Supreme Court of California
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Supreme Court of California
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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ALAN HEIMLICH, Petitioner v. SHIRAZ M. SHIVJI, Respondent	Cal. Supreme Court Case No. S243029 Court of Appeal Case No. H042641 Santa Clara County Superior Court Case No. 112-CV-231939

Sixth Appellate District, Case No. H042641

Santa Clara County Superior Ct. Case No. 112CV231939

REPLY TO ANSWER TO PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL SIXTH APPELLATE DISTRICT

STAY REQUESTED of APPELLATE RULING TO SUPERIOR COURT issued May 31, 2017.

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REPLY TO ANSWER TO PETITION FOR REVIEW

To the Honorable Chief Justice of the California Supreme Court and the Associate Justices of the Supreme Court of California:

Alan Heimlich, Petitioner, respectfully submits this Reply to Answer to Petition for Review of the decision of the Court of Appeal, Sixth Appellate District (per Conrad L. Rushing, P.J.), issued on May 31, 2017. Petition for rehearing (June 15, 2017) and Sur petition for rehearing (June 22, 2017) denied on June 27, 2017.

Appellant Shiraz Shivji's Answer to the Petition for Review is not persuasive. Petitioner requests a STAY of the Appellate ruling issued May 31, 2017, to avoid a possible conflicting ruling that may need to be undone later and to avoid wasting court resources.

I. ARGUMENT

A. *WHITE V. WESTERN TITLE INS. CO.* IS IN DIRECT CONFLICT WITH THIS CASE.

Appellant Shivji would have this Court believe that because the CCP §998 offer in *White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870, was introduced for more than just an allocation of costs, that it is not applicable to this case. This is simply flawed logic.

First, *White* clearly articulates a basic principle: that section 998, subdivision (b)(2) "bar[s] the introduction into evidence of an offer to compromise a claim for the purpose of proving liability for that claim," but "permit[s] its introduction to prove some other matter at issue." *Id.* at pp. 888-889 (emphasis added).

Next, if evidence of a §998 offer to compromise is admissible to prove a cause of action (breach of the implied covenant of good faith and

fair dealing), it certainly should be admissible for the purpose of simply reserving the right to have the Arbitrator rule on a CCP §998 motion.

Furthermore, in *White*, while the Court did not hear evidence on the substance of the CCP §998 offer until the second phase of the trial, it was very likely aware of the CCP §998 offer before liability was established.[1]

While Appellant arrives at an incorrect conclusion, Appellant's analysis actually supports Petitioner's main argument: that the Appellate Opinion erroneously conflated presenting details of a CCP §998 offer with the mere explanation that a CCP §998 offer existed, in direct conflict with *White* which makes clear that a CCP §998 can be mentioned to reserve rights and presented for purposes other than proving liability of a party. Shivji could have easily informed the Arbitrator of the existence of a CCP §998 offer (without saying who made the offer or the details) and asked for an interim award (which AAA rules provide for) or to ask for a bifurcated trial like the *White* parties did. It is undisputed that Shivji never even mentioned the CCP §998 offer to the Arbitrator during the arbitation to protect his right to present it to the Arbitrator and hence Shivji waived his rights to seek recoupment of his costs based on the CCP §998 offer. Further, Shivji and the Court of Appeals misstated the factual record by claiming that the Arbitrator failed to consider the CCP §998 offer, as Shivji never presented the CCP §998 offer to the Arbitrator until 6 days after the Final Award in Arbitration was issued, which is too late. One cannot refuse to hear evidence that was never presented. Here, the CCP §998 offer was

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[1] If Appellant (Shivji) is correct in his assertion that the breach of the implied covenant of good faith cause of action was based on the CCP 998 offer and that the trial was bifurcated "to accommodate the competing considerations" of introducing the CCP §998 evidence, the Court was aware of the existence of the CCP §998 offer prior to bifurcation, and possibly even as early as the filing of the amended Complaint.

never presented to the Arbitrator until 6 days after the Final Award was issued.

Shivji incorrectly argues that *White*'s bifurcation was like the Heimlich Appellate Court decision to recharacterize a Final Award in Arbitration as interim. However, this is wrong, because *White* bifurcated the proceeding before finishing the trial, but the Heimlich Appellate Court Opinion instead chooses to ask for a re-do (and to rewrite the AAA rules to include an after-final award by having the arbitrator "recharacterize" (Appellate Court language) the Final Award in Arbitration sometime later as an interim award) after the Arbitration was complete, which is completely different.

B. THE ANSWER DOES NOT CITE A SINGLE CASE WHEREIN AN AFTER FINAL ARBITRATION AWARD REQUEST FOR COSTS IS TIMELY.

Appellant's Answer is void of any case law supporting the position that a request for CCP §998 costs made after a Final Arbitration Award is timely. Appellant's only citation is to the "Heimlich Court" (the Appellate Court's) position that an after Final Arbitration Award request is akin to a civil court determination of §998 costs and should follow the same timeline. Citation to the lower court in this very case is not persuasive (otherwise Petitioner would merely cite to the trial court's opinion to make its case). Further, the citation to Court procedure is inappropriate when this case was tried in Arbitration (with its own procedures), not Court.

