

2006

# Lisa Bybee v. Alan Abdulla : Brief of Appellee

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH	
LISA BYBEE,  Plaintiff and Appellee,  vs.  ALAN ABDULLA, MD and JOHN DOES 1-5,  Defendant and Appellant.	Supreme Court No. 20060424  Trial Court No. 050903397
BRIEF OF APPELLEE	
APPEAL FROM A DECISION OF THE SECOND JUDICIAL DISTRICT COURT HONORABLE PAMELA G. HEFFERNAN	

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## ISSUES PRESENTED FOR REVIEW

All arbitration agreements shall inform patients of their right to consult with an attorney and the right to compel mediation prior to arbitration. Dr. Abdulla's arbitration agreement does not inform patients of their rights to obtain an attorney and compel mediation.

Patients hold no power to bind non-signatory heirs to participate in arbitration, prior to revision of Utah Code Ann. § 78-14-17 (2003). Dr. Abdulla's arbitration agreement binds third party non-signatories.

One individual cannot unilaterally terminate the constitutionally guaranteed rights of another. Dr. Abdulla's arbitration agreement unilaterally terminates Lisa Bybee's constitutionally guaranteed rights to jury trial and court access for resolution of her constitutionally protected right to suit for wrongful death.

Substantive unconscionability invalidates arbitration agreements where the agreement imposes terms unreasonably favorable to the other party. Dr. Abdulla's arbitration agreement eliminates the right to jury trial for his patients, but retains that same right for himself.

## RELEVANT STATUTES AND RULES

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## STATEMENT OF FACTS

Dr. Abdulla first treated Mark Bybee for allergies in December 1998. (R. 20).

After treating Mr. Bybee for nearly five years, Dr. Abdulla required Mr. Bybee to sign an arbitration agreement on May 23, 2003. (R. 20). Dr. Abdulla continued acting as Mr. Bybee's primary physician for the treatment of allergies until October 2003, when Mark Bybee sought treatment from Dr. Abdulla for his depression. Dr. Abdulla, despite never having previously treated Mark Bybee for mental illness, nonetheless attempted to render care for Mr. Bybee's depression by prescribing the medication Zyprexa. (R. 1).

On November 24, 2003, without any direct physical examination or interview of Mark Bybee, Dr. Abdulla refilled the prescription. (R. 2). Again, on December 8, 2003 Dr. Abdulla refills the prescription without any examination or reevaluation of Mark Bybee's depression. On February 20, 2004 Mark Bybee killed himself. Following the death of Mr. Bybee, Lisa Bybee brought an action on behalf of herself, the couple's children and all other heirs of Mark Bybee. (R. 1-3) The defendant Dr. Abdulla sought to compel participation in arbitration based upon the agreement signed by Mark Bybee.

Abdulla maintains his arbitration agreement "complies with all requirements found in both Utah Code §§ 78-14-17 and 78-31a-101, including all of the newly codified requirements found in the 2004 amendment." (Appellant's Brief at 3-4). However, under the 2004 Act arbitration agreements must, in writing, inform the patient of their right to seek advice of an attorney and their right to demand mediation prior to arbitration.

Utah Code Annotated § 78-14-17 (1)(a) (2004). Nowhere does the Defendant's arbitration agreement expressly inform patients of these rights. (R. 38, Appellant's Appendix 1).

The arbitration agreement requires patients to give up their right of recourse to a judicial forum. Dr. Abdulla also requires patients to unilaterally compromise a spouse or heirs claim and right to be heard for wrongful death in our courts. However, Dr. Abdulla exempts himself from being compelled to participate in arbitration in order to pursue the only potential claim he could have against his patients, collection of fees. "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." (R. 38, Appellant's Appendix 1). At no point did Lisa Bybee, or the children or heirs, agree to give up their right to seek judicial redress for the wrongful death of Mark Bybee.

#### SUMMARY OF THE ARGUMENT

Abdulla's arbitration contract attempts to bind third-party claims of wrongful death heirs who are non-signatories to the underlying contract. In *Jenkins v. Percival*, 962 P.2d 796, 800 (Utah 1998) the court observed that "while the public policy of promoting speedy and inexpensive resolutions of controversies favor arbitration in some cases, these considerations cannot outweigh the constitutional right of access to the courts unless one waives that right." Because neither Lisa nor the heirs agreed to substitute a private arbitration for their right to jury trial and court access to redress the constitutionally

protected claim of wrongful death, the arbitration agreement cannot be enforced against them.

If enforced as urged by Abdulla, the Arbitration Agreement directly conflicts with Utah appellate court decisions requiring a “voluntary, intelligent and knowing waiver of both parties' Constitutional right to seek judicial redress.” *Jenkins*, 962 P.2d at 799 (“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”); *Lindon City v. Engineers Const. Co.*, 636 P.2d 1070, 1074 (Utah 1981)(same); *Bracken v. Dahle*, 251 P. 16, 20 (Utah 1926)(same). Under the 2003 version of the Act, there existed no express legislative permission or authority to bind third-party non-signatories to an arbitration agreement signed by a patient. Abdulla’s position that the 2004 Act merely “clarified” pre-existing law fails in the face of these well established authorities.

However, even if the 2004 version of the Act applied, arbitration agreements which waive a right to jury trial and court access must strictly comply with the statutes allowing their enforcement in the first instance. Prior to legislative recognition, this court frequently refused to enforce arbitration agreements governing future disputes. Here, Abdulla’s arbitration agreement fails to satisfy legislative requirements that a patient be informed of their right to seek legal counsel, as well as their right to compel arbitration. Failing to comply with the statute which enables arbitration agreements to be enforced in the first instance, Abdulla’s arbitration agreement cannot be enforced at all.

Further, construing the 2004 Act as urged by Abdulla creates a constitutional conflict with a wrongful death claimant's right to jury trial, court access and due process. A constitutional conflict only arises as a result of Abdulla's desire to ignore the Act's language which imposes arbitration only on those claims based 'solely' upon injury to the patient. Wrongful death claims are not based solely on injury to the patient, but also upon statutory and constitutional provisions creating an entirely new and independent cause of action in the heirs.

Finally, arbitration agreements arising from unconscionable procedures, or imposing unconscionable terms, will not be enforced. In *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996) the court held an arbitration agreement signed shortly before surgery unconscionable and unenforceable. The party seeking to compel arbitration bears the burden of demonstrating that an enforceable arbitration agreement exists. *Mohamed v. Auto Nation USA Corp.*, 89 S.W. 3d 830, 835 (Ct. App. Tex. 2002). This proof may not be by mere inference, but "direct and specific evidence of an agreement between the parties" is required. *McCoy v. Blue Cross and Blue Shield of Utah*, 2001 UT 31, ¶ 17, 20 P.3d 901, 905. Here, Abdulla cannot demonstrate that his boilerplate and adhesive contract preserves procedural safeguards. Further, the contract itself imposes substantively unconscionable terms because it eliminates the rights of court access and jury trial for patients, but preserves and retains Abdulla's own right to court access and jury trial for collection of his fees.

## ARGUMENT

### **Introduction and Background: Consumer Arbitration Agreements**

Arbitration agreements originally arose in the commercial context as a means to reduce litigation costs between businesses dealing at arm's length. "Out of court arbitration was initially created so that parties, with equal bargaining power, could reduce the costs of litigation by agreeing to resolve their dispute through the use of a mutually acceptable arbitrator." *Mandatory Arbitration Clauses in Consumer Contracts:*

*Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191, 1191 (2001). However, arbitration now permeates many "agreements involving the 'little guy's' ... day to day needs (agreements concerning the purchase and sale of goods and services, including financial and medical services)." *The Redefinition of Arbitration By Those With Superior Bargaining Power*, 1999 UTAH L. REV. 857, 860 -863.

Because the little guy typically must accept agreements to arbitrate without any ability to negotiate the terms, "we are at the point where, at least when the weaker party has no power to negotiate the existence or the terms of the arbitration clause, the weaker party needs some protection from the use of arbitration." *Id.* "While out of court arbitration may be beneficial for parties with equal contractual bargaining power, it is inherently unfair in situations where the parties exhibit a substantial disparity in power." *Mandatory arbitration clauses in consumer contracts*, 50 DEPAUL L. REV. 1194 -1195. Boilerplate arbitration clauses are now used to "undermine the enforceability of rights



potentially threatening to [the party in control of the drafting process].” *Redefinition of arbitration*, 1999 UTAH L. REV. 857, 867.

Frequently, the argument is made that public policy favors arbitration agreements.

However:

the stronger party has redefined arbitration ... it may no longer be efficient, expeditious or accessible; and it may involve more than just the relinquishment of "procedural" rights. Arbitration has been corrupted; it has been used by the more economically powerful party to extract, often in an underhanded manner, unfair advantages and important substantive rights from the unwitting economically weaker party.

