

2006

Lisa Bybee v. Alan Abdulla and John Does 1 through 5 : Brief of Appellant

Utah Supreme Court

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LISA BYBEE,

PLAINTIFF/APPELLEE,

V.

ALAN ABDULLA, M.D., AND JOHN DOES 1
THROUGH 5,

DEFENDANTS/APPELLANTS.

APPEAL FROM A DECISION OF THE SECOND JUDICIAL DISTRICT COURT
HONORABLE PAMELA G. HEFFERNAN

Attorneys for Appellants

FILED
UTAH APPELLATE COURTS
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STATEMENT OF JURISDICTION

This is an appeal of an order of the Second Judicial District Court in a civil case denying a motion to compel arbitration. Denial of a motion to compel arbitration is appealable under UTAH CODE ANN. § 78-31a-129. This Court's jurisdiction is also based upon UTAH CODE ANN. § 78-2-2(3)(j).

ISSUE PRESENTED FOR REVIEW

In a wrongful death action brought by the surviving spouse, did the trial court err by refusing to enforce an otherwise valid arbitration agreement entered into by the decedent and his physician? (R. 6-19.) "A trial court's denial of a motion to compel arbitration presents a question of law which we review for correctness." *Docutel Olivetti Corp. v. Dick Brady Sys., Inc.*, 731 P.2d 475, 479 (Utah 1986).

RELEVANT STATUTES AND RULES

In 2004, the Legislature amended UTAH CODE ANN. § 78-14-17, which relates to arbitration agreements in malpractice actions against health care providers, by inserting the following provision:

(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:

(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).

2004 Utah Laws ch. 84 § 1. Based upon the Governor's signature, the effective date of the amendment was April 29, 2004. The act provides, however, in § 2, that "[t]his bill applies to an action for which a court of competent jurisdiction has not issued an order as of the effective date of this bill certifying the action as a class action in accordance with Utah Rules of Civil Procedure, Rule 23."

STATEMENT OF THE CASE

NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

This is an appeal in a civil case from a final order of the Second Judicial District Court of Weber County, Utah denying a motion to compel arbitration, entered April 6, 2006. (R. 164.) Defendant timely filed his notice of appeal on May 5, 2006. (R. 178.)

STATEMENT OF FACTS

The decedent, Mark Bybee, committed suicide on February 20, 2004. (R. 1.) Mrs. Bybee asserted in her Complaint that Mr. Bybee died as a result of alleged medical negligence in Dr. Abdulla's treatment of Mr. Bybee for depression. (R. 1.) On May 23, 2003, prior to receiving medical care from Dr. Abdulla, Mr. Bybee signed a document entitled "Arbitration Agreement." (R. 38.) The Arbitration Agreement signed by Mr.

Bybee provides that anyone making any claims as a result of the care he received, including claims for wrongful death, would be required to arbitrate their claims. The agreement provides in pertinent part:

Article 1: Agreement to Arbitrate: 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 (hereinafter collectively referred to as "Physician"), must be arbitrated including without limitation, claims for personal injury, loss of consortium, *wrongful death*, emotional distress or punitive damages. . . .

We expressly intend *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 (hereinafter collectively referred to as "Patient").

Article 2: 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.

* * *

Article 7: Read and Understood: I (Patient or Patient's representative) have read and I understand the above Agreement which has been verbally explained to me to my satisfaction. I understand that I have the right to have my questions about arbitration answered and I do not have any unanswered questions. I execute this agreement of my own free will and not under any duress, and I understand that my signing this agreement is not a requirement in order to receive medical services from Physician.

(R. 38 (emphasis added).) A copy of the Arbitration Agreement is included in the Appendix. The Arbitration Agreement signed by Mr. Bybee and Dr. Abdulla complies with all requirements found in both UTAH CODE ANN. § 78-14-17 and §§ 78-31a-101, *et seq.*,

including all of the newly codified requirements found in the 2004 amendment to the Utah Health Care Malpractice Act.

SUMMARY OF ARGUMENT

The lower court refused to enforce the Arbitration Agreement against Mrs. Bybee, reasoning that Mrs. Bybee could not be forced to arbitrate her wrongful death claims because she did not sign the agreement. As this Court recognized in *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327 (Utah 1997), however, Mr. Bybee was the master of his own claim and he held the right to determine the forum for any claim arising out of his patient-physician relationship with Dr. Abdulla.

Mr. Bybee could have affected his claim in much more significant ways than simply choosing the forum for any claim he or his heirs might bring. He could have permanently impaired or settled any claim he or his heirs may have had against Dr. Abdulla, binding Mrs. Bybee and his heirs. Because Mr. Bybee could have forever impaired any claim he or his heirs could bring, he likewise was free to affect to a lesser degree any claim he or his heirs could bring by, for example, pre-selecting the forum through use of an arbitration agreement.

Mr. Bybee and Dr. Abdulla expressly intended that Mr. Bybee's heirs, including Mrs. Bybee, would be bound by the agreement. Dr. Abdulla, therefore, is entitled to require Mrs. Bybee to arbitrate her wrongful death claims which are specifically derivative of any claims Mr. Bybee could have brought against Dr. Abdulla had he survived. This is a question affecting not only the integrity of the contractual basis for the relationship

between physician and patient, but also the patient's rights of privacy and self-determination.

