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IN THE SUPREME COURT OF CALIFORNIA

ROGER BURLAGE et al.,
Petitioners,

v.

VENTURA COUNTY SUPERIOR COURT,
Respondent;

MARTHA MARTINEZ SPENCER,
Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION SIX
CASE NO. B211431

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION: WHY REVIEW SHOULD BE DENIED

Far from being the outlier that petitioners portray, the Court of Appeal's decision does no more than enforce the plain language of Code of Civil Procedure section 1286.2, subdivision (a)(5) (section 1286.2(a)(5)), a statutory provision that for over 150 years has ensured that arbitrators do not refuse to hear material evidence in situations where substantial prejudice would result to one side. Section 1286.2(a)(5) provides the balance that legitimizes the general principle that arbitration decisions will not be reviewed for

legal error where no specific statutory basis for vacating the resulting award is implicated.

Petitioners (the Burlages) nonetheless seek review, contending that the Court of Appeal's decision is in conflict with *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*). There is no such conflict. In *Moncharsh* this court affirmed a trial court's obligation to vacate an arbitration award when one of the procedural protections set forth in section 1286.2 has been violated. The trial court here did just that, and the Court of Appeal's affirmance is entirely faithful to *Moncharsh*.

The Burlages predict that the Court of Appeal's opinion signals doom for the efficiency and predictability of arbitration as an alternative means of dispute resolution. But the Federal Arbitration Act (FAA) contains an almost identical statutory protection that has been interpreted the way the Court of Appeal here interpreted our state's counterpart, and yet only a handful of federal decisions have vacated arbitration awards based on that provision. None of those few decisions has weakened the efficacy of federal arbitrations.

Should trial courts in the future misperceive the Court of Appeal's decision as granting broad license to overturn arbitration awards—which is highly doubtful, given the court's careful delineation of its reasoning as applied to the unusual fact situation presented here—review can be granted in a later case to clarify the boundaries of the statute's application. But until there is some indication that the sky is really going to fall, as the Burlages suggest, review is premature. Certainly this case, in which the

statutory requirements are so clearly met, is not the proper vehicle for attempting to draw lines that will apply in close cases.

STATEMENT OF THE CASE[1]

A. After buying Spencer's house, the Burlages discover that its pool area encroaches on adjacent land.

The Burlages purchased a house from Spencer located next to a country club. (Typed opn., 2.) After escrow closed, it was discovered that the pool and pool fence encroached on property owned by the country club. (*Ibid.*) The encroachment was on unusable hillside property abutting the country club's golf course—land that the country club neither maintained nor planned to use in the future. (Exh. 6, p. 337, ¶ 5 [Davis declaration, excluded by arbitrator].)

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[1] We agree with the facts stated in the Court of Appeal's opinion, which we summarize here for the court's convenience, supplemented with a few additional details. All citations to the Court of Appeal's opinion are to its final decision issued after rehearing. All exhibit cites are to the writ petition exhibits submitted to the Court of Appeal by the Burlages.

B. Although the title insurer pays to adjust the lot line to remedy the encroachment, the Burlages press claims against Spencer.

The country club never asked the Burlages to relocate any portion of their swimming pool or pool fence, but instead told them it would cooperate to resolve the problem. (Exh. 6, p. 338, ¶ 11 [Davis declaration, excluded by arbitrator].) Thereafter, the title insurer that issued a policy in connection with the house sale purchased the affected property from the country club for $10,950 in exchange for a lot-line adjustment that gave the Burlages clear title to the encroached-upon land.[2] (Typed opn., 3.)

Despite this resolution of the encroachment issue, the Burlages decided to pursue a claim against Spencer for the alleged diminution in value of their property resulting from the encroachment, and for the allegedly anticipated (but obviously unnecessary) cost of moving the pool and fence that were on the encroached-upon land they now owned. (Typed opn., 3.)

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[2] The Burlages now contend they paid nominal sums to the title company and the country club in connection with the lot-line adjustment, but they cite no evidence or finding by the arbitrator to that effect. (See Petition for Review (PFR) 5.)

