

2010

Glade Terry and Kairle Terry v. C. William Bacon, M.D.; Central Utah Clinic, P.C., and Utah Valley Regional Medical Center : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Terry v. Bacon*, No. 20100893 (Utah Court of Appeals, 2010).
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GLADE TERRY and KAIRLE TERRY,

VS.

Defendants and Appellees.

Appellate Case No. 20100893-CA

(Oral Argument Requested)

Appeal from the Fourth District Court, Utah County, Judge Samuel McVey

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FILED
UTAH APPELLATE COURTS

JUL 11 2011

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ARGUMENT

I. FOR ANY WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE TO OCCUR UNDER UTAH R. EV. 504(d), THE CLIENT MUST ASSERT A CLAIM, AS DISTINGUISHED FROM A MERE DEFENSE, WHICH PLACES AT ISSUE THE NATURE OF THE PRIVILEGED MATERIAL; OR THE CLIENT MUST ASSERT A BREACH OF DUTY BY THE ATTORNEY.

The Defendants C. William Bacon and Central Utah Clinic correctly state that the attorney-client privilege may be waived by the client, and correctly state that a party impliedly waives his right to assert the privilege “by putting the lawyer’s performance at issue during the course of the litigation.” (Brief for Defendants at p. 9.) But then they go on to suggest – citing no Utah case law whatsoever – that such a waiver occurs where the client asserts a claim *or defense* which places at issue the nature of the privileged material. It is respectfully submitted that, where as here the clients have not affirmatively “put the lawyer’s performance at issue,” but merely defended against the opposing parties’ allegations regarding the attorney’s conduct, no effective waiver of the attorney-client privilege has taken place which will permit the attorney to reveal confidential statements made to him during the course of the representation. On this and other bases, all of the cases cited by the Defendants are distinguishable from the facts in the instant case.

In re Lott, 424 F.3d 446 (6th Cir. 2005), was a criminal case where the District Court held that the defendant's claim of actual innocence impliedly waived the attorney-client privilege "to the extent necessary for the Respondent to defend the actual innocence claim." *Id.* at 448. In reversing, the Court of Appeals held that "The District Court's order is clear error as a matter of law," *id.* at 452, and "constitutes a departure from existing law for which we find no precedent. It undermines the historically strong protections of the attorney-client privilege." *Id.* at 448. Significantly, the question whether there was an implied waiver of the privilege came up at all only because the client made an affirmative claim of actual innocence. Thus, *In re Lott* may properly be read as holding that even if the client makes such an affirmative claim which implicates the attorney-client privilege, such a claim will not necessarily support an implied waiver of the privilege.

In *Beery v. Thomson Consumer Electronics, Inc.*, 218 F.R.D. 599 (S. D. Ohio 2003), as with *In re Lott*, *supra*, the District Court determined that there was no implied waiver of the privilege. *Berry* was a patent infringement suit where the client asserted in his deposition that he never asserted any patent infringement claim without seeking the advice of an attorney, and the District Court correctly held that such an assertion did not impliedly waive the attorney-client privilege to enable the opposing party to seek privileged information from the client's

attorney. In *Berry*, the party seeking the implied waiver suggested that “[i]t is unfair, inconsistent and contrary to law for Mr. Berry to claim infringement on the one hand, while withholding as privileged the basis that claim on the other.” *Id.* at 605. The Court, while acknowledging “some degree of unfairness and inconsistency” in Mr. Berry’s position, *id.*, nevertheless was unwilling to find any implied waiver of the attorney-client privilege under the facts of that case.

In *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 470 (S.D.N.Y. 1996), the District Court properly held that communications to attorneys which had already been extrajudicially published would waive the attorney-client privilege as to those communications. The Defendants make no claim in the instant case that there has at any time been any “extrajudicial publication” of the alleged settlement agreement.

