FILED October 20, 2015 02:10 PM
Appellate Court Records

IN THE SUPREME COURT

OF THE STATE OF OREGON

COUCH INVESTMENTS, LLC, an Oregon limited liability company, Respondent on Review, v. LEONARD PEVERIERI, an individual; JUDITH PEVERIERI, an individual, and PEVERIERI INVESTMENTS LLC, an Oregon limited liability company, Petitioners on Review.	Deschutes County Circuit Court Case No. 11 CV 0285 F CA No. A155483 **S063209**

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

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Review of the decision of the Court of Appeals
on Petitioners' Appeal from a Judgment of the Circuit Court
for Deschutes County, Honorable A. Michael Adler.

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Decision of Court of Appeals filed April 1, 2015
Sercombe, Presiding Judge, and Hadlock, Judge, and Tookey, Judge.

October 2015

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SUBJECT INDEX

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A. Legal Question Presented on Review

Petitioners-Defendants ("Defendants") pose an improperly argumentative and overly narrow legal question on review. Defendants also fail to state the rule of law that Defendants propose be established, as required by ORAP 9.17(2)(b)(i).

Plaintiff-Respondent ("Plaintiff") submits that a more appropriate legal question on review is: What is the scope of an arbitrator's authority to fashion a remedy for an issue submitted by the parties for arbitration?

B. Nature of Action and Relief Sought In the Trial Court

Defendants, Leonard and Judith Peverieri, as landlords, entered into a written lease agreement with Plaintiff, Couch Investments, LLC, for commercial property upon which Plaintiff has operated a gas station and convenience store since execution of the lease. The Oregon Department of Environmental Quality ("DEQ") later adopted new storm water regulations that require improvements to the storm water drainage on the subject property.

The parties disagreed whether the cost of improvements required by the DEQ had to be paid by Plaintiff or Defendants under the terms of the parties' lease (the "DEQ Issue"). The parties filed separate lawsuits alleging a variety of claims, including the DEQ Issue. After consolidation of the

lawsuits and 20 months of litigation in the Deschutes County Circuit Court, the parties agreed to narrow their dispute and arbitrate liability for the DEQ Issue. The parties further agreed that, other than the DEQ Issue, all claims raised in the parties' Circuit Court pleadings would be dismissed with prejudice.

The Arbitrator determined that Defendants were liable for the cost of the improvements required by the DEQ, determined the approximate cost of the improvements, and required that Defendants place those funds in Plaintiff's attorney's trust account to be used by Plaintiff for completion of the improvements.

Defendants filed a petition to vacate the arbitration award in the Circuit Court pursuant to ORS 36.705(1)(d), contending that the arbitration award "exceeded the arbitrator's powers." The Circuit Court denied Defendants' petition to vacate, and entered the arbitration award.

C. Nature of Judgment Rendered By the Trial Court

On October 17, 2013, the Circuit Court entered a General Judgment and Money Award that confirmed and incorporated the terms of the arbitration award.

D. Facts Material to Determination on Review

In September 1997, Defendants, as landlords, entered into a written lease agreement with Plaintiff, as tenant, for premises upon which Plaintiff

has operated a gas station and convenience store since the time of the lease. (Defendants' ER-5-9) The lease requires that Plaintiff use the premises as a "service station minimart and related retail activities." (Defendants' ER-6) After the initial 10-year term, the lease provides for four additional five-year terms. (Defendants' ER-7)

The DEQ required improvements to the storm water surface drainage for the property, and the parties disagreed who was liable under the lease for the cost of the required improvements. Defendants filed an eviction complaint against Plaintiff in the Deschutes County Circuit Court, alleging that Plaintiff was in default under the terms of the parties' lease. (TCF, April 12, 2011 Eviction Complaint) One of the defaults alleged by Defendants in their complaint was Plaintiff's purported "failure to comply with DEQ regulations pertaining to the capture of storm water from the area surrounding the fueling stations." (*Id.,* Exh. 1, p. 1) Plaintiff then filed suit against Defendants, alleging claims for intentional interference with economic relations, breach of the lease, and injunctive relief. (TCF, April 15, 2011 Complaint) The Circuit Court later consolidated the two cases. (TCF, July 26, 2011 Order-Consolidate)

