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## I. ASSIGNMENTS OF ERROR

### *Assignments of Error*

- A. The Trial Court erred in ordering Plaintiff and Appellant Alpacas of America (“AOA”) and Defendant and Respondent James Ayers to arbitration *sua sponte* and pursuant to the wrong contract, at a hearing where arbitrability was not at issue and was not briefed.
- B. The Trial Court erred in confirming the arbitrator’s award when the arbitrator lacked subject matter jurisdiction over the case, since the dispute resolution clause in the governing contract conferred jurisdiction and venue on the Thurston County Superior Court and gave AOA the option of making a written demand for arbitration, a demand that AOA never made.
- C. The Trial Court erred in confirming the arbitrator’s award when there were errors of law on the face of the arbitration award, meaning that the arbitrator exceeded his powers pursuant to RCW 7.04A.230(1)(d).

### *Issues Pertaining to Assignments of Error*

- A. Does the doctrine of merger provide that the dispute resolution clause in a superceding contract between the parties governs, rather than the dispute resolution clause in a superceded contract between the parties?
- B. In the case of contractual arbitration, does the arbitