successors and estates.
- D. The term "Patient" or "you" means:
 - (1) you and any person who makes a Claim for care given to YOU, such as your heirs, your spouse, children, parents or legal representatives, AND
 - (2) your unborn child or newborn child for care provided during the 12 months immediately following the date you sign this Agreement, or any person who makes a Claim for care given to that unborn or newborn child.

Article 3 Dispute Resolution Options

Methods Available for Dispute Resolution. We agree to resolve any Claim by:

- (1) working directly with each other to try and find a solution that resolves the Claim, OR
- (2) using non-binding mediation (each of us will bear one-half of the costs); OR
- (3) using binding arbitration as described in this Agreement.

You may choose to use any or all of these methods to resolve your Claim.

Legal Counsel. Each of us may choose to be represented by legal counsel during any stage of the dispute resolution process, but each of us will pay the fees and costs of our own attorney.

Arbitration - Final Resolution. If working with the Provider or using non-binding mediation does not resolve your Claim, we agree that your Claim will be resolved through binding arbitration. We both agree that the decision reached in binding arbitration will be final.

Article 4 How to Arbitrate a Claim

Notice. To make a Claim under this Agreement, mail a written notice to the Provider by certified mail that briefly describes the nature of your Claim (the "Notice"). If the Notice is sent to the Provider by certified mail will suspend (toll) the applicable statute of limitations during the dispute resolution process described in this Agreement.

Arbitrators. Within 30 days of receiving the Notice, the Provider will contact you. If you and the Provider cannot resolve the Claim by working together or through mediation, we will start the process of choosing arbitrators. There will be three arbitrators, unless we agree that a single arbitrator may resolve the Claim.

- (1) Appointed Arbitrators. You will appoint an arbitrator of your choosing and all Providers will jointly appoint an arbitrator of their choosing.
- (2) Jointly-Selected Arbitrator. You and the Provider(s) will then jointly appoint an arbitrator, (the "Jointly-Selected Arbitrator"). If you and the Provider(s) cannot agree upon a Jointly-Selected Arbitrator, the arbitrators appointed by each of the parties will choose the Jointly-Selected Arbitrator from list of individuals approved as arbitrators by the state or federal courts of Utah. If the arbitrators cannot agree on a Jointly-Selected Arbitrator, either or both of us may request that a Utah court select an individual from the lists described above. Each party will pay their own fees and costs in such an action. The Jointly-Selected Arbitrator will preside over the arbitration hearing and have all other powers of an arbitrator as forth in the Utah Uniform Arbitration Act.

Arbitration Expenses. You will pay the fees and costs of the arbitrator you appoint and the Provider(s) will pay the fees and costs of the arbitrator the Provider(s) appoints. Each of us will also pay one-half of the fees and expenses of the Jointly-Selected Arbitrator and any other expenses of the arbitration panel.

Final and Binding Decision. A majority of the three arbitrators will make a final decision on the Claim. The decision shall be consistent with the Utah Uniform Arbitration Act.

E. All Claims May be Joined. Any person or entity that could be appropriately named in a court proceeding ("Party") is entitled to participate in this arbitration as long as that person or entity agrees to be bound by the arbitration decision ("Joinder"). Joinder may also include Claims against persons or entities that provided care prior to the signing date of this Agreement. A "Joined Party" does not participate in the selection of the arbitrator but is considered a "Provider" for all other purposes of this Agreement.

Article 5 Liability and Damages May Be Arbitrated Separately
At the request of either party, the issues of liability and damages will be arbitrated separately. If the arbitration panel liability, the parties may agree to either continue to arbitrate damages with the initial panel or either party may cause a second panel be selected for considering damages. However, if a second panel is selected, the Jointly Selected arbitrator will remain the same and will continue to preside over the arbitration unless the parties agree otherwise.

Article 6 Venue / Governing Law
The arbitration hearings will be held in a place agreed to by the parties. If the parties cannot agree, the hearings will be held in Salt Lake City, Utah. Arbitration proceedings are private and shall be kept confidential. The provisions of the Utah Uniform Arbitration Act and the Federal Arbitration Act govern this Agreement. We hereby waive the prelitigation discovery requirements. The arbitrators will apportion fault to all persons or entities that contributed to the injury claimed by the Patient, whether or not those persons or entities are parties to the arbitration.