After 20 months of litigation in the Circuit Court, the parties entered into a stipulation to narrow their dispute to an issue raised in the parties'

pleadings (the "Stipulation"), and to arbitrate who is "liable under the lease that is the subject of the above actions (the 'Lease') for the cost of storm water drainage improvements required by the Oregon Department of Environmental Quality (the 'DEQ Issue')." (Defendants' ER-1-3) The parties further agreed that "[o]ther than the DEQ Issue, all claims raised in the Parties' pleadings will be dismissed by the Parties with prejudice." (*Id.*) Thus, contrary to what Defendants contend, the parties did not dismiss all of their claims. The parties simply narrowed their respective claims to one of the issues that was already alleged in their pleadings, and was one of the grounds upon which Defendants based their Circuit Court eviction complaint. The parties' Stipulation did not, in any way, limit or waive the Arbitrator's ability to fashion a remedy for the DEQ Issue.

After the parties entered into the Stipulation, Defendants submitted a pre-arbitration memorandum to the Arbitrator containing the following statements evidencing Defendants' understanding that the Stipulation granted the Arbitrator authority to fashion remedies for the DEQ issue:

(1) "The issue to be determined in this arbitration is which party is responsible for ensuring that real property in this matter – an operating gas station and convenience store – complies with Federal and State laws enacted to protect the safety of underground water supplies." (TCF, May 9, 2013 Affidavit of Martin E. Hansen In Support of Response to Petition to Vacate Arbitration Award, Exhibit 13, p. 1)

(2) "[Plaintiff] is obligated to make the repairs to the property to ensure compliance with State and Federal laws because it unambiguously agreed [to] do so in its long term lease with [Defendants]." (*Id.*, p. 2)

(3) "The arbitrator should enforce the lease as written, and find that [Plaintiff] must undertake the work to make sure the property is in compliance." (*Id.*; Emphasis added)

(4) "Plaintiff is responsible for paying for the work necessary to ensure that the use of the property does not contaminate the surrounding groundwater." (*Id.*; Emphasis added)

As for the cost of the DEQ improvements, Defendants argued that "the evidence will show that the DEQ Compliance Work will cost $23,140.00 to construct, with an additional $6,000.00 for consulting and engineering services, for a total cost of approximately $30,000.00." (*Id.*, p. 5) Defendants' defined the "DEQ Compliance Work" in their pre-arbitration memorandum as a specific plan to address the DEQ Issue, which "calls for the construction of a trench drain, an oil-water separator, and a swale." (*Id*.) This plan had already been approved by the DEQ. (*Id.*)

During the arbitration, both sides presented evidence relating to liability for the DEQ Issue under the terms of the parties' lease, and evidence relating to the cost of the improvements required by the DEQ. (Plaintiff's SER-10-12, 13-37) At the arbitration hearing, the arbitrator heard from Mr. Cole of the

DEQ that, consistent with Defendants' pre-arbitration memorandum, the cost of the improvements necessary to remedy the DEQ Issue was between $25,000 and $30,000. (Defendants' ER-11) Both parties also submitted evidence relating to the cost of the improvements. (Plaintiff's SER-10-11, 14-21)

The Arbitrator ultimately determined that Defendants were liable for the cost of the improvements required by the DEQ. (Defendants' ER-13) Plaintiff then submitted a proposed arbitration award to the Arbitrator. (Defendants' ER-14-17) Defendants objected to the proposed arbitration award. (Defendants' ER-18-20) In their objections, Defendants argued that Plaintiff's proposed arbitration award "should be changed to reflect that [Defendants are] responsible for paying for the improvements necessary to comply with OAR 340-044-0018(3), which is the applicable DEQ regulation regarding the property…." (Defendants' ER-19) Defendants further argued that Plaintiff's proposed arbitration award "should also be changed to reflect that [Defendants are] responsible for managing and completing installation of the DEQ Improvements." (*Id.*) Thus, Defendants did not contend that the Arbitrator was powerless to include remedies for the DEQ Issue in the arbitration award. Instead, Defendants argued that the Arbitrator should modify the proposed remedies to something Defendants deemed more

favorable.

