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

Utah Supreme Court

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Christensen and Jensen; Attorneys for Appellant;

Howard & Lewis; Attorneys for Respondents;

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**In the Supreme Court of the
State of Utah**

JAY O. BARNHART and VIDA N.
BARNHART,

Plaintiffs and Respondents,

vs.

CIVIL SERVICE EMPLOYEES
INSURANCE COMPANY,
Defendant and Appellant.

FILED

JUL 17 1964

Clerk, Supreme Court, Utah

CASE

NO. 10133

RESPONDENTS' BRIEF

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

JACKSON B. HOWARD
HOWARD AND LEWIS
290 North University Avenue
Provo, Utah
Attorney for Plaintiff
and Respondent

RAY CHRISTENSEN
CHRISTENSEN AND JENSEN
Suite 1205, Continental Bank Bldg.
Salt Lake City, Utah
Attorney for Defendant
and Appellant

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In the Supreme Court of the State of Utah

JAY O. BARNHART and VIDA N.
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CIVIL SERVICE EMPLOYEES
INSURANCE COMPANY,

Defendant and Appellant.

CASE
NO. 10133

RESPONDENTS' BRIEF

STATEMENT OF KIND OF CASE

Respondents accept appellant's statement.

DISPOSITION IN LOWER COURT

Respondents accept appellant's statement.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmation of judgment below.

STATEMENT OF FACTS

Basically the respondents agree with the facts submitted by appellant; however, there are a few important and salient areas wherein the facts are in controversy, and the appellant's statement of facts fail to show the controverted facts. These are:

(1) The respondent may have been 82 feet south of the break in the double yellow lines, but she was still in a position to make the left hand turn onto old Highway 91 within the area designated "G", which is commonly used for making the turn onto old U. S. 91. (R. 59; TR. 27).

(2) The respondent, Mrs. Barnhart, did not see any north bound truck intending to make a left hand turn across the south bound lanes. (R. 59; TR. 49). She stated that she looked in her rear view mirror (R. 59; TR. 49) and that she saw the driver, Welcker, approaching her and that she had an opportunity to brace herself momentarily prior to the collision. (R. 59; TR. 49). She at no time saw the truck referred to by Welcker and it is not likely that the truck existed, based upon her abilities to observe and the circumstances surrounding the collision.

(3) Entrance to the old Highway 91 involves a large approach apron that is several hundred feet in width. The approach is on the curve of the highway as it runs east and west and then curves toward the south. (See Exhibit 2).

(4) The facts concerning insurance coverage are contained under the designation B. The facts as to insurance coverage, are substantially correct. The main difference is that prior to the trial of this case, the plaintiffs, of their own motion, dismissed their cause concerning loss of consortium on behalf of Mr. Barnhart. (R. 59; TR. 3). This

dismissal did not take place at the appellant's instant nor upon motion of the trial court.

ARGUMENT

POINT I

THE JUDGMENT RENDERED IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED.

POINT II

ARBITRATION PROVISIONS IN CONTRACTS ARE SEVERABLE FROM THE CONTRACT AND ARE VOID AND UNENFORCEABLE.

ARGUMENT POINT I

There was substantial evidence available to the court to justify the conclusion that it came to. The key to the entire problem of fact could probably be answered in stating that even if the respondent violated the statutory standard of care, which the respondent denies, this violation would not prohibit the recovery if it was not a proximate cause contributing to the injury. The key to the question was whether the respondent's conduct in any way proximately caused the collision. The court rightfully held that it did not.

Even accepting Welcker's, the uninsured motorist's, version of the collision, no fault or blame, causation wise, can be placed upon Mrs. Barnhart. (R. 59; TR. 11, 12, 13). The truck never came into his lane of traffic, never crossed in front of him, was not observed by Mrs. Barnhart, and mysteriously vanished after the collision. (R.

59; TR. 16). In fact Welcker's testimony was inconsistent. For example, the following:

"Q. If this were west, going this way, (Indicating), would you say the Olsen truck was in this vicinity, somewhere, where I am pointing?

"A. Yes, sir, I think so.

"Q. And was it signaling to make a turn into the opposite lane of traffic?

