Supreme Court Case No. S243029

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ALAN HEIMLICH,

Plaintiff and Respondent,

vs.

SHIRAZ M. SHIVJI,

Defendant and Appellant

SUPREME COURT CASE NO. S243029

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL

SIXTH APPELLATE DISTRICT, CASE NO. H042641

HON. WILLIAM J ELFVING, SUP. CT. CASE NO. 112CV231939

OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

This case presents the following issues for review:

1. Determine whether the Sixth District erred in holding that CCP § 998 offers are not allowed prior to a final Arbitration award for the purpose of preserving the right to post-offer costs.
2. Resolve the split in the Courts of Appeal created by the Sixth District's opinion, regarding when a "timely" request for CCP § 998 costs must be made.
3. Determine whether the Sixth District exceeded its authority in vacating the Arbitration Award and erred in creating a new mandate for a post-final Arbitration order.

II. INTRODUCTION

In *Heimlich v. Shivji*, 12 Cal. App. 5th 153 (Cal. App. 6th Dist. May 31, 2017), the Court of Appeal reversed the order of the Santa Clara County Superior Court confirming the arbitration award and denying Mr. Shivji's CCP § 998 request for costs (made six days after the final arbitration award was issued) as untimely, and instead directed that the final arbitration award be partially vacated to allow the arbitrator or the lower court to determine the CCP § 998 request.

The Sixth District Appellate Court's Opinion creates a split in the Courts of Appeal that runs counter to the California Supreme Court's prior holding in *White v. Western Title Ins. Co.* (1985) 40 Cal. 3d 870 (*White*), superseded by statute on another ground as stated in *Lee v. Fidelity National Title Ins. Co.* (2010) 188 Cal.App.4th 583, 596, and creates an immediate and extreme need for resolution by the California Supreme Court, in that it leaves wide open the question of when a "timely" request for CCP § 998 costs must be made, as discussed in detail below.

If upheld, the Sixth District's Opinion will force each district, and each individual arbitrator, to "pick a side" in determining whether to attempt to reserve the right to CCP § 998 costs during arbitration, as clearly articulated in *Maaso v. Signer* (2012) 203 Cal. App. 4th 362 (*Maaso*), and permitted in *White*, or wait until after a final ruling in arbitration, risking the loss of an award of CCP § 998 costs in an effort to follow the Sixth District's flawed instructions articulated in this case.

The Sixth District's Opinion threatens to produce unintended and harmful consequences for Mr. Heimlich and the entire arbitration system. Ultimately, the Opinion obliterates the finality of a final award in arbitration and runs contrary to established California Supreme Court precedent.

The Court of Appeal creates a hole in arbitration finality so large a truck could be driven through any arbitration award. One not happy with an arbitration award must merely raise something days, weeks, or months after a Final Award and any Arbitrator or Court can simply "recharacterize" its final award as not final. The Appellate Court's decision clearly ignores the California Supreme Court's prior holding in *White*, and the AAA rules, rewriting them with an arbitrary and capricious standard that allows changes to final awards without any legal basis stated for such changes.

For the reasons set forth above, Mr. Heimlich respectfully requests that this Court reverse the Court of Appeal in this case and affirm the Santa Clara County Superior Court's decision to uphold the Arbitrator's decision and make no award of costs for Mr. Shivji under CCP § 998.

III. STATEMENT OF THE CASE

A. The Civil Case

This case arose over a dispute over attorney's fees owed to Mr. Heimlich for patent work performed for Mr. Shivji pursuant to a legal

services agreement dated August 8, 2003. After bills were not paid, Mr. Heimlich sent a Mandatory Fee Arbitration letter to Mr. Shivji. Mr. Shivji did not avail himself of this procedure. Mr. Heimlich filed suit on September 10, 2012, for breach of contract, monies owed and common counts (Santa Clara County Case No. 112CV231939). The case was litigated extensively in civil court for fourteen (14) months. During that time, Mr. Shivji sent a § 998 Offer for $30,001, which was not accepted, and filed a Motion for Summary Judgment in Court, which was denied by the Court. Thereafter, on November 14, 2013, the Court granted Mr. Heimlich's Motion for Judgment on the Pleadings as to parts of the case.

