

2006

# Lisa Bybee v. Alan Abdulla, M.D. and John Does 1 through 5 : Amicus Brief

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James R. Hasenyager, Peter W. Summerill; Hasenyager & Summerill; attorneys for appellee.  
Brian P. Miller, Kennethe L. Reich; Snow, Christensen & Martineau; attorneys for appellant; Roger Hoole; Hoole & King; Todd Wahlquist; Wahlquist Law Firm; Attorneys for Amicus Curiae.

---

## Recommended Citation

Legal Brief, *Bybee v. Abdulla*, No. 20060424 (Utah Court of Appeals, 2006).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/6491](https://digitalcommons.law.byu.edu/byu_ca2/6491)

This Legal Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

---

IN THE SUPREME COURT OF UTAH

---

LISA BYBEE.

Plaintiff and Appellee.

v.

ALAN ABDULLA, M.D. and JOHN  
DOES I through 5,

Defendants and Appellant.

---

**BRIEF OF AMICUS CURIAE UTAH  
TRIAL LAWYERS ASSOCIATION**

Supreme Court No. 20060424

Trial Court No. 050903397

---

Appeal From A Decision Of The Second Judicial District Court, Davis County  
The Honorable Pamela G. Hefferman, District Judge

---

Roger Hoole  
**HOOLE & KING, L.C.**  
4276 S. Highland Dr.  
Salt Lake City, UT 84124

Todd Wahlquist  
**WAHLQUIST LAW FIRM**  
648 East 100 South, Suite 200  
Salt Lake City, UT 84102  
*Attorneys for Amicus Curiae, UTLA*

Brian Miller  
Kenneth Reich  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 Exchange Place, 11<sup>th</sup> Floor  
Salt Lake City, UT 84145  
*Attorneys for Appellant*

James R. Hasenyager  
Peter W. Summerill  
**HASENYAGER & SUMMERILL**  
1004 24<sup>th</sup> Street  
Ogden, UT 84401  
*Attorneys for Appellee*

FILED  
UTAH APPELLATE COURT

2007 3 1 2006

---

IN THE SUPREME COURT OF UTAH

---

LISA BYBEE,

Plaintiff and Appellee.

v.

ALAN ABDULLA, M.D. and JOHN  
DOES I through 5.

Defendants and Appellant.

**BRIEF OF AMICUS CURIAE UTAH  
TRIAL LAWYERS ASSOCIATION**

Supreme Court No. 20060424

Trial Court No. 050903397

---

Appeal From A Decision Of The Second Judicial District Court, Davis County  
The Honorable Pamela G. Heffernan, District Judge

---

Roger Hoole  
**HOOLE & KING, L.C.**  
4276 S. Highland Dr.  
Salt Lake City, UT 84124

Todd Wahlquist  
**WAHLQUIST LAW FIRM**  
648 East 100 South, Suite 200  
Salt Lake City, UT 84102  
*Attorneys for Amicus Curiae, UTLA*

Brian Miller  
Kenneth Reich  
**SNOW, CHRISTENSEN & MARTINEAU**  
10 Exchange Place, 11<sup>th</sup> Floor  
Salt Lake City, UT 84145  
*Attorneys for Appellant*

James R. Hasenyager  
Peter W. Summerill  
**HASENYAGER & SUMMERILL**  
1004 24<sup>th</sup> Street  
Ogden, UT 84401  
*Attorneys for Appellee*

## TABLE OF CONTENTS

CONSENT FOR AMICUS FILING.....	1
STATEMENT OF JURISDICTION.....	2
STATEMENT OF ISSUES PRESENTED ON APPEAL.....	2
STANDARD OF REVIEW.....	2
RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	3
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	5
I.    THE PHYSICIAN-PATIENT RELATIONSHIP SHOULD BE ABOUT HEALTH CARE NOT CONTRACTS.....	5
A.    Pre-Dispute Jury Trial Waivers Do Not Belong In The Health Care Arena Because Doctors And Patients Do Not Have Equal Bargaining Power.....	5
B.    Rescission Is Not The Answer For Patients.....	9
C.    The Supposed “Benefits” Of Arbitration In Other Contexts Do Not Exist In The Health Care Setting.....	10
D.    Arbitration Favors The “Repeat Player” Insurance Industry Over The Individual Patient.....	16
II.   THERE IS NO PUBLIC POLICY FAVORING UN-KNOWING, INVOLUNTARY, UNINTELLIGENT WAIVERS OF A NON-PARTY’S CONSTITUTIONAL RIGHT TO A JURY TRIAL.....	22
A.    Mrs. Bybee Could Not Make A Knowing, Voluntary And	

	Intelligent Waiver Of A Right That Did Not Exist At The Time The Agreement Was Entered.....	26
B.	Mr. Bybee's Intentions With Regard To Binding His Heirs Are Irrelevant.....	27
III.	THE 2004 AMENDMENTS TO § 78-14-17 DO NOT REQUIRE WRONGFUL DEATH HEIRS TO SUBMIT THEIR CLAIMS TO ARBITRATION.....	29
A.	A Wrongful Death Action Belongs To The Heirs And Is Distinct From Any Claims Of The Decedent.....	29
B.	Not All Defenses Are Available To Wrongful Death Defendants...	32
C.	How Can The Law Give Non-Signatory Defendants The <i>Option</i> Of Joining Arbitration On The One Hand, But <i>Require</i> Non-Signatory Plaintiffs To Join On The Other?.....	34
IV.	THE DECISIONS CITED BY UMA FROM OTHER JURISDICTIONS ARE EASILY DISTINGUISHABLE FROM THE PRESENT CASE AND OUGHT NOT GUIDE THIS COURT.....	35
V.	FORCING NON-SIGNATORY HEIRS INTO ARBITRATION IS NOT THE ANSWER TO ANY POTENTIAL FOR ANOMALOUS RESULTS WHEN LOSS OF CONSORTIUM AND SURVIVAL CLAIMS ARE ASSERTED.....	41
VI.	THE ANSWER TO ALL CONCERNS ABOUT JURY TRIAL WAIVERS IS TO ALLOW POST-DISPUTE AGREEMENTS.....	42
	CONCLUSION.....	44

## TABLE OF AUTHORITIES

### CASES

Allen v. Pacheco, 71 P.3d 375, 381 (Colo. 2003) (en banc), cert denied, 2004 WL 324431 (U.S. 2004).....	35, 39
Allred v. Educators Mutual Ins. Ass'n. Of Utah, 909 P.2d 1263, 1265 (Utah 1996).....	10, 42
Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669, 687 (Cal. 2000).....	12
Ballard v. Southwest Detroit Hospital, 119 Mich. App. 814, 327 N. W. 2d 370 (Mich. Ct. App. 1982).....	37
Behm v. Gee ( <i>In re</i> Behm's Estate), 117 Utah 151, 158, 213 P.2d 657 (1950).....	26, 29, 30
Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179, 1184 (Utah 1983).....	31
Berry by and through Berry v. Beech Aircraft Corp., 717 P.2d 670, 684 (Utah 1985).....	36
Buckner v. Tamarin, 98 Cal. App. 4 <sup>th</sup> 140, 119 Cal. Rptr. 2d 489 (Cal. Ct. App. 2002)....	37
Cade v. Zions First National Bank, 956 P.2d 1073, 1077 (Utah Ct. App. 1998).....	25
Camp v. Offices of Recovery Services of Utah Dept. Of Social Services, 779 P.2d 242 (Utah App. 1989).....	28
Central Florida Investments, Inc. v. Parkwest Associates, 40 P.3d 599, 604 (Utah 2002).....	28
Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907).....	23
Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 581 (1990).....	23
Ciaccio v. Cazayoux, 519 So. 2d 799 (La. App. 1 Cir. 1987).....	40, 41
Cole v. Burns Intern. Security Services, 105 F.3d 1465, 1484 (D.C. Cir. 1997).....	12

Cook's Pest Control, Inc. v. Boykin, 807 So.2d 524, 526 (Ala. 2001).....	26
Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985).....	25
Dimick v. Schiedtg, 293 U.D. 474, 486(1935).....	23
Engalla v. Permanente Medical Group, Inc., 938 P.2d 903, 987 (Cal. 1997) (Kennard, J. concurring).....	12, 20
Gershon v. Regency Diving Center, Inc., 368 N.J. Super. 237 (2004).....	27, 40
Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 90 (2000).....	12
Halling v. Indus. Comm'n of Utah, 263 P. 78, 79 (Utah 1927).....	31
Hull v. Silver, 577 P.2d 103, 106 (Utah 1978).....	31, 32, 33
In re Big 8 Food Stores, Ltd., 166 S.W.3d 869, 876 (Tex. App. El Paso 2005).....	26
In Re Kepka, 178 S.W.3d 279, 286 (Tex. App. - Houston [1 <sup>st</sup> Dist].....	24, 38, 39
Intern. Harvester Credit v. Pioneer Tractor, 626 P.2d 418, 421 (Utah 1981).....	22
Jackson State Bank v. Homar, 837 P.2d 1081, 1085 (Wyo. 1992).....	26
Jansen v. Salomon Smith Barney, Inc, 776 A.2d 816 (N.J. Supper. App. Div.2001).....	38
Jenkins v. Percival, 962 P.2d 796, 800 (Utah 1998).....	22, 23, 24
Jensen v. HHC Hospitals, Inc., 944 P.2d 327 (Utah 1997).....	27, 30, 32, 33, 34
John Wagner Associates v. Hercules, Inc., 797 P.2d 1123 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991).....	28
Kelson v. Salt Lake County, P.2d 1152 (Utah 1989).....	28, 33
McCoy v. Blue Cross and Blue Shield of Utah, 220 P.3d 901, 904 (Utah 2001) (2005).....	24, 27