In *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1992), the defendant was prosecuted for violations of the securities laws, and at trial, he argued that he did not intend to violate the securities laws, but believed the financing structure of the transactions would allow him legally to avoid disclosures regarding other investors, and that describing the source of his funds as “personal” was lawful. He also filed a motion *in limine* seeking a ruling that would permit him to testify regarding his belief in the lawfulness of describing the

source of his funds as “personal” without being subjected to cross-examination on communications he had with his attorney on the subject. The District Court denied the motion *in limine*, opining that if the defendant testified regarding his good faith on the legality of the disclosure, it would open the door to cross-examination with respect to the basis for his belief, and that such cross-examination would allow inquiry into communications with his attorney. In affirming this ruling the Second Circuit determined that “a defendant may not use the privilege to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes.” *Id.* at 1292. Unlike the situation in *Bilzerian*, here the clients took no affirmative steps whatsoever to put his attorney’s advice before the Court. Instead, they merely denied that they had agreed at any time to any settlement of their case.

Tasby v. United States, 504 F.2d 232 (8th Cir. 1974), also cited by the Defendants, merely restates the traditional view that a party cannot call into public question the competence of his attorney without impliedly waiving the privilege. In *Tasby*, a criminal case, the client made various allegations of misconduct and incompetence against his attorney, and the Eighth Circuit rightly held that such allegations impliedly waived the attorney client privilege. Here, it is important to point out that the clients made no allegations of misconduct or incompetence

against their attorney, limiting their testimony to factual assertions regarding whether they had entered into any settlement of the case.

It is true that the clients here did not – and indeed they could not – agree to a settlement of their case which they testified they had never assented to. It is also true that the Defendants thereafter were fully entitled to move the court for enforcement of the alleged settlement. The only issue is whether the clients, by the mere act of defending against that motion by asserting no settlement was ever agreed to by them, impliedly waived the attorney client privilege, thus permitting their own attorney to testify *against them* at the hearing.

The record in this case is simply devoid of even a scintilla of evidence that the clients at any time expressly alleged any breach of a duty owed to them by their former attorney, and in the absence of any such allegation, Rule 504(d)(3) of the Utah Rules of Evidence cannot be used to support any implied waiver of the privilege. This is not a case where the clients have attacked their former attorney or asserted any improper misconduct by their attorney. Rather, the record reflects only that the clients have a decidedly different recollection than their former attorney as to whether any settlement was actually reached. Such a misunderstanding between the attorneys and the clients, without an express allegation by the clients that the attorney has breached a duty to them, cannot form

the basis for any implied waiver of the attorney-client privilege and it is respectfully submitted that the Court of Appeals should so hold.

II. IF THERE IS A VALID AGREEMENT THAT A CASE SHALL BE SUBMITTED TO ARBITRATION, A SETTLEMENT OF THE CASE WHICH HAS NOT BEEN REDUCED TO WRITING MAY NOT BE ENFORCED.

The Defendants further argue that the Utah Supreme Court's holding in *Reese v. Tingey*, 177 P.2d 605 (Utah 2008), to the effect that settlements in mediated cases must be reduced to writing, should not be extended to the instant case because the Plaintiffs below failed to raise that issue before the trial court. It is submitted that this issue may be mooted, in some degree, by this Court's very recent ruling in *Stewart v. Bova*, 2011 UT App. 129 (Filed April 21, 2011), a copy of which is included in the Addendum¹. There, the Court of Appeals expressly held that an agreement to arbitrate a medical malpractice dispute must, to be enforceable, comply with the specific requirements of the arbitration statute of the Utah Health Care Malpractice Act, *citing* Utah Code Ann. §§ 78B-3-401 to -422 (2008).

All parties in the instant case acknowledge that the Plaintiff Glade Terry

¹The opinion in *Stewart* was handed down some ten days after the filing of the Plaintiffs' opening brief herein.