Although the trial court placed great emphasis on whether the 2003 or 2004 version of the Utah Health Care Malpractice Act applied, the arbitration agreement is binding on Mrs. Bybee and Mr. Bybee's heirs because the amendment simply clarified prior law concerning when medical arbitration agreements bind heirs of the patient.

Mrs. Bybee is also bound by the Arbitration Agreement because of her position as an express third-party beneficiary of the agreement.

ARGUMENT

I. THE DECEDENT, AS THE MASTER OF HIS OWN MEDICAL RELATIONSHIPS AND POTENTIAL CLAIM, WAS FREE TO STRUCTURE THAT RELATIONSHIP AND POTENTIAL CLAIM SUCH THAT HIS HEIRS ARE BOUND BY HIS DECISION.

The lower court reasoned that Mrs. Bybee was not bound by the Arbitration Agreement because she did not sign it and no rule of law or statute existed at the time the agreement was signed that bound her to arbitrate her wrongful death claims against Dr. Abdulla. (R. 171.) This Court, however, has previously established that heirs bringing wrongful death claims are subject to the actions of the decedent, even actions that could impair or even bar the heirs' claims.

In *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327 (Utah 1997), the decedent allegedly died as a result of medical malpractice committed four years before her death. Prior to

her death, neither she nor those acting on her behalf¹ had filed an action for medical negligence, and the trial court ruled that the two-year statute of limitations barred the claim. The heirs appealed, arguing that the wrongful death was a separate wrong that accrued to them, not the decedent, and that the decedent's failure to pursue her claim was therefore not binding on them. This Court rejected their argument, holding that the decedent was the master of her own claim. "[T]he 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." 944 P.2d at 332.

As one of the foremost authorities on the law of torts has observed, the rationale underlying the rule barring the heirs from bringing a wrongful death suit after the injured patient has brought suit on the underlying personal injury action is that "the injured individual is not merely a conduit for the support of others, he is master of his own claim and he may settle the case or win or lose a judgment on his own injury even though others may be dependent upon him."

Id. (quoting W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 127, at 955 (5th ed. 1984)).

Applying the rule of *Jensen* to the case at bar, Mr. Bybee was master of the terms of his professional relationship with Dr. Abdulla, including the terms for resolution of any dispute. Arbitration clauses often affect the substantive terms of the relationship itself, including the willingness of one or both parties to enter into the relationship. Be-

¹ Although Ms. Hipwell was in a coma from nearly the date of injury until her death in May 1992, she was represented by various sets of counsel who allowed the statute of limitations to run on her medical malpractice claim.

cause Mr. Bybee was master of his own affairs, his actions during his lifetime are binding on his heirs in attempting to recover based upon the treatment rendered pursuant to the agreement he signed.

The trial court, however, without any discussion of this Court's holding in *Jensen*, rejected Mr. Bybee's Arbitration Agreement and thereby rejected his right to be the master of his own health, life, privacy, and any claim arising out of his physician-patient relationship with Dr. Abdulla. The trial court erroneously found that because Mrs. Bybee had not signed the Arbitration Agreement, she could not be bound by it even though the claim she seeks to assert arises out of the relationship created by that agreement.

II. THE CLAIMS OF HEIRS ARE SUBJECT TO DEFENSES WHICH COULD HAVE BEEN ASSERTED AGAINST THE DECEDENT.

According to the terms of the Arbitration Agreement, Mr. Bybee "expressly intend[ed] that th[e] Arbitration Agreement shall bind all persons whose claims for injuries and losses arise out of medical care rendered [by Dr. Abdulla] . . . including any spouse or heirs of [Mr. Bybee]" (R. 38.) Mr. Bybee also expressly intended that all "claims for personal injury, loss of consortium, wrongful death, emotional distress, and punitive damages" would be subject to arbitration. *Id.*

As a general rule, the heirs of a decedent are bound by the contracts of the decedent. The most obvious example of this is a release of all claims by the decedent prior to death. As this Court noted in *Jensen*, the "majority of states refuses to allow a decedent's heirs to proceed with a wrongful death suit after the decedent has settled his or her personal injury case or won or lost a judgment before dying." 944 P.2d at 332; *see also*

Dowling v. Bullen, 2004 UT 50 ¶ 14, 94 P.3d 915 (quoting the above phrase and asserting that the *Jensen* court agreed with the majority of the states that a decedent may win, lose, or settle his case before dying); *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4th 748, 757, 29 Cal. Rptr. 2d 177, 182 (1993) (“[t]he decedent’s express release of any negligence liability on the part of Paralift binds his heirs in this action and provides Paralift with a complete defense”); *Rowan v. Vail Holdings, Inc.*, 31 F. Supp. 2d 889, 895 (D. Colo. 1998) (“if [the deceased] would have been barred from suing Vail because of the release, his parents will be barred from asserting their wrongful death claim under the above authority”); *Kulling v. Grinders for Industry, Inc.*, 115 F. Supp. 2d 828, 852 (E.D. Mich. 2000) (spouse bound by release of claims found in her deceased spouse’s employment separation agreement).

Mr. Bybee, therefore, had the ability to deny his heirs of any recovery by allowing the statute of limitations to run or to bind his heirs to a settlement disposing of any claim the heirs could bring. Indeed, if an injured person could not bind his heirs by contract, every settlement agreement, stipulation, and any other agreement that could adversely affect how, when, or where an action is brought, maintained, or adjudicated would be invalidated upon the death of the injured person.