C. The arbitrator rules that in measuring damages he will not hear any evidence regarding the lot-line adjustment.

The Burlages' claims were arbitrated before a retired judge associated with Judicial Arbitration and Mediation Services, Inc. (JAMS), and under the JAMS arbitration rules.[3] (Typed opn., 3; see exh. 6, pp. 238-248.)

During the arbitration, the Burlages moved in limine to exclude evidence of the lot-line adjustment to prevent Spencer from showing the Burlages were not damaged by the encroachment. (Typed opn., 3.) Spencer explained to the arbitrator that this evidence was at the heart of her defense and should be considered in measuring damages. (Exh. 9, p. 517:7-22 ["the fact of resulting damage . . . is an element of fraud" and "they have no damage because Mrs. Spencer did provide a policy that covered them . . . . The fact of the lack of damages has to come in"]; see typed opn., 3.) Nonetheless, without offering any legal reasoning or other explanation, the arbitrator ruled "that the motion in limine is granted." (Exh. 9, p. 518:18-19; see also exh. 14, p. 580:9-11.)

The arbitrator refused Spencer's later request to reconsider his refusal to hear her evidence regarding the lot-line adjustment.

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[3] The Burlages assert that under the JAMS rules, "the arbitrator will consider evidence 'that he or she finds relevant and material to the dispute.'" (PFR 14.) As the Court of Appeal noted, the JAMS rules also provide that the arbitrator "*must afford* all parties 'the opportunity to present material and relevant evidence.'" (Typed opn., 6; see also Answer to Petition for Rehearing (APFRH) 18-19.)

(Exh. 14, p. 688:8-9; see exh. 14, pp. 638-656 [Spencer's motion], 658-670 [Burlages' opposition], 672-678 [Spencer's reply], 680-684 [Burlages' surreply].) Again, the arbitrator provided no explanation regarding his reasons for refusing to hear the evidence, other than to say "the prevailing law does not support the Respondent's Motion."[4] (Exh. 14, p. 688:8-9.)

As a consequence of these rulings, the arbitrator refused to hear any evidence regarding the financial effect that the lot-line adjustment had on the Burlages' damages. (See typed opn., 3.)

D. The arbitrator issues a $1.5 million award to the Burlages that includes damages for a nonexistent encroachment.

The arbitrator ultimately awarded $1.5 million to the Burlages consisting of compensatory and punitive damages, plus attorney fees and costs. (See exh. 1, pp. 38:26-28, 41:5-11.) The $552,750 compensatory damages award included somewhere in the range of $100,000 to $160,000 to move the pool, spa and fence (see exh. 1, p. 30:22-23), even though the excluded evidence would have conclusively established that the Burlages would never have to do so.

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[4] Contrary to the Burlages' representation (PFR 6), this cursory explanation was given by the arbitrator only as a basis for denying reconsideration of his earlier ruling on the motion in limine, and not in connection with the original in limine ruling.

The arbitrator further awarded the Burlages up to $112,650 as the alleged value of the land the Burlages believed they had acquired with their home (see exh. 1, p. 30:26-28), even though the land had already been purchased by the title insurer on their behalf, and even though its total actual market value was $10,950—as established by its actual purchase from the country club.

Consequently, and as a result of the arbitrator's refusal to hear evidence regarding the lot-line adjustment with respect to damages, the Burlages received a windfall compensatory damages award and correspondingly inflated punitive damages and attorney fees.

E. The trial court grants Spencer's petition to vacate the arbitration award under section 1286.2(a)(5) based on the arbitrator's refusal to hear material evidence and resulting substantial prejudice.

In response to the Burlages' petition to confirm the arbitration award, Spencer moved to vacate the award under section 1286.2(a)(5), which requires an arbitration award to be vacated when a party's rights are "substantially prejudiced" by the arbitrator's refusal to hear "evidence material to the controversy." (Typed opn., 3.) The trial court granted Spencer's motion, ruling that the arbitrator's refusal to admit evidence of the lot-line adjustment had substantially prejudiced Spencer's "'ability to dispute the amount of damage suffered by'" the Burlages. (Typed opn., 3.)

