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Jay O. Barnhart and Vida N. Barnhart v. Civil Service Employees Insurance Co. : Brief of Appellant

Utah Supreme Court

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UNIVERSITY OF UTAH

OCT 1 1 1964

IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

JUN 22 1964

JAY O. BARNHART and VIDA
N. BARNHART,

Plaintiffs and Respondents,

vs.

CIVIL SERVICE EMPLOYEES
INSURANCE COMPANY,

Defendant and Appellant.

Clerk, Supreme Court, Utah

Case
No.
10133

APPELLANT'S BRIEF

Appeal from the Judgment of the Fourth
District Court for Utah County
Honorable Maurice Harding, Judge

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JAY O. BARNHART and VIDA
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Plaintiffs and Respondents,

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CIVIL SERVICE EMPLOYEES
INSURANCE COMPANY,

Defendant and Appellant.

Case
No.
10133

APPELLANT'S BRIEF

STATEMENT OF KIND OF CASE

This is an action by plaintiff Vida Barnhart to recover damages under the Uninsured Motorist coverage of her own insurance policy, issued by the defendant, for personal injuries sustained by her in an accident with an uninsured motorist.

DISPOSITION IN LOWER COURT

The trial judge, sitting without jury, rendered judgment in favor of the plaintiff and against the defendant in the amount of \$6,182.50.

RELIEF SOUGHT ON APPEAL

Defendant and appellant seeks reversal of the judgment below.

THE FACTS

The record on appeal consists essentially of three documents. The first of these is a folder containing papers and pleadings filed by the respective parties, minute entries of the court, and similar documents. In referring to papers contained in that folder, we shall designate them by the Initial "R." Secondly there is a transcript of the proceedings at trial with pages numbered separately. References to this transcript are prefaced by the letters "Tr." Thirdly, there is an envelope containing exhibits received in evidence, and we refer to the exhibits by their exhibit numbers. The parties are designated as they appeared in the court below. Unless otherwise indicated by the context, the word plaintiff refers to plaintiff Vida Barnhart. The facts are substantially without dispute.

On this appeal two separate and wholly unrelated theories are relied upon by appellants. For the convenience of the court, we have divided the facts into separate categories pertaining to the legal questions involved: (a) the facts of the accident; and (b) the facts relating to the insurance coverage.

A. The Facts of the Accident.

On September 1, 1962, the plaintiff was involved in an automobile collision with an automobile operated by

one Kenneth Daniel Welcker. (Tr. 7). The collision occurred under the following circumstances:

The collision occurred on a curve in U.S. Highway 91 near American Fork, and at approximately the junction of old highway 91 with new highway 91. (Ex. 2; Tr. 8, 24). At the place where the accident occurred there were two sets of double yellow lines. (Tr. 18-19, 31). There was a break in the double yellow lines at the point of the intersection of old and new highway 91, permitting south bound traffic on highway 91 to make left hand turns from new highway 91 onto old highway 91. (Tr. 18-19, 31).

Plaintiff was proceeding southerly along highway 91 intending to make a left hand turn onto old highway 91. (Tr. 48). When she reached the point of the opening in the two sets of double yellow lines she did not come to a complete stop, but moved slowly past the opening to a point approximately 82 feet south of the break in the double yellow lines. She was waiting for a break in north bound traffic to permit her to complete her left hand turn. (Tr. 31, 48-49).

Welcker was also proceeding southerly along highway 91 and when he approached the break in the yellow lines, a north bound truck had started through the break intending to make a left hand turn across the south bound lanes. (Tr. 11-12). Welcker turned out to avoid a collision with this truck, which partially obstructed the inside lane for south bound traffic, in which he was traveling. As he turned around the truck, he observed,

for the first time, the plaintiff's automobile. (Tr. 12-13). He applied brakes but was unable to stop in time to avoid a collision. (Tr. 8). The accident occurred 82 feet south of the opening in the double yellow lines. (Tr. 31).

B. The facts as to Insurance Coverage.

On April 10, 1962, defendant Civil Service Employees Insurance Company issued to plaintiff's husband a certain insurance policy designated as an automobile policy, Serial No. 0014-04-8. The coverage afforded by this policy was public liability insurance and uninsured motorist insurance. By express provision of the policy, the wife of the named insured (plaintiff), during the time she occupied the insured automobile, was entitled to the benefits of the Uninsured Motorist coverage. (Ex. 1) This policy was in full force and effect at the time of the above mentioned accident. (Ex. 1.) Welcker testified that he had no liability insurance. (Tr. 8).