Consistent with that line of cases, Utah courts hold that heirs are bound by the agreements of the decedents from whom the claim is derived. For example, in *Russ v. Woodside Homes, Inc.*, 905 P.2d 901 (Utah Ct. App. 1995), the Utah Court of Appeals ruled that a hold harmless agreement signed by the decedent was clear and unequivocal and prevented the heirs from bringing wrongful death and negligence claims. 905 P.2d at

906. *Accord, In re Estate of Shepley*, 645 P.2d 605, 607 (Utah 1982) (estate bound by contract of decedent).

Similarly, in *Kelson v. Salt Lake County*, 784 P.2d 1152 (Utah 1989), the Utah Supreme Court held that the heirs in a wrongful death action are subject to decedent's contributory negligence. *Id.* at 1155. *Kelson* involved the death of Kelson's son in a high-speed chase with police. Kelson brought a wrongful death claim against the police and a jury was permitted to apportion fault among the parties. Kelson was apportioned seventy-five percent of the fault and received no judgment. The *Kelson* court acknowledged that "the heirs have 'a right to proceed against the wrongdoer subject to the defenses available against the deceased, had he [or she] lived and prosecuted the suit.'" *Id.* at 1154 (quoting *Van Wagoner v. Union Pacific R.R.*, 186 P.2d 293, 303-04 (1947), *modified on other grounds*, 112 Utah 218, 189 P.2d 701 (1948)).

Courts in other jurisdictions also agree that the heirs are subject to the contracts of the decedent in wrongful death actions, including arbitration agreements.²

² See *Allen v. Pacheco*, 71 P.3d 375, 379-80 (Colo. 2003) (en banc), *cert. denied*, 540 U.S. 1212 (2004) (wife claiming wrongful death bound by husband's arbitration agreement with HMO, however, arbitration agreement not enforceable due to failure to comply with health care act requirements in obtaining the agreement); *Ballard v. Southwest Detroit Hospital*, 119 Mich. App. 814, 327 N.W.2d 370 (1982) (personal representative bound by decedent's arbitration agreement in wrongful death action); *Jansen v. Salomon Smith Barney, Inc.*, 342 N.J. Super. 254, 776 A.2d 816 (App. Div. 2001) (heirs bound by decedent's contract that included arbitration clause in negligence action against stock broker); *Smith, Barney, Inc. v. Henry*, 775 So.2d 722 (Miss. 2001) (wrongful conversion claim by heirs subject to arbitration clause in broker agreement); *Collins v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 561 So.2d 952 (La. Ct. App. 1990) (same); *American Bureau of Shipping v. Tenacora Shipyard*, 170 F.3d 349 (2d Cir. 1999) (non-signatory insurance underwriter compelled to arbitrate); *Seborowski v. Pittsburgh Press Co.*, 188 F.3d 163 (3d Cir. 1999) breach of collective bargaining agreement claims

This Court should honor and enforce Mr. Bybee's right and intent to commit all claims arising out of his patient-physician relationship and agreement with Dr. Abdulla to arbitration. Wrongful death claimants have no right to excuse themselves from a hold harmless agreement signed by the decedent, to excuse themselves from a settlement agreement signed by the decedent, to excuse themselves from the decedent's failure to timely prosecute his claims, to excuse themselves from a decedent's contributorily negligent conduct, or, as in this case, to excuse themselves from a decedent's valid arbitration agreement. Mr. Bybee and Dr. Abdulla clearly and expressly intended that Mrs. Bybee's wrongful death claims be arbitrated and this Court should enforce that agreement.

by non-signatory beneficiaries of deceased employees compelled to arbitrate claims); *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789 (7th Cir. 1981) (non-signatory transport company subject to arbitration as an agent of plaintiff); *Briarcliff Nursing Home, Inc. v. Turcotte*, 894 So.2d 661, 665 (Ala. 2004) (estate of deceased nursing home patient required to arbitrate wrongful death claim); *Wilkerson ex rel. Estate of Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 288 (M.D.N.C. 2005) (husband and child of deceased patient required to arbitrate wrongful death claim against hospital); *Pelz ex rel. Estate of Pelz v. Sears, Roebuck & Co.*, 367 F. Supp. 2d 711, 721 (E.D. Pa. 2005) (heirs required to arbitrate wrongful death claims that were based on contractual relationship between decedent and defendant); *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.*, 47 Cal. App. 4th 237, 242, 54 Cal. Rptr. 2d 628 (1996) (nonsignatories required to arbitrate where "a preexisting relationship existed between the nonsignatory and one of the parties to the arbitration agreement, making it equitable to compel the nonsignatory to also be bound to arbitrate his or her claim"); *Bolanos v. Khalatian*, 231 Cal. App. 3d 1586, 1591, 283 Cal. Rptr. 209 (1991) (spouses, children and heirs of patients who have signed arbitration agreements required to arbitrate medical malpractice claims, especially if the claims derive from treatment of the signatory patient); *NORCAL Mutual Ins. Co. v. Newton*, 84 Cal. App. 4th 64, 72-73, 100 Cal. Rptr. 2d 683 (2000) (same; listing cases); *Harris v. Superior Court*, 188 Cal. App. 3d 475, 478, 233 Cal. Rptr. 186 (1986) (non-signatory employees required to arbitrate pursuant to agreements signed by their employers).

