Case No. B211431

STATE OF CALIFORNIA

COURT OF APPEAL

SECOND APPELLATE DISTRICT, DIVISION SIX

ROGER BURLAGE and CHERYL BURLAGE,

Petitioners,

vs.

SUPERIOR COURT OF VENTURA COUNTY,

Respondent.

MARTHA MARTINEZ SPENCER,

Real Party in Interest.

Ventura County Superior Court, Case No. SC045480
Honorable William Liebmann, Judge

APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST MARTHA MARTINEZ SPENCER; PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF REAL PARTY IN INTEREST MARTHA MARTINEZ SPENCER

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Pursuant to California Rules of Court, rule 8.200(c)(1), the Association of Southern California Defense Counsel (ASCDC) respectfully requests leave to file an amicus brief supporting the position of real party in interest Martha Martinez Spencer.

ASCDC is the nation's largest and most preeminent regional organization of lawyers who specialize in defending civil actions,

comprised of approximately 1,400 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous appellate cases.

In addition to representation in appellate matters and comment on proposed Court Rules, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ASCDC members routinely represent clients in arbitration proceedings and have a direct interest in such proceedings remaining fair, with an opportunity for all parties to fully present their cases.

Counsel for ASCDC has reviewed the briefing in this matter and believes that ASCDC can provide an important broader perspective that goes beyond the facts of this particular case. No party has funded this amicus brief nor has any party drafted it. It is the work of counsel representing ASCDC.

For all of these reasons, ASCDC respectfully requests that it be granted leave to file the accompanying Amicus Brief of the Association of

Southern California Defense Counsel In Support Of Real Party In Interest Martha Martinez Spencer.

Dated: April 3, 2009

Respectfully submitted,

GREINES, MARTIN, STEIN & RICHLAND LLP
ROBERT A. OLSON

By: 

Robert A. Olson

Attorneys for Prospective Amicus Curiae Association of Southern California Defense Counsel

Case No. B211431

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Honorable William Liebmann, Judge

AMICUS CURIAE BRIEF OPPOSING PETITION FOR WRIT OF MANDATE

INTRODUCTION

Arbitration is intended to be a relatively fast and economical means of resolving disputes. It is not intended, however, to be an arbitrary process or one where only one side gets its say. ASCDC and the defense lawyers that it represents are in favor of full and fair arbitration proceedings. They believe that is what the Legislature has mandated. We recognize that arbitration is supposed to be final and sometimes even informal. Nonetheless arbitration presents great prospects for arbitrariness and abuse. The Legislature has recognized this and placed boundaries on arbitration to assure fairness.

The admittedly loose statutory constraints do draw a line, limiting arbitrators' ability to simply act by fiat without having heard both sides. Important among those constraints is Civil Code section 1286.2, subdivision (a)(5) directing that trial courts must vacate arbitration awards where "[t]he rights of the party were substantially prejudiced by the refusal of the arbitrators . . . to hear evidence *material* to the controversy." (Emphasis added.)

A statutory limitation that can never be, or is never, applied is one in name only. The Legislature must be presumed to have intended this limitation on otherwise often unfettered arbitrator power to have real meaning and real teeth. The true questions then are (1) what standard is the trial court to apply in considering a motion to vacate on this ground and (2) what is the *appellate* court standard in reviewing the trial court's decision.

As we discuss, the trial court's determination of materiality of evidence (and the coincident question of substantial prejudice) in the context of the particular controversy is a uniquely factual one, to be reviewed for substantial evidentiary support or similar deferential standard. Whether to vacate an award upon a finding of a substantially prejudicial

refusal to hear material evidence is a question of law – that statute affords no discretion; once a violation is found, the award *must* be vacated.

A. The Trial Court Must Properly Determine Whether The Arbitrator Has Failed To Hear "Evidence Material To The Controversy."

