

**IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA**

ALAN HEIMLICH,

Plaintiff and Respondent,

v.

SHIRAZ M. SHIVJI,

Defendant and Appellant.

Cal. Supreme Court  
Case No. S243029

Court of Appeal  
Case No. H042641

Santa Clara County Superior  
Court Case No. 112-CV-231939

**APPELLANT SHIRAZ M. SHIVJI'S ANSWER TO  
RESPONDENT ALAN HEIMLICH'S PETITION FOR REVIEW**

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After Decision of the Court of Appeal  
Sixth Appellate District, Case No. H042641

City and County of Santa Clara  
Superior Court No. 112CV231939, Honorable William J. Elfving, presiding

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## I. INTRODUCTION

Defendant and Appellant Shiraz M. Shivji (“Mr. Shivji”) herewith submits his answer to the Petition for Review filed by Plaintiff and Respondent Alan Heimlich (“Attorney Heimlich.”)

Respectfully, Attorney Heimlich’s Petition for Review before the Supreme Court is based on erroneous interpretations of California law. The Appellate decision properly partially vacated the arbitration award because the arbitrator refused to hear evidence material to the controversy (i.e. evidence of Mr. Shivji’s rejected CCP §998 (“§998”) offer) under CCP §1286.2(a)(5). (Court of Appeal’s Typed Opinion (“Op.”), p. 30-31.)

## II. DISCUSSION

Attorney Heimlich’s Petition for Review sets forth three theories supporting this Court’s review. Each argument lacks merit. Attorney Heimlich fails to demonstrate that review is necessary to secure uniformity or to settle an important issue of law.

### A. The Appellate Decision Does Not Conflict with *White v. Western Title Insurance Company* (1985) 40 Cal.3d 870

Attorney Heimlich argues that an arbitrator must be informed of a rejected §998 offer prior to his decision on the merits, citing to *White v. Western Title Insurance Company* (1985) 40 Cal.3d 870. However, *White* does not support this position.

In *White*, Plaintiffs were purchasers of real property who sued the title insurance company in relation to the company’s preparation of preliminary title insurance reports that failed to mention recorded water easements. *White*, 40 Cal.3d at 878. Plaintiffs’ complaint originally contained two causes of action: (1) breach of the insurance contract and (2) negligence.

During litigation, the defendant title insurance company made an informal settlement offer and subsequently a §998 offer. *Id.* at 879. Plaintiffs rejected the offers, and, based upon the offers, amended their complaint to state a third cause of action for breach of the covenant of good faith and fair dealing. *Id.* at 879.

Whether the title insurance company's settlement and §998 offers were fair and reasonable were at issue in Plaintiffs' allegation of breach of the covenant of good faith and fair dealing. Denying the introduction of evidence of the settlement offers would prevent Plaintiffs from accurately "show[ing] that defendant was not evaluating and seeking to resolve their claim fairly and in good faith." *Id.* at 888. But the *White* Court faced a competing consideration: it construed Evidence Code §1152 and CCP §998 as "serv[ing] the same purpose" to prevent introduction of offers into evidence to prove "liability for the loss or damage . . . but to permit its introduction to prove some other matter at issue." *Id.* at 888-89.

To accommodate the competing considerations, the *White* trial court bifurcated trial. It first allowed the parties to present evidence on the claims for breach of contract and negligence. Then, and only with liability already established, the trial court admitted the offers into evidence on the issue of breach of the covenant of good faith and fair dealing, reasoning that the duty of good faith and fair dealing continued after plaintiffs filed their lawsuit. *Id.* at 889. Accordingly, the offers "were inadmissible to prove liability on plaintiffs' original causes of action, but were admissible to prove liability for breach of the covenant." *Id.* at 889.

The present action is distinguishable. Here, liability was not established, and the premature introduction of Mr. Shivji's §998 offer, as the Appellate decision acknowledges, violates CCP §998(b)(2), which prohibits evidence of a §998 offer upon arbitration.

Attorney Heimlich wrongly argues that because the *White* Court allowed introduction of §998 offers for the limited purpose of evaluating the good faith of an insurance company's settlement offer after liability was established, the *Heimlich* Court of Appeal committed legal error by violating an imaginary *White* mandate to introduce evidence of a rejected §998 offer for any purpose. It did not.

Attorney Heimlich's position is contrary to the spirit of *White*, which carefully bifurcated issues of liability and evidence of a §998 offer to prevent bias relating to the trier-of-fact's determination of liability. *White*'s bifurcation mirrors the two-step methodology prescribed by the *Heimlich* Appellate Court: "the arbitrator should have reached the merits of Client's post-award section 998 request by recharacterizing his final decision as an interim or partial final decision." (Op. p. 30.)

**B. There is No Conflict Among Appellate Decisions Regarding When a "Timely" Request for CCP 998 Costs Must be Made**

Attorney Heimlich next claims that Mr. Shivji's request to the arbitrator was not timely because it was made six days after the award was issued.<sup>1</sup> The *Heimlich* Court of Appeal analogized the timeliness of Mr. Shivji's post-award request for determination of §998 costs to California Rule of Court, Rule 3.1700(a) which requires a prevailing party claiming costs to file a memorandum of costs within 15 days of the notice of entry of judgment or 180 days after entry of judgment, whichever occurs first. (Op. p. 19, fn. 16.) Accordingly, Mr. Shivji's request for §998 costs was both timely and submitted to the correct decisionmaker.

