IN THE SUPREME COURT
OF THE STATE OF OREGON

COUCH INVESTMENTS, LLC, an Oregon limited liability company,	)	
Respondent on Review,	)	Deschutes County Circuit Ct. Case No. 11CV0285SF
v.	)	CA No. 155483
LEONARD PEVERIERI, an individual, JUDITH PEVERIERI, an individual, and PEVERIERI INVESTMENTS, LLC, an Oregon limited liability company,	)	**S063209**
Petitioners on Review.	)	

BRIEF ON THE MERITS OF PETITIONERS ON REVIEW

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

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

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August 2015

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SUBJECT INDEX

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A. Legal Question Presented on Review

The legal question presented is:

When parties to an arbitration agreement express a clear intent to limit the scope of arbitration, may an arbitrator nonetheless disregard that intended limitation because the agreement did not explicitly waive or vary the arbitrator's remedial powers under ORS 36.695(3)?

B. Nature Of The Action Or Proceeding and Relief Sought In The Trial Court

This case arose from a dispute over the terms of a long-term commercial lease. A question arose as to whether Leonard and Judith Peverieri and Peverieri Investments, LLC, the owners of the commercial property (hereinafter referred to as "Landlords") or Couch Investments, LLC, the lessee (hereinafter referred to as "Tenant") were responsible under the lease for complying with Oregon Department of Environmental Quality ("DEQ") regulations concerning the capture of storm water.

Although two separate lawsuits were filed alleging a variety of claims, the parties ultimately agreed to dismiss *all claims* and, by way of a Stipulation to Arbitrate and Limit Claims, submitted a single *issue* to an arbitrator for determination. The arbitrator ruled in favor of Tenant, and then proceeded to issue decisions on matters which Landlords contend exceeded the arbitrator's authority set forth in the Stipulation.

Pursuant to ORS 36.705(1)(d), Landlords filed with the Deschutes County Circuit Court a Petition to Vacate Arbitration Award.

C. Nature of The Judgment Rendered By The Trial Court

On October 17, 2013, the Circuit Court entered a General Judgment and Money Award which in effect implemented the scheme set forth in the Arbitration Award.

D. Facts Material To Determination On Review

Tenant operates a gas station in Bend, Oregon on commercial property owned by Landlords. Several years ago, DEQ gave notice that new state regulations required installation of a new drainage system on the property that would separate oil spillage from the storm water sewer system. Landlords and Tenant disagreed as to which party was legally responsible for the cost of complying with the new regulations, and this dispute resulted in the filing of two separate lawsuits: Landlords filed an eviction notice alleging lease violations by Tenant; and Tenant filed a complaint against the Landlords alleging intentional interference with economic relations as well as breach of the lease agreement, and also sought mandatory injunctive relief. Tenant's Complaint requested, among other relief, a money judgment in its favor.

The parties eventually agreed to dismiss with prejudice "all claims raised in the Parties' pleadings" (ER-2) and submit a single *issue* to an arbitrator for determination. The Stipulation to Arbitrate and Limit Claims specified:

> The *only issue to be resolved through arbitration* is whether Plaintiff, as tenant, or Defendants, as landlord, are 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").

ER-2 (emphasis added). The rest of the Agreement further reinforced the parties' intent that the arbitrator decide only the single, discrete issue of liability for cost of the DEQ compliance work. Consistent with the narrow issue to be decided, the Agreement further stipulated to a very limited presentation of evidence at arbitration:

> The Parties agree that David Cole of the DEQ may testify both through his affidavit and by phone, as well. The parties disagree whether any other witness can provide relevant testimony on DEQ issue. The Parties, however, do agree that should the arbitrator allow any testimony to be offered on the DEQ Issue (other than Mr. Cole's testimony), it will only be testimony of the Parties themselves.

