

2006

Lisa Bybee v. Alan Abdulla : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

LISA BYBEE,)	
)	CASE No. 2006-0424-SC
)	
PLAINTIFF/APPELLEE,)	DISTRICT Ct. No. 050903397
)	
v.)	
)	
ALAN ABDULLA, M.D., AND JOHN DOES 1)	
THROUGH 5,)	
)	
DEFENDANTS/APPELLANTS.)	
)	

REPLY BRIEF OF APPELLANTS

APPEAL FROM A DECISION OF THE SECOND JUDICIAL DISTRICT COURT
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ARGUMENT

I. THE ARBITRATION AGREEMENT AS APPLIED TO MR. BY-BEE AND HIS HEIRS IS NOT UNCONSTITUTIONAL, DOES NOT ELIMINATE ANY RIGHT HELD BY THE HEIRS, AND IS NOT UNCONSCIONABLE.

Mr. Bybee's heirs assert that the Arbitration Agreement is invalid because it unconstitutionally abrogates certain rights of the heirs, and because it is unconscionable. Those assertions are not correct.

A. *Enforcement of the Arbitration Agreement Does Not Violate the Utah Constitution.*

The heirs assert that enforcement of the Arbitration Agreement would work a "secret elimination of constitutional rights," referencing the Open Courts Clause and wrongful death protections in the Utah Constitution. The threshold question under the Utah constitution's Open Courts Clause, UTAH CONST. art. I, § 11, is "whether the statute abrogated an existing remedy or cause of action." *Wood v. University of Utah Medical Center*, 2002 UT 134, ¶ 12, 67 P.3d 436. A similar analysis necessarily applies to the wrongful death provision, which provides that the right of action to recover damages for wrongful death cannot be "abrogated." UTAH CONST. art. XVI, § 10.

The legislation providing for arbitration, like all legislative enactments, enjoys a presumption of constitutionality. *In re Estate of Baer*, 562 P.2d 614, 616 (Utah), *appeal dismissed*, 434 U.S. 805 (1977). While there remains controversy concerning the level of deference to be afforded under article I, section 11, *see Wood*, 2002 UT 134 at ¶¶ 8, 42, it is settled that "we will declare a statute violative of the open courts provision only if it 'is unreasonable and arbitrary and will not further the statutory objectives.'" *Hirpa v. IHC*

Hospitals, Inc., 948 P.2d 785, 792 (Utah 1997) (quoting *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 681 (Utah 1985)).

The heirs challenge the enforceability of the arbitration clause itself, not merely its imposition on the heirs, because all arbitration clauses restrict access to the courts in precisely the way this arbitration clause restricts the heirs' access to the courts. Yet the constitutionality of legislation providing for arbitration has been previously upheld. The heirs fail to reconcile their arguments with this Court's consistent recognition of the constitutionality of arbitration:

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

Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983) (citations omitted). Specifically, the Arbitration Act has been held to satisfy the requirements of the Due Process clause of article I, section 7 of the Constitution of Utah. *Lindon City v. Engineers Const. Co.*, 636 P.2d 1070, 1074-75 (Utah 1981). Likewise, this Court has found the Arbitration Act constitutional under the Open Courts provision of article I, section 11. *Allred v. Educators Mut. Ins. Ass'n of Utah*, 909 P.2d 1263, 1265 (Utah 1996).

According to the United States Supreme Court, the choice of arbitration is simply the substitution of one decision making forum for another, without the loss of substantive rights: "By agreeing to arbitrate a statutory claim, a party does not forego the substantive

rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). Arbitration does not affect the remedy, it simply changes the forum where the dispute will be resolved.

Although the heirs assert that the wrongful death clause, UTAH CONST. article XVI, section 5, is violated, they do so without meaningful analysis and only with conclusory assertions. As discussed above, the enforcement of an arbitration clause does not “abrogate” the right to recovery but merely compels, subject to appropriate judicial review, an initial forum selection.