The statutory standard is that an award is to be vacated if the arbitrator fails to "*hear evidence material* to the controversy" to a party's substantial prejudice. (Civ. Code, § 1286.2, subd. (a).)[1] The standard is not some quasi-appellate review of arbitration evidentiary objections or rulings. The evidentiary standard at arbitration is a relaxed one. The rules of evidence do not provide the standard by which the trial court is to judge the arbitrator's actions. An arbitrator's pronouncements about relevance or admissibility, while they might be considered by the trial court, are not binding on the trial court in its determination whether *material* evidence was shut out to a party's substantial prejudice. The standard is whether the arbitrator refused to hear evidence material to the controversy and whether there was resulting substantial prejudice. Under the plain statutory language, the standard is materiality and prejudice; necessarily, that means the trial court's independent analysis of materiality and prejudice in the context of the particular controversy. (*Ibid.*)

That is particularly true as to evidence which a party identifies as the heart of its case. Comparably to an appellate court's consideration of a petition for a writ of mandate, an arbitrator's decision that has the effect of

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[1] The substantial prejudice requirement appears to mirror the materiality determination. If excluded evidence substantially prejudices a party's case, it would appear to be, by definition, material. On the other hand, if evidence is material, its exclusion would, by definition, appear to be prejudicial.

depriving a party of a claim or defense should be subject to close scrutiny by the trial court. (See *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 816 [writ relief appropriate where party denied substantial claim or defense]; *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 807 [same]; *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1273 [same].) The arbitrator should at least consider that evidence in reaching his or her conclusion and should not preclude a party from presenting his or her fundamental theory as to liability or damages.

Does that mean that an arbitrator has to hear any evidence that a party proffers? Of course not. Some proffered evidence may be too attenuated to the issues at hand to be material. (See *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011 [evidence of plaintiff's multiple marital affairs inadmissible in personal injury action against tire manufacture to show poor memory or motive to overload vehicle].) Other evidence may be cumulative or repetitive. But where the evidence *directly relates* to the issue in dispute and does so in a substantial way not already before the arbitrator, the arbitrator presumptively must at least hear it.

The presumption that the statute imposes is that the arbitrator will hear material evidence. Thus, an arbitrator's decision to exclude evidence, his or her refusal to hear particular evidence, necessarily must be reviewed more closely than the arbitrator's decision to hear evidence. (Cf. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980 [denials of relief from default scrutinized more strictly than grants]; *Bussard v. Department of Motor Vehicles* (2008) 164 Cal.App.4th 858, 863, fn. 1 [given policy in favor of full and fair hearings, denials of continuances are reviewed more stringently than grants].) That's how the statute is drafted. It favors a full airing of both sides of the case over a narrowly constrained one, especially a presentation that is narrowly constrained on one side but not the other.

What is material or substantially prejudicial depends on the particular controversy. As arbitrations are not necessarily constrained by the strict legal elements of a claim or defense, materiality (and prejudice) should depend on what a reasonable, unbiased referee would normally want to hear. It is a "reasonable arbitrator" standard. Here, the evidence at issue that the arbitrator refused to consider apparently tended to show that the plaintiff had been fully compensated for the loss or would not suffer harm by way of the alleged mistake. Is that something that an objectively reasonable neutral not constrained by formalistic legal rules would want to know? The answer would appear to be "yes."

B. This Court's Review Should Be Deferential As To The Materiality And Prejudice Decisions; Review Should Be De Novo As To The Effect Of The Materiality Determination.

The other fundamental question is what role the trial court is to play and what role this Court is to play in the determinations required by section 1286.2. One line of cases holds that this Court's review is de novo. (E.g., *SWAB Financial v. E*Trade Securities* (2007) 150 Cal.App.4th 1181, 1196; *Glassman v. McNab* (2003) 112 Cal.App.4th 1593, 1598.) Other cases hold that a substantial evidence or some similar deferential standard applies. (E.g., *Malek v. Blue Cross of California* (2004) 121 Cal.App.4th 44, 55-56; *Reed v. Mutual Service Corp.* (2003) 106 Cal.App.4th 1359, 1364-1365; *Fininen v. Barlow* (2006) 142 Cal.App.4th 185, 190-191 [deference to trial court fact finding; Second District, Division Six].)