ER-2. The attorneys acknowledged that that the agreed-upon scope of the arbitration severely limited what evidence could be presented. Tenant's counsel sent an email stating: "[Tenant] believes that no other witnesses are

relevant to testify on *the sole issue for resolution in this matter*, the liability for the DEQ compliance work." (ER-4 – emphasis added). As stated by Landlords' attorney:

> [T]he Stipulation contained a conscious decision to submit a very narrow legal issue to the arbitrator: who should be liable for the cost of the DEQ upgrade. The question required some factual inquiry, but most of those facts were not in dispute. In other words, the task for the arbitrator was mostly to apply the law to the undisputed facts. Because the arbitration proceeding had such a narrow focus, I decided it was not necessary to call any witnesses on behalf of [Landlords], other than [Landlord] Leonard Peverieri.

(ER-41).

At arbitration, the parties adhered to their stipulation limiting evidence solely to the issue of which party was liable for the costs of the DEQ upgrade. Tenant's only witness was the aforementioned DEQ employee, and Landlords offered no witness other than Leonard Peverieri. No contractors were called to testify as to the cost of the upgrade, nor were any bids offered into evidence.

The arbitrator subsequently issued a four-page opinion letter wherein he acknowledged that the parties "agreed to a binding arbitration *of a single issue in this action*, that is, whether the plaintiff-lessee (Couch Investments LLC) or the defendants-lessors (Leonard Peverieri and Judith Peverieri) are

liable for the cost of storm water drainage improvements required by the Oregon Department of Environmental Quality (DEQ)." (ER-10 – emphasis added). After presenting his analysis on this issue, the arbitrator found that Landlords were liable for the storm water drainage improvements. (ER-13).

Tenant's proposed Arbitration Award – and the letter accompanying it – once again reflected Tenant's understanding of the very limited issue that the arbitrator was asked to decide. Indeed, Tenant's attorney – in the aforementioned letter – logically assumed from the arbitrator's ruling that *Landlords* would complete any required DEQ improvements. The letter from Tenant's attorney to the arbitrator read in relevant part: "I left a blank in the Award for the date by which *Mr. Peverieri* is required to complete the DEQ upgrades." (ER-14 – emphasis added). Significantly, Tenant's proposed award did not seek the entry of a money award except for one relating to costs and attorney fees, thus once again reflecting the narrow issue to be decided by arbitration. Landlords responded to Tenant's Proposed Arbitration Award by submitting their Objections to it and by offering their own proposed award, which similarly sought only entry of an order assigning financial liability. (ER-18 through ER-20).

Things started to slip, however, when the arbitrator – while conducting a hearing on the form of the Arbitration Award – indicated that

he wanted to enter *an award of money damages that Landlords must pay to Tenant* for the cost of the repairs. The arbitrator further ordered that *Tenant* – and not Landlords – would hire the contractor and supervise the work to make sure it complied with DEQ requirements, and also ordered that both parties should obtain bids for the work to be performed and that a subsequent hearing would be held to evaluate the bids. The arbitrator stated that he would then evaluate the bids and decide what amount should be entered in the Arbitration Award. (ER-50).

Landlords responded by offering the arbitrator several reasons why such an approach was unworkable:

- Entering a monetary award exceeded the arbitrator's authority;
- Given that Landlords owned the property in question, it was problematic to make Tenant responsible for ensuring the contractor carry out the work properly;
- Tenant would have little incentive to keep the costs low;
- Landlords would be precluded from administratively challenging the opinion of the DEQ employee as to what scope of work was necessary to comply with the regulation; and
- Landlords would be precluded from arranging for their own contractor to carry out the work at their agreed price and terms.

(ER-50). The arbitrator nonetheless issued a letter opinion memorializing his ruling on the form of the Arbitration Award (ER-21 to ER-24), stating

his belief that the authority granted him under ORS 36.630(2) and ORS 36.695(3) allowed him to make the rulings in question. (ER-22). In other words, although the arbitrator acknowledged that he was exceeding the scope of the Stipulation, he expressed his opinion that the aforementioned statutes gave him the authority to do so.

The Landlords subsequently sought a loan from Sterling Bank to pay the costs of the construction work, but the potential loan terms dictated that the lender would disburse funds directly to the contractor carrying out the work and not directly to Tenant as the arbitrator required. The arbitrator's requirement that the funds be disbursed directly to Tenant therefore prevented Landlords from securing a loan for the work. (ER-38 to ER-39).

In an email exchange, the arbitrator stated he would consider bids from both parties and would give each bid "whatever weight [he] believe[d] would be appropriate under the circumstances." (ER-29). Tenant subsequently submitted a bid for $38,515 (ER-25) and Landlords submitted a bid for $19,405 along with a declaration signed by the contractor. (ER-26 to ER-28). At a subsequent hearing, the arbitrator heard arguments from the attorneys concerning the merits of the bids, but it was not an evidentiary hearing – no witnesses testified and no exhibits were admitted. (ER-50). A

few days later, the arbitrator issued his award, setting the principal amount at $32,500.

Landlords then moved in circuit court to vacate the arbitration award pursuant to ORS 36.705(1)(d), which states that a court shall vacate an arbitration award if the arbitrator "exceeded the arbitrator's powers[.]" The circuit court denied the motion to vacate and the Court of Appeals affirmed in *Couch Investments, LLC v. Peverieri,* 270 Or App 233, 346 P3d 1299 (2015).

E. Summary Of Argument

Contrary to the Court of Appeals' assertion, the parties in this case did in fact intend to limit the arbitrator's authority when they agreed that the only issue to be resolved at arbitration was liability for the costs of the DEQ upgrade. To the extent an actual waiver is required, the Court of Appeals' holding that the parties must "explicitly" agree to waive the arbitrator's authority to order remedies finds no support in the statutory scheme. Moreover, given that the parties agreed to dismiss with prejudice all claims raised in the parties' pleadings, there were no claims left in the case upon which the arbitrator could order remedies.

Even if an explicit waiver is needed under ORS 36.610(1) to waive the requirements of the Uniform Arbitration Act, the statute only refers to

"requirements" and not to an arbitrator's mere "authority" to order remedies. If the arbitrator's "authority" pursuant to ORS 36.695(3) could somehow be interpreted to constitute a waivable "requirement," the Court of Appeals' decision ignores the parties' actual agreement that the "*only* issue to be resolved through arbitration" was liability for the cost of the DEQ upgrade.

The Court of Appeals' decision also works to nullify ORS 36.705(1)(d) because that statute – which states that a court shall vacate an arbitration award if the arbitrator "exceeded the arbitrator's powers" – could never have any application unless the parties explicitly waived certain language found in ORS 36.695(3).

F. Argument

Landlords readily concede that courts give great deference to arbitrators and seek to uphold their decisions. *See, e.g., Budget Rent-A-Car of Washington -Oregon, Inc. v. Todd Inv. Co.*, 43 Or App 519, 524, 603 P2d 1199 (1979) ("Oregon's policy is to construe general arbitration agreements broadly to enhance arbitrability of disputes."). This is as it should be. But Oregon law also contemplates that the parties should be allowed to control the arbitration process. Oregon law further holds that if an arbitrator exceeds the scope of his or her authority, then the arbitration award *shall* be vacated.

The Court of Appeals, in its opinion upholding the trial court's refusal to vacate the arbitration award, relied heavily on ORS 36.610(1), which states in relevant part: "[A] party to an agreement to arbitrate or to an arbitration proceeding may waive, or the parties may vary the effect of, the requirements of ORS 36.600 to 36.740 to the extent permitted by law." But comment 1 of RUAA §4 – the section on which ORS 36.610(1) is based [1] – reads in relevant part:

> The intent of Section 4 is to indicate that, although the RUAA is primarily a default statute *and the parties' autonomy as expressed in their agreements concerning an arbitration normally should control the arbitration*, there are provisions the parties cannot waive prior to a dispute arising under an arbitration agreement or cannot waive at all.

ORS 36.695(3), the statute on which the arbitrator relied upon to justify his actions in this case,[2] states:

> [A]n arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding. The

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[1] As noted in the Court of Appeals' opinion, a commentary to a uniform act that is enacted by the Oregon legislature "`is part of the act's legislative history.'" 270 Or App at 241-242 (*quoting Livingston v. Metropolitan Pediatrics, LLC*, 234 Or App 137, 144, 227 P2d 796 (2010)).

[2] The arbitrator also relied on ORS 36.630(2), which gives arbitrators authority to issue provisional remedies. As pointed out in the Court of Appeals' opinion, however, the parties "agree that provisional remedies were not at issue in this case." 270 Or App at 238 n.1.