Metals Manuf. Co. v. Bank of Commerce, 395 P.2d 914 (Utah 1964).....	28
Mont. Trucking, Inc. v. Entradas Indus. Inc., 802 P.2d 799, 781 ( Utah Ct. App. 1990).....	26
Mormile v. Sinclair, 26 Cal.Rptr.2d 725 (Cal. Ct. App. 1994).....	36
Mountain States Tel. & Tel Co., v. Payne, 782 P.2d 464, 467 (Utah 1989).....	32
Rhoades v. Wright, 622 P.2d 343 (Utah 1980).....	36
Riverside Capital Advisors, Inc. v. Winchester Global Trust Co. Ltd., 21 A.D.3d 887 (N.Y.A.D. 2 Dept. 2005).....	26
Scruggs v. State Farm Mut. Auto. Ins. Co., 62 P.3d 989 (Ariz. App. Div. 1 2003).....	26
Shankle v. B-G Maintenance Management of Colorado, 163 F.3d 1230, 1235 (10 <sup>th</sup> Cir. 1999).....	12
Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996).....	5
State Ex Rel. Dunlap v. Berger, 211 W. Va. 549, 599, 567 S.E.2d 265 (2002).....	12, 28
State v. Hassan, 108 P.3d 695, 698 (Utah 2004).....	23
Van Wagoner v. Union Pacific Ry. Co., 112 Utah 189 (1974).....	30

## **STATUTES**

Utah Code Ann. § 78-14-17 (2003 and 2004) .....	2, 29
Utah Const. Art. I, § 10: [Trial by jury.].....	2
Utah Const. Art. I, § 11 [Courts open - - Redress of injuries.].....	2
Utah Const. Art. XVI, § 5 [Injuries resulting in death - - Damages.].....	3



## **OTHER AUTHORITIES**

- Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002).....7
- American Arbitration Association, *Health Care Policy Statement*, available at <http://www.adr.org/sp.asp?id=21885>.....8
- American Health Lawyers Association, *About Arbitration and Medication Services: Important Rules Amendment*, available at [http://www.healthlawyers.org/Template.cfm?Section=About\\_Arbitration\\_and\\_Mediation\\_Services&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3049](http://www.healthlawyers.org/Template.cfm?Section=About_Arbitration_and_Mediation_Services&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3049).....8
- 17A Am.Jur.2d *Contracts* § 412.....28
- Beverly Hawkins, *Medical Arbitration Agreements*, MEDICAL ETHICS IN UTAH, December 2003, available at <http://uuhsc.utah.edu/ethics/NewsArchive/2003/December%202003%20.pdf>.....11
- Bob Carlson, *First Business, Now Health Care: Signing Away One's Right To Sue*, MANAGED CARE, June 2002, available at <http://www.managedcaremag.com/archives/0206/0206.binding.html>.....43
- Bryson B. Morgan, *Mandatory Medical Arbitration: The Wrong Answer to the Rising Cost of Health Care in Utah*, 6 HINCKLEY JOURNAL OF POLITICS at 44 (2005).....13, 16
- Commission on Health Care Dispute Resolution, Final Report, July 27, 1998 at 14, available at <http://www.ama-assn.org/ama1/pub/upload/mm/395/healthcare.pdf>.....8
- Dan Lawton, *Fair Shake? Arbitration Industry Has No Incentive to Reform A System That Serves It Well*, LOS ANGELES DAILY JOURNAL, July 24, 2002 at 6.....18
- District Court Caseload FY2005 - Statewide Summary, available at [http://www.utcourts.gov/stats/FY05/dist/fy2005\\_9.htm](http://www.utcourts.gov/stats/FY05/dist/fy2005_9.htm).....16

James R. Holbrook, <i>Mandatory Binding Arbitration of Medical Malpractice Claims in Utah</i> , Utah Bar Journal, October 2003, at 10.....	21
<i>Medical Malpractice: Few Claims Resolved Through Michigan's Voluntary Arbitration Program</i> , (GAO:HRD-91-38, Dec. 27, 1990).....	10
Public Citizen, Congress Watch April 2002: <i>The Costs of Arbitration</i> at 61 (May 1, 2002).....	10, 19, 44
Sarah Rudolph Cole, <i>Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees</i> , 64 UMKC L. REV. at 452 (1996).....	17, 19
Shane Johnson, <i>Arbitration Frustrations: Doctors find creative ways to force patients into malpractice agreements despite Utah law</i> , Salt Lake City Weekly: City Beat - July 8, 2004, available at <a href="http://www.slweekly.com/editorial/2004/city_2004-07-08.cfm">http://www.slweekly.com/editorial/2004/city_2004-07-08.cfm</a> .....	10
Todd D. Rakoff, <i>Contracts of Adhesion: An Essay in Reconstruction</i> , 96 HARV. L. REV. 1174, 1179 (1983).....	7
Tony Kreindler, <i>Sponsor of Utah Malpractice Arbitration Bill Now Wants Repeal</i> , ADRWorld.com, January 21, 2004, available at <a href="http://www.adrworld.com/sp.asp?id=27131">www.adrworld.com/sp.asp?id=27131</a> .....	16
Tracy Walters McCormack, <i>Privatizing the Justice System</i> , REVIEW OF LITIGATION: SYMPOSIUM 2006, Vol.25:4 at 735.....	22
U.S. Department of Justice, Civil Justice Survey of State Courts, 2001: Medical Malpractice Trials and Verdicts in Large Counties, 2001.....	21
U.S. Department of Justice, Federal Justice Statistics Program: Federal Tort Trials and Verdicts, 2002-2003.....	21
2003GS House Floor Debate SB0138 - Day 45 (3/5/2003), available at <a href="http://www.image.le.state.ut.us/imaging/bill.asp">http://www.image.le.state.ut.us/imaging/bill.asp</a> .....	15

### **CONSENT FOR AMICUS FILING**

The Utah Trial Lawyers Association ("UTLA") is a statewide organization comprised of 400 attorneys who are active in defending the rights of tort victims in the courts and in the legislative arena. Our main focus is to preserve the American justice system and the right to trial by jury. We work to strengthen and defend laws that protect Utah families. Our mission is to preserve justice and accountability by upholding the Constitutions of the United States and the State of Utah, including preserving the rights of access to the courts, due process, and trial by jury. We seek to advance the cause of those who are injured in person or property and who must therefore seek redress; promoting the fair, prompt and efficient administration of justice; developing and encouraging high standards of personal and professional conduct among the trial lawyers of Utah; and promoting excellence and training in the art of advocacy.

Many UTLA members have represented plaintiffs in wrongful death actions, including those stemming from medical malpractice. Accordingly, UTLA has a significant interest in the outcome of the Court's ruling on this appeal. Furthermore, all parties in this matter have consented to the appearance of the UTLA as amicus curiae as required by Rule 25 of the Utah Rules of Appellate Procedure. A Stipulation Consenting to the Filing of a Brief by the Utah Trial Lawyers Association as Amicus Curiae is attached hereto as Addendum A.

### **STATEMENT OF JURISDICTION**

The Utah Trial Lawyers Association adopts and incorporates the Statement of Jurisdiction set forth in the brief of Appellee.

### **ISSUES PRESENTED ON APPEAL**

The Utah Trial Lawyers Association adopts and incorporates the Statement of the Issues Presented on Appeal set forth in the brief of Appellee.

### **STANDARD OF REVIEW**

The Utah Trial Lawyers Association adopts and incorporates the Standard of Review set forth in the brief of Appellee.

### **RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS**

Utah Code Ann. § 78-14-17 (2003 and 2004) are attached as Addendum B to the brief of Utah Medical Association.

Utah Const. Art. I, § 10: [Trial by jury.]

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal case the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Utah Const. Art. I, § 11 [Courts open - - Redress of injuries.]

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.

Utah Const. Art. XVI, § 5 [Injuries resulting in death - - Damages.]

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.

### **STATEMENT OF THE CASE**

The Utah Trial Lawyers Association adopts and incorporates the Statement of the Case set forth in the brief of Appellee.

### **SUMMARY OF ARGUMENT**

Patients and health care providers do not have equal bargaining power. There is no reasonable opportunity for a meeting of the minds between a sick patient and her physician on the terms of an agreement wherein substantive constitutional rights are purported to be waived. The physician-patient relationship is not about contracts, it is about health care. Pre-dispute jury trial waivers have no place in the health care setting. None of the purported benefits of arbitration, such as it being cheaper, faster, or fairer, are applicable to agreements between patients and physicians. Procedures in arbitration are conducted exactly as they would be in litigation. There is no evidence, or even a rationale, for how arbitration of medical malpractice claims in Utah could be faster, cheaper, or fairer. In fact, evidence seems to suggest that the insurance companies, as

“repeat players” in the arbitration business, have advantages over “one-shot” plaintiffs that make the arbitration process inherently unfair for injured patients and their families.

The right to a jury trial is a substantive right that cannot be pre-empted by public policy. Jury trial waivers must be knowing, voluntary and intelligent. There is no public policy favoring pre-injury jury trial waivers that do not meet this strict criteria. Mrs. Bybee was not a signatory to the arbitration agreement and never agreed to waive her right to a jury trial. Additionally, Mrs. Bybee’s wrongful death claims did not exist at the time her husband signed the arbitration agreement and he was powerless to waive her rights to a jury trial of those claims.

The 2004 amendments to the Utah Health Care Malpractice Act do not provide for the arbitration of wrongful death claims where the heirs are non-signatories to the agreement. The sole basis for Mrs. Bybee’s claims is not any injury suffered by her husband. Her claims are based on her own injuries suffered as a result of her husband’s death. The statute does not provide for the arbitration of such claims, and in fact, the Utah Constitution protects her right to litigate those claims in court.

The answer to all concerns about arbitration agreements is to allow post-dispute agreements between the parties. Until a dispute arises it is impossible for either side to make a knowing, voluntary and intelligent decision about which dispute resolution method best suits the facts of the case.

