

1964

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Christensen and Jensen; Attorneys for Appellant;

Howard & Lewis; Attorneys for Respondents;

Recommended Citation

Reply Brief, *Barnhart and Civil Service Employees Insurance Co.*, No. 10133 (Utah Supreme Court, 1964).

https://digitalcommons.law.byu.edu/uofu_sc1/4581

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
SEP 21 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 REPLY BRIEF

Appeal from Judgment of the Fourth District Court
for Utah County
HONORABLE MAURICE HARDING, JUDGE

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

JACKSON B. HOWARD
HOWARD AND LEWIS
290 North University Avenue
Provo, Utah

*Attorney for Plaintiff and
Respondent*

STATE OF UTAH
OCT 7 1966

LAW LIBRARY

INDEX

ARGUMENT	1
CONCLUSION	8

ARTICLE CITED

50 American Bar Association Journal, pp. 459-460....	3
--	---

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.

Case
No.
10133

APPELLANT'S REPLY BRIEF

ARGUMENT

In view of the rather loose and unsupported statements urged by respondents under Point II of their brief, we feel constrained to submit this reply brief.

Respondents at first attack the text material quoted by appellant from various journals. It should be pointed out that these are not "insurance company publications" as alleged by respondent, but are respectively, a law magazine and a trade journal designed to keep the profession and the industry informed of current developments in the insurance field and not for the purpose of arguing controversial questions. The Insurance Law Journal is a publication of Commerce Clearing House, Inc., a publisher of many legal works in various fields

of the law, and having no connection with the insurance industry. The publication is available to all lawyers on a subscription basis. It deals with problems in all areas of insurance law. Its field of interest is not limited to the insurance companies' point of view. Best's Insurance News is published by Alfred M. Best Co., Inc. and is not subject to the financial control of any insurance company or group of insurance companies.

The articles from which we quoted were not in any sense arguments in support of any particular theory, but merely explanations tracing the history of the Uninsured Motorist Coverage, and the reasons for the provisions included in that coverage. The mere fact that these articles were published in journals dealing particularly with problems of the insurance industry is no reason to consider them as unworthy of consideration. In fact this would seem to entitle them to the most careful consideration of the Court. Moreover, it is wholly incorrect to say that the articles were written from a strictly biased standpoint. As above noted they were not written for the purpose of arguing points but merely to inform.

It is likewise incorrect to say that plaintiffs seldom have sufficient continuity of interest to publish law journals. The NACCA Law Journal is an excellent periodical published by and for attorneys representing plaintiffs and covering all branches of the personal injury field from the plaintiff's point of view.

It is urged on page 6 of respondent's brief, that the American Arbitration Association is not an impartial, unbiased, tribunal, but "a minion of the insurance companies combined." No documentation is offered in support of this bold assertion. It could hardly be further from the truth. The history of the American Arbitration Association, its purposes and functions, are described in an article in the May 1964 number of the American Bar Association Journal, Volume 50, page 459. The American Arbitration Association was created in 1926, more than a quarter of a century before the Uninsured Motorist Coverage provisions were ever conceived by the insurance industry. It was formed primarily for the purpose of settling commercial disputes. However, as the value of arbitration has been increasingly recognized as a useful tool in the settlement of many kinds of disputes, its functions have grown over the years. Its function in connection with the insurance industry is but a minor part of its entire role. In no sense can it be said to be a "minion" of the insurance companies and the statement that it exists on the gratuities of the insurance companies is wholly without foundation.

At the bottom of page 7 of respondents' brief, counsel inquires what other rules there are for the selection of arbitrators, not specified in the literature quoted in his brief. We invite attention again to the above cited article in the American Bar Association Journal, at page 460, where the author says:

"Under the rules of the A. A. A., *counsel may decide for themselves who the arbitrators are to*

be or how they are to be selected. Without sacrifice of order or fairness, a tailor-made forum may be *mutually* arranged. *Even the location of the hearing may be determined by mutual agreement of counsel.* These rights and options are clearly specified in the Commercial Arbitration Rules which any of the association's regional offices will make available to counsel." (Emphasis ours.)

It will be noted that the selection is not by the insurance company, or by one party, but by agreement of both parties.

On page 8 of their brief, respondents' assert that arbitrators are unqualified because of lack of experience. In view of the above quotation, this statement is obviously without merit. However, even if it be assumed that the basic premise is true, it is not a valid argument against arbitration. The greatest qualification of a juror for service is his complete lack of knowledge of the issues to be tried.

Counsel next complains that the proceeding is tried on a most informal basis without a record. The same criticism can be made of judicial proceedings in Justice of the Peace Courts and even in many City Courts throughout the state and country, to say nothing of the innumerable boards and commissions which hold hearings almost always informally, and quite commonly without court reporters.