Moreover, as set forth in detail below, Arbitration procedure is distinct from that of civil court. The Heimlich Opinion (Appellate Court Decision) confuses the two distinct sets of rules regarding when CCP §998

offers are presented in Arbitration versus Civil Court. This case was tried in Arbitration and in Arbitration as explained in the well reasoned logic in *Maaso v. Signer* (2012) 203 Cal. App. 4th 362 and in the AAA Rules all items must be presented prior to a Final Award as the AAA Rules do not provide for an after Final Award. Shivji could have asked the Arbitrator to issue an interim award (which the AAA rules provide for), which would have reserved Shivji's right to present his CCP §998 offer after the interim award on liability was issued. However, in Court, a CCP §998 offer is presented after trial. The Appeals Court for this case, changed the Arbitration rules (which require all presentation prior to a Final Award) on when to present a CCP §998 offer to say that Arbitration should have a CCP §998 offer considered after a Final Award in Arbitration, thereby improperly rewriting AAA rules, which the Appellate Court has no authority to do.

C. *MAASO V. SIGNER* IS DIRECTLY RELEVANT TO THIS CASE.

Appellant reaches another flawed conclusion in its analysis of *Maaso v. Signer* (2012) 203 Cal. App. 4th 362, arguing that the *Maaso* holding does not conflict with the Heimlich Opinion because in *Maaso* the existence of a §998 offer was timely presented before the close of evidence. This is precisely the reason that the Opinion does conflict with *Maaso*.

In *Maaso*, Maaso's attorney attempted to bring the §998 offer to the Arbitrator's attention, but didn't go far enough, in that he did not seek to reserve the right to request costs or present further evidence of the §998 offer. *Id.* at 377. In our case, Appellant did even less because Shivji did not even mention the CCP §998 offer until 6 days after the Final Arbitration Award. Shivji clearly should have reserved the right during the

Arbitration hearing (which lasted 5 days) or prior to the Final Award at the latest. It follows, then, that if Maaso didn't do enough to preserve his rights when he mentioned it to the Arbitrator, Appellant can't preserve his rights by being silent.

D. *HIGHTOWER V. SUPERIOR COURT* DOES NOT SUPPORT APPELLANT'S ARGUMENT THAT A COURT IS PERMITTED TO CREATE A NEW MANDATE FOR AN AWARD AFTER A FINAL ARBITRATION AWARD.

In *Hightower v. Superior Court* (2001) 86 Cal. App. 4th 1415, the Court of Appeals analyzed an unrelated statute (CCP §1283.4) and affirmed that an Arbitrator had the power to issue an interim award. *Id.* This has no bearing on our case because the Heimlich Opinion authorized the Court to recharacterize a final award as a interim ward after the fact, usurping the Arbitrator's authority retroactively, which *Hightower* does not do.

There is simply no legal support for the Court of Appeals' decision to re-write the AAA Rules, which do not provide for such an after Final Arbitration Award, especially in light of the analysis on this issue in *Maaso v. Signer* (2012) 203 Cal. App. 4th 362. While Shivji claims that the Court is merely interpreting the AAA rules, this is not true as the AAA rules do not provide for after-final awards. The *Maaso* court specifically held that the Arbitrator, not the court, decides the issue of CCP §998 costs in Arbitration:

> The most logical way to read this parallel language is that in cases tried to the court, the court makes the decisions about awarding CCP §998 costs connected with the case, while in cases that are arbitrated, those decisions belong to the arbitrator. It is not logical to read the statute as inviting a procedure that permits a party to forum shop between the court and the arbitrator, and to bring the request to whichever

> forum that party believes is most likely to make a favorable award."

Id. at 379.

The Arbitrator in this case specifically responded to Shivji's untimely request for CCP §998 costs: "As discussed in the Award, whatever may have been the costs, fees, etc. associated with the Santa Clara litigation were to be borne by the parties . ." There is simply no authority supporting the Heimlich Opinion overturning the Arbitrator's decision.

For the foregoing reasons, review of this case should be undertaken to provide guidance as to whether a Court is permitted to create a new mandate for the AAA for an award after a Final Arbitration Award.

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II. CONCLUSION

Appellant's Answer makes clear that the Heimlich Opinion creates confusion about the role of the Court in Arbitration proceedings and the introduction of the existence of a CCP §998 offer to prove some other matter at issue. Without immediate instruction from the California Supreme Court, future case law will inevitably parallel this confusion, necessitating more litigation on this important procedural issue.

Based upon the foregoing, Appellant respectfully requests this Court Grant Respondent's Petition for Review.

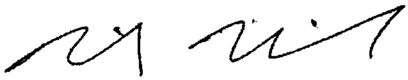
Respectfully submitted,

Dated: August 7, 2017 Law Offices of Nicholas D. Heimlich

Nick Heimlich
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Nick Heimlich, Attorney for Respondent hereby certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Reply to Answer to Petition for Review of Respondent is produced using 13 point Roman type including footnotes and contains exactly 1,975 words, as calculated by the computer program which produced said brief, which Counsel relies upon to determine the word count in this brief.



_______________________________ Date: 08/07/2017

Nicholas D. Heimlich
Attorney for Petitioner, Alan Heimlich

CERTIFICATE OF SERVICE

I, the undersigned, under penalty of perjury, certify and declare: That I am a citizen of the United States, over 18 years of age, a resident of or employed in the County where the herein described mailing took place, and not a party to the within action.

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Nick Heimlich

Jorge E. Navarrete, Court Administrator and Clerk
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STATE OF CALIFORNIA
Supreme Court of California

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