This Court in *Hirpa v. IHC Hospitals, Inc.*, 948 P.2d 785 (Utah 1997), rejected a challenge under art. XVI, § 5 because the statute in question did not “abrogate” the cause of action for wrongful death by merely creating a defense to certain types of claims:

“The plain meaning of the constitutional provision . . . is to prevent the abolition of the right of action for a wrongful death, ‘whether in a wholesale or piecemeal fashion.’” *Berry*, 717 P.2d at 684 (quoting *Malan v. Lewis*, 693 P.2d 661, 667 (Utah 1984)). Thus, the legislature may not repeal the wrongful death statute; neither may it nullify the wrongful death action by indirect means. However, “the Legislature may enact reasonable procedures for the enforcement of wrongful death actions and may provide for reasonable defenses that are not inconsistent with the fundamental nature of the wrongful death action itself.” *Berry*, 717 P.2d at 685.

Utah law is clear that a plaintiff in a wrongful death action is subject to defenses which could have been asserted against the decedent had he lived and prosecuted the suit. *Kelson v. Salt Lake County*, 784 P.2d 1152, 1155 (Utah 1989). The Good Samaritan Act is intended to induce licensed medical providers to voluntarily render emergency medical aid by eliminating their liability. *The Act provides that a defense can be asserted against a malpractice claim by a living plaintiff. That same defense should be allowable in a wrongful death action by the deceased patient’s heirs.* In view of this, we think the Good Samaritan Act to be a reasonable defense, not in-

consistent with the fundamental nature of the wrongful death action nor an abrogation of the wrongful death action itself. Therefore, it does not violate article XVI, section 5.

Hirpa, 948 P.2d at 794 (emphasis added).

Here, the heirs' wrongful death remedy is not abrogated by enforcement of the arbitration agreement entered into by Mr. Bybee. The fact that the heirs are bound by the arbitration agreement affects forum selection but does not abrogate the heirs' underlying cause of action or their rights of judicial review, and therefore does not implicate the Open Courts clause or article XVI, section V.

B. *The Arbitration Agreement Is Not Unconscionable.*

The heirs assert that the Arbitration Agreement is unconscionable both procedurally and substantively.¹

This Court in *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996), set forth the considerations important in determining whether an arbitration agreement is procedurally unconscionable:

Factors bearing on procedural unconscionability include (1) whether each party had a reasonable opportunity to understand the terms and conditions of the agreement; (2) whether there was a lack of opportunity for meaningful negotiation; (3) whether the agreement was printed on a duplicate or boilerplate form drafted solely by the party in the strongest bargaining position; (4) whether the terms of the agreement were explained to the weaker party; (5) whether the aggrieved party had a meaningful choice or instead felt compelled to accept the terms of the agreement; and (6) whether the stronger party employed deceptive practices to obscure key contractual provisions.

924 P.2d at 362 (citations omitted).

In *Sosa*, a physician presented his patient with an arbitration agreement “just minutes” before a scheduled surgery at a time when the patient was nervous and apprehensive. Also, a provision of the arbitration agreement required the plaintiff to pay the physician for his time spent arbitrating the case together with the physician’s attorney’s fees. The patient had fourteen days in which to unilaterally revoke the agreement, however, it was unclear whether the patient ever received a copy of the agreement. The court found the procedure used to obtain the agreement was unconscionable, however, the physician could have cured the objectionable practice if the patient had been given a copy of the arbitration agreement. If the objectionable procedure had been cured, the offending provision of the contract requiring payment of fees would have been severed from the agreement and the balance of the agreement enforced.

The Malpractice Act in effect at the time Mr. Bybee signed this agreement addresses the concerns raised in *Sosa*. Specifically, the Act required that patients be given written information concerning seven substantive areas of the arbitration agreement. *See* UTAH CODE ANN. § 78-14-17(1)(a)(i) - (vii) (2003). The Act next required that any arbitration agreement contain precise terms established by statute. *Id.*, § 78-14-17(1)(b)(i)-(vi) (2003). The agreement Mr. Bybee signed complied with those procedural requirements.

