# Doctors, Patients, and Arbitration Agreements: The NC Supreme Court's Ruling in King v. Bryant

Last Friday the North Carolina Supreme Court issued an opinion that should prick up the ears of any physician, hospital, or healthcare facility that asks its patients to agree to binding arbitration in the event of a dispute. In *King v. Bryant* (January 27, 2017), the court's majority held that a physician was in a fiduciary relationship with a new patient at the time the patient signed an arbitration agreement at his initial intake. The majority then concluded that, because the physician's office did not take sufficient measures to disclose the nature and import of the agreement, but instead effectively buried it among other intake papers, the agreement was the product of breach of that fiduciary duty.

***Background.*** The procedural history of the case is complex, but here are the essential facts and lower-court findings that led to the ruling:

In 2009, Mr. King was referred to a surgeon, Dr. Bryant, for a hernia repair. While Mr. King was in the waiting area before meeting Dr. Bryant for the first time, the desk employee asked him to complete forms seeking his medical history and to sign several documents, among which was an arbitration agreement. This was the routine practice in the office for new patient intake. After meeting with Dr. Bryant, Mr. King signed another series of health-related and insurance forms. Believing all the documents to be "just a formality," he did not read them before signing. During the surgery, Dr. Bryant injured Mr. King's distal abdominal aorta, requiring substantial additional hospital treatment and causing significant injury to Mr. King's right leg and foot. Mr. King filed a medical malpractice action about two years later.

Dr. Bryant and his practice then attempted to compel arbitration pursuant to the agreement. The agreement provided for "final and binding resolution through private arbitration," for which the parties would hire three arbitrators, two of whom were to be licensed to practice law in North Carolina and one of whom was to be a physician board certified in the same specialty as Dr. Bryant. When Mr. King later read the agreement, he asserted that he still did not understand its purpose or significance or that it affected his right to pursue an action in court. In a 2013 order, the trial court found that there was a relationship of trust and confidence between Mr. King and Dr. Bryant; that the agreement had been presented to Mr. King casually and without explanation of its importance; and that the wording of the agreement was confusing and lacked reference to its effect on the right to seek a jury trial or consult an attorney before signing. The trial court ruled the agreement unenforceable. The Court of Appeals affirmed, holding that the agreement was procedurally and substantively unconscionable.

***The opinion (majority)***: The Supreme Court allowed defendants' petition for discretionary review. The majority held that there was a fiduciary relationship between Mr. King and Dr. Bryant at the time Mr. King signed the agreement, irrespective of whether the parties had yet formed an actual

physician-patient relationship. The court noted in particular that Mr. King had come to Dr. Bryant specifically because of Dr. Bryant's special knowledge and skill and that Mr. King had entrusted Dr. Bryant's practice with his confidential medical information. The court stated that, "[i]t is difficult to see how one could reach any conclusion other than that Mr. King reposed trust and confidence in Dr. Bryant, to whom he had been referred by his family physician for the purpose of receiving surgical treatment." The court went on to find that that fiduciary duty had been breached, in short, because Dr. Bryant 's practice had "failed to make full disclosure of the nature and import of the arbitration agreement to him at or before the time that it was presented for his signature." The Court therefore upheld the denial of defendants' motion to compel arbitration.

***The dissents***. There were two separate and relatively vigorous dissents. The first dissenting judge took issue with what he deemed the majority's attempt to "have its cake and eat it too" by finding a fiduciary duty based on the characteristics of a physician-patient relationship without first concluding that such a relationship existed. But the main argument—as well as that of the second dissent—revolved around preemption by the Federal Arbitration Act of state law defenses to arbitration agreements. A lot more can be said on this important ADR topic, but an analysis of these arguments is outside the scope of this post. For anyone who specializes in arbitration, though, they are an interesting read.

***The takeaway.*** The court declined to compel arbitration based on the facts of this case, but that does not mean all physician-patient arbitration agreements are unenforceable. The court explained that

> "[w]e…wish to make clear that nothing in our decision in this case should be understood to cast doubt upon the availability of physicians and patients, assuming that proper disclosure is made, to enter into appropriately drafted agreements providing for the arbitration of disputes like the one that underlies this case."

In light of *King v. Bryant*, then, it seems that medical practices hoping to bind their patients to arbitration might fare better if they:

- Make the language of the arbitration agreement clear and complete. Include a plainly worded explanation that binding arbitration affects the patient's right to pursue other legal remedies including access to a jury. Include language advising the patient of the right to consult counsel before signing. And unless a physician truly intends to reject a patient who does not sign, also include a statement that the patient is not required to sign the agreement in order to receive treatment.
- Instruct office staff to present the arbitration agreement to the patient separately from health- and insurance-related documents. Consider having staff point out the key disclosures of the agreement to the patient before giving the document over for the patient's review. To create evidence that this step was actually performed, also consider

having the patient sign a separate page acknowledging that it was done.