Plaintiff and her husband commenced this action against the defendant under the Uninsured Motorist coverage, claiming damages for personal injuries on behalf of plaintiff, and property damage and loss of consortium on behalf of her husband. (R. 3). However, the husband's cause of action was dismissed at the trial as not being within the scope of the Uninsured Motorist coverage. (Tr. 4.)

Defendant's policy is a standard form automobile policy. It is so designed as to permit the writing of

several different types of automobile coverage in one document, whether the insured desires several coverages; or only limited coverage. In this instance, the insured purchased only public liability insurance, which (in this policy) automatically included Uninsured Motorist coverage. The policy provisions concerning Uninsured Motorist Coverage are contained in Part IV of the policy. The following provisions are of material importance in this case:

“PART IV — FAMILY PROTECTION AGAINST UNINSURED MOTORISTS

“1. Damages for Bodily Injury Caused by Uninsured Automobiles: To pay all sums which the insured or his legal representatives shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called ‘bodily injury,’ sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; *provided for the purposes of this endorsement, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured for such representative and the company, or if they fail to agree, by arbitration.*

* * * * *

“6. *Arbitration:* If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured

automobile because of bodily injury to the insured, or do not agree as to the amount of payment which may be owing under this coverage, *then, upon written demand of either*, the matter or matters upon which such person and the company do not agree *shall be settled by arbitration* in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to consider itself bound and to be bound by any award made by the arbitrators pursuant to this endorsement.

* * * * *

“9. Action Against Company: *No action shall lie against the company unless, as a condition precedent thereto*, the insured or his legal representative has fully complied with all the terms of this endorsement nor unless within one year from the date of the accident:

* * * * *

“(c) the insured or his legal representative has formally instituted arbitration proceedings.” (Emphasis ours.) (Ex. 1.)

It was stipulated that the defendant had filed a demand for arbitration before the time of trial, and that plaintiffs refused to submit to arbitration claiming that they were not required to do so under Utah law. (Tr. 63).

Following a trial on the merits, the court ordered judgment in favor of the plaintiff and against the defendant in the amount of \$6,182.50. (R. 40, 49). A motion to set aside the judgment and to enter judgment for the

defendant, or in the alternative for a new trial, was denied by the court. (R. 46, 48, 53). This appeal followed. (R. 50).

ARGUMENT

POINT I

THE JUDGMENT IS CONTRARY TO THE EVIDENCE AND AGAINST LAW.

POINT II

DEFENDANT WAS ENTITLED TO HAVE THE ISSUE OF ITS LIABILITY TO PLAINTIFFS, AND THE AMOUNT OF PLAINTIFF'S LOSS DETERMINED BY ARBITRATION PROCEEDINGS.

This case squarely raises for decision by this court, the issue of the enforceability of the arbitration provisions of the Uninsured Motorist coverage. This is an issue of considerable importance to the insurance industry, not only in Utah, but elsewhere in the nation. It is an issue which has been treated only by a few appellate courts in the country, none of which have the same general arbitration law as Utah. However, there are many other states which do have similar statutes, and the decision of this court in this case will no doubt become a landmark in this field of the law.

The Uninsured Motorist coverage is a relatively new type of coverage, devised by the insurance industry in an attempt to furnish some protection, at nominal cost, to the innocent victim of an accident caused by the negligence of an uninsured motorist, or a hit-run driver. This coverage must still be considered as being in the

experimental stage. Some authoritative discussion on its background may be helpful to the court. See Plummer's article in the Insurance Law Journal, August, 1957, 494:

"The history of the 'innocent victim' or the 'uninsured motorist' coverages is short but popular. It really began in January, 1954, when a few insurance companies added the 'unsatisfied judgment' endorsement to their standard form automobile liability policies at a premium range from \$5 to \$7.50. Most of the endorsements covered bodily injury — no property damage — and would pay after the claim was reduced to judgment. * * *

* * * * *

"It was in December, 1956, that the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau drafted and promulgated an endorsement that could only be attached to the family automobile policy. It provided coverage only for bodily injuries with maximum limits being the same as the financial responsibility law requirements (with a premium range from \$3 to \$12). The National Bureau named it the 'Family Protection-Automobile Coverage' and the Mutual Bureau gave it the title of 'Family Protection against Uninsured Motorists.' * * *

