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Utah Supreme Court

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IN THE UTAH SUPREME COURT

CHRISTINE BAKER, Personal Representative of the Estate of Gary Baker, for herself and on the other heirs of GARY BAKER, Plaintiff and Appellee, vs. GREGORY P. STEVENS, M.D., RICHARD M. ROSENTHAL, M.D., and IHC HEALTH CENTER - HOLLADAY Defendants and Appellants.	**REPLY BRIEF OF GREGORY P. STEVENS, M.D. AND IHC HEALTH CENTER - HOLLADAY** Supreme Court No. 20030434-SC

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT, UTAH COUNTY, TRIAL COURT NO. 020404386, HONORABLE CLAUDIA LAYCOCK, DISTRICT JUDGE

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(Oral Argument and Published Decision Requested)

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ARGUMENT

POINT I.

THE COURT SHOULD NOT CONSIDER THE ISSUES RAISED FOR THE FIRST TIME ON APPEAL.

Baker's brief relies in part on issues which were not presented before the trial court below, and which should not be considered for the first time on appeal. "As a general rule, claims not raised before the trial court may not be raised on appeal." *Peterson v. Sunrider Corp.*, 2002 UT 43, n. 12, 48 P.3d 918 (*citing State v. Holgate*, 2000 UT 74, ¶ 11, 10 P.3d 346; *Monson v. Carver*, 928 P.2d 1017, 1022 (Utah 1996)). "Utah courts have consistently followed a policy strongly opposed to the raising of issues for the first time on appeal." *Monte Vista Ranch, Inc.*, 758 P.2d 451, 456 (Utah Ct. App.1988). Indeed, the Utah Supreme Court has stated on a number of occasions, "As a general rule, we will review issues raised for the first time on appeal only if exceptional circumstances or 'plain error' exists." *Salt Lake City v. Ohms*, 881 P.2d 844, 847 (Utah 1994). Therefore, those issues raised only now for the first time on appeal should not be considered by this Court. Because the argument sections I, IV and V of Baker's brief and the argument section II of the brief of Amicus Curiae, the Utah Trial Lawyers Association ("UTLA") present issues for the first time, they should not be considered by the Court.

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A. No Claim was Made and the Record Does not to Support a Claim That "The Arbitration Agreement Does Not Comply with Statutory Requirements."

In section I of her brief, Baker introduces for the first time her claim that "The agreement could not have been enforced against Mr. Baker." (Appellee Brief at p. 4.) However, in addition to this claim being without merit, there is nothing in the record to justify raising this issue for the first time on appeal. Indeed, Baker herself acknowledges that "this argument was not relied upon below." (Appellee Brief at p. 4.)

Ostensibly recognizing the well-established authority which precludes issues from being considered for the first time on appeal, Baker cites to the rule that "a trial court decision may be affirmed 'on any ground available to the trial court, even if it was not relied upon below.'" (Appellee Brief at p. 4.) However, Baker confuses the "affirm on any ground" rule of appellate review with the general rule that "issues not raised [in the district court] cannot be argued for the first time on appeal, and this rule applies to constitutional questions." *State v. Hodges*, 2002 UT 117, ¶ 5, 63 P.3d 66.

As the Utah Supreme Court has pointed out, "While we acknowledge the existence and validity of the 'affirm on any ground' rule of appellate review, we caution that it is a tool available **only in limited circumstances**." *Bailey v. Bayles,* 2002 UT 58, n. 3, 52 P.3d 1158 (emphasis added). The Utah Supreme Court has clarified that "an appellate court *may* affirm the judgment appealed from 'if it is sustainable on any legal ground or theory *apparent on the record*.'" *Id.* at ¶ 13 (emphasis in original). However, "In the limited circumstance that an appellate court chooses to affirm on an alternate ground, it may do so **only where the alternate ground is apparent on the record**." *Id.* at ¶ 20

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(emphasis added). The alternate ground raised for the first time on appeal is not apparent on the record, and Baker's new argument is just the type of argument where the "affirm on any ground" rule should not be applied.

> If, in any way, the ground or theory urged for the first time on appeal is not apparent on the record, the principle of affirming on any proper ground has no application. To hold otherwise would invite the prevailing party to selectively focus on issues below, the effect of which is holding back issues that the opposition had neither notice of nor an opportunity to address. Because of this due process component, "apparent on the record," in this context, **means more than mere assumption or absence of evidence** contrary to the "new" ground or theory. The record must contain sufficient and **uncontroverted evidence** supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal.