Moreover, there is no evidence from which the lower court could have concluded that Mr. Bybee’s signing of the Arbitration Agreement was anything other than knowing,

¹ The lower court never reached this issue because it determined that the heirs were not bound by the Arbitration Agreement.

willing, and with full and complete disclosure of all terms. Mr. Bybee indicated and agreed that he had received a copy of the Arbitration Agreement (Article 8), that the agreement had “been verbally explained to [his] satisfaction” (Article 7), and that he could unilaterally revoke that Arbitration Agreement within 30 days (Article 5). *See* Arbitration Agreement. Moreover, Mr. Bybee twice signed a second document reiterating the same terms and Dr. Abdulla signed the Arbitration Agreement confirming these facts and has provided similar affidavit testimony.² None of the concerns of the *Sosa* court are present and the undisputed facts demonstrate that the Arbitration Agreement in this case is valid and binding.

In addition to their procedural unconscionability argument, the heirs also assert that the Arbitration Agreement is substantively unconscionable because it permits the physician to maintain a suit for collection of fees without requiring arbitration of the fee dispute. The provision is actually more complex, permitting a collection action in court but providing that any assertion of malpractice in the fee dispute would require the case to be referred to arbitration:

We agree that the Physician may pursue a legal action to collect any fee from the patient and doing so shall not waive the Physician’s right to compel arbitration of any malpractice claim. However, following the assertion of any malpractice claim against the Physician, any fee dispute, whether or not the subject of any existing legal action, shall also be resolved by arbitration.

Arbitration Agreement, Article 1.

² The heirs object for the first time on appeal to Dr. Abdulla’s affidavit, however, the heirs waived any objections by their failure to raise their objections to the trial court.

Here, the heirs do not identify anything inherently unfair in the above provision, but make the conclusory assertion that the parties' division of claims subject to arbitration is a "gross disparity of terms." Utah law requires a showing that the terms are oppressively one-sided:

The arguments for and against substantive unconscionability focus on the contents of the agreement, examining the "relative fairness of the obligations assumed." When determining whether a contract is substantively unconscionable, we have considered whether its "terms [are] so one-sided as to oppress or unfairly surprise an innocent party" or whether there exists "an overall imbalance in the obligations and rights imposed by the bargain." [citation omitted]. The terms of the contract should be considered "according to the mores and business practices of the time and place."

Sosa, 924 P.2d at 361 (citations omitted).

Reserving the ability to litigate a purely contractual claim for fees, while requiring that a tort claim for medical malpractice be submitted to arbitration, is not oppressively one-sided. The claims are fundamentally distinct, and the benefits of arbitration for which the parties bargained are very real when the claim is one for medical malpractice. A contractual claim for non-payment is inherently simpler, and does not implicate the same interests as does a claim for medical malpractice.

Finally, the heirs assert that arbitration agreements should not be permitted between patients and physicians. The heirs presume that patients are in a weaker position vis-à-vis physicians and the likelihood of unfairness too great. The Legislature, however, favors arbitration and has established multiple layers of safeguards to prevent any unfairness, whether real or imagined. On that basis, it has legislatively rejected the claims the heirs urge upon this Court.

For the foregoing reasons, the heirs' assertions of unfairness do not arise to the level of unconscionability and the agreement is enforceable.

II. MR. BYBEE'S ARBITRATION AGREEMENT IS A DEFENSE THAT REQUIRES HIS HEIRS TO ARBITRATE THEIR WRONGFUL DEATH CLAIMS.

The heirs assert that wrongful death claims are independent and not subject to Mr. Bybee's Arbitration Agreement, quoting only part of the Utah Supreme Court's holding in *Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327 (Utah 1997). Appellee Brief at 17. The heirs neglect to mention that the Utah courts have "not entirely separated the heirs' right from the decedent's because the heirs' right is in major part based on the rights of support, both financial and emotional, that run to them from the deceased." *Jensen*, 944 P.2d at 332.