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<sup>1</sup> Arbitrator's award was emailed to the parties on Friday, March 6, 2015. Mr. Shivji sent his request to the Arbitrator on Wednesday, March 11, 2015.

Attorney Heimlich complains, “the Opinion destroys the finality of final arbitration awards, rendering them meaningless, and the proceedings in arbitration definite.” (Petition, page 7/16.) Attorney Heimlich overstates the effect of allowing §998 offers to be presented after an award on the merits. As the *Heimlich* decision explained:

“[t]his is not a case where Client has sought to reopen the arbitration hearings to present new evidence on a submitted issue. (Compare *Cooper, supra*, 230 Cal.App.4th at p. 20, 178 Cal.Rptr.3d 322.) The section 998 issue had not been submitted before the award was made. Nor is this a case where Client submitted the issue to the arbitrator and presented evidence and now claims a legal error in the arbitrator’s decision. . . . As the arbitrator did not decide Client’s section 998 request, the trial court might correct the award under section 1286.6, subdivision (b) ‘without affecting the merits of the decision upon the controversy submitted. . .’ (Op. p. 30.)

Nor does the *Heimlich* decision conflict with *Maaso v. Signer* (2012) 203 Cal.App.4th 362. In *Maaso*, “[d]uring the course of the arbitration proceedings Maaso’s counsel advised the panel that Maaso had previously made a section 998 offer that was rejected by Signer, without stating the amount of the offer.” *Maaso*, 203 Cal.App.4th at 368 (emphasis added). The *Maaso* Court held, “[w]e nevertheless conclude that Maaso was not entitled this costs and interest because he never requested these enhancements from the arbitrators. . . . ***With knowledge of the rejected offer***, the arbitrators made no award of section 998 costs. . .” *Id.* at 377. In contrast, in the *Heimlich v. Shivji* proceedings, the arbitrator was never made aware of a rejected §998 offer, pursuant to CCP §998(b)(2). Thus, the arbitrator’s decision did not deliberately reject of the party’s §998 costs, as it did in *Maaso*.

**C. The Court of Appeal Property Determined that the Arbitrator's Award Should be Partially Vacated**

Attorney Heimlich's third argument challenges the Appellate Court's authority to (1) correct or vacate an arbitrator's decision and (2) interpret the AAA Commercial Arbitration Rules.

First, the Court of Appeal's authority to review an arbitrator's decision is found in CCP §1286.2(a)(5) which provides, "[s]ubject to Section 1286.3, the court shall vacate the award if the court determines any of the following: . . . (5) The rights of the party were substantially prejudiced . . . by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title." The Court of Appeal determined that the arbitrator exceeded his power in refusing to hear evidence of Attorney Heimlich's rejection of Mr. Shivji's §998 offer.

Second, the Court of Appeal may properly interpret AAA Commercial Arbitration Rules to authorize an arbitrator to issue a partial final award. In *Hightower v. Superior Court* (2001) 86 Cal.App.4th 1415, the Court determined that under AAA Commercial Arbitration Rules, an arbitrator was authorized to issue a partial final award giving one party an option to purchase shares of stock. *Hightower v. Superior Court*, 86 Cal.App.4th at 1420. The source of this arbitral authority was, in part, a provision in AAA's Commercial Arbitration Rules that provided "[t]he arbitrator may grant *any remedy or relief that the arbitrator deems just and equitable* and within the scope of the agreement of the parties." As the *Heimlich* Court noted, "*Roehl v. Ritchie* (2007) 147 Cal.App.4th 338 followed *Hightower* in upholding an arbitrator's authority 'to reserve jurisdiction to make incremental decisions.'" (Op. p. 26, fn. 22.) The Court of Appeal interpreted the AAA Commercial Arbitration Rules in a



manner consistent with case law and in a way that afforded meaning to CCP §998(b)(2).

### **III. CONCLUSION**

Attorney Heimlich's Petition is unsupported by applicable law, and there is no issue worthy of review. Mr. Shivji respectfully submits that Attorney Heimlich's Petition for Review should be denied.

Dated: June 28, 2017

Respectfully submitted,

/s/

\_\_\_\_\_  
Leila N. Sockolov  
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Attorneys for Appellant Shiraz M. Shivji

**RULE 8.204 CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I, Leila N. Sockolov, attorney for Shiraz M. Shivji, certify that this brief uses proportionately spaced Times New Roman 13-point typeface, and that the text of the brief consists of **1526 words**. I have relied on the word count of the computer program I used to prepare the brief to calculate the number of words.

Dated: July 28, 2017

/s/  
\_\_\_\_\_  
Leila N. Sockolov

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ALAN HEIMLICH'S PETITION FOR REVIEW**

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San Jose, CA 95113

Honorable William J. Elfving  
Judge of the Superior Court  
191 North First Street, Dept. 3  
San Jose, CA 95113

Nicholas D. Heimlich, Esq.  
Law Offices of Nicholas D. Heimlich  
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Dated: July 28, 2017

/s/ \_\_\_\_\_  
Elizabeth Soriano

STATE OF CALIFORNIA  
Supreme Court of California

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