signed an agreement to submit the dispute herein to arbitration, and by Order filed November 13, 2007, the court ordered the proceedings stayed as to Defendant Utah Regional Medical Center. *All parties* asserted reliance on the Plaintiff's agreement to submit the case to arbitration. (R. 20, 27, 30). At issue in *Stewart* was whether the arbitration agreement admittedly signed by a patient was unenforceable for failure to comply with the express provisions of the arbitration statute. While that is not the precise issue here, *Stewart* establishes the rule that once arbitration has been elected, any settlement in a case referred to arbitration must strictly comply with the provisions of the arbitration statutes in order to be enforceable. Pursuant to Utah Code Ann. § 78B-3-418(2)(a), the appointed panel which adjudicates a medical malpractice claim must "render its opinion in writing not later than 30 days after the end of the proceedings . . .". No such written opinion was ever entered in this case and, despite the express requirements of the statute, the case was settled without any written memorialization whatsoever signed by either an arbitration panel or by the parties. As noted by the Court of Appeals in *Stewart*, "our task is to interpret the words used by the legislature, not to correct or revise them." *Stewart* at ¶ 21. Given the rationale for the holding in *Stewart*, it is apparent that, if there was a binding agreement to arbitrate the case, then any disposition thereafter must be in writing to be enforceable. Thus, the

appropriate resolution in this case is to void the alleged oral agreement, to remand the case to the District Court for further proceedings to consider the arbitration issues, and finally to enter a disposition in the case based upon the writing required by Utah Code Ann. § 78B-3-418(2)(a).

In the alternative, the Court of Appeals should reject the Defendants' position that the Plaintiff's argument for an extension of the holding in *Reese v. Tingey*, 177 P.3d 605 (Utah 2008) to the facts in this case is a "newly raised argument" that may not be considered for the first time on appeal. First, the *Reese* case was not even decided until February 1, 2008, more than four months *after* the instant case was filed with the District Court. Second, shortly after the filing of the case, on November 13, 2007, the proceedings were stayed to enable the parties to conduct the arbitration, which was initiated but never in fact actually conducted. Finally, following the motion of the Defendants to enforce an alleged settlement, the Court disposed of the entire case by ruling that such a settlement had occurred. In short, the Plaintiffs did not have any real opportunity at any time to raise any additional arguments; consequently, they should not now be barred from raising this purely legal issue on appeal for the first time.

The Defendants are flatly wrong in asserting that "only settlement agreements in mediation or that implicate the statute of frauds are required to be

reduced to writing in any other litigation context.” (Appelles Brief at 16-17) As set forth above, if the parties have properly elected arbitration, the Utah arbitration statutes also mandate that any finally determined award be reduced to writing. Given this requirement, and the fact that the parties purported to submit the case to arbitration, the arbitration rules should be strictly applied and the alleged settlement herein should be declared void for its failure to comply with the arbitration statute.

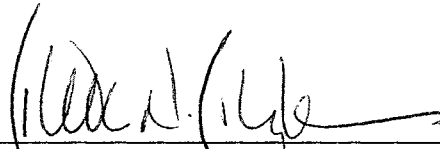
The Plaintiffs believe that the remaining issues on appeal have been adequately addressed in their opening brief.

For the reasons set forth above, it is respectfully submitted that the Court of Appeals should hold (a) that the Plaintiffs did not impliedly waive the attorney-client privilege in this case and their former attorney should not have been permitted to testify against them in support of the putative settlement; (b) that, if the parties validly entered into an agreement or agreements to submit this case to arbitration, the lack of any written settlement agreement voids the putative settlement; (c) that there was no meeting of the minds regarding any settlement

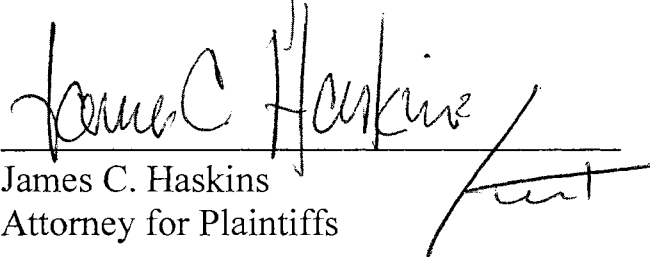
between the parties; and (d) that the putative settlement allegedly reached by the parties, pursuant to which the Plaintiffs receive virtually no compensation for the Plaintiff Glade Terry's substantial injuries, should shock the conscience of the court. Accordingly, this case should be reversed and remanded for arbitration or trial on the merits of the case.

DATED this 11th day of July, 2011.