"A. Well, I am not sure. When I seen him last, he was parked on the side of the road near the field." R. 59; TR. 16).

Welcker further testified that he was not sure if he had to leave his lane of traffic to go around the truck, but if so, "just a little bit." (R. 59; TR. 13). He also stated that the impact involved the right front of his vehicle and the left rear of the plaintiff's vehicle. Mr. Welcker even placed and labeled the vehicles on the diagram. (Exhibit 2, R. 59; TR. 16, 19, 20 & 21). It would be difficult to correlate the diagram with his testimony. The testimony and diagram certainly do not excuse the negligence of Welcker and do justify the court's finding of fact based upon substantial evidence. The rule is specifically set out in *Prim v. Prim*, 45 Cal. 2d 690, 299 P. 2d 231:

"This is the sole question presented for determination: Is there substantial evidence in the record to support the findings of fact set forth above?

"Yes. The rule is established that when a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, con-

tradicted or uncontradicted, which will support the finding of fact."

(Jensen v. Union Paving Company, 97 2d Cal. App. 637, 218 P. 2d 134; Johnson v. Nas, 50 Wash. 2d 87, 309 P. 380; Laurence v. Bamberger Railroad Co., 3 Utah 2d 247, 282 P.2d 335; O'Gara v. Findlay, 6 Utah 2d 102, 306 P. 2d 1073.)

POINT II

ARBITRATION PROVISIONS IN CONTRACTS ARE SEVERABLE FROM THE CONTRACT AND ARE VOID AND UNENFORCEABLE.

The main point of argument raised by the appellant concerns the arbitration provision in the contract. Appellant begins its dissertation by quoting articles from insurance company publications, to-wit: Plummer's article in the Insurance Law Journal and Fieting's article in Best's Insurance News, Fire and Casualty edition. We do not believe that articles in particular trade journals are authoritative citations in court. These articles, however, give the respondent an opportunity to reply in kind, in an essay form, concerning arbitration. The articles cited are from a strictly biased standpoint and overlook the fact that plaintiffs seldom have sufficient continuity of interest to publish law journals, to retain permanent counsel or to write essays on particular legal theorems.

The clause cited in the insurance contract required 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." We respectfully submit to

the Court that such a provision is a genuine attempt to relieve the courts of jurisdiction over causes that are inherently judicial in nature. We respectfully state to the court that such a provision is an unconstitutional deprivation to the parties of a right to have their matter heard in court and of a right to have a jury trial if they so desire.

The unfair aspect of this particular provision to the unwary insurance purchaser is that the American Arbitration Association is not an impartial, unbiased tribunal for the hearing of insurance matters.

The American Arbitration Association, insofar as uninsured motorists are concerned, is the minion of the insurance companies combined. The filing fees, although less than nominal, are insufficient to support its operation. It is an organization that exists on the gratuities of the insurance company.

According to the literature of the American Arbitration Association, in 1950, at the instance of certain insurance companies, they agreed to arbitrate claims for the insurance companies if provision for such arbitration was provided in the insurance companies' policies. The American Arbitration Association literature states "It was their (the insurance companies) desire that the fee for such arbitrations be set at a nominal amount of no greater than \$50.00, rather than have it in accordance with the schedule of fees prescribed in our commercial rules.*** The association agreed to write a special set of rules incorporating the \$50.00 fee. Because the insurance companies in turn agreed that they would subscribe to a special budget to cover the difference between what the association would

receive at the nominal \$50.00 rate and the rate of fees under the commercial arbitration rules.***"

The motto of the American Association is "speed, economy, justice." It is rather interesting that Mr. Fieting in *Best's Insurance News*, Fire and Casualty edition, October, 1961, states the purpose of arbitration is "Provide a speedy, just and economical means for determining the amount of the insurer's payment liability." The American Arbitration Association claims to have used those terms since 1926. The point of the dissertation being that Fieting's article is nothing more than a propaganda dissertation for and on behalf of the American Arbitration Association.