Though an independent action, this Court has long recognized that the wrongful death cause of action is derived from the duty owed by the defendant to the decedent, and is subject to the defenses available against the decedent had he lived:

The right of action running to the appellants in this case is founded on the same unlawful acts of the defendant, but the loss and damages suffered by them arise out of the death of the deceased. The legislature has thus said the right of action vests in the heirs-at-law if death ensues but it does not say the rights of the third parties are modified, altered, or changed. On the contrary, it bases recovery on the wrongful death by another and wrongful is used in the sense of wrongful as against the deceased, and does not include those situations where the deceased either solely or proximately contributes negligently to his own death. This court is of the opinion the legislature did not intend to change the rules of substantive law and deny to litigants the right to defend on the ground of contributory negligence. For the purposes of this suit, *all that Section 104-3-11, U.C.A. 1943, grants to the heirs is a right to proceed against the wrongdoer subject to the defenses available against the deceased, had he lived and prosecuted the suit.* The court did not err in submitting this issue to the jury.

Van Wagoner v. Union Pac. R.R., 112 Utah 189, 186 P.2d 293, 303-04 (Utah 1947) (emphasis added).

Mr. Bybee's choice of arbitration as the mechanism for resolving disputes concerning the duties Dr. Abdulla assumed by agreeing to treat him is a valid defense to any claim Mr. Bybee could have brought in court for breach of that duty. That defense, being integral to the physician/patient relationship as it existed in this case, remains viable against the heirs' claim for breach of those same duties. Not everyone believes as Mr. Bybee's heirs believe, that medical negligence claims must be resolved in court. Many (including the Utah Legislature, *see* UTAH CODE ANN. § 78-14-2) see medical malpractice lawsuits as imposing an undue burden on the provision of health care in this state. The heirs' position dishonors Mr. Bybee's freedom to reject the opportunity to contribute to that burden. His decision is not qualitatively different from a pre-event release agreement, which is plainly enforceable in a wrongful death action. *See Russ v. Woodside Homes*, 905 P.2d 901 (Utah Ct. App. 1995).

The only reported Utah case in which a "defense" was not applied to a wrongful death claim is *Hull v. Silver*, 577 P.2d 103 (Utah 1978). However, *Hull* is unique and thus distinguishable. In *Hull*, the court reversed the trial court's granting a "motion for summary judgment based on the common law doctrine of marital tort immunity." *Id.* at 104. The court reasoned that "both spouses are dead, the conventional family unit has been destroyed, and a wrongful death action has been brought by the heirs. Thus, there is no marital harmony that needs protection, and there is no possibility of collusion." *Id.* at 103. The court's holding was limited: "Thus, when heirs or a personal representative

bring an action under the Utah wrongful death statute such an action is not subject to the defense of interspousal tort immunity.” *Id.* at 104.

Hull does not establish the broad proposition, urged by Mr. Bybee’s heirs, that defenses that derive from the decedent personally, including contractual defenses, do not apply to wrongful death heirs’ claims. Rather, *Hull* is limited to cases in which a decedent, for public policy reasons, was unable to sue while living, but for whom those policy reasons vanished upon death. *See id.* at 106 (“whether the disability is based on the supposed unity of husband and wife or the public policy to preserve peace and tranquility in the home, the reason for immunity ceases to exist upon death”). Here, the heirs’ wrongful death claim is based on alleged breach of a duty of care the assumption of which was based in part on the agreement to arbitrate. The Arbitration Agreement is a defense that inheres in the alleged tort because Mr. Bybee and Dr. Abdulla chose to incorporate a duty to arbitrate within the doctor-patient relationship upon which the tort claim is necessarily based.