Respectfully Submitted,



Thomas N. Thompson
Attorney for Plaintiffs



James C. Haskins
Attorney for Plaintiffs

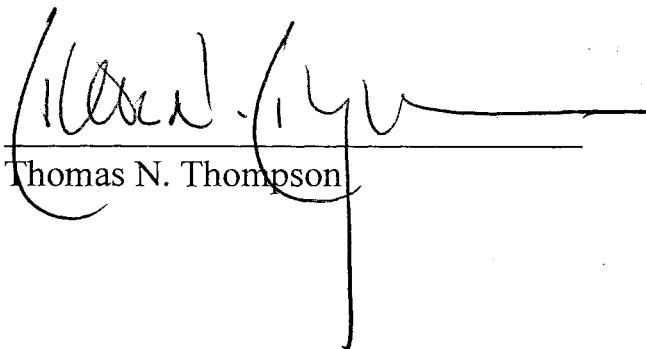
CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2011, two true and correct copies of the forgoing REPLY BRIEF OF APPELLANTS were served by HAND DELIVERY, together with a searchable disk containing the same in .pdf format, to the offices of the following:

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DATED this 11th day of July, 2011.


Thomas N. Thompson

ADDENDUM

Glenna Stewart v. Charles Bova, M.D., and Pioneer Valley Hospital, 2011
UT App. 129 (Slip Op. Filed April 21, 2011).

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DOI: 10.1002/anie.200500000

¶1 The question presented by this appeal is whether an agreement to arbitrate a medical malpractice dispute must, to be enforceable, comply with the specific requirements of the arbitration statute of the Utah Health Care Malpractice Act. *See* Utah Code Ann. §§ 78B-3-401 to -422 (2008). We hold that it must.

BACKGROUND

¶2 On September 16, 2008, Glenna Stewart underwent a lumbar nerve root injection at Pioneer Valley Hospital. The procedure was performed by Dr. Charles Bova. Ms. Stewart was accompanied by her daughter, a registered nurse.

¶3 According to Ms. Stewart's declaration, at the hospital she was led to a treatment room and instructed to change into a hospital gown. Ms. Stewart was in "a lot of pain" and was "very anxious." A nurse came into the room with a "stack of papers" and told Ms. Stewart to sign them. However, Ms. Stewart noticed a different patient's name on the top page of the stack of papers and pointed this fact out to the nurse. The nurse brought a new stack of papers and pointed to specific pages for Ms. Stewart to sign. Ms. Stewart signed them. Ms. Stewart was then moved to another room and placed on a table in preparation for the injection. Just before the injection, Ms. Stewart was presented with another paper to sign. She believes that this may have been an arbitration agreement. According to her declaration, Ms. Stewart was not given an explanation about the contents of any of the papers she signed. In particular, she was not encouraged to ask questions about the arbitration agreement or given a chance to read it before signing. The day after the injection, Ms. Stewart saw Dr. Bova for a follow-up appointment and signed a second arbitration agreement. The two arbitration agreements are identical.¹ Ms. Stewart declares that she received copies of neither. Her daughter later stated in an affidavit, "If I had known that there was an arbitration agreement in the documents given to my Mother to sign, I would have instructed her not to sign it."

¶4 According to his declaration, Dr. Bova reviewed the Agreement with Ms. Stewart and her daughter prior to the injection. In addition, he answered all of Ms. Stewart's questions regarding the Agreement and confirmed that Ms. Stewart understood the terms of the Agreement. Dr. Bova then observed Ms. Stewart sign the Agreement. Dr. Bova does not, however, contend that Ms. Stewart was verbally encouraged to read the materials or to ask any questions.

1. For simplicity, we refer to the two identical arbitration agreements collectively as "the Agreement."

¶5 Following the injection, Ms. Stewart experienced a loss of sensation and motor function in her leg. She sued Dr. Bova, alleging medical malpractice. Dr. Bova moved to stay the court action and to compel arbitration as required by the Agreement. Ms. Stewart responded that the Agreement is invalid because (1) she was not verbally encouraged to read the materials or ask questions; (2) she was not given a copy of the Agreement; (3) she was not given the written information required by section 78B-3-421(1)(a) of the Utah Health Care Malpractice Act; and (4) the Agreement is unconscionable. The trial court denied Dr. Bova's motion. It ruled that no question of fact existed as to whether Dr. Bova had verbally encouraged plaintiff to read the Agreement and to ask any questions. Consequently, it ruled that the Agreement was not validly executed under section 78B-3-421. The trial court did not address whether the Agreement was otherwise unconscionable. Dr. Bova appeals.²