F. The Court of Appeal affirms the order vacating the arbitration award.

The Burlages filed a writ petition challenging the trial court's order. The Court of Appeal agreed to hear the challenge but, after reviewing the record and the parties' briefs, and hearing oral argument, the Court of Appeal concluded that the trial court had not erred in vacating the arbitration award. (Typed opn., 3-7.)

In its majority decision, the Court of Appeal fully acknowledged this court's prior decisions holding that, *in the absence of any statutory ground for vacating an arbitration award,* legal error alone is not a basis for vacating an arbitration award, even when the error "is apparent on the face of the award and causes substantial injustice." (Typed opn., 4.) The Court of Appeal held, however, that this case falls under section 1286.2(a)(5)—one of the enumerated statutory grounds authorizing trial courts to vacate arbitration awards—which provides "that a court 'shall' vacate an award when a party's rights 'were substantially prejudiced . . . by the refusal of the arbitrator[] to hear evidence material to the controversy . . . .'" (Typed opn., 5.)

The Court of Appeal determined that all the statutory elements of section 1286.2(a)(5) were met.

First, the arbitrator refused to hear "evidence that the title company solved the problem [of the lot-line encroachment] through a modest payment to the country club." (Typed opn., 5.)

Second, such excluded evidence was material because "the Burlages presented expert testimony about the effect of what had

become a nonexistent encroachment," yet "Spencer was not even permitted to refute the Burlages' expert who opined that the encroachment reduced the value of the property [by] $100,000" with evidence "that the title company solved the encroachment issue through a payment of approximately one-tenth that amount." (Typed opn., 5.)

Third, there was substantial evidence supporting the trial court's determination that the refusal to hear Spencer's evidence was prejudicial because, "[w]ithout this crucial evidence, the arbitration assumed the nature of a default hearing in which the Burlages were awarded $1.5 million in compensatory and punitive damages they may not have suffered." (Typed opn., 6.) Thus, the trial court "found *on substantial evidence* that '[t]he Arbitrator's refusal to admit these subsequent circumstances directly affected the issue of damages, thereby substantially prejudicing Defendant's [Spencer's] ability to dispute the amount of damage suffered by Plaintiffs [the Burlages].'" (Typed opn., 7, emphasis added.)

The Court of Appeal was careful to note that "not every evidentiary ruling by an arbitrator 'can or should be reviewed by a court.'" (Typed opn., 6) Nonetheless, "'[t]hat's not the same thing as saying no evidentiary ruling can or should be reviewed by a court.'" (*Ibid.*) Under the circumstances here, if the arbitrator's refusal to hear evidence did not justify an order vacating the resulting award, "'[i]t would have the effect of . . . deleting subsection 5 from the statute [section 1286.2, subdivision (a)(5)].'" (*Ibid.*) In that event, "arbitration itself would be suspect." (*Ibid.*)

The dissenting opinion based its analysis on the assumption that when an arbitrator couches his or her refusal to hear evidence as an evidentiary ruling, the refusal is immunized from judicial review under section 1286.2(a)(5). Although the arbitrator here did not identify relevance as his basis for refusing to hear the lot-line adjustment evidence, the dissent inferred that was the arbitrator's rationale, and from that premise concluded that the arbitrator had drawn a "legal conclusion" that "is not subject to judicial review," regardless whether the evidentiary ruling caused substantial prejudice resulting from the arbitrator's refusal to hear material evidence. (Typed opn., 3 (dis. opn. of Perren, J.).) And, even though the *Moncharsh* decision emphasized that section 1286.2 provides enumerated *exceptions* to the general rule against judicial review of arbitration awards, the dissent asserted that "affirming the order of the trial court cuts the heart out of *Moncharsh*." (Typed opn., 4 (dis. opn. of Perren, J.).)