B. The Arbitration

After seeing that his defenses and theory of the case with the Motion for Summary Judgment would not work in civil court, Mr. Shivji decided to switch forums to Arbitration after 14 months of litigation. Mr. Shivji then also filed a claim seeking $176,000 in affirmative relief (demanding a refund of all patent filing fees and attorney's fees paid) with the American Arbitration Association (AAA) on November 18, 2013. The Superior Court ordered the parties to arbitration on May 29, 2014. The case was arbitrated and the Arbitrator entered a Final Award denying both Mr. Shivji's ($176,000) and Mr. Heimlich's ($125,000) claims, explicitly stating that "EACH SIDE WILL BEAR THEIR OWN ATTORNEY'S FEES AND COSTS." The final award also stated, "This Award is intended to be a complete disposition of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby[] denied." This became the Final Judgment of the Case, after Mr. Shivji moved to confirm the Arbitration Award in the Superior Court.

C. Confirmation of the Arbitration Award

Mr. Shivji did not mention or present in any way his § 998 costs claims to the Arbitrator until *six (6) days after* the Final Award was already issued. Mr. Shivji was represented by Counsel who did not mention the CCP § 998 offer (or reserve the right to present the CCP § 998 issue at a later time) in multiple briefs to the Arbitrator or during the five days of hearing in the Arbitration. The arbitrator responded by e-mail the next day after the request of the CCP § 998 costs and stated: "Counsel, once I issued [m]y Final Award I no longer have jurisdiction to take any further action in this matter. 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 ..."

Mr. Shivji moved to confirm the arbitration award. On May 25, 2015, the Superior Court confirmed the Arbitration Award and entered Judgment of the Final Award.

D. Motion to Tax Costs

After the Final Arbitration Award and Entry of Judgment, Mr. Shivji filed a Memorandum of Costs on April 24, 2015 seeking Mr. Shivji's § 998 costs in Court. Mr. Heimlich filed a Motion to Tax Costs on May 4, 2015. On June 16, 2015, the Superior Court denied the untimely request for CCP § 998 costs, which were stricken and taxed to zero.

E. Appeal to Sixth District Court of Appeals

Mr. Shivji appealed the denial of his § 998 Costs to the Sixth District Court of Appeal. *Heimlich v. Shivji*, 12 Cal. App. 5th 153 (Cal. App. 6th Dist. May 31, 2017), which reversed the trial court's ruling (and that of the Arbitrator), and partially vacated the award and ordered a hearing on the

request for CCP § 998 costs.

On Appeal, Mr. Heimlich argued that the standard of review on appeal should be abuse of discretion. Mr. Shivji argued for a de novo standard of review. The Sixth District's Opinion did not address these arguments, and failed to articulate a standard of review.

F. Request for Rehearing

Pursuant to California Court Rule 8.268(a), Mr. Heimlich petitioned the Court of Appeal for rehearing of the Opinion filed May 31, 2017. The Petition for Rehearing was filed on June 15, 2017 and a Sur Petition filed on June 22, 2017. The Court of Appeal declined rehearing on June 27, 2017.

IV. ARGUMENT

A. The Sixth District's Opinion Erred in Ignoring *White v. Western Title Ins. Co.* (Cal. Sup. Ct. 1985) 40 Cal. 3d 870 (*White*) in Its Holding That CCP § 998 Offers Are Not Allowed Prior to a Final Arbitration Award for the Purpose of Preserving the Right to Post-Offer Costs.

In briefing and oral argument, Mr. Heimlich listed several ways in which Mr. Shivji could have reserved the right to have the Arbitrator rule on a CCP § 998 motion, including after the close of evidence but before the final order. The Court of Appeal found each of these improper, holding that "[w]e do not believe that such a pre-award request or alert would be consistent with the evidentiary restriction in section 998, subdivision (b)(2)." *Heimlich*, at 169. In so doing, the 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*.

The *White* court stated "that [the 998(b)(2)] language refers to the trial upon the liability which the offer proposed to compromise" and held 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." (Emphasis added.) (*White, supra*, at pp. 888-889.) Accordingly, in *White*, section 998, subdivision (b)(2) barred the introduction of the § 998 offer to prove Defendants' liability for malpractice, but permitted its introduction on the issue of costs.