ISSUE AND STANDARD OF REVIEW

¶6 Dr. Bova raises several issues on appeal, but they all resolve into a single question: whether the Agreement is enforceable under section 78B-3-421, the arbitration provision of the Utah Health Care Malpractice Act. "The interpretation of a statute is a question of law that we review for correctness" *Jaques v. Midway Auto Plaza, Inc.*, 2010 UT 54, ¶ 11, 240 P.3d 769.

2. Notwithstanding the fact that Dr. Bova's appeal does not arise from a final judgment or order, we have jurisdiction over it pursuant to Utah Code Ann. § 78B-11-129(1)(a) (2008). That section provides that "an appeal may be taken from ... an order denying a motion to compel arbitration." *Id.*; see also *Pledger v. Gillespie*, 1999 UT 54, ¶ 17, 982 P.2d 572 (holding that a party may seek review of any order denying a motion to compel arbitration, irrespective of whether the order is a final judgment or has been designated as such under Utah Rule of Civil Procedure 54(b)).

ANALYSIS

The Agreement Was Not Validly Executed

¶7 Generally speaking, “[i]t is the policy of the law in Utah to interpret contracts in favor of arbitration, in keeping with our policy of encouraging extrajudicial resolution of disputes when the parties have agreed not to litigate.” *Central Florida Investments, Inc. v. Parkwest Assocs.*, 2002 UT 3, ¶ 16, 40 P.3d 599 (internal quotation marks omitted). And while “no public policy requires such agreements to be subjected to a different analysis when they are between physicians and patients,” *Sosa v. Paulos*, 924 P.2d 357, 359 (Utah 1996), the Utah Legislature has by statute established specific requirements for the valid execution of an arbitration agreement between a patient and a health care provider, *see* Utah Code Ann. § 78B-3-421 (2008). These requirements include terms that must be contained in the arbitration agreement, information the patient must be provided in writing, and information the patient must be verbally told. *Id.* At issue here is this last requirement, what the patient must be told:

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed . . . :

(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.

Id. § 78B-3-421(1)(c). The written information required by subsection (1)(a) includes the patient’s waiver of the right to have a claim heard by a judge or jury; the patient’s responsibility, if any, for the costs of arbitration; the patient’s right to decline arbitration and still receive treatment; the automatic renewal of the arbitration agreement; and the patient’s right to rescind the arbitration agreement within ten days. *See id.* § 78B-3-421(1)(a).

¶8 Ms. Stewart does not deny that she signed the Agreement. The Agreement provides that she will resolve any claim against Dr. Bova by negotiation, mediation, or arbitration. It also contains a provision reciting that she had the right to ask questions about the arbitration 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 Claim I might have must be resolved through the dispute resolution process in this Agreement instead of having them [sic] 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.

However, Dr. Bova does not contend that Ms. Stewart was verbally encouraged to read the written information required by subsection (1)(a) and the Agreement or to ask any questions.

¶9 The trial court ruled that because the uncontested facts demonstrated that the requirements of section 78B-3-421 were not met, the Agreement was not validly executed, and hence, is unenforceable. Dr. Bova challenges this conclusion on several grounds.

A. Compliance with Section 78B-3-421(1)(c)

¶10 Dr. Bova contends "that the Agreement complies with the legislatively established requirements to create a presumptively valid and enforceable agreement." He does not contest that Ms. Stewart was not verbally encouraged to read any materials or to ask any questions. Rather, he argues that "[i]t 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." In effect, Dr. Bova argues that where the objectives of the statute have been satisfied, substantial compliance was sufficient.

