

JULY 2014

ESSAY QUESTIONS 1, 2 AND 3



California Bar Examination

Answer all 3 questions

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

Percy and Daria entered into a valid written contract for Percy to design and install landscaping for an exclusive housing development that Daria owned. Percy agreed to perform the work for \$15,000, payable upon completion. Percy estimated that he would work approximately 100 hours a month on the project and would complete the project in three months. His usual hourly fee was \$100, but he agreed to reduce his fee because Daria agreed to let him photograph the entire landscaping project for an article he planned to propose to *Beautiful Yards and Gardens* magazine. He anticipated that publicity from the article would more than compensate him for his reduced fee.

Percy completed two months' work on the project when Daria unjustifiably repudiated the contract. He secured a different project with Stuart in the third month, which paid him \$1,500 and took 15 hours to complete. He could have completed Daria's project at the same time.

At the time Daria unjustifiably repudiated the contract, Percy was negotiating with Tammy to landscape her property for \$30,000. Once Tammy learned what had happened, she stopped negotiation.

Percy has sued Daria. Ideally, he would like to finish the project with her.

What remedy or remedies may Percy reasonably seek and what is the likely outcome? Discuss.

Question 2

Pete was a passenger on ABC Airlines (ABC), and was severely injured when the plane in which he was flying crashed because of a fuel line blockage.

Pete sued ABC in federal court, claiming that its negligent maintenance of the plane was the cause of the crash.

At trial, Pete's counsel called Wayne, a delivery person, who testified that he was in the hangar when the plane was being prepared for flight, and heard Mac, an ABC mechanic, say to Sal, an ABC supervisor: "Hey, the fuel feed reads low, Boss, and I just cleared some gunk from the line. Shouldn't we do a complete systems check of the fuel line and fuel valves?" Wayne further testified that Sal replied: "Don't worry, a little stuff is normal for this fuel and doesn't cause any problems."

On cross-examination, ABC's counsel asked Wayne: "Isn't it true that when you applied for a job you claimed that you had graduated from college when, in fact, you never went to college?" Wayne answered, "Yes."

ABC then called Chuck, its custodian of records, who identified a portion of the plane's maintenance record detailing the relevant preflight inspection. Chuck testified that all of ABC's maintenance records are stored in his office. After asking Chuck about the function of the maintenance records and their method of preparation, ABC offered into evidence the following excerpt: "Preflight completed; all okay. Fuel line strained and all valves cleaned and verified by Mac." Chuck properly authenticated Sal's signature next to the entry.

Assuming all appropriate objections and motions were timely made, did the court properly:

1. Admit Wayne's testimony about Mac's question to Sal? Discuss.
2. Admit Wayne's testimony about Sal's answer? Discuss.
3. Permit ABC to ask Wayne about college? Discuss.
4. Admit the excerpt from the maintenance record? Discuss.

Answer according to the Federal Rules of Evidence.

Question 3

Alice's and Bob's law firm, AB Law, is a limited liability partnership. The firm represents Sid, a computer manufacturer. Sid sued Renco, his chip supplier, for illegal price-fixing.

Renco's lawyer asked Alice for a brief extension of time to respond to Sid's interrogatories because he was going on a long-planned vacation. Sid told Alice not to grant the extension because Renco had gouged him on chip prices. She denied the request for an extension. Sid also told Alice that he'd had enough of Renco setting the case's pace, so he wasn't going to appear at his deposition scheduled by Renco for the next week, and that he'd pay his physician to write a note excusing him from appearing. Alice did nothing in response.

In the course of representing Sid, Alice learned that Sid planned a tender offer for the publicly-traded shares of chipmaker, Chipco. Alice bought 10,000 Chipco shares. By buying the 10,000 Chipco shares, she drove up the price that Sid had to pay by \$1 million. When Alice sold the 10,000 Chipco shares, she realized a \$200,000 profit.

1. What ethical violations, if any, has Alice committed regarding:
 - a. The discovery extension? Discuss.
 - b. The physician's note? Discuss.
 - c. The Chipco tender offer? Discuss.

Answer according to California and ABA authorities.

2. What claims, if any, does Sid have against Alice, AB Law, and Bob? Discuss.



July 2014

**California
Bar
Examination**

**Performance Test A
INSTRUCTIONS AND FILE**

TEHAMA COUNTY v. TEPEE CAMPGROUND

Instructions.....

FILE

Memorandum to Applicant from Lou Estepe.....

Notice to Abate.....

Newspaper Article (June 19, 2014).....

Newspaper Article (June 24, 2014).....

Conditional Use Permit Application – Staff Report.....

Memorandum to County Commissioners from
Director, Building Department.....

Letter from Recreational Park Trailer Industry Association, Inc.....

Traffic Impact Assessment.....

Air Quality & Fuel Consumption Analysis.....

TEHAMA COUNTY v. TEPEE CAMPGROUND

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

APEL & ESTEPE

Attorneys at Law

MEMORANDUM

TO: Applicant
FROM: Lou Estepe
SUBJECT: Tehama County v. Tepee Campground
DATE: July 29, 2014

We represent Jane Maya, who owns and operates Tepee Campground. Jane was served with a Notice to Abate by the County Attorney's Office of Tehama County. We have an abatement hearing scheduled. The abatement hearing is a trial before an independent administrative law judge.

Before I write my brief, please draft an objective memorandum that discusses and analyzes the charges made in the Notice to Abate, and evaluates our chances of prevailing against each charge. Take into consideration arguments likely to be made by the County. A separate statement of facts is not necessary. Instead, use the facts in your analysis of the charges.

TEHAMA COUNTY, COLUMBIA

**Al Read
County Attorney
P.O. Box 1000
200 King Street
Short Mill, Columbia**

June 13, 2014

Jane Maya
Tepee Campground
78200 West Bank Road
Tehama County, Columbia

NOTICE TO ABATE

Property Address:

**Recreational Park Trailers at Tepee Campground
78200 West Bank Road
Tehama County, Columbia**

NOTICE IS HEREBY GIVEN that the following conditions, activities, or uses exist at Tepee Campground, 78200 West Bank Road, Tehama County, Columbia, in violation of the following Tehama County Land Development Regulations (LDRs): 54 recreational park trailers (RPTs) present in a district zoned rural/residential.

1. The RPTs are permanent structures in violation of LDR, Section 222.1; and
2. The RPTs are an enlargement, expansion, or material increase in intensity of a nonconforming use; or a change to another nonconforming use that is not a materially less intense use -- in violation of LDR, Sections 541.1, 541.2, and 541.3.

Required Corrective Action: Removal of all RPTs within 10 days of receipt of this Notice, or by June 30, 2014, whichever date is later.

Please comply promptly with this Notice or I will refer the matter for an immediate abatement hearing.

Sincerely,

Al Read

County Attorney, Tehama County

NEWSPAPER ARTICLE

North Country Boomerang

June 19, 2014

GLAMPING DEBUTS ON WEST BANK ROAD

Jane Maya Rolls in 54 Recreational Park Trailers to Provide a Glamorous Camping Experience.

by Damon Suarez, Boomerang Reporter

Last Monday, a red GMC Denali towing a white recreational trailer rolled down the Tepee Campground drive toward the rental office, past a row of new modern wood-paneled cabins.

The sport utility vehicle was pushed down in the back by the weight of the trailer. Jane Maya, owner of Tepee Campground, guessed the SUV and trailer measured about 55 feet, still shy of the campsite's limit of 78 feet for recreational vehicles (RVs).

"That's not even as big as the biggest RV trailers," she said, noting the Denali and trailer didn't compare to the mega land yachts that come to her campground on West Bank Road.

After parking, the owner turned on a gas-powered generator to run his air conditioner and appliances. The loud hum was expected to reverberate throughout the campground until his departure.

In contrast, Maya's new mobile "cabins" -- which are called recreational park trailers or RPTs -- took up just 39 feet of each RV slot on which they sat. They too are on wheels, and were towed by light-duty pickup trucks. But with electricity already hooked up, there were no noisy generators needed.

Guests at some of the new cabins sat on the front porch, sipping soda.

"This is so much more subdued and quiet, like being in the outdoors was meant to be," Maya said of the cabins, which she trucked in last week. "But it's the same use."

With the arrival of the mobile cabins, Maya estimates the number of guests such as those driving the big diesel Denali and trailer will decrease by hundreds. In doing so, she will

transition her decades-old Tepee Campground to a resort called “Solitude.” She said Solitude Resort will be a new “glampground” where guests can still camp under the stars, albeit in a mobile cabin with creature comforts -- running water, high-definition TV, and feathered pillows.

“This is the evolution of camping,” she said. “Glamping is in between staying in a hotel and camping. It’s glamorous camping.”

With diesel prices at more than \$4 a gallon, it’s no wonder that occupancy of these cabins is nearly full every night and rentals on her RV slots are down about 40 percent. “I don’t think we’d stay open another 5 years just renting to RVs and tent campers,” she said. “But with recreational park trailers, we expect full occupancy year-round.”

Campgrounds across the country are parking these units on-site, according to Maya. “It’s the future for campgrounds,” said Maya. She added, “And we go from gas guzzling motor homes to families who arrive in hybrids or public transportation to stay in certified green trailers.”

Maya said that she will only accept short-term rental, no permanent or long-time tenants, but does expect to rent the trailers year-round. “We always have,” she said.

Maya’s trailers are 12-feet wide, built on a chassis, 39-feet long and measure about 395 square feet. “Everything is built onto the trailer,” said Maya. “I personally made sure that they fit the federal government’s definition of an RV.” Maya added, “No sheds or decks attached, like you see at mobile home parks.”

Maya’s cabins are paneled with reclaimed mountain snow fencing and each comes with a fireplace, hardwood floors, and wireless internet. Outside, guests have a deck with a grill and a private outdoor campfire lawn.

In the kitchen, guests will find a stove, refrigerator, microwave oven, and dishwasher. Bathrooms come with a sink, granite countertops, and large stand-up shower.

The queen-size plush-top mattresses are covered with luxury linens, goose down pillows, and European-style bed covers. Furniture and all-wood fixtures were built from pine-beetle-killed trees.