III. UTAH STATUTES ANTICIPATE ENFORCEMENT OF ARBITRATION AGREEMENTS AGAINST THE HEIRS OF MR. BY-BEE.

The Utah Arbitration Act anticipates that an arbitration agreement would apply to a decedent's heirs. This act provides that "[a] written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable" except under certain conditions not found or argued here. UTAH CODE ANN. § 78-31a-3; *see also* *Lincoln City v. Engineers Constr. Co.*, 636 P.2d 1070, 1074 (Utah 1981) (nothing prevents agreement to arbitrate future claims or disputes); *Allred v. Educators Mut. Ins. Assn. of Utah*, 909 P.2d 1263, 1265 (Utah 1996) ("[t]he Act supports arbitration of both present and future disputes").

The Utah Health Care Malpractice Act also specifically envisions the enforcement of arbitration agreements against persons other than the patient. The Act contemplates that all persons claiming damages, not just the patient, will be involved in, and thus bound by, the arbitration process:

[T]he [arbitration] agreement shall require that

- (i) one arbitrator be collectively selected by all persons claiming damages;
- (ii) one arbitrator be selected by the health care provider;
- (iii) a third arbitrator be jointly selected by all persons claiming damages and the health care provider from a list of individuals approved as arbitrators by the state or federal courts of Utah.

UTAH CODE ANN. § 78-14-17(1)(b).

A single patient is typically the only physically injured party in a medical malpractice action. It is clear, therefore, the legislature anticipated that arbitration agreements would encompass claims for damages other than those brought by the injured patient such as wrongful death and loss of consortium claims. Other courts have enforced arbitration agreements against the spouse and heirs for wrongful death, *see, e.g., Allen v. Pacheco*, 71 P.3d 375, 379, 80 (Colo. 2003) (*en banc*), *cert. denied*, 540 U.S. 1212 (2004)) (enforcement denied on other grounds), as well as persons claiming damages for loss of consortium who were not signatories to the arbitration agreement, *see, e.g., Georgia Power Co. v. Partin*, 727 So.2d 2 (Ala. 1998) (spouse's loss of consortium claim subject to employee's arbitration agreement).

The 2004 amendment to the Act limits the enforceability of arbitration clauses against persons who are not parties to the contract only to the extent “the sole basis for the claim is an injury sustained by [the patient].” Given the status of Utah law regarding the status of a decedent as the “master of his own claim,” this amendment is properly viewed as a clarification or limitation of prior law, not as an expansion of that law. It is not, as the lower court believed, a question of retroactivity. In considering the amendment as a retroactivity issue, the lower court failed to recognize that so far as applicable to the facts in this case, the amendment was a reiteration of prior law, not a change to prior law.

The Arbitration Agreement is valid and binding upon Mrs. Bybee and the district court erred by refusing to enforce the agreement according to Utah law.

IV. PUBLIC POLICY FAVORS ENFORCEMENT OF THE ARBITRATION AGREEMENT BECAUSE IT GIVES EFFECT TO THE PARTIES' INTENT AND AVOIDS PHYSICIAN-PATIENT PRIVACY CONCERNS.

This Court has held that arbitration agreements are favored in Utah. *See Allred v. Educators Mut. Ins. Assn. of Utah*, 909 P.2d 1263, 1265 (Utah 1996). In *Allred*, this Court unanimously upheld the enforceability of an arbitration clause in a long-term disability policy stating:

The [Arbitration] Act supports arbitration of both present and future disputes and reflects long-standing public policy favoring speedy and inexpensive methods of adjudicating disputes.

909 P.2d at 1265 (citation omitted).

Other courts have expressed the concern that if an arbitration agreement cannot be enforced against the heirs or spouse of the patient absent the heir's or spouse's signature, a patient's privacy is jeopardized because "to authorize an intrusion into a patient's confidential relationship with a physician as the price for guaranteeing a third person, even a spouse, access to a jury trial *on matters arising from the patient's own treatment*, poses problems of a particularly serious nature." *Gross v. Recabaren*, 206 Cal. App. 3d 771, 782 (1988) (emphasis in original).

The significance of a patient's personal privacy rights with respect to medical matters is accorded special protection by Utah's legislature, *see, e.g.*, UTAH R. EVID. 506, (physician-patient privilege); UTAH CODE ANN. § 58-17a-502(10) (prohibiting disclosure of confidential pharmacy records); § 58-44a-502(1) (prohibiting "disregard for a patient's dignity or right to privacy as to his person, condition, possessions, or medical records" by

a nurse-midwife), and the rules promulgated under the recently effective Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) (imposing significant fines, penalties, and/or jail time for non-compliance with privacy rules). Moreover, Utah courts have recognized that “a patient has a right of privacy and self determination as regards his or her own medical care.” *Lounsbury v. Capel*, 836 P.2d 188, 198 (Utah Ct. App. 1992).

The *Gross* court further explained that

[i]t would appear indisputable that if spouses disagree on any decision regarding the terms of medical treatment, including the desirability of an arbitration provision, the view of only one can prevail. Inasmuch as the patient is more directly and immediately affected, as between the two, the balance must weigh in that individual’s favor.

Gross, 206 Cal. App. 3d at 782.