See also the paper on this subject delivered at the 1960 Annual Meeting of the Section of Insurance, Negligence, and Compensation Law of the American Bar Association, reported in the official report of those proceedings at pages 281 and 282:

"The history and evolution of the Coverage began with the public concern for the innocent

victim who must shoulder the burden of his injuries caused by the negligent wrongdoer and the financially irresponsible uninsured motorist. In the years between 1925 and 1954 the various state legislatures attempted to reduce the number of uncompensated victims by enacting motorist responsibility laws. They sought to distribute this responsibility throughout the motoring public by requiring the owners to post financial security with the state. * * * Each plan had merit and many were incorporated in the various State Financial Responsibility Laws. * * * There is and continues to be considerable debate over the merits of the various plans to meet public responsibility for the payment of the claims and judgments against the uninsured and irresponsible motorists. Still, the gap was not closed in compensating the injured against the drivers whose companies denied liability for lack of permission to drive by the owner and for want of insured's cooperation. In other words, there were still a great number of unsatisfied judgment creditors who were not compensated for injuries received. * * * Private companies showed little interest and they did not begin to accept the 'public responsibility' until January, 1954. At that time the insurance industry became interested in devising a plan to compensate injured parties. Pressure of public opinion continued to increase, but the companies were not too quick to accept the challenge because of possible political meddling, rate and underwriting problems, operating expenses, etc. They planned and wrote an uninsured coverage provision in the policy within the frame work of the present private insurance principle without too great an increase in premium cost, within the administration of justice and rules of tort liability. * * *

The significance and importance of the arbitration feature of this coverage was explained by Fieting in Best's Insurance News, Fire and Casualty edition, October, 1961, at page 57:

"Provision for arbitrating what were anticipated to likely be the most common kinds of disagreements between insurance companies and their insureds under uninsured motorists coverage has been part and parcel of this form of insurance ever since its inception in New York State back in 1955. It recognizes the desirability of and is designed to accomplish these things:

"1. Provide a *speedy, just and economical* means for determining the amount of the insurer's payment liability.

"2. Avoid the necessity for and disadvantages of litigation with the uninsured motorist prior to settlement of claims under this coverage.

"3. Leave the legal status of the uninsured motorist's liability to respond in damages unaffected by any action or proceedings taken in disposition of an insured's claim under this coverage.

"Basic to Coverage

"The basic arbitration requirement is part of the very grant of coverage, the insuring agreement specifying that 'determination as to whether the insured . . . is legally entitled to recover . . . damages, and if so, the amount thereof, shall be made by agreement between the insured . . . and the company or, if they fail to agree, by arbitration. Means for implementation of this arbitration requirement and objective are contained in two additional policy (or endorsement) provi-

sions. One of these specifies the American Arbitration Association as the tribunal for any arbitration, and makes the arbitrators' awards binding on the parties even to the extent of permitting entry of judgment on such awards. The other makes full compliance with all terms of the uninsured motorists coverage a condition precedent to any action against the company.

* * * * *

"The language employed can leave no doubt but that as to liability (as distinguished from coverage) and as to the amount of recoverable damages, the policy or endorsement makes arbitration of an uninsured motorist's claim compulsory at the option of either the insured or the insurance company. The policy language in this respect, in effect, undertakes to abrogate the right of either party to sue the other in courts of law on such disputed questions.

"What about questions as to whether this coverage applies at all to an asserted claim? What about a claim denied by the insurance company on the ground that the automobile which struck the insured was not in fact an 'uninsured automobile?' Or, what if the insurance company denies that the injured person qualifies as an 'insured' and consequently, is not a beneficiary of this coverage? Can arbitration of such coverage questions be required? Can an 'insured' or alleged insured compel the insurance company to proceed with arbitration of disputed questions of liability and damages while such coverage questions remain unresolved?

"There manifestly is no reference in any of the policy or endorsement provisions to arbitration of such coverage question and disagreements.

It consequently was quite properly assumed and continues to be the position of the insurance companies that coverage questions, as distinguished from liability and damage issues, are not subject to compulsory arbitration and, unless both parties agree to arbitrate such differences, they must be determined in appropriate court proceedings. The New York case law, originally developed accordingly and early tended to establish these propositions:

“1. Only disagreements between insured and insurance company relating to the legal liability of the uninsured motorist and the amount of the insured’s damages must be arbitrated.