## ARGUMENT

### **I. THE PHYSICIAN-PATIENT RELATIONSHIP SHOULD BE ABOUT HEALTH CARE, NOT CONTRACTS.**

Defendant's amicus argues that enforcement of the arbitration agreement is required by the physician-patient relationship. The argument is that the physician and the patient contracted to make arbitration part of their relationship, and the family should be bound by the patient's decision. This argument ignores the reality of the true physician-patient relationship.

#### **A. Pre-Dispute Jury Trial Waivers Do Not Belong In The Health Care Arena Because Doctors And Patients Do Not Have Equal Bargaining Power.**

This Court has stated that "no public policy requires [arbitration] agreements to be subject to a different analysis when they are between physicians and patients. They are enforceable if they meet the standards applicable to all contracts."<sup>1</sup> However, the reality is that pre-dispute jury trial waivers entered into between physicians and their patients do not meet the "standards applicable to all contracts" because virtually all such agreements are entered into in a procedurally unconscionable manner.

Patients and healthcare providers do not have equal bargaining power. Our society has put physicians on a pedestal. We give them a special title and we give them special

---

<sup>1</sup> Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996).

privileges. Patients do not go to their doctor to discuss and negotiate waivers of substantive constitutional rights. People go to the doctor because they are sick and need help. When a patient is given a stack of papers to sign before being able to see the doctor, they sign them. He is the doctor, he knows what is best.

Typically, patients do not even see the doctor until after the arbitration agreement is signed and never have an opportunity to actually bargain with the doctor over the terms of the agreement. Even if patients want to discuss the terms of the agreement with the doctor, they are often not in a position to make any realistic demands. They are likely there in the first place because their insurance limits who they can see. If this particular insurance-approved physician requires an arbitration agreement, they assume all other approved physicians will require one as well. Additionally, patients are seeing the doctor in the first place because something is wrong. They need treatment to cure an ill and are reluctant to do anything that might jeopardize their ability to get timely medical help.

There is a fundamental difference between the physician-patient relationship and the relationship between other parties to pre-dispute jury trial waivers. Patients do not view the relationship with their physician as being contractual. They see it as medicinal.

Furthermore, studies have shown that a very small percentage of consumers read



form agreements and only a few of those actually understand what they read.<sup>2</sup> Doubtless, this is even more true in the context of a sick patient reading and signing numerous forms in a doctor's office.

In 1997 the American Arbitration Association, the American Bar Association and the American Medical Association formed a commission to study, and make recommendations regarding, alternative dispute resolution of health care claims. The Commission on Health Care Dispute Resolution was made up of leaders of these three organizations and issued a final report in 1998. The Commission recognized that alternative dispute resolution agreements between physicians and patients were different than agreements between businesses and consumers in other settings:

The nature of the relationship between plans and patients or providers is such that little, if any negotiation over terms - including external review or ADR systems - takes place. Since these ADR systems or external review procedures will invariably not be the product of a negotiated agreement, the Commission believes it would be especially useful to set forth key aspects of procedural due process, to ensure a "level playing field" for resolving health care disputes by ADR.<sup>3</sup>

---

<sup>2</sup>See Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233 (2002) (analyzing literacy research that demonstrated a high percentage of literate adults are incapable of extracting relevant information from form contracts); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1179 (1983) (discussing studies showing that consumers are unlikely to read adhesion contracts before signing them and less likely to understand what they read).

<sup>3</sup>Commission on Health Care Dispute Resolution, Final Report, July 27, 1998 at 14, available at <http://www.ama-assn.org/ama1/pub/upload/mm/395/healthcare.pdf>.

One of the key procedural due process principles set forth by the commission was that “in disputes involving patients, binding forms of dispute resolution should be used *only* where the parties agree to do so *after* a dispute arises.”<sup>4</sup> The recommendation to only accept post-dispute agreements was one of only five unanimous recommendations of the Commission. In response to this recommendation, the American Arbitration Association announced that effective January 1, 2003, it would no longer accept cases involving pre-dispute arbitration agreements in the health care area.<sup>5</sup>

Soon thereafter, The American Health Lawyers Association’s Alternative Dispute Resolution Service amended its rules and effective January 1, 2004, announced that it would only administer arbitration agreements entered by parties after an injury occurred.<sup>6</sup>

These policies to administer only post-dispute agreements acknowledge the inherent unfairness of asking patients to sign pre-dispute waivers and recognize the reality that such waivers are in no way knowing, voluntary or intelligent.

---

<sup>4</sup>*Id.* at 15 (emphasis added).

<sup>5</sup>American Arbitration Association, *Health Care Policy Statement*, available at <http://www.adr.org/sp.asp?id=21885>.

<sup>6</sup>American Health Lawyers Association, *About Arbitration and Mediation Services: Important Rules Amendment*, available at [http://www.healthlawyers.org/Template.cfm?Section=About\\_Arbitration\\_and\\_Mediation\\_Services&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3049](http://www.healthlawyers.org/Template.cfm?Section=About_Arbitration_and_Mediation_Services&Template=/ContentManagement/ContentDisplay.cfm&ContentID=3049).

## **B. Rescission Is Not The Answer For Patients.**

Although the law allows patients to rescind arbitration agreements,<sup>7</sup> this is a toothless defense against doctors intent on perpetuating mandatory arbitration. Because physicians are no longer required to give a verbal explanation of the nearly 1,200 word agreements, many patients likely do not even realize they have the right to rescind them. Those who do exercise this right, as allowed by law, may find their doctor coming up with other excuses for refusing to treat them.

A recent newspaper article reported the story of Colleen Brunson, a victim of illegal, mandatory arbitration. Mrs. Brunson was required to sign an arbitration agreement in September 2003, after the legislature allowed physicians to deny treatment to patients who refused to sign. In 2004 the legislature amended the law to prevent such coercion, and Mrs. Brunson rescinded her agreement within 5 days of when the new law took effect. Just three days later, Mrs. Brunson's physician sent her a letter saying he would no longer be able to treat her "due to problems communicating" with her. After seven years of treating with the same doctor, Mrs. Brunson and her family were forced to seek medical help elsewhere.<sup>8</sup>

---

<sup>7</sup>Patients were allowed 30 days to rescind agreements under the 1999-2003 versions of the act. Under the 2004 amendments, patients are allowed only 10 days in which to rescind.

<sup>8</sup>Shane Johnson, *Arbitration Frustrations: Doctors find creative ways to force patients into malpractice agreements despite Utah law*, Salt Lake City Weekly; City Beat - July 8, 2004, available at [http://www.slweekly.com/editorial/2004/city\\_2004-07-08.cfm](http://www.slweekly.com/editorial/2004/city_2004-07-08.cfm).

**C. The Supposed "Benefits" Of Arbitration In Other Contexts Do Not Exist In The Health Care Setting.**

Although Utah law favors "speedy and inexpensive methods of adjudicating disputes,"<sup>9</sup> there is no evidence to suggest arbitration of medical malpractice claims falls in this category.

Proponents of arbitration claim that one of its advantages is the reduced cost when compared with litigation. However, they offer no evidence in support of this claim and it is difficult to conceive of how they could.<sup>10</sup> Aware of this claimed "benefit" to arbitration, the United States General Accounting Office ("GAO") studied the costs of arbitration versus litigation in Michigan's arbitration program and concluded that the costs were virtually the same.<sup>11</sup> In Utah, medical malpractice arbitrations are conducted pursuant to the Utah Rules of Civil Procedure. All the deadlines and discovery tools permitted under the rules are utilized in arbitrations exactly as they would be in litigation. Written discovery is propounded. Medical records are collected and reviewed.

---

<sup>9</sup> Allred v. Educators Mutual Ins. Ass'n. of Utah, 909 P.2d 1263, 1265 (Utah 1996).

<sup>10</sup>Public Citizen, Congress Watch April 2002: *The Costs of Arbitration* at 61 (May 1, 2002) ("there appears to be no report or study finding that litigants, by giving up free use of a public court system, can actually save money through private adjudication." And "a review of the literature on arbitration finds no scholarly writing setting forth a theory behind claims of arbitration cost savings").

<sup>11</sup>*Medical Malpractice: Few Claims Resolved Through Michigan's Voluntary Arbitration Program*, (GAO/HRD-91-38, Dec. 27, 1990) (median defense costs were \$17,509 for arbitration and \$17,798 for litigation).

Depositions are taken. Experts are retained. All of the costs incurred in traditional litigation are, of necessity, incurred in arbitration. Health care providers in Utah recognized this fact even in 2003 when they were pushing for increased use of arbitration:

The patient and physician share the fees and expenses of the neutral arbitrator, and each pays the fees and expenses of their chosen arbitrator. This is in addition to any attorney's fees incurred, which, for the patient, can still be negotiated as a contingency fee. If attorney fees have traditionally been paid for by contingency (for the patient) and an insurance company (for the defendant), neither individual involved in arbitration would find a savings or additional expense here. However, the arbitrators' fees and expenses might represent new costs in this process.<sup>12</sup>

This added cost should not be casually dismissed. Arbitrators charge hourly fees that can range from \$250 to \$350 an hour. Not only do parties have to pay the hourly fee of three arbitrators over the length of the arbitration hearing, but they must pay an arbitrator for each hour that is spent acting as a judge and ruling on discovery disputes, scheduling conferences, substantive motions, etc. Even a "simple" medical malpractice case will incur thousands of dollars in arbitrator fees that would not be imposed on litigants in a traditional civil action.