> fact that such a remedy could not or would not be granted by the court is not a ground for refusing to confirm an award under ORS 36.700 or for vacating an award under ORS 36.705.

The Court of Appeals also relied on ORS 36.695(3), but introduced for the first time in this litigation a theory never before raised by Tenant, the arbitrator, or the trial court; namely, the notion that ORS 36.610(1) allows parties to an arbitration to waive or vary the effect of ORS 36.695(3) only if certain “magic words” are used to do so.

The Court of Appeals’ analysis is best encapsulated in this paragraph near the end of the opinion:

> The parties specified that the "issue to be resolved" by the arbitrator was whether tenant or landlords were liable under the lease for the cost of the required storm water drainage improvements. The parties did not *explicitly agree*, in their stipulation, to "waive" or "vary the effect" of the arbitrator's *authority* to "order such remedies as the arbitrator consider[ed] just and appropriate under the circumstances of the arbitration proceeding." ORS 36.695(3). Furthermore, there is no indication in the stipulation that they intended to do so. Thus, we conclude, as a matter of law, that the provision of the parties' stipulation specifying the "issue to be resolved," in the context of the stipulation as a whole, does not indicate an intent to waive or vary the effect of the arbitrator's broad statutory authority to "order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding." ORS 36.695(3).

270 Or App at 244 (emphasis added). As noted below, there are serious analytical problems with the Court of Appeals' reasoning contained in the above-quoted paragraph.

1. The Stipulation Unambiguously Did Vary the Arbitrator's Authority.

The Court of Appeals concluded that the parties did not intend to waive or vary the arbitrator's authority, but that flies in the face of the plain language of the Stipulation to Arbitrate and Limit Claims, as well as all of the extrinsic evidence. Indeed, if the parties did not intend to limit the arbitrator's authority, then what was the purpose of the Stipulation? In fact, the parties dismissed every claim and every remedy allowable under such claims, leaving the arbitrator to decide just one narrow issue.

The Court of Appeals implies that some kind of explicit language or "magic words" are needed to waive the provisions of ORS 36.695(3), but that is simply not the case. Nothing in ORS 36.610(1) indicates precisely how the parties must go about waiving or varying the requirements of the Uniform Arbitration Act. The statute merely states that a party to an arbitration agreement "may waive, or the parties may vary the effect of, the requirements of ORS 36.600 to 36.740 to the extent permitted by law."

The legislature, if it truly wanted to delineate a specific procedure that must be followed for a waiver to occur in a specific situation, certainly

knows how to devise one. The Oregon Revised Statutes are replete with examples of the legislature doing so. Some are as simple as merely requiring that a waiver be in writing. *See*, *e.g.*, ORS 731.414(2) ("[T]he director shall refuse, suspend or revoke the certificate of authority only after a hearing granted to the insurer, unless the insurer waives such hearing in writing."). Others require something more than a mere written waiver. *See*, *e.g.*, ORS 65.347(1) ("[T]he waiver must be in writing, must be signed by the director entitled to the notice, must specify the meeting for which notice is waived and must be filed with the minutes or the corporate records.").

ORS 107.136 – which addresses the reinstatement of spousal support obligations – actually requires a reference to the statutory provision being waived. ORS 107.136(6) states: "At any time, the parties may waive their rights under this section in writing, signed by both parties *and referencing this section*." (Emphasis added). The Court of Appeals' apparent position herein is that ORS 36.610(1) is precisely that type of statute, i.e., one that requires direct reference to the statutory provision being waived.

But nothing in ORS 36.610(1) requires that type of specificity in order for a waiver to occur – the Court of Appeals simply wrote such a requirement into the statute when it stated that the parties "did not *explicitly*

agree, in their stipulation, to 'waive' or 'vary the effect' of the arbitrator's authority * * *."