We submit that both standards are appropriate and work together.

1. The trial court's materiality and prejudice decisions are factual ones to be reviewed for substantial evidence or otherwise deferentially.

A substantial evidence/deference standard should apply to most of the predicates for the section 1286.2 determination, e.g., was there corruption, fraud or undue means, did substantially prejudicial misconduct take place, was a party substantially prejudiced by a refusal to continue a hearing upon cause or by the arbitrators' failure to hear material evidence, did an arbitrator fail to make a required disclosure? These are factual determinations and like other factual determinations are placed primarily in the hands of the trial court. Trial court fact determinations are reviewed deferentially no matter in what context the factual record is presented. (See, e.g., *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711, fn. 3 [motion to recuse criminal prosecutor; "that the trial court's findings were based on declarations and other written evidence does not lessen the deference due those findings"]; *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 911-912 [determinations on written declarations as to enforcement of settlement under Code of Civil Procedure section 664.6 reviewed for substantial evidence]; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 & fn. 4 [deference to trial court factual findings applies even if based solely on documentary evidence; disapproving contrary authority]; *Fininen v. Barlow*, *supra*, 142 Cal.App.4th at pp. 189-190 [fact determination based on declarations in motion to vacate arbitration award]; *Guess?, Inc. v. Superior Court* (2000) 79 Cal.App.4th 553 [determination whether party waived right to arbitrate].)

The one possible exception might be a determination of whether the arbitrators exceeded their powers, one of the separately enumerated grounds for vacation. Where the arbitrators' powers are defined solely by contract

and there is no conflicting extrinsic evidence, what might otherwise be a fact question becomes an issue of law, reviewed de novo, just like any other contract interpretation issue. (E.g., *City of Hope Nat. Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865-866; *Wolf v. Walt Disney Pictures and Television* (2008) 162 Cal.App.4th 1107, 1125-1128.) Not surprisingly, the cases that tout a de novo standard of review almost uniformly involve challenges that the arbitrators exceeded their powers as defined in a contract, the interpretation of which did not involve conflicting extrinsic evidence.

But the issues pertinent here – materiality and substantial prejudice in the context of the case as a whole – are quintessentially *fact* determinations. As such, they are no different than other fact determinations assigned in the first instance to the trial court. The statute is clear – it requires vacation *if the court* (meaning the trial court) determines that any of the grounds for vacation exist. (See *Fininen v. Barlow*, *supra*, 142 Cal.App.4th at pp. 190-191 [statutory direction is clear; allowing exception in unusual circumstances amount to estoppel or waiver].) The determination depends not only on the particular witness and testimony, but on the circumstances of the case as a whole. For example, the arbitrator's refusal to hear a party's sole witness on a crucial issue may well be a deprivation of a substantial right to present one's case; the arbitrator's refusal to hear the same witness's testimony on the same subject may not be material or substantially prejudicial when the party has presented 11 other witnesses on the same subject. Both materiality and substantial prejudice, thus, require context, context of the case as a whole. They are undeniably at heart factual determinations.

The petitioner appears to contend that review of the trial court's determinations should be de novo because the arbitration record before the trial court might be imperfect. Imperfect arbitration records are more likely the norm rather than the exception. But if anything, that argues for more deference to the trial court's determination, not less. As discussed above, even where the record is wholly documentary, factual determinations are subject to deferential appellate review. Certainly, a trial court might determine that it does not have enough information about what happened at arbitration that it cannot find substantial prejudice or materiality. But an incomplete record should not preclude the opposite conclusion or trigger a different standard for reviewing the trial court's decision. What happened at arbitration is a factual determination. The trial court should be allowed all of the normal inferences from circumstantial evidence that it might make as to other factual determinations.