This added cost alone may be enough to render arbitration agreements unenforceable. The Supreme Court has recognized that "the existence of large arbitration

---

<sup>12</sup>Beverly Hawkins, *Medical Arbitration Agreements*, MEDICAL ETHICS IN UTAH, December 2003, available at <http://uuhsc.utah.edu/ethics/NewsArchive/2003/December%202003%20.pdf>.

costs could preclude a litigant . . . from effectively vindicating her . . . rights in the arbitral forum.”<sup>13</sup> Other courts addressing this issue have also concluded that when arbitration costs raise barriers to due process, the agreements should not be enforced.<sup>14</sup>

There is also no evidence that arbitration is faster than traditional litigation. As noted above, because discovery in arbitration proceeds exactly as it does in litigation, there is no reasonable explanation for how it could be faster. In fact, it was observed in California that the average wait for an arbitration hearing was almost 30 months, while 96% of cases in trial court were disposed of in less than 24 months.<sup>15</sup>

Another touted benefit of medical malpractice arbitration is that the process would lower the cost of malpractice insurance and, in turn, help keep a lid on the rising cost of

---

<sup>13</sup> Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 90 (2000).

<sup>14</sup> Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669, 687 (Cal. 2000) (holding that when an employer imposes mandatory arbitration as a condition of employment, the arbitration process cannot impose expenses on the employee that he would not have to bear in court); Shankle v. B-G Maintenance Management of Colorado, 163 F.3d 1230, 1235 (10<sup>th</sup> Cir. 1999) (an arbitration agreement requiring employee to pay one-half of arbitrator’s fee placed employee “between the proverbial rock and hard place – it prohibited use of the judicial forum, where a litigant is not required to pay for a judge’s services, and the prohibitive cost substantially limited use of the arbitral forum”); Cole v. Burns Intern. Security Services, 105 F.3d 1465, 1484 (D.C. Cir. 1997) (court refused to compel arbitration and held that it was unacceptable to require the plaintiff to pay arbitrator’s fees “because such fees are unlike anything that he would have to pay to pursue his statutory claims in court”); State Ex Rel. Dunlap v. Berger, 567 S.E.2d 265 (W.Va. 2002) (holding that provisions in contracts of adhesion that impose unreasonably burdensome costs or that would have a deterrent effect upon a person seeking to vindicate rights are unconscionable).

<sup>15</sup> Engalla v. Permanente Medical Group, Inc., 938 P.2d 903, 987 (Cal. 1997) (Kennard, J. concurring).

health care. Although courts often defer such policy judgments to the legislature, when it comes to medical malpractice arbitration, that deference should be tempered by reality. In analyzing the 2003 Utah Legislature's passage of the well-publicized mandatory arbitration amendments of the Utah Health Care Malpractice Act, one commentator noted that representatives "gave inadequate consideration to the scope of the problem, the causes of the problem, the proposed solution, and the impact of the bill on the public."<sup>16</sup> The lack of adequate information results in legislators who are "forced to rely more and more heavily on information from lobbyists and colleagues, and when the time to vote on a bill arrives, it has become common for a legislator to look to either a member of leadership or the gallery for an indication of how to vote."<sup>17</sup>

Evidence in support of this commentary is found in the recordings of the debate on the senate floor for the 2003 amendments. It appears the legislature either misunderstood or misrepresented facts which bore directly on their ability to engage in appropriate legislative decision making with regard to the proposed changes to arbitration of medical malpractice claims in Utah:

Rep. Ferrin:	I am looking at lines 105 through 108 and it would appear to me that the substantive effect of this change is that a patient may now be denied health care of any
--------------	---

---

<sup>16</sup>Bryson B. Morgan, *Mandatory Medical Arbitration: The Wrong Answer to the Rising Cost of Health Care in Utah*, 6 HINCKLEY JOURNAL OF POLITICS at 44 (2005).

<sup>17</sup>*Id.* at 43.

kind on the sole basis that the patient or person refused to enter into a binding arbitration agreement with the health care provider. . . . Is that the desired effect of the bill?

Rep. Dayton: No. The desired effect of the bill is to allow two parties to negotiate together. Whether or not they will agree to arbitration. Doesn't mean that all physicians will want arbitration, it doesn't mean everybody has to. It just allows this because the way the law is now, physicians are not permitted that arbitration option.

Rep. Ferrin: But am I mistaken that a patient under this change, a patient may be denied health care of any kind on the sole basis that they did not enter into an arbitration agreement?

Rep. Dayton: No, because they can decide from there if they don't want to enter into an arbitration agreement what to do with their relationship from there. So, no they can't be denied and there are other options.

\*\*\*

Rep. Christensen As a follow up to Representative Ferrin's question, am I correct in understanding at line 71h that 78-14-17 will be repealed in 2009 as it now currently is codified?

Rep. Dayton: This does have a six year sunset if that is what you are asking.

Rep. Christensen But it specifically repeals 78-14-17 does it not?

Rep. Dayton: Correct.

Rep. Christensen And if you look at 78-14-17 sub paragraph 2, it currently provides exactly what Representative Ferrin



was asking about, that a patient may not be denied health care of any kind on the sole basis that the patient or a person described in subsection five refused to enter into a binding arbitration agreement with a health care provider. So that protection will both disappear and be gone right?

Rep. Dayton: The purpose of this bill is to allow arbitration as an option which it is not an option right now. People enter into business relationships every day. Whether or not they choose to do so should be their decision. We would never force a patient to go to a particular doctor or even an attorney for someone against their will, but what we are saying here is that what applies to other business relationships can now apply to physicians except in emergencies, and that is that they may have the option of offering arbitration.<sup>18</sup>

Contrary to these troubling representations made during “debate” on the bill, arbitration had long been available to physicians under the law in existence since 1999, and under the proposed 2003 amendments health care providers were permitted to refuse treatment to unwilling patients. These excerpts make it clear that when it comes to public policy behind medical malpractice arbitration, the legislature does not deserve the deference it is accorded.

With regard to the stated goal that the 2003 amendments would help protect the health care system, one of the chief sponsors of the bill, Senator Parley Hellewell,

---

<sup>18</sup>2003GS House Floor Debate SB0138 - Day 45 (3/5/2003), available at <http://www.image.lc.state.ut.us/imaging/bill.asp>.

reversed his position during the next legislative session and conceded that malpractice lawsuits are not damaging the system and “doctors are not leaving the state or quitting their practices” as a result of lawsuits.<sup>19</sup> This acknowledgment is in line with the fact that of the 252,571 cases filed in Utah District Courts in 2005, only 262 were medical malpractice cases.<sup>20</sup> Additionally, research has shown that “medical malpractice premiums as a percent of health care costs have been steadily declining over the past decade from .95 percent in 1988 to an estimated .57 percent in 2003.”<sup>21</sup> Tort reform rhetoric should no longer be a justification for unwarranted infringements on constitutionally protected rights.

**D. Arbitration Favors The “Repeat Player” Insurance Industry Over The Individual Patient.**

“A repeat player is an individual or organization who repeatedly interacts with a particular institution or engages in certain behaviors, for example, commercial transactions or dispute resolution.”<sup>22</sup>

---

<sup>19</sup>Tony Kreindler, *Sponsor of Utah Malpractice Arbitration Bill Now Wants Repeal*, ADRWorld.com, January 21, 2004, available at [www.adrworld.com/sp.asp?id=27131](http://www.adrworld.com/sp.asp?id=27131).

<sup>20</sup>District Court Caseload FY2005 - Statewide Summary, available at [http://www.utcourts.gov/stats/FY05/dist/fy2005\\_9.htm](http://www.utcourts.gov/stats/FY05/dist/fy2005_9.htm).

<sup>21</sup>Bryson B. Morgan, *Mandatory Medical Arbitration: The Wrong Answer to the Rising Cost of Health Care in Utah*, 6 HINCKLEY JOURNAL OF POLITICS at 45 (2005).

<sup>22</sup>Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. at 452

One of the inequities that results from this disparity in experience is that one-shot players, such as patients, blindly sign arbitration agreements because they do not think it will matter. They “improperly value the inclusion of the arbitration agreement” in their physician-patient relationship. Patients “suffer from judgmental bias as a result of their personal experiences. That is, they systematically ignore or de-emphasize the likelihood that a low probability event will occur because the event has never affected them.” This causes the patient to “misapprehend the risk” that they will engage in litigation with their doctor.<sup>23</sup>

This problem is even more pronounced under the 2004 amendments to the act because physicians are no longer required to give a verbal explanation of the jury trial waiver. When patients find an arbitration agreement among the myriad of other forms given to them in the waiting room of their physician’s office it is simply unreasonable to expect that they purposefully consider the remote possibility that the doctor will provide negligent treatment that will result in serious life-threatening injuries or death. It is even more unreasonable to assume the patient then makes an informed, thoughtful decision that in the event of such a tragedy she would prefer to resolve the claim in a secret, binding, unappealable forum unencumbered by the protections afforded her in the

---

(1996).

<sup>23</sup> Id.

constitution. Simply put, patients cannot be expected to fully comprehend the implications of signing pre-dispute jury trial waivers with their trusted physicians.

The insurance industry repeatedly attempts to force arbitration on patients because it is well understood that “the playing field in arbitration is tilted in favor of those who benefit most from it – corporate defendants.”<sup>24</sup> As “repeat players,” medical malpractice insurers have advantages in arbitration proceedings that are not available to “one-shot” participants like individual plaintiffs.

One such advantage is the secrecy of the proceedings. In reality, the secrecy is only one-sided. While individual plaintiffs know nothing about prior arbitrations (e.g. who the defendant was, who the defendant’s attorney was, who the arbitrators were, what the issues were, what the verdict was) the insurance carrier defendant has access to all this information for every arbitration dealing with any of its insureds.

The repeat player’s more sophisticated understanding of the dispute resolution process and his ability to influence that process through repeated informal relations with the decision maker may also be advantageous. Finally, the repeat player will be able to make use of his own “institutional memory.” The repeat player will be familiar with both the line of decisions affecting his own workforce as well as those arbitrators who are likely to render favorable decisions.<sup>25</sup>

This institutional verdict reporting system gives the defendants an enormously

---

<sup>24</sup>Dan Lawton, *Fair Shake? Arbitration Industry Has No Incentive to Reform A System That Serves It Well*, LOS ANGELES DAILY JOURNAL, July 24, 2002 at 6.