¶11 "To interpret a statute, we always look first to the statute's plain language in an effort to give effect to the legislature's intent, to the degree it can be so discerned." *In re*

Olympus Constr., L.C., 2009 UT 29, ¶ 10, 215 P.3d 129. In addition, “[w]hen interpreting a statute, we assume, absent a contrary indication, that the legislature used each term advisedly according to its ordinary and usually accepted meaning.” *Hutter v. Dig-It, Inc.*, 2009 UT 69, ¶ 32, 219 P.3d 918. Moreover, “‘effect must be given, if possible, to every word, clause and sentence of a statute No clause[,] sentence or word shall be construed as superfluous, void or insignificant if the construction can be found which will give force to and preserve all the words of the statute.’” *State v. Maestas*, 2002 UT 123, ¶ 53, 63 P.3d 621 (quoting Norman J. Singer, 2A *Sutherland Statutory Construction* § 46:06 (4th ed. 1984)).

¶12 Here, the language of the statute could not be more clear: “for a binding arbitration agreement between a patient and a health care provider to be validly executed . . . : (c) the patient shall be verbally encouraged to: (i) read the [specified] written information . . . and the arbitration agreement; (ii) and ask any questions.” Utah Code Ann. § 78B-3-421(1)(c) (2008). Ms. Stewart was not verbally encouraged to read the materials or to ask any questions. Accordingly, under the explicit terms of the statute, the Agreement was not validly executed.

¶13 Dr. Bova contends that the acknowledgment signed by Ms. Stewart demonstrates that she understood the Agreement and had the opportunity to ask questions. Thus, he reasons, “the overall purpose of the statute” was fulfilled. Undoubtedly, the ultimate goal of this statutory provision is to ensure that the patient understands what she is signing and, to that end, has the opportunity to have her questions answered. However, the Legislature did not merely specify the goal; it also specified, in the clearest terms, the method by which that goal is to be attained. The statute commands, not that the patient reach an understanding of the Agreement, but rather that the patient’s understanding be achieved by particular means, including being verbally encouraged to read the materials and to ask questions. Cf. *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (holding that, while the Confrontation Clause’s ultimate goal is to ensure reliability of evidence, it “commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination”); accord *Gygi v. St. George Surgical & Medical Center, L.P.*, 2005 U.S. Dist. LEXIS 38290 (D. Utah) (holding that substantial compliance is insufficient given the “very specific terms” of a different subsection of this statute).

¶14 Dr. Bova argues that this reading of the statute undermines the purpose of the statute because it would result in fewer arbitrations. He cites section 78B-3-421 as

evidence of "the Legislature's desire to encourage arbitration" in the medical malpractice context. The Legislature does in fact encourage medical malpractice arbitration. But the history of medical malpractice arbitration in Utah has been complicated, if not contentious, involving a delicate legislative balancing of competing interests. *See, e.g., Soriano v. Graul*, 2008 UT App 188, ¶ 2, 186 P.3d 960 (noting that the 2004 statutory amendments came in "response to a public outcry"); Daniel Nelson, Note, *Recent Legislative Developments: Medical Dispute Resolution Amendments*, 2005 Utah L. Rev. 387, 389 (describing public picketing against 2003 amendments concerning arbitration). Section 78B-3-421's detailed requirements reflect careful balancing of the interests of health care providers and their patients.

¶15 Requiring compliance with specific patient safeguards before an arbitration agreement is validly executed does create the possibility that some arbitration agreements will not be validly executed, and thus that some disputes will be litigated rather than arbitrated. We have every reason to believe the Legislature was well aware of this risk and enacted the patient safeguards notwithstanding it. *See Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints*, 2007 UT 42, ¶ 46, 164 P.3d 384 ("We presume that the legislature used each word advisedly. . . ." (internal quotation marks omitted)). Accordingly, we understand the purpose of the section to be to encourage arbitration when statutory safeguards have been observed, but not when those safeguards have been ignored.

B. The Parol Evidence Rule

¶16 Dr. Bova further contends that Ms. Stewart's declarations are inadmissible parol evidence and that the trial court erred by relying on them to contradict the unambiguous terms of the Agreement.

