2007

# Gloria Soriano v. Elizabeth A. Graul : Reply Brief

Utah Court of Appeals


Fred R. Silvester; Silvester & Conroy; Attorneys for Appellee.
Elliott J. Williams; Stephen T. Hester; Williams & Hunt; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

| | | |
|---|---|---|
| GLORIA SORIANO,<br><br>Plaintiff and Appellee,<br><br>v.<br><br>ELIZABETH A. GRAUL, M.D., an individual,<br><br>Defendant and Appellant. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | Case No. 20070347-CA<br>(Third District Case No. 060915141) |

# REPLY BRIEF OF DEFENDANT/APPELLANT ELIZABETH A. GRAUL, M.D.

**Appeal from a Memorandum Decision of the Third Judicial District Court Denying Motion to Stay Litigation and Compel Arbitration, Honorable Kate Toomey, Presiding**


FRED R. SILVESTER
SILVESTER & CONROY
1370 East 2100 South, Suite 200
Salt Lake City, Utah 84105
Phone (801) 532.2266
Facsimile (801) 532.2270
Attorneys for Plaintiff and Appellee Gloria Soriano

ELLIOTT J. WILLIAMS (A3483)
STEPHEN T. HESTER (9981)
**WILLIAMS & HUNT**
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, Utah 84145-5678
Phone (801) 521.5678
Facsimile (801) 364.4500
Attorneys for Defendant and Appellant Elizabeth S. Graul, M.D.

**IN THE UTAH COURT OF APPEALS**

| | | |
|---|---|---|
| GLORIA SORIANO,<br><br>Plaintiff and Appellee,<br><br>v.<br><br>ELIZABETH A. GRAUL, M.D., an individual,<br><br>Defendant and Appellant. | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | Case No. 20070347-CA<br>(Third District Case No. 060915141) |

# REPLY BRIEF OF DEFENDANT/APPELLANT ELIZABETH A. GRAUL, M.D.

**Appeal from a Memorandum Decision of the Third Judicial District Court Denying Motion to Stay Litigation and Compel Arbitration, Honorable Kate Toomey, Presiding**


FRED R. SILVESTER
SILVESTER & CONROY
1370 East 2100 South, Suite 200
Salt Lake City, Utah 84105
Phone (801) 532.2266
Facsimile (801) 532.2270
Attorneys for Plaintiff and Appellee Gloria Soriano

ELLIOTT J. WILLIAMS (A3483)
STEPHEN T. HESTER (9981)
**WILLIAMS & HUNT**
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, Utah 84145-5678
Phone (801) 521.5678
Facsimile (801) 364.4500
Attorneys for Defendant and Appellant Elizabeth S. Graul, M.D.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes

**Other Authority**

## ARGUMENT

In opposing Dr. Graul's opening brief, Plaintiff does not dispute the dispositive proposition that the 2004 Amendments to § 78-14-17 should not be applied retroactively because they affect the substantive rights of parties to physician-patient arbitration agreements. That is because she cannot do so. It is indisputable that the retroactive application of the 2004 Amendments not only affects Dr. Graul's and Plaintiff's contractual rights and obligations under their Agreement, it affects the rights of all parties to physician-patient arbitration agreements entered into prior to May 3, 2004. Indeed, the retroactive application of the 2004 Amendments will directly interfere with the contractual rights of parties to hundreds, if not thousands, of physician-patient arbitration agreements. The trial court should be reversed for this reason alone.

In addition, Plaintiff further fails to dispute that the retroactive application of the 2004 Amendments violates the contract clauses of the Utah and United States Constitutions by substantially impairing—and invalidating—physician-patient arbitration agreements validly executed under prior versions of § 78-14-17. The instant case is illustrative. The trial court's decision clearly changes the meaning of

the Agreement and deprives Dr. Graul of her right to compel Plaintiff to arbitrate her claims, a right that Dr. Graul would have had under the 2003 version of § 78-14-17.

Plaintiff's attempts to avoid the contract clause issue by raising the procedural argument that Dr. Graul failed to adequately preserve the issue for appeal are without merit. Dr. Graul properly raised the issue in the trial court, preserved the issue in the appellate process and adequately briefed the issue in her opening brief. The issue of whether the retroactive application of the 2004 Amendments violates the contract clauses of the Utah and United States Constitutions is properly before this Court.