<sup>25</sup> Cole, *supra* note 22, at 453.

unfair advantage in the proceedings. Not only does secrecy shield plaintiffs from the knowledge of precedent, but it also shields the public from the knowledge of potential bad actors. Jury verdicts in this country not only serve to compensate injured victims of negligence, but they also serve to sound a warning cry to other potential wrongdoers. For example, many of the safety standards we have come to expect from the automotive and pharmaceutical industries came about as a result of juries sending a message that negligence would not be tolerated.

Why do capitalist nations have publicly-supported courts systems if private arbitrators can resolve disputes? It is not because the public has an interest in adjudicating individual disputes: it is because the very existence of a court system induces voluntary compliance with contracts and respect for rights of others.<sup>26</sup>

When negligent physicians and hospitals are permitted to “resolve” valid claims in secret, unreportable, unappealable forums, society as a whole is worse off.

A further disadvantage imposed on the “one shot” patient in arbitration is that she is unable to offer the decision makers the additional income that might arise from future disputes.

And the fact that the business organization imposing the arbitration clause is a repeat player in the arbitration system, while the consumer or employee is not, raises the potential that arbitrators will consciously or unconsciously

---

<sup>26</sup> Public Citizen, Congress Watch April 2002; *The Costs of Arbitration* at 74 (May 1, 2002).

bias their decisions in favor of [the business] that hires them regularly.<sup>27</sup>

The pool of qualified medical malpractice arbitrators in Utah is woefully shallow and comprised of mostly "professional" arbitrators. Coincidentally, the pool of malpractice insurance companies operating in Utah is equally shallow, consisting of only two or three significant players. This is a dangerous combination. Defendants select one of the arbitrators on each three person panel and have veto power over a second. When an arbitrator's livelihood is dependent upon the benevolence of an insurance carrier he will be understandably reluctant to do anything that might make the carrier unhappy. Simple logic would lead anyone to conclude that a plaintiff's verdict in arbitration would make an insurance carrier quite unhappy. On the other hand, an arbitrator who repeatedly renders decisions in favor of defendant physicians will quickly find himself at the top of the "preferred provider" list. The bias is a tremendous advantage to the defendants, and whether such bias occurs consciously or unconsciously is of little importance to the individual plaintiff left without recourse for his injuries. When it comes to income for arbitrators, a la carte plaintiffs simply cannot compete with the all-you-can-eat buffet offered by the defense.

Due to the secrecy of arbitration proceedings in Utah it is impossible to compile

---

<sup>27</sup> Engalla v. Permanente Medical Group, Inc., 938 P.2d 903, 988 (Cal. 1997) (Kennard, J. concurring).

statistics regarding the outcomes of hearings. However, in 2003, legal counsel for the Utah Medical Insurance Association, Elliott Williams, stated that he had been involved in nine arbitration proceedings and all nine decisions were in favor of the physicians.<sup>28</sup>

Although plaintiffs in medical malpractice cases nationally win twenty-seven percent of the time in state courts<sup>29</sup> and thirty-seven percent of the time in federal court,<sup>30</sup> injured patients forced to arbitrate their claims in Utah have a 0% success rate according to Mr. Williams.

Given these advantages, it is little wonder the insurance industry favors arbitration over jury trials. However, these same advantages should cause this Court to ask pointed questions regarding the fairness and constitutionality of pre-dispute jury trial waivers in the health care setting:

Where judges are provided free (through taxes) in court, parties are paying time and expenses for a panel in arbitration at a rate far higher than we pay our judges. What are we saying about our confidence in the judiciary we elect and/or appoint that we are unwilling to allow them to determine cases even in a bench trial? Is the quality of private decision makers worth making clients pay so much more? If arbitration is not a reflection on our judiciary, then is it an attempt to escape laws? Are corporations adding

---

<sup>28</sup>James R. Holbrook, *Mandatory Binding Arbitration of Medical Malpractice Claims in Utah*, Utah Bar Journal, October 2003, at 10.

<sup>29</sup>U.S. Department of Justice, Civil Justice Survey of State Courts, 2001; Medical Malpractice Trials and Verdicts in Large Counties, 2001.

<sup>30</sup>U.S. Department of Justice, Federal Justice Statistics Program; Federal Tort Trials and Verdicts, 2002-2003.

arbitration clauses to every contract to escape the rules of evidence, procedure and even the substantive law? Surely we are not paying for an entire replacement system just to avoid the occasional jury trial?

Isn't something amiss when the law, the courts, and juries still exist, but all the cases have been moved elsewhere?<sup>31</sup>

The physician-patient relationship should be about health care and not about contracts. There is unequal bargaining power between the parties and the nature of the relationship prevents any reasonable opportunity for a meeting of the minds on complex jury trial waiver issues.

## **II. THERE IS NO PUBLIC POLICY FAVORING UN-KNOWING, INVOLUNTARY, UNINTELLIGENT WAIVERS OF A NON-PARTY'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.**

"[W]hile the public policy of promoting speedy and inexpensive resolution of controversies favors arbitration in some cases, these considerations cannot outweigh the constitutional right of access to the courts unless one waives that right."<sup>32</sup>

Article I, Section 10 of the Utah Constitution guarantees civil litigants the right to a trial by jury.<sup>33</sup> This substantive right is integral to our state and federal systems of justice. Although parties are free to waive their constitutional right to a trial by jury,

---

<sup>31</sup>Tracy Walters McCormack, *Privatizing the Justice System*, REVIEW OF LITIGATION: SYMPOSIUM 2006, Vol.25:4 at 735.

<sup>32</sup> Jenkins v. Percival, 962 P.2d 796, 800 (Utah 1998).

<sup>33</sup> See, Intern. Harvester Credit v. Pioneer Tractor, 626 P.2d 418, 421 (Utah 1981).



courts have an obligation to ensure that any such waiver is spotless from the stains of fraud, coercion, or ignorance. The Court's role as protector of this fundamental right has been repeatedly emphasized by the United States Supreme Court:

The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.<sup>34</sup>

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeing curtailment of the right to a jury trial should be scrutinized with the utmost care.<sup>35</sup>

The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.<sup>36</sup>

Because this right is a "jealously guarded privilege under the Constitution,"<sup>37</sup> this Court has held that any jury trial waiver must be knowing, voluntary and intelligent.<sup>38</sup>

Lisa Bybee was not a party to the arbitration agreement at issue in the present case, and it is impossible to conclude that she made a knowing, voluntary and intelligent waiver

---

<sup>34</sup>Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 581 (1990).

<sup>35</sup>Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

<sup>36</sup>Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142, 148 (1907).

<sup>37</sup>State v. Hassan, 108 P.3d 695, 698 (Utah 2004).

<sup>38</sup> Jenkins, 962 P.2d at 799.

of her right to a jury trial with regard to her wrongful death claims.

Amicus Curiae Utah Medical Association argues there is a federal and state policy favoring arbitration. However, it is well-accepted that this “favored” status does not extend to dragging non-parties into arbitration and only comes into play after establishing a valid agreement between the parties. This Court has recognized that any policy favoring arbitration does not trump contractual requirements or constitutional protections:

Judicial promotion of alternative methods of dispute resolution is not the sole consideration, however. When parties agree to arbitrate, they waive the substantial right to judicial resolution of their disputes. Consequently, 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.<sup>39</sup>

This Court addressed the issue of binding non-parties to arbitration in Jenkins v. Percival,<sup>40</sup> and after stating that “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,” held that a non-signatory insured could not be bound by an arbitration agreement between his insurance company and a tort plaintiff. In

---

<sup>39</sup>McCoy v. Blue Cross and Blue Shield of Utah, 220 P.3d 901, 904 (Utah 2001) (citations omitted). See also, In Re Kepka, 178 S.W.3d 279, 286 (Tex. App. - Houston [1<sup>st</sup> Dist] 2005) (“this federal policy favoring arbitration does not apply to the determination of whether there is a valid agreement to arbitrate between the parties . . . [and] the federal policy favoring arbitration does not extend to a determination of who is bound”).

<sup>40</sup> 962 P.2d 796, 799 (1998).

the view of the Jenkins Court, the open courts provision of the Utah Constitution, Article I, Section 11, prohibited depriving a litigant of his day in court without an express agreement.

The reality is that any policy "favoring" arbitration came about in an effort to place arbitration agreements "upon the same footing as other contracts,"<sup>41</sup> and not to raise alternative dispute resolution above a litigant's constitutional right to a jury trial. While policy favoring arbitration should be used to allow parties to an agreement the opportunity to resolve a dispute in an alternative forum if they so choose, it should not be used to allow a party who desires alternative dispute resolution the power to unilaterally force arbitration on a non-signatory. The principle that parties cannot be compelled to arbitrate claims unless they have agreed to do so was succinctly stated by the Utah Court of Appeals as follows:

Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit. This is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute. Thus, although there is a presumption in favor of arbitration, a party will not be required to arbitrate when it has not agreed to do so. We 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.<sup>42</sup>

---

<sup>41</sup> Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985).

<sup>42</sup> Cade v. Zions First National Bank, 956 P.2d 1073, 1077 (Utah Ct. App. 1998).

This position is consistent with numerous other jurisdictions that refuse to force non-signatories into a forum they did not chose.<sup>43</sup> As a non-signatory to the agreement, Mrs. Bybee cannot be compelled to arbitrate her claims.