Such a conclusion cannot withstand even minimal scrutiny. Although it is true that "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," *Johnson v. Swaim,* 343 Or 423, 431, 172 P3d 645 (2007), Oregon law is equally clear that a waiver can occur "expressly or by implication." *Guardian Management, LLC ex rel. Villa v. Zamiello,* 194 Or App 524, 529, 95 P3d 1139 (2004). This certainly occurred in the instant case – the parties specifically agreed in writing that "[t]he only issue to be resolved through arbitration" was liability for the cost of the DEQ upgrade. (ER-2). Even if such a clear waiver was not contained in a signed writing, the parties and their attorneys conducted themselves in such a way that such a waiver could clearly be implicated.

2. The "Waive or Vary The Effect" Language in ORS 36.610(1) Applies To "Requirements" Of the Uniform Arbitration Act and Not To An Arbitrator's "Authority."

Even if ORS 36.610(1) does somehow require parties to explicitly waive *requirements* contained in the Uniform Arbitration Act, the Court of Appeals nonetheless reached an erroneous conclusion in this case because it conflated the "requirements" of arbitration with the arbitrator's "authority."

As noted above, ORS 36.610 states that a party to an arbitration agreement "may waive, or the parties may vary the effect of, *the requirements* of ORS 36.600 to 36.740 to the extent permitted by law." It is axiomatic that not every word used or provision set out from ORS 36.600 to ORS 36.740 is a "requirement." The Court of Appeals, however, has re-written that statute to broadly apply to an arbitrator's statutory *authority* when it stated in its opinion that the parties "did not explicitly agree, in their stipulation, to 'waive' or 'vary the effect' of the arbitrator's *authority* to 'order such remedies as the arbitrator consider[ed] just and appropriate under the circumstances of the arbitration proceeding.'" 270 Or App at 244 (emphasis added).

Webster's Third New International Dictionary defines "requirement" to mean:

> *Something required* : **a :** something that is wanted or needed **:** NECESSITY <production was not sufficient to satisfy both civilian and government ~s for automobiles> <permit agriculturalist to buy the ~s upon favorable conditions – nineteenth century> **b :** *something called for or demanded **:** a requisite or essential condition* **:** a required quality, course, or kind of training < two ~s are necessary … for a material to rate as an insulation – P.D. Close> <the doctoral student must satisfy the language ~ – H.R.Bowen> <fulfill the ~s for college entrance>

WEBSTER'S THIRD NEW INT'L DICTIONARY, 1929 (unabridged ed. 2002 – emphasis added). The same dictionary defines the word "require" to mean, among other things,

> to demand as necessary or essential (as on general principles or in order to comply with or satisfy some regulation) : make indispensable <the inference ... is not absolutely required by the facts – Edward Sapir> <no religious test shall ever be required as a qualification – *U.S. Constitution*>

WEBSTER'S THIRD NEW INT'L DICTIONARY, 1929 (unabridged ed. 2002). The Uniform Arbitration Act contains many requirements – *e.g.*, ORS 36.625 specifies the mechanism for compelling arbitration – but the Act does not *require* that arbitrators must have the authority to order such remedies as the arbitrator considers just and appropriate under the circumstances – ORS 36.695(3) merely states that an arbitrator "may" order such remedies. Nothing is "required" of either the parties or the arbitrator under this section. Therefore, the "waiver" and "vary the effect" language of ORS 36.610(1) cannot reasonably be applied to ORS 36.695(3).

3. The Court of Appeals' Analysis Ignored the Word "Only" In Describing The Agreement Between The Parties.

Even if an arbitrator's authority pursuant to ORS 36.695(3) could somehow be interpreted to constitute a waivable "requirement" of the Uniform Arbitration Act, the Stipulation to Arbitrate and Limit Claims

stated that "[t]he *only* issue to be resolved through arbitration is whether Plaintiff, as tenant, or Defendants, as landlord, are liable under the lease *** for the cost of storm water drainage improvements ***." (ER-2). Although the Court of Appeals, in its opinion, does initially set out the full text of the above-quoted section, the word "only" is ultimately discarded by the time the holding is rendered. The second to the last paragraph of the Court of Appeals' opinion states in part: "The parties specified that the '*issue to be resolved*' by the arbitrator was whether tenant or landlords were liable under the lease for the cost of the required storm water drainage improvements." 270 Or App at 244 (emphasis added).