LEGAL DISCUSSION

I. REVIEW IS NOT NECESSARY TO RESOLVE ANY CONFLICT IN THE LAW.

A. The Court of Appeal's decision is not in conflict with this court's decision in *Moncharsh*.

The Burlages contend that the Court of Appeal's decision conflicts with *Moncharsh*, *supra*, 3 Cal.4th 1, "and with the many

more cases that have followed *Moncharsh*." (PFR 2.) But the Burlages' assertion of a conflict is based on the false assumption that this court has previously held that the few statutory provisions specifically authorizing judicial review are inapplicable if the review would reveal that legal error has occurred. Specifically, even though section 1286.2(a)(5) provides without qualification that an arbitration award *must* be vacated where the exclusion of material evidence has substantially prejudiced a party, the Burlages contend that *Moncharsh* narrowed section 1286.2(a)(5) so that it applies *only* when one can be sure the refusal to hear evidence was based on something other than a legal ruling. That is the equivalent of arguing that an arbitration award cannot be vacated based on "corruption in any of the arbitrators"—another ground listed in section 1286.2—if one of the arbitrator's erroneous legal rulings is linked with the corruption.

Moncharsh does not stand for any such extreme proposition and, consequently, the Court of Appeal's majority opinion is not in conflict with *Moncharsh*. We explain.

In *Moncharsh*, this court addressed the viability of a *court-made* rule that effectively supplemented the statutory grounds for judicial review of an arbitration award, permitting review based on legal error if the error appeared on the face of arbitration award. This court rejected that rule, which was not tethered to any of the statutory grounds enumerated in section 1286.2 for vacating an arbitration award. But this court then went out of its way to *affirm* that judicial review of arbitration awards remains available based on the grounds set forth in section 1286.2. The *Moncharsh* decision

emphasized that while "an arbitrator's decision is not *generally* reviewable for errors of fact or law," section 1286.2 provides exceptions to this general rule. (*Moncharsh, supra,* 3 Cal.4th at p. 6, emphasis added.)

This court explained further that the risk of erroneous arbitration decisions can be tolerated only *because* the Legislature has reduced the risk of error "by providing for judicial review in circumstances involving serious problems with the award itself, or with the fairness of the arbitration process." (*Moncharsh, supra,* 3 Cal.4th at p. 12.) Giving full effect to section 1286.2 is critical in advancing that goal. (See *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1356 (*Cable Connection*) [arbitration awards may "be corrected or vacated by the court" under section 1286.2]; *id.* at p. 1371 (conc. & dis. opn. of Moreno, J.) [section 1286.2 protects against "arbitrary action by the arbitrator that deprives a party of basic procedural fairness, such as the . . . denial of the right to put on material evidence"].)[5]

Contrary to the Burlages' assertion, then, *Moncharsh* does not stand for the proposition that every legal error in an arbitration award is effectively immune from any judicial review. Rather, while legal error on the face of an arbitration award *alone* cannot provide

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[5] The Burlages argue that "[a]rbitration is supposed to be efficient, economical, and predictable." (PFR 14.) Setting aside the question whether an arbitration can be "predictable" when one side's most material evidence is arbitrarily excluded, the Burlages omit "fair" as an attribute of arbitration. As reflected by this court's analysis in *Moncharsh*, the important benefits of efficiency, economy, and predictability can never be achieved in arbitration unless a fair process—and the perception of a fair process—is provided.

a basis for vacating an award, an award *must* be vacated when the elements of one of section 1286.2's enumerated provisions are met, as here—regardless whether the reason involves legal error by the arbitrator. Thus, the majority decision properly rejected the dissent's assumption that an arbitrator can insulate an arbitration award from the reach of section 1286.2(a)(5)'s protection merely by characterizing a categorical and prejudicial refusal to hear material evidence as an evidentiary ruling. (Notably, the arbitrator here did not actually attempt to cast his rejection of Spencer's evidence as the result of a legal analysis concerning relevance. Rather, plaintiffs have urged that such an intent by the arbitrator be *inferred,* and that the resulting *implicit* legal ruling insulates the award from review under section 1286.2.)