Article 7 Term / Rescission / Termination
Term. This Agreement is binding on both of us for one year from the date you sign it unless you rescind it. If not rescinded, it will automatically renew every year unless either party notifies the other in writing of a decision to terminate it.
Rescission. You may rescind this Agreement within 10 days of signing it by sending written notice by registered or certified mail to the Provider. The effective date of the rescission notice will be the date the rescission is postmarked. If not rescinded, this Agreement will govern all medical services received by the Patient from the Provider after the date of signing, except in the case of a Joined Party that provided care prior to the signing of this agreement (see Article 4(E)).
Termination. If the Agreement has not been rescinded, either party may still terminate it at any time, but termination will not take effect until the next anniversary of the signing of the Agreement. To terminate this Agreement, send written notice by registered or certified mail to the Provider. This Agreement applies to any Claims that arises while it is in effect, even if you file a Claim or request arbitration after the Agreement has been terminated.

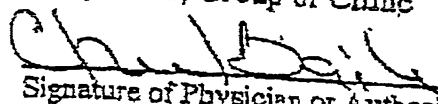
Article 8 Severability
If any part of this Agreement is held to be invalid or unenforceable, the remaining provisions will remain in full force and effect and will not be affected by the invalidity of any other provision.

Article 9 Acknowledgement of Written Explanation of Arbitration
I have received a written explanation of the terms of this Agreement. I have had the right to ask questions and have my questions answered. I understand that any Claim I might have must be resolved through the dispute resolution process in this Agreement instead of having them heard by a judge or jury. I understand the role of the arbitrators and the manner in which they are selected. I understand the responsibility for arbitration related costs. I understand that this Agreement renews each year unless cancelled before the renewal date. I understand that I can decline to enter into the Agreement and I receive health care. I understand that I can rescind this Agreement within 10 days of signing it.


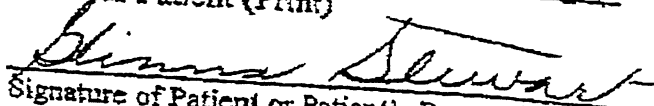
Article 10 Receipt of Copy I have received a copy of this document.

Provider Charles Bova, MD
Christopher Caldwell, DO
Howard Loomis, DO

Name of Physician, Group or Clinic


Signature of Physician or Authorized Agent

03/04)


Name of Patient (Print)

Signature of Patient or Patient's Representative (Date)

ADDENDUM

3

ARBITRATION AGREEMENT

Article 1 Dispute Resolution

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The term "Claim" means one or more Malpractice Actions defined in the Utah Health Care Malpractice Act (Utah Code 78-14-3(15)). Each party may use any legal process to resolve non-medical malpractice claims. The term "Provider" means the physician, group or clinic and their employees, partners, associates, agents, successors and estates.

The term "Patient" or "you" means:

- (1) you and any person who makes a Claim for care given to YOU, such as your heirs, your spouse, children, parents or legal representatives, AND
- (2) your unborn child or newborn child for care provided during the 12 months immediately following the date you sign this Agreement, or any person who makes a Claim for care given to that unborn or newborn child.

Article 3 Dispute Resolution Options

Methods Available for Dispute Resolution. We agree to resolve any Claim by:

- (1) working directly with each other to try and find a solution that resolves the Claim, OR
- (2) using non-binding mediation (each of us will bear one-half of the costs); OR
- (3) using binding arbitration as described in this Agreement.

You may choose to use any or all of these methods to resolve your Claim.

Legal Counsel. Each of us may choose to be represented by legal counsel during any stage of the dispute resolution process, but each of us will pay the fees and costs of our own attorney.

Arbitration – Final Resolution. If working with the Provider or using non-binding mediation does not resolve your Claim, we agree that your Claim will be resolved through binding arbitration. We both agree that the decision reached in binding arbitration will be final.

Article 4 How to Arbitrate a Claim

Notice. To make a Claim under this Agreement, mail a written notice to the Provider by certified mail that briefly describes the nature of your Claim (the "Notice"). If the Notice is sent to the Provider by certified mail it will suspend (toll) the applicable statute of limitations during the dispute resolution process described in this Agreement.

Arbitrators. Within 30 days of receiving the Notice, the Provider will contact you. If you and the Provider cannot resolve the Claim by working together or through mediation, we will start the process of choosing arbitrators. There will be three arbitrators, unless we agree that a single arbitrator may resolve the Claim.

- (1) Appointed Arbitrators. You will appoint an arbitrator of your choosing and all Providers will jointly appoint an arbitrator of their choosing.
- (2) Jointly-Selected Arbitrator. You and the Provider(s) will then jointly appoint an arbitrator (the "Jointly-Selected Arbitrator"). If you and the Provider(s) cannot agree upon a Jointly-Selected Arbitrator, the arbitrators appointed by each of the parties will choose the Jointly-Selected Arbitrator from a list of individuals approved as arbitrators by the state or federal courts of Utah. If the arbitrators cannot agree on a Jointly-Selected Arbitrator, either or both of us may request that a Utah court select an individual from the lists described above. Each party will pay their own fees and costs in such an action. The Jointly-Selected Arbitrator will preside over the arbitration hearing and have all other powers of an arbitrator as forth in the Utah Uniform Arbitration Act.