“2. Other disagreements — those relating to application of the coverage — may be litigated in courts of law or equity.” (Emphasis ours.)

In light of these considerations, we proceed to an examination of the law. There appears to be a misconception among the bench and bar generally of this State, that any contract to submit to arbitration a dispute of *any* issue which may arise in the future under contractual agreement, is unenforceable. We do not believe that any decision of this court has gone so far. A careful reading of the earlier decisions of this court will reveal that they are not out of harmony with general principles regarding arbitration in other states. We shall later examine the Utah authorities in detail, but first we turn to some general principles.

In 5 Am. Jur. 2d 535, Arbitration and Award, Sec. 30, the following rule is set forth:

“Where a contract contains a stipulation that the *decision of arbitrators on certain questions*

*shall be a condition precedent to the right of action on the contract itself, such stipulation will be enforced, and until the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought on the contract. * * **" (Emphasis ours.)

In the same article at page 573, Sec. 72, the following rule is set forth:

"Notwithstanding the general rule that an unperformed abritration agreement will not bar a suit on the same subject matter, *if a party's right to bring suit is validly conditioned on an award of abritrators or appraisers respecting differences as to certain factual matters, the courts will not take jurisdiction of his suit until he has complied with the condition precedent* or is legally excused therefrom. If the arbitration fails through the fault of the suing party, it is a bar to his action. * * *" (Emphasis ours.)

And at pages 574-5 of the same work, the following language is found:

"As a general rule, if the terms of the contract expressly or by necessary implication require an award on a preliminary question absolutely and in any event before a suit may be brought, it is incumbent on the suitor, under penalty of not stating a cause of action, affirmatively to plead and prove his performance of the condition, or, by appropriate specific allegations, affirmatively to excuse his nonperformance. On the other hand, if arbitration is not of the essence of the contract, but is to proceed, according to the terms of the agreement, only on occurrence of a contingency, such as an actual disagreement on the arbitrable question, or the re-

quest of one of the parties, the failure of the arbitration is matter of defense to be pleaded and proved in order to defeat a recovery. Although there is authority to the contrary, where arbitration is a condition precedent, in order to bar a suit, it is ordinarily sufficient to set up the agreement and nonperformance thereof through fault of the party bringing suit, since the agreement, if valid, is concerned only with ascertainment of preliminary facts, and not with liability, and the award will be evidence of such facts but will not itself support an action."

See also 29A Am. Jur. 699, Insurance Sec. 1611:

"In accordance with general principles applicable to all contracts, it is the rule that a provision in an insurance policy that *all* disputes arising under the policy shall be submitted to arbitrators, or a provision similar in substance and effect, is not binding. On the other hand, the view prevailing in nearly all jurisdictions is that a stipulation not ousting the jurisdiction of the courts, but leaving the general question of liability for a loss to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is valid." (Emphasis ours.)

Many courts in construing insurance contracts have held in accordance with the principles above set forth.

In *Hamilton v. Liverpool & London & Globe Ins. Co.*, 136 U.S. 242, 34 L.ed. 419, 10 S.Ct. 945, the Supreme Court of the United States said:

"The conditions of the policy in suit clearly and unequivocally manifest the intention and

agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted at the request, in writing of either party, to the appraisal of competent and impartial persons to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained, and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition maintenance of any action. Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and this country. . . . The case comes within the general rule long ago laid down by this court: 'Where the parties, in their contract, fix on a certain mode by which the amount be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. . . . [T] he defendant explicitly and repeatedly, in writing, requested that the amount of the loss or damage should be sub-

mitted to appraisers, in accordance with the terms of the policy, and . . . the plaintiff has as often peremptorily refused to do this. . . . The court, therefore rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided in the policy, and that the plaintiff therefore could not maintain this action."