But that was not what the parties specified. The parties actually agreed that "[t]he *only* issue to be resolved through arbitration" was liability for the cost of the DEQ upgrade. (ER-2 – emphasis added). The word "only" was not mere superfluous verbiage. Indeed, that single word – or a synonym thereof – *guided the scope of the arbitration itself* as well as a significant portion of the post-arbitration proceedings.

The parties' attorneys acknowledged that such wording limited the presentation of evidence. Tenant's counsel confirmed that "the sole issue for resolution" at arbitration was "the liability for the DEQ compliance work." (ER-4). The Landlords' attorney acknowledged that the Stipulation

"contained a conscious decision to submit a very narrow legal issue to the arbitrator," and that this narrow focus lead to his decision *not* to call any witnesses except his client. (ER-41). The arbitrator himself acknowledged the limited scope of the proceeding when he wrote in his opinion letter that the parties "agreed to a binding arbitration of a *single issue* in this action ..." (ER-10 – emphasis added). Tenant's proposed Arbitration Award and accompanying letter – as well as Landlords' Objections to the form of the proposed award – reiterated that parties' understanding of the very limited issue that the arbitrator was asked to decide. It was only after the objections were presented that the arbitrator discarded the very clear mandate he was given and instead opted to make rulings far outside the narrow scope of the arbitration agreement.

4. The Matter of What Remedies To Award Can Certainly Be An "Issue" In a Case.

Webster's Third New International Dictionary defines "issue" to mean: "a point in question of law or fact; specif **:** *a single material point* in law or fact depending in a suit that is affirmed by one side and denied by the other and that is presented for determination at the conclusion of the pleadings." WEBSTER'S THIRD NEW INT'L DICTIONARY, 1201 (unabridged ed.

2002). *Black's Law Dictionary* 745 (5th ed 1979) similarly defines "issue" to mean:

> A single, certain, and material point, deduced by the allegations and pleadings of the parties, which is affirmed on one side and denied on the other. A fact put in controversy by the pleadings; such may either be issues of law or fact. *An "issue" is a disputed point or question to which the parties to action have narrowed their several allegations and upon which they are desirous of obtaining either decision or court on question of law or of court or jury on question of fact.*

(Emphasis added).

The Court of Appeals in this case defined "remedy" as "'[t]he means of enforcing a right or preventing or redressing a wrong; legal or equitable relief.'" 270 Or App at 240 (quoting *Black's Law Dictionary* 1407 (9th ed 2009)). Implicit in the Court of Appeals' decision is the notion that a "remedy" cannot be an "issue" to be decided in a case. But the appropriate remedy to award in a particular situation can, of course, be *an issue* for a judge or jury to decide. *See, e.g., Hammer v. Oregon State Penitentiary, Corrections Division*, 283 Or 369, 372, n 2, 583 P2d 1136 (1978) ("Since the Dixon case dealt only with the substantive question of whether a hearing was in fact required, and not with *the issue of remedies*, we see no reason to reconsider the propriety of the remedy we granted in *Hammer I* * * *" – emphasis added). However, when the parties specifically agreed that only a

single issue is to be resolved by the arbitrator, then the matter of appropriate remedies was removed as an issue that was within the arbitrator's purview.

5. There Were No "Claims" Upon Which the Arbitrator Could Decide Remedies.

The parties, however, agreed to more than merely limiting the arbitration to the resolution of a single issue. Following the execution of the Stipulation to Arbitrate and Limit Claims, there were, in fact, no remaining claims.

Landlords raise this point because many appellate cases addressing whether an arbitrator exceeded his or her authority deal with situations where the arbitration agreements are very broadly written to cover any controversy arising out of a dispute. The Court of Appeals cited one such case, to-wit: *Seller v. Salem Womens Clinic, Inc.*, 154 Or App 522, 963 P2d 56, *rev. den*., 328 Or 40, 977 P2d 1170 (1998). In *Seller*, the arbitrator was given the authority to decide "any controversy, dispute, or claim of whatever nature" arising out of the dissolution of a corporation. 154 Or App at 527.