Under the title "Selecting the Arbitrator" the literature of the American Arbitration Association states:

"The next step involved is the selection of the arbitrator. A special accident claims panel of arbitrators has been created consisting of attorneys who have been nominated by bar associations throughout the country or by other attorneys who are not commercial arbitrators of this association's national panel. To give the insurance companies and the policy holders the most acceptable arbitrators, one rule is that no attorney working for an insurance company or specializing in negligence cases may serve in accident claims cases. Arbitrators are appointed administratively by the Association without the submission of lists to the parties.***"

One might ask what the other rules are for the selection of arbitrators which are not specified in the literature furnished to the insured or his counsel. Undoubtedly, the insurance companies are better acquainted with

the rules for the selection of an arbitrator than those who receive the literature.

Under Section 11 of its accident claims rules, the litigants are informed as follows:

"The arbitrators will be appointed from a special accident claims panel. Members of the panel serve without fee in accident claims arbitrations. In prolonged or in special cases, the parties may agree to the payment of a fee. Any arrangement for the compensation of a panel arbitrator shall be made only through the administrator."

Claimant's attorneys who have had experience before the Arbitration Association contend that in many instances the arbitrators are unqualified because of lack of experience or are seeking only recognition from those who can properly reward such talents. The proceeding is tried in a most informal basis without a record, and the litigants must necessarily depend upon the note taking of the arbitrator, who does not have available to him a court reporter or a record from which he could clarify a confusing aspect of the case upon deliberation. If a record is to be kept, it has to be kept by one of the parties at the party's expense, which, of course, is of no value to the arbitrator. Furthermore, the rules provide no means for appeal. The decision of the arbitrator is final.

There are many shortcomings in arbitration and many reasons why a person might prefer to litigate his cases in court where he had the right of due process. Due process presumes a fair hearing from beginning to end with the right of appeal in order to review possible error of the trial judge, such as that the appellant claims here but which it

would deny the respondent by arbitration. The arbitrator acts informally and, according to the publications of the American Arbitration Society, "The object of examination of witnesses is to get the fact; arbitrators will usually permit witnesses to go somewhat afield as long as relevant facts are being produced.***" "He (the arbitrator) is the one who must be convinced, not a jury of laymen who might perhaps be more taken in by flights of flowery appeal. He (the arbitrator) will recognize that the common law rules of evidence are not strictly applied. This does not mean he will calmly admit all sorts of irrelevant matters and hearsay evidence. He (the lawyer) knows that the arbitrator will recognize weak evidence for what it is and will recognize the deficiencies of second and third hand testimony."

We respectfully state that this is a country that has long nurtured and cherished the jury system and has espoused a confidence in it that has prohibited a change in it for a hundred and seventy-five years. It is one of the very foundations of our Constitutional system and is provided for in the Constitution of the United States and of all of the states in the Union.

The reason insurance companies desire an arbitration panel is obvious. It merely means that one of the litigants, the insurance company, wants to try its case before a select court. It merely means hearsay testimony, secondary and insubstantial evidence, innuendo and implication are the hallmarks of trial by arbitration, which are rightfully prohibited in a court of law. It merely means that the insurance companies, by this devious route, have selected a battle ground wherein they control all of the command points

and have full and sometimes exclusive knowledge of the terrain. It is a battle field upon which they have fought numerous battles and upon which their captains are daily associated with the personnel of the supposedly neutral referee. The arbitrator, in the course of his experience, may sit on a number of cases in which counsel for the insurance company appears, but he is not likely to see counsel for the litigant or the litigant himself on any more than one occasion.

The AAA claims that their process is speedy. Some claimants contend that they could have had a much more rapid hearing in a court of law. One case that counsel for the respondent is familiar with had a request for arbitration duly filed on February 13, 1963, and without delay caused by either litigant, the case was ultimately tried on January 30th, 1964, before the arbitration tribunal. If this is a standard, one might wonder if that is "speedy."

The AAA and the appellant contend that arbitration is just. The respondent has pointed out many unjust features above, of which the following are the most flagrant examples:

1. There is no provision for requiring testimony from out of state witnesses.
2. In many states, such as Utah, there is no provision for the attendance of witnesses within the forum.
3. The selection of the arbitrator is made by the Association irrespective of experience or motives and the insurance companies are much more likely to be associated and acquainted with him than the claimant.
4. The arbitrator is immune from mistake. There is

no method by which his finding can be appealed nor his errors corrected.