Counsel next points out that there are many shortcomings in arbitration and many reasons why a person

might prefer to litigate his case in court. Like all human institutions, arbitration no doubt has its failings, but this also is true of the court system. In the case of the Uninsured Motorist Coverage, the insured contracts for arbitration by voluntary agreement. The remedy afforded is a part of the coverage package.

Counsel next complains that the common law rules of evidence are not applied. This criticism is equally applicable to proceedings before practically all administrative commissions, boards, and tribunals which are now a firmly established part of our legal machinery.

We fully share with counsel his devotion to the right of trial by jury. However, this is a right which can be and frequently is waived in common law cases, (and was in fact waived by both parties in this case); and to which neither party has a right in equity cases. It is of course not available in cases cognizable by the various administrative boards and tribunals.

Counsel goes on, with more enthusiasm than logic, to allege that trial before an arbitration commission means hearsay testimony, secondary and insubstantial evidence, innuendo and implication. He further alleges that insurance companies "have selected a battle ground wherein they control all of the command points and have full and sometimes exclusive knowledge of the terrain. . . .", etc. All of this without any authoritative foundation whatsoever. He next cites an isolated instance where, in his own experience, an arbitration claim was not heard for approximately a year after demand. While this is

somewhat faster than a court trial in many jurisdictions, the fact that the arbitration association falls short of its objectives in a particular instance, is not proof that as a general rule arbitration is less speedy than litigation through the courts.

Counsel winds up with nine complaints against arbitration under the American Arbitration Association. We answer them as follows:

1. There is no provision for requiring testimony from out of state witnesses, in court hearings any more than in arbitration proceedings.

2. Ordinarily the witnesses needed at a hearing on a claim of this type are available without need for subpoena.

3. The claim that the selection of the arbitrator is made by the association without regard to expense or motives and that the insurance companies are much more likely to be associated with and acquainted with him than the claimant, is wholly without foundation in fact. The claimant has an equal voice with the insurance company in the selection of the arbitrator.

4. The arbitrator is no more immune from mistake than is a judge or jury sitting as a trier of fact. Errors in law or arbitrary or capricious action can certainly be set aside by a reviewing court as could erroneous legal action or arbitrary or capricious action on the part of a court or administrative tribunal. The findings of fact of a jury, court or administrative tribunal, just as by an

arbitrator, are final and irreversible, if supported by evidence.

5. There is no basis to the claim that the arbitration forum is a forum of the insurance companies or that it denies a claimant the equal right of appointment.

6. Technical rules of evidence are not followed in most hearings before administrative boards and tribunals, and as a practical matter are frequently not followed in the Justice of the Peace Courts, where the justice is frequently without learning in the law.

7. There is no basis to the assertion that the claimant is forced to litigate at an inconvenient forum.

8. Testimony under oath is no guarantee as to its accuracy or honesty.

9. As previously noted many tribunals receive evidence by way of affidavit, and in fact the courts of law receive affidavits in support of motions for summary judgment and in various types of proceedings.

Counsel then goes on to complain about the cost of arbitration. While the filing fee may be greater than the filing fee for initiating a suit in a court of law, the cost thereafter diminishes substantially. Let it be noted that a claimant before an arbitrator does not need the services of a lawyer, and the lawyer's fees are ordinarily the largest item of expense in any litigation. Even if a lawyer is engaged, much less of his time will be required to

present a matter to an arbitrator. Arbitration proceedings, do not contemplate depositions, and other extensive and expensive discovery proceedings, court hearings on motions, pretrial conferences, etc.. nor do they ordinarily require more than a part of one day in hearing.

Counsel also expresses concern over the cost of preparing a record of the arbitration proceedings. However, in hearings before Justice of the Peace Courts and City Courts, if there is any stenographic record it must be furnished at the cost of the party desiring it. Even in trials in the district courts where court reporters are available, the cost of a transcript is borne by the party who requested it, and not by the court. Most cases tried in courts of law, either to a judge or jury, are determined by the trier of fact from memory of the evidence which has been presented, and not from a study of a transcript of it. The complaint about cost of a transcript before an arbitrator is purely a strawman which counsel has erected for the pleasure of kicking over.

CONCLUSION

In summary, all of the complaints which counsel makes of arbitration proceedings are without foundation in fact. Those which are factually correct are complaints which might be levelled with equal validity against most of our other institutions for hearing and determining controversies between parties, including in many instances, the trial courts themselves. They are certainly not of sufficient gravity to warrant this court in refusing to enforce a contract for settlement of a dispute by ar-

bitration. Respondents have advanced no meritorious reason for the denial of arbitration in this case. The judgment of the trial court should be reversed.

Respectfully submitted,

CHRISTENSEN AND JENSEN

By RAY R. CHRISTENSEN

*Attorney for Defendant and
Appellant*

Suite 1205, Continental Bank Bldg.
Salt Lake City, Utah