**A. Mrs. Bybee Could Not Make A Knowing, Voluntary And Intelligent Waiver Of A Right That Did Not Exist At The Time The Agreement Was Entered.**

Mrs. Bybee could not have waived, nor could her husband have waived on her behalf, her constitutional right to a jury trial of her wrongful death claims because the claims did not exist at the time her husband signed the agreement. In Utah, "in order for waiver to occur, there must be an existing right, benefit or advantage, a knowledge of its existence, and an intention to relinquish it."<sup>44</sup> As noted in Behm v. Gee (In re Behm's Estate),<sup>45</sup> a wrongful death cause of action "only comes into existence upon the happening

---

<sup>43</sup> Cook's Pest Control, Inc. v. Boykin, 807 So.2d 524, 526 (Ala. 2001) ("it is the general rule that a non-signatory to an arbitration agreement cannot be forced to arbitrate her claims"); In re Big 8 Food Stores, Ltd., 166 S.W.3d 869, 876 (Tex. App. El Paso 2005) ("a party seeking to enforce a purported arbitration agreement must establish that the parties agreed to arbitrate the dispute"); Riverside Capital Advisors, Inc. v. Winchester Global Trust Co. Ltd., 21 A.D.3d 887 (N.Y.A.D. 2 Dept. 2005) ("it is well settled that a party may not be compelled to arbitrate a dispute unless there is evidence which affirmatively establishes that the parties clearly, explicitly, and unequivocally agreed to arbitrate the dispute"); Scruggs v. State Farm Mut. Auto. Ins. Co., 62 P.3d 989 (Ariz. App. Div. 1 2003) ("parties are only bound to arbitrate those issues which by clear language they have agreed to arbitrate; arbitration agreements will not be extended by construction or implication"); Jackson State Bank v. Homar, 837 P.2d 1081, 1085 (Wyo. 1992) ("no party is required to arbitrate a dispute unless the parties have bargained for this procedure as a method of resolve").

<sup>44</sup> Mont. Trucking, Inc. v. Entrada Indus., Inc., 802 P.2d 799, 781 (Utah Ct. App. 1990).

<sup>45</sup> 117 Utah 151, 158, 213 P.2d 657 (1950).

of death.” Because a wrongful death claim is an independent action accruing in the heirs of the deceased,<sup>46</sup> and because a person’s heirs are not defined until the time of death,<sup>47</sup> Mrs. Bybee’s wrongful death cause of action did not exist at the time her husband purportedly waived her right to litigate the claim.

As this Court stated in McCoy,<sup>48</sup> “waiver is the intentional relinquishment of a known right.” Because the cause of action did not exist at the time her husband signed the agreement it would be impossible for Mrs. Bybee to have intentionally relinquished that right.

**B. Mr. Bybee’s Intentions With Regard To Binding His Heirs Are Irrelevant.**

Generally, the obligation of contracts is limited to the parties making them . . . Parties to a contract cannot thereby impose any liability on one who, under its terms, is a stranger to the contract. . . . In the case of a written contract, a person who is not named in, or bound by, the terms of a written contract cannot be rendered liable on it by a mere intention that he or she should be bound[.]<sup>49</sup>

Defendant’s amicus argues that Mr. Bybee intended to bind his heirs to the arbitration agreement and that his intentions should be controlling. Such a position

---

<sup>46</sup> Jensen v. IHC Hospital, Inc., 944 P.2d 327 (Utah 1997).

<sup>47</sup> See, Gershon v. Regency Diving Center, Inc., 368 N.J. Super. 237 (2004).

<sup>48</sup> 20 P.3d at 905

<sup>49</sup> 17A Am.Jur.2d *Contracts* § 412.

ignores this Court's recognition that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."<sup>50</sup> Further, it ignores the fact that Mr. Bybee lacked the capacity to bind his statutory heirs with regard to a new cause of action. This Court has previously explained that it is the statutory intent, and not the decedent's wishes, that is controlling in wrongful death cases.<sup>51</sup>

Wrongful death heirs are essentially third parties to a relationship that existed between the decedent and the tortfeasor. The Utah Wrongful Death Act exists to protect the rights of these third parties to recover for their injuries. Utah courts have consistently held that ordinary contract principles that might bind non-consenting third parties in the context of common law claims are not applicable to statutorily created causes of action designed to protect persons designated in the statute.<sup>52</sup>

---

<sup>50</sup> Central Florida Investments, Inc. v. Parkwest Associates, 40 P.3d 599, 604 (Utah 2002).

<sup>51</sup> See, Kelson v. Salt Lake County, 784 P.2d 1152 (Utah 1989).

<sup>52</sup> See, Metals Manuf. Co. v. Bank of Commerce, 395 P.2d 914 (Utah 1964) (holding that the contractually manifested intentions of the Lessor and Lessee could not bind third party suppliers who were not privies to the agreement where enforcing the agreement would circumvent a statute whose purpose is to protect suppliers); John Wagner Associates v. Hercules, Inc., 797 P.2d 1123 (Utah App. 1990), cert. denied, 815 P.2d 241 (Utah 1991) (refusing to enforce parties intentions on third party protected by the mechanics lien statute); Camp v. Offices of Recovery Services of Utah Dept. Of Social Services, 779 P.2d 242 (Utah App. 1989) (Medicaid not bound by agreement made by recipient in wrongful death case and can recover in full if recipient proceeds without State's consent); State Ex Rel. Dunlap v. Berger, 211 W. Va. 549, 599, 567 S.E.2d 265 (2002) ("we recognize and hold that exculpatory provisions in a contract of adhesion that if applied would prohibit or substantially limit a person from enforcing and vindicating rights and protections or from seeking and obtaining statutory or common-law

**III. THE 2004 AMENDMENTS TO § 78-14-17 DO NOT REQUIRE WRONGFUL DEATH HEIRS TO SUBMIT THEIR CLAIMS TO ARBITRATION.**

The Utah Medical Association argues that the current version of § 78-14-17 specifically provides that non-party heirs can be bound by arbitration agreements signed by their decedents. This is not true. Subparagraph (1)(b)(vii) provides that agreements shall only apply to:

- (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. . . ; 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)*.<sup>53</sup>

The sole basis for Mrs. Bybee's claims are not the injuries sustained by her husband, they are her own, individual injuries.

**A. A Wrongful Death Action Belongs To The Heirs And Is Distinct From Any Claims Of The Decedent.**

This Court reiterated in In re Behm's Estate,<sup>54</sup> that a wrongful death claim is independent from the injuries suffered by the decedent:

---

relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public are unconscionable").

<sup>53</sup> Utah Code Ann. § 78-14-17 (2004) (emphasis added).

<sup>54</sup> 117 Utah at 158.

[A] claim for death is a separate and independent cause of action and is not a continuation of the right of action of the injured party for personal injuries. The death creates a new cause of action for the loss suffered by the heirs by reason of death, and only comes into existence upon the happening of death.<sup>55</sup>

Thus, the “sole basis” for Mrs. Bybee’s claims is not the injuries suffered by her deceased husband, but the individual injuries she suffered as a result of her husband’s death. The injuries suffered by Mrs. Bybee are the loss of support, affection, counsel, care, comfort and pleasure her husband would have provided, but for his wrongful death.<sup>56</sup>

Mrs. Bybee does not represent the estate of her husband in this action. Her claims are based on Utah’s Wrongful Death Act and she is bringing the claims as a statutory heir. Because an “action for wrongful death is an independent action accruing in the heirs of the deceased,”<sup>57</sup> the amendments to § 78-14-17 do not compel Mrs. Bybee to arbitrate her statutory claims against the defendant.

It is argued that because courts have not “entirely separated the heir’s right from the decedent’s,”<sup>58</sup> the decedent should be permitted to waive his wife’s constitutional

---

<sup>55</sup> (Citing Van Wagoner v. Union Pacific Ry. Co., 112 Utah 189 (1947)).

<sup>56</sup> See, Id. at 159.

<sup>57</sup> Jensen v. HHC Hospital, Inc., 944 P.2d 327, 332 (Utah 1997).

<sup>58</sup> Id.



right to a jury trial of her statutorily created wrongful death claims. This argument would render meaningless the difference between common law personal injury claims and statutory wrongful death claims. However, it is because of the difference in these two types of claims that the Utah Wrongful Death Act was passed in the first place.<sup>59</sup> Prior to the creation of this statutory cause of action a wife could not sue for the wrongful death of her husband. Also worthy of note is the fact that "at common law, an action for personal injury abates upon the death of the person injured," and a decedent's common law heirs, such as his wife, could not succeed to the husband's cause of action.<sup>60</sup> Although a common law personal injury claim and a statutory wrongful death claim may derive from the same acts of negligence by a physician, the two actions serve distinct purposes and the wrongful death claims are not legally derivative of the personal injury claims. The wrongful death claim "derives from the wrongful act causing the death, rather than from the person of the deceased."<sup>61</sup>

Additionally, if the arbitration provisions of the statute were construed as the other side suggests, it would raise serious constitutional questions because it would deny Mrs.

---

<sup>59</sup> "The Utah wrongful death act was originally passed by the Territorial Legislature in 1874 to remedy the harsh effects of the common law rule which did not recognize wrongful death actions at all." Behrens v. Raleigh Hills Hosp., Inc., 675 P.2d 1179, 1184 (Utah 1983).

<sup>60</sup> Halling v. Indus. Comm'n of Utah, 263 P. 78, 79 (Utah 1927).

<sup>61</sup> Hull v. Silver, 577 P.2d 103, 106 (Utah 1978).

Bybee her constitutional right to a jury trial without due process and may violate the open courts provision of the Utah Constitution. This Court has stated that statutes should be construed so as to avoid constitutional problems.<sup>62</sup>

Thus, although Mr. Bybee may have consented to arbitrate his common law personal injury claims against Dr. Abdulla, he was powerless to prohibit his statutory heirs from litigating their statutory claims in the forum of their choosing.

**B. Not All Defenses Are Available To Wrongful Death Defendants.**

Because a wrongful death cause of action is subject to *some* of the defenses that could have been asserted against the deceased,<sup>63</sup> defendant's amicus wrongly assumes that such claims are subject to *all* possible defenses. This Court rejected such an argument in Hull v. Silver<sup>64</sup> and held that some defenses, such as those based upon personal disability to sue, were not available to a wrongful death defendant. The categories of defenses found by the Court to be available included those "which inhere in the tort, or which are based upon decedent's course of conduct after the injury and before

---

<sup>62</sup>See, Mountain States Tel. & Tel. Co., v. Payne, 782 P.2d 464, 467 (Utah 1989) ("a final reason for our construction of [the statute] is that it avoids the due process challenge upon which appellant relies. If there are alternative statutory constructions possible, one rendering a statute constitutional and the other unconstitutional, the former should be adopted.").