5. The arbitration forum selected is a forum of the insurance companies and denies the claimant an equal right of appointment.

6. The rules of evidence by which the rights of the claimant are protected are abandoned if the arbitrator so desires and, therefore, there is no hope of due process as the claimant might expect in a court of law.

7. The claimant is forced to litigate at a place selected by the Arbitration Association regardless of convenience to himself and witnesses, which, according to the rules of the American Arbitration Association, may be within or without the state wherein the occurrence happened.

8. Witnesses are not required to testify under oath and, therefore, the moral sanction that attends a proceeding at law are denied the litigant.

9. The evidence may be introduced that is completely hearsay and evidence may be introduced by affidavit, thereby denying the litigant of a right of cross examination.

The AAA contends that their proceeding is economical. The filing fee for the claimant is \$50.00. The cost of each day the proceeding exceeds the first day is \$25.00. In the event that the proceeding runs after 6:00 P. M. on any day, the charge is \$3.00 per hour. All chargeable to the claimant if he institutes the proceeding. Rule 4, Section 11, indicates that in certain cases "in prolonged or in special cases, the parties may agree to the payment of a fee" to the arbitrator. Under what circumstances these might be, the claimant does not know.

Another interesting aspect to the "economical" claim of the Arbitration Society is that specified under Section 16, Taking of a Stenographic Record:

"The tribunal clerk shall make the necessary arrangements for the taking of stenographic record of the testimony whenever such record is requested by one or more parties. The requesting party or parties shall pay the cost of such record as provided in Rule 8, Section 38."

As pointed out above, the claimant is required, if he wants a record, to pay the cost of the reporter plus the cost of transcribing, if it is to be of any benefit to the arbitrator. This, as all lawyers will attest, is no small charge. The claimant must arrange for and pay for the attendance of witness and in states where such attendance is not provided for by statute, as in this state, the obtaining of witnesses becomes an extreme hardship upon the claimant and, needless to say, an expense, for there are few witnesses who desire to attend for the witness fees provided by law.

We have taken considerable time to controvert the suggestions in the journals quoted as authorities. We respectfully state that our opinion, based upon experience, would be as persuasive as the opinion of an insurance company attorney writing in an insurance law journal concerning a matter in which he has a prejudicial interest. We respectfully state that these citations are not authority and should not be given any more weight or treated with any more dignity than the reflections of counsel for the respondent set forth above.

Getting to the real meat of the question raised, it should be sufficient to state that the Utah Supreme Court on three

occasions and the United States District Court in and for the District of Utah on one occasion, (*Shumaker v. Utex Exploration Co.*, 157 F. Supp. 68), has stated the provisions substantially similar to that contained in this insurance policy are void for good and sound reasons. Those cases, with the exception of the *Shumaker* case, were cited by the appellant, but the appellant casually says that they are distinguishable. This same argument was made to the learned trial judge who, after listening to the arguments and taking the case under advisement, was unconvinced. For example, the distinction made between the *Fox Film Corporation vs. Ogden Theatre* case, 82 Utah 279, 17 Pac. 2d 294, and this case seems to be that arbitration in this case does not deal with procedure, but with substance of the agreement and that arbitration in the *Fox Film Corporation* case dealt with procedure and not substance. By what method the appellant is able to come to this conclusion is not known to the respondent. One would think that the statements of the court in that case would be good evidence of the intent of that court and the field they intended to cover by their decision.

Appellant cites *Johnson vs. Brinkerhoff*, 89 Utah 580, 57 Pac. 2d 1132. He says this case is not in point for here the parties had agreed to arbitrate "all" disputes. Here counsel suggests that all the contracting parties intended to litigate by arbitration was (a) liability, and (b) damages. (Brief page 23 and 24.) One might ask, "What else is there left to litigate in any law suit but liability and damages?" Suppose that Mrs. Barnhart in this case had purchased only a policy for uninsured motorist protection. What then would be left for the court if arbitration was

given the task of determining liability and damages? In this particular case, the only part of the contract in issue is the uninsured motorist provision and nothing is left for any inquiry by the court. What more could be a complete ouster of jurisdiction in the realm of liability and damages or any other judicial realm insofar as the uninsured motorist policy is concerned.

