

1994

Gary E. Reed vs. Davis County School District : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark F. James; Terry E. Welch; Kimball, Parr, Waddoups, Brown and Gee; Attorneys for Appellant.
Felshaw King; King and King; Attorneys for Appellee.

Recommended Citation

Reply Brief, *Reed v. Davis County School District*, No. 940172 (Utah Court of Appeals, 1994).
https://digitalcommons.law.byu.edu/byu_ca1/5868

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 Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS

UTAH
COURT OF
APPEALS
50
A10
DOCKET NO.

940172

IN THE UTAH COURT OF APPEALS

GARY E. REED,)
) Case No. 940172-CA
Plaintiff/Appellant,)
)
vs.)
)
DAVIS COUNTY SCHOOL DISTRICT,) Priority No. 15
)
Defendant/Appellee.)

REPLY BRIEF OF PLAINTIFF/APPELLANT AND CROSS-APPELLEE

APPEAL FROM A JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH, DATED FEBRUARY 3, 1994,
DISMISSING GARY REED'S MOTION TO ARBITRATE

District Court Civil No. 930700200CV

HONORABLE RODNEY S. PAGE, DISTRICT JUDGE

Felshaw King
KING & KING
330 North Main Street
P.O. Box 320
Kaysville, Utah 84037

Attorneys for Appellee/
Cross-Appellant Davis
County School District

Mark F. James
Terry E. Welch
KIMBALL, PARR, WADDOUPS,
BROWN & GEE
185 South State Street
Suite 1300
Salt Lake City, Utah 84111

Attorneys for Appellant/
Cross-Appellee Gary E. Reed

FILED

JUL 13 1994

IN THE UTAH COURT OF APPEALS

GARY E. REED,)	
)	Case No. 940172-CA
Plaintiff/Appellant,)	
)	
vs.)	
)	
DAVIS COUNTY SCHOOL DISTRICT,)	Priority No. 15
)	
Defendant/Appellee.)	

REPLY BRIEF OF PLAINTIFF/APPELLANT AND CROSS-APPELLEE

**APPEAL FROM A JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH, DATED FEBRUARY 3, 1994,
DISMISSING GARY REED'S MOTION TO ARBITRATE**

District Court Civil No. 930700200CV

HONORABLE RODNEY S. PAGE, DISTRICT JUDGE

Felshaw King
KING & KING
330 North Main Street
P.O. Box 320
Kaysville, Utah 84037

Attorneys for Appellee/
Cross-Appellant Davis
County School District

Mark F. James
Terry E. Welch
KIMBALL, PARR, WADDOUPS,
BROWN & GEE
185 South State Street
Suite 1300
Salt Lake City, Utah 84111