For those reasons, this Court should recognize the importance of Mr. Bybee’s—and all patients’—privacy rights and rights of personal determination by enforcing the Arbitration Agreement as Mr. Bybee intended, in favor of arbitration of all “claims for personal injury, loss of consortium, [and] wrongful death” asserted by Mrs. Bybee. (R. 10.)

V. MRS. BYBEE IS BOUND BY THE ARBITRATION AGREEMENT AS A THIRD-PARTY BENEFICIARY.

Some courts in other jurisdictions which have examined this issue have held that heirs are bound as third-party beneficiaries of the agreement to arbitrate. Under that analysis, although Mrs. Bybee did not sign the Arbitration Agreement, she is bound by its terms as a third-party beneficiary.

Third-party beneficiaries are those “‘recognized as having enforceable rights created in them by a contract to which they are not parties and for which they give no consideration.’” *Harper v. Great Salt Lake Council, Inc.*, 976 P.2d 1213, 1218 (Utah 1999). “The existence of third party beneficiary status ‘is determined by examining a written contract.’” *Wagner v. Clifton*, 2002 UT 109 ¶ 11, 62 P.3d 440 (quotation omitted).

Article 1 of the Arbitration Agreement provides that Mr. Bybee and Dr. Abdulla “expressly intend that this Arbitration Agreement shall bind all persons whose claims for injuries and losses arise out of medical care rendered or which should have been rendered by [Dr. Abdulla] after the date of this Agreement, including any spouse or heirs of the patient and any children.” (R. 10.) Mr. Bybee and Dr. Abdulla created in Mrs. Bybee an enforceable right to arbitration. Arbitration was a significant benefit to Mr. Bybee and Dr. Abdulla as evidenced by their agreement. Among the benefits of arbitration include the “speedy and inexpensive methods of adjudicating disputes,” *Allred v. Educators Mut. Ins. Assn. of Utah*, 909 P.2d 1263, 1265 (Utah 1996), and “giving effect to the intentions of the parties[and] easing court congestion,” *Lindon City v. Engineers Constr. Co.*, 636 P.2d 1070, 1073 (Utah 1981). As a further benefit, Mr. Bybee and Dr. Abdulla also specifically entered into the Arbitration Agreement intending that “arbitration proceedings” remain “private, not public,” and requiring that the “privacy of the parties and of the arbitration proceedings shall be preserved.” (R. 10.) Mrs. Bybee expressly received the right to enforce arbitration as a third-party beneficiary.

The trial court found that arbitration was not a benefit to Mrs. Bybee because Mrs. Bybee subjectively did not consider it a benefit and because it deprived her of a choice to

have a judicial resolution of her dispute. (R. 168.) This analysis, however, is erroneous because it is immaterial whether the beneficiary desires the benefit since it is the beneficiary who seeks the other benefits of the contractual relationship between the parties. Mrs. Bybee seeks to recover from Dr. Abdulla based upon his physician-patient relationship and yet Mrs. Bybee desires to avoid the Arbitration Agreement that formed a part of that relationship. Utah law does not permit the division of a contractual relationship in this manner. *See, e.g., Central Fla. Invs., Inc. v. Parkwest Assocs.*, 2002 UT 3 ¶ 12, 40 P.3d 599. Hence, Mrs. Bybee may not bring her wrongful death claim based on the physician-client relationship without complying with the arbitration provision of that relationship.

Mr. Bybee and Dr. Abdulla undertook the Arbitration Agreement not only for Dr. Abdulla's benefit, but also for Mrs. Bybee's and the heirs' direct benefit and affirmatively made this intention clear by naming Mrs. Bybee and Mr. Bybee's heirs in the terms and language of the agreement. Mrs. Bybee is bound by the terms of the Arbitration Agreement as third-party beneficiaries and the Court should order arbitration accordingly. *See Parsley v. Terminix Int'l. Co.*, 1998 WL 1572764 (S.D. Ohio) (arbitration agreement enforced against third-party beneficiary); *Terminix Int'l. Co., LP v. Ponzio*, 693 So.2d 104 (Fla. Ct. App. 1997) (same).

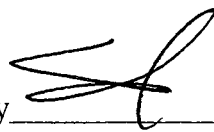

CONCLUSION

For the reasons set forth above, Dr. Abdulla respectfully requests that the Court reverse the district court's order refusing to stay the proceedings and compel arbitration

and remand the case for further proceedings in accordance with the Arbitration Agreement.

DATED this 30th day of August, 2006.

SNOW, CHRISTENSEN & MARTINEAU

By  
Brian P. Miller
Kenneth L. Reich
Attorneys for Defendant/Appellant

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing BRIEF OF APPELLANT were served by U.S. Mail on August 30, 2006 as follows:

JAMES R. HASENYAGER
PETER W. SUMMERILL
HASENYAGER & SUMMERILL
1004 24TH ST
OGDEN UT 84401-2702



RODNEY R. PARKER

APPENDIX

1. Arbitration Agreement, May 23, 2003
2. Decision, April 5, 2006

ARBITRATION AGREEMENT

Article 1: Agreement to Arbitrate: 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 (hereinafter collectively referred to as "Physician"), must be arbitrated including, without limitation, claims for personal injury, loss of consortium, wrongful death, emotional distress or punitive damages. We agree that the Physician may pursue a legal action to collect any fee from the patient and doing so shall not waive the Physician's right to compel arbitration of any malpractice claim. However, following the assertion of any malpractice claim against the Physician, any fee dispute, whether or not the subject of any existing legal action, shall also be resolved by 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 (hereinafter collectively referred to as "Patient").