Were there any conflict between the plain language of section 1286.2(a)(5) and *Moncharsh's* general principle of limited judicial review, on which the Burlages rely, the statute and the Legislature's intent must prevail. The plain language of the statute does not allow trial courts to sidestep the statute by analyzing the arbitrator's reasons—legal or otherwise—for refusing to hear relevant evidence, but *mandates* that an arbitration award be vacated when "[t]he rights of the party were substantially prejudiced by . . . the refusal of the arbitrator[ ] to hear evidence material to the controversy." (Code Civ. Proc., § 1286.2, subd. (a)(5).)

The Court of Appeal's decision thus does not represent any deviation from this court's decision in *Moncharsh.* Far from it, the decision correctly applies the clear language of section 1286.2 in

accordance with its plain meaning to the rather extreme circumstances presented here, as this court has emphasized courts must do in order to ensure procedural fairness in arbitrations. (See PFR 13 ["Section 1286.2(a)(5) addresses procedural fairness, not substantive outcome. . . . The statute requires fair opportunity"].) It is only in light of procedural protections such as section 1286.2(a)(5) that "the residual risk to the parties of an arbitrator's erroneous decision represents an acceptable cost—obtaining the expedience and financial savings that the arbitration process provides—as compared to the judicial process." (*Moncharsh, supra,* 3 Cal.4th at p. 13.)

B. The Court of Appeal's decision is not in conflict with the *Hall* decision.

Nor is there any conflict between the Court of Appeal's decision and the decision in *Hall v. Superior Court* (1993) 18 Cal.App.4th 427 (*Hall*), as the Burlages contend. (PFR 2, 12.) To the contrary, the Court of Appeal's decision expressly *endorses* the holding in *Hall* that section 1286.2(a)(5) should function as "'a safety valve in private arbitration that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case.'" (Typed opn., 5.)

The fact that in *Hall* the requirements of section 1286.2(a)(5) were not met on the facts before the court does not create any conflict with the Court of Appeal's decision here. *Hall* involved a situation in which the arbitrator actually *heard* the party's offer of

proof, and announced that his decision would be the same even with the proffered evidence. By contrast, the arbitrator in the present case did not hear Spencer's evidence.[6] Nor did the arbitrator indicate that his decision would be the same even with the proffered evidence. The arbitrator's repeated refusal to hear the evidence and the Burlages' vociferous opposition to every attempt by Spencer to introduce it compels the conclusion that the evidence *would* have affected the arbitrator's decision if he had heard and considered it.

Thus, the difference in outcomes between *Hall* and this case comes down to the somewhat pedestrian fact that, in *Hall*, there was no basis for concluding the excluded evidence would have made a difference because the arbitrator expressly stated it would not have changed his mind. But "[u]nlike *Hall*, the trial court here found on substantial evidence that '[t]he Arbitrator's refusal to admit these subsequent circumstances *directly affected* the issue of damages, thereby substantially prejudicing Defendant's [Spencer's] ability to dispute the amount of damage suffered by Plaintiffs [the Burlages]." (Typed opn., 7, emphasis added.)

In sum, whether there was substantial evidence in the record supporting an order vacating an arbitration award here but not in *Hall* is not a conflict in the law requiring resolution by this court.

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[6] As the Court of Appeal observed, the arbitrator did not consider the lot-line adjustment evidence in connection with the in limine motion because "'[o]ne cannot "consider" what one has refused to "hear." Legally speaking the admission of evidence is to hear it, and the weighing of it is to give it consideration.'" (Typed opn., 6.)

II. REVIEW IS NOT NECESSARY TO AVOID UNPREDICTABILITY IN ARBITRATIONS, SINCE THE COURT OF APPEAL'S DECISION MERELY ENCOURAGES ENFORCEMENT OF THE EXISTING STATUTORY SCHEME REQUIRING A FAIR ARBITRATION PROCESS.

The Burlages' petition for review is based on another suspect premise—that the decision will unleash the hounds of judicial review, leading to "expense and unpredictability throughout the legal system." (PFR 14, capitalization and boldface omitted.) Not so, for several reasons.