Arbitration Expenses. You will pay the fees and costs of the arbitrator you appoint and the Provider(s) will pay the fees and costs of the arbitrator the Provider(s) appoints. Each of us will also pay one-half of the fees and expenses of the Jointly-Selected Arbitrator and any other expenses of the arbitration panel.

Final and Binding Decision. A majority of the three arbitrators will make a final decision on the Claim. The decision shall be consistent with the Utah Uniform Arbitration Act.

All Claims May be Joined. Any person or entity that could be appropriately named in a court proceeding ("Joined Party") is entitled to participate in this arbitration as long as that person or entity agrees to be bound by the arbitration decision ("Joinder"). Joinder may also include Claims against persons or entities that provided care prior to the signing date of this Agreement. A "Joined Party" does not participate in the selection of the arbitrator but is considered a "Provider" for all other purposes of this Agreement.

Article 5 Liability and Damages May Be Arbitrated Separately

At the request of either party, the issues of liability and damages will be arbitrated separately. If the arbitration panel finds no fault, the parties may agree to either continue to arbitrate damages with the initial panel or either party may cause that a second panel be selected for considering damages. However, if a second panel is selected, the Jointly Selected arbitrator will remain the same and will continue to preside over the arbitration unless the parties agree otherwise.

Article 6 Venue / Governing Law

All arbitration hearings will be held in a place agreed to by the parties. If the parties cannot agree, the hearings will be held in Salt Lake City, Utah. Arbitration proceedings are private and shall be kept confidential. The provisions of the Utah Uniform Arbitration Act and the Federal Arbitration Act govern this Agreement. We hereby waive the prelitigation discovery requirements. The arbitrators will apportion fault to all persons or entities that contributed to the injury claimed by the Patient, whether or not those persons or entities are parties to the arbitration.

Article 7 Term / Rescission / Termination

Term. This Agreement is binding on both of us for one year from the date you sign it unless you rescind it. If it is not rescinded, it will automatically renew every year unless either party notifies the other in writing of a decision to terminate it.

Rescission. You may rescind this Agreement within 10 days of signing it by sending written notice by registered or certified mail to the Provider. The effective date of the rescission notice will be the date the rescission is postmarked. If not rescinded, this Agreement will govern all medical services received by the Patient from the Provider after the date of signing, except in the case of a Joined Party that provided care prior to the signing of this agreement (see Article 4(E)).

Termination. If the Agreement has not been rescinded, either party may still terminate it at any time, but termination will not take effect until the next anniversary of the signing of the Agreement. To terminate this Agreement, send written notice by registered or certified mail to the Provider. This Agreement applies to any Claim that arises while it is in effect, even if you file a Claim or request arbitration after the Agreement has been terminated.

Article 8 Severability

If any part of this Agreement is held to be invalid or unenforceable, the remaining provisions will remain in full force and effect and will not be affected by the invalidity of any other provision.

Article 9 Acknowledgement of Written Explanation of Arbitration

I have received a written explanation of the terms of this Agreement. I have had the right to ask questions and have my questions answered. I understand that any Claim I might have must be resolved through the dispute resolution process in this Agreement instead of having them heard by a judge or jury. I understand the role of the arbitrators and the manner in which they are selected. I understand the responsibility for arbitration related costs. I understand that this Agreement renews each year unless cancelled before the renewal date. I understand that I can decline to enter into the Agreement and still receive health care. I understand that I can rescind this Agreement within 10 days of signing it.

Article 10 Receipt of Copy I have received a copy of this document.

Provider Charles Bova, MD
Christopher Caldwell, DO
Howard Loomis, DO

Name of Physician, Group or Clinic

By: [Signature]
Signature of Physician or Authorized Agent

Glenna E Stewart
Name of Patient (Print)

Glenna E Stewart
Signature of Patient or Patient's Representative (Date)

A D D E N D U M

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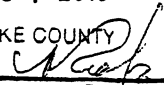
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FILED DISTRICT COURT
Third Judicial District

APR 01 2010

SALT LAKE COUNTY

By


Deputy Clerk

THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH

GLENNA STEWART
Plaintiff,

vs.

CHARLES BOVA MD and PIONEER
VALLEY HOSPITAL
Defendants.

**MEMORANDUM AND ORDER ON
DEFENDANT BOVA'S MOTION TO
STAY PROCEEDINGS AND COMPEL
ARBITRATION**

Case No. 090900273

SALT LAKE CITY DIVISION

Judge Kennedy

The Court heard arguments on defendant Bova's Motion to Stay Proceedings and Compel Arbitration on 6/15/09 and ordered supplemental briefing on whether the lack of a date on the arbitration agreement rendered it unenforceable. The Court heard further argument on 10/19/09 and, being fully advised in the matter, makes the following Order:

The Defendant's Motion to Stay Proceedings and Compel Arbitration is denied. The plaintiff will prepare an Order and Memorandum of Decision.