Maya charges \$175 to \$300 a night to rent one of her glampers.

NEWSPAPER ARTICLE

Tehama Times Eagle

June 24, 2014

TEPEE CAMPGROUND GOING ROGUE?

It's an RV, It's a Cabin, It's a Modular Home.

by Zena Owens, Times Eagle Correspondent

Though enmeshed in a legal battle with Tehama County about whether she needs permission to use cabins-on-wheels, Jane Maya, owner of Tepee Campground, decided to bring the units in anyway. She believes they are allowed, while the County Planning Department says she needs a special permit for them.

Recreational park trailers, or RPTs as they are known in the trade, are a fast-growing trend in the camping community. They bear little resemblance to a typical RV. They look more like modular cabins.

"Jane says these RPTs are just like RVs. I don't agree," said Planning Director Jason Drulard.

County land regulations do not allow permanent structures in campgrounds without the permission of the County. Two months ago, Maya sought permission to bring RPTs on 54 of her RV sites.

Drulard acknowledged that Maya at first tried to work with the County. "I really regret what has happened," Drulard said. "We persuaded Jane to seek a conditional use permit, but then her neighbors flooded the County Commissioners with complaints, and they temporarily suspended the process."

Drulard admits that government does not move at the pace of commerce, but says he is just following protocol. "I am absolutely appreciative of her frustration right now," Drulard added.

Drulard pleaded with Maya to hang in there. “She’s come so close with this application. To bail now, it’s a shame,” Drulard said. “But at this point, given that she has withdrawn her application for a conditional use permit, we can’t just let her bring the units in.”

The delay was the last straw for Maya. “I was at the end of my rope,” she said.

“I had them built, ready for delivery, and even booked, when the County Commissioners decided not to hear my case,” Maya exclaimed.

Maya is moving RPTs onto her site as quickly as they can build them in Red Bluff. Maya herself designed the cabins with a builder of prefabricated modular homes.

“Just because I made these cool, I shouldn’t be persecuted for that,” Maya said. “If they looked tacky, I would probably have gotten approval.”

Everything Maya wants to do hinges on the County’s definition of an RPT.

“The Planning Department and the County Commission never got to decide whether an RPT is a structure. Now a judge will do it,” lamented Drulard. If the units are in violation, fines and legal action could result.

What will Maya do if she loses?

“If they want to defeat this project, then they are going to have the Wild West out here,” Maya warned. “We can pack this place with aluminum-sided trailers. I can rent these sites for \$600 a month and fill every one. It’s going to be filled with people rebuilding their dirt bikes out front. So if they want to see that, game on.”

CONDITIONAL USE PERMIT APPLICATION

STAFF REPORT

BY JASON DRULARD, PLANNING DIRECTOR, TEHAMA COUNTY

April 30, 2014

APPLICANT: Tepee Campground

OWNER: Jane Maya

REQUEST: Conditional Use Permit to use Recreational Park Trailers (RPTs) on 50% of the current campsites, to be located on the site year-round and rented for visitor use on a short-term basis.

PLANNING DEPARTMENT STAFF FINDINGS:

PROJECT HISTORY

Tepee Campground has been in existence since the mid-1970s. Thereafter, when the County adopted its first land use regulations, the campground was a permitted nonconforming or a “grandfathered” use.

In 1994, the current Tehama County Land Development Regulations (LDRs) were adopted and all properties within Tehama County were rezoned. As part of that rezone, the Tepee Campground property was located in a district zoned rural/residential. Within the rural/residential zoning district, campgrounds are a permitted use requiring a Conditional Use Permit (CUP). Since this was a campground that existed prior to the current zoning regulations and would require a CUP under the current LDRs if newly proposed, the existing campground is considered a permitted nonconforming use per the definition of Nonconforming Use (LDR, Section 540).

In 1979, the campground had a total of 142 campsites (33 tent sites and 109 RV, i.e., recreational vehicle, sites) on 7.6 acres, and structures (A-frame office, residential duplex, shed and store) totaling 5,100 square feet. Under current permitted density ratios for campsites, Tepee Campground would have the same number of sites as it has now.

The current site consist of 33 tent sites, 109 RV sites, and related structures.

ISSUES

Issue 1: Are RPTs recreational vehicles (RVs) or are they structures being used as lodging?

Recreational park trailer (RPT) use is not defined in the LDRs generally or in the campground definition. The LDRs, when written, could not have contemplated all uses or inventions. Campgrounds are defined in the LDRs as “establishments providing overnight or short-term sites for recreational vehicles, trailers, campers or tents, that have no permanent structures. . . .” LDR, Section 222.1.

Classification depends on whether RPTs are considered recreational vehicles (RVs) or structures. The County Building Department has not treated RPTs, or RVs, as buildings in the past. (See attached Building Department Memorandum.)

RVs, in general, are defined in, although not regulated by, federal regulations (24 C.F.R. Section 3282.8 (g)). The RPT industry claims that RPTs fit within the criteria of RVs. The RPT industry has established construction standards for RPTs. To meet the standards, RPTs must be limited to 400 square feet, built on a single chassis, mounted on wheels, and must comply with various requirements for electrical, plumbing, and heating systems. If certified under the RPT industry standards, many states treat RPTs as vehicles; for example, by taxing them as vehicles. (See attached Recreational Park Trailer Industry Association letter.)

Although RPTs are hauled to their ultimate resting place on wheels, they hook up to sewer systems, draw power from the grid, and feature running water and refrigeration.

If classified as structures, RPTs could not be placed in a campground (LDR, Section 222.1); they would require building permits and would be subject to the County Building Code requirements for buildings. Neither short-term rentals of lodging, nor mobile home parks, which are intended for long-term occupancy, would be permitted in a rural/residential zone without a conditional use permit.

Issue 2: Are RPTs an enlargement, expansion, or material increase in intensity of a nonconforming use, or a change to another nonconforming use?

This change is not a new development in a rural/residential zone, but rather it is a change in the operational characteristics of what exists on the property. The overall proposed

development, as an existing nonconforming use, may not be compatible with the surrounding uses (a campground among rural residences).

The applicant describes the use as a form of campground use, and thus identical to the existing non-conforming use. The fact that customers stay for short periods of time, that the vehicles may meet the federal definition of recreational vehicles (RVs), and that the owner intends no expansion of the existing pads lends support to this view.

By affixing the so-called trailers to her land and attaching them to services, however, has the applicant changed the use of her property? No longer is she charging visitors \$27.50 per night to park vehicles in a campsite. Instead, she will be charging more than \$175 per night for a room.

Staff notes significant differences between campgrounds and a property equipped with RPTs. In the former, the patron brings a vehicle to the property and removes it when leaving. In the latter, the landowner maintains the vehicle on the property, rents it to a patron and repairs, maintains, and cleans it between occupancies. The use may be very similar to a motel unit in that a guest comes to the campground in a passenger vehicle, stays a limited time, leaves, and the campground staff cleans the unit to prepare it for the next guest. As noted above, short-term rentals, such as a motel or hotel, would not be permitted in the rural/residential district.

A common complaint from neighbors is that the campground has expanded the number of sites over time, and that the introduction of RPTs will further increase site density. Staff cannot substantiate either claim. The County's historical aerial photography indicates that the campground's current configuration is almost identical to the 1978 layout, suggesting little, if any, expansion has occurred over the years in terms of site development. This application seeks to replace one-half of the current RV sites with RPT sites. There would be no increase in the number of sites.

RPTs will be no bigger than many, if not most, RVs. The maximum length of RPTs is 40 feet, although they may be wider, at 12 feet versus 8 feet for most RVs. In general, the footprint or structure floor area of the pads will be smaller than the current pads. The bulk of current RVs, in total, may be greater than proposed RPTs.

Some neighbors and nearby businesses have supported the appearance of the attractive wood-sided RPTs and the enhanced landscaping.

The County Transportation Department estimates a slight reduction in traffic entering and leaving the campground, more importantly, replacing the less nimble fuel-inefficient RVs with passenger cars. The Traffic Impact Assessment is attached.

Applicant also asserts other benefits mitigating or minimizing potential adverse impacts to neighboring properties, such as benefits to air quality and fuel consumption. (See attached Air Quality & Fuel Consumption Analysis submitted by the applicant.)

The campground is one block from a county bus shelter, and across from the extensive network of pathways for hiking and biking. The site has safe, convenient, and direct access to public transportation.

From comments and community complaints, it is probable that there has been a small amount of long-term use on the property for many years. Long-term use would be an established, historical use. Applicant could probably convert part or all of the campground into a mobile home park.

Applicant has proposed a 30-day stay limit for the entire campground -- all RPTs, RVs, and tent campers. Current uses by long-term renters would go away. If the CUP is granted, staff recommends that it be limited so that only short-term rentals are allowed at the campground, not only for RPTs, but for all users. Precluding continuation of long-term use at this campground, located as it is in the rural/residential zone, has significant benefit for the character of the surrounding neighborhood, by preventing RPTs from becoming in effect a mobile home park.

MEMORANDUM

TO: County Commissioners
FROM: Director, Building Department
DATE: April 21, 2014
RE: Recreational Park Trailers

The Tehama County Building Code has no provisions on recreational park trailers (RPTs) or any other recreational vehicles (RVs). We have never issued a building permit for one, nor inspected an RPT before or after installation.

The Building Code does not make a distinction between types of RVs, whether fifth wheels, towable trailers, or motor homes; it considers them all to be RVs. While the building code recognizes RVs, it does not regulate them.

I checked with Peter Mendez of the HUD Office on Manufactured Housing, and he said that RPTs are not being regulated by HUD.

If the Commissioners decide that RPTs are structures, then of course the full Building Code regime of permits for construction, code standards, and inspection would be applicable.

In the opinion of the Tehama County Building Department, RPTs pose less of a risk to the public than a conventional RV and therefore should not be subject to anything that we are not willing to require of fifth wheels, towable trailers or motor homes, provided the property was located in an area zoned for such use.