Attorneys for Appellant/
Cross-Appellee Gary E. Reed

TABLE OF CONTENTS

DETERMINATIVE STATUTES	1
ARGUMENT	1
I. THE TRIAL COURT ERRED IN GRANTING THE DISTRICT'S MOTION TO DISMISS	2
II. THE TRIAL COURT CORRECTLY RULED THAT THE PROFESSIONAL AGREEMENT CONSTITUTES AN ARBITRATION AGREEMENT	2
A. An Arbitration Agreement Need not Contain the Word "Arbitrate."	3
B. The Procedure Contained in the Professional Agreement is Final and Binding	4
III. PUBLIC POLICY MANDATES THAT ANY DOUBTS REGARDING ARBITRABILITY BE RESOLVED IN FAVOR OF ARBITRATION	5
IV. MR. REED HAS NOT WAIVED HIS RIGHT TO ARBITRATION IN ANY EVENT	7
A. Mr. Reed has not Substantially Participated in Litigation	8
B. The District has not been Prejudiced	9
V. THE TRIAL COURT COMMITTED ERROR IN FAILING TO STRIKE, AND IN RELYING UPON INADMISSIBLE STATEMENTS CONTAINED IN, THE AFFIDAVITS OF FELSHAW KING AND MEL MILES	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<u>Bernalillo City Medical Center Employees v. Cancelosi</u> , 587 P.2d 960 (N.M. 1978)	9
<u>Board of Education, Taos Municipal School v. The Architects, Taos</u> , 709 P.2d 184 (N.M. 1985)	9, 10
<u>Chandler v. Blue Cross Blue Shield of Utah</u> , 833 P.2d 356 (Utah 1992)	5, 7, 9, 10
<u>Hunter v. Hunter</u> , 669 P.2d 430 (Utah 1983)	6
<u>Price v. Drexell Burnham Lambert, Inc.</u> , 791 F.2d 1156 (5th Cir. 1986)	10
<u>Red Sky Homeowners Ass'n v. Heritage Cove</u> , 701 P.2d 603 (Colo. Ct. App. 1984)	5
<u>Soter's, Inc. v. Deseret Federal Sav. & Loan Ass'n</u> , 857 P.2d 935 (Utah 1993)	5, 6, 7
<u>Van Eck v. Oregon State Employees Ass'n</u> , 574 P.2d 633 (Or. 1978)	4
<u>Wood v. Miller's National Insurance Co.</u> , 632 P.2d 1163 (N.M. 1981)	9

STATUTES

Utah Code Ann. § 63-2-201 (1992)	8
Utah Code Ann. §§ 78-31a-1 - 78-31a-20 (1985)	1
Utah Code Ann. § 78-31a-4(1) (1993)	2

RULES

Utah Rule of Civil Procedure 41	8
---	---

Plaintiff/Appellant and cross-Appellee Gary E. Reed ("Reed"), respectfully submits the following reply brief.

DETERMINATIVE STATUTES

Utah Code Ann. §§ 78-31a-1 - 78-31a-20 (1985) (the "Utah Arbitration Act")

- § 78-31a-3:** A written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or equity to set aside the agreement, or when fraud is alleged as provided in the Utah Rules of Civil Procedure.
- § 78-31a-4:** (1) The court, upon motion of any party showing the existence of an arbitration agreement, shall order the parties to arbitrate. If an issue is raised concerning the existence of an arbitration agreement or the scope of the matters covered by the agreement, the court shall determine those issues and order or deny arbitration accordingly.
- § 78-31a-19:** An appeal may be taken by any aggrieved party as provided by law for appeals in civil actions from any court order:

- (1) denying a motion to compel arbitration;

ARGUMENT

In addition to responding to the three issues raised by Mr. Reed in his appeal, the District has cross-appealed as to one additional issue: whether the grievance procedure constitutes an arbitration agreement subject to the Utah Arbitration Act. In the interest of efficiency, Mr. Reed responds to this newly raised issue, together with the issues raised by Mr. Reed, in this Reply Brief.

I. THE TRIAL COURT ERRED IN GRANTING THE DISTRICT'S MOTION TO DISMISS.

As established in Mr. Reed's opening brief, a Motion to Dismiss was not a proper response to a Motion to Compel Arbitration, and the trial court erred in granting the District's motion. A motion to compel arbitration does not constitute an action -- like a Complaint -- which requires the pleading of a claim upon which relief can be granted. Rather, a Motion to Compel Arbitration seeks only an order that the parties shall arbitrate. Furthermore, as discussed at length in the opening brief, the District did not meet the burden of such a Motion in any event. Indeed, a Motion to Compel Arbitration, pursuant to statute, need set forth only one fact -- the existence of an arbitration agreement, to properly overcome a motion to dismiss. See Utah Code Ann. § 78-31a-4(1) (1993). Mr. Reed's verified Motion plainly set forth the existence of an arbitration agreement.¹ Thus, the trial court erred in looking beyond the facts as pled in Mr. Reed's Motion to Compel Arbitration.