Plaintiff's argument that the statute's mere inclusion of the date the original version was enacted constitutes an express declaration by the Legislature to retroactively apply the 2004 Amendments is similarly unavailing. Plaintiff's arguments contradict the strong presumption against the retroactive application of statutes and lack any support in relevant or binding authority.

Finally, Plaintiff's arguments that the Agreement could not be renewed without violating the 2004 Amendments miss the point. The Agreement met the

requirements of the 2003 version of § 78-14-17(1) at the time it was executed and it never needed to be, nor was it ever renewed. As a result, it was not required to amend or re-execute the Agreement to bring it in compliance with the 2004 Amendments. As a result, the Agreement is valid and enforceable.

## I. THE STATUTE'S INCLUSION OF THE DATE THE ORIGINAL VERSION WAS ENACTED IS NOT AN EXPRESS DECLARATION BY THE LEGISLATURE TO APPLY THE 2004 AMENDMENTS RETROACTIVELY.

Plaintiff does not dispute that in Utah, there is a strong presumption against the retroactive application of statutes, and if the Legislature intends for a statute to apply retroactively, it must expressly and unequivocally declare this intent in the statute itself. Goebel v. Salt Lake City Southern R.R. Co., 2004 UT 80, ¶ 39, 104 P.3d 1185 (citing Utah Code Ann. § 68-3-3 (2000)). In her opening brief, Dr. Graul established that a plain reading of Utah Code Ann. § 78-14-17—and the 2004 Amendments—reveals that the Legislature did not make an express declaration to apply any amendments to the statute retroactively. (See Dr. Graul's Br. at § I.) As a result, the trial court erred in applying the 2004 Amendments retroactively to invalidate the Arbitration Agreement in this case.

In opposing this argument, Plaintiff parrots the trial court's reasoning that the statute's inclusion of the date the original version was enacted (i.e., May 2, 1999) constitutes the Legislature's express declaration that any amendments to the statute must be applied retroactively. (Pl.'s Br. at § I.) In an attempt to buttress this assertion, Plaintiff argues that "[h]ad the legislature intended to apply the amendments only prospectively, as Dr. Graul avers, they would have simply drafted the enacting line of the statute to read, 'After May 3, 2004 . . .' The fact that the legislature did not do so is a sufficiently express declaration of retroactive intent." (Id. at pp. 8-9.)

Contrary to Plaintiff's assertions, however, the mere inclusion of the date the original version of the statute was enacted does not amount to an express declaration by the Legislature to overcome the strong presumption against the retroactive application of statutes. Fundamentally, neither the Legislature, nor the statute, demands that valid arbitration agreements be automatically undone by later-enacted amendments.

### A. Plaintiff's Arguments Contradict the Presumption Against the Retroactive Application of Statutes.

Noticeably absent from Plaintiff's arguments is an analysis of the strong presumption against the retroactive application of statutes. In addition, there is no mention of the Legislature's specific codification of this presumption that "[n]o part of these revised statutes is retroactive, unless expressly so declared." Utah Code Ann. § 68-3-3 (2000). Section 68-3-3 makes clear that the entire Utah Code, including the 2004 Amendments , are to be applied prospectively only, unless the Legislature expressly declares otherwise. Further, it is well-settled in Utah that if the Legislature intends to overcome the strong presumption against the retroactive application of statutes, it must expressly and unequivocally declare this intent in the statute itself. Goebel v. Salt Lake City Southern R.R. Co., 2004 UT 80, ¶ 39, 104 P.3d 1185 (citing Utah Code Ann. § 68-3-3 (2000)).

A plain reading of § 78-14-17 reveals that it does not contain an express and unequivocal declaration by the Legislature that "it is the intent of the Legislature that the requirements of this statute apply retroactively" (see Utah Code Ann. § 19-6-302.5 (1995)), or that "the provisions of this section apply retroactively." See Utah

Code Ann. § 77-18-17 (1994). It merely contains the language "After May 2, 1999, . . ." See Utah Code Ann. § 78-14-17 (2004).

Ostensibly recognizing the inadequacy of this alleged "express declaration" to retroactively apply the 2004 Amendments, Plaintiff attempts to turn the presumption against the retroactive application of statutes on it head by arguing "[h]ad the legislature not wanted the 2004 Amendments to be applied retroactively, they would have said so by drafting the enacting language to state, 'After May 3, 2004.'" (Pl.'s Br. at p. 7) (emphasis added). Indeed, the entire premise of Plaintiff's argument is to reverse the presumption against the retroactive application of statutes by arguing that the mere presence of the language "After May 2, 1999" demonstrates that any amendments to the statute are presumptively retroactive. Plaintiff further argues that if the Legislature intended for the 2004 Amendments to not apply retroactively, they were required to expressly declare so. Plaintiff's assertion, however, directly contradicts the presumption against the retroactive application of statutes codified in § 68-3-3.