RECREATIONAL PARK TRAILER INDUSTRY ASSOCIATION, INC.

Washington, D.C.

recreationalparktrailers.com

April 15, 2014

Dear Commissioners:

The Recreational Park Trailer Industry Association (RPTIA) is the national trade association representing the manufacturers of recreational vehicle park trailers and their related suppliers. The Association also represents allied retailers, RV parks and resorts.

We submit this letter in support of the application from Tepee Campground for a conditional use permit.

Recreational park trailers (RPTs) are RVs primarily designed as temporary living quarters for recreation, camping or seasonal use. They are built on a single chassis, mounted on wheels, and have a gross trailer area not exceeding 400 square feet in the set-up mode. One type is less than 8'6" in width and designed for frequent travel on highways, while the other and more popular type is usually 12' in width, must be transported with special movement permits from state highway departments, and are usually sited in a resort or RV park for an extended term, typically several years.

A determination by your county that these vehicles are "structures" would have a catastrophic impact on the campground industry and businesses related thereto. All RVs in the United States have been classified by the states and federal government using the criteria outlined above. If Tehama County were able to classify one of these RV units as a "structure" and require it to meet local building codes as a "structure," this same logic could then be applied to all other RVs, including folding camping trailers, travel trailers, fifth wheel travel trailers, and motor homes. Local building codes are designed for structures that are rigid, not for vehicles that are designed for transport on roads and highways. While the RPT might look like a building, it is not. It is a vehicle.

Respectfully submitted,

George Rubottom
Executive Director

TRAFFIC IMPACT ASSESSMENT

TEPEE CAMPGROUND

For TEHAMA COUNTY PLANNING DEPARTMENT

By Lopez-Granada Engineering

Big City, Columbia

April 21, 2014

Summary:

This traffic impact assessment is a narrowly focused examination of a proposed change to the operational characteristics on the existing recreational vehicle site. While RVs would still visit the site, one-half of the use would shift to patrons coming in SUVs and passenger cars. The proposed development will slightly reduce vehicle traffic flow on West Bank Road, introduce no increase in traffic impacts, and provide more than adequate vehicular site access. The change would have the benefit of replacing the less nimble fuel-inefficient RVs with passenger cars. The applicant's proposal would likely increase the number of patrons, yet decrease the number of recreational vehicles accessing and exiting the property.

AIR QUALITY & FUEL CONSUMPTION ANALYSIS FOR RECREATIONAL VEHICLE SITE REPLACEMENT WITH RECREATIONAL PARK TRAILERS

Report prepared for Tepee Campground

By Science for Hire

April 10, 2014

ABSTRACT

Tepee Campground is seeking to diversify a portion of its inventory to include recreational park trailers (RPTs) on premises. By swapping out a subset of existing recreational vehicle (RV) spaces for RPT sites, the Campground will be positioned to offer visitors an ecologically friendly alternative to driving or towing their lodging, which is inherent to RV travel.

Our study has shown that replacing one traditional RV site with one RPT site could save approximately 9,500 gallons of fuel and reduce the CO₂ emissions released into the atmosphere by 363,000 pounds each year. If Tepee Campground replaced 54 RV sites with RPT sites, it would save 513,000 gallons of fuel consumption and reduce carbon emissions by 19,602,000 pounds or 9,801 tons annually.



July 2014

**California
Bar
Examination**

Performance Test A

LIBRARY

TEHAMA COUNTY v. TEPEE CAMPGROUND

LIBRARY

Selected Tehama County Land Development Regulations.....

**Tall Timbers Resort v. Oregon Construction Department
Appellate Division (2010).....**

**County of Los Banos v. Leskiewicz
Columbia Court of Appeal (2000).....**

**SELECTED TEHAMA COUNTY
LAND DEVELOPMENT REGULATIONS**

DIVISION 200: ZONING DISTRICT REGULATIONS

The purpose of this article is to establish zoning districts and uses that regulate the type and density of land uses within the county to:

- A. Ensure the protection of the desired community character of each zoning district;
- B. Promote adequate housing and business activity within the county;
- C. Promote stability of existing land uses and protect them from inharmonious influences and harmful intrusions; and
- D. Ensure that uses and structures enhance their sites and are compatible with the natural beauty of the county's setting and critical natural resources.

DIVISION 220: ZONING DISTRICTS USES

* * * * *

Section 222. Campgrounds

222.1. Campground use means establishments providing overnight or short-term sites for recreational vehicles, trailers, campers or tents, that have no permanent structures other than a management office, laundry, small grocery, storage facility, and sanitary facilities that shall be solely for the occupants of the campground.

222.2. Camping Sites. Each camping site in the campground shall consist of a camp pad that provides adequate parking, the camp site (including a fireplace or barbecue, and a table), a pole for hanging food stores or bear proof boxes, where appropriate, and a surrounding active recreational area.

* * * * *

Section 540. Nonconforming Use

Nonconforming use means any use of land, building or structure which was established pursuant to the zoning and building laws in effect at the time of its development, but which use

is not permitted by these Land Development Regulations for the zoning district in which it is located. A use permitted by right at the time of its development, but now designated as a nonconforming use for the zoning district in which it is located, is a permitted nonconforming use. A Conditional Use Permit is not required to continue the existing use, but a Conditional Use Permit is required for any change of use.

Section 541. Change in Use or Characteristics

541.1. A nonconforming use shall not be enlarged or expanded in areas of structure or land occupied.

541.2. A nonconforming use shall not be materially increased in intensity.

541.3. A nonconforming use shall not be changed to another nonconforming use unless any new use is a materially less intense nonconforming use.

541.4. The determination of the level of intensity shall include consideration of traffic generated, perceived level of activity, operational characteristics and potentially adverse impacts on neighboring lands.

TALL TIMBERS RESORT v. OREGON CONSTRUCTION DEPARTMENT

Appellate Division (2010)

On November 30, 2008, the Commissioner of the State of Oregon Construction Department (Commissioner or Department) adopted a new set of regulations, which determined that recreational park trailers (RPTs) are subject to the State Uniform Construction Code (Construction Code).

Appellants, who are a seller of RPTs, the owner of a campground in which RPTs are installed, and the owners of an RPT, challenge the validity of these regulations on the ground the Construction Code Act does not confer authority upon the Department to regulate RPTs under the Construction Code.

The applicable administrative regulation defines a “recreational park trailer” (RPT) as a trailer-type unit that is primarily designed to provide temporary living quarters for recreational, camping, or seasonal use, that meets the following criteria:

1. Is built on a single chassis mounted on wheels;
2. Has a gross trailer area not exceeding 400 square feet in setup mode, and, if less than 320 square feet in the setup mode, would require a special movement permit for highway transit; and
3. Is certified by the manufacturer as complying with standards set by the recreational park industry.

In proposing the adoption of the challenged regulation, the Department stated:

Commonly referred to as “park models,” recreational park trailers (RPTs) are types of recreational vehicles (RVs) that are installed in recreational vehicle parks or condominium campgrounds based upon long-term ground leases, or ownership in the case of condominium campgrounds. Site built appurtenances such as decks, sunrooms, and others are often attached to the recreational park trailers. They are typically used as vacation homes.

RPTs are constructed in generally the same manner as single family dwellings and incorporate the same types of electrical, plumbing, and mechanical systems as dwellings.

An RPT is closed construction, which means that it arrives at the site already assembled so that most building, plumbing, mechanical and electrical systems cannot be inspected because they are already concealed.

RPTs may be found sited in campgrounds, in mobile home or manufactured home parks or on individual lots. Wherever they are and whether they are used for vacation purposes or as permanent residences, they are subject to the requirements of the Construction Code.

The Department received extensive comments regarding its proposals for adoption of the regulation. Those comments and the Department's responses mirror to a substantial extent the arguments presented in this appeal.

The purposes of the Oregon Construction Code Act include "providing requirements for construction and construction materials consistent with nationally recognized standards" and "insuring adequate maintenance of buildings and structures throughout the State and adequately protecting the health, safety and welfare of the people." To accomplish the legislative objective of protecting the health, safety, and welfare of occupants of buildings and structures, the Legislature delegated authority to the Commissioner of the Department to "adopt a State Construction Code for the purpose of regulating the structural design, construction, maintenance and use of buildings or structures to be erected, and the alteration, renovation, rehabilitation, repair, maintenance, removal or demolition of buildings or structures already erected."

Our Supreme Court has indicated that the Construction Code Act is remedial in nature, and designed to address directly matters affecting health, safety and welfare. By its own terms, the Construction Code Act's provisions must receive liberal construction to advance its purposes.

The key terms of the Construction Code that the Legislature authorized the Department to adopt are "structure" and "building." The Commissioner of the Department has interpreted "structure" and "building" to include RPTs. The Commissioner cited various reasons supporting this interpretation, including:

- A recreational park trailer (RPT) is a combination of the same types of materials used in any home and it involves all the same safety issues as a home.

- It is intended for the same type of occupancy as any other vacation home.
- A recreational park trailer (RPT) is a structure that is enclosed with exterior walls -- walls identical in construction to those of any dwelling.
- It is clearly designed for housing or shelter and it is arranged for the support of individuals.
- It is equipped with plumbing, electrical and mechanical systems just as is any dwelling.

Appellants challenge the Commissioner's interpretation that RPTs are "structures," arguing that they should be classified as recreational vehicles (RVs). Appellants rely on the definition of RVs contained in the regulations of the Federal Manufactured Home Construction & Safety Standards Act. The Act governs "manufactured homes." The regulations issued pursuant to the Act expressly exclude "recreational vehicles" from the category of "manufactured homes." In the federal regulations, "recreational vehicles" are defined as: (1) built on a single chassis; (2) 400 square feet or less when measured at the largest horizontal projection; (3) self-propelled or permanently towable by a light duty truck; and (4) designed primarily not for use as a permanent dwelling, but as temporary living quarters for recreational, camping, travel, or seasonal use. 24 CFR, Section 3282.8(g).