In *Headley v. Aetna Ins. Co.*, 202 Ala. 384, 80 So. 466, the Alabama Court said:

"A covenant in a contract, whether of insurance or of other matters, to submit every matter of dispute between the parties, growing out of such contract, to arbitration or to a board of appraisers, to the end of defeating the jurisdiction of courts as to the subject-matter, are universally held to be void, as against public policy. . . . Agreements, however, which merely provide a mode or manner for ascertaining the value of property or the amount of damages, losses, or profits, are valid, and may be made conditions precedent to the right of action to recover damages based on such values, damages, losses or profits. . . . The clause of the insurance policy in question falls within the latter class, and is valid and enforceable. *The policy of this state favors arbitration and amicable settlement of differences between parties; but it does not favor or allow agreements in advance to oust or defeat the jurisdiction of all courts, as to all differences between parties.* . . .

* * * * *

"Where the contract explicitly makes the determination by arbitration of amounts, values, qualities, etc., a condition precedent to the main-

tenance of an action, it is binding, as in insurance . . . contracts, . . .

* * * * *

“If parties to contracts of insurance covenant that in case of disagreement as to the amount of the loss or damages, or the value of the property destroyed or damaged, they will submit such differences to disinterested parties as appraisers, arbitrators, or umpires, . . . and make an award of such parties a prerequisite to the bringing of a suit on such insurance policy, such covenant or agreement is valid, and will be enforced by the courts, . . .” (Emphasis ours.)

In *St. Paul F. & M. Insurance Co. v. Kirkpatrick*, 129 Tenn. 55, 164 S.W. 1186, the Tennessee court said:

“When there is an arbitration clause in substance like the one we have described, it is the duty of either party to comply and appoint an arbitrator, when requested so to do by the other party. If the insured fails to comply with this demand, he cannot sue on the policy, and, if the refusal be persisted in for an unreasonable time, it will amount to a forfeiture of the policy.”

In *Fisher v. Merchants Insurance Co.*, 95 Me. 486, 60 A2d 82, the Court said:

“While it has long been settled in this country and in England that a stipulation in a contract providing for the settlement by arbitration of all controversies and disputes that might subsequently arise between the parties is invalid, because its effect would be to oust the courts of their jurisdiction, it is equally well settled that if the arbitration agreement relates only to the determination of some preliminary matter, such as the

amount of damages to be recovered, and does not apply to the whole question of liability, such provision, when a reasonable and definite method is provided for choosing the arbitrators is valid and enforceable."

That court also quoted from *Stephenson v. Ins. Co.*, 54 Me. 55, as follows:

"While parties may impose, as a condition precedent to application to the courts, that they shall first have settled the amount to be recovered by an agreed mode, they cannot entirely close the access to the courts of law.' This doctrine has become so universally recognized by the courts that it is unnecessary to refer to further authorities in support.

* * * * *

"And it is settled beyond controversy that, when the contract provides that no action upon it shall be maintained until after such an award, then the award is a condition precedent to the right of action."

Before turning to the decisions of this court, we also invite attention to the well considered opinion of the Supreme Court of Minnesota in the case of *Park Construction Co. v. Independent School District No. 32*, 296 NW 475. The court there said:

"The historical and only basis for the opinion that executory agreements to arbitrate all issues to arise under the contract are void, as against public policy, is open to serious question. There is eminent authority . . . that the rule was the product of judicial jealousy rather than judicial reasoning. . . . [I]t arose in the time when the

emoluments of the judges depended mainly, or almost entirely, upon fees.' In those days they had no fixed salary and so there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble . . . for the division of the spoil.' In consequence, they had great jealousy of arbitrations . . . they said that the courts ought not to be ousted of their jurisdiction, and that it was, contrary to the policy of the law to do so.'

"To that doctrine, its questionable origin aside, there are two destructive objections:

"First, there appears never to have been any factual basis for holding that an agreement to arbitrate 'ousted' jurisdiction. It has no effect upon the jurisdiction of any court. Arbitration simply removes a controversy from the arena of litigation. It is no more an ouster of judicial jurisdiction than is a compromise and settlement or that peculiar offspring of legal ingenuity known as the covenant not to sue. Each disposes of issues without litigation which no more than the other ousts the courts of jurisdiction. . . .

"The decision by arbitration is the decision of a tribunal of the parties' own choice and erection. . . The tribunal is one that they have a legal right to erect. That being so, what self justification can judges assert for nullifying such rightful choice. In the field of industry, a chorus of deserved derision would silence declaration that a collective bargaining agreement for arbitration of future issues was violative of public policy.

"Second, if there ever was public policy against agreements to arbitrate, it has disappeared. Now the policy of this state, as declared

by the legislature, . . . and applied by this court . . . favors arbitration.