First, whether the Burlages' prediction will ever prove true is purely speculative. The circumstances under which the required elements of section 1286.2(a)(5) can be met will likely be rare. The reason why is reflected by the majority opinion's comment that its holding does *not* "make[] suspect every arbitration ruling excluding evidence." (Typed opn., 6.) For section 1286.2(a)(5) to apply, there must not only be a refusal by an arbitrator to hear evidence, but the trial court must find the evidence was *material* and the refusal to hear it was *substantially prejudicial*. Those criteria will rarely be met. Indeed, the fact that section 1286.2(a)(5) has been on the books for over 150 years, and this case is only the third published decision regarding its application, shows how infrequently the statutory requirements can be established.

Second, the Court of Appeal decision in this case fosters, rather than impairs, predictability in the legal system. Litigants

need assurance that the process they have contracted for will be, at a most fundamental level, fair—that they will have an opportunity to present their case before a decision is made. That did not occur in this case, which thus falls squarely within the statutory "safety valve" that allows a small but important release from the otherwise applicable prohibition against judicial review. Even the dissent concedes that the arbitrator "unquestionably precluded the admission of evidence of mitigation of damage." (Typed opn., 1 [dis. opn. of Perren, J.].) On the extreme facts here, reversing the trial court's order would signal that section 1286.2(a)(5) allows no judicial review in *any* case.

The Burlages counter with a most unrealistic hypothetical, arguing that the statute would apply when an arbitrator announces a refusal to hear evidence based on "a witness's race or religion or an arbitrary time limitation on the proceedings." (PFR 20.) But the chances of an arbitrator voicing such a rationale are remote to say the least, and no language narrowing the statutory terms to such an unlikely scenario is found anywhere in the statute itself, or in any case law. It just makes no sense that the Legislature would enact a rule that would virtually never apply. Furthermore, where an arbitrator has indicated actual bias against a party based on his or her race or religion, a *different* provision—section 1286.2(a)(6)—would require that the resulting award be vacated. It would make no sense for the legislature to enact a statutory provision that applies only to a situation already remedied by a different provision in the same statute.

Third, in prematurely predicting the end of arbitration as we know it, the Burlages overlook that the FAA contains a provision that is nearly identical to the state statute at issue here. (See 9 U.S.C.A. § 10(a)(3) [a court may vacate an arbitration award "where the arbitrators were guilty of misconduct in . . . refusing to hear evidence pertinent and material to the controversy"].) And, in extreme situations like those in the present case, that provision has occasionally required the vacatur of an arbitration award. (See Return to Petition for Writ of Mandate or Other Appropriate Writ 36-39, 52, fn. 18.) Despite the FAA's *nationwide* application, there are only a handful of such decisions. Clearly, if the federal courts' experience under the FAA is any indication, there is no reason to believe that the Court of Appeal's decision will lead to any deprivation "of the efficiency, economy and finality of arbitration by expanding the scope of judicial review." (PFR 18.)

Fourth, far from creating "'great mischief'" (PFR 18), the Court of Appeal's decision is likely merely to encourage fair arbitrations in which material evidence is not arbitrarily excluded.[7] By virtue of section 1286.2(a)(5), the Legislature has determined

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[7] Since section 1286.2(a)(5) applies only to *material* evidence whose exclusion results in substantial prejudice, the Court of Appeal's decision does not require arbitrators to hear duplicative, redundant, or irrelevant evidence. It therefore does not "eliminate[] economy by exposing parties and arbitrators to significantly longer arbitration hearings." (PFR 15.) And the Burlages' lament that "they would have conducted the arbitration differently" (PFR 19) if they knew section 1286.2(a)(5) would actually be enforced merely means that they would not have tried to mislead the arbitrator into excluding plainly relevant evidence—a result that should be encouraged, not deterred.

that arbitrators should err on the side of admitting material evidence. Indeed, had the arbitrator here admitted Spencer's evidence and then reached the same result, presumably due to a failure to appreciate the legal significance of the evidence establishing the overreaching nature of the Burlages' damages claim, there would have been no judicial review because section 1286.2(a)(5) would have had no application. The likelihood, however, is that if the arbitrator had agreed to hear all of Spencer's evidence, he would have understood the case better, and awarded little or nothing to the Burlages. The Legislature's assumption that fairer results will be achieved if arbitrators hear all material evidence is a policy decision that affords a nice balance against the Legislature's further policy decision that, if statutory procedures are followed, an arbitration award will be final notwithstanding a certain amount of error in the arbitrator's reasoning.