1999 UTAH L. REV. at 864 -865.

In the situation where the party providing the service requires an arbitration clause, the traditional safeguards of contractual fairness are missing. *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims* 67-Spring LAW & CONTEMP. PROBS. 253, 255. Because the traditional safeguards may be missing, a danger arises that arbitration will be enforced even where true consent is absent. *Id.* In the personal injury context, this danger threatens not only the rights of the injured party, but also “threatens the retributive, economic, and communitarian goals of tort law.” *Id.*

Our judicial branch first approached arbitration agreements with complete skepticism, an attitude which flows through even the most recent appellate court decisions. At one time, it was “almost the universal rule that in the absence of a statute to the contrary, an agreement to arbitrate all future disputes thereafter arising under the contract does not constitute a bar to an action on the contract involving such dispute, on

the ground that it seeks to deny to the parties judicial remedies and therefore is contrary to public policy.” *Latter v. Holsum Bread Co.*, 108 Utah 364, 368, 160 P.2d 421, 423 (1945).

Arbitration agreements run contrary to the expressed purpose and spirit of our judicial system by conferring final judicial authority on private arbitrators, tending to divest the official public courts of jurisdiction. *Barnhart v. Civil Service Emp. Ins. Co.*, 16 Utah 2d 223, 227-228, 398 P.2d 873, 876 (1965). In light of Utah's constitutional guarantee to court access under Article I, Section 11, as well as the constitutional guarantee to jury trial under Article I, Section 10, courts should approach arbitration agreements with a healthy dosage of skepticism and scrutiny of the highest order. *Id.*

Only after statutory amendment did Utah courts begin to give any real effect to arbitration agreements. *See, Allred v. Educators Mut. Ins. Ass'n of Utah*, 909 P.2d 1263, 1265 (Utah 1996). Nonetheless, even after legislation recognizing the validity of arbitration agreements, the original judicial skepticism runs strong and courts continue to scrutinize arbitration agreements in the consumer context where a stronger party forces the weaker party to accept arbitration. In *McCoy v. Blue Cross and Blue Shield of Utah*, 2001 UT 31, ¶ 15, 20 P.3d 901, the court refused to compel arbitration and observed that “the policy of liberally construing agreements in favor of arbitration is conditioned upon the prior determination that arbitration is a remedy freely bargained for by the parties and [which] provides a means of giving effect to the intention of the parties.”

**I. THE ARBITRATION CONTRACT IN THIS CASE CANNOT BE ENFORCED UNDER EITHER THE 2004 OR 2003 VERSIONS OF THE ACT.**

Rather than directly attack the trial court's conclusion that the 2003 Act governed this arbitration contract, or demonstrate how this contract complies with 2004 statutory requirements, Abdulla offers only two semantic arguments which fail to resolve whether the trial court erred in this case.

First, Abdulla argues that the Utah Arbitration Act "anticipates" binding non-signatories because it applies to "[a] written agreement to submit any existing or future controversy."<sup>1</sup> (Appellant's Brief at 11). However, construing the Utah Arbitration Act to apply to a decedent's heirs lacks support in the statutory language and violates fundamental constitutional rights of the heirs. Although the Arbitration Act admittedly validates the ability to arbitrate future disputes, this came about as a legislative response to the judiciary's skeptical attitude toward privatization of legal disputes. *See, Barnhart v. Civil Service Emp. Ins. Co.*, 16 Utah 2d 223, 227-228, 398 P.2d 873, 876 (1965). No language in the Utah Arbitration Act expressly binds third party non-signatories and, in fact, the Utah Court of Appeals does not interpret the statute to bind non-signatories.

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<sup>1</sup> Abdulla incorrectly cites the Utah Uniform Arbitration Act as § 78-31a-3. This section was repealed in 2002 and effective May 15, 2003, became number § 78-31a-107. Abdulla also alleges that arbitration agreements are enforceable under this section "except under certain conditions not found or argued here." On the contrary, Appellee maintains that the arbitration agreement in this case fails "upon a ground that exists at law or in equity" as more fully argued below regarding unconscionability. *See*, Utah Code Ann. § 78-31a-107(1) (West 2006).

*Cade v. Zions First Nat. Bank*, 956 P.2d 1073, 1077 (Utah App.,1998)(“a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute.”)(citation omitted).

Further, legislation expressing a general approval of arbitration agreements cannot be interpreted so as to run afoul of constitutional rights. Construing the Utah Arbitration Act to bind non-signatory heirs to an arbitration agreement, thereby depriving them of their constitutional rights to court access, jury trial and redress for wrongful death, not only exceeds the scope of the Act’s plain language, but violates the well-established rule requiring avoidance of constitutional conflict. *See, State v. Mooney*, 2004 UT 49, ¶ 12, 98 P.3d 420 (appellate courts hold “a duty to construe statutes to avoid constitutional conflicts.”).

Second, Abdulla suggests that the Utah Health Care Malpractice Act “envision[s] the enforcement of arbitration agreements against persons other than the patient.” (See, Appellant’s Brief at 11). Abdulla construes the “all persons claiming damages” of Utah Code Annotated § 78-14-17(1)(b) (2004) to mean that everyone is automatically bound by arbitration agreements. However, the selected language comes from a subsection of the code designating the required provisions within an arbitration agreement before it will be held valid. It is not a statutory requirement that the entire universe of all persons therefore are bound by arbitration. Rather, the statutory language sets forth the provisions required to be contained in an arbitration agreement. For example, the subsection relied

upon by Abdulla also includes language that arbitration agreements require: (iv) rights of rescission; (v) length of the agreement, (vi) right to retain legal counsel; and, (vii) scope of the agreement. Abdulla's argument assumes the very issue before the court: whether or not non-signatories can be bound by the terms of the agreement. In short, the language "the agreement shall require" assumes there to be an agreement in the first place. Here, Lisa Bybee and the heirs have not agreed to arbitrate and, hence, there is no agreement on which to impose the requirements of subsection 78-14-17(b).

Abdulla's semantic argument notwithstanding, the arbitration contract at issue in this case cannot be enforced because: (1) it attempts to bind non-signatories absent an authority to do so under the 2003 Act; and, (2) it fails to satisfy the 2004 Act's statutory requirements. *See, e.g., Allen v. Pacheco*, 71 P.3d 375, 381 (Colo. 2003) ("arbitration agreement is unenforceable against [heir], because the agreement does not comply with the [statutory] requirements set forth in the Colorado HCAA.").

A. THE 2003 ACT DOES NOT EMPOWER PATIENTS AND PHYSICIANS TO BIND NON-SIGNATORY THIRD-PARTIES.

Abdulla offers only a single conclusory paragraph, completely devoid of any legal authority, supporting the claim that the 2003 Act does not apply. In sum, Abdulla argues the legislature simply "clarified" prior law and did not "expand" the law by making arbitration agreements binding on all claims where "the sole basis for the claim is an injury sustained by [the patient]." (Appellant's Brief at 12). Abdulla then, by *ipse dixit*, concludes that application of the 2003 Act is not "a question of retroactivity." (Id.).

Abdulla offers no case authority or analysis of the provisions at issue and submits no argument other than the asserted conclusions.

In the action below, Abdulla urged that the 2004 Act applied retroactively because it was merely a ‘procedural’ mechanism *and* a ‘clarification’ of the law. (R. 93). Abdulla has apparently abandoned the procedural exception argument on appeal and urges only the ‘clarification’ exception to allow retroactive application of the 2004 Act. (Appellant’s Brief at 12). Nonetheless, a review of the provisions at issue demonstrates that application of the 2004 Act as urged by Abdulla constitutes an impermissible retroactive change in substantive rights and not merely a ‘clarification’ of preexisting law.

Under the former Act, there existed no express legislative authority to either (1) bind third persons not party to the contract or (2) bind an unborn child. Under the amended Act, legislative permission exists for binding "the unborn child of the person" receiving treatment or "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 receiving treatment. *See*, Utah Code Ann. § 78-14-17(1)(b)(vii)(B)(III) and (1)(b)(vii)(C) (2004). Prior to passage of the current Act, the 2003 Act granted no legislative power to bind either third parties or unborn children.

Abdulla attempts to bind the third party heirs through retroactive application of the 2004 Act. Although Abdulla claims this is merely a clarification, there can be no doubt that the choice to forego judicial resolution of disputes in favor of arbitration represents a

substantive right that cannot be taken away so easily.

The clarification exception allowing retroactive application of a statute only comes into play when there exists an unresolved ambiguity within a statute. “Statutory amendments that merely clarify an ambiguity in an original statute will be given retroactive effect.” *Evans & Sutherland Computer Corp. v. Utah State Tax Commission*, 953 P.2d 435, 440 (Utah 1997). Further, courts presume that legislative changes are intended to change existing legal rights. “Ordinarily, the presumption is that an amendment is intended to change existing legal rights.” *Visitor Information Center Authority of Grand County v. Customer Service Div., Utah State Tax Com’n*, 930 P.2d 1196, 1198 (Utah 1997). Abdulla adduces no evidence to support a claim that an ambiguity exists. Moreover, because the language in the 2004 statute is completely absent from the prior statute, there could not be an ambiguity in need of clarification. Abdulla fails to overcome the presumption against applying the clarification exception.

Finally, the 2004 changes affected the fundamental rights to seek court redress for wrongful death. *Jenkins v. Percival*, 962 P.2d 796, 799 (“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”). While the new statute may not have ‘enlarged, eliminated or destroyed’ any of Mark Bybee’s rights, it most certainly affected the rights of the third party heirs, including minor children. Prior to the legislative grant of power, patients could not bind non-signatories.