State v. Montoya, 937 P.2d 145, 149-50 (Utah Ct. App.1997) (emphasis added).

No challenge to the validity and enforceability of the arbitration agreement signed by Mr. Baker was presented. Although not raised before the trial court, Mrs. Baker now states that the arbitration agreement statute, Utah Code Ann. § 78-14-17, provides that an arbitration agreement is "not enforceable unless the patient is given, 'in writing and by verbal explanation,' six specified items of information." (Appellee Brief at p. 5). Baker goes on to claim that:

> No verbal explanation was given. Defendants, whose burden it was to present evidence establishing the existence of a valid agreement, presented no evidence other than the written agreement itself. **This Court should, therefore, presume that no evidence exists that the verbal explanation was given. It is unlikely that defendants could have presented the necessary evidence.**

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(Appellee Brief at p. 5, emphasis added). However, Baker failed to make any challenge before the trial court concerning the evidence of a valid and enforceable agreement. Baker's own claims demonstrate that her newly raised issue is not apparent on the record because she invites the Court to "**presume** that no evidence exists," and speculates that "[i]t is **unlikely** that defendants could have presented the necessary evidence." (Appellee Brief at p. 5.) Moreover, Mr. Baker's death makes it impossible to secure his testimony in this matter. Issues that require the Court to **presume** a lack of evidence or **speculate** as to a party's ability to present evidence on "an argument [that] was not relied upon below" are issues that are **not** apparent on the record, and which are improper for consideration. "Although we '*may* affirm' a trial court's ruling on grounds not raised below, we do not find the record sufficient to properly consider this issue." *See In re Sheville*, 2003, UT App 141, ¶ 3, 71 P.3d 179 (citing *State v. Montoya,* 937 P.2d 145, 149 (Utah Ct. App.1997) (emphasis in original).

Therefore this Court should **not** apply the "affirm on any ground"rule as the record is not sufficient and there is not uncontroverted evidence to support Baker's new theory that the arbitration agreement is unenforceable. Instead, the Court should follow its well-established precedent and decline to consider this argument that Baker raises for the first time on appeal.

Even were the Court to address whether a valid arbitration agreement existed, the record supports only a finding that a valid enforceable arbitration agreement exists. In fact, Dr. Rosenthal's statements before the trial court included that "Mr. Baker expressly

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affirmed that he understood and voluntarily entered into the agreement." (R. 15.) Similarly, Baker never challenged or objected to the assertions of IHC Health Center – Holladay and Dr. Stevens that "It is not disputed that a valid, enforceable arbitration agreement exists." (R. 23.) Despite ample opportunity before the trial court, Baker did not object to any of the numerous statements in the record pertaining to the validity and enforceability of the arbitration agreement.

Moreover, Baker erroneously states the burden of proof, claiming that "Defendants had the burden to establish the existence of a binding arbitration agreement." (Appellee Brief at p. 4), However, under the applicable statute the burden would have shifted to Baker to present evidence that no valid arbitration agreement existed because Mr. Baker had signed a written acknowledgment. Utah Code Ann. § 78-14-12(3) (Supp. 2002), provided:

> A written acknowledgment of having received a written and verbal 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 and verbal 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.

Article 7 of the arbitration agreement sets forth Mr. Baker's written acknowledgment. (R. 35.) Thus, the burden was on Baker to either prove that Mr. Baker lacked capacity or to

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show by clear and convincing evidence that fraud was involved. The clear and convincing evidence standard has been described in Utah as follows:

> That proof is convincing which carries with it, not only the power to persuade the mind as to the probable truth or correctness of the fact it purports to prove, but has the element of clinching such truth or correctness. Clear and convincing proof clinches what might be otherwise only probable to the mind. . . . But for a matter to be clear and convincing to a particular mind it must at least have reached the point where **there remains no serious or substantial doubt** as to the correctness of the conclusion.

Jardine v. Archibald, 279 P.2d 454, 457, 3 Utah 2d 88 (Utah 1955) (quoting *Greener v. Greener*, 212 P.2d 194, 204-205, 116 Utah 571 (Utah 1949) (emphasis added; omission in original; internal quotes omitted)).