In his ruling on Defendants' objections to the proposed arbitration award, the Arbitrator reasonably concluded that "given my liability finding, the arbitration award should provide that defendants are to pay the cost of [the required DEQ improvements]." (Defendants' ER-23) This conclusion was consistent with the remedies sought by Defendants in their pre-arbitration memorandum, the only difference being that Defendants, and not Plaintiff, would pay the costs of the DEQ improvements.

The Arbitrator then allowed both sides to submit additional evidence regarding the cost of the DEQ improvements, and conducted a hearing on that issue. (Defendants' ER-23, 25, 26-29; Plaintiff's SER-11-12) Prior to and during that hearing, both sides presented additional evidence of the cost of the DEQ improvements. (Plaintiff's SER-12, 22-37) After considering that evidence, the Arbitrator decided that a reasonable estimate of the cost of the DEQ improvements was $32,500. (Defendants' ER-30-35) This amount was close to the $30,000 figure argued by Defendants at the outset of the arbitration.

The Arbitrator then issued an award that required Defendants to deposit the $32,500 estimated cost in counsel for Plaintiff's trust account. (Defendants' ER-32-35) Plaintiff would then be responsible for completing

the improvements with the funds deposited by Defendants. (*Id.*) Upon completion of the improvements, Plaintiff would provide Defendants with an accounting, and any unused funds would be refunded to Defendants. (*Id.*) Thus, under no circumstance would Defendants pay more than the actual cost of the required improvements. In correspondence to counsel for the parties, the Arbitrator repeatedly stated his belief that the Stipulation and ORS 36.695(3) granted him the authority to make the findings, conclusions and awards in the arbitration award.[1] (Defendants' ER-22, 37)

Defendants petitioned the Circuit Court to vacate the arbitration award pursuant to ORS 36.705(1)(d), while Plaintiff petitioned the Circuit Court to enter the arbitration award. After a hearing, the Circuit Court entered an order denying Defendants' petition to vacate the arbitration award and granting Plaintiff's petition to enter the arbitration award. (Defendants' ER-43-45) A general judgment and money award was thereafter entered, which Defendants appealed. (Defendants' ER-46-49)

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[1] As recognized by the Court of Appeals, Defendants' contention that the Arbitrator acknowledged that he was exceeding the scope of his authority is baseless. Instead, the Arbitrator merely explained why he believed he had the authority to rule as he did. The Court of Appeals correctly concluded that the "arbitrator's understanding of his authority was correct." *Couch Investments, LLC v. Peverieri*, *et al.*, 270 Or App 233, 241, 346 P3d 1299 (2015).

E. Summary of Argument

After time-consuming and expensive litigation in the Circuit Court, the parties entered into a "Stipulation to Arbitrate and Limit Claims." (Defendants' ER-1-3) The purpose of the Stipulation was to limit the parties' dispute by arbitrating the DEQ Issue. The parties agreed to dismiss their other Circuit Court claims with prejudice.

The Stipulation did not, in any way, waive or limit the Arbitrator's power to order remedies for the DEQ Issue under ORS 36.695(3), or otherwise. Nor did the conduct of the parties evidence an intent to limit or waive the Arbitrator's power to order remedies for the DEQ Issue. In fact, the opposite is true. In their pre-arbitration memorandum to the Arbitrator, Defendants sought the same remedies they now claim the Arbitrator was powerless to order. Specifically, Defendants requested that the Arbitrator require Plaintiff to undertake and pay for specific improvements, at a specific cost, to make sure the property is in compliance with applicable law. (TCF, May 9, 2013 Affidavit of Martin E. Hansen In Support of Response to Petition to Vacate Arbitration Award, Exhibit 13, pp. 1-2, 5, 10) In other words, Defendants expressly acknowledged the Arbitrator's power to order remedies on the DEQ Issue until the Arbitrator ruled against Defendants and Defendants changed counsel of record.

Defendants do not dispute that ORS 36.695(3) grants an arbitrator broad authority to order just and appropriate remedies under the circumstances of an arbitration. Nor can Defendants point to anything in the Stipulation, or any conduct of the parties, that waived or otherwise limited the Arbitrator's broad authority to order remedies on the DEQ Issue.