It is not surprising that Plaintiff resorted to an attempt to persuade the Court to reverse the presumption against the retroactive application of statutes. Indeed, because § 78-14-17 lacks any express declaration by the Legislature to apply it, or

any amendments, retroactively, Plaintiff is left with no choice. Plaintiff's attempt to perform an "end-run" around well-established principles of statutory construction should be rejected.

### B. Plaintiff's Argument Is Unsupported by Relevant or Binding Authority.

Plaintiff fails to cite to any illustrative, let alone binding, authority in support of her argument that the mere inclusion of the date the original version of the statute was enacted constitutes an express declaration by the Legislature to retroactively apply the 2004 Amendments. That is because no such authority exists.

Instead, Plaintiff argues that "Dr. Graul errs in demanding the legislature actually use the word 'retroactive' instead of providing an earlier effective date as done here." (Pl.'s Br. at p. 8.) In support of this argument, Plaintiff cites to C.J.S. STATUTES § 408 (1999) for the proposition that the presence of the date the original version of the statute was enacted is an expression denoting past time similar to "heretofore" or "has been," thereby giving the statute a retrospective operation. (See Pl.'s Br. at p. 8.) Plaintiff then cites to the sole case mentioned in C.J.S. § 408 in support of this proposition: the temporally remote 1940 New York case of Nervo

v. Mealey, 25 N.Y.S.2d 632, 634 (N.Y. Sup. 1940). See C.J.S. STATUTES § 408 (1999). Plaintiff's reliance on Nervo, and C.J.S. § 408, is misplaced.

In a significant distinction from the instant case, Nervo involved an arcane traffic law in 1940's New York governing the suspension of chauffeurs' licenses. Section 78-14-17, however, prescribes the contractual rights and obligations of parties to modern day physician-patient arbitration agreements. Indeed, it is unclear whether the retroactive application of the statute in Nervo affected the contractual rights and obligations of chauffeurs in 1940's New York, or whether the court considered this consequence in issuing its ruling. Further, the court in Nervo does not provide any analysis of why the terms "has been" sufficiently expressed the legislature's intent to apply the statute retroactively. The court merely states "it is mandatory that the Commissioner restore the license and certificate of registration no matter when revoked for the use of the words 'has been' or 'some other expression denoting past time is construed as retrospective, when constitutional difficulties do not forbid.'"[1] Id. at 634 (citing McKinney's Consolidated Laws,

---

[1] Given the Nervo court's lack of analysis on the issue, one cannot help but wonder if the Nervo court would allow the retroactive application of a statute if such application violated the contract clause of both the state and federal Constitutions—as in this case. (See § III. infra.; see also Dr. Graul's Br. at § III.)

Book 1, page 74). In short, the only case law cited by Plaintiff is non-binding, temporally remote, factually distinguishable and non-illustrative.

## II. THE AGREEMENT IS VALID AND ENFORCEABLE BECAUSE IT MET THE REQUIREMENTS OF § 78-14-17 WHEN IT WAS EXECUTED AND WAS NEVER RENEWED.

Plaintiff concedes that the Agreement met the requirements of the 2003 version of § 78-14-17 when it was executed in April of 2003. (Pl.'s Br. at p. 5.) Accordingly, there is no dispute that the Agreement met the requirements of Subsection (1) of the statute on at least one occasion, namely, when it was executed. See Utah Code Ann. § 78-14-17(1) (2004). As established in Dr. Graul's opening brief, this fact renders the agreement valid and enforceable under the second alternative in § 78-14-17(1). (See Dr. Graul's Br. at § IV.) In opposing this conclusion, Plaintiff argues that Dr. Graul misinterprets the alternative nature of Subsection (1) of § 78-14-17 by placing significant import on the term "this" in the Subsection. Plaintiff's argument misses the point.

"The best evidence of the legislature's intent and purpose [in enacting statutes] is the plain language of the statute." Eastern Utah Broadcasting and Worker's Compensation Fund v. Labor Comm'n, 2007 UT App 99, ¶ 8, 158 P.3d 1115. Subsection (1) of § 78-14-17 reads: "After May 2, 1999, for a binding

arbitration agreement between a patient and a health care provider to be validly executed, or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed . . ." Utah Code Ann. § 78-14-17(1). Contrary to Plaintiff's assertions, Dr. Graul does not place emphasis on the term "this" when interpreting Subsection (1). Rather, she places emphasis on the entire phrase: "or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed . . ." Utah Code Ann. § 78-14-17(1).