II. THE TRIAL COURT CORRECTLY RULED THAT THE PROFESSIONAL AGREEMENT CONSTITUTES AN ARBITRATION AGREEMENT.

In bringing a cross-appeal, the District raises one new issue not raised in Mr. Reed's original appeal: whether the Professional Agreement that governs the parties' employment contains an arbitration provision that is subject to the Utah Arbitration Act. The District contends that the Professional Agreement is not subject to the provisions of the Utah Arbitration Act because it provides only a grievance procedure and not a mechanism for binding arbitration.

¹ In addition, the trial court correctly concluded that an arbitration agreement in fact existed.

In support of its position, the District makes essentially two arguments. First, the District maintains that there is no right to arbitrate pursuant to the Professional Agreement because it nowhere contains the word "arbitrate." Second, relying on an Oregon case, the District argues that no arbitration agreement exists within the Professional Agreement because the grievance procedure contained in that agreement is not final and binding. Neither argument is persuasive.

A. An Arbitration Agreement Need not Contain the Word "Arbitrate."

While the grievance procedure contained within the professional agreement nowhere contains the word "arbitrate," it clearly evinces an intent by both parties to submit disputes thereunder to arbitration. The grievance procedure sets forth several steps that an employee should take to invoke arbitration. Section 5.4.1 of the Professional Agreement provides that, first, a complainant is to attempt informal discussions with his principal or immediate supervisor. If such discussions do not resolve any grievance, then four formal steps may be taken pursuant to section 5.4.2.

Step one allows an employee to invoke the formal procedure by sending a written form to "the principal or immediate supervisor." Prof. Agreement at 50. "If the educator is not satisfied with the disposition of the grievance at Step 1," he may forward his complaint to the Superintendent of Schools pursuant to Step 2. See Prof. Agreement at 51. Step 3 provides as follows:

Step 3: If the educator is not satisfied with the decision rendered in Step 2, the educator ... may submit the grievance to a hearing examiner

Prof. Agreement at 51. Step 3 goes on to describe the process for selecting a hearing examiner. Finally, Step 4 provides as follows:

Step 4: If the educator is not satisfied with the decision rendered in Step 3, the educator and/or his/her chosen representative may request and be granted a hearing before the Board of Education in executive session. Following an executive session, the Board will render its decision in an open meeting....

Prof. Agreement at 51.

It is difficult to imagine how a contract could more clearly set forth an arbitration procedure. Whether the procedure is labeled a grievance or arbitration, it is subject to a final determination by a body acting as an arbitrator of the dispute. The District's semantical distinction simply is unpersuasive. To accept the District's argument in this regard would be similar to finding that no binding contract exists because the parties to the contract chose to use the word "agreement" rather than "contract." It is settled that courts look not to the form or labels by which parties choose to title their agreements, but to the substance of the agreement. In this case, the substance clearly calls for an arbitration process.

B. The Procedure Contained in the Professional Agreement is Final and Binding.

The District also argues that the grievance procedure contained in the Professional Agreement is not final and binding and, therefore, cannot constitute an arbitration agreement.

The District points to the last sentence of Step 4, which provides as follows:

Nothing herein shall be construed to limit the right of the District or the educator to appeal to an appropriate court of law.

Prof. Agreement at 51. The District also cites an Oregon case holding that a contract between a school district and its employees contained no arbitration agreement because the procedure was not final and binding. See Van Eck v. Oregon State Employees Ass'n, 574 P.2d 633 (Or. 1978). Not only is Van Eck not controlling, it is inapposite to this situation and is not

persuasive. In Van Eck, the procedure was in fact binding only on the association and the employees were free to seek any available remedy after having followed all available administrative steps. That is simply not the case here.

Step 4 of the grievance procedure clearly indicates that the procedure is binding on both parties. The District has pointed to the right to appeal to an appropriate court of law, as set forth in Step 4, as somehow negating the binding nature of the arbitration process. The fact that the procedure allows an appeal does not make the procedure any less binding than the final order of any trial court would be simply because it may be appealed.