As demonstrated by the line of cases developed subsequent to *Hull*, the law in Utah remains, “[a]s the *Van Wagoner* Court said, [that] the heirs have ‘a right to proceed against the wrongdoer subject to the defenses available against the deceased, had he lived and prosecuted the suit.’” *Kelson v. Salt Lake County*, 784 P.2d 1152, 1155 (Utah 1989); *see also Hirpa*, 948 P.2d at 794 (“Utah law is clear that a plaintiff in a wrongful death action is subject to defenses which could have been asserted against the decedent had he lived and prosecuted the suit.”). In this case, Mr. Bybee’s waiver of the right of trial and agreement to arbitrate is a defense applicable to the heirs’ claims. *See also Cleveland v.*

Mann, 942 So.2d 108, 118-20 (Miss. 2006) (“Since the beneficiaries may only bring claims the decedent could have brought had the decedent survived, logic requires us to conclude that the converse is true, that is, the decedents may NOT bring claims the decedent could not have brought, had the decedent survived”); *Sanford v. Castleton Health Care Center, Inc.*, 813 N.E.2d 411, 421 (Ind. Ct. App. 2004) (“Because the allegations asserted in Count I of the amended complaint would not have been justiciable, absent review of an arbitral award, during [the decedent’s] lifetime, they clearly did not become justiciable upon her death”).

The lower court’s and heirs’ reliance on *Jenkins v. Percival*, 962 P.2d 796 (Utah 1998), is misplaced. In *Jenkins*, the plaintiff was injured when a wheel came off the defendants’ truck. She contended that in connection with the subsequent settlement of her minor children’s claims, the truck owner’s insurance company orally agreed to arbitrate her own claim. The court held that the insurance company could only agree to arbitrate for its insured within policy limits, and that an agent’s attempt to bind the insured to arbitrate the portion of the claim which exceeded policy limits was unauthorized and unenforceable. The court also held that, although the oral agreement was unenforceable under the Utah Arbitration Act, it might nevertheless be enforceable under equitable principles of detrimental reliance.

The *Jenkins* case offers no guidance on the issue before this Court, which is whether or not an agreement to arbitrate which is integral to the duties attendant to the physician/patient relationship may be enforced against heirs suing for alleged violation of those very duties. Here, the heirs must pursue their wrongful death claim subject to the

defenses that would have been available against the decedent, and *Jenkins* has no application.

III. THE OUTCOME OF THIS CASE TURNS NOT ON WHETHER THE 2003 OR 2004 VERSION OF THE STATUTE APPLIES BUT WHETHER UNDER UTAH COMMON LAW AT THE TIME MR. BYBEE ENTERED INTO THE ARBITRATION AGREEMENT HE COULD BIND HIS HEIRS TO ARBITRATION IN THE EVENT OF HIS DEATH.

The heirs assert that determination of which statute applies, the 2003 or 2004 amended version, is required in order to resolve whether the Arbitration Agreement binds the heirs. The Arbitration Agreement was signed when the 2003 version was effective. The 2004 amendments were not explicitly made retroactive by the Legislature and therefore are only retroactive if the Court determines that the modifications in the statute were merely procedural or met some other exception.

The 2004 amendment imposed additional procedural requirements on arbitration agreements. The underlying common law, as set forth in detail above, was not altered. Arbitration of the claim is a substantive provision of the physician/patient relationship in this case. Invalidation of that contractual provision based upon requirements imposed by later enactments would alter the rights of the parties under their agreement, and thus by definition be substantive. *Washington Nat'l Ins. Co. v. Sherwood Assocs.*, 795 P.2d 665, 670 (Utah Ct. App. 1990).

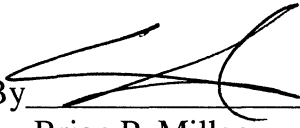
CONCLUSION

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

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

DATED this 29th day of December, 2006.

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CERTIFICATE OF SERVICE

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