The appellant makes a strained and tenuous argument in order to differentiate *Latter vs. Holsum Bread Company*, 108 Utah 364, 160 Pac. 2d 421. All of the argument is based upon the concurring opinion of Justice Wolf. The appellant fails to concede that three other justices in that case agreed as follows:

“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.”

Apparently the distinction contended for in the *Latter vs. Holsum Bread* case is that the court in its language used the word “all” before “disputes”, (Note: The contract in that case did not use “all” disputes), whereas, in our case we are only talking about uninsured motorists. We respectfully state to the court that this is a difference without any more distinction than if the contracts involved in the *Fox Film Corporation vs. Ogden Theatre Company*, *Johnson vs. Brinkerhoff* and *Latter vs. Holsum Bread* company cases had stated that only the question of liability and damages would be litigated and all other questions

would be reserved to the court. If these cases had said that, then it is the contention of the appellant that this court would not have held, in those cases, that arbitration was a void provision.

In respect to the policy, it is interesting to note the following language in paragraph 9 of part 4. This paragraph reads as follows:

“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 the terms of this endorsement nor unless within one year from the date of the accident: (a) suit for bodily injury has been filed against the uninsured motorist in a court of competent jurisdiction or (b) agreement as to the amount due under this coverage has been concluded, or (c) the insured or his legal representative has formally instituted arbitration proceedings.”

The important aspect of this provision is that (a), (b), and (c) use the disjunctive word “or.” One could reasonably conclude that all that has to be done to comply with the terms of the policy is to comply with all of the other terms of the policy and do any one of the three specified in (a), (b), or (c). In this instance the insured filed a suit against the uninsured motorist as required by paragraph (a). This paragraph seems extremely burdensome upon the insured for he does not own the suit and, as in this case, the law suit has been sitting without prosecution for more than a year. Or (b) he can agree with the company, which in this case could not be done. Or (c) he could institute arbitration proceedings. Apparently compliance with (a) would have been sufficient and, there-

fore, the question of arbitration is superfluous. No contention is made that the insured did not comply with all the other terms of the policy.

Paragraph 6 of Part 4 under arbitration states in the event that company and the insured are unable to agree

“then upon written demand of either, the matter or matters upon which such person and 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 agrees to consider itself bound and to be bound by any award made by the arbitrators pursuant to this endorsement.”

One would wonder, therefore, under the above stated terms of the policy what provisions are left to the court for determination. If this is a condition precedent, then after the condition is performed, what is there left for the court except to enter judgment perfunctorily as a clerk might.

One could wonder who will be the arbitrators for the provision merely states that the arbitration shall be in accordance with the rules of the American Arbitration Association, but it says nothing about who the arbitrators will be or how they will be appointed or whether they will be appointed under the auspices of the American Arbitration Association. Are these rules merely incorporated by reference? Are we compelled, as a matter of language, in the policy, to arbitration before this particular tribunal? We respectfully state that the policy is silent as to these matters.

The law is universally established in states that have not modified the common law by statute. American Jurisprudence says the law in these states is as follows:

"The courts have held almost universally that under the common law the parties to a dispute may not oust the jurisdiction of the courts by an arbitration agreement. And an agreement is not taken out of the scope of the rule by an express stipulation that suit shall be subject to the condition that arbitration first be had, **except** as it may be a condition precedent to suit where the agreement is for the purpose of finding preliminary facts or ascertaining values. Although many courts in supporting the rule have called such contracts illegal and void, this characterization is criticized as wanting in strict accuracy, in view of the authority sustaining enforcement of executed agreements and of other cases that support a right to recover damages in case of breach. Other courts have variously held that such agreements are invalid, voidable, or unenforceable, and that either of the parties to the arbitration agreement may revoke or abrogate the agreement at any time prior to the making of a valid award, and that notwithstanding such agreement the courts will determine all disputes between the parties." 5 Am. Jur. 2d 547, Sec. 36.

The New York decisions set forth on page 24 of appellant's brief, are cases which have been decided in a state which has adopted the uniform arbitration act. These cases are, therefore, not in point.