Appellants contend that RPTs fit the federal definition of an RV. An RPT, however, can be distinguished from a conventional RV. It is a special type of RV that is intended for installation in a "park." They are built under a different standard than conventional RVs. The principal difference between the national consensus standard for RVs and the standards for RPTs, is that the RPT standard covers all types of the requirements typically found in a building code while the RV standard does not.

Appellants cite other distinctions between RPTs and manufactured homes, or most other homes, to support their contention that RPTs are not structures. In their view, both a manufactured or other home is a structure because it is constructed, erected, or attached to something with *a fixed location on the ground*. For example, RPTs have a fifth wheel for hauling and are designed for greater mobility and movement than a manufactured home. An RPT is not manufactured to HUD specifications for a manufactured home and has a maximum area of 400 square feet. The wheels are not removed from the chassis of an RPT, as are wheels from a manufactured home, and an RPT is not placed on a permanent foundation. An

RPT is left on its wheels and parked on a recreational vehicle pad. RPTs remain readily movable.

The federal definition of RVs also contains a standard that is entirely dependent upon its intended use, i.e., “designed primarily not for use as a permanent dwelling, but as temporary living quarters for recreational, camping, travel, or seasonal use.” 24 C.F.R, Section 3282.8(g)(4). Appellants say the standard is an objective one, and that a reasonably prudent person would use as a temporary dwelling what was designed for temporary use, although such temporary dwelling also may be used for permanent living quarters for one or more families or individuals. Appellants contend that the objective design of the trailer for normal use controls, rather than the subjective *intent* of the user. Thus, travel and recreational design determines the temporary nature of the trailer, notwithstanding that there may be those individuals who may use it as a permanent dwelling.

However, the appellants’ contentions, whether they are correct or not, miss the point. We do not need to classify RPTs as either manufactured homes or RVs. The Department has determined that RPTs are structures, even if primarily designed to provide temporary living quarters for recreational, camping, or seasonal use.

The Department’s determination that RPTs fall within the Construction Code’s definition of “structure” is not plainly unreasonable and therefore must be upheld.

Affirmed.

COUNTY OF LOS BANOS v. LESKIEWICZ

Columbia Court of Appeal (2000)

The County of Los Banos (County) commenced an abatement proceeding to enjoin the defendant-landowners from renting space for recreational vehicles and other camping trailers to members of the public. Defendants own a 14-acre tract of land in Los Banos County, made up of three separate parcels. It is located in a rural-agricultural district, which does not permit the uses made by Defendants of renting camping sites.

Prior to the adoption of the county zoning ordinance, Defendants had improved the 14-acre tract by trimming trees, removing and burning brush, grading, erecting retaining walls, building a road, installing a cesspool, and erecting an outhouse. They also built two tents, a picnic area, and a camping trailer; the trailer was there for about three weeks. During the time, Defendants rented the facilities to the public for camping. For one or two years, the "picnic area-campground" operated in summers to permit outdoor visits for two to four families at a time.

Thereafter, the County adopted its zoning ordinance which did not permit commercial uses, such as campgrounds, in the rural-agricultural district.

Over several years, Defendants erected a building to provide sanitation services for picnickers and campers. The record does not indicate whether Defendants obtained a building permit for the building. Defendants expanded their business to allow the rental of sites for camping trailers and tents. Gradually more sites were added, eventually growing to about 20 picnic-camping sites.

Defendants then started to erect additional sanitary facilities, consisting of toilets and showers, on the land and more grading and landscaping to further increase the capacity for more camping sites, and larger sites for bigger recreational vehicles. Defendants were informed by the County Planning Department that, because a business use was involved, the building permit could not be issued until a Conditional Use Permit was applied for and obtained from the County Commission. Defendants sought the Conditional Use Permit, and were eventually granted a variance, recognizing that the campground use was a legal nonconforming use which Defendants had a right to continue, but concluding that Defendants had no right to enlarge its camping operation.

Defendants challenged that determination. The County also brought an abatement proceeding. In the consolidated cases, the trial court upheld the County's determination.

It is well-recognized law that, if before the adoption of the zoning ordinance, the defendants had established a use as a picnic and camping park, they acquired a vested right to continue that use thereafter as a nonconforming use.

A legal nonconforming use has been defined as authority granted to the owner to use his property in a manner otherwise violative of the zoning regulations. In other words, it is in the nature of a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit and purpose. Over the ensuing years Defendants have properly relied on the nonconforming use, thus acquiring a vested right which could not be affected or changed after the nonconforming use was granted.

Having thus acquired a nonconforming use to use their 14-acre tract as a picnic and camping park, any regulation of the county zoning ordinance which would prevent that use did not apply to Defendants' 14-acre tract.

Hence the issue presented on this appeal, which is whether Defendants can rent space for recreational vehicles and other camping trailers, cannot be resolved by a determination of whether such trailers come within the zoning ordinance that regulates the use of "trailers and/or mobile homes" in this district of the County. Rather, the issue is whether the use of such trailers is a method ordinarily and reasonably adopted to make the original use granted to Defendants available to them without constituting a substantial change in the nature and purpose of that original use, or whether, on the contrary, the use of these trailers would constitute such a departure from the original use as to constitute a new and impermissible use.

The burden of establishing that the use in question is fundamentally the same use and not a new and impermissible one is on the party asserting it. This is in accordance with the general policy of zoning to carefully limit the extension and enlargement of nonconforming uses. However, the use cannot be interpreted in such a way as to unlawfully reduce the original vested interest acquired by the nonconforming use.

We feel that some amount of latitude must be allowed a nonconforming use for reasonable expansion and the maintenance of accessory uses. Businesses should not be prevented from staying competitive in their respective markets by expanding or evolving in the modern world. The fact that improved and more efficient or different instrumentalities are used

in the operation of the use does not preclude the use made from being a continuation of the prior nonconforming use, provided that such means are ordinarily and reasonably adapted to make the established use available to the owners and so long as the original nature and purpose of the undertaking remain unchanged.

The determination of whether the use challenged is substantially the same kind of use as that which was originally obtained is necessarily based in large measure on the facts and circumstances of the particular case. In deciding whether the particular activity is within the scope of the established or acquired nonconforming use, consideration may be given to, among others, the following factors:

- (1) To what extent does the use in question reflect the nature and purpose of the prevailing nonconforming use?
- (2) Is it merely a different manner of utilizing the same use or does it constitute a use different in character, nature, and kind?
- (3) Does this use have a substantially different effect on the neighborhood?

The degree to which the original nature and purpose of the undertaking remains unchanged largely determines whether there has been a change in the preexisting use.

We are unable to say on the record before us that the decision of the trial court was based on a finding and ruling that the renting of spaces by Defendants on their 14-acre tract for more and larger recreational vehicles would constitute such a change in, or enlargement of, the use of their land for the granted use of a picnic and camping park as to amount to the substitution of a new and different use. The case is remanded for disposition in accordance with the principles enunciated in this opinion.

Reversed and remanded.

JULY 2014

ESSAY QUESTIONS 4, 5 AND 6



California Bar Examination

Answer all 3 questions

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

One summer afternoon, Officer Prowl saw Dan, wearing a fully buttoned-up heavy winter coat, running down the street. Officer Prowl ordered Dan to stop. Dan complied. As Officer Prowl began to pat down Dan's outer clothing, a car radio fell out from underneath. Officer Prowl arrested Dan and took him to the police station.

At the police station, Officer Query met with Dan and began asking him questions about the radio. Dan stated that he did not want to talk. Officer Query responded that, if Dan chose to remain silent, he could not tell the District Attorney that Dan was cooperative. Dan immediately confessed that he stole the radio.

Dan was charged with larceny. He retained Calvin as his attorney. He told Calvin that he was going to testify falsely at trial that the radio had been given to him as a gift. Calvin informed Dan that he would make sure he never testified.

Calvin filed motions for the following orders: (1) suppressing the radio as evidence; (2) suppressing Dan's confession to Officer Query under *Miranda* for any use at trial; and (3) prohibiting Dan from testifying at trial.

At a hearing on the motions a week before trial, Dan, in response to Calvin's motion for an order prohibiting him from testifying, stated: "I want to represent myself."

1. How should the court rule on each of Calvin's motions? Discuss.
2. How should the court rule on Dan's request to represent himself? Discuss.

Question 5

Henry and Wynn married in 2000. During the first ten years of their marriage, Henry and Wynn lived in a non-community property state. Henry worked on writing a novel. Wynn worked as a history professor. Wynn kept all her earnings in a separate account.

Eventually, Henry gave up on the novel, and he and Wynn moved to California. Wynn then set up an irrevocable trust with the \$100,000 she had saved from her earnings during the marriage. She named Sis as trustee and Henry as co-trustee. She directed that one-half the trust income was to be paid to her for life, and that the other one-half was to be paid to Charity, to be spent only for disaster relief, and that, at her death, all remaining assets were to go to Charity.

Wynn invested all assets in XYZ stock, which paid substantial dividends, but decreased in value by 10%. Charity spent all the income it received from the trust for administrative expenses, not disaster relief.

Later, Sis sold all the XYZ stock and invested the proceeds in a new house, in which she lived rent-free. The house increased in value by 20%.

Henry has sued Sis for breach of trust, and has sued Charity for return of the income it spent on administrative costs.

1. What is the likely result of Henry's suit against Sis? Discuss.
2. What is the likely result of Henry's suit against Charity? Discuss.
3. What rights, if any, does Henry have in the trust assets? Discuss. Answer according to California law.

Question 6

Owner owned and operated a small diner where Cook and Waiter worked. After closing one day, Cook called in sick for the following day. Owner knew that an acquaintance, Caterer, owned and operated a catering business. Owner asked Caterer to fill in for Cook. Owner told Caterer: "I want you to run the kitchen for one day. I will pay you your standard catering fee. I just need somebody who knows what he's doing." Caterer agreed, telling Owner, "I'll bring my own knife set, but I assume the kitchen is fully equipped."

Owner did not check Caterer's references. If he had, he would have learned that Caterer's business had once been shut down by the health department.

Caterer went to Owner's diner and started to cook. Patron, a customer, ordered chicken wings from Waiter. Waiter gave the order to Caterer.