The 2003 Act did not bind third-party non-signatory claims to arbitration. When Mark Bybee signed the arbitration contract, he held no statutory authority to unilaterally eliminate his heir's right to jury trial and court access because those provisions came into effect in 2004. In the absence of a statutory ability to eliminate these important constitutional rights of third parties, the arbitration agreement is void and cannot be enforced against Lisa Bybee.

**B. BECAUSE THE ARBITRATION AGREEMENT FAILS TO COMPLY WITH THE 2004 ACT, IT CANNOT BE ENFORCED AGAINST ANYONE.**

The arbitration contract in this case also fails to comply with the 2004 Act's requirements and cannot be enforced. A contract which violates the express public policy of the legislative branch cannot be enforced by the judiciary. "There can be no doubt concerning the duty of this court to invalidate contracts which have a tendency to be injurious to the public welfare." *Frailey v. McGarry*, 116 Utah 504, 516, 211 P.2d 840, 847 (1949). Public policy, as expressed by the Utah State Legislature, demonstrates that agreements to arbitrate medical malpractice claims cannot be executed without informing the patient of her right to consult with legal counsel, presumably before signing the agreement. "[T]he agreement shall require that... the patient has the right to retain legal counsel." *See*, Utah Code Ann. § 78-14-17(1)(b)(vi) (2004).

Abdulla's agreement fails to inform patients of the right to consult with legal counsel. Without informing patients of their right to consult with an attorney, a patient



cannot intelligently decide whether to revoke the agreement under the 10 day period of § 78-14-17(a)(vii). Further, Utah Code Ann. § 78-14-17(1)(a)(viii) states: “the patient shall be given, in writing, ...the right of the patient to require mediation of the dispute prior to the arbitration of the dispute.” Nowhere does Abdulla's arbitration agreement inform patients of their right to demand mediation.

The legislature chose to use the word shall with both these requirements. Other courts interpreting statutes permitting arbitration agreements in the medical malpractice context require strict compliance with the statutory requirements. *See, e.g., Allen*, 71 P.3d at 381 (“arbitration agreement is unenforceable against [heir], because the agreement does not comply with the [statutory] requirements set forth in the Colorado HCAA.”); *and, Ewald v. Pontiac General Hosp.*, 329 N.W.2d 495, 497 (Mich. Ct. App. 1983)(“With failure of strict compliance with the statute, no valid arbitration agreement was formed.”). Here, effect should be given to the mandatory requirements imposed by our legislature. By not informing patients of their right to counsel, patients may not fully understand the legal implications of waiving not only their substantial court access and jury rights, but also those of their heirs. Because Abdulla’s contract fails to comply with the statutory requirements, no valid arbitration agreement was formed.

**II. A PATIENT MAY NOT UNILATERALLY ELIMINATE AN HEIRS CONSTITUTIONAL RIGHTS TO COURT ACCESS AND JURY TRIAL FOR REDRESS OF THE CONSTITUTIONALLY PROTECTED WRONGFUL DEATH CLAIM.**

The Utah Constitution protects the claim of wrongful death.<sup>2</sup> The Utah Constitution guarantees both the right to court access<sup>3</sup> and jury trial.<sup>4</sup> “[T]he right of trial by jury should be scrupulously safeguarded.” *Abdulkadir v. Western Pac. R. Co.*, 7 Utah 2d 53, 55, 318 P.2d 339 (1957). It would be unprecedented to allow a third-party to intentionally, through contract, modify, eliminate or control constitutional rights without permission of the individual to whom those rights belong. In *Jenkins v. Percival*, 962 P.2d 796, 800 (Utah 1998) the court observed that “while the public policy of promoting speedy and inexpensive resolutions of controversies favor arbitration in some cases, these considerations cannot outweigh the constitutional right of access to the courts unless one waives that right.” Here, Appellant Abdulla seeks to eliminate Lisa Bybee and her

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<sup>2</sup> “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.” Utah Constitution Article XVI, Section 5.

<sup>3</sup> Utah Constitution Article I, Section 11. “All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.”

<sup>4</sup> Utah Constitution Article I, Section 10.

children's constitutional rights by virtue of a contract to which they are not parties.<sup>5</sup>

Appellant Abdulla relies extensively on *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327 (Utah 1997) to establish the proposition that, because a decedent may deny his heirs of any recovery by allowing a statute of limitations to run, Mr. Bybee could unilaterally deprive his heirs of the ability to pursue their constitutional right to court access for redress of their constitutionally protected wrongful death claim. *Jensen* involved very difficult factual scenarios which included collusion amongst plaintiff's attorneys and defendant doctors to fraudulently deprive the plaintiff of their claims as well as attendant delays and prosecution of the claim.

Importantly, *Jensen* only made wrongful death actions subject to *some* of the *defenses* which would have been available against the decedent. "[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." *Id.* at 332.

*Jensen* does not control or limit *all* actions flowing from medical malpractice. "Rather than establishing a uniform rule for all derivative malpractice actions... *Jensen* addresses the statute of limitations question solely in the wrongful death context, and we decline to adopt [the] suggestion that we expand its holding to include all derivative

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<sup>5</sup> Construing the Malpractice Act to permit elimination of an heirs right to pursue their fully vested claim also runs afoul of Utah's constitutional guarantee to due process. *See*, Utah Const. art I, § 7.

medical malpractice claims.” *Dowling v. Bullen*, 2004 UT 50, ¶14, 94 P.3d 915. Put another way, *Jensen* addressed wrongful death solely in the context of a statute of limitations bar. Nonetheless, Abdulla contends that *Jensen* in effect establishes a uniform rule allowing a patient to eliminate the heirs constitutional guarantees and rights. Indeed, Abdulla goes so far as to assert that, under *Jensen*, a patient can unilaterally eliminate any and all rights heirs might have for wrongful death through settlement, compromise or stipulation. (See, Appellant’s Brief at 8). Abdulla’s argument stretches *Jensen* well beyond the express holding in *Jensen* and beyond any reasonable interpretation of that case. More importantly, Abdulla’s argument runs contrary to statute.

Under former Utah Code Ann. § 78-14-17 no legislative expression allowed a patient to bind third parties. *See*, Utah Code Ann. § 78-14-17 (2003). The 2003 version was in effect at the time Mr. Bybee signed the arbitration contract. By contrast, under the 2004 version, § 78-14-17(1)(b)(vii)(B) and (vii)(C) expressly allowed a patient to choose arbitration for “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 the patient. *Id.* Absent legislative empowerment to alter or limit the constitutional rights of third parties, there exists no basis on which to compel Lisa Bybee and her children to forego their constitutional right of court access for redressing the constitutionally protected wrongful death cause of action. In light of *Dowling* and the lack of legislative power allowing a patient to bind third parties, the trial court did not need to ‘discuss’ *Jensen*.

Further, assuming that § 78-14-17 could apply retroactively, interpreting the statute as Abdulla urges infringes upon constitutional rights. Applying the statute to eliminate an heirs right to court access and jury trial for wrongful death contravenes the constitutional protections afforded those rights. Moreover, applying § 78-14-17 to eliminate these rights before they even come into existence also violates due process.<sup>6</sup> However, constitutional conflict can be avoided by interpreting the statute's language in a manner both consistent with the spirit of the statute as well as the constitutional rights at issue.

Because injury to the patient does not form the sole basis upon which a wrongful death claimants cause of action exists, § 78-14-17 does not operate to control the heirs wrongful death cause of action. Under Utah Code Annotated § 78-14-17(b)(vii)(C) arbitration agreements may "only apply to: 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 patient]." Wrongful death claims, however, involve more than just an injury sustained by a patient.

A wrongful death claim is "a new cause of action which runs directly to the heirs to compensate each for the individual loss suffered by the death.... [and] is a personal property right of the heir." *Switzer v. Reynolds*, 606 P.2d 244, 246 -247 (Utah 1980). In other words, the sole basis for a wrongful death claim is not merely injury to the patient, but also involves injury to the heirs and beneficiaries who lose the love society and companionship of the individual who died as a result of medical malpractice. Because

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<sup>6</sup> Utah Constitution Article I, Section 7

the sole basis for the claim is not merely injury to the patient, § 78-14-17 does not operate in a manner which eliminates the important and substantive constitutional rights of non-signatory third parties.

Courts are obligated to give effect to each of the words and phrases used by the Legislature within a statute. While interpreting a statute this Court seeks “to render all parts of the statute relevant and meaningful and we therefore presume the legislature used each term advisedly and according to its ordinary meaning. Consequently, we avoid interpretations that will render portions of a statute superfluous or inoperative.” *State ex rel. Div. of Forestry, Fire & State Lands v. Tooele County*, ¶ 10, 44 P.3d 680 (citations omitted). Abdulla’s argument effectively reads out of the statute the “sole basis for the claim” language. A wrongful death claim depends upon more than just injury to the patient and is in and of itself an entirely new cause of action. “The right of action at common law in favor of the decedent was based on one fact,—the wrongful act; but the right under the statute in favor of the heir is based on two,—the wrongful act and the death.” *Mason v. Union Pacific Railway Co.*, 7 Utah 77, 24 P.2d 796, 797 (1890).