III. PUBLIC POLICY MANDATES THAT ANY DOUBTS REGARDING ARBITRABILITY BE RESOLVED IN FAVOR OF ARBITRATION.

The District maintains that Mr. Reed waived his right to arbitration. No such waiver has occurred. To the contrary, Reed has acted in a manner consistent with his clear intent not to waive his right to arbitration.

It is well settled in Utah, as in other jurisdictions, that public policy strongly favors arbitration. Chandler v. Blue Cross Blue Shield of Utah, 833 P.2d 356, 358 (Utah 1992). Public policy not only approves but encourages arbitration as a method of settling disputes because it generally is less expensive and eases court congestion. Id. Accordingly, any doubt concerning arbitrability ought to be resolved in favor of arbitration. Given the strong public policy favoring arbitration, the right to arbitrate is not to be waived unless the intent to waive is clear. Red Sky Homeowners Ass'n v. Heritage Cove, 701 P.2d 603, 604 (Colo. Ct. App. 1984).

Under Utah law, it is also well settled that waiver does not occur absent voluntary relinquishment of a known right. E.g., Soter's, Inc. v. Deseret Federal Sav. & Loan Ass'n, 857 P.2d 935 (Utah 1993) (rejecting previous, more specific, statements of the rule of waiver in favor of this general statement -- which is to be applied to each case on its facts). In other words, the waiving party must (1) clearly know of the rights which will be waived by this action; and (2) voluntarily and intentionally relinquish such rights. Furthermore, such relinquishment must be clearly intended under the facts of the case. Id. at 941; see also Hunter v. Hunter, 669 P.2d 430, 432 (Utah 1983) ("[T]o constitute waiver, one's actions or conduct must be distinctly made, must evince in some unequivocal manner an intent to waive, and must be inconsistent with any other intent.").²

²As noted in Mr. Reed's opening brief, the Utah Supreme Court recently clarified (and likely overruled) the standard as set forth in Hunter. The Court, however, went on to state that "the Hunter language was not inappropriate under the facts of that case ... [but] went well beyond the elements of proof [relevant to waiver]." Soter's, 857 P.2d at 940. The Soter's Court went on to hold "that a fact finder . . . assess the totality of the circumstances to determine whether the relinquishment is clearly intended." Id. at 941.

Soter's further provides that prior statements of the rule that rely on application of rules of waiver in specific types of cases or under specific facts should no longer be followed. Rather, the general principle -- that to constitute waiver, one must voluntarily relinquish a known right -- is to be applied to specific facts. The court went on to explain:

This general statement of the proof that is necessary to show intentional relinquishment is all the specification that we think appropriate. Beyond this, the appellate courts of this state need not attempt to articulate as general principles the specific facts that are required to show intentional relinquishment in particular cases. Over time, factual patterns may emerge from affirmances and reversals of specific decisions that may serve to flesh out the law, but that does not require repeated reformulation of the general statement In fact, such attempts at reformulation can be detrimental, as the history of appellate case law since Hunter demonstrates.

The "evidence" upon which the District relies in arguing waiver does not establish that Mr. Reed voluntarily relinquished his right to arbitration. Application of strong public policy considerations to the facts of this case weigh heavily in favor of this Court ordering the District to submit to arbitration as clearly provided under the Agreement between Mr. Reed and the District.

IV. MR. REED HAS NOT WAIVED HIS RIGHT TO ARBITRATION IN ANY EVENT.

The District has failed meet its "burden of establishing [both] substantial participation and prejudice" as set forth by the Utah Supreme Court in Chandler. Chandler, 833 P.2d at 358. Reed's actions prior to filing his Motion to Compel Arbitration do not rise to a level constituting "substantial participation" in litigation to a point inconsistent with an intent to arbitrate. In addition, even assuming his actions constituted substantial participation in litigation, which they did not, the District has not been prejudiced.

Id. at 941. In discussing the evolution away from this general standard, the Court stated:

[W]e think that the error resulted from the rather random movement in our law of waiver away from pure legal requirements toward a description of facts that seemed important in particular situations in determining whether the legal requirements of waiver were met. Unfortunately, we and the court of appeals tended to elevate to statements of general application what amounted to case-bound determinations of factual sufficiency.