A notice posted on the kitchen wall, entitled "Health and Safety Code Section 300 Notification," stated: "To avoid food poisoning, all poultry products must be cooked at a minimum temperature of 350 degrees." Upon observing that the oven was set at 250 degrees, Waiter informed Caterer that the oven should be set at 350 degrees. Caterer responded: "Just worry about waiting tables, and leave the cooking to me." Caterer did not raise the temperature of the oven, and removed the chicken wings shortly thereafter.

Waiter served Patron the chicken wings. Patron ate the chicken wings and suffered food poisoning as a result.

Under what theory or theories, if any, might Patron bring an action for negligence against Caterer, Waiter, and/or Owner, and what is the likely outcome? Discuss.



July 2014

**California
Bar
Examination**

**Performance Test B
INSTRUCTIONS AND FILE**

RILEY INSTRUMENTS, INC. v. LRI, INC.

Instructions.....

FILE

Interoffice Memorandum to Applicant from Helen Rivera.....

Memorandum Regarding Persuasive Briefs.....

Arbitrator’s Final Decision and Award.....

Letter from Helen Rivera to Arbitrator.....

Letter from Mark Stilton to Arbitrator.....

Arbitrator’s Amended Final Decision and Award.....

Petition to Vacate Arbitrator’s Amended Final Decision and Award.....

RILEY INSTRUMENTS, INC. v. LRI, INC.

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

MARTIN, RIVERA & TRAN, LLP

Attorneys and Counselors at Law

Eagle Point, Columbia

INTEROFFICE MEMORANDUM

TO: Applicant
FROM: Helen Rivera
RE: Riley Instruments, Inc. v. LRI, Inc.
DATE: July 31, 2014

On May 12, 2014, we received the Final Decision and Award of Arbitrator Stanley Warren ruling in favor of our client, Riley Instruments, Inc. Later we realized that Arbitrator Warren had failed to address one of the issues that we had submitted to him and that he had also failed to award us attorney's fees. We brought these matters to his attention on May 27, 2014. Over the objection of Mark Stilton, the attorney for the defendant LRI, Inc., Arbitrator Warren sent us an Amended Final Decision and Award, dated July 11, 2014, covering the omitted issue, awarding us our fees, and inviting us to file an application for fees.

LRI has filed a petition in the Superior Court to vacate the Amended Final Decision and Award. We now need to respond by opposing LRI's petition to vacate.

Please draft for my review a brief in opposition to LRI's petition. Be guided by our Office Memorandum on Persuasive Briefs. You must be sure to refute each of the points raised in LRI's petition and argue persuasively why the court should deny LRI's petition.

MARTIN, RIVERA & TRAN, LLP

Attorneys and Counselors at Law

Eagle Point, Columbia

MEMORANDUM

August 15, 2011

SUBJECT: Persuasive Briefs

Unless otherwise instructed, attorneys shall include in all briefs a short and concise Statement of Facts written in such a way as to persuade the tribunal that the facts support our client's position. The Statement of Facts is not an indiscriminate recitation of all the facts in the case. Although the facts must be stated accurately, careful selection of the ones pertinent to the legal arguments and that support our client is not improper.

The Argument section of the brief should contain separate segments, each labeled with carefully crafted headings that summarize the argument in the ensuing segment. Do not write a brief that contains only a single broad heading. Each heading should succinctly state the reasons why the tribunal should adopt the position you are advocating and not merely a bare legal or factual proposition.

The body of each argument should match the relevant facts to the legal authorities and argue persuasively how the facts as applied to those authorities support our client's position. Authority that favors our client should be emphasized, but contrary authority should be addressed in the argument and distinguished or explained. Do not reserve argument for reply or supplemental briefs.

You need not prepare a table of contents, a table of cases, a summary of the argument, or an index. These will be prepared after the draft is approved.

**ARBITRATION PROCEEDINGS BEFORE
THE MANUFACTURERS ARBITRATION ASSOCIATION
PURSUANT TO THE AGREEMENT OF THE PARTIES**

In the Matter of an Arbitration between RILEY INSTRUMENTS, INC., Plaintiff and LRI, INC., Defendant.	MAA Case No. 14-1322 FINAL DECISION AND AWARD
Including a counterclaim by LRI, Inc. for breach of contract to recover the contract price.	

I.

INTRODUCTION

Riley Instruments, Inc. (Riley) and LRI, Inc. (LRI) entered into a contract under which LRI agreed to manufacture and supply computer chips to Riley in accordance with Riley's specifications. This arbitration is pursuant to that contract, which provides, *inter alia*, that:

ARBITRATION OF DISPUTES.

In the event a dispute arises under this contract, which dispute the parties are unable to settle amicably, the parties agree that the dispute shall be submitted to final and binding arbitration to be conducted under the rules of the Manufacturers Arbitration Association. The arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute.

II.
THE ISSUES

At the commencement of the hearing in this matter, the parties agreed upon the following statement of the issues to be submitted to the Arbitrator for decision:

Whether LRI breached its contract by failing to manufacture the cp426i series chip according to Riley's specifications and whether LRI intentionally concealed a manufacturing flaw in the production run of the chips delivered to Riley. If so, what shall be the appropriate remedy? If not, shall LRI recover the contract price on its counterclaim?

III.
CONCLUSIONS AND AWARD

The Arbitrator finds and concludes that LRI breached its contract as alleged by Riley and that Riley suffered damages from said breach. According to the proof, Riley's damages, consisting of lost profits, cost of cover for replacement goods, delays in delivery of product to its customers, and associated administrative expenses, totaled \$875,650.

Accordingly, the Arbitrator makes the following AWARD:

1. LRI shall forthwith pay Riley \$875,650 as contract damages;
2. Said amount shall bear interest at the legal rate from and after the date of this AWARD;
3. LRI shall pay Riley \$12,133 as its costs in this matter;
4. LRI shall pay \$7,500 as administrative and filing fees to the Manufacturers Arbitration Association.
5. LRI shall take nothing on its counterclaim.

Dated: May 9, 2014

_____ *Stanley Warren* _____

Stanley Warren
Arbitrator

MARTIN, RIVERA & TRAN, LLP

Attorneys and Counselors at Law

35 Birdshot Plaza, Suite 1900

Eagle Point, Columbia

May 27, 2014

Stanley Warren
Law Offices of Stanley Warren
4289 Greyfeather Drive, Suite 430
Eagle Point, Columbia

Re: Riley Instruments, Inc. v. LRI, Inc.
Manufacturers Arbitration Association
Case No. 14-1322

Dear Arbitrator Warren:

I write on behalf of my client, Riley Instruments, Inc. On May 12, 2014, we received your Final Decision and Award dated May 9, 2014. We wish to point out to you what we believe are inadvertent omissions therein, and we request that you change the Award to cover the omissions.

First: The agreed-upon submission stated two issues: (1) whether LRI breached its contract and (2) whether LRI intentionally concealed a manufacturing flaw. Regarding the second point, we refer you to our post-hearing brief in which we recite the following evidence, fully supported by the testimony and documents in the record:

LRI's former Director of Manufacturing gave unrebutted testimony that he knew about a flaw in the computer chips manufactured for Riley and that he consciously decided not to disclose it because he knew it would cause Riley to reject the chips. Also, we presented unrebutted evidence that Riley spent \$75,000 for an engineering analysis to determine why the chips were not performing as intended and that it was only after incurring that expense that Riley

discovered the flaw. In our brief, we also argued for an award of punitive damages based on LRI's intentional concealment.

Your Final Decision and Award does not appear to have dealt with the concealment issue and the damages attributable thereto, as well as the punitive damages remedy.

Second: The contract pursuant to which this arbitration was conducted provides that: "The arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute."

Although you did not explicitly state in your Award that Riley was the prevailing party, it is clear that Riley did prevail in all respects over LRI and is therefore entitled to its attorney's fee.

Accordingly, we respectfully request that you change your Final Decision and Award to cover the intentional concealment, punitive damages, and attorney's fee issues.

Very truly yours,

MARTIN, RIVERA & TRAN, LLP

By Helen Rivera

Helen Rivera, Partner

cc: Mark Stilton, Attorney for LRI, Inc.

LAW OFFICES OF MARK STILTON

MARK STILTON

Attorney at Law

1823 Herrick Blvd., Suite 3

Eagle Point, Columbia

May 30, 2014

Stanley Warren
Law Offices of Stanley Warren
4289 Greyfeather Drive, Suite 430
Eagle Point, Columbia

Re: Riley Instruments, Inc. v. LRI, Inc.
Manufacturers Arbitration Association
Case No. 14-1322

Dear Arbitrator Warren:

I strenuously object, on behalf of my client, LRI, Inc., to the request by Riley Instruments, Inc. that you amend your Final Decision and Award in the above-referenced matter. Suffice it to say that, having issued your *Final* Decision and Award, you are without authority, power, or jurisdiction by reason of the doctrine of *functus officio* to do anything further with respect to that Award.

Sincerely,

Mark Stilton

cc: Helen Rivera

**ARBITRATION PROCEEDINGS BEFORE
THE MANUFACTURERS ARBITRATION ASSOCIATION
PURSUANT TO THE AGREEMENT OF THE PARTIES**

In the Matter of an Arbitration between RILEY INSTRUMENTS, INC., Plaintiff and LRI, INC., Defendant.	MAA Case No. 14-1322 AMENDED FINAL DECISION AND AWARD
Including a counterclaim by LRI, Inc. for breach of contract to recover the contract price.	

I.

INTRODUCTION

On May 29, 2014, the Arbitrator received Riley Instruments, Inc.'s May 27, 2014 letter requesting an amended Final Decision and Award, asserting that the Arbitrator had inadvertently omitted from his May 9, 2014 Final Decision and Award rulings on three issues:

1. Whether LRI intentionally concealed a manufacturing defect and, if so, what damages Riley Instruments should recover as a consequence;
2. Whether Riley Instruments should recover punitive damages on account of the intentional concealment; and
3. Whether Riley Instruments should recover its attorney's fees.