A more appropriate interpretation for the “sole basis” language, one which avoids constitutional conflict, would be to apply that language in the context of a survival action, as opposed to a claim for wrongful death. Under a survival action, a cause of action for personal injury does “not abate upon the death of the injured person... the personal representatives or heirs of the person who died have a cause of action against the

wrongdoer... for special and general damages.” Utah Code Ann. § 78-11-12(1) (West 2006). The sole basis for a survival action is in fact injury to the patient. It therefore makes sense that the legislature intended to apply arbitration agreements to survival actions. However, it makes no sense, and conflicts directly with constitutional rights, to interpret § 78-14-17 to control the wrongful death cause of action, an action which is not solely based on injury to the patient and an action which has not vested or even come into existence until after the death of the patient.

### **III. WRONGFUL DEATH CLAIMS DO NOT BELONG TO THE DECEDENT.**

A wrongful death claim belongs to the heirs. Utah courts have long recognized the separate and distinct nature of wrongful death claims. Under *Halling v. Industrial Commission*, 71 Utah 112, 263 P. 78 (1927) the action itself belongs to the statutory heirs and not to the decedent's estate. “[T]he right of an employee's dependents to recover for wrongful injury resulting in the death of such employee is not the result of any contract. It is a constitutional right which cannot be denied dependents without their consent, except by a court or other judicial tribunal of competent jurisdiction after notice given and a hearing had.” *Id.* at 81.<sup>7</sup> It follows that consent to arbitration and waiver of jury trial by

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<sup>7</sup> See, also, *Mason v. Union Pacific Railway Co.*, 7 Utah 77, 24 P.2d 796 (1890)(the heirs’ “legal rights were not invaded until death ensued, and then the statute gave them instantly a right of action to redress the losses following that invasion of their rights.”); *Hull v. Silver*, 577 P.2d 103, 104 (Utah 1978)(holding that a wrongful death action “is not derivative” and cannot be limited by interspousal tort immunity); and, *Haro v. Haro*, 887 P.2d 878, 879 (Utah Ct. App. 1994)(a decedent’s estate could not maintain

the decedent can bind only the decedent and not the statutory heirs.

Abdulla contends that “[a]s a general rule, the heirs of the 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.” (Appellant’s Brief 7). Contrary to Abdulla’s contention several authorities allow a wrongful death cause of action to be brought *in spite of* a prior adjudication or settlement by the decedent. “Injured persons may release their own claims; they cannot, however, release claims that are not yet in existence and that accrue in favor of persons other than themselves.” *Thompson v. Wing*, 637 N.E.2d 917, 922 (Ohio 1994). *See, also, Halling v. Industrial Commission*, 71 Utah 112, 263 P. 78 (1927)(where this Court held that the wife and other heirs of the deceased employee could pursue a claim for wrongful death even though decedent had pursued and lost a claim based on the same injuries); *and, Earley v. Pacific Elec. Ry. Co.*, 167 P. 513, 513-14 (Cal. 1917)(noting survival actions could be compromised by decedent, but that wrongful death actions cannot).

*Jensen* reaffirmed that “an action for wrongful death is an independent action accruing in the heirs of the deceased.” *Jensen*, 944 P.2d at 332. *Jensen* simply chose the more specific statute of limitations for medical malpractice as applicable to wrongful death claims. *Id.* *Jensen* did not elevate the status of the injured party to a lord with

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an action for wrongful death, claim belongs exclusively to heirs); *and, Oxendine v. Overturf*, 1999 UT 4 ¶ 9, 973 P.2d 417(same).



dominion over claims and rights which: (1) did not belong to him or her; and, (2) did not even exist yet as a claim which could be compromised.

In *Jensen* this Court adopted the minority rule regarding a statute of limitations as it applies to wrongful death claims. As to the defense of the statute of limitations “the considerable majority of the courts have held that the statute runs against the death action only from the date of death, even though half that time the decedent’s own action would have been barred while he was living.” W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 127 at 957 (5<sup>th</sup> ed. 1984). Considering the circumstances surrounding *Jensen* and the holding itself, this Court should take this opportunity to reign in any expansion of what remains a minority view, applied in the very unique factual circumstances of that case.

Indeed, several courts recognize that even the *wholly* derivative claim for loss of consortium cannot be compromised by the other spouse. Although some courts recognize a release by the injured spouse as binding on the non-injured spouse, “the more prevalent view seems to be that the loss of consortium suit is not barred as it is a separate and independent cause of action which is the property of the spouse and cannot be controlled by the injured person.” 29 A.L.R.4th 1200, *Injured party's release of tortfeasor as barring spouse's action for loss of consortium* (1984). Spouse’s are simply incapable of jeopardizing or limiting a claim to which they hold no interest. “[S]ince Mrs. Davis neither participated in nor signed the release, it cannot preclude her claim against

Huskipower for loss of consortium.” *Davis v. Huskipower Outdoor Equipment Corp.*, 936 F.2d 193, 198 (C.A.5 1991). If the derivative claim for loss of consortium cannot be limited by a spousal release, then certainly the constitutionally protected rights of court access/jury trial and wrongful death cannot be unilaterally eliminated by Dr. Abdulla’s arbitration contract.

Abdulla relies on a string of ‘exculpatory clause’ case law. Abdulla cites *Russ v. Woodside Homes, Inc.*, 905 P.2d 901, 905 (Utah Ct. App. 1995) which defined exculpatory clauses as relieving “one party from the risk of loss or injury in a particular transaction or occurrence and deprive the other party of the right to recover damages for loss or injury.” Abdulla also relies on *Paralift, Inc. v. Superior Court*, 23 Cal. App. 4<sup>th</sup> 748 (1993)(preinjury release/hold harmless by individual engaged in skydiving binding on heirs); and, *Rowan v. Vail Holdings, Inc.*, 31 F Supp. 2d 889 (D. Colo. 1998)(skier’s preinjury release/hold harmless contract binding on heirs.) (See, Appellant’s Brief at p. 8). These cases fail to advance an analysis of whether a decedent may eliminate the constitutional rights of his heirs.

Exculpatory clause cases involve ‘pre-injury’ releases of liability whereby the tortfeasor would be released from all liability for injury as a result of negligence. These types of releases usually arise as part of engaging in some hazardous activity, such as skydiving or skiing. However, citation to exculpatory clause case law actually undermines argument that a decedent-victim of medical malpractice may barter away

constitutional rights of third party heirs.<sup>8</sup>

Exculpatory clause contracts waiving all claims of negligence by the patient against the physician are void as against public policy. *See, Tunkl v. Regents of University of Cal.*, 383 P.2d 441 (Cal. 1963). Where an exculpatory waiver affects services within the public interest (e.g., common-carriers, residential leases, inns & hotels), such waivers will not be enforced. Factors in determining whether an exculpatory contract impermissibly infringes upon public interest include: transactions involving business of a type generally thought suitable for public regulation;<sup>9</sup> party seeking exculpation performs a service of great importance to the public; the service is a often a matter of practical necessity; the party holds himself out as willing to perform this service for any member of the public who seeks it; because of the essential nature of the service,

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<sup>8</sup> Abdulla also relies on *Kulling v. Grinders for Industry, Inc.*, 115 F. Supp. 2d 828 (E.D. Mich. 2000) and *In re Estate of Shepley*, 645 P.2d 605 (Utah 1982). *Kulling* involved Michigan law which holds that wrongful death claims are derivative. *Id.* at 852. The court rejected Plaintiff's argument that their claim was not subject to a release based on the fact that "Plaintiff seeks to have it both ways, arguing that the Michigan act confers separate, substantive rights upon the heirs of Mr. Kulling that are not displaced by the ADEA's remedial scheme, yet also arguing that this separate wrongful death claim is sufficiently 'derivative' of Mr. Kulling's ADEA claim that the protections of the OWBPA extend to the heirs' claims as well." *Id.* at 852-853. *Kulling* cannot advance any meaningful analysis in this case where the arguments and authority differ so greatly from the facts at bar.

*Shepley* involved only the question whether an *estate*, as distinguished from heirs, could be bound by the decedents contractual agreement to pay attorney fees. (See, Appellant's Brief at 8-9). In that sense, *Shepley* is consistent with the idea that survival actions may be limited by decedent's contracts, but wrongful death claims cannot.

<sup>9</sup> Utah law extensively regulates the practice of medicine. *See*, Utah Code Ann. § 58-67-101, *et seq.* (West 2006).

in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services; and, in exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation; and, finally, as a result of the transaction, the person of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents. *Id.* at 445-446.

Not surprisingly, each of these factors mirror those when presenting a patient with an arbitration agreement, including the ability of Abdulla to withhold medical services if Mr. Bybee refused to sign.<sup>10</sup> To the extent that exculpatory clauses might allow a decedent to preclude his heirs to bring a claim, that analysis fails when placed in the context of medical care, a public interest service. *Tunkl* refused to uphold an exculpatory clause in the medical context based on the above factors. After noting that inns and hotels cannot exculpate themselves from negligence, the *Tunkl* court concluded “[w]e see no cogent current reason for according to the patron of the inn a greater protection than the patient of the hospital; we cannot hold the innkeeper's performance affords a greater public service than that of the hospital.” *Id.* at 447. To the best of counsel’s legal research ability, no case exists where a court enforced a pre-injury release of liability signed by a patient.

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<sup>10</sup> See, Utah Code Ann. § 78-14-17(1)(a)(iv) (2003)(which allows physicians to withhold treatment for refusal to sign an arbitration contract *except* in the emergency room context).