The record is devoid of proof that Mr. Baker lacked the capacity to enter into the agreement or clear and convincing proof of any fraud. Thus, Baker's newly raised claim that there was no enforceable agreement fails as a matter of law even were the Court to consider it.

B. Constitutionality was Not Raised Below, and Should Not be Considered By This Court.

Attempts to raise constitutional challenges for the first time on appeal should also fail. As previously set forth, "Under ordinary circumstances, appellate courts will not consider . . . a constitutional argument, raised for the first time on appeal unless the trial court committed plain error." *State v. Helmick*, 2000 UT 70, ¶ 8, 9 P.3d 164. This Court has further stated: "[A]s the court of appeals has correctly observed on several occasions, 'the proper forum in which to commence thoughtful and probing analysis of state

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constitutional interpretation is before the trial court, not . . . for the first time on appeal.'" *State v. Pritchett*, 2003 UT 24, n. 3, 69 P.3d 1278 (*citing State v. Bobo*, 803 P.2d 1268, 1273 (Utah Ct. App.1990) (ellipses in original quotation)).

As in the instant case, efforts to raise constitutional challenges involving due process and the Open Courts provision have been claims have been rejected when raised for the first time on appeal. For example, in *Bunch v. Englehorn*, 906 P.2d 918 (Utah Ct. App. 1995), the Utah Court of Appeals court noted,

> Bunch suggests that this interpretation of the statute renders it unconstitutional under Article I, Sections 7 and 11 of the Constitution of Utah. Bunch never presented these arguments to the trial court, but raises them for the first time on appeal.
>
> To assert constitutional claims on appeal, parties must generally assert them first in the trial court. In *State v. Bobo*, 803 P.2d 1268 (Utah Ct. App.1990), this court declared that "the proper forum in which to commence thoughtful and probing analysis of state constitutional interpretation is before the trial court, not, as typically happens . . . for the first time on appeal."

Bunch v. Englehorn, 906 P.2d 918 (Utah Ct. App. 1995).

"With limited exceptions, the practice of this court has been to decline consideration of issues raised for the first time on appeal." *Espinal v. Salt Lake City Bd. of Educ.*, 797 P.2d 412, 413 (Utah 1990). However, neither Baker nor UTLA has presented any evidence in the record of plain error or exceptional circumstances, or even claimed that such circumstances exist. Therefore, Baker should not be allowed to raise new issues for the first time in her appellate brief, and the Court should decline to consider them.

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C. Neither Baker Nor UTLA Have Complied with the Provisions of Utah Code Ann. § 78-33-11 Requiring Notice to the Attorney General in Order to Challenge the Constitutionality of a Statute

It is inappropriate at this time for Baker or Amicus Curiae UTLA to seek declaratory relief regarding the constitutionality of the Arbitration Act. In its Brief of Amicus Curiae UTLA claims that "if Mr. Baker's arbitration agreement is deemed to be binding on Mrs. Baker because of its consonance with the Utah Arbitration Act and the Utah Healthcare Malpractice Act, then **those statutes violate the Utah Constitution.**" (Brief of Amicus Curiae UTLA at p. 28) (emphasis added). UTLA goes on to claim:

> Assuming *arguendo* that the defendants are correct in their interpretation of those statutes, their argument does not require reversal of the trial court's decision holding that Mrs. Baker is obliged to arbitrate her statutory claims. Instead, their argument **requires this Court to invalidate those statutes as violative of the Utah Constitution.**

Id. (emphasis added). UTLA's claim challenges the validity of the Utah Arbitration Act and the Utah Healthcare Malpractice Act. However, it is "the well-settled rule that an amicus brief cannot extend or enlarge the issues on appeal." *Madsen v. Borthick*, 658 P.2d 627, 629 n. 3 (Utah 1983) (*citing In re Woodward*, 14 Utah 2d 336, 337, 384 P.2d 110, 111 (1963)).

Utah Code Ann. § 78-33-11 provides that "if a statute . . . is alleged to be invalid the attorney general **shall** be served with a copy of the proceeding and be entitled to be heard." (Emphasis added.)

> It is also well established that "[t]he form of the verb used in a statute, i.e., something 'may,' 'shall' or 'must' be done, is the

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> single most important textual consideration determining whether a statute is mandatory or directory."
>
> "According to its ordinary construction, the term 'may' means permissive, and it should receive that interpretation unless such a construction would be obviously repugnant to the intention of the Legislature or would lead to some other inconvenience or absurdity." The term "shall," on the other hand, "is usually presumed mandatory and has been interpreted as such previously in this and other jurisdictions."