The bottom line is that the trial court's materiality and prejudice determinations are factual ones that deserve the same deferential review as any other trial court fact determination.

2. The *effect* of the trial court's substantially prejudicial exclusion of material evidence determination is a question of law reviewed de novo.

Once the trial court makes its factual determination regarding whether the enumerated grounds for vacation exist or not, the issue becomes one of law. Section 1286.2 does not afford discretion. If the trial court finds one of the six predicates to vacation, it *must* vacate the award. It has no discretion. Section 1286.2 is mandatory: "the court *shall* vacate the award if the court determines" any of the six factors. (Emphasis added.)

"On its face, [section 1286.2] leaves no room for discretion. If a statutory ground for vacating the award exists, the trial court must vacate the award." (*Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 957, citations omitted; accord *Ovitz v. Schulman* (2005) 133 Cal.App.4th 830, 845; see *Fininen v. Barlow*, *supra*, 142 Cal.App.4th at pp. 190-191 [accepting general statutory mandate but implying exception in unusual circumstances amounting to estoppel or waiver].) Thus, in this sense, review is de novo of the *consequences* of the trial court's findings as to the six statutory vacation grounds. But, as discussed, the determination of those grounds, in most instances, is a matter left in the trial court's fact-finding function.

Here, the trial court found, as a factual matter, that a party was denied an opportunity to present a *material* part of its case – that the plaintiff had suffered no loss and had been fully compensated – and was substantially prejudiced thereby. If the predicate finding is supportable on a substantial evidence or other deferential, fact-based standard, then the effect of that finding is legally mandated and not a matter of this court's or the trial court's discretion. The effect of such a standard is clear – vacation of the award and a re-arbitration of the dispute.

CONCLUSION

Arbitration is not supposed to be a random process. It should not be the modern-day equivalent of trial by chance, trial by combat, or trial by dunking. There are minimal guarantees of fairness. Arbitrators do not have unfettered discretion to reach whatever result they want without listening to both sides. One of those safety valve guarantees is that a party should not be arbitrarily barred from presenting a substantial claim or defense. The statutory standard recognizes this. The determination of whether that has happened is a matter uniquely within the ken and judgment of the trial

court. It is much like an appellate court's determination on a writ of mandate petition that a party has been by demurrer or summary judgment or other means deprived of a substantial claim or defense. When a trial court has found that a party to an arbitration has been denied the opportunity to present to the arbitrator a material claim or defense, the remedy is statutorily mandated: vacating the award.

Defense counsel is not suggesting that every perceived evidentiary misstep or slight in arbitration should be subject to judicial review. Certainly, an arbitrator has the right to say "enough" and to exclude the repetitive and the tangential. But the refusal of an arbitrator to listen to one side's case should be viewed with more doubt than other decisions. In those circumstances a trial court can, but not necessarily must, conclude that a party was denied the opportunity to present a *material* element of its case and thereby substantially prejudiced and denied a fair proceeding. Where a party was arguably denied an opportunity to present an important part of its case, that should be enough to allow the trial court to order a do-over.

Dated: April 3, 2009

Respectfully submitted,

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1) & (4), I certify that this **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST MARTHA MARTINEZ SPENCER; PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF REAL PARTY IN INTEREST MARTHA MARTINEZ SPENCER,** contains **2,926** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Dated: April 3, 2009

Robert A. Olson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On April 3, 2009, I served the foregoing document described as **APPLICATION OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST MARTHA MARTINEZ SPENCER; PROPOSED AMICUS CURIAE BRIEF ON BEHALF OF THE ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL IN SUPPORT OF REAL PARTY IN INTEREST MARTHA MARTINEZ SPENCER** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I caused such envelope to be deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with this office's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on April 3, 2009, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

BURLAGE, et al.
v.
SUPERIOR COURT OF VENTURA COUNTY
[Case No. B211431]

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