LRI's attorney responded on May 30, 2014 in opposition to Riley's request by asserting that the Arbitrator is *functus officio* and therefore has no power to amend the initial Final Decision and Award.

II. DISCUSSION

Counsel for Riley Instruments is correct in her assertion that the omissions recited in her May 27, 2014 letter were entirely inadvertent. The Arbitrator has reviewed the record in this case, including the transcript of the hearing, the documentary evidence, and the arguments set out in the post-hearing briefs of the parties and concludes that an Amended Final Decision and Award is appropriate and within the Arbitrator's power to resolve ambiguities and correct omissions.

First, the Arbitrator intended, but neglected, to state specifically that LRI intentionally concealed from Riley Instruments the manufacturing defect and, therefore breached the term in the contract between the parties that provided explicitly that, "LRI shall monitor the production of the cp426i series chip and furnish Riley with periodic quality control reports." Implicit in that term is LRI's obligation to inform Riley Instruments of any problems. The monetary award of \$875,650 that was recited in the Arbitrator's May 9, 2014 Final Decision and Award in fact includes the \$75,000 that Riley Instruments incurred for the engineering study that led to the discovery of the flaw. It should have been itemized as follows: \$800,650 for lost profits, cost of cover for replacement goods, delays in delivery of product to its customers, and associated administrative expenses; \$75,000 for the engineering study to discover the manufacturing flaw.

The record, by reason of the unrebutted testimony of the Director of Manufacturing formerly employed by LRI, also supports Riley Instruments' assertion that LRI's concealment was intentional and with knowledge that, if disclosed, it would have caused Riley Instruments to reject the entire production

run of computer chips. (See transcript at p. 327.) The Arbitrator, again inadvertently, neglected to make that finding explicit in the original Final Decision and Award and hereby corrects that omission by making it explicit that LRI's concealment was intentional and with a motive to deceive. The Arbitrator finds he has the authority under the clear terms of the submission to determine the "appropriate remedy" and that LRI's intentional breach of contract warrants imposition of punitive damages to punish LRI for its unconscionable conduct. Accordingly, the Arbitrator awards \$100,000 as punitive damages in favor of Riley Instruments and against LRI as prayed for in Riley Instruments' closing brief.

Finally, Riley Instruments is correct in its assertion that it is entitled to recover a reasonable attorney's fee in accordance with the arbitration provision of the parties' contract that states that "[t]he arbitrator shall award a reasonable attorney's fee to the prevailing party in the dispute." Obviously, Riley Instruments is the prevailing party. Thus, the Arbitrator hereby awards to Riley Instruments a reasonable attorney's fee.

III.

AMENDED AWARD

The Arbitrator incorporates herein by this reference his May 9, 2014 Final Decision and Award and issues the following AMENDED AWARD:

1. LRI shall forthwith pay Riley Instruments \$800,650 as contract damages for lost profits, cost of cover for replacement goods, delays in delivery of product to its customers, and associated administrative expenses;
2. LRI shall forthwith pay Riley Instruments \$75,000 as damages for the expense of an engineering study that led to the discovery of the manufacturing flaw;
3. LRI shall forthwith pay Riley Instruments \$100,000 as punitive damages for the intentional concealment of the manufacturing flaw;

4. Said amounts shall bear interest at the legal rate from and after the date of this AMENDED AWARD;
5. LRI shall pay Riley \$12,133 as its costs in this matter;
6. LRI shall pay \$7,500 as administrative and filing fees to the Manufacturers Arbitration Association.
7. LRI shall take nothing on its counterclaim.
8. Riley Instruments, as the prevailing party in this dispute, shall recover a reasonable attorney's fee. Within 30 days of the date of this Amended Award, Riley Instruments shall lodge with the Arbitrator and serve upon LRI its application for attorney's fees, supported by billings and time records. Within 15 days thereafter, LRI shall lodge with the Arbitrator and serve upon Riley Instruments LRI's memorandum, if any, challenging Riley Instruments' application. The Arbitrator will then rule on the amount of fees based on the submissions of the parties.

Dated: July 11, 2014

_____ *Stanley Warren* _____

Stanley Warren
Arbitrator

Mark Stilton
Law Offices of Mark Stilton
1823 Herrick Blvd., Suite 3
Eagle Point, Columbia

Attorney for LRI, Inc.

**SUPERIOR COURT OF THE STATE OF COLUMBIA
RADLEY COUNTY**

LRI, INC., Petitioner vs. RILEY INSTRUMENTS, INC., Respondent.	Civ. Case No. 14-44378 PETITION TO VACATE ARBITRATOR'S AMENDED FINAL DECISION AND AWARD
Including a counterclaim by LRI, Inc. for breach of contract to recover the contract price.	

An arbitration was conducted under the rules of the Manufacturers Arbitration Association pursuant to a contract between LRI, Inc. and Riley Instruments, Inc. On May 9, 2014, Arbitrator Stanley Warren issued a *Final* Decision and Award in favor of Riley Instruments. On May 27, 2014, Riley Instruments, in a letter to the arbitrator, asserted that the arbitrator had failed to rule on certain issues and requested that the arbitrator amend the May 9, 2014 award to include the allegedly omitted issues.

On July 11, 2014, Arbitrator Warren issued an Amended Final Decision and Award in which he purported to "correct" the earlier award. Both of the arbitrator's awards are attached hereto as exhibits.

LRI, Inc. moves on the following grounds to vacate the Amended Final Decision and Award.

1. Once he issued his Final Decision and Award, the arbitrator was *functus officio* and had no power whatsoever to amend or otherwise change the award. It is a fundamental common law principle that once an arbitrator has made and published an award, his authority is exhausted and he is *functus officio* and can do nothing more in regard to the subject matter of the arbitration. The policy that lies behind this is an unwillingness to permit one who is not a judicial officer, and who acts informally and sporadically, to reexamine a final decision that he has already rendered because of the potential evil of outside communication and unilateral influence which might affect a new conclusion. See, *Transport, Inc. v. National Petroleum Corp.*, Col. Ct. App. (1990).

2. The purported amendment and the request therefor were in any event untimely. Rule 46 of the Commercial Arbitration Rules of the Manufacturers Arbitration Association requires that the arbitrator must “dispose of the request [for a correction] within 20 days after service of the request.” Also, Columbia Code of Procedure, Section 1284, requires that any request for a correction be made “not later than 10 days after service of a signed copy of the award on the applicant” and that the requested correction be made “not later than 30 days after service of a signed copy of the award on the applicant.” On all counts, the requisite time limits were exceeded.

3. Both Rule 46 and the CCP Section 1286.6 allow the arbitrator to make “corrections” only for essentially clerical, typographical, or computational errors not affecting the merits of the award. The arbitrator clearly exceeded the scope of any power he may have had by (a) adding a finding, not made in the original award, regarding the alleged liability of LRI for an alleged intentional concealment, (b) recharacterizing the amount of the contract damages award, and (c) deciding that Riley Instruments is entitled to attorney’s fees and claiming to retain the power to determine the amount. These are clearly substantive changes “affecting the merits of the award.”

4. The arbitrator committed a grave error of law by awarding punitive damages in a contract case. It is a fundamental principle of law that punitive damages do not lie for breach of contract.

LRI, Inc. therefore moves the court to vacate the arbitrator's July 11, 2014 Amended Final Decision and Award.

Dated: July 16, 2014

Respectfully submitted,

LAW OFFICES OF MARK STILTON

By Mark Stilton

Mark Stilton
Attorney for LRI, Inc.



July 2014

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RILEY INSTRUMENTS, INC. v. LRI, INC.

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Selected Provisions of the Commercial Arbitration Rules of the
Manufacturers Arbitration Association and of the
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Classic Construction, Inc. v. Vladomir Development Co., et al.
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Commercial Arbitration Rules
Manufacturers Arbitration Association

Rule 43. Scope of Award

The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.

* * * * *

Rule 46. Modification of Award

Within 10 days after the service of an award, any party, upon notice to the other parties, may request the arbitrator to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The arbitrator shall dispose of the request within 20 days after service of the request to the arbitrator and any response thereto.

Columbia Arbitration Act
Columbia Code of Procedure (CCP)

Section 1283. Award

The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy.

Section 1284. Application for Correction

The arbitrators, upon written application of a party to the arbitration, may correct the award upon any of the grounds set forth in subdivisions (a) and (c) of Section 1286.6 not later than 30 days after service of a signed copy of the award on the

applicant. Application for such correction shall be made not later than 10 days after service of a signed copy of the award on the applicant.

Section 1285. Petition to Confirm, Correct, or Vacate

Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award.

* * * * *

Section 1285.2. Response to Petition

A response to a petition under this chapter may request the court to dismiss the petition or to confirm, correct or vacate the award.

* * * * *

Section 1286.2. Grounds for Vacation

The court shall vacate the award if the court determines any of the following:

- (a) The award was procured by corruption, fraud or other undue means.
- (b) There was corruption in any of the arbitrators.
- (c) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator.
- (d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.
- (e) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

* * * * *

Section 1286.6. Correction by Court

The court, unless it vacates the award pursuant to Section 1286.2, shall correct the award and confirm it as corrected 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.

Monroe v. Henson & Bailey
Columbia Supreme Court (1992)

Walter Monroe was employed as a lawyer by the law firm of Henson & Bailey under an employment contract that contained an agreement to submit “any dispute arising out of this contract to final and binding arbitration.” There was a provision in the contract regarding allocation of attorney’s fees in the event Monroe left the firm and took clients with him. When Monroe resigned, a number of clients followed him to his new practice, and a dispute arose over how to allocate the fees earned and to be earned. The parties submitted the dispute to an arbitrator, who essentially ruled against Monroe. Monroe petitioned the trial court to vacate the award. That court denied his petition.

We granted review and directed the parties to address the limited issue of whether and under what conditions a trial court may review an arbitrator's decision.

1. *The General Rule of Arbitral Finality.*

This case involves private, nonjudicial arbitration, which the parties submitted to an arbitrator pursuant to their written agreement. The Columbia Arbitration Act, found in the Code of Procedure (CCP), represents a comprehensive statutory scheme regulating private arbitration in this state and expresses a strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.