In *Wilson vs. Gregg*, 208 Oklahoma 291, 255 Pac. 2d 517 (1952) (1953), the court in an exhaustive review of the law, including cases under the statutes and cases under the common law, summarized its research and the law as follows:

"Generally arbitration agreements to submit controversies arising in the future have been held unenforceable because they deprive the courts of jurisdiction and are contrary to public policy. The decisions of some courts hold that such agreements are void. Other courts hold that such agreements are voidable and still others hold that such agreements are not enforceable. There is a line of decisions which hold that even though the agreement is not enforceable it is binding if acted upon by both parties thereto and an award made. Some authorities have held that an agreement to submit minor elements of a future controversy to arbitration is binding. There is authority both in the decisions of the courts and in text writers sustaining arbitration provided for by constitutions, by-laws, rules and regulations of lodges and other voluntary associations on the theory that such associations make their own rules and laws and the courts will not interfere with such associations enforcement of such rules. But the great weight of authority is to the effect that an agreement such as is involved in this case is not enforceable and that an action will not lie based upon the findings and conclusions of the arbitrators. There are decisions to the effect that agreements to arbitrate are a condition precedent to an action on the original cause. We are not dealing in this case with any of the exceptions or distinctions above mentioned. In Oklahoma the common law of arbitration prevails."

American Jurisprudence in quoting the above case and in quoting the case of Myers vs. Jenkins, 63 Ohio State 101, 57 NE 1089, and the annotation found in 135 ALR 85, says as follows:

"The primary difference between a clause in a contract under which it is agreed that future differences arise

ing out of the contract will be arbitrated, and an agreement to submit to arbitration, a controversy that has already arisen, is that in the former case there is an attempt to contract away the right to appear in a court before a cause of action arises, while in the latter case, a cause of action has already accrued and the parties agreeing to arbitration make a choice as to the form in which the existing controversy may be cited." 5 Am. Jur. 2d 548, Sec. 36, Note 15.

The Wilson vs. Gregg case cited many prominent and respectable courts including the decision of this court in the case of Johnson vs. Brinkerhoff, cited above. It would seem inappropriate to, at this date, overrule such a respectable body of law and add additional fires to the charge being made against the judiciary of inconstancy and perfidy.

Some courts have attempted to distinguish a general arbitration provision from a condition precedent provision. The court will note that the specific language of our contract says that arbitration is the condition precedent. Our court has considered the case of Blodgett Company vs. Bebe Company, 214 Pac. 38, and has cited that decision in its opinions with approval. That decision took up the question of whether a contract that stated that arbitration is a condition precedent escapes the application of the common law rule that it is a void provision. In that case the court said:

"It is apparent that where the cause of action is not complete until the establishment of a prescribed mode of a given fact, such fact is necessarily a condition precedent to the right of action; but where the right of action is complete, the bringing of suit thereon is,

of course, not impliedly subject to the condition that arbitration first be had, nor can it be expressly made so unless we are prepared to abandon the established rule. This we think obvious from a consideration of the general rule itself and the consequences necessarily flowing from its application. The rule is that an agreement for the arbitration of any dispute thereafter to arise under a given contract will not be enforced by the courts. But such an agreement is itself an attempt to make arbitration a condition precedent to the bringing of suit and its effect is no different than from that of an express stipulation that arbitration shall be a condition precedent. Assume that the latter is binding; what would be the court's pursuit under it? A dispute arises and arbitration is had. An award being made, can a party to the stipulation say 'I have submitted the question in dispute to arbitration and thus complied with the condition precedent; now I will bring my suit upon my original claim and ignore the award.'? Evidently not, for if so the arbitration would be an idle proceeding."

CONCLUSION

The respondent respectfully urges that the decision of the trial court be affirmed. To do otherwise would require the reversal of substantial law upon which rights and duties have become fixed. In this particular case, the respondent, because she relied upon the prior decisions of this court could, if they were now revised or distinguished, find herself without any remedy either under the contract or in court. This we submit would be a harsh and unjust penalty.

The respondent further urges the court to sustain the decision of the trial court on the basis of public policy.

Already too many judicial safeguards have been lost by legislative assignment, private barter and judicial abdication.

Respectfully submitted,

JACKSON B. HOWARD, for
HOWARD AND LEWIS

Attorneys for Respondent
290 North University Avenue
Provo, Utah