Id. at 941. In other words, the general statement of the principle of waiver does not change depending on the context (e.g., arbitration). Rather the principle remains constant. Waiver has occurred only if, under the facts of the case, an intentional relinquishment of a known right has occurred.

A. Mr. Reed has not Substantially Participated in Litigation.

In Chandler, the Court found that Blue Cross (the party seeking arbitration) had, prior to filing a motion seeking to compel arbitration, filed an answer and a cross complaint and had participated in five months of extensive formal discovery. The Court held that by participating in such extensive discovery -- discovery which would not have been available in arbitration -- Blue Cross clearly had manifested its intent to proceed to trial. Thus, the Chandler court held that Blue Cross' action satisfied the first prong of the test.

Mr. Reed, on the other hand, has engaged in no discovery. Indeed, although he filed a formal Complaint against the District, he dismissed the Complaint before the District filed an answer. Reed's actions were at the beginning point on the litigation continuum. Certainly they did not rise to either "substantial participation" or to the inconsistency point. Reed's actions in dismissing his Complaint under Utah Rule of Civil Procedure 41 manifest not an intent to waive arbitration, but rather just the opposite. Furthermore, it is important to note that at the time Reed filed the Complaint, the District already had refused to act on his attempt at arbitration. [Record at 127-132; see Fact 4 in Opening Brief and Exhibit B.] Indeed, prior to taking any other action, Mr. Reed attempted to invoke the arbitration procedures set forth in the Professional Agreement by letter dated September 19, 1992. [See Opening Brief, Exhibit B.] It was only when the District failed to respond in any way to Mr. Reed's attempt at arbitration that he pursued additional avenues. In short, the first prong of the Chandler test has not been satisfied in this case.

The District's likening of Mr. Reed's GRAMA request to formal discovery is equally unavailing. Unlike formal discovery, any information available to Mr. Reed under GRAMA would equally be available to him under an arbitration process. Indeed, under Utah law, any member of the public can, at any time, request access to public records pursuant to GRAMA. See Utah Code Ann. § 63-2-201 (1992). A GRAMA request simply does not equate to formal discovery.

B. The District has not been Prejudiced.

The second prong that must be established in order to find waiver of arbitration under Chandler is a finding of prejudice to the party opposing arbitration. As set forth in the opening brief, no prejudice exists in this case. Indeed, the District is unable to establish prejudice under any of the three examples cited by the Utah Supreme Court in Chandler. First, Mr. Reed has gained no advantage through participation in pre-trial procedures. Unlike the party in Board of Education, Taos Municipal School v. The Architects, Taos, 709 P.2d 184, 186 (N.M. 1985), Mr. Reed has not availed himself of any discovery process "which would have been lost under arbitration." Id., 709 P.2d at 186. No discovery has occurred between Reed and the District, and certainly none that would have been lost under arbitration.

Similarly, the District is unable to establish prejudice under the Utah Supreme Court's second example; i.e., that "the party seeking arbitration is attempting to forum shop after 'the judicial waters [have] . . . been tested.'" Chandler, 833 P.2d at 359. As stated in Wood v. Miller's National Insurance Co., 632 P.2d 1163, 1165-66 (N.M. 1981), relied upon by the Utah Supreme Court in support of its second example of prejudice:

The instigation of legal action is not determinative for purposes of deciding whether a party has waived arbitration. The point of no return is reached when the party seeking to compel arbitration invokes the court's discretionary power, prior to demanding arbitration, on a question other than its demand for arbitration.

Wood, 632 P.2d at 1165-66 (emphasis added); see also Bernalillo City Medical Center Employees v. Cancelosi, 587 P.2d 960, 963 (N.M. 1978) (the case was not at issue and since no hearings have been held, the judicial waters had not been tested prior to the time the motion for arbitration had been filed). Mr. Reed has not invoked or sought to invoke the discretionary powers of any court prior to the filing of the Motion to Compel Arbitration. The judicial waters simply have not been tested.