In *White*, the court approved a procedure whereby the trial court bifurcated the trial and admitted the § 998 offer into evidence in the second phase of the trial, which did not involve the liability that the § 998 offer proposed to compromise. (*Id.* at p. 889.)

Mr. Shivji has argued 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. The Court of Appeal made no reference to *White* anywhere in its Opinion. *Heimlich v. Shivji*, 12 Cal. App. 5th 153 (Cal. App. 6th Dist. May 31, 2017).[1]

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

[1] Mr. Shivji incorrectly argues that *White*'s bifurcation was analogous to the Court of Appeal's decision to recharacterize a Final Award in Arbitration as interim. However, *White* bifurcated the proceeding before finishing the trial, while the Sixth District instead choose to order a re-do and to rewrite the AAA rules to include an after-final award by requiring the arbitrator to recharacterize the Final Award in Arbitration as an interim award after the Arbitration was complete, which is entirely different than a simple mid-litigation bifurcation.

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.[2] Thus, *White's* holding is analogous to our case, and should have yielded a different result than the Sixth District's Opinion.

The Sixth District Appellate Court's ruling is in direct opposition to and in direct conflict with, the California Supreme Court ruling in *White*, which clearly articulates the principle that CCP § 998 offers may be introduced into evidence to prove some other matter at issue (for example, to allocate costs). The limitation the Court of Appeal places on the holding in White is improper and should be reversed.

Mr. Heimlich respectfully requests that this Court re-affirm its holding in *White*: that CCP § 998 offers may be introduced for the limited purpose of reserving the right to make a request for CCP § 998 costs.

B. A "Timely" Request for CCP § 998 Costs Must be Made Prior to a Final Arbitration Award.

As made clear in *Maaso v. Signer* (2012) 203 Cal. App. 4th 362, and Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2015), Paragraph 5:402.13-14 (citing *Maaso*), "[t]he arbitrator must be informed, however, of the rejected CCP § 998 offer prior

[2] If Mr. 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.

to making a final award in order to impose any applicable costs 'penalties' . . . ." (*Ibid.* Emphases added.)

Put simply, *White* allows for the introduction of evidence of a CCP § 998 offer prior to a final award, and *Maaso* requires it.

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. Accordingly, the arbitrator did not award CCP § 998 costs to Maaso. *Id.* at 377.

Mr. Shivji argued that the *Maaso* holding does not conflict with the Sixth District's Opinion because in *Maaso* the existence of a § 998 offer was timely presented before the close of evidence. This is precisely why this appellate Opinion conflicts with *Maaso,* because in Maaso even presenting the § 998 offer was not enough without asking for a ruling from the Arbitrator or reserving the right to present the § 998 offer issue. Furthermore, in Arbitration Shivji did not even mention the § 998 offer before close of evidence, which is indisputably even less than was done in *Maaso,* and therefore Shivji failed to preserve his rights to present a § 998 offer issue to the Arbitrator before the arbitration was done and over.

Mr. Shivji did not even mention the CCP § 998 offer until 6 days after the Final Arbitration Award. Mr. 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 for bifurcation like the *White* parties did. Instead, it is undisputed that Mr. Shivji never even mentioned the CCP § 998 offer to the Arbitrator during the arbitration or in briefs before or after the presentation of evidence to protect his right to request costs.

Mr. Shivji was required to reserve the right to petition for costs 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 the CCP § 998 offer to the Arbitrator, Mr. Shivji certainly couldn't have preserved his rights by being silent. Hence, Mr. Shivji waived his rights to seek recoupment of his costs based on the CCP § 998 offer.

Until the Sixth District Appellate Court's Opinion, the Second, Fourth, and even the Sixth District Court of Appeal (and possibly others) consistently upheld *Maaso*.[3] The Sixth District Court of Appeals' Opinion, then, contradicts *Maaso*, and its own prior holdings on this issue, without explanation, and creates a split in the Courts, where one did not exist.

The Sixth District suggests that because it was allegedly "not practical" to ask the Arbitrator to issue an interim award, or otherwise reserve the right to bring a § 998 motion, Mr. Shivji's post-final award request, presented six (6) days after the final award was therefore, under the Sixth District's rationale deemed timely. In addition to ignoring the California Supreme Court's position in *White* on the admissibility of CCP § 998 offers, and *Maaso's* requirements, this holding ignores the amount of time that passed between the presentation of evidence, which concluded on November 13, 2014, and the request on March 11, 2015 (made six days after the issuance of the final award on March 5, 2015).