Article 2: Waiver of Right to 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.

Article 3: Procedures and Appointment of Arbitrators: Patient shall serve Physician by certified mail with a written demand for arbitration which shall specify the nature of the claim, the date of the claimed occurrence, the complained of conduct by the Physician, and a description of the Patient's injuries and damages. Within 60 days after the demand, the parties shall agree upon a neutral arbitrator to be selected from a list of individuals approved as arbitrators by the State or Federal courts of Utah. If the parties cannot agree upon a neutral arbitrator, the court shall select an individual from that list. The neutral arbitrator shall: preside over the arbitration hearing and pre-arbitration conferences; establish scheduling orders; supervise the conduct of discovery to prevent abuse and insure efficiency and cost-effectiveness; rule on all motions, including motions for summary judgment and motions to dismiss for failure to proceed with reasonable diligence; administer oaths; issue subpoenas; and exercise other powers granted to arbitrators in the Utah Arbitration Act. Within six months of the demand for arbitration or as otherwise ordered by the neutral arbitrator, Patient shall select one arbitrator and Physician shall select one arbitrator. Patient and Physician shall pay the fees and expenses of his or her own arbitrator. Each party shall share equally the expenses and fees of the neutral arbitrator. The parties agree that the arbitrators have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator under this Agreement.

All claims based on the same occurrence, incident, or case shall be arbitrated in one proceeding; however, Patient or Physician shall have the absolute right to arbitrate separately issues of liability and damage upon written request to the neutral arbitrator. Arbitration hearings will be held in the County of the Physician's principal place of business or elsewhere as the parties may agree.

The parties consent to the participation in this arbitration of any person or entity that would otherwise be a proper additional party in a court action and which agrees to be bound by the arbitration decision. Any existing court action against such additional person or entity shall be stayed upon agreement to participate in the arbitration.

The parties agree that the arbitration proceedings are private, not public, and the privacy of the parties and of the arbitration proceedings shall be preserved.

Article 4: Applicable Law: With respect to any matter not herein expressly provided for, the arbitration shall be governed by the Utah Arbitration Act. All provisions of the Utah Health Care Malpractice Act, with the exception of the notice of intent and pre-litigation hearing requirements which the parties hereby waive, shall apply to the arbitration. The comparative fault provisions of Utah law apply to the arbitration and the arbitrators shall apportion fault to all persons or entities who contributed to the claimed injury whether or not they are parties to the arbitration.

Article 5: Revocation: This Agreement may be revoked by written notice mailed to the Physician, by certified mail, within 30 days after signature, and if not revoked shall govern all medical services received by the Patient after the date of this Agreement.

Article 6: Term: The term of this Agreement is one year from the date it is signed. It shall be automatically renewed from year to year thereafter unless either party to this Agreement notifies the other of his or her election not to renew in writing delivered by certified mail prior to the renewal date.

Article 7: Read and Understood: I (Patient or Patient's representative) have read and I understand the above Agreement which has been verbally explained to me to my satisfaction. I understand that I have the right to have my questions about arbitration answered and I do not have any unanswered questions. I execute this agreement of my own free will and not under any duress, and I understand that my signing this agreement is not a requirement in order to receive medical services from Physician.

Article 8: Received Copy: I have received a copy of this document.

Article 9: Severability: If any provision of this Agreement is held invalid or unenforceable, the remaining provisions shall remain in full force and shall not be affected by the invalidity of any other provision.

ALAN B. ABDUTTA
Name of Physician, Group or Clinic

[Signature]
Signature of Physician or
Authorized Representative (Date)

Mark A. Bybee
Name of Patient (Print)

[Signature] 05.23.03
Signature of Patient or Patient's
Representative (Date)

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
COUNTY OF WEBER, STATE OF UTAH**

LISA BYBEE,

Plaintiff,

vs.

ALAN ABDULLA, MD and JOHN DOES 1-5,

Defendants.

APR 03 2006

DECISION

Case Number: 050903397

Judge Pamela G. Heffernan

UNDISPUTED FACTS:

1. On May 23, 2003, Mark Bybee, deceased husband of plaintiff Lisa Bybee, signed an Arbitration Agreement with defendant Dr. Alan Abdulla.
2. The Arbitration Agreement provides that the parties would submit to binding arbitration for "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."
3. The Arbitration Agreement further "bind(s) all persons whose claims for injuries and losses arise out of medical care rendered or which should have been rendered ... including any spouse or heirs of the patient and any children..."

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ABDULLA,ALAN MD

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4. The Arbitration Agreement also represents that the Agreement was read and understood by Mr. Bybee and provides that signing the agreement is not a prerequisite to receiving medical services from the doctor.

5. Lisa Bybee did not sign the agreement.

6. Medical treatment was rendered to Mr. Bybee by Dr. Abdulla.

7. On February 20, 2004, Mr. Bybee committed suicide.

8. Lisa Bybee brings this action alleging that Dr. Abdulla committed medical malpractice in his treatment of Mr. Bybee and that she is entitled to damages for Mr. Bybee's wrongful death.