Defendants' contention that the parties somehow agreed to limit the Arbitrator to issuing nothing more than an advisory opinion requires an unreasonably narrow and implausible interpretation of the Stipulation. It also flies in the face of Oregon's long-standing policies of construing arbitration agreements broadly in favor of arbitration, and confining judicial review of arbitration to the strictest possible limits. Accepting Defendants' position would represent a fundamental shift in how Oregon courts interpret arbitration agreements and review arbitration decisions that would all but eliminate the important benefits typically associated with arbitration, such as efficiency, reduced expense, and finality.

Here, the Arbitrator reasonably concluded that, based on the parties' Stipulation, ORS 36.695(3), and the arbitration proceedings, he possessed the authority to order remedies on the DEQ Issue. Even if there were any doubts as to the Arbitrator's conclusion, the arbitration award should remain undisturbed based on well-established Oregon law. The Court of Appeals'

decision should be affirmed for these reasons.

F. Argument

1. The Arbitrator Reasonably Concluded that He Possessed the Authority to Include Remedies in the Arbitration Award

It is well-established that judicial review of arbitration awards is "confined to the strictest possible limits." *Brewer v. Allstate Insurance Co.*, 248 Or 558, 562, 436 P2d 547 (1968). Judicial intervention is appropriate only when an arbitrator's decision is "so grossly erroneous as to strike at the heart of the decision-making process." *Id.* at 563; *Bisaccio v. Hart*, 213 Or App 75, 81, 159 P3d 1179 (2007) (same); *Native Sun v. L & H Development Inc.*, 149 Or App 623, 627, 944 P2d 995 (1997) ("Consistent with the admonition in *Brewer* to confine judicial review 'to the strictest possible limits,' . . . case law does demonstrate that the courts have taken a fairly broad view of what is not a ground for reversal under ORS 36.355.") Defendants do not dispute these authorities, and "readily concede that [Oregon] courts give great deference to arbitrators and seek to uphold their decisions." (Brief on the Merits of Petitioners on Review, p. 9)

Review of an arbitrator's authority is a question of law, "bearing in mind 'Oregon's policy to construe arbitration agreements broadly to enhance the arbitrability of disputes.'" *Native Sun*, 149 Or App at 627 (quoting *Budget*

Rent-A-Car v. Todd Investment Co., 43 Or App 519, 603 P2d 1199 (1979)); *Budget Rent-A-Car*, 43 Or App at 524 ("Oregon's policy is to construe general arbitration agreements broadly to enhance arbitrability of disputes.") Based on that policy, "arbitration is required, unless we can say with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, and we resolve all doubts in favor of coverage." *Snow Mountain Pine Ltd v. Tecton Laminates Corp.,* 126 Or App 523, 529, 869 P2d 369 (1994).

"The determination of the coverage of the arbitration clause and the scope of the arbitrable issues is, in the first instance, a task for the arbitrator." *Snow Mountain Pine Ltd.,* 126 Or App at 532-533 (1994). Consistent with the holding in *Brewer*, "[e]ven if the arbitrator is legally wrong as to the extent of his authority intended to be vested in him by the parties, his decision will stand provided that it is at least arguably correct." *Seller v. Salem Women's Clinic, Inc.,* 154 Or App 522, 526-528, 963 P2d 56, *rev den*, 328 Or 40, 977 P2d 1170 (1998). For example, in *Seller*, the trial court refused to vacate the arbitrator's award, stating:

> "Although I would conclude that the arbitrator was ultimately wrong on the facts, and wrong on the law as to both the agreement of the parties as to the measure and payment of bonuses, and the intent of the parties as to the issues to be submitted to arbitration, and although I further conclude that the resulting decision is

> inequitable, nevertheless I am persuaded that under the law the arbitrator's decision must stand."

Id. at 525-526. The Court of Appeals affirmed, holding that "the policy supporting binding arbitration requires that the parties submit to both the risks and the benefits that accompany it." *Id.* at 527.

Claims that arbitrators exceeded their authority by awarding an allegedly impermissible remedy have also been rejected. *Harold Schnitzer Properties v. Tradewell Group*, 104 Or App 19, 799 P2d 180 (1990), *rev den* 311 Or 150, 806 P2d 128 (1991), *Native Sun*, 149 Or App at 627 ("As in [*Harold Schnitzer Properties*], the parties in this case may well have contemplated the application of a contractual limitation on damages that the arbitrator failed to apply. The fact remains that such errors by an arbitrator are not ground for reversal under the arbitration statute.")