In addition to the 90 days between the presentation of evidence and the final award, Mr. Shivji let six (6) days lapse before informing the Arbitrator of the CCP § 998 offer issue. It is not only practical, but imperative, that a party reserve the right to present evidence of the rejected CCP § 998 offer prior to the issuance of the Final Award, and, in fact, Mr. Shivji had numerous opportunities and methods by which to accomplish

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[3] As these cases are unpublished, they will not be referenced.

this. Appellant simply failed to make any effort at all until six (6) days after a Final Award.

The Court of Appeal concluded, without analysis or reference to the six (6) day lapse between the Final Award and request, that "The client timely presented his § 998 claim" to the arbitrator. *Heimlich*, at 152. Six (6) days after a final award is clearly not timely. This is akin to a party asking to present new witnesses at trial 6 days after a court's final ruling. Thus, the Court of Appeal is silent on the issue of timeliness, which was discussed heavily in the briefing, and leaves open ended the deadline, if any, by which a post-final award request can be made. In doing so, the Opinion destroys the finality of final arbitration awards, rendering them meaningless, and the proceedings in arbitration indefinite.

If, under *Heimlich*, a timely request for CCP § 998 costs need no longer be made prior to a Final Award in arbitration, an open question exists as to when a CCP § 998 request for costs would be considered untimely. This hole in the analysis of "timeliness" cannot stand, particularly if post-final award requests for CCP § 998 costs are now considered timely in the Sixth District.

Neither Mr. Shivji nor the Court of Appeal have presented any case law supporting the position that a request for CCP § 998 costs made after a Final Arbitration Award is timely. Further, the citation to Court procedure is inappropriate when *Heimlich* was tried not in Court, but in Arbitration (with its own procedures), and at the specific (and delayed) request of Mr. Shivji.

Moreover, as set forth in detail below, Arbitration procedure is distinct from that of civil court. The Sixth District's Opinion 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. 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. The AAA Rules do not provide for an after Final Award. Mr. Shivji could have asked the Arbitrator to issue an interim award (which the AAA rules provide for), which would have reserved Mr. Shivji's right to present his CCP § 998 offer after the interim award on liability was issued. He failed to do so. As such, his request was untimely.

Regardless of how it is done, *Maaso* clearly articulates that the request for CCP § 998 costs must be made prior to a Final Arbitration Award (in contrast to Civil Court, where a CCP § 998 offer is presented after trial).

Mr. Heimlich respectfully requests that this Court decide when a CCP § 998 request for costs would be considered untimely in AAA Arbitration.

C. The Sixth District Exceeded its Authority in Vacating the Arbitration Award and Erred in Creating a New Mandate for a Post-Final Arbitration Award.

"It is well settled that the scope of judicial review of arbitration awards is extremely narrow." (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943; accord, *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 333 (*City of Palo Alto*).)

In *Moncharsh v. Heily & Blase,* (1992) 3 Cal. 4th 1, the California Supreme Court "held judicial review of private, binding arbitration awards is generally limited to the statutory grounds for vacating (§ 1286.2) or correcting (§ 1286.6) an award" and "rejected the view that a court may vacate or correct the award because of the arbitrator's legal or factual error, even an error appearing on the face of the award." (*Moshonov v. Walsh*

(2000) 22 Cal. 4th 771, 775 (*Moshonov*), citing *Moncharsh, supra*, 3 Cal. 4th at pp. 8-28.)