State ex rel. M.C., 940 P.2d 1229, 1236 (Utah Ct. App. 1997) (citations omitted). "The meaning of the word shall is ordinarily that of command." *Herr v. Salt Lake County*, 525 P.2d 728, 729 (Utah 1974). Thus, notice to the attorney general is mandatory. "This mandatory language leaves no discretion to the court." *Lyon v. Burton*, 2000 UT 19, ¶ 76, 5 P.3d 616. No constitutional challenge of a statute can be commenced until proper service is given.

In *Parker v. Rampton*, 497 P.2d 848, 852-53 (Utah 1972), the Utah Supreme Court, while discussing Utah Code Ann. § 78-33-11, clarified that the "interests of the State and the Attorney General in sustaining the validity of enactments of the legislative branch of government are recognized in [U.C.A. § 78-33-11]" and cited *Ethington et al. v. Wright et al.*, 189 P.2d 209 (Ariz. 1948), which "indicates that when the validity of a statute is challenged the Attorney General should be a party."

Since UTLA claims that "if Mr. Baker's arbitration agreement is deemed to be binding on Mrs. Baker because of its consonance with the Utah Arbitration Act and the Utah Healthcare Malpractice Act, then those statutes violate the Utah Constitution," (Brief of Amicus Curiae UTLA at p. 28), UTLA challenges the validity of the Utah

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Arbitration Act and the Utah Healthcare Malpractice Act. As a result, the UTLA is required to either give notice by way of service upon the Attorney General or make the Attorney General a party to this action. (*See Thiokol Chemical Corp. v. Peterson,* 393 P.2d 391 (Utah 1964) ("The Utah Attorney General was served pursuant to Section 78-33-11, U.C.A.1953, because the validity of the statute is involved.")) However, there is no indication that UTLA has fulfilled either of these requirements. Therefore, the Court should decline to consider UTLA's constitutional argument because UTLA has not fulfilled the proper notice requirements of U.C.A. § 78-33-11 by either serving the Utah Attorney General or making the Attorney General a party in this action. (*See Jefferson County Fiscal Court et al. v. Trager*, 189 S.W.2d 955 (Ky. 1945) (The court stated that declaratory judgment as to the validity of a statute should not be given because the Attorney General had not been served.))

D. The Arbitration Act is Presumed Constitutional and has been Previously Upheld as Constitutional.

Were the court inclined to consider the constitutional arguments raised for the first time on appeal, it should begin with the presumption that the Arbitration Act is constitutional. This Court has clearly established such precedent:

> Furthermore, we presume the legislation being challenged is constitutional, and we resolve any reasonable doubts in favor of constitutionality. As this court stated in a prior Open Courts case:
>
> The first and foundational [principle of law relating to the constitutionality of statutes] is that the prerogative of the legislature as the creators of the law is to be respected. Consequently, its enactments are accorded a presumption of

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> validity; and the courts do not strike down a legislative act unless the interests of justice in the particular case before it require doing so because the act is clearly in conflict with the higher law as set forth in the Constitution.

Wood v. University of Utah Medical Center, 2002 UT 134, ¶ 7, 67 P.3d 436 (*citing State v. Daniels*, 2002 UT 2, ¶ 30, 40 P.3d 611; *Utah Sch. Bds. Ass'n v. State Bd. of Educ.*, 2001 UT 2, ¶ 9, 17 P.3d 1125; *Zamora v. Draper*, 635 P.2d 78, 80 (Utah 1981); *Soc'y of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 920 (Utah 1993); *Lindon City v. Engineers Const. Co.*, 636 P.2d 1070, 1073 (Utah 1981)).

Neither Baker nor UTLA have satisfied their burden regarding their constitutional challenge.

> The decisions of this court unanimously support a presumption of constitutionality of legislative enactments. In determining constitutionality, statutes are presumed to be constitutional until the contrary is clearly shown. It is only when statutes manifestly infringe upon some constitutional provision that they can be declared void. Every reasonable presumption must be indulged in and every reasonable doubt resolved in favor of constitutionality.

In re Estate of Baer, 562 P.2d 614, 616 (Utah 1977), appeal dismissed *sub nom. Baer v. Baer*, 434 U.S. 805, 98 S.Ct. 35, 54 L.Ed.2d 63 (1977); Furthermore, there is no heightened scrutiny in cases involving Open Courts challenges.