* * * * *

“Here . . . our conclusion opposes that of many earlier decisions of this court insofar as they have ruled that a general agreement to arbitrate all differences to arise under a contract is contrary to public policy and therefore void, they are overruled. . . . They are disapproved notwithstanding their accord with a prevailing view of decision law elsewhere.

“For this departure from a doctrine of long standing, we make no apology. To us the reasons assigned are so compelling as to allow no other course.

* * * * *

“So long as an award of arbitrators is enforceable by action, it is automatically subject to enough of court review.”

In order to give force and effect to the arbitration provisions of the policy here involved, it is not necessary for this court to go as far as the Minnesota court has gone. Indeed, as we shall demonstrate, it is not necessary for this court to depart from its previous holdings. However, some words of elucidation by this court would no doubt be helpful to the trial bench and bar.

There appear to be three earlier decisions from the Court bearing on this question. The first of these was *Fox Film Corporation v. Ogden Theatre Co.* 82 Ut. 279, 17 P.2d 294. This court there said:

“Arbitration provisions in contracts are very generally held to be severable from the body of

the contract. Arbitration provisions of the kind in question, that is, *those types that are in no wise connected with the promises each party makes to the other*, but which on the contrary look to the future and provide a method of arbitrating disputes that may arise, are by practically all courts held to be severable provisions. * * * An agreement in a contract to arbitrate disputes that may arise is not a part of the substance of the contract. It pertains to remedy only, and is collateral to the contractual matters. The contract was not made for the purpose of bringing about the arbitration. * * *

“We are of the opinion that the arbitration provisions in the contract at bar deal wholly with a method of procedure and are therefore severable from the body of the contract that fixes the obligations of the parties.” (Emphasis ours.)

The inference naturally to be drawn from the quoted language is that where the arbitration agreement is inextricably interwoven with the substance of the contractual agreement, and is part of the consideration therefor, as is the situation here, it will be enforceable. One of the basic considerations which influenced the insurance industry to make this coverage available to the motoring public at a nominal rate was that claims thereunder could be handled at minimal expense through arbitration proceedings, rather than by the comparatively expensive process of litigation.

The second Utah case is *Johnson v. Brinkerhoff*, 89 Ut. 580, 57 P.2d 1132. In that case this court quoted with approval from *Blodgett Co. v. Bebe Co.*, 190 Cal. 664, 214 P. 38, 41, 26 A.L.R. 1070, as follows:

“The provision for arbitration in the case at bar, *being one covering all disputes thereafter to arise under the contract, and not being confined to the ascertainment of a fact essential to the existence of the cause of action itself*, comes clearly within the general rule that it is not binding upon either party to it.” (Emphasis ours.)

The type of contract there discussed was entirely different from the one in the case at bar. Again we invite attention to the fact that the arbitration provision in the Uninsured Motorist coverage does not purport to require arbitration of all disputes arising under the insurance contract. On the contrary, by its express terms, it is limited to certain types of disputes arising under Uninsured Motorist coverage only. There is, for example, no provision for arbitration of disputes arising under the liability coverage provisions of the policy, nor under the physical damage provisions of the policy; nor the medical payments coverage of the policy form. Neither do its provisions purport to require arbitration of all disputes under the Uninsured Motorist coverage itself. For example, the parties are not required to arbitrate the question of timeliness of the notice of the claim. See 7 Appleman, Insurance Law and Practice, Sec. 4331, supplement page 12:

“The question of timeliness of notice of claim is not within the purview of arbitration clause.”

See also Application of M.V.A.I.C., 226 NYS2d 285.

Likewise a dispute as to whether the claimant is an insured within the meaning of the Uninsured Motorist

coverage is not subject to arbitration. See 7 Appleman, Insurance Law and Practice, Sec. 4331, supplement page 12:

“A dispute relating to status of a claimant as an insured within coverage of policy was not within arbitration provision of uninsured motorist endorsement.”

See also McGuinness v. M.V.A.I.C., 225 NYS2d 36, Syllabus 3:

“A dispute relating to status of a claimant under an automobile policy as an insured was not a dispute within the arbitration provision of the uninsured motorist coverage of policy.”