Finally, Mr. Reed has not caused the District "to undergo the types of expenses that arbitration is designed to alleviate." Chandler, 833 P.2d at 359. In support of this third example, the Chandler court cited several cases in which the opposing party had incurred significant expenses during a formal discovery process. Id. at 359 n.16; see also, e.g., Price v. Drexell Burnham Lambert, Inc., 791 F.2d 1156, 1159 (5th Cir. 1986) (stating that defendant initiated extensive discovery without demanding arbitration). Taos, 709 P.2d at 185 (same). The court did not cite, nor did it rely upon, any case wherein the opposing party had not been subjected to substantial formal discovery expense. The District has presented only inadmissible evidence of having incurred expense and, even then, has wholly failed to establish that it otherwise would have avoided such purported expense under arbitration.

In short, Reed has gained no advantage, procedurally or otherwise, by filing and then voluntarily dismissing a lawsuit prior to his Motion to Compel Arbitration. In addition, unlike the example cited by the Utah Supreme Court in Chandler, Reed has not engaged in forum shopping. No court ever has exercised its discretionary power with regard to this case. The District has suffered no prejudice as defined by the Utah Supreme Court.

V. THE TRIAL COURT COMMITTED ERROR IN FAILING TO STRIKE, AND IN RELYING UPON INADMISSIBLE STATEMENTS CONTAINED IN, THE AFFIDAVITS OF FELSHAW KING AND MEL MILES.

The District claims that even if the court should have stricken portions of the affidavits of Felshaw King and Mel Miles, its failure to do so was harmless. In essence, the District argues that Reed suffered no harm from the court's reliance on such affidavits in that (1) Reed admitted some of the same facts in his opening brief, (2) "statements contained in the Affidavits did nothing more than supplement the arguments made by the School District, or (3) the statements in the Affidavits were made on the basis of personal knowledge." Appellee Brief at 23.

These arguments are unpersuasive, particularly in light of the fact that the affidavits were offered and considered in support of the District's so-called motion to dismiss -- requiring all facts to be frozen as stated in the pleadings on record. In addition, there are several obvious problems with the District's logic. First, Mr. Reed has not admitted any facts that correspond to objections to statements in the affidavits. In addition, perhaps the most important and prejudicial "fact" supported only in the affidavits is the claim that the District has expended substantial amounts of money in responding to Mr. Reed's claimed discrimination. No

discovery has been conducted on this issue and it is impossible for Mr. Reed to dispute or admit any such statements. Affidavits offered in support of a motion to dismiss that are immune from attack do not become admissible by a statement that they are "made on personal knowledge" or that they merely "supplemented the arguments" espoused by movant. Indeed, while it may be permissible to introduce evidence in support of a motion to dismiss (thus automatically converting it into a motion for summary judgment), such evidence will not carry the day where it is still contrary to facts as plead unless beyond any genuine dispute. The District's facts clearly are not beyond any genuine dispute. Finally, "evidence" set forth in the form of affidavit testimony is irrelevant because there is no evidence from, or even allegation by, the District that it would have avoided any expense it allegedly has incurred were it to be required to submit to arbitration.

CONCLUSION

For the foregoing reasons, Mr. Reed respectfully requests that this Court affirm the trial court's decision that the Professional Agreement contains an arbitration agreement subject to the Utah Arbitration Act. Mr. Reed further requests that this Court reverse the trial court's determination of waiver and remand this case and instruct the trial court to enter an order compelling the District to submit to arbitration with Mr. Reed.

//

//

//

DATED this 13th day of July, 1994.

KIMBALL, PARR, WADDOUPS, BROWN & GEE



Mark F. James, Esq.
Terry E. Welch, Esq.
Attorneys for Gary Reed

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 1994, a true and correct copy of the foregoing was served by United States mail, first class postage prepaid, on the following:

Felshaw King
King & King
251 East 200 South
Clearfield, Utah 84015