> We recognize that on previous occasions involving Open Courts challenges this court recognized an exception to our well-settled presumption-of-constitutionality standard. We submit that this heightened standard of review for Open Courts challenges was in error. Any heightened level of scrutiny simply because the constitutional challenge is based on the Open Courts Clause is improper.

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Wood v. University of Utah Medical Center, 2002 UT 134, ¶ 8, 67 P.3d 436 (citations omitted).

Moreover, the constitutionality of the Arbitration Act as been previously upheld. Baker and UTLA ignore the prior opinions of this Court upholding the constitutionality of the Arbitration Act.

> The Territory and State of Utah have had statutory provisions for arbitration of disputes since 1884. The policy of our law favors arbitration as a speedy and inexpensive method of adjudicating disputes. To that end, the Legislature amended the Arbitration Act to permit valid and enforceable agreements for arbitration of future as well as present disputes. **We held that amendment constitutional** in an opinion that reaffirms the strong public policy in favor of arbitration as an approved, practical, and inexpensive means of settling disputes and easing court congestion.

Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983) (citations omitted) (emphasis added).

Specifically, the Arbitration Act has been held to satisfy the constitutional provisions of the due process clause.

> Plaintiff contends the amendment violates the due process clause of Article I, Section 7, Constitution of Utah. Such an argument is not persuasive. In *Christiansen v. Harris*, this Court observed that due process of law does not necessarily require judicial action. The purposes of the law, especially as to property, may be effected by executive or administrative action, and still be valid if they meet the requirements of due process. The requirements are 'that no party can be affected by such action, until his legal rights have been the subject of an inquiry by a person or body authorized by law to determine such rights, of which inquiry the party has due notice, and at which he had an opportunity to be heard and to give evidence as to his rights or defenses.

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> A survey of Chapter 31, Title 78 reveals that **the Arbitration Act more than fulfills all these requirements.** In addition, there are provisions for action by the courts to affirm, modify, correct or vacate an award.

Lindon City v. Engineers Const. Co., 636 P.2d 1070, 1074-75 (Utah 1981) (emphasis added).

This Court has also found the Arbitration Act constitutional under the Open Courts provision.

> In *Lindon City v. Engineers Construction Co.*, 636 P.2d 1070, 1074 (Utah 1981), we recognized this change in Utah law and the constitutionality of the 1977 amendment. . . The legislature responded to the clarion opinions expressed by members of this Court and amended the statute [in 1977] to permit valid and enforceable agreements for arbitration of future disputes. **This amendment does not violate Article I, Section 11, Constitution of Utah.**

Allred v. Educators Mut. Ins. Ass'n of Utah, 909 P.2d 1263, 1265 (Utah 1996) (*citing Lindon City v. Engineers Construction Co.*, 636 P.2d 1070 (Utah 1981)).

In any event, the threshold question under Open Courts analysis "is whether the statute abrogated an existing remedy or cause of action." *Wood v. University of Utah Medical Center*, 2002 UT 134, ¶ 12, 67 P.3d 436. In the present action, no legal remedy has been abrogated. Recognizing that the proper application of the Arbitration Act and Utah Health Care Malpractice Act requires that Baker be bound by the arbitration agreement entered into by her deceased husband does not abrogate Baker's wrongful death remedy. Mr. Baker waived the right to judicial resolution of any dispute arising out of his health care; he did not give up his right to recover damages for alleged medical

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malpractice. Thus, the fact that Baker is bound by the arbitration agreement does not abrogate the underlying cause of action and therefore does not implicate the Open Courts Clause. Arbitration does not affect the remedy, it simply changes the forum for its resolution.

POINT II.

WRONGFUL DEATH CLAIMS ARE SUBJECT TO DEFENSES AVAILABLE AGAINST THE DECEASED, INCLUDING WAIVER OF THE RIGHT TO TRIAL.

Baker claims that a "wrongful death action belongs to the statutory heirs and is distinct from any claim owned by the decedent." (Appellee Brief at p. 8.) However, the Utah Supreme Court has clarified the "independent" nature of a wrongful death claim:

> We have held that an action for wrongful death is an independent action accruing in the heirs of the deceased. However, we have not entirely separated the heirs' right from the decedent's because the heirs' right is in major part based on rights of support, both financial and emotional, that run to them from the deceased. Accordingly, we have held that the wrongful death cause of action is based on the underlying wrong done to the decedent and may only proceed subject to at least some of the defenses that would have been available against the decedent had she lived to maintain her own action.

Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 332 (Utah 1997). Therefore, any discussion of the "independent" or "distinct" nature of Baker's claims must be qualified by the recognition that Utah courts "have not entirely separated the heirs' right from the decedent's" and that the appellee "may only proceed subject to at least some of the defenses that would have been available against the decedent had [Gary Baker] lived to maintain [his] own action." *Id.*

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While Utah courts have not identified all of the defenses that heirs are subject to for wrongful death claims, Baker goes too far in claiming that these defenses are limited to considerations that determine whether a claim exists. (Appellee Brief at p. 10.) Utah courts have never made this qualification nor any other categorical generalizations regarding defenses available under the wrongful death statute. Instead, the courts have proceeded on a specific, defense-by-defense basis.

In *Hirpa v. IHC Hospitals, Inc.*, 948 P.2d 785 (Utah 1997), the Utah Supreme Court allowed the defendant health care providers in a wrongful death medical malpractice action to assert the same defenses against the deceased patient's heirs which they could have asserted against a living patient plaintiff. In *Hirpa*, the Court stated:

> Plaintiffs also argue that section 58-12-23 violates Utah Constitution article XVI, section 5, the wrongful death provision, which states:
>
> The right of action to recover damages for injuries resulting in death, shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitation, except in cases where compensation for injuries resulting in death is provided for by law.
>
> "The plain meaning of the constitutional provision . . . is to prevent the abolition of the right of action for a wrongful death, 'whether in a wholesale or piecemeal fashion.'" *Berry*, 717 P.2d at 684 (quoting *Malan v. Lewis*, 693 P.2d 661, 667 (Utah 1984)). Thus, the legislature may not repeal the wrongful death statute; neither may it nullify the wrongful death action by indirect means. However, "the Legislature may enact reasonable procedures for the enforcement of wrongful death actions and may provide for reasonable defenses that are not inconsistent with the fundamental nature of the wrongful death action itself." *Berry*, 717 P.2d at 685.

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> Utah law is clear that a plaintiff in a wrongful death action is subject to defenses which could have been asserted against the decedent had he lived and prosecuted the suit. *Kelson v. Salt Lake County*, 784 P.2d 1152, 1155 (Utah 1989). The Good Samaritan Act is intended to induce licensed medical providers to voluntarily render emergency medical aid by eliminating their liability. The Act provides that a defense can be asserted against a malpractice claim by a living plaintiff. **That same defense should be allowable in a wrongful death action by the deceased patient's heirs**. In view of this, we think the Good Samaritan Act to be a reasonable defense, not inconsistent with the fundamental nature of the wrongful death action nor an abrogation of the wrongful death action itself. Therefore, it does not violate article XVI, section 5.

Hirpa v. IHC Hospitals, Inc., 948 P.2d 785, 794 (Utah 1997) (emphasis added).

Enforcing an arbitration agreement entered into by Mr. Baker does not conflict with the underlying purpose of the wrongful death statute in allowing his heirs to pursue their wrongful death claim. The legislative history of the wrongful death statute indicates that the "underlying purpose of this statute is 'to provide compensation to those who were dependent upon the decedent as a sole or supplemental means of economic and emotional support.'" *Haro v. Haro*, 887 P.2d 878, 879 (Utah Ct. App. 1994) (quoting Dennis C. Farley, Note, Decedent's Heirs Under the Utah Wrongful Death Act, 1979 Utah L.Rev. 77, 80). Through arbitration, the heirs are still able to pursue the wrongful death claim for any compensation they may be entitled to receive. Therefore, enforcing the decedent's agreement to require arbitration by his heirs does not frustrate the underlying purpose of the wrongful death statute because the heirs are still able to pursue their claim for compensation.

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Baker "acknowledges the public policy to enforce all contracts, including arbitration agreements" but claims that policy "cannot be used to force arbitration against a party without that party's consent." (Appellee Brief at p. 7.) In support of her claim, appellee quotes Am.Jur.2d *Contracts* § 412:

> Generally, the obligation of contracts is limited to the parties making them . . . In the case of a written contract, a person who is not named in, or bound by, the terms of a written contract **cannot be rendered <u>liable</u>** on it by the mere intention that he or she should be bound.