To bolster their speculation about the possible future effect of the Court of Appeal's decision, the Burlages cite purported criticisms in blogs and the legal press. (See PFR 18-19, fn. 12.) But the cited commentary does not actually reflect broad criticism at all (see APFRH 8-9 [fisking the Burlages' commentary citations]; see also Raucher & Bartek, *Vacating Arbitration Awards, Now Less Daunting of a Task?*, L.A. Daily J. (Dec. 9, 2009) p. 7 ["*Burlage* enunciates a rule that courts should not just disregard exclusion of material evidence by an arbitrator, even though that exclusion is arguably based on a legal determination. This result is more in keeping with the statutory language of 1286.2, which does not contain an exception allowing an arbitrator to refuse to hear

material evidence, even when done under the guise of a legal determination"].)

At any rate, concerns by critics of the Court of Appeal's decision are based on the shibboleth that, since *Moncharsh*, arbitration awards have been simply unreviewable. But as discussed above, this court explained in *Moncharsh* and again in *Cable Connection* that the principal of limited judicial review can exist *only* because a fundamentally fair arbitration is guaranteed by section 1286.2, including subdivision (a)(5). If the resistance to judicial review of arbitration awards is so unyielding as to defeat the protection provided by section 1286.2(a)(5) under the circumstances presented here, the protection would as a practical matter apply in no case ever, and section 1286.2(a)(5) would be rendered a dead letter.

III. NONE OF THE BURLAGES' SUBSIDIARY QUESTIONS WARRANT REVIEW.

The Burlages' petition for review raises three subissues. None warrant review.

First, the Burlages argue that review should be granted to determine whether a Court of Appeal must first decide that the arbitrator's purported reason for exclusion of evidence (irrelevance) was legally incorrect before vacating the arbitration award based on a refusal to hear material evidence. (PFR 4, 16.) That issue is not presented. In finding that the arbitrator improperly refused to consider "material" evidence, the Court of Appeal *did* necessarily

find that the arbitrator had no valid legal basis for considering the evidence to be *immaterial.* Given that the evidence indisputably would have showed the Burlages suffered no actual harm from the failure to disclose the lot-line encroachment, the Court of Appeal's decision asks rhetorically, "What could be more material than evidence that the problem was 'fixed' and there are no damages?"[8] (Typed opn., 5.)

Second, the Burlages argue that review is necessary to determine whether a trial court must review the transcript of an arbitration in its entirety before determining that the excluded evidence was material or that the refusal to hear it was prejudicial. (PFR 4, 16-17.) Again, the issue is not properly presented because the Burlages waived the issue by not lodging the arbitration transcript with the trial court when they had an opportunity to do so. (See APFRH 19-21.)

Regardless, any requirement requiring submission of a transcript of the entire arbitration would limit the application of section 1286.2(a)(5) to arbitrations that are reported, and there is no such limitation in the statute. Imperfect arbitration records are more likely to be the norm rather than the exception. The trial court properly determined that it had enough information from the

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[8] The court's implied answer was correct because the Burlages never presented any conceivable valid legal basis for the arbitrator to have concluded the evidence was irrelevant or otherwise immaterial. In fact, the legal arguments made by the Burlages to the arbitrator about why he should find the evidence to be immaterial were legally frivolous. There is no basis on which the Court of Appeal could have held that the arbitrator *correctly* excluded the evidence in question.

documents, declarations, and record excerpts submitted by the parties to establish what happened at the arbitration, which provided the trial court with a sufficient basis to make a factual finding (subject to deference on appeal) about whether substantial prejudice had occurred from the arbitrator's refusal to hear material evidence.