The arbitration clause included in the employment agreement in this case specifically states that the arbitrator's decision would be both binding and final. The arbitrator's decision should be the end, not the beginning, of the dispute. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so*. The courts simply assure that the parties receive the benefit of that bargain by minimizing judicial intervention in the arbitration process.

Arbitrators may base their decisions upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party

might successfully have asserted in a judicial action. Moreover, they are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award according to what is just and good. Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law.

In reaffirming this general rule, we recognize there is a risk that the arbitrator will make a mistake. That risk, however, is acceptable – first, because the parties have voluntarily and contractually agreed to bear that risk, and second, because by enacting the Columbia Arbitration Act, the Legislature has reduced the risk by providing for judicial review in circumstances involving serious problems with the award itself or with the fairness of the arbitration process. The Act sets forth the grounds for both vacation and correction of an award. See, CCP Sections 1286.2 and 1286.6.

In the present case, Monroe puts forth three exceptions to the general rule that he claims apply to his case. First, he claims a court may review an arbitrator's decision if an error of law is apparent on the face of the award and that error causes substantial injustice. Second, he claims the arbitrator exceeded his powers. Third, he argues courts will not enforce arbitration decisions that are illegal or violate public policy.

2. Error of Law on the Face of the Arbitration Decision Does Not Warrant Judicial Review.

As previously noted, the Legislature has set forth grounds for vacation and correction of an arbitration award, and an error of law is not one of the grounds.

Early cases, predating the Columbia Arbitration Act, followed the common law rule that arbitration awards were freely reviewable by the courts, particularly if the challenge to the award was based on an error of law. Later cases drew back on that view, especially in light of the passage of the Act, but even then the courts were reluctant to adopt a hands-off approach. Finally, this court pronounced that the merits of the controversy between the parties are not subject to judicial review. The form and sufficiency of the evidence and the credibility

and good faith of the parties, in the absence of corruption, fraud or undue means in obtaining an award, are not matters for judicial review. In this way, this court suggested that the Columbia Arbitration Act – and not the common law – established the limits of judicial review of arbitration awards. Thus, we held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, *may not be reviewed except as provided in the statute*.

The law has thus evolved from its common law origins and moved toward a more clearly delineated scheme rooted in statute. We adhere to the line of cases that limit judicial review of private arbitration awards to those cases in which there exists a statutory ground to vacate or correct the award. Those decisions permitting review of an award where an error of law appears on the face of the award causing substantial injustice have perpetuated a point of view that is inconsistent with the modern view of private arbitration and are therefore disapproved.

3. The Arbitrator Did Not Exceed His Powers.

Monroe argues that, in allocating the earned and to-be-earned fees as he did, the arbitrator exceeded his powers, but it is unclear what Monroe's theory is other than that the arbitrator's interpretation of the contract is erroneous. It is well settled that arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision. A contrary holding would permit the exception to swallow the rule of limited judicial review; a litigant could always contend the arbitrator erred and thus exceeded his powers. To the extent Monroe argues his case comes within CCP Section 1286.2, subdivision (d), merely because the arbitrator reached an erroneous decision, we reject the point.

It is within the "powers" of the arbitrator to resolve the entire "merits" of the "controversy submitted" by the parties. Obviously, the "merits" include all the contested issues of law and fact submitted to the arbitrator for decision. The arbitrator's resolution of these issues is what the parties bargained for in the arbitration agreement. Monroe does not argue that the arbitrator's award strayed

beyond the scope of the parties' agreement by resolving issues the parties did not agree to arbitrate. The agreement to arbitrate encompassed "any dispute arising out of" the employment contract. The parties' dispute over the allocation of attorney's fees following termination of employment clearly arose out of the employment contract; the arbitrator's award does no more than resolve that dispute. Under these circumstances, the arbitrator was within his "powers" in resolving the questions of law presented to him.

A related paramount principle that bears on the arbitrator's power to determine and resolve the merits is this: Unless the contract, the submission, or the rules governing the arbitration provide otherwise, an arbitrator's choice of relief awarded to the prevailing party does not exceed his or her powers so long as it bears a rational relationship to the underlying contract and to the breach thereof *as interpreted, expressly or impliedly, by the arbitrator*. This holds true as to any plausible theory of the arbitrator's interpretation of the contract. In this case, the logical connection of the nature of the relief fashioned by the arbitrator to the underlying contract is plain. Thus, the award is not subject to vacation or correction based on any of the statutory grounds asserted by Monroe.

We conclude that an award reached by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in CCP Sections 1286.2 and 1286.6. Further, the existence of an error of law apparent on the face of the award, even one that causes substantial injustice, does not provide grounds for judicial review.

The judgment is affirmed.

Marco v. Chandler
Columbia Court of Appeals (1995)

Plaintiffs and appellants Joel Marco and Linda Marco (collectively, Marco) appeal a judgment insofar as it awards \$19,575 in attorney's fees to defendant and respondent Dixie N. Chandler (Chandler). The essential issues are whether the arbitrator exceeded his powers by denying an award of attorney's fees to Chandler, and whether the trial court erred in awarding attorney's fees to Chandler for the underlying arbitration instead of remanding to the arbitrator for that purpose.

In March 1991, Marco entered into a real estate purchase contract to acquire certain property from Chandler. Marco subsequently filed an action for rescission. Because the contract contained an arbitration clause, the matter was referred to the Manufacturers Arbitration Association. In an award made January 9, 1992, the arbitrator denied Marco's claim against Chandler and denied all requests for attorney's fees. On April 20, 1992, Chandler filed a petition in the trial court to correct the arbitration award. Chandler contended that the arbitrator exceeded his power by not applying the attorney's fee provision and that the error appeared on the face of the record. The contract between the parties provided that "[i]n any action, proceeding or arbitration arising out of this agreement, the prevailing party shall be entitled to reasonable attorney's fees." The matter was heard May 22, 1992, at which time the trial court ordered the matter back to the arbitrator to clarify his denial of attorney's fees to Chandler.

On October 13, 1992, the arbitrator filed a clarification of the award, stating that Chandler prevailed against Marco but that, in rendering the award, he believed he had the discretion to deny the request for attorney's fees, notwithstanding the determination that Chandler was the prevailing party. He added, "If the arbitrator does not have that discretion and the prevailing parties are entitled to attorney's fees as a matter of right, attorneys' fees should be awarded to the prevailing parties to the degree such fees were incurred in arbitrating the claim upon which they prevailed."

On November 20, 1992, Chandler filed a second petition in the trial court to correct and to affirm the award as clarified by the arbitrator. In the petition, Chandler sought a correction of the award to reflect her entitlement to reasonable attorney's fees as the prevailing party. Marco filed opposition papers, arguing that the petition was time-barred, that the trial court lacked the power to correct the award even if the petition were timely, that Chandler had failed to provide any admissible and competent evidence of whether the attorney's fees sought were reasonable or necessary, and that sanctions should be imposed against Chandler and her counsel.

Chandler's reply papers asserted the petition was timely. Chandler's counsel attached a copy of her prior bill in this matter, in the amount of \$19,575, and asked the court to make a determination of the *amount* of fees Chandler was entitled to.

The trial court granted Chandler's motion and awarded Chandler \$19,575 as a reasonable attorney's fee. Marco appealed.

1. *There is no merit to Marco's contention that the trial court was bound by the arbitrator's denial of an award of attorney's fees.*

Marco, citing the Columbia Supreme Court's decision in *Monroe v. Henson & Bailey*, contends the trial court was bound by the arbitrator's decision denying Chandler an award of attorney's fees, i.e., that the trial court had no power to review the arbitrator's decision. The argument lacks merit.

In *Monroe*, the Supreme Court clarified the law as to the limited scope of judicial review of arbitration awards. *Monroe* held an award rendered by an arbitrator pursuant to a contractual agreement to arbitrate is not subject to judicial review except on the grounds set forth in the Columbia Arbitration Act.

Here, the arbitrator's decision to deny Chandler an award of attorney's fees, notwithstanding his finding Chandler was the prevailing party, exceeded his powers because the agreement provides that "the prevailing party *shall* be entitled to reasonable attorney's fees." (Italics added.)

Had the arbitrator found neither Marco nor Chandler was the prevailing party, the arbitrator properly could have declined to make any award of attorney's

fees. But having made a finding Chandler was the prevailing party, the arbitrator was compelled by the terms of the agreement to award her reasonable attorney's fees and costs. That error was subject to correction because Section 1286.6(b) of the Columbia Arbitration Act provides an award shall be corrected if "[t]he arbitrators exceeded their powers [and] the award may be corrected without affecting the merits of the decision" (Italics added.)

2. There is, however, merit to Marco's contention that the amount of attorney's fees to be awarded for the arbitration proceeding is to be determined by the arbitrator.

The issue is whether the arbitrator should have been directed to decide the *amount* of attorney's fees to be awarded for the arbitration proceeding, or whether the issue of the amount of those fees was a matter for the trial court.

An award of attorney fees for the arbitration itself is within the arbitrator's purview. After the arbitrator declined to award Chandler her attorney's fees, notwithstanding his determination she was the prevailing party, the trial court was empowered to correct the award to provide for an award of attorney's fees to Chandler. However, the trial court should have remanded the matter to the arbitrator to determine the *amount* of attorney's fees to which Chandler was entitled for the arbitration proceeding, rather than making that determination at the trial court level. It is the arbitrator, not the trial court, who is best situated to determine the amount of reasonable attorney's fees to be awarded for the conduct of the arbitration proceeding. We remind the arbitrator that he is compelled by the parties' agreement to award reasonable attorney's fees to the prevailing party and that he lacks discretion to do otherwise.

The judgment is reversed insofar as it awards \$19,575 in attorney's fees to Chandler, and the matter is remanded to the arbitrator for a determination of the amount of attorney's fees.