In order to establish jurisdiction, the Court of Appeal misstated the factual record by claiming that the Arbitrator failed to consider the CCP § 998 offer. However, Mr. Shivji never presented the CCP § 998 offer to the Arbitrator until 6 days after the Final Award in Arbitration was issued, which, as stated by the Arbitrator, was untimely and no longer within his jurisdiction to consider (*functus officio*). One cannot refuse to hear evidence that was never presented. The CCP § 998 offer was never presented to the Arbitrator until 6 days after the Final Award was issued. Thus, it was not subject to correction for the Arbitrator's refusal to hear evidence:

> Under the statutory scheme, **a party's failure to request the arbitrator to determine a particular issue within the scope of the arbitration is not a basis for vacating or correcting an award.** (Code Civ. Proc., §§ 1286.2, 1286.6; *Sapp v. Barenfeld* (1949) 34 Cal.2d 515, 524 [212 P.2d 233].) Unless a statutory basis for vacating or correcting an award exists, a reviewing court 'shall confirm the award as made ... .' (Code Civ. Proc., § 1286.)" (*Ibid.*) The court concluded: "Such an interpretation of the applicable statutes promotes the Legislature's determination that there is a ' "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." ' [Citation.] As a general rule, **parties to a private arbitration impliedly, if not expressly, agree that the arbitrator's decision will be both binding and final and thus the arbitrator's decision 'should be the end, not the beginning, of the dispute**.' [Citation.]

Maaso, at 378. (Emphases added.)

Mr. Shivji's Motion to Confirm the Arbitration Award and file a Memorandum of Costs was essentially an improper request to correct the Arbitration Award:

> "Although Maaso styled his petition as one to "confirm" the award, he essentially sought "correction" of the award by asking the court to add costs and interest not awarded by the panel, and which were in fact inconsistent with the panel's award. Code of Civil Procedure section 1286.6 sets forth the exclusive grounds for correction of an award "if the court determines that: [¶] (a) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; [¶] (b) The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or [¶] (c) The award is imperfect in a matter of form, not affecting the merits of the controversy." None of these three statutory grounds exist here."

Maaso, at 378.

Thus, the trial court properly refused to award CCP § 998 costs to Mr. Shivji. However, the Court of Appeal acted outside of its authority when substituting its judgment for that of the Arbitrator and re-writing the rules of the American Arbitration Association.

In direct contradiction to established case precedent regarding judicial review of Arbitration, the Court of Appeal second guesses the Arbitrator's decision to deny costs and maintain the "final" status of his award, and asserts that the Arbitrator should have ruled on the § 998 motion when presented with it six (6) days *after* the final award was received by Mr. Shivji.

However, the American Arbitration Association (AAA) Rules do not provide for such an after-final award. AAA Rule R-47 (b) provides "In addition to a final award, the arbitrator may make other decisions, including

interim, interlocutory, or partial rulings, orders, and awards.", each of which precede a Final Award, but there are no "after final" Awards. AAA Rule R-47 (page 28). The categorization of the order as "final award" suggests, by its definition, and mandates that it is the ultimate, conclusive, and last order. If the AAA intended to allow for after-final awards, it would have provided for them in Rule R-47.

There is no procedure under the AAA Rules to modify final awards, except "to correct any clerical, typographical, or computational errors in the award." AAA Rule R-50 (page 28-29). Here, the Court has created a new set of AAA rules that have no cited legal basis, no standards, and are entirely arbitrary and capricious. Thus, the Court of Appeal unilaterally changed the Arbitration rules regarding CCP § 998 requests to mirror the Civil Court rules, thereby improperly invalidating and rewriting AAA rules, without any legal authority to do so.

Under the Court of Appeal's theory, if the proposed presentation of the Section § 998 offer is not practical (and the Court of Appeal opines that it is never practical), the Court can simply ignore the statute and the AAA rules: "The best practice to avoid violating section 998, subdivision (b)(2) would be to present evidence of a rejected section 998 offer after an arbitration award resolves the underlying dispute." *Heimlich* at 169. The Court of Appeal fails to cite any legal precedent on which it is permitted to ignore the clear intent of the legislature and to rewrite the AAA rules to allow for post-final order requests for CCP § 998 costs and creating its new "after final" rule. In so doing, the Court essentially creates new, much broader, legal doctrine, without cited legal authority, to cancel any law that does not have a practical procedure spelled out within its framework.

The Opinion states that it sees nothing in the Commercial Rules that prevents an Arbitration award from changing or "recharacterizing" from a final to a non-final award (*Heimlich*, at 177), erroneously holding that

because the AAA Rules do not expressly prohibit such a thing, that it is permitted. This is a clear logical fallacy. The Court of Appeal fails to give any credence to the clear language of the AAA Rules. Instead the Opinion suggests that Courts can act as a legislature, re-writing the AAA rules, which the Court has no power to do. The Court of Appeal further suggests that because an Arbitrator can re-characterize its award, the Court also has the discretion to order such a recharacterization, which it similarly has no legal authority to support.