<sup>63</sup>Jensen v. HHC Hospitals, Inc., 944 P.2d 327, 332 (Utah 1997).

<sup>64</sup>577 P.2d 103, 105 (Utah 1978).

death.”<sup>65</sup>

The defense of comparative negligence, permitted in Kelson v. Salt Lake County,<sup>66</sup> falls under the first category because, as the Kelson Court noted, the decedent’s contributory negligence goes to the question of whether or not his death was “wrongful” under the terms of the statute.<sup>67</sup> Such a defense “inhere[s] in the tort” and is justifiably available to the defendant.

Additionally, the statute of limitations defense permitted in Jensen v. HHC Hospitals, Inc.<sup>68</sup> is based on the fact that it was the “decedent’s course of conduct after the injury and before death” that justified a finding that it would be “inequitable to recognize a cause of action for wrongful death.”<sup>69</sup> Allowing a statute of limitations defense to be asserted against the heirs where a patient is aware of an injury and chooses to allow the statute of limitations to run prior to his death should be read as an extension of the “one action rule” rather than a quest to limit the rights of statutory wrongful death heirs.

---

<sup>65</sup> Hull, 577 P.2d at 105.

<sup>66</sup> 784 P.2d 1152 (Utah 1998).

<sup>67</sup> Kelson, 784 P.2d at 1155 (“after the passage of the comparative negligence legislation, that wrongfulness standard was whether the victim, had he or she survived, would have been barred from recovery in whole or in part under the provisions of section 78-27-37”).

<sup>68</sup> 944 P.2d at 332-333.

<sup>69</sup> Id.

In brief, this Court's prior holdings that *some* defenses are available to wrongful death defendants should not be interpreted to mean that *all* defenses are available. While Mr. Bybee may have been the "master of his own claim,"<sup>70</sup> he was not the master of the forum in which his wife could assert her own personal claims.

**C. How Can The Law Give Non-Signatory Defendants The *Option Of* Joining Arbitration On The One Hand, But *Require* Non-Signatory Plaintiffs To Join On The Other?**

Article 3, paragraph 3 of the Arbitration Agreement provides that:

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

This "piggy-back" provision is contained in virtually every health care arbitration agreement and gives other health care providers, who were non-signatories to the agreement, the option of joining the arbitration after a dispute arises. What makes this paragraph noteworthy is that while it gives other defendants the option of joining, it does not require them to do so. It specifically requires an "agreement to participate in the arbitration" before any non-signatory defendant can be bound by the decision.

If the insurance industry had their way in enforcing such inequitable agreements, the absurd result would be that wrongful death plaintiffs could be arbitrating claims

---

<sup>70</sup> Id. at 322.

against defendants pursuant to an agreement to which neither of them were parties. An important distinction being that the defendants elected to be in the forum while the plaintiffs were dragged there against their will. Basic contract principles would prevent this outcome in virtually every setting imaginable.

This Court should not enforce such an inherently unfair agreement. If arbitration is truly an “alternative” method of dispute resolution, it should be an “alternative” for both parties, not just the physician.

**IV. THE DECISIONS CITED BY UMA FROM OTHER JURISDICTIONS ARE EASILY DISTINGUISHABLE FROM THE PRESENT CASE AND OUGHT NOT GUIDE THIS COURT.**

Amicus Curiae Utah Medical Association asserts that courts in others jurisdictions are routinely enforcing arbitration agreements against non-signatory wrongful death heirs. A review of the cases cited reveals important factual and legal differences between those cases and the one presently before this Court.

Although the Colorado Supreme Court in Allen v. Pacheco<sup>71</sup> held that “a non-party may fall within the scope of the agreement,” the Court made no effort to analyze the implications of the state’s wrongful death act and simply relied on the terms of the agreement. The Court gave nearly reverential treatment to the intentions of the signatory parties without bothering to determine if the statute gave effect to such intentions. The

---

<sup>71</sup> 71 P.3d 375, 381 (Colo. 2003) (en banc), cert. denied, 2004 WL 324431 (U.S. 2004).

Allen decision should also be viewed in the context of Colorado's hostility toward wrongful death actions, which this Court recognized in Rhoades v. Wright.<sup>72</sup> In comparing Colorado law with Utah law in this area, the Rhoades Court noted that unlike Colorado's scheme, "our wrongful death act, places no limitation on recovery, allowing for such damages as under all the circumstances of the case may be just. Again, our statutory approach to the problem evidences a strong public policy against limitations being placed on damages."<sup>73</sup>

Colorado also lacks the constitutional protections afforded wrongful death claimants under Article XVI, § 5 of the Utah Constitution. Such protections were described by this Court as existing "to prevent the abolition of the right of action for a wrongful death, whether in a wholesale or piecemeal fashion."<sup>74</sup>

The California Court of Appeals case, Mormile v. Sinclair,<sup>75</sup> is easily distinguishable from the present case in that it did not involve a wrongful death claim. The court merely held that a husband's loss of consortium claim, which is derivative of the wife's claim and based on the wife's physical injuries, was subject to the arbitration

---

<sup>72</sup> 622 P.2d 343 (Utah 1980).

<sup>73</sup> Id. at 351 (citations omitted).

<sup>74</sup> Berry by and through Berry v. Beech Aircraft Corp., 717 P.2d 670, 684 (Utah 1985) (citations omitted).

<sup>75</sup> 26 Cal.Rptr.2d 725 (Cal. Ct. App. 1994).

agreement signed by the wife. In Utah, wrongful death claims are not derivative.

More to the point is the later California case of Buckner v. Tamarin<sup>76</sup> where the California Court of Appeals affirmed a trial court's denial of a motion to compel arbitration against wrongful death heirs. The court reasoned that the patient had entered into the arbitration agreement solely for his own medical care, he was not the agent of his heirs, and "he therefore lacked the authority to waive their right to a jury trial of their claims."<sup>77</sup>

Defendant also cites the case of Ballard v. Southwest Detroit Hospital,<sup>78</sup> which is distinguishable from the present case in that, unlike the arbitration provisions of the Utah Health Care Malpractice Act, the Michigan statute specifically permitted the arbitration of claims "arising out of . . . the death of a person."<sup>79</sup> The Michigan court also examined the state's wrongful death statute and, unlike Utah courts, determined that an "action brought by the personal representative is a derivative one, and the representative in effect stands in the shoes of the decedent." As discussed above, this is in direct contrast to the law in Utah, which holds that a wrongful death claim is not derivative and heirs do not step into

---

<sup>76</sup> 98 Cal. App. 4th 140, 119 Cal. Rptr.2d 489 (Cal. Ct. App. 2002).

<sup>77</sup> Id. at 143.

<sup>78</sup> 119 Mich. App. 814, 327 N.W.2d 370 (Mich. Ct. App. 1982).

<sup>79</sup> Id. at 817.

the shoes of their decedents.

Jansen v. Salomon Smith Barney, Inc.<sup>80</sup> is easily distinguishable in that the court noted that non-parties can be bound by agreements if they were agents of the signatory or a third party beneficiary to the agreement. The court also determined the beneficiaries' claims were "derivative of the decedent's rights," and therefore, the non-signatories were bound.<sup>81</sup>

As with Jansen, none of the other securities cases cited by Utah Medical Association from other jurisdictions do anything to illuminate the issues presently before this Court. The securities cases deal with third-party beneficiaries who were successors to the contractual rights of their decedents. In Utah, statutory wrongful death claimants are not successors to the rights of the decedent, they are asserting statutory claims that did not exist prior to the death of their loved one.

More instructive is the Texas case of In Re Kepka,<sup>82</sup> where the appellate court reversed the trial court's order compelling a wrongful death heir to arbitrate her claims pursuant to her decedent's agreement with a health care provider. Mrs. Kepka admitted her husband to a nursing home and, as part of the admission documents, signed an

---

<sup>80</sup> 776 A.2d 816 (N.J. Super. App. Div. 2001).

<sup>81</sup> Id. at 258.

<sup>82</sup> 178 S.W.3d 279 (Tex. App. - Houston [1<sup>st</sup> Dist] 2005).



arbitration agreement on her husband's behalf as his legal representative. After his wrongful death, Mrs. Kepka filed suit and the defendant nursing home sought to compel arbitration in accordance with the agreement. The court found that Mrs. Kepka had only signed the agreement on behalf of her husband and had not agreed to arbitrate any claims she might have herself. The court went on to enumerate six contract and agency theories used to bind non-signatories to arbitration agreements<sup>83</sup> and concluded that none of the theories applied. Finding that because Mrs. Kepka "did not sign the arbitration agreement in her individual capacity and because her wrongful-death claim was necessarily brought in her individual capacity for damages personal to her," the court held that it was an abuse of discretion to order her individual wrongful death claim to arbitration.<sup>84</sup> Interestingly, the Kepka court took the opportunity to discuss the recent Colorado Pacheco case, which is relied on by defendant's amicus, and correctly pointed out the problems with the Colorado decision:

The Pacheco court's holding blends together the determination of what claims fall within an agreement's scope and the determination of who can be bound by the agreement. Our state supreme court has held that the presumptions and strong policy favoring arbitration have no application until after the movant has shown the existence of a valid arbitration agreement.

---

<sup>83</sup>(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary. In Re Kepka, 178 S.W.3d at 293.

<sup>84</sup> Id. at 294.