A plain reading of this language shows that an arbitration agreement is validly executed if it met the requirements of previous versions of § 78-14-17(1) on at least one occasion. The execution of the Agreement in this case is illustrative. In April of 2003, the 2003 version of Subsection (1) was in effect. The Agreement was executed in April of 2003 and Plaintiff concedes that the Agreement complied with the requirements of the 2003 version of Subsection (1) when it was executed. Thus, the requirements of this Subsection (1) have been met on at least one occasion, namely, when it was executed. See Utah Code Ann. § 78-14-17(1). Accordingly, the Agreement is valid and enforceable.

In addition, the Agreement continues to be valid and enforceable because it never needed to be renewed, nor was it renewed. Under Subsection (1), if the

Agreement needed to be renewed after the initial one-year term to cover future ongoing care of Plaintiff, it would have needed to be amended or re-executed to bring it in compliance with the 2004 Amendments. The Agreement, however, never needed to be renewed because the physician-patient relationship between Dr. Graul and Plaintiff did not last more than a few months, if that. In other words, there was no need to renew the Agreement to cover future or ongoing care of Plaintiff. Thus, the Agreement remains valid and enforceable under the 2003 version of § 78-14-17(1).

Plaintiff opposes this conclusion by arguing that under the automatic renewal clause of the Agreement, it was automatically renewed twice and because it was never amended or re-executed to bring it in compliance with the 2004 Amendments, it is invalid. (Pl.'s Br. at p. 12-13.)[2] Plaintiff's argument ignores the undisputable fact that the Agreement was not renewed and, thus, never needed to be amended or re-executed to bring it into compliance with the 2004 Amendments.

---

[2] As an initial matter and contrary to Plaintiff's assertion, the automatic renewal provision under Article 6 of the Agreement is triggered only when the physician-patient relationship continues beyond the one-year term of the Agreement. Indeed, there is no need to renew an arbitration agreement between a physician and patient when there is no further health care services to be covered by the agreement.

"The existence of a physician-patient relationship between a physician and an individual can only be recognized when the individual is in fact a patient." Joseph v. McCann, 2006 UT App 459, ¶ 12, 147 P.3d 547. This relationship "is consensual, and one in which the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient." Id. (internal quotations omitted). Accordingly, the relationship terminates if the patient no longer seeks the assistance of the physician, or the necessity which gave rise to the relationship is no longer present. See id.

In the instant case, the physician-patient relationship between Plaintiff and Dr. Graul terminated following the surgery on May 10, 2003, because Plaintiff never returned to Dr. Graul for any further heath care or treatment and the necessity giving rise to the surgery was no longer present. [R. 91, pp. 14-16.] Further, the term of the Agreement was one year from the date of signing (i.e., until April 28, 2004) and only needed to be renewed if the physician-patient relationship between Plaintiff and Dr. Graul continued beyond that point. As a result, the automatic renewal provision was never triggered because the physician-patient relationship between Plaintiff and Dr. Graul did not continue beyond the April 28, 2004

renewed date. Thus, there was no need, nor opportunity, to renew the Agreement to bring it into compliance with the 2004 Amendments.

## III. THE ISSUE OF WHETHER THE RETROACTIVE APPLICATION OF THE 2004 AMENDMENTS VIOLATES THE CONTRACT CLAUSES OF THE UTAH AND UNITED STATES CONSTITUTIONS WAS ADEQUATELY PRESERVED FOR APPEAL.

Significantly, Plaintiff fails to oppose Dr. Graul's argument that the retroactive application of the 2004 Amendments violates the contract clauses of the Utah and United States Constitutions. That is because she cannot do so. It is undisputable that the retroactive application of the 2004 Amendments violates the contract clauses of the Utah and United States Constitutions by substantially impairing—and invalidating—existing physician-patient arbitration validly executed under prior versions of § 78-14-17. See Washington Nat'l Ins. Co. v. Sherwood Associates, 795 P.2d 665, 670 (Utah Ct. App. 1990). Indeed, in the instant case, the trial court's decision clearly changes the meaning of the Agreement and deprives Dr. Graul of her right to compel Plaintiff to arbitrate her claims, a right that Dr. Graul would have had under the 2003 version of § 78-14-17. See id. The trial court should be reversed for this reason alone.