The arbitration agreement in the instant case stands in stark contrast to the one in *Seller* and cases like it. This is particularly so, given that as part of the arbitration agreement, the parties agreed that "all claims" other than the DEQ issue "will be dismissed by the Parties with prejudice." (ER-2). By dismissing all claims, the parties deprived the arbitrator of authority to order

remedies, including the entry of a money judgment in favor of Tenant. *Cf. Laquer v. Falcone*, 165 So3d 19 (D.C. App Fla, 2015) (voluntary dismissal of cross-claims deprived arbitrator of subject matter jurisdiction over cross-claims).

The reason that a dismissal of all claims must necessarily include the removal of all remedies from the picture is because a remedy is an essential part of a claim. *See Drews v. EBI Companies*, 310 Or 134, 147, 795 P2d 531 (1990) (noting that for claim preclusion purposes, "claim" includes "all rights *or remedies* between the parties with respect to all or any part of a transaction, or series of connected transactions, out of which the action arose." – emphasis added). *See also Stowell v. R.L.K. and Co.*, 66 Or App 567, 571, 675 P2d 1074 (1984) (the doctrine of res judicata defines a "claim" as an aggregate of facts "entitling a party to some form of relief.").

The determination of a disputed *issue*, however, does not automatically require the determination of a remedy as well. The parties in the instant case did not request that the arbitrator resolve matters concerning remedies. The parties simply wanted the arbitrator to determine the single issue of who was liable under the lease for the cost of the DEQ upgrades.

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6. ORS 36.705(1)(d) Must Be Interpreted To Have Meaning.

ORS 36.705(1)(d) states that a court shall vacate an arbitration award if the arbitrator "exceeded the arbitrator's powers[.]" The Court of Appeals utterly ignored that statute – it never analyzed its meaning or discussed under what circumstances that statute might be given force. In fact, the Court of Appeals made no effort to reconcile ORS 36.705(1)(d) with other sections of the Uniform Arbitration Act such that all of the language therein would have effect.

That is error. When the legislature approved that particular legislation, it intended that the statutory sections be read together to form a coherent arbitration program. *See Quintero v. Board of Parole and Post-Prison Supervision*, 329 Or 319, 324, 986 P2d 575 (1999) ("This court's stated goal [is] giving effect to every provision of a statute."). In particular, the language of ORS 36.695(3) must be compatible with ORS 36.705(1)(d). One section should be given as much weight as the other.

Under the Court of Appeals' interpretation, however, ORS 36.705(1)(d) could never have any application unless the parties to an arbitration agreement explicitly waived certain language of ORS 36.695(3). Yet ORS 36.705(1)(d) does not state this is a necessary condition in order to

trigger the statute's effectiveness. Certainly the legislature did not put any such language in the statute.

In short, the Court must construe the statute as whole, and this means giving effect to ORS 36.705(1)(d), a statute enacted to ensure an arbitrator does not exceed his or her authority. That statute should be applied here.

G. Conclusion

After issuing his award, the arbitrator attempted to justify why he issued rulings beyond the single issue mandated by the parties in their agreement:

> "If my authority had been limited to a simple declaration one party or the other was legally obligated to pay the mandated construction costs, the plaintiff would have taken my binding declaration to the court, and the court, in all likelihood, would have imposed the same remedies as those found in the arbitration award. The only difference would be additional delay and additional costs to the parties, including an even greater award of attorney fees against the defendants."

(ER-31). The arbitrator later wrote that he crafted the award the way he did in order to avoid "opportunities for mischief." (ER-37).

Nearly two-and-a-half years have passed since the arbitrator wrote his "opportunities for mischief" letter – and tens of thousands of dollars in

attorney fees have been incurred – because the arbitrator issued rulings that neither party authorized nor requested.

Landlords request that this Court correct that error, reverse the trial court and the Court of Appeals, vacate the arbitration award, and order the arbitrator to issue an award consistent with the Stipulation to Arbitrate and Limit Claims signed by the parties in 2012.

DATED this 26th day of August, 2015.

/s/ Charlie Ringo
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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 5,139 words.

Type Size

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 26th day of August, 2015.

/s/ Charlie Ringo
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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2015, the foregoing BRIEF ON THE MERITS OF PETITIONERS ON REVIEW was electronically served on the following named attorneys:

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