DECISION:

The court concludes that the Arbitration Agreement signed by Mr. Bybee purporting to bind Lisa Bybee, his wife, to the agreement to submit to binding arbitration is not enforceable as to Lisa Bybee. The reasons for this decision are set forth below.

The threshold question is whether the 2003 version (enacted in 1999) or the 2004 version of Utah Code Ann. 78-14-17 applies. The applicable change from the 2003 version is that the legislature specifically added language in 2004 that expanded the individuals to whom an

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Arbitration Agreement would apply. Prior to 2004 the statute at issue referred only to the applicability of the Agreement to the patient. In 2004 the following language was added:

- (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)

Plaintiff argues that the 2003 version of the applicable statute is applicable to the instant case because the claims arose before the 2004 version went into effect. Defendant argues that the 2004 version is applicable and retroactive because the changes made were procedural rather than substantive.

The court finds it critical to first analyze which version of the statute applies to the instant case for reasons which will become obvious in the latter portion of this opinion.

At first blush, defendant's argument that the 2004 changes in the statute at issue are procedural only because it specifies only the forum in which disputes will be decided appears to have merit. However, upon further analysis, it is clear that it is not simply a procedural change that was enacted. Rather, the change fundamentally alters the party's substantive right of access to the courts.

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Generally, a statute cannot be given retroactive effect unless the legislature expressly declares such an intent in the statute. Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1988). However, if the statute changes procedural rather than substantive rights, the new statute will apply to all cases including those which have accrued or are pending actions. Pilcher v. State, 663 P.2d 450, 455 (Utah 1983). This court is directed, however, to narrowly construe what is defined as procedural for the purpose of retroactive application of a statute. Olsen v. Samuel McIntyre Investment Co., 956 P.2d 257,261 (Utah 1998).

Defendant's position that the statute's change is procedural only is in direct conflict with precedent. In Jenkins v. Percival, 962 P.2d 796 (Utah 1998), the Utah Supreme Court clearly states that the right to apply to the courts for relief from a perpetrated wrong is a substantive right. Justice Stewart in Jenkins states the following:

Article I, Section 11 of the Utah Constitution guarantees that courts shall be open and that every injured person shall have a remedy by due course of law. Even the most limited reading of this provision guarantees a day in court to all parties with potential liability...

Justice Stewart goes on to state that binding someone who is not a party to an arbitration agreement to submit to arbitration would be depriving them of "this substantive right." Id. at 799.

Because the change in the 2004 amendment is substantive rather than procedural, the court finds that it is not retroactive to a claim that allegedly arises before its enactment, specifically this case. Therefore, defendant cannot rely on the 2004 amendment to require Mrs. Bybee to submit her claim to binding arbitration.

Defendant also argues that even if the 2004 changes to the statute are not retroactive, the

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Arbitration Agreement is binding on plaintiff because the Agreement signed by Mr. Bybee explicitly binds her to arbitrate. Assuming for purposes of this decision that the claims asserted by Mrs. Bybee fall within the ambit of those to which the Agreement refers, the next question is whether such an agreement is binding as to Mrs. Bybee under the applicable state law governing contracts. (This court recognizes that the legislature may change common law by statute which it apparently did in the 2004 changes to the applicable statute; however, given the decision that the 2004 amendments relating to binding of spouses are not retroactive, the court is bound to resort to an analysis of the applicable common law).

It is a fundamental tenet of contract law that a contract is enforceable only between the parties to the contract. Wagner v. Clifton, 62 P.3d 440, 442 (Utah 2002). That rule of contract law is applicable to arbitration agreements. See Cade v. Zions First National Bank, 986 P.2d 1073 (Utah App. 1998). In McCoy v. Blue Cross and Blue Shield of Utah, 20 P.3d 901 (2001) Justice Durrant elaborates on this principal and states the law as follows:

Because parties to a binding arbitration waive substantial rights to formal public adjudication of their disputes, the Act demands, as a minimum threshold for its enforcement, direct and specific evidence of an agreement between the parties. Id. at 17.

It is clear from the face of the Arbitration Agreement that plaintiff Mrs. Bybee did not sign the Agreement and there is no evidence that she otherwise agreed to be bound by the Arbitration Agreement. However, she still may be bound under the common law if she is deemed to be a third party beneficiary of the Agreement or if it can be concluded that Mr. Bybee was acting as her agent when he signed the Agreement. The defense urges the court to find both of these propositions to be true in this case. The court finds, however, that neither of these exceptions is

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applicable to the instant case.

First, a third party beneficiary is one who has enforceable rights pursuant to a contract to which they aren't parties and haven't tendered any consideration. Rio Algom Corp. V. Jimco. Ltd., 618 P.2d 497 (Utah 1980). In addition, the contract must make clear an intention to confer a "separate and distinct benefit upon the third party." Wagner v. Clifton, 62 P.3d 440, 441-442 (Utah 2002).