Here, the parties' Stipulation empowered the Arbitrator to determine whether Defendants or Plaintiff were liable under their lease for the cost of the storm water drainage improvements required by the DEQ. The Stipulation did not contain any limitation on, or waiver of, the Arbitrator's authority to order remedies for the DEQ Issue under ORS 36.695(3) or otherwise. In their pre-arbitration memorandum to the Arbitrator, Defendants specifically requested that the Arbitrator require Plaintiff to undertake and pay for specific improvements, at a specific cost, "to make sure the property is in

compliance" with State and Federal laws. Thus, the Arbitrator reasonably concluded that his authority under the Stipulation and ORS 36.695(3) included determining the cost of the DEQ Improvements and ordering payment of those costs toward completion of the DEQ Improvements. (Defendants' ER-22, 23, 31, 37)

Defendants' interpretation focuses only on the word "liability" in the Stipulation, and ignores the rest of the sentence, "for the cost of storm water drainage improvements required by the Oregon Department of Environmental Quality (the 'DEQ issue')." Considering the text and context of the disputed provision of the Stipulation, the Arbitrator clearly interpreted it correctly to allow him to determine the questions of liability, costs, and remedies.

The Arbitrator's decision to include remedies in the arbitration award was not a surprise to Defendants considering that Defendants' pre-arbitration memorandum to the Arbitrator sought nearly identical remedies. It is telling that Defendants' "no remedy" position emerged only after the Arbitrator decided against Defendants. However, Defendants' dislike of the result is not a valid basis for disturbing the arbitration award. *See Harrell v. Dove Mfg. Co.*, 234 Or 321, 326, 381 P2d 710 (1963) ("It would be patently unfair to allow a party to an arbitration proceeding for which both parties have

voluntarily contracted to turn the proceedings into a lawsuit in the event the arbitrator's decision is unfavorable to him.")

The Arbitrator in this case also correctly recognized that a simple declaration regarding liability for the DEQ Issue, without any corresponding remedies, would have undermined the parties' Stipulation, and resulted in additional Circuit Court litigation between the parties. (Defendants' ER-31) It defies logic that, after 20 months of litigation in the Circuit Court, the parties intended to participate in a toothless arbitration of the DEQ Issue that would not result in finality. *See Brewer,* 248 Or at 562 ("The principal purpose of arbitration is to avoid litigation. If the arbitrator's award is subject to extensive judicial control, this purpose is largely frustrated."); *Gemstone Builders, Inc. v. Stutz*, 245 Or App 91, 261 P3d 64 (2011) ("we are guided by policies that favor arbitration and the recognition that, in general, arbitration is intended to be an alternative to litigation, not a prolongation of the dispute between the parties.") The Arbitrator's reasoning is also consistent with Comment B.1. to § 23 of the Revised Uniform Arbitration Act,[2] which states, in pertinent part, that:

> "At its core, arbitration is supposed to be an alternative to litigation in a court of law, not a prelude to it. It can be argued that parties unwilling to accept

[2] ORS 36.705, which sets forth the bases for vacating an arbitration award, is based on § 23 of the Revised Uniform Arbitration Act.

> the risk of binding awards because of an inherent mistrust of the process and arbitrators are best off contracting for advisory arbitration or foregoing arbitration entirely and relying instead on traditional litigation."

Here, the Arbitrator correctly concluded that the parties did not contract for an advisory arbitration. If the parties had intended a mere advisory arbitration, stating that fact in the Stipulation would have been simple.

The Arbitrator's interpretation of his authority under the Stipulation and ORS 36.695(3), and the resulting arbitration award, were entirely reasonable. This is not a case where one can say "with positive assurance" that the Stipulation was not susceptible to the Arbitrator's interpretation of that document. *Snow Mountain Pine Ltd*, 126 Or App at 529. This is especially true when analyzed in the context where all doubts are resolved in favor of arbitrability, and the decision should stand if "at least arguably correct." *Seller v. Salem Women's Clinic, Inc.*, 154 Or App at 526-528. Accordingly, for these reasons alone, the Court of Appeals' decision should be affirmed.