(Appellee Brief at p. 12, emphasis added.) However, the appellant-defendants are not seeking to render Mrs. Baker **liable** under the "contract." Requiring the plaintiff-appellee to arbitrate her claims is not a liability. Nonetheless, Baker claims that "Mrs. Baker was not the intended recipient of a 'separate and distinct benefit,' but was arguably the intended recipient of a distinct liability." (Appellee Brief at p. 15.) Plaintiff-appellee fails to establish how enforcement of the arbitration agreement results in any liability to Mrs. Baker. Indeed, it is rather obvious that she is seeking compensation which is clearly not a liability but rather a "benefit."

The mere fact that Baker does not desire to enforce her right to arbitrate her claim, and indeed is seeking to avoid arbitration, does not obviate her right to do so which right is a direct benefit provided her by the agreement. Instead of dealing directly with the existence and reality of this benefit, Baker ignores the benefit and claims that because she is not attempting to enforce the arbitration agreement, the agreement cannot be enforced as to her to require her to arbitrate her claims. In support of her assertion, she quotes

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from a federal district court case where a consultant hired by a managing partner of a limited partnership sought to hold general partners liable for unpaid wages. The court indicated that the "court knows of no rule nor any reason why a third party beneficiary should be liable on a contract to which it was not a party." *Harper v. Delaware Valley Broadcasters, Inc.,* 743 F. Supp. 1076, 1084 (D. Del. 1990). Baker's reference to *Harper* is not well-taken because, once again, the defendants are not seeking to render Mrs. Baker **liable** on a "contract." Requiring the plaintiff-appellee to arbitrate her claims is not a liability. Furthermore, in addition to the cases cited by these appellants in their initial brief, federal law also provides for the enforcement of arbitration agreements against third party beneficiaries such as Mrs. Baker.[1]

---

[1]*See e.g. Intergen N.V. v. Grina*, 344 F.3d 134, 145 (1st Cir. 2003) ("a third-party beneficiary of a contract containing an arbitration clause can be subject to that clause and compelled to arbitrate."; *E.I. DuPont De Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 195 (3d Cir. 2001) ("whether seeking to avoid or compel arbitration, a third party beneficiary has been bound by contract terms where its claim arises out of the underlying contract to which it was an intended third party beneficiary."); *Industrial Electronics Corp. of Wisconsin v. iPower Distribution Group, Inc.*, 215 F.3d 677, 680 (7th Cir. 2000) ("As a third-party beneficiary, Industrial Electronics also would be bound by the arbitration provision."*)*; *Gibson v. Wal-Mart Stores, Inc.* 181 F.3d 1163, 1170 n.3 (10th Cir. 1999) ("fact that [plaintiff] did not individually sign the Agreement does not preclude enforcement of the Agreement with respect to [defendant's claims against her because it is clear that [plaintiff] was, at the very least, a third party beneficiary of the Agreement."); *MS Dealer Service Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999) ("exception arises when the parties to a contract together agree and upon formation of their agreement, to confer certain benefits thereunder upon a third party, affording that party rights of action under the contract.")

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In addition to the benefit of being able to enforce the terms of the arbitration agreement as a third party, Baker received benefits as a result of the agreement. In Baker's Complaint, she claims:

> The heirs of Gary Baker have been damaged by the conduct of the defendants and are **entitled** to the following damages: (a) For loss of companionship, care, comfort and society, consortium and other general damages . . . (b) For all economic losses including, but not limited to, loss of support, loss of inheritance, funeral expenses and medical expenses.

(R. at 4, emphasis added.) All of the claimed injuries and damages are benefits that Mrs. Baker is claiming that the heirs were 'entitled' to and lost as a result of the defendants' alleged negligence. However, the plaintiff-appellee's "entitlement" is based upon the benefits of the patient-physician relationship entered into between Gary Baker and his medical care providers that was subject to the terms of the arbitration agreement. Mr. Baker agreed to arbitrate any medical malpractice claims as a condition for receiving medical care. The prospect of improved health and well-being of Mr. Baker, which was the object of that medical care, benefitted the heirs by ideally extending and improving their opportunity to enjoy Mr. Baker's companionship, care, comfort and society, and consortium. Thus, another "distinct and separate benefit" that plaintiff-appellee received from the relationship and the associated arbitration agreement is the inverse of her claimed damages: the prospect of continued companionship, care, comfort, society, and consortium, as well as continued economic support.