The AAA rules do not allow any post-final award; in fact, only interim, interlocutory, or partial rulings, orders, and awards are allowed (Rule R-47), each of which precede a final order. The Arbitrator made a clear determination that the Award in this case was final, and the Opinion has cited no authority for this "recharacterization" doctrine. There is nothing in the rules that allow the alchemy of a final award into a Interim or Partial final Award after issuance as the Court claims.

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 Court of Appeal authorized the Court to recharacterize a final award as a interim award after the fact, usurping the Arbitrator's authority retroactively, which *Hightower* does not allow.

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 Mr. Shivji claims that the Court is merely interpreting the AAA rules, this is simply 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 Mr. 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 Court of Appeal decision to overturn the Arbitrator's decision.

This completely upends the arbitration system and runs afoul of the method by which rules and statutes have been interpreted and relevant case law, which in this case are *White*, *Maaso,* and *Moncharsh* (the parties' expectation of finality from a binding arbitration requires that "judicial intervention in the arbitration process be minimized." *Id.* at 10 (internal citations omitted)).

The Opinion, then, reaches a flawed conclusion by holding that such an order is possible, and, in fact, mandatory. A change in the AAA Rules cannot and should not come from the Court, but rather from the American Arbitration Association itself, which would be done prior to a proceeding, not after a proceeding is completed, decided, and final.

For the foregoing reasons, Mr. Heimlich respectfully requests that this Court rule that a Court is not permitted to create a new mandate for the AAA for a post-final Arbitration award.

V. CONCLUSION

The Sixth District's Opinion re-writes the rules of the American Arbitration Association, supplants its authority over that of the Arbitrator, and, in so doing, creates confusion among the courts in the interpretation of longstanding case law.

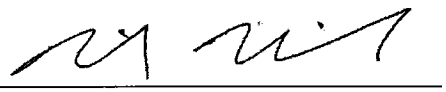
We think the better approach is to have the arbitrator, who is in a much better position than a court, deal with CCP § 998 issues in accordance with *Maaso* as allowed under *White* for notifying the arbitrator of the existence of a § 998 offer before a final arbitration award.

Accordingly, Mr. Heimlich respectfully requests this Court reverse the Sixth District Court of Appeal's decision and affirm the Superior Court's ruling to uphold the Arbitrator's decision and make no award of costs for Mr. Shivji.

Respectfully submitted,

Dated: September 22, 2017

Law Offices of Nicholas D. Heimlich



Nick Heimlich

Attorney for Respondent

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 brief of Respondent is produced using 13 point Roman type font including footnotes and contains exactly 5,264 words, as calculated by the computer program which produced said brief, which Counsel relies upon to determine the word count in this brief.

Date: 09/22/2017

Nicholas D. Heimlich
Attorney for Respondent, 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.

That my business address is 5595 Winfield Blvd., Suite 110, San Jose, CA 95123. That on behalf of the Law Offices of Nicholas D. Heimlich, I served the foregoing document(s) described as: **OPENING BRIEF ON THE MERITS**, on September 22, 2017, on the following persons in this action, by placing a true and accurate copy thereof addressed as follows, in the ordinary course of business at Law Offices of Nicholas D. Heimlich, placed in that designated area is picked up that same day for delivery the following business day:

Via Electronic Filing and Mail Service:
California Court of Appeal
Sixth Appellate District
333 W. Santa Clara Street, Suite 1060
San Jose, CA 95113

Via Mail Service, Electronic Service and Email:
Omair Farooqui
Ellahie & Farooqui LLP
12 South First Street, Suite 600
San Jose, CA 95113

Via Mail Service and Court Filing:
Superior Court of California
Clerk, for Dept. 3, Judge Elfving
191 North First Street
San Jose, CA 95113

Via Electronic Submission and Original +8 copies via Courier:
Supreme Court of California
350 McAllister, Room 1295
San Francisco, CA 94102-4797

I declare that the above service was made at the direction of a member of the bar of this Court.

Executed on September 22, 2017, at San Jose, California.

Nick Heimlich