It is fundamental that the beneficiary receive a benefit. The defense argues that Mrs. Bybee receives the benefit of having the right to require the defendant doctor to arbitrate her claim rather than having the case decided in court. They argue that arbitration is a more beneficial way to resolve legal disputes because it is speedier, less expensive and more private. That position ignores the possibility that if Mrs. Bybee does not wish to arbitrate but rather sees it to her benefit to proceed with her claim in court, the agreement deprives her of the substantial benefit of having that option. Enforcement of the Arbitration Agreement as to her would effectively deprive her of her "substantial right to judicial resolution of (her) dispute." McCoy supra at 15. It defies common sense to claim that Mrs. Bybee is a third party beneficiary to an agreement when the option she wishes to exercise, i.e., having her claim adjudicated in court, has been terminated by that agreement if it is enforced. Had the Arbitration Agreement provided the spouse the option of electing either arbitration or judicial resolution as to claims that the patient could not have brought such as in the instant case, wrongful death, then arguably she would have received a distinct and separate benefit of the agreement.

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The second exception urged upon the court by the defense is that a husband may bind his wife to an Arbitration Agreement by virtue of their spousal relationship. Essentially, the argument is that Mr. Bybee acted as his wife's agent in agreeing to bind her to the Arbitration Agreement. They cite to the statutory provisions that provide for joint and several liability of a husband and wife for expenses of the family (Utah Code Ann. 30-2-9). They also cite to Utah Code Ann. 30-2-8 which provides that either a husband or wife may appoint the other as their attorney subject to the right to revoke that appointment just as any other person would have.

As to the family expense doctrine, if this case involved an action by the doctor to recover for medical expenses incurred by Mr. Bybee, Utah Code Ann. 30-2-9 may apply and a good argument could probably be made that Mrs. Bybee should be required to arbitrate those claims. Effectively she would step into the shoes of Mr. Bybee and probably should be required to submit to the limitations agreed to by Mr. Bybee on how the matter of a debt should be resolved.. That is obviously not the issue here.

As to Utah Code Ann. 30-2-8, there is simply no evidence that Mrs. Bybee gave Mr. Bybee any power of attorney to enter into a contract with the defendant to which she would be bound. The more applicable section that establishes Mrs. Bybee's independent right to enter into contracts is found in Utah Code Ann. 30-2-2. That statute codifies the elimination of the common law restriction on a woman's right to contract. Utah Code Ann. 30-2-4 also makes clear that a woman may bring legal action separate from her husband and may "recover against a third person for such injury or wrong as if

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unmarried...” Id.

The defense also cites as authority for the proposition that Mr. Bybee could bind Mrs. Bybee to the terms of the Arbitration Agreement the statute which provides that a spouse may consent to health care for their spouse. Utah Code Ann. 78-14-5 (4)(b). The authorization for a spouse to consent to health care for another spouse has been limited to situations where the spouse in need of health care and is not capable of giving their own consent. It does not stand for the proposition that a husband may bind his wife to a contract to which she is not a party, has not agreed to, and which contract does not represent a family type of expense.

The case of Jenkins v. Percival et al., 962 P.2d 796 (Utah 1998) is instructive although the facts of that case are substantially different from those in the instant case. In Jenkins, supra, the plaintiff sought to enforce an oral agreement to arbitrate her personal injury claim against defendant Gerald Percival. Plaintiff alleged that her counsel and Percival’s insurance adjuster entered into an oral agreement to arbitrate her claim after settling the personal injury claims of Jenkins’ children. All the claims arose out of the same accident. Percival resisted the attempt to require him to arbitrate arguing that the arbitration may expose him to liability in excess of his policy limit. Percival further argued that the insurance adjuster lacked authority to waive his right of access to the courts. Although Jenkins, supra, addresses the issue of an arbitration agreement in the context of an insured’s potential exposure to liability beyond his policy limits, Justice Stewart’s reasoning and statements in that decision make it clear that absent a voluntary and

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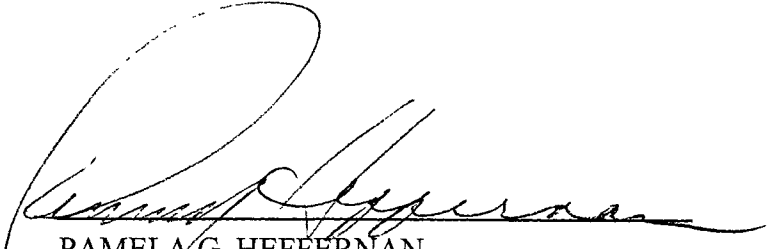
intelligent waiver by one holding a legal claim, access to the court shall be preserved for all injured persons. Jenkins, supra at 799. Specifically Justice Stewart stated that:

The insurance contract between the insurance company and the insured does not authorize the adjuster to waive the individual rights of the insured. "The right to apply to the courts for relief for the perpetration of a wrong is a substantial right" and cannot be waived through contract except "in the most unequivocal terms." (quoting from Bracken v. Dahle, 251 P. 16, 20 (1926) As a result, the adjuster cannot unilaterally bind the insured to arbitration. Supra.

In the instant case there is no factual or legal basis to allow Mr. Bybee to unilaterally bind Mrs. Bybee to an Agreement to Arbitrate. There is no evidence of an agency relationship either by agreement or by law.

Because the court has decided the issues as set forth above, it is unnecessary to address the issues of whether the Arbitration Agreement is unconscionable or whether federal preemption is applicable.

DATED this 5 day of April, 2006.



PAMELA G. HEFFERNAN

District Court Judge

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing Decision, first class mail and postage prepaid, to the following parties this 7th day of April, 2006.

Peter W. Summerill
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Royanne Baptist
In court Clerk