¶17 The parol evidence rule "operates, in the absence of fraud or other invalidating causes, to exclude evidence of contemporaneous conversations, representations, or statements offered for the purpose of varying or adding to the terms of an integrated contract." *Tangren Family Trust v. Tangren*, 2008 UT 20, ¶ 11, 182 P.3d 326 (emphasis and internal quotation marks omitted). "Thus, if a contract is integrated, parol evidence is admissible only to clarify ambiguous terms; it is not admissible to vary or contradict the clear and unambiguous terms of the contract." *Id.* (internal quotation marks omitted). However, "extrinsic evidence is appropriately considered, even in the face of

a clear integration clause, where the contract is alleged to be a forgery, a joke, a sham, lacking in consideration, or where a contract is voidable for fraud, mistake, or illegality.” *Id.* ¶ 15. “Such invalidating causes need not and commonly do not appear on the face of the writing.” Restatement (Second) of Contracts § 214 cmt. c (1981).

¶18 Noncompliance with section 78B-3-421 is just such an invalidating cause. Ms. Stewart alleges that Dr. Bova and his staff did not comply with the requirements of the statute. Compliance with statutory requirements is essential for a medical malpractice arbitration agreement to be “validly executed.” Utah Code Ann. § 78B-3-421(1) (2008). Thus, Ms. Stewart is not attempting to vary or add to the terms of the Agreement, but to demonstrate that it was not validly executed, just as if she had alleged that the Agreement was “voidable for fraud, mistake, or illegality.” *Tangren*, 2008 UT 20, ¶ 15. Accordingly, her testimony is not excluded by the parol evidence rule.

C. Problems of Proof

¶19 Finally, Dr. Bova contends that “[t]he burden of proving verbal encouragement by extrinsic evidence is nearly impossible to meet.” “Absent a recording of the conversation,” he reasons, “there is no way to positively prove that such a verbal exchange occurred,” raising the specter of “dueling affidavits.” Therefore, he concludes, reading the statute to require such proof would lead to “absurd consequences,” *State v. Redd*, 1999 UT 108, ¶ 12, 992 P.2d 986 (noting that statutes should be interpreted to avoid absurd consequences), and accordingly would not be a “reasonable and sensible construction,” *State v. Garcia*, 965 P.2d 508, 512 (Utah Ct. App. 1998) (quoting *State v. GAF Corp.*, 760 P.2d 310, 313 (Utah 1988)).

¶20 To begin with, we do not agree that the plain language of section 78B-3-421(1)(c) places on health care providers a uniquely difficult—or even unusual—evidentiary burden. The evidentiary difficulties associated with proof of verbal encouragement are certainly no greater than those associated with other invalidating causes, such as where a contract is alleged to be “a forgery, a joke, a sham, lacking in consideration, or . . . voidable for fraud, mistake, or illegality.” *Tangren*, 2008 UT 20, ¶ 15. Moreover, knowing in advance that one might later be called upon to prove a particular fact is a great advantage to a potential litigant. Dr. Bova recognizes that various methods of proof are available, but contends that these methods are not feasible or fall short of positive proof.

¶21 We recognize that “a court should not follow the literal language of a statute if its plain meaning works an absurd result.” *In re Z.C.*, 2007 UT 54, ¶ 11, 165 P.3d 1206 (internal quotation marks omitted). On the other hand, “[o]ur task is to interpret the words used by the legislature, not to correct or revise them.” *State v. Wallace*, 2006 UT 86, ¶ 9, 150 P.3d 540. We do not agree that requiring health care providers to prove compliance with the arbitration statute’s requirements by means normally employed to prove facts is a result “so absurd that the legislative body which authored the legislation could not have intended it.” *In re Z.C.*, 2007 UT 54, ¶ 13.

D. Unconscionability

¶22 In the trial court, Ms. Stewart argued that, in addition to not being validly executed under section 78B-3-21, the Agreement was procedurally unconscionable due to the manner in which Dr. Bova’s staff procured her signature on the document. Because the trial court ruled that the Agreement was unenforceable under section 78B-3-421, it did not rule on whether it was procedurally unconscionable. Nevertheless, on appeal, Dr. Bova contends that the Agreement is not procedurally unconscionable under *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

¶23 Whether the Agreement suffers from procedural unconscionability or not, it is unenforceable under section 78B-3-421. Therefore, like the trial court, we have no need to address the question of unconscionability and decline to do so.