In an effort to avoid this conclusion, Plaintiff raises a procedural argument that this Court should not consider the contract clause issue because Dr. Graul failed to adequately preserve it for appeal. Specifically, Plaintiff argues that "Dr. Graul did not include this argument in her initial brief in support of her Motion to Compel Arbitration" and "failed to raise the issue to a level of consciousness before the trial court." (Pl.'s Br. at p. 9.) Plaintiff's procedural argument is without merit.

In order to properly preserve an issue for appeal, a constitutional argument "must be raised in the trial court, preserved through the appellate process, and adequately briefed." State v. Worwood, 2007 UT 47, ¶ 18, 164 P.3d 397. There is no magic formula for an adequate constitutional analysis. Id. Applying these principles to the instant case, Dr. Graul adequately preserved the contract clause argument for consideration on appeal.

Dr. Graul raised the issue in the trial court in her Reply Memorandum in Support of her Motion to Compel Arbitration. [See R. 48-49.] Indeed, in her Reply Memorandum, Dr. Graul specifically stated "[r]etroactive application of the 2004 Amendment would obviate the one-year term specified by statute and in the Arbitration Agreement, would impair the contractual relationship between parties, and would fail to pass muster under the Contracts Clause of the U.S. and Utah

Constitutions, which prohibits laws "impairing the obligations of contracts." U.S. Const. Art. I, § 10, cl. 1; Utah Const. Art. I, § 18. [Id.]

In addition, the issue was sufficiently raised to a level of consciousness before the trial court. The fundamental crux of a contract clause argument is whether existing contracts will be impaired by the application of a law or statute. See Washington Nat'l Ins. Co., 795 P.2d at 670. Likewise, the entire focus of Dr. Graul's argument in her Reply Memorandum, and at the hearing, against the retroactive application of the 2004 Amendments centered on the fact that if the 2004 Amendments are applied retroactively, they will impair Dr. Graul's ability to enforce the Agreement. [R. 47-49; 91.] Indeed, the trial court was well aware of the obvious consequence that the retroactive application of the 2004 Amendments was to negate Dr. Graul's contractual right to compel Plaintiff to arbitrate her claims, and Plaintiff's corresponding obligation to arbitrate her claims. [R. 91.]

The contract clause issue was also preserved in the appellate process and adequately briefed. The issue being considered in the instant appeal is whether the 2004 Amendments to Utah Code Ann. § 78-14-17 should be applied retroactively. (Dr. Graul's Br. at p. 1.) The contract clause issue is subsumed in the issue on appeal because the unavoidable consequence of applying the 2004 Amendments

retroactively is a violation of the contract clauses of the Utah and United States Constitutions. In addition, the issue was adequately briefed in Dr. Graul's opening brief. (See Dr. Graul's Br. at § III.) Thus, the issue of whether the retroactive application of the 2004 Amendments has been adequately preserved for appeal and is properly before this Court.

## CONCLUSION

For the foregoing reasons, Dr. Graul respectfully requests that this Court reverse the trial court and hold that the 2004 Amendments to § 78-14-17 should not be applied retroactively.

Respectfully submitted this 21 day of December, 2007.

**WILLIAMS & HUNT**

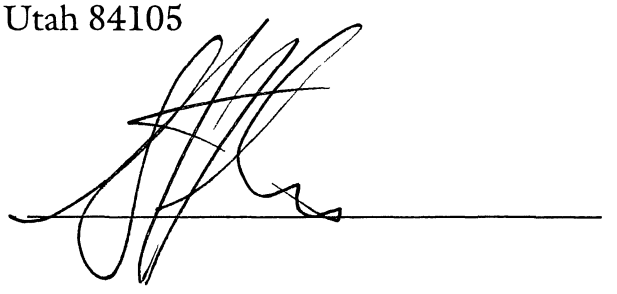
By _____

ELLIOTT J. WILLIAMS
STEPHEN T. HESTER
Attorneys for Defendant and Appellant
Elizabeth S. Graul, M.D.

## CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of December, 2007, I caused two (2) true and correct copies of the foregoing **REPLY BRIEF OF DEFENDANT/ APPELLANT ELIZABETH S. GRAUL, M.D.** to be mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

Fred R. Silvester
SILVESTER & CONROY
1371 East 2100 South, Suite 200
Salt Lake City, Utah 84105



139317.1