Transport, Inc. v. National Petroleum Corp.
Columbia Court of Appeals (1990)

This case involves an arbitration of a dispute between the petitioner, Transport, Inc. (Transport), and the respondent, National Petroleum Corp. (NPC), over the transportation of petroleum products. The issues that the parties initially submitted to the arbitrators for decision were: (1) whether NPC breached its contract by canceling the fourth shipment it had agreed to tender to Transport, and (2) if so, what damages Transport suffered. At the commencement of the arbitration, the parties agreed to bifurcate the liability and damages issues, requesting the arbitrators to issue first a “partial final award” on the question of liability, i.e., whether NPC breached the contract.

After issuance of a “partial final award” in which the panel of arbitrators found in favor of Transport on the issue of liability, one of the three arbitrators died. Transport sought in the court below to confirm the “partial final award” and requested the court to appoint a replacement for the deceased arbitrator and remand the matter to the reconstituted panel for a decision on the issue of damages.

NPC cross-petitioned the court to vacate the partial final award, require the parties to select a new panel of arbitrators, and commence the matter anew. The court below, exercising its authority under the Columbia Arbitration Act, appointed an arbitrator to replace the deceased one, confirmed the partial final award, and remanded the case to the reconstituted panel for decision on the issue of damages.

On this appeal, NPC argues that, notwithstanding that the ruling of the arbitrators here was titled “partial *final* award,” the general rule is that an arbitral decision is not final unless it conclusively decides every point required by and included in the submission of the parties. That is in fact the general rule, but it must be assessed in light of two other pertinent principles: First, if the parties agree that the panel of arbitrators is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so. Second,

once the arbitrators have finally decided the submitted issues, they are in common law parlance *functus officio*, meaning that their authority over those questions is ended.

The latter principles govern the present dispute. The parties agreed at the commencement of the arbitration to a bifurcated decision. They asked the panel to decide the issue of liability. Prior to the death of the third arbitrator, the panel ruled on that issue conclusively, deciding every point required by and included in the first part of the parties' submission. Thus, with respect to liability, the original panel was *functus officio*, so the reconstituted panel cannot be ordered to rearbitrate that issue.

The Columbia Arbitration Act makes specific provision for filling vacancies in arbitration panels: The court is authorized to do so upon application of a party if the agreement of the parties does not otherwise provide. This authority extends to pending arbitrations. The court below acted within its authority.

We affirm the judgment of the court below.

Classic Construction, Inc. v. Vladomir Development Co., et al.

Columbia Court of Appeals (1999)

Appellants Vladomir Development Company (Vladomir) and Mandeville Township (Mandeville) appeal from a judgment confirming an amended arbitration award in favor of respondent Classic Construction, Inc. (Classic). Vladomir and Mandeville contend that the arbitrator exceeded his powers by amending the award to determine an issue he had failed initially to decide. They contend that the trial court was required to vacate the amended award and order the entire dispute reheard by a new arbitrator.

Facts and Procedural Background

Classic, a subcontractor, performed asphalt work and other improvements for Vladomir at an elementary school in Mandeville. A dispute arose about the work. Classic stopped work and served a stop payment notice upon Mandeville, i.e., a notice that Mandeville should withhold payment pending settlement of the dispute. Classic then sued Vladomir and Mandeville for damages.

The parties stipulated that the entire dispute would be resolved by binding arbitration. They briefed the questions presented and introduced oral and documentary evidence on all issues. The parties each submitted proposed forms of judgment that addressed all the questions submitted to the arbitrator. The arbitrator issued his decision awarding Classic \$42,051 in damages against Vladomir for breach of contract, but the award did not resolve the claim against Mandeville based upon the stop payment notice. The arbitrator did not, therefore, determine all the questions submitted.

After receiving the award, counsel for Classic wrote a letter to the arbitrator requesting that he amend the award to include a judgment against Mandeville based upon the stop payment notice. Counsel for Classic did not send a copy of this letter to the attorney representing both Vladomir and Mandeville.

Four days later, counsel for Classic telephoned the administrator for the arbitrator. The arbitrator confirmed that he had received the letter and said he would make a decision in the next few days. These calls were also ex parte.

The arbitrator thereafter issued an amended award, which included a finding favorable to Classic on the cause of action against Mandeville. The amended portion of the award provided: "Classic's stop notice directed to Mandeville is found valid for purposes of this action." Upon receipt of the amended award, counsel for Vladomir and Mandeville attempted unsuccessfully to contact the arbitrator and then learned of the ex parte communications from counsel for Classic.

Classic subsequently petitioned the trial court to confirm the amended arbitration award. Vladomir and Mandeville opposed the petition, moved to vacate the amended award, and requested that the trial court order that the entire dispute be reheard by a new arbitrator. In a declaration submitted to the trial court, the arbitrator confirmed that the parties had submitted proposed judgments at the conclusion of the arbitration that resolved the causes of action based upon the contract and the stop payment notice. The arbitrator further confirmed that counsel for Classic notified him that the award omitted a finding on the latter cause of action, and that he advised counsel for Classic that he had all the information necessary from the documents received at the arbitration and his notes to render a decision on this cause of action. The arbitrator stated that his failure to address the stop notice claim was inadvertent.

The trial court declined to vacate the amended award, granted Classic's petition to confirm the amended award, and entered judgment in favor of Classic for \$42,051 and against both Vladomir and Mandeville.

Discussion

Vladomir and Mandeville contend that the trial court erred in refusing to vacate the amended arbitration award because the arbitrator: (1) exceeded his power under CCP Section 1284 by amending the award; (2) violated procedural requirements for amending or correcting the award under Section 1284; (3)

issued an amended award based upon information obtained outside the arbitration in violation of CCP Section 1282.2; and (4) engaged in misconduct with Classic's counsel in violation of CCP Sections 1286.2 and 1286.6. We disagree.

As a general rule, courts will indulge every reasonable intendment to give effect to arbitration proceedings. To ensure that an arbitrator's decision is the end of the dispute, arbitration awards are subject to very narrow judicial review. See, *Monroe v. Henson & Bailey*, Columbia Supreme Court (1992).

Arbitrators must produce an award that includes “a determination of all the questions submitted to the arbitrators, the decision of which is necessary in order to determine the controversy.” (CCP Section 1283.) The consequence of an omission to decide all the questions is not addressed by Section 1283 or by any other provisions of the Act. Nothing in the statutory scheme either authorizes or prohibits the amendment of an award.

Section 1286.2 sets forth the exclusive grounds for vacating an arbitration award. Except on these grounds, arbitration awards are immune from judicial review in proceedings to confirm or challenge the award. (*Monroe, supra.*)

The record here does not establish that the amended arbitration award was procured by corruption, undue means, or misconduct of the arbitrator. In a sworn declaration, the arbitrator explained that he inadvertently had not resolved one cause of action and that, when contacted by Classic's counsel, he informed counsel that he had all the information from the documents admitted during the arbitration and his notes to issue a decision on the omitted claim. Thus, the record does not reveal that the arbitrator considered information outside the arbitration proceeding in ruling upon the claim. Nor does the record reveal any improper intent or attempt to influence the arbitrator on the part of opposing counsel. Classic's counsel explained, in a declaration submitted under penalty of perjury, that he had no intent to reargue the matters presented at the arbitration or bias the arbitrator, but intended only to remind the arbitrator that both sides had desired a ruling on the claim and had included it in proposed judgments previously submitted to him.

In the absence of a showing that the arbitrator was improperly influenced or actually considered evidence outside the original arbitration proceedings such that appellants needed a further opportunity to be heard on the stop notice claim, appellants cannot demonstrate that the amended award was procured by corruption, fraud, undue means, or misconduct of the arbitrator within the meaning of Section 1286.2.

The remaining issue is whether issuance of the amended award in response to an *ex parte* communication is an action in excess of the arbitrator's powers or constitutes "other conduct ... contrary to the provisions" of the Act. We conclude that it is not.

Section 1284 authorizes an arbitrator, upon written application of a party to the arbitration, to *correct* the award upon either of the grounds set forth in Section 1286.6, subdivisions (a) and (c), i.e., where there is a miscalculation of amounts, a mistake in the description of a person or property referred to in the award, or where there is a defect *in the form* of the award that does not affect the merits of the controversy. Any application to correct an arbitration award under this section requires notice to the opposing party.

The *amendment* of the arbitration award in this case does not fall within these subdivisions. The arbitrator was not "correcting" a miscalculation or description contained in the prior award or correcting a defect in its "form." Rather, he was resolving the remainder of the dispute submitted to him. Thus, the time limits specified in Section 1284 do not apply.

The absence of a statutory provision authorizing amendment of an award does not deprive the arbitrator of jurisdiction to do so. The parties concede that the arbitrator had authority to decide the entire dispute, including the cause of action against Mandeville. The stop notice claim was raised in the pleadings, briefed by the parties, and included in proposed judgments submitted by both sides to the arbitrator. The amendment was made promptly. It is not inconsistent with other provisions of the original award and it does not substantially prejudice the legitimate interests of any party. In our view, the

arbitrator was simply finishing his assignment by making a complete and full award on the matters submitted to him for resolution.

It has been suggested that the ancient rule of *functus officio* requires the award to be vacated under the circumstances we face here. That rule survives, but just barely, to bar arbitrators from revisiting and changing *complete* awards, i.e., awards where they in fact decided all the issues presented to them. But cases holding that an *incomplete* award is a nullity and must be vacated were generally decided before Columbia's Arbitration Act and the Supreme Court's instruction that the courts indulge every reasonable intendment to give effect to arbitration proceedings. To deny arbitrators the authority to complete their task under such circumstances elevates form over substance.

We conclude Columbia's contractual arbitration law permits arbitrators to issue an amended award to resolve an issue omitted from the original award through the mistake, inadvertence, or excusable neglect of the arbitrator if the amendment is made before judicial confirmation of the original award, is not inconsistent with other findings on the merits of the controversy, and does not cause demonstrable prejudice to the legitimate interests of any party.

This opinion should not be read to condone the actions of Classic's counsel in communicating *ex parte* with the arbitrator. Counsel's *ex parte* communications were inappropriate, and under different, more egregious circumstances, might require vacation of an arbitration award.

The judgment is affirmed.