2. Defendants' Position Would Fundamentally Change Oregon Law Regarding the Interpretation of Arbitration Agreements and the Review of Arbitration Decisions

Defendants contend that the arbitration award should be vacated pursuant to ORS 36.705(1)(d) because the Arbitrator exceeded his powers by including remedies in the arbitration award. In doing so, Defendants

argue that Stipulation should be interpreted narrowly, and that the Stipulation constrained the Arbitrator to do nothing more than declare which party is liable for the DEQ Improvements without determining the cost or requiring that the costs are paid to complete the DEQ improvements. Such an interpretation flies in the face of Oregon's long standing policy of interpreting arbitration agreements broadly, and would represent a fundamental change in Oregon law concerning the interpretation of arbitration agreements and the review of arbitration awards. Acceptance of Defendants' position would open the litigation floodgates by encouraging parties who lose in arbitration to challenge any remedy imposed by an arbitrator that was not specifically referenced in the parties' arbitration agreement. This would eviscerate the primary benefits typically associated with arbitration, which are a streamlined process for the adjudication of disputes, reduced expense, and finality. *Brewer,* 248 Or at 562.

3. The Stipulation Did Not Limit the Arbitrator's Power to Order Remedies

Defendants concede that "to make out a case for waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose." (Brief on the Merits of Petitioners on Review, p. 14) Defendants rely exclusively on the Stipulation for their express waiver argument. However, on its face, the Stipulation did not in any way limit or waive the Arbitrator's power to order

remedies for the DEQ Issue. Thus, Defendants' express waiver argument must be rejected. *See, e.g., Johnson v. Swaim*, 343 Or 423, 431, 172 P3d 645 (2007) (although waivers of constitutional and statutory rights may be expressed through contract terms, those terms must clearly indicate an "'intention to renounce a known privilege or power.'") (quoting *Great American Ins. v. General Ins.*, 257 Or 62, 72, 475 P2d 415 (1970)); *Taylor v. U.S. National Bank*, 248 Or 538, 544, 436 P2d 256 (1968) (contract language construed to relinquish a widow's statutory right to homestead and exempt property must evince a "clear and explicit" waiver of those rights); *Waterway Terminals Co. v. P.S. Lord Mechanical Contractors*, 242 Or 1, 27, 406 P2d 556 (1965) ("To make out a case of waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such a purpose . . . ."); *State by State Highway Com. v. Feves*, 228 Or 273, 284, 365 P2d 97 (1961) (where the parties had entered into written stipulation of compromise and the stipulation was silent on recovery of costs and fees pursuant to the condemnation statute, the court could not read into the stipulation defendants' intent to waive their rights under the statute).

Because Defendants cannot credibly cite the Stipulation as an express waiver, Defendants argue that "the parties and their attorneys conducted themselves in such a way that such a waiver could clearly be implicated." Precisely the opposite is true. Defendants' pre-arbitration memorandum expressly

requested the same remedies that the Arbitrator ultimately included in the arbitration award – payment for and completion of the DEQ Improvements. (TCF, May 9, 2013 Affidavit of Martin E. Hansen In Support of Response to Petition to Vacate Arbitration Award, Exhibit 13, pp. 1-2, 5, 10) Defendants' objections to the proposed arbitration award further evidenced Defendants' understanding that the Arbitrator possessed the authority to order remedies for the DEQ Issue. While Defendants' objections sought modifications to the proposed arbitration award, Defendants' objections nevertheless acknowledged that the Arbitrator had the authority to require Defendants to pay for and complete the DEQ Improvements. (Defendants' ER-18-20) Thus, the record evidences that the parties intended the Arbitrator's authority to include the power to order appropriate remedies for the DEQ Issue. Defendants' implied waiver argument is flawed for this reason.