CONCLUSION

¶24 We affirm the trial court’s ruling that the Agreement was not validly executed under section 78B-3-421 and is therefore unenforceable. We remand for further proceedings.

J. Frederic Voros Jr., Judge

¶25 I CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

ORME, Judge (concurring):

¶26 I concur in the court's opinion. I write separately to comment on a point made in the lead opinion and to share a concern about the practical implications of the statutory requirement that patients be encouraged to ask questions before signing the arbitration agreement.

¶27 The lead opinion observes that "[r]equiring compliance with specific patient safeguards before an arbitration agreement is validly executed does create the possibility that some arbitration agreements will not be validly executed, and thus that some disputes will be litigated rather than arbitrated." *Supra* ¶ 15. While this may be true, it is not a function of the legislation but rather of lax practices on the part of health care providers. In other words, this is something entirely within the control of health care providers. They have the ability to make sure arbitration agreements are validly executed. And it is a simple matter to encourage a patient to read an arbitration agreement and to ask any questions.¹

1. Documenting statutory compliance is not overly burdensome. A recording could be made easily enough. But a checklist in which the patient checks and initials the provider's compliance with each required step would also be adequate, as would the patient's signing an affidavit or declaration outlining the steps that had been taken. Any hindrances to taking these measures are not inherent in the statutory scheme but rather are practical ones. Implementing such measures will slow down the processing of patients. Anticipating the possibility of malpractice and dwelling on the intricacies of arbitration may negatively affect provider-patient relations. And, of course, careful compliance with the statutory requirements may result in fewer acceptances of

(continued...)

¶28 The Legislature's directive that a patient be encouraged to ask questions could not be more clear. And the provider in this case did not demonstrate compliance with this directive. While that ends our inquiry in this case, I do wonder what the point of the exercise is. In my experience, the arbitration agreement is just tucked into a packet that includes health questionnaires, insurance forms, privacy notices, etc. As such, it is handled by front office personnel, not the medical provider. But whether it is the receptionist, nurse, or doctor who encourages the patient to take a few minutes to carefully read the required statement and the agreement and then to ask any questions, I wonder if any of them are qualified to answer the questions that are germane: Will I be as readily able to secure the services of an attorney if the case is arbitrated rather than handled in court? What are the differences in costs, including the cost of legal counsel, for arbitration versus traditional litigation? What are the differences in terms of both liability determinations and the range of monetary awards between malpractice cases adjudicated by arbitration tribunals and those adjudicated in court? Are there differences in the admissibility of evidence as between arbitration and a court proceeding? Which procedure is likely to be concluded more quickly?

¶29 I'm guessing that when put to medical office personnel, such questions will invariably be met with blank stares, looks of astonishment, and candid answers of "I honestly don't know." If the goal of the Legislature is to make sure arbitration agreements are only entered into by fully informed patients—and that is the clear thrust of the statute—an opportunity to ask questions of someone not qualified to answer them may not be the best way to accomplish that goal. Perhaps a brochure that the patient would be encouraged to read would better serve the purpose. Patterned roughly after the familiar Utah Voter Information Pamphlet, it could begin with a neutral explanation of traditional litigation and arbitration, the statute authorizing malpractice arbitration agreements, and the steps required for entering into a valid arbitration agreement. This

1. (...continued)

arbitration, even as it makes rock-solid those acceptances that are given.

Whether it is worth the trouble is up to the provider. The statute in question authorizes malpractice arbitration agreements if specific requirements are complied with. But such agreements are not mandated. I think that the policy of the statute is not to encourage the use of malpractice arbitration agreements per se, but rather to encourage their use only when they have been fully explained, are fully understood, and are acceptable to a fully-informed patient.

could be followed by a statement in favor of arbitration by, perhaps, the Utah Medical Association or the Utah Hospitals and Health Systems Association, and a statement against by, say, the Utah Association for Justice.

¶30 True, fewer of the arbitration agreements would be signed. But those that were signed would be signed by people who understood what they were doing. And that seems to be the point of the statutory framework adopted by our Legislature.

Gregory K. Orme, Judge