The Defendant's Motion to Stay Discovery Pending Appeal is due in five days. The plaintiff may submit a responsive brief five days after the Motion is filed. The defendant may submit a reply brief five days after plaintiff's brief is filed. The Court makes a preliminary ruling that discovery should proceed.

MEMORANDUM OF DECISION

The following issues were presented for decision:

Was the arbitration agreement signed before the allegedly negligent procedure?

Was the plaintiff "verbally encouraged" to read the written information and ask questions?

The Court declined to decide the first issue. The Court determined that the second issue was a matter of law and was dispositive of this motion.

The arbitration statute U.C.A §78B-3-421 (1) (c) (formerly and at the time this dispute arose U.C.A §78-14-17) requires that "for a binding arbitration agreement between a patient and a health care provider to be validly executed" . . . "the patient shall be verbally encouraged" to read the written information and ask questions.

Plaintiff asserted in her declaration that no such verbal encouragement occurred prior to the allegedly negligent procedure. She stated "No one asked me if I had any questions, or encouraged me to ask questions regarding any of the documents I signed."

Defendant asserted by affidavit that "I answered any of Mrs. Stewart's questions regarding the arbitration agreement and confirmed that Mrs. Stewart understood the terms of the

arbitration agreement and that if we had a dispute related to the procedure, the dispute would be addressed in arbitration.”

The Court finds that defendant’s affidavit is insufficient to create an issue of fact as to whether or not he verbally encouraged plaintiff as required by the statute. The Court determines, as a matter of law, that the phrase in the signed arbitration agreement stating “I have had the right to ask questions and have my questions answered” does not satisfy the requirement of the statute that the patient be “verbally encouraged.” Therefore, the Court finds that there is no issue of fact to resolve in determining this motion. The Court finds that there is no proof that defendant “verbally encouraged” the patient as required by statute.

The Court finds, as a matter of law, that the party seeking to enforce a contract such as an arbitration agreement bears the burden of proving its validity. “Most contracts bind only those who bargain for them, and the burden of proof for showing the parties' mutual assent as to all material terms and conditions is on the party claiming that there is a contract. Arbitration agreements are not exempt from this rule.” Bybee v. Abdulla, 189 P.3d 40, 43 (Utah, 2008) (internal citations and quotation marks omitted.)

Each of the three elements of subsection (1) of the statute is required before an arbitration agreement can be “validly executed.” The defendant, who is seeking to enforce this agreement, cannot prove that his conduct met one of the three elements of the statute, the requirement of subsection (1)(c) that “the patient shall be verbally encouraged” to ask questions.

The defendant argues that the declaration of plaintiff is insufficient to alter the terms of the contract, because the contractual terms are unambiguous and therefore are not subject to

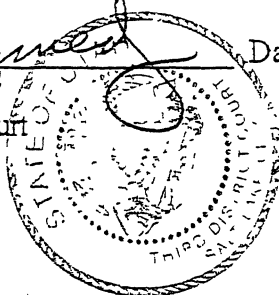
alteration by extrinsic or parol evidence. The Court is not persuaded by this argument because the argument assumes that the contract in question is valid. The Court has determined that this is not a valid contract because it does not meet the statutory requirements "to be validly executed."

Therefore, as a matter of law, there is no contract between the parties and no terms to which the Court must apply parol or extrinsic evidence.

This order is effective as of 10, 2009.

/s/ *John P. Kennedy*
Hon. John Paul Kennedy
Judge, Third District Court

Date 4-1-2010



Prepared by:

Clark Newhall

CLARK NEWHALL
Attorney for Plaintiff

Approved as to form:

/s/ refused to sign Date _____
Steve Hester
Kurt Frankenburg
Williams & Hunt
Attorneys for defendant Bova

/s/ no response received Date _____
Ken Reich
Brian Miller
Snow Christensen & Martineau
Attorneys for defendant Pioneer Valley

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on October 30th, 2009, I caused a true and correct copy of the above and foregoing to be served by depositing in the U.S. Mail, postage prepaid, to:

Brian Miller Snow Christiansen & Martineau 10 Exchange Place 11th Floor Salt Lake City UT 84145 Attorney for Pioneer Valley Hospital	Kurt Frankenburg Williams & Hunt PO Box 45678 257 E. 200 South, Suite 500 Salt Lake City UT 84145-5678 Attorney for Charles Bova
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s/ Blanca J. Guedes
Legal Assistant
Law Office of Clark Newhall MD JD