Finally, plaintiff-appellee claims that "some exceptions may allow an arbitration clause to be enforced against a nonsignatory, but none of these exceptions apply here."

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(Appellee Brief at p. 19.) Baker cites five exceptions based upon Texas and Second Circuit case law. As set forth in these appellants initial brief, the five exceptions referred to by Baker are not the only recognized exceptions. However, one exception cited by plaintiff-appellee is the equitable remedy of estoppel. It would be inequitable to permit Mrs. Baker to escape the obligations of the arbitration agreement where the health care providers were induced to enter into the health care relationship with Mr. Baker by his agreement to arbitrate any claims related to the health care provided and where the heirs stood to benefit from the care provided to Mr. Baker. The health care providers would suffer injury by not being entitled to arbitrate the claims related to the care provided to Mr. Baker.

It is readily apparent from the plain language of the arbitration agreement that Mr. Baker intended and contemplated that his spouse and heirs would be third party beneficiaries to the agreement and bound by its terms. As previously set forth in these appellants' opening memorandum, the application of well established principles of contract construction require this conclusion and warrant enforcement of the agreement as to Mrs. Baker. The terms of the arbitration agreement indicate:

> We hereby 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 or which should have been rendered after the date of this Agreement. **All claims** for monetary damages against the physician, and the physician's partners, associates, association, corporation or partnership, and the employees, agents and estates of any of them (herein collectively referred to as "physician"), **must be arbitrated including** without limitation, claims for personal

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> injury, loss of consortium, **wrongful death**, emotional distress or punitive damages. . .

Arbitration Agreement, R. 35. It is unambiguous that Mr. Baker's spouse and heirs were intended to fall within the scope of the agreement and that any claim arising out of the medical care at issue is subject to arbitration.

> We expressly intend that **this Agreement shall bind all persons whose claims for injuries and losses arise out of medical care rendered or which should have been rendered** by Physician after the date of this Agreement, **including any spouse or heirs of the patient** and any children, whether born or unborn at the time of the occurrence giving rise to any claim.

(Arbitration Agreement, R. 35, emphasis added). It is clear from the terms of the agreement that with regard to any claims regarding the health care to be proved to Mr. Baker, Mr. Baker intended that his spouse and heirs, in addition to himself, enjoy the benefits of and be subject to the obligations of the arbitration agreement. Subject to the terms of this agreement, the health care providers rendered care to Mr. Baker.

In this case, Gary Baker's waiver of the right of trial remains a viable defense. The arbitration agreement includes a specific, unambiguous waiver to the right to trial.

> **Waiver of Right of Trial:** We expressly waive all rights to pursue any legal action to seek damages or any other remedies in a court of law, including the right to a jury or court trial, except to enforce our decision to arbitrate, to collect any arbitration award and to facilitate the arbitration process as permitted by the Utah Arbitration Act.

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(R. 35.) Such waiver of the right to trial does not abrogate Baker's wrongful death action but remains a valid defense to Baker's claim that arbitration is not the proper forum for pursuing her wrongful death claim.

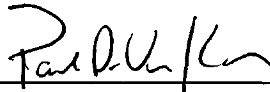
CONCLUSION

For the reasons set forth above, Appellants Gregory P. Stevens, M.D. and IHC Health Center - Holladay respectfully request that the Court reverse the ruling of the trial court and order that arbitration agreement be enforced in this matter.

RESPECTFULLY SUBMITTED this 1st day of July 2004.

BURBIDGE & WHITE

Larry R. White



Paul D. Van Komen
Attorneys for Defendants and Appellants Gregory P. Stevens, M.D. and IHC Health Center - Holladay

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CERTIFICATE OF SERVICE

I hereby certify that on the 1 day of July 2004, I caused to be served by the method indicated below two true and correct copies of the attached and foregoing **REPLY BRIEF OF GREGORY P. STEVENS, M.D. AND IHC HEALTH CENTER - HOLLADAY** to the following:

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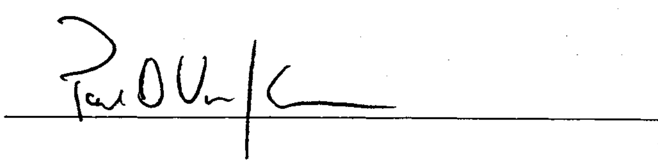

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