Again the question of whether the vehicle involved was in fact uninsured is not an issue subject to arbitration under the Uninsured Motorist coverage. See 7 Appleman, Insurance Law and Practice, Sec. 4331, page 215:

“It has presently been held that the parties are not bound to arbitrate the question of whether or not the vehicle in question was in fact uninsured — as to that issue, declaratory judgment would be a proper remedy.”

To the same effect see Mithewitz v. Travelers Ins. Co., 198 N.Y.S.2d 101, and Application of Allstate Ins. Co., 207 N.Y.S.2d 645. See also Merchants Mutual Casualty Co. v. Wildman, 197 N.Y.S.2d 925.

In fact, of all of the issues which might arise under the contract of insurance, only two are made the subject of arbitration. These are the questions of (a) whether there is liability on the part of the uninsured motorist

to the claimant; and (b) the amount of damages the plaintiff is entitled to recover. See *Murtaugh v. American State Ins. Co.*, (O. App.), 187 NE2d 518:

“Only the two special issues [liability and damages] agreed to be arbitrated can be arbitrated. All other questions of law and fact were not submitted.”

Quite obviously the arbitration provision of this insurance contract does not purport to make all future disputes between the parties the subject of arbitration, but merely to make two particular questions under one particular coverage, the subject of arbitration. This is not the type of arbitration provision which this court refused to enforce in *Johnson vs. Brinkerhoff*.

Apparently the most recent expression of this court in this field, is that contained in the case of *Latter v. Holsum Bread Co.*, 108 Ut. 364, 160 P.2d 421. In that case this court refused to enforce an arbitration agreement which required arbitration of *all* future disputes with the following language:

“It is almost the universal rule that in the absence of a statute to the contrary, an agreement to arbitrate *all* future disputes thereafter arising under the contract does not constitute a bar to an action on the contract involving such dispute, on the ground that it seeks to deny to the parties judicial remedies and therefore is contrary to public policy. * * *” (Emphasis ours.)

In a forward-looking concurring opinion, Justice Wolfe made the following comments:

“In *Johnson v. Brinkerhoff*, 89 Utah 530, 57 P.2d 1132, we affirmed the common law rule relative to commercial arbitration agreements. However, there is no reason to interject that same rule into other fields of law unless compelled to do so by legislation. *We should not hesitate to make ourselves free from this rule whenever legislation indicates a change in public policy.* In the absence of legislation to the contrary, courts should not hold that arbitration of disputes arising out of labor contracts are un-enforceable as against public policy.

* * * * *

“Court hostility to arbitration may in the past have had a restrictive influence on our arbitration statute. *It is time that courts generally evidence a change in attitude to encourage rather than discourage use of arbitration machinery in cases where such machinery is well adapted.* * * *” (Emphasis ours.)

We invite also attention to certain provisions of the Insurance Code. Sec. 31-19-9, U.C.A. 1953, provides in part as follows:

“*No insurance policy form, other than a surety bond form or application form where written application is required, or rider form, pertaining thereto shall be issued, delivered, or used unless it has been filed with and approved by the commissioner.*” (Emphasis ours.)

Sec. 31-19-10, U.C.A. 1953, provides, insofar as material here, as follows:

“The commissioner shall disapprove any such form of insurance policy, application, rider, or

endorsement, or withdraw any previous approval thereof, *only*

“(1) if it is in any respect in violation of or does not comply with this code; * * *” (Emphasis ours.)

Sec. 31-19-11, U.C.A. 1953, provides, insofar as material here, as follows:

“(1) The written instrument, in which a contract of insurance is set forth, is the policy.

“(2) *A policy shall specify:*

* * * * *

“(g) *the conditions pertaining to the insurance.*” (Emphasis ours.)

It is apparent that the form here involved is one which has had the approval of the Insurance Commissioner. The fact that the Commissioner has not disapproved it, gives it, at least *prima facie*, the stamp of validity under Sec. 31-19-10, U.C.A. 1953. The form sets forth the conditions pertaining to the insurance as required by Sec. 31-19-11, U.C.A. 1953. The form therefore has the sanction of statute and cannot be said to be out of harmony with the public policy of this state. In summary, we suggest that:

1. The arbitration provisions of the insurance policy under consideration are limited in scope, and do not purport to require arbitration of all disputed issues, but only of two issues which might arise under one coverage only, of an insurance contract form which affords many different coverages.

2. The form has the aproval of the Insurance Commissioner, in accordance with Legislative requirement, and is therefore not contrary to public policy.