*Tunkl* voices those important policy reasons why adhesive contracts affecting substantive rights should not be enforced. Parties should certainly be allowed to arrange their affairs through private contract. However, the disparate differences in bargaining power between a patient and physician require careful scrutiny and review of the rights released. While insisting on an arbitration contract Abdulla exercised a decisive advantage in bargaining power, the ability to withhold medical care. Mr. Bybee, the would-be patient, was in no position to reject the proffered agreement. A doctors admission room, or for that matter, examination room, certainly contains no bargaining table where, as would occur in a private business transaction, the patient can debate the terms of the arbitration contract. *Id.*

Similarly, in the context of minor rights, parents cannot waive a minor's right to maintain an action for negligence by agreeing to exculpatory clauses on behalf of the minor. In *Hawkins v. Peart*, 37 P.3d 1062 (Utah 2001) this Court refused to allow a parent to unilaterally waive a minor's cause of action. The *Hawkins* court stated "[Defendant] has cited no source of law, and we are aware of none, granting parents in Utah a general unilateral right to compromise or release a child's existing causes of action without court approval or appointment to that effect." If a parent cannot waive a minor's cause of action for negligence, then Mr. Bybee cannot eliminate the constitutional rights of Mr. Bybee's children in this case.

Abdulla argues that "[t]his Court should honor and enforce Mr. Bybee's right... to

commit all claims... to arbitration.” (Appellant’s Brief at 10). However, it is not solely Mr. Bybee’s rights which are at stake. In the case at hand, the sole basis for the claim is not injury sustained by Mark Bybee. Rather, it is a claim for wrongful death, a claim which the statutory heirs did not agree to arbitrate. Prior to forcing a party to arbitrate, a court “must first conclude that arbitration is a remedy which has been bargained for by the parties. Only when such agreement on arbitration exists may we encourage arbitration by liberal interpretation of the arbitration provisions themselves.” *Cade*, 956 P.2d 1076-77. This principle must be especially honored because the Utah Constitution guarantees a wrongful death right of action. *See*, Utah Const. art. XVI, § 5. Because Lisa Bybee’s claims do not depend solely upon injury, but instead upon separate and independent constitutional rights, the Malpractice Act cannot extend binding arbitration to govern her claim without eliminating those rights.

Public policy supports limiting a wrongful death claim to the extent a statute of limitations has run or comparative fault of the decedent exceeds that of the tortfeasor. The mere fact that a claim involves the constitutional right to wrongful death does not eliminate all defenses and give the claimants a strict liability claim against defendants. On the other hand, it is entirely inappropriate to allow one individual to exercise control over the claims of another through contract, especially where those claims involve constitutional rights such as jury trial and court access. Public policy grounds support the ability of a spouse to maintain a loss of consortium claim, despite her husband’s

settlement of that claim because he is master of only *his* claim. Public policy supports the ability of the heirs to maintain their constitutional right of access to a jury trial for the constitutionally protected claim of wrongful death despite an arbitration agreement by the decedent because the decedent is the master of only his claim, not the constitutional rights of his heirs.

Abdulla cites a host of cases, claiming that “[c]ourts in other jurisdictions also agree that the heirs are subject to the contracts of the decedent in wrongful death actions, including arbitration agreements.” (See, Appellant’s Brief at 9, n. 2). A review of the cases cited shows that, in the consumer medical malpractice context, courts are not as willing to enforce arbitration agreements as Abdulla might hope. Of the 16 cited cases, six involved complex business transactions ranging from brokerage agreements to indemnity provisions governing Lloyd’s insurance contracts over salvage of oil tankers. (See, Appendix “3”). The remaining ten cases involved consumer arbitration. (Id.). However, of those ten, three refused to actually enforce the arbitration agreement at issue. (Id.). Of the remaining cases, several enforced the arbitration provision because the claimants allegations depended directly on the contract which also imposed arbitration as a requirement. (Id.). *See, e.g., Pelz v. Sears, Roebuck & Co.*, 367 F. Supp. 2d 711, 718-19 (E.D. Pa. 2005)(Heirs ‘equitably estopped’ from escaping arbitration in contract which provided the very basis for the claim).

Several of the cases relied upon by Abdulla originate in California. Interestingly,

one of those cases held that “[a]ll nonsignatory arbitration cases are grounded in the authority of the signatory to contract for medical services on behalf of the nonsignatory-to bind the nonsignatory in some manner.” *County of Contra Costa v. Kaiser Foundation Health Plan, Inc.*, 47 Cal.App.4th 237, 243, 54 Cal.Rptr.2d 628, 632 (Cal. App. 1 Dist. 1996). Abdulla has not pointed to any authority held by Mark Bybee which enabled him to eliminate the constitutional rights of his wife and children in exchange for health care. Finally, none of the cases relied upon by Abdulla actually involved an assertion that the arbitration agreement impermissibly infringed upon the constitutional rights of the non-signatory.

By contrast, several courts refuse to enforce arbitration agreements against non-signatory parties. In *Ciaccio v. Cazayoux*, 519 So.2d 799 (La. App. 1 Cir. 1987) a husband brought a claim for medical malpractice against a physician when his children died during childbirth. The wife had signed an arbitration agreement providing “any controversy arising out of claims based on negligence or medical malpractice between patient, whether a minor or an adult, or the heirs at law... shall be submitted to arbitration.” *Id.* at 804. The physician attempted to compel the husband to participate in arbitration. The court refused to compel arbitration because “ordinary contract principles govern the question of who is bound by an arbitration agreement, and a party cannot be



required to submit to arbitration any dispute that he has not agreed to submit.” *Id.*<sup>11</sup> Utah courts similarly hold to this principle. *Cade*, 956 P.2d 1076-77.

Where a physician seeking to enforce an arbitration agreement fails to meet the burden of demonstrating assent by the patient, the agreement will not be enforced. In *Obstetrics and Gynecologists et. al. v. Pepper*, 693 P.2d 1259 (Nev. 1985) the court affirmed a trial court’s decision not to enforce an arbitration agreement against a patient. Characterizing the arbitration contract as ‘adhesive’ because no meaningful bargaining could occur, the court placed the burden on the clinic to demonstrate that the patient had agreed to the terms. Because the physician could not present evidence which compelled the conclusion that the patient knowingly assented, the agreement was unenforceable. Here, similarly, Abdulla cannot conclusively demonstrate that his take-it-or-leave-it arbitration contract was fully assented to by Mark Bybee. No one ever apparently read or explained the contract as demonstrated by the facts that: (1) Mark Bybee signed where there should have been a clinic employee’s signature verifying explanation; and, (2) no signature by a clinic employee, necessary to verify the contract had been read and explained, appeared anywhere. (R. 21). Further, there can be absolutely no question that

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<sup>11</sup> See, also, *Benjamin v. Pipoly*, 800 N.E.2d 50, 2003-Ohio-5666, at ¶ 36 (“Because arbitration is a matter of contract, a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”); *Peters v. Columbus Steel Castings Co.*, 2006 WL 225274, \*5 (Ohio App. 10 Dist. 2006)(“because a wrongful death claim is independent from any claim the decedent could have pursued... wrongful death beneficiaries, who are not otherwise bound to an arbitration agreement, are not required to arbitrate simply because the decedent agreed to do so.”)

Lisa Bybee and the heirs had absolutely no opportunity to understand the implications of Mark's alleged waiving of their constitutional rights.<sup>12</sup> The trial court in this case similarly correctly concluded that given the absence of evidence of assent, the arbitration agreement was unenforceable.

The fundamental right to court access and jury trial cannot be waived without a voluntary, knowing and intelligent decision by the party to whom the waiver would apply. In *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1 (Mont. 2002) the court refused to enforce an arbitration contract against a consumer in the broker-securities context. The court found that “[f]or a fundamental right [of jury trial] to be effectively waived, the individual must be informed of the consequences before personally consenting to the waiver.” *Id.* at 15. Lisa Bybee and the heirs did not personally consent to waive their rights to jury trial for the constitutionally protected claim of wrongful death. They did not even know those rights were in jeopardy until they sought to assert them. Because there is no knowing waiver of the rights by those who held them, the arbitration contract cannot be enforced against Lisa Bybee and the children of Mark Bybee.

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<sup>12</sup> See, also, *Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992)(refusing to enforce arbitration agreement against patient seeking abortion who “was under a great deal of emotional stress, had only a high school education, was not experienced in commercial matters, and is still not sure ‘what arbitration is.’”).

**IV. PUBLIC-POLICY FAVORING ARBITRATION AGREEMENTS CANNOT SUPPORT UNILATERALLY ELIMINATING THIRD PARTY RIGHTS AND NO PHYSICIAN-PATIENT PRIVILEGE IS IMPLICATED IN THIS CASE.**

The public policy favoring enforcement of arbitration agreements only comes into play upon a finding that a party has agreed to arbitrate. “[A]lthough there is a presumption in favor of arbitration, a party will not be required to arbitrate when it has not agreed to do so.” *Cade v. Zions First Nat. Bank*, 956 P.2d 1073, 1076 -1077 (Utah Ct. App. 1998)(citations omitted). The burden is on the party seeking to compel arbitration to demonstrate the existence of a valid and binding agreement. *Mohamed v. Auto Nation USA Corp.*, 89 S.W. 3d 830, 835 (Ct. App. Tex. 2002). This proof may not be by mere inference, but “direct and specific evidence of an agreement between the parties” is required. *McCoy v. Blue Cross and Blue Shield of Utah*, 2001 UT 31, ¶ 17, 20 P.3d 901, 905. It is undisputed in this case that neither Lisa Bybee nor the heirs agreed to the terms of the arbitration contract.