Similarly, because the parties did not waive or otherwise limit the Arbitrator's authority to order remedies for the DEQ Issue, Defendants' discussion regarding ORS 36.610, and the waiver of a "requirement" versus the waiver of "authority," is irrelevant. Defendants do not dispute that, absent some limitation and/or waiver, an arbitrator possesses broad authority to order appropriate remedies under ORS 36.695(3). *See* RUAA § 21[3], Comment 3 ("Section 21(c) preserves the traditional,

[3] ORS 36.695 is based on RUAA § 21, and their language is identical other than the cross-references to other sections.

broad right of arbitrators to fashion remedies…. The purpose of including this language in the UAA was to insure that arbitrators have a great deal of creativity in fashioning remedies; broad remedial discretion is a positive aspect of arbitration. Just as in UAA Section 12(a), this language in Section 21(c) means that arbitrators issuing remedies will not be confined to limitations under principles of law and equity (unless the law or the parties' agreement specifically confines them).") In addition, the Arbitrator's interpretation of his powers under the Stipulation is given considerable deference under Oregon law.

Defendants also attempt to establish waiver by repeatedly misrepresenting the terms of the Stipulation, claiming that the Stipulation dismissed "every claim and every remedy allowable under such claims…." (Brief on the Merits of Petitioners on Review, p. 12) This contention is patently false. The DEQ Issue was alleged by the parties in their Circuit Court pleadings, and the wording of the Stipulation clearly reflects that fact. The title of the document is "Stipulation to Arbitrate and Limit Claims." (Defendants' ER-1; emphasis added) Paragraph four of the Stipulation then states that "[o]ther than the DEQ Issue, all claims raised in the Parties' pleadings will be dismissed by the Parties with prejudice." (Defendants' ER-2; emphasis added) The Stipulation also acknowledged the that the DEQ Issue arose out of the parties' Circuit Court claims alleging various breaches of the parties' lease, stating that liability for remedying the DEQ Issue

was to be determined "under the lease that is the subject of the above actions…." (*Id.*) Thus, rather than dismissing all claims and associated remedies, the parties simply limited their dispute to the DEQ Issue, which was first alleged by Defendants in their Circuit Court eviction complaint.

4. The Court of Appeals' Opinion Does Not Render ORS 36.705(1)(d) Meaningless

The Court of Appeals concluded that "[t]he arbitrator's understanding of his authority was correct," and that the Arbitrator acted within his powers by including remedies for the DEQ Issue in the arbitration award. Based on this conclusion, the Court of Appeals also determined that the Arbitrator had not "exceeded his powers," and that vacation of the arbitration award pursuant to ORS 36.705(1)(d) was unwarranted.

The Court of Appeals did not, as argued by Defendants, ignore or render meaningless ORS 36.705(1)(d). Instead, the Court of Appeals simply disagreed with Defendants' argument on appeal. Nor was the Court of Appeals, as Defendants suggest, obligated to articulate hypothetical examples of circumstances where an arbitrator might be found to have exceeded the arbitrator's powers under ORS 36.705(1)(d).

G. Conclusion

The Arbitrator's decision to include remedies for the DEQ Issue in the arbitration award was based on the Arbitrator's reasonable interpretation of his

authority under the Stipulation and ORS 36.695(3). Under Oregon law, the Stipulation should be interpreted broadly. The Arbitrator's decision should only be disturbed if it was "so grossly erroneous as to strike at the heart of the decision-making process." *Brewer*, 248 Or at 563. This is certainly not such a case, and there is no reason to change Oregon's well-established policies regarding the interpretation of arbitration agreements and review of arbitration awards.

In addition, contrary to what Defendants contend in the conclusion of their brief, the remedies ordered by the Arbitrator are precisely the types of remedies requested by Defendants at the outset of the Arbitration. Defendants complain now only because the Arbitrator ruled against them. Arbitration awards should not be subject to attack simply because the losing party dislikes the result.

Accordingly, Plaintiff respectfully submits that the Court of Appeals' decision should be affirmed.

DATED this 20th day of October, 2015.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief Length

I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and the word-count of this brief is 4,776 words.

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I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

DATED this 20th day of October, 2015.

FRANCIS HANSEN & MARTIN LLP

s/ Christopher J. Manfredi
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CERTIFICATE OF SERVICE

I certify that on October 20, 2015, the foregoing **BRIEF ON THE MERITS - RESPONDENT** was electronically served on the following named attorney:

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DATED this 20th day of October, 2015.

FRANCIS HANSEN & MARTIN LLP

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