3. The modern trend of decision is to recognize and enforce arbitration agreements which do not offend against general public policy.

4. Enforcement of this arbitration agreement would not represent a departure from the public policy of this state, nor a departure from the rules of decision previously laid down by this court, but on the contrary would be in harmony with the rules of decision of this court.

5. The arbitration agreement is limited in scope; is in harmony with public policy; is harmonious with the applicable statutes of this state; is harmonious with the previous decisions of this court, and therefore, valid and enforceable.

Plaintiff admittedly failed to comply with a condition precedent provided by the contract of insurance on which she based her claim, and having so failed, she has no standing to maintain this action, and the judgment in her favor should be reversed and set aside.

POINT I

THE JUDGMENT IS CONTRARY TO THE EVIDENCE AND AGAINST LAW.

POINT III

PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW.

Section 41-6-63.10 U.C.A. 1953 provides as follows:

“Whenever a highway has been divided into two separate roadways by a dividing section, it shall be unlawful to drive any vehicle upon any such highway except to the right of such dividing section, or to drive any vehicle over, upon, or across any such dividing section or to make any left turn or semi-circular or U-turn on any such divided highway, except through a plainly marked opening in such dividing section designed and designated for such left turn, semicircular or U-turn, unless a sign or signs authorized and displayed by the state road commission or other governmental agency shall otherwise indicate.

“A dividing section shall divide a highway into two separate roadways, and shall consist of:

* * * * *

“(3) A dividing area of over two feet in width defined by either

“(a) A standard double line marking on each side of the dividing section, each double line marking consisting of two four-inch wide lines four inches apart, * * *”

The undisputed evidence in this case establishes that at the place where the accident occurred, the highway was divided into two separate roadways by a dividing section as defined in the statute. Although there was an opening or break in the divider in the vicinity where the accident occurred, the evidence establishes without any dispute that the plaintiff had passed beyond the opening where a left hand turn could lawfully have been made, and had proceeded to a point 82 feet south of the opening, where she had stopped intending to execute a

left hand turn when there was an opening in oncoming traffic. In short, plaintiff by her own admission was in the act of violating the statute above cited. In so doing she was clearly guilty of contributory negligence as a matter of law, and for that reason the judgment in her favor should be reversed.

It is well settled in this state that the violation of a statute or ordinance which fixes a standard of care and is designed for the protection of the public or a portion thereof is negligence as a matter of law. See *Smith v. Mine & Smelter Supply Co.*, 32 Utah 21, 88 P. 683; *Skerl v. Willow Creek Coal Co.*, 92 Utah 474, 69 P.2d 502. That rule has been held fully applicable to violations of statutes for the control of motor vehicle traffic in the case of *North v. Cartwright*, 119 Utah 516, 229 P.2d 871, where this court said:

*"The statutes were promulgated for the protection of the public and to safeguard property, life and limb of persons using the highways from accidents of the type here involved. Violation of these statutes then, constitutes negligence in law. This doctrine of law has been steadfastly adhered to by this court and generally in other courts throughout the United States. * * **

"Plaintiff's violation of the statutory standard of care here involved, bars recovery if the violation was a proximate contributing cause of the injury." (Emphasis ours.)

It is no answer to say that questions of negligence and contributory negligence are generally for jury determination. While this is manifestly true where there

is a conflict in the evidence, no conflict exists here. What occurred is established by the undisputed testimony of the plaintiff herself, by which she is bound. There is neither a conflict in evidence to be resolved, nor are there different inferences to be drawn from the undisputed evidence. Neither is this an area where the trier of fact may say what a reasonable person would have done under the circumstances. The legislature has specifically prescribed what all persons shall do under the circumstances here prevailing. Plaintiff clearly did not conform to the legislative standard. Her failure to do so under the law of this state is negligence as a matter of law barring her recovery in this case.

CONCLUSION

Plaintiff admittedly failed to comply with a condition precedent stipulated in her contract of insurance for the bringing of an action against her insurer, the defendant in this case. Said stipulation was in harmony with the public policy of this state, and was valid and enforceable, and by reason thereof, plaintiff is debarred from maintaining this action. The evidence further shows that she was guilty of contributory negligence as a matter of law. The judgment should be reversed with directions to enter judgment in favor of the defendant and against the plaintiff, no cause of action.

Respectfully submitted,

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