Third, the Burlages contend that review is necessary to determine whether, under section 1286.2(a)(5), a trial court must attempt to discern what portions of the arbitration award were prejudicially affected by a refusal to hear material evidence, and reverse only those aspects of the resulting award.[9] (PFR 4.) This issue is likewise not properly presented because it was not asserted in the Court of Appeal until the Burlages' petition for rehearing. (See *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 276 ["It is much too late to raise an issue for the first time in a petition for rehearing"]; *Exarhos v. Exarhos* (2008) 159 Cal.App.4th 898, 907 [argument "forefeited" that was not raised "at any time prior to filing his petition for rehearing"]). Even in the Burlages' petition for review, the issue is barely explained. (See PFR 16.)

Moreover, the question is not whether *every* element of damages awarded by the arbitrator in his lump sum award was

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[9] The Burlages' contention that the arbitrator's refusal to hear evidence "affects at most 20% of the compensatory damages" is mistaken. (PFR 16.) As explained in our answer to the Burlages' petition for rehearing in the Court of Appeal, which included the same assertion, the refusal to hear evidence affected more than half of the compensatory damages, not "at most 20%" as they assert. (APFRH 16, fn. 8.)

affected by his refusal to hear material evidence, but whether that refusal caused substantial prejudice to Spencer. The trial court correctly found that it did because the elements of section 1286.2(a)(5)—a refusal to hear material evidence, resulting in substantial prejudice—were plainly met. Regardless whether *some* damages were supported by the evidence, the arbitrator did not provide the fair process guaranteed by section 1286.2(a)(5), which mandated that the resulting arbitration award be vacated in its entirety.[10]

CONCLUSION

A leading English criminal decision established that social satisfaction with the rule of law is a fundamentally important aspect of justice: "justice should not only be done but should manifestly and undoubtedly be *seen* to be done." (*Rex v. Sussex Justices, ex parte McCarthy* (1924) 1 KB 256, 259, emphasis added.) A decision by this court holding that the protections of section 1286.2(a)(5) do not apply even under the extreme circumstances here—in which the arbitrator refused to hear evidence establishing that the Burlages suffered no actual injury, and then awarded them

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[10] At any rate, because the arbitrator did not break down the compensatory damage award into components, there was no practical way for the Court of Appeal to determine what portion of the award was affected by the refusal to hear evidence, or how the punitive damages award would have been affected if the arbitrator had heard evidence that the Burlages suffered no actual harm from the alleged failure to disclose the lot-line encroachment.

$1.5 million in damages—would not only undermine public confidence in the fairness of the arbitration process, but would also chill the use of arbitration as an efficient and fair alternative for resolving disputes between California citizens. In the extremely unlikely event that any of the Burlages' dire predictions about the effect of the Court of Appeal's decision should ever prove to be accurate, a case in which a fair arbitration process has not been *patently* denied would be the better vehicle for exploring the scope of section 1286.2(a)(5).

December 18, 2009

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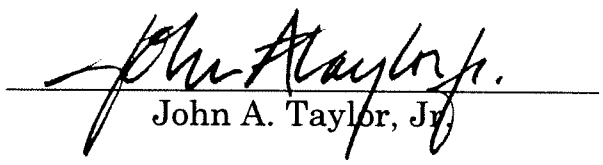
By: 
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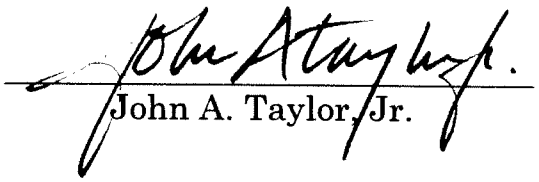
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 5,580 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: December 18, 2009



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

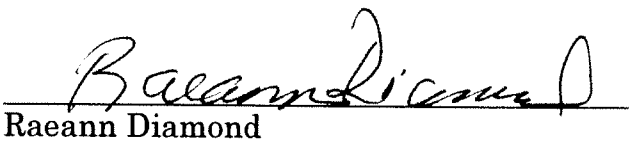
On December 18, 2009, I served true copies of the following document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on December 18, 2009, at Encino, California.



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