Part of the burden of showing a valid arbitration agreement's existence is showing that the entity against whom the movant seeks enforcement is either a party to the agreement or a non-party who may nonetheless have the agreement enforced against it. "A party cannot be required to arbitrate unless it has agreed to do so." Accordingly, Texas courts would not apply the favorable-to-arbitration presumption that the Pacheco court applied to resolve an ambiguity about which non-signatories were bound by the arbitration agreement.<sup>85</sup>

In Ciaccio v. Cazayoux,<sup>86</sup> Mrs. Ciaccio signed an arbitration agreement prior to receiving obstetrical care related to her pregnancy. After her twin babies died shortly after birth, she and her husband filed wrongful death actions against the physician. The appellate court concluded that although Mrs. Ciaccio's claims were subject to the arbitration agreement she signed, the claims of her husband were not. He had not signed the agreement, nor had anyone signed on his behalf, and the court refused to compel him to arbitrate his claims.

In Gershon v. Regency Diving Center, Inc.,<sup>87</sup> it was held that a release signed by the decedent with the express purpose of barring his potential heirs from instituting a wrongful death action in the event of his death did not legally extinguish the heir's rights because they were not parties to the agreement. The Court determined that "the public policy underpinning the Wrongful Death Act requires that we narrowly construe any

---

<sup>85</sup> Id. at 295 (citations omitted).

<sup>86</sup> 519 So.2d 799 (La. App. 1 Cir. 1987).

<sup>87</sup> 368 N.J. Super. 237 (2004).

attempt to contractually limit . . . recovery.”<sup>88</sup>

Courts from other jurisdictions which view wrongful death claims in a similar manner as Utah courts have held that non-signatory wrongful death heirs cannot be bound by arbitration agreements.

**V. FORCING NON-SIGNATORY HEIRS INTO ARBITRATION IS NOT THE ANSWER TO ANY POTENTIAL FOR ANOMALOUS RESULTS WHEN LOSS OF CONSORTIUM AND SURVIVAL CLAIMS ARE ASSERTED.**

Utah Medical Association argues that if non-signatory wrongful death heirs cannot be bound by arbitration agreements, then the next sign of the apocalypse is that consortium claims and survival claims of non-signatories may also be exempt from such agreements and require dual litigation in district court. This issue is not currently before the Court. Unlike wrongful death claims, loss of consortium claims and survival claims are derivative claims and arguably within the scope of the amended statute. Whether they are subject to arbitration is a question for another day and should not influence the Court’s decision on the issue before it.

However, it should be noted that the problem of dual litigation already exists under the current state of the law. Many malpractice cases involve claims against physicians as well as the hospitals in which they practice. Most hospitals in Utah refuse to participate in arbitration, requiring the plaintiff to file a parallel suit in district court.

---

<sup>88</sup> *Id.* at 247.

This problem is routinely and easily addressed by a stipulation in which all parties agree to joint discovery. Because the discovery process is identical in both actions, there is no prejudice to either party. It is well-understood that most cases, in arbitration and litigation, settle during the discovery period, so the potential for two separate “trials” is remote at best.

Additionally, although defendant’s amicus expresses a fear of dual actions if derivative claims are litigated separately from other claims, it offers no justification for why a non-signatory’s constitutional right to a jury trial should be sacrificed on the altar of judicial economy.

#### **VI. THE ANSWER TO ALL CONCERNS ABOUT JURY TRIAL WAIVERS IS TO ALLOW POST-DISPUTE AGREEMENTS.**

In Allred v. Educators Mutual Ins. Assoc.<sup>89</sup> this Court stated that the Utah Arbitration Act supported arbitration of both past and future disputes. However, much of the law on arbitration, including the Allred decision, was developed prior to the proliferation of arbitration agreements in the health care setting. As discussed above, the physician-patient relationship is based on a higher level of trust and dependence than exists in other contexts where arbitration is routinely favored. It is unrealistic to compare the physician-patient relationship with that of bank-creditor, business-business, employer-

---

<sup>89</sup> 909 P.2d 1263, 1265 (Utah 1996).

employee or broker-investor. The physician-patient relationship is not about money. It is about healing. A procedure that may be fair and effective in righting financial wrongs is not necessarily fair and effective in dealing with the wrongful death of a loved one.

Additionally, pre-dispute jury trial waivers are losing favor. Georgia, Maine, Washington and Texas have all passed laws prohibiting pre-dispute mandatory arbitrations against health care plans.<sup>90</sup> As noted above, many groups that administer arbitrations, including the American Arbitration Association and The American Health Lawyers Association's Alternative Dispute Resolution Service, will no longer accept cases involving pre-dispute arbitration agreements in the health care area.

However, if arbitration truly is a better way for resolving disputes then there is no reason to suspect that natural forces will not lead patients and physicians to agree to arbitration after a dispute arises. If there is a procedure for resolving disputes that really is faster, cheaper and fairer then all parties would be wise to sit down and consider it. By evaluating the pros and cons of all dispute resolution methods, in conjunction with the particular facts of their case, both plaintiffs and defendants can make a truly informed decision about the terms under which they may choose to arbitrate. An truly informed decision is simply not possible with pre-dispute waivers:

---

<sup>90</sup>Bob Carlson, *First Business, Now Health Care: Signing Away One's Right To Sue*, MANAGED CARE, June 2002, available at <http://www.managedcaremag.com/archives/0206/0206.binding.html>.

There is a tremendous difference between arbitration agreements that bind "one shot" litigants and those that are entered into by more sophisticated parties. A pre-dispute "agreement" to arbitrate cannot be truly knowing and voluntary, because the one-shot player does not contemplate the consequences of submitting a hypothetical, yet-to-arise claim to arbitration. He will not be familiar with the costs of arbitration relative to ordinary court costs. He also will not be in a position to shop among arbitration provider organizations, or for individual arbitrators, at the time he subscribes to the clause. There is thus no opportunity to find affordable arbitration services

The option of post-dispute arbitration, on the other hand, can be of tremendous benefit to both parties. Both parties evaluate whether the unique characteristics of arbitration, such as expertise or confidentiality, provide benefits that outweigh the increased forum costs.<sup>91</sup>

There is nothing that prevents patients and physicians from entering arbitration agreements after a dispute arises. If wrongful death heirs, such as Mrs. Bybee, sign a post-injury agreement to arbitrate there will be no concern about whether the jury trial waiver was knowing, intelligent and voluntary.

### **CONCLUSION**

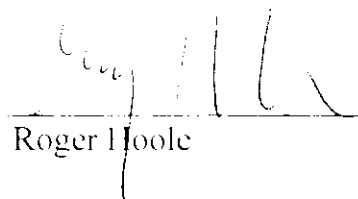
Pre-dispute arbitration agreements are disfavored in the health care setting, and public policy does not favor jury trial waivers that are unknowing, involuntary and unintelligent. Utah law does not permit decedents to bind their non-signatory heirs to arbitration agreements. Arbitration should be voluntary, not compulsory.

---

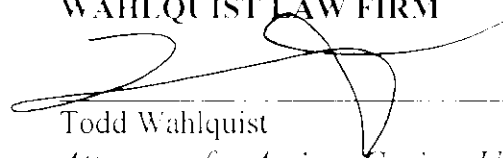
<sup>91</sup>Public Citizen, Congress Watch April 2002: *The Costs of Arbitration* at 74 (May 1, 2002).

DATED this 5<sup>th</sup> day of October, 2006.

**HOOLE & KING, L.C.**

  
\_\_\_\_\_  
Roger Hoole

**WAHLQUIST LAW FIRM**

  
\_\_\_\_\_  
Todd Wahlquist  
*Attorneys for Amicus Curiae, UTLA*

# Appendum A



**RECEIVED**

SEP 06 2006

Wahlquist Law Firm

Todd Wahlquist (#9893)  
**WAHLQUIST LAW FIRM**  
648 East 100 South, Suite 200  
Salt Lake City, UT 84102  
Telephone: (801) 326-8400  
Facsimile: (801) 326-8088  
*For Utah Trial Lawyers Association*

IN THE SUPREME COURT OF UTAH

LISA BYBEE,

Plaintiff and Appellee,

v.

ALAN ABDULLA, M.D. and JOHN DOES I  
through 5,

Defendants and Appellant.

**STIPULATION CONSENTING TO THE  
FILING OF A BRIEF BY THE UTAH  
TRIAL LAWYERS ASSOCIATION AS  
AN AMICUS CURIAE**

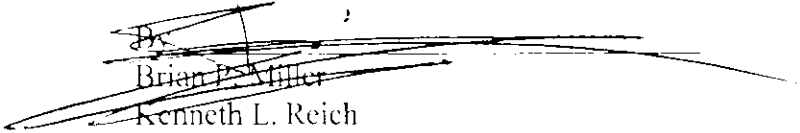
Supreme Court No. 20060424

Trial Court No. 050903397

Pursuant to Rule 25 of the Utah Rules of Appellate Procedure, the parties, by and through their respective counsel of record, hereby stipulate and give their consent for the Utah Trial Lawyers Association to file a brief as an *amicus curiae* in support of the position of Plaintiff/Appellee Lisa Bybee within the time allowed for the submission of the briefs of Plaintiff/Appellee.

SNOW, CHRISTENSEN & MARTINEAU

DATED: 8/25/06

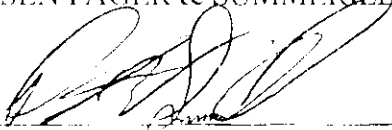
  
Brian P. Miller

Kenneth L. Reich

Attorneys for Defendant/Appellant Alan  
Abdulla, M.D.

DATED: 9/1/2006

HASENYAGER & SUMMERILL

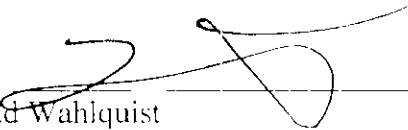
By 

Peter W. Summerill

Attorneys for Plaintiff/Appellee Lisa Bybee

WAHLQUIST LAW FIRM

DATED: Aug 30, 2006

By 

Todd Wahlquist

Attorney for Utah Trial Lawyers Association