Abdulla raises a parade of horrors regarding patient privacy and confidential relationship between physicians and patients. However, the specters raised by Abdulla under the rubric “public policy” cannot overcome the more fundamental issue before the court: whether the rights of third-party nonsignatories may be controlled, jeopardized, or eliminated entirely and unilaterally. Furthermore, the realities differ significantly from the speculative fears urged by Abdulla.

Abdulla first argues that there are concerns regarding the privacy of the patient.

However if the patient wants to unilaterally eliminate the rights of third parties, he or she cannot be surprised or claim “privacy” by requiring those parties whose rights are at issue be informed. Abdulla presents no substantive reason as to why the waiver of the right to court access and jury trial for wrongful death suits cannot be made by those who would ultimately hold the claim.

Abdulla similarly argues that informing those who hold the claims for wrongful death in the right to jury trial in court access would invade upon the “confidential relationship.” But the upshot of Abdulla’s argument is that any waiver would be done in secret, and be maintained in secret, until it was far too late for anyone who held those rights to argue against the waiver. Under Utah Code Ann. §78-14-17(1)(a)(vii) (2004), a patient must revoke any arbitration contract within 10 days following signature. Indeed, it appears that even if the patient died within that 10 days the heirs in a wrongful death suit would be incapable of revocation based on the language that “a patient” must make the revocation. (Appellant’s Appendix 1).

Abdulla urges the significance of the patient’s personal privacy rights with respect to medical matters. The irony here is that a defendant physician would no doubt completely open up these alleged privacy rights in the name of ‘discovery’ while defending a lawsuit. More importantly, however, Abdulla himself should not be allowed to raise his patient’s privacy rights in order to defend himself.

Abdulla also, once again, turns to California law to support the proposition that the

patient's rights to contract somehow take precedent over the independent constitutional rights of third parties. As is so often the situation with California lower court authorities, the confusing and contradictory patchwork of case law fails to advance any meaningful analysis under Utah law. In *Baker v. Birnbaum*, 202 Cal.App.3d 288, 248 Cal.Rptr. 336 (Cal.App. 2 Dist.,1988) a California court came to opposite conclusion is that reached by the authority relied upon by Abdulla, *Gross v. Recabaren*, 206 Cal.App.3d 771, 775, 253 Cal.Rptr. 820, 822 (Cal.App. 2 Dist.,1988).

In *Baker*, one spouse contracted solely for medical services for herself and in doing so signed an arbitration agreement. The arbitration agreement in *Baker* governed "any dispute as to medical malpractice." *Baker*, 202 Cal.App.3d. at 290. Later, the wife developed cancer. The wife brought a lawsuit against the physician for medical malpractice while the husband brought a lawsuit for loss of consortium. The health care providers attempted to assert the arbitration agreement and forced the husband into arbitration. The *Baker* court declined. "Arbitration assumes, however, an election by the parties involved to use it as an alternative to the judicial process. A party cannot be compelled to arbitrate a dispute it has not elected to submit." *Id.* at 291. This apparent split amongst the California authorities remains unresolved by either the California Supreme Court or the California Legislature to date.

No question exists that Mr. Bybee's privacy rights and rights of personal determination are important. However, those rights simply fail to come into play with

regard to whether or not potential heirs in a wrongful death claim should be informed of the waiver of their claims in a timely manner allowing them to, at the very least, have input or be put on notice. In sum, no dispute exists that Mr. Bybee should be protected in his privacy rights, but this does not give him free reign to secretly eliminate the fundamental constitutional rights of his heirs and spouse.

**V. IF MRS. BYBEE SAW ANY BENEFIT IN PARTICIPATING IN ARBITRATION, THIS CASE WOULD NOT BE BEFORE THE COURT.**

Contrary to the assertions of Abdulla, Lisa Bybee's suit is one grounded in tort, not contract. Although there are cases compelling non-signatories to arbitration through a 'third-party' beneficiary theory, all of these cases involve a suit based on the contract itself. To this extent, the third-party beneficiary rule as applied to compel a non-signatory to participate in arbitration should actually be viewed as a theory under equitable estoppel. For example, in *Peltz v. Sears, Roebuck & Co.*, 367 F.Supp.2d 711, 719 (E.D.Pa. 2005) the plaintiffs brought a wrongful death claim when their parent died from heat exhaustion. The defendant, Sears, allegedly failed to timely repair the air conditioning unit under a maintenance agreement with the deceased. The maintenance agreement also required arbitration of any claims brought thereunder.

The court held the heirs were required to participate in arbitration because their cause of action arose only as a result of the maintenance agreement which contained the arbitration clause. "Under the equitable estoppel theory, a non-signatory to a contract will

be compelled to arbitrate if he or she knowingly exploits the agreement. The policy behind this rule is to prevent a non-signatory from embracing a contract, and then turning its back on the portions of the contract, such as an arbitration clause, that it finds distasteful.” *Id.* at 719. Because the wrongful death claims relied upon the maintenance agreement, and the maintenance agreement was incorporated by reference in the pleadings of the plaintiff, the wrongful death heirs were not free to ignore the arbitration clause.

Similarly, the case cited by Abdulla also involved allegations sounding in and depending upon the contract between the plaintiff and the defendant. *Terminix Intern. Co., LP v. Ponzio*, 693 So.2d 104, 105 (Fla.App. 5 Dist. 1997)(plaintiff alleged “that Terminix breached the agreement by failing to control or eradicate all pests listed in the pest control service agreement and that as a direct and proximate result of Terminix's breach, the plaintiffs suffered bodily injury.”). Although the court characterized this as compelling a third-party beneficiary to participate in arbitration, the reality is that the very claims brought were dependent upon the underlying contract. Accordingly, the theory should more accurately be characterized as equitable estoppel.

Considering the lengthy history of the wrongful death action in Utah being one considered wholly independent and not derivative, the cases relied upon by Abdulla applying equitable estoppel cannot bind the heirs in this case. Simply put, Lisa Bybee’s claim against Dr. Abdulla does not depend upon the arbitration agreement. Rather, Lisa

Bybee's claim for herself and the heirs arises out of professional negligence and the constitutionally protected cause of action for wrongful death.

On a broader note, this Court should consider the long-running effect that a decision binding a nonsignatory to an arbitration agreement may have. Specifically, left unchecked adhesive arbitration agreements will ultimately work their way into every aspect of a consumer's life. Furthermore, these agreements may include boilerplate language which not only waives the right court access and a jury trial, but also somehow limits the ability of arbitrators to award punitive damages, damages for pain and suffering, or even special damages leaving the arbitrator to award nothing more than the strict consequential damages from the breach of contract. Indeed, Terminix, the defendant in the case relied upon by Abdulla incorporates these very terms into its contracts. *See, Carll v. Terminix International Co., L.P.*, 793 A.2d 921, 924 (Pa.Super. 2002)(service contract with arbitration clause denied "the arbitrator the authority to award damages for personal injury which is alleged to have been caused by the application of a pesticide product in and around Appellees' home.").

Abdulla contends that three benefits are conferred by the arbitration agreement. First, arbitration allegedly constitutes a "speedy and inexpensive method." Speedy and inexpensive may be accurate relative to the commercial context where arbitration originally arose between parties dealing at arms length. Complex litigation between corporations can become a lengthy, arduous and very expensive process. However,



Abdulla cites nothing to demonstrate that arbitration in the personal injury arena speeds a result. Further, the costs of arbitration will no doubt result in a chilling effect upon plaintiffs forced to pay an incredibly high hourly rate for 1.5 arbitrators over a period of several days, if not a week. A severely injured plaintiff, potentially out of work or suffering the loss of primary income due to the death of the sole wage earner in the family will no doubt think twice before pursuing a claim when presented with the costs associated in paying up to \$350 per hour for arbitrators.

Abdulla further urges as a benefit involved in arbitration is the “easing court congestion.” (Appellant’s Brief at 15). Once again, Abdulla’s position fails to match the reality. For the fiscal year 2005 there were 262 total malpractice cases filed in the state of Utah. *See, Utah Courts Caseload Statistics* [http://www.utcourts.gov/stats/FY05/dist/fy2005\\_9.htm](http://www.utcourts.gov/stats/FY05/dist/fy2005_9.htm) . There were a total of 252,571 cases filed overall. Even if each and every one of those malpractice cases in 2005 had been subject to an arbitration agreement, it cannot be argued with any sincerity that this will somehow ease court congestion, let alone how such a minimal reduction would benefit Lisa Bybee.

Finally, Abdulla maintains a further benefit of arbitration will be that the proceedings become “private, not public.” This argument assumes that Lisa Bybee and the heirs in this case desire a private outcome. Abdulla has not demonstrated that this is in fact the case nor has Abdulla demonstrated any significant benefit to be derived as a

result of a private proceeding.

More importantly, our court system not only operates on the premise that the injured must be compensated for negligence of another, but also that there is a public vindication of rights as against the tortfeasor. The public vindication serves to deter future conduct which may result in harm. In tort law “courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of harm.” W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 4 at 25 (5<sup>th</sup> ed. 1984).<sup>13</sup> Privatizing the tort system by imposing private arbitration upon parties who never agreed to it in the first place simply cannot stand without simultaneously undermining the foundations and function of a public judiciary in addressing tortious conduct.

Abdulla cites no case compelling a nonsignatory to become an unwilling beneficiary to an arbitration agreement, except those cases where the cause of action was premised on the same contract incorporating the arbitration clause. At the end of the day, it cannot be disputed that if Lisa Bybee viewed a private arbitration, and paying arbitrators up to a rate of \$350 per hour as beneficial, she would have agreed to arbitration and this case would not currently stand before the Court. As the trial court

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<sup>13</sup> See, also, *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976 (Utah 1993)(acknowledging deterrent function of the tort system).

concluded “[i]t 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.” (R. 168).

**VI. BECAUSE THIS ARBITRATION AGREEMENT VIOLATES RULES REGARDING PROCEDURAL AND SUBSTANTIVE CONSCIONABILITY, THE AGREEMENT MUST BE INVALIDATED.**

Prior to finding that the arbitration contract can bind wrongful death heirs, the Court must first find that there is a valid arbitration agreement. In *McCoy*, the Utah Supreme Court held “the policy of liberally construing agreements in favor of arbitration is conditioned upon the prior determination that arbitration is a remedy freely bargained for by the parties.” 2001 UT 31, ¶ 15. Even if the arbitration agreement could be applied to eliminate the significant constitutional rights to jury trial, court access and the cause of action for wrongful death, no enforceable agreement to arbitrate exists in this case.

Arbitration agreements between patients and physicians may only be enforced “if they meet the standards applicable to all contracts.” *Sosa*, 924 P.2d at 359. As such, arbitration agreements resulting in unconscionability remain unenforceable. *Id.* Courts divide unconscionability into two separate branches: procedural unconscionability focusing on the formation of the agreement; and, substantive unconscionability focusing on the agreement's contents. *Id.* at 360. In effect, procedural unconscionability is found by “an absence of meaningful choice on the part of one of the parties” and substantive unconscionability arises where the terms “are unreasonably favorable to the other party.”

*Id.*

Procedural unconscionability results when there is no meaningful choice on the part of one party. Factors contributing to procedural unconscionability include: (1) whether a party could ask questions to aid in understanding the terms and conditions; (2) whether the party could meaningfully negotiate those terms once understood; (3) whether the agreement presented boilerplate language drafted solely by the stronger party; (4) whether the stronger party actually explained the terms; (5) whether the weaker party had a meaningful choice or instead felt compelled to accept the terms; and, (6) whether the stronger party employed practices to obscure provisions. *Sosa*, 924 P.2d at 362.

In this case, the arbitration contract and procedure for signing violate every factor employed by Utah courts in finding procedural unconscionability. The only evidence available at the time of signing shows that the contract was never explained to Mark Bybee. In the line to be signed by the person from Dr. Abdulla's office, Mark Bybee's name appears. (R. 21). Because Mark filled in the blank where he was supposed to sign, it is more likely than not the case that no one explained any of the four documents to him. Mark was presented with a stack of documents, four different boilerplate forms, to be filled out. Although Abdulla submitted affidavits below alleging explanation, those affidavits were never notarized. Further, Abdulla's Affidavit alleges "I and/or my staff had a discussion with Mark Bybee." (R. 43, ¶ 2). The affidavit clearly lacks a basis in personal knowledge where it fails to definitively state who actually conversed with Mr.

Bybee. Although the trial court concluded that Mark Bybee signed the arbitration contract, there is no factual conclusion that Mark Bybee actually received an explanation.<sup>14</sup> Finally, the individual heirs, whose rights are at stake in this case, were never given any opportunity to knowingly waive those rights in favor of arbitration. Because Abdulla never presented the agreement to Lisa Bybee, the process provides no procedural safeguards and violates all factors considered in finding procedural unconscionability.

Even absent procedural unconscionability, arbitration agreements may still be unenforceable due solely to substantive unconscionability. “Gross disparity in terms, absent evidence of procedural unconscionability, can support a finding of unconscionability.” *Sosa*, 924 P.2d at 361. Abdulla retains the right to seek judicial redress for claims against his patients. “[T]he 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.” (R. 38, Appellant’s Appendix 1 at Article 1). If arbitration represents a ‘speedy and inexpensive method,’ then Abdulla should embrace it for resolution of the only possible claim he could have against patients, recovery of his fees.

Yet, Abdulla instead opts out of arbitration for his claims and forces patients to arbitrate “all disputes and claims of any kind for injuries and losses arising from the

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<sup>14</sup> On this matter, the trial court as finder of fact should be accorded a discretionary standard of review.

medical care rendered.” (R. 38, Appellant’s Appendix 1 at Article 1). The agreement provides none of the procedural protections afforded through the judicial system.

Additionally, the agreement eliminates any right to an appeal of an adverse decision.

“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.” (R. 38, Appellant’s Appendix 1 at Article 2). Abdulla's unilateral retention of his significant constitutional right to seek judicial redress and the co-existing right to an appeal, while compelling third-party heirs and patients to forego their own rights, results in a gross disparity of terms and requires a finding that the contract is unconscionable and therefore unenforceable.

### CONCLUSION

Enforcing arbitration agreements against third-party non-signatories eliminates important constitutional rights. No statute enables a patient to give up the constitutional rights of his heirs to court redress by a jury. Even assuming the 2004 Act could apply retroactively, Abdulla’s construction once again impermissibly infringes upon these same rights and creates a statute ripe with constitutional infirmity. Of course, enforcement of the arbitration agreement to unilaterally infringe on these rights assumes a valid arbitration agreement. However, Abdulla cannot demonstrate the existence of a valid and enforceable agreement in this case. Abdulla’s agreement fails to satisfy all the requirements under the 2004 Act. Even if an enforceable agreement existed, it violates

both procedural and substantive conscionability. The circumstances under which the agreement is signed lack procedural safeguards, especially as to the third-party heirs whose rights secretly disappear under the agreement. Finally, because Abdulla retains in himself the right of court access while simultaneously eliminating the rights of his patients, as well as non-signatory rights, substantive unconscionability prohibits enforcement.

DATED this 30<sup>th</sup> day of October, 2006.

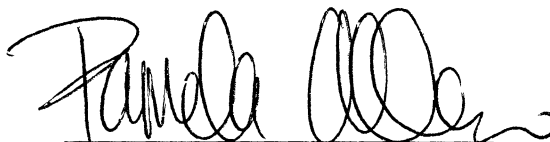


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CERTIFICATE OF MAILING

I hereby certify that on this 30th day of October, 2006, I mailed a true and correct copy of the above and foregoing Brief of Appellee, postage prepaid to:

Brian P. Miller  
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SECRETARY

# APPENDIX 1



UTAH CODE, 1953

TITLE 78. JUDICIAL CODE

PART II. Actions, Venue, Limitation of Actions

CHAPTER 14. MALPRACTICE ACTIONS AGAINST HEALTH CARE PROVIDERS

78-14-17 Arbitration agreements.

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

(a) the patient shall be given, in writing and by verbal explanation, the following information on:

(i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;

(ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;

(iii) the patient's responsibility, if any, for arbitration-related costs under the agreement;

(iv) the right of the patient to decline to enter into the agreement and still receive health care if Subsection (2) applies;

(v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date;

(vi) the right of the patient to have questions about the arbitration agreement answered; and

(vii) the right of the patient to rescind the agreement within 30 days of signing the agreement; and

(b) the 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;

(iv) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;

(v) the patient be given the right to rescind the agreement within 30 days of signing the agreement; and

(vi) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date.

(2) Notwithstanding Subsection (1), a patient may not be denied health care of any kind from the emergency department of a general acute hospital, as defined in Section 26-21-2, on the sole basis that the patient or a person described in Subsection (5) refused to enter into a binding arbitration agreement with a health care provider.

(3) 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.

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

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

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

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

#### NOTES, REFERENCES, AND ANNOTATIONS

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

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

**Effective Dates.** --Laws 1999, ch. 278 became effective on May 3, 1999, pursuant to Utah Const., Art. VI, Sec. 25.

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# APPENDIX 2

WEST'S UTAH CODE ANNOTATED

TITLE 78. JUDICIAL CODE

PART II. ACTIONS, VENUE, LIMITATION OF ACTIONS

CHAPTER 14. UTAH HEALTH CARE MALPRACTICE ACT

§ 78-14-17. Arbitration agreements

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

(a) the patient shall be given, in writing, the following information on:

(i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;

(ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;

(iii) the patient's responsibility, if any, for arbitration-related costs under the agreement;

(iv) the right of the patient to decline to enter into the agreement and still receive health care if Subsection (3) applies;

(v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date;

(vi) the right of the patient to have questions about the arbitration agreement answered;

(vii) the right of the patient to rescind the agreement within ten days of signing the agreement; and

(viii) the right of the patient to require mediation of the dispute prior to the arbitration of the dispute;

(b) the agreement shall require that:

(i) except as provided in Subsection (1)(b)(ii), a panel of three arbitrators shall be selected as follows:

(A) one arbitrator collectively selected by all persons claiming damages;

(B) one arbitrator selected by the health care provider; and

(C) a third arbitrator:

(I) jointly selected by all persons claiming damages and the health care provider; or

(II) if both parties cannot agree on the selection of the third arbitrator, the other two arbitrators shall appoint the third arbitrator from a list of individuals approved as arbitrators by the state or federal courts of Utah; or

(ii) if both parties agree, a single arbitrator may be selected;

(iii) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;

(iv) the patient be given the right to rescind the agreement within ten days of signing the agreement;

(v) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date;

(vi) the patient has the right to retain legal counsel;

(vii) the agreement only apply to:

(A) an error or omission that occurred after the agreement was signed, provided that the agreement may allow a person who would be a proper party in court to participate in an arbitration proceeding;

(B) the claim of:

(I) a person who signed the agreement;

(II) a person on whose behalf the agreement was signed under Subsection (6); and

(III) the unborn child of the person described in this Subsection

(1) (b) (vii) (B), for 12 months from the date the agreement is signed; and

(C) the claim of a person who is not a party to the contract if the sole basis for the claim is an injury sustained by a person described in Subsection

(1) (b) (vii) (B); and

(c) the patient shall be verbally encouraged to:

(i) read the written information required by Subsection (1) (a) and the arbitration agreement; and

(ii) ask any questions.

(2) When a medical malpractice action is arbitrated, the action shall:

(a) be subject to Chapter 31a, Utah Uniform Arbitration Act; and

(b) include any one or more of the following when requested by the patient before an arbitration hearing is commenced:

- (i) mandatory mediation;
- (ii) retention of the jointly selected arbitrator for both the liability and damages stages of an arbitration proceeding if the arbitration is bifurcated; and
- (iii) the filing of the panel's award of damages as a judgement against the provider in the appropriate district court.

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

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

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

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

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

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

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

Laws 1999, c. 278, § 1, eff. May 3, 1999; Laws 2003, c. 207, § 3, eff. May 5, 2003; Laws 2004, c. 83, § 1, eff. May 3, 2004.

<General Materials (GM) - References, Annotations, or Tables>

#### SUNSET PROVISIONS

<For repeal affecting § 78-14-17, regarding medical malpractice arbitration agreements, see § 63-55-278.>

#### HISTORICAL AND STATUTORY NOTES

Laws 2003, c. 207, added "if Subsection (2) applies" at the end of subsec.

(1)(a)(iv), added subsec. (1)(a)(vii), and inserted in subsec. (2) "from the emergency department of a general acute hospital, as defined in Section 26-21-2".

Laws 2004, c. 83, rewrote this section that formerly provided:

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

"(a) the patient shall be given, in writing and by verbal explanation, the following information on:

"(i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;

"(ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;

"(iii) the patient's responsibility, if any, for arbitration-related costs under the agreement;

"(iv) the right of the patient to decline to enter into the agreement and still receive health care if Subsection (2) applies;

"(v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date;

"(vi) the right of the patient to have questions about the arbitration agreement answered; and

"(vii) the right of the patient to rescind the agreement within 30 days of signing the agreement; and

"(b) the 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;

"(iv) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;

"(v) the patient be given the right to rescind the agreement within 30 days of signing the agreement; and

"(vi) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date.

"(2) Notwithstanding Subsection (1), a patient may not be denied health care of any



kind from the emergency department of a general acute hospital, as defined in Section 26-21-2, on the sole basis that the patient or a person described in Subsection (5) refused to enter into a binding arbitration agreement with a health care provider.

"(3) 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.

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

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

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

#### CROSS REFERENCES


Alternative Dispute Resolution Act, see § 78-31b-1 et seq.

Alternative dispute resolution, court-annexed program in civil cases, see Jud. Admin., Rule 4-510.

Arbitration and mediation, generally, see ADR, Rule 101 et seq.

Uniform Arbitration Act, see § 78-31a-101 et seq.

#### LIBRARY REFERENCES

Arbitration  6, 7.3, 7.5, 26, 2.2.

Westlaw Key Number Searches: 33k6; 33k7.3; 33k7.5; 33k26; 33k2.2.

C.J.S. Arbitration §§ 7, 10, 14 to 19, 21 to 22, 24, 60 to 62.

U.C.A. 1953 § 78-14-17, UT ST § 78-14-17

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# APPENDIX 3

Appellant cites the following cases for the proposition that “[c]ourts in other jurisdictions also agree that the heirs are subject to the contracts of the decedent in wrongful death actions, including arbitration agreements.”

Case Cite	Holding	Comment	Outcome
<i>Allen v. Pacheco</i> , 71 P.3d 375 (Colo. 2003)	Refused to enforce arbitration agreement against spouse because it failed to strictly comply with statutory requirements.	No state constitutional rights at issue; no issues raised regarding procedural or substantive unconscionability.	Unenforceable
<i>Ballard v. Southwest Detroit Hospital</i> , 327 N.W.2d 370 (1982)	Refused to enforce agreement, but arbitration could bind heirs because under Michigan law, wrongful death a derivative cause of action.	No state constitutional rights at issue; court found agreement inherently unconscionable.	Unenforceable
<i>Jansen v. Salomon Smith Barney, Inc.</i> , 776 A.2d 816 (App. Div. 2001)	Brokerage and securities agreement compelled arbitration by heirs in suit against brokerage.	No wrongful death claim, no constitutional rights at issue.	Enforceable
<i>Smith, Barney, Inc. v. Henry</i> , 775 So.2d 722 (Miss. 2001)	Brokerage and securities agreement compelled arbitration by heirs in suit against brokerage.	No wrongful death claim, no constitutional rights at issue.	Enforceable
<i>Collins v. Merrill Lynch, et. al.</i> , 561 So. 2d 952 (La. Ct. App. 1990)	Brokerage and securities agreement compelled arbitration by heirs in suit against brokerage.	No wrongful death claim, no constitutional rights at issue.	Enforceable
<i>American Bureau of Shipping v. Tenacara Shipyard</i> , 170 F.3d 349 (2 <sup>nd</sup> Cir. 1999)	International yacht builders, owners and insurers required to arbitrate.	No wrongful death or other constitutional rights at issue.	Enforceable
<i>Seborowski v. Pittsburgh Press Co.</i> , 188 F.3d 163 (3 <sup>rd</sup> Cir. 1999)	Employees bound by collective bargaining agreement entered into by their union.	Appeal from unfavorable arbitration result, no wrongful death or constitutional issues.	Enforceable

Case Cite	Holding	Comment	Outcome
<i>In re Oil Spill by the Amoco Cadiz</i> , 659 F.2d 789 (7 <sup>th</sup> Cir. 1981)	Arbitration of tanker owner's claim against tug owner required under Lloyd's standard salvage agreement.	No wrongful death or constitutional issues. Dispute and contract between sophisticated businesses.	Enforceable
<i>Briarcliff Nursing Home, Inc. v. Turcotte</i> , 894 So.2d 661 (Ala. 2004)	Arbitration enforceable in claim by decedent's estate against nursing home.	No wrongful death or constitutional issues discussed by main opinion;	Enforceable
<i>Wilkerson v. Nelson</i> , 395 F. Supp. 2d 281, 289 (M.D.N.C. 2005)	Arbitration of wrongful death enforceable, wrongful death claim is "legally derivative."	No mention of a constitutionally protected wrongful death claim; no other constitutional issues raised.	Enforceable
<i>Pelz v. Sears, Roebuck &amp; Co.</i> , 367 F.Supp. 2d 711, 718-19 (E.D. Pa. 2005)	Arbitration of wrongful death claims required where claims premised on contract which gave rise to the claim for wrongful death.	Heirs/beneficiaries suit brought pursuant to failure of defendant to fulfill terms of maintenance agreement and same agreement required arbitration. Heirs 'equitably estopped' from escaping arbitration.	Enforceable
<i>County of Contra Costa v. Kaiser Foundation Health Plan, Inc.</i> , 54 Cal. Rptr. 2d 628, 632 (1996)	Refusing to compel arbitration by non-signatories. "All nonsignatory arbitration cases are grounded in the authority of the signatory to contract for medical services on behalf of the nonsignatory-to bind the nonsignatory in some manner."	Third-party non-signatories could not be compelled to arbitrate their claims.	Unenforceable

Case Cite	Holding	Comment	Outcome
<i>Bolanos v. Khalatian</i> , 283 Cal. Rptr. 209 (1991)	Arbitration governed claims by third-party spouse.	No constitutional arguments raised regarding wrongful death, court access or jury trial.	Enforceable
<i>NORCAL Mutual ins. Co. v. Newton</i> , 100 Cal. Rptr. 2d 683 (2000)	Arbitration governed claims by wife against insurance company where she accepted benefit under policy.	By accepting the benefits of the insurance contract, wife incapable of repudiating arbitration requirements.	Enforceable
<i>Harris v. Superior Court</i> , 233 Cal. Rptr. 186, 188 (1986)	Physician compelled to arbitrate because “voluntary acceptance of the benefit of a transaction constitutes consent to all the obligations arising from it” including arbitration.	No constitutional right to jury or court access arguments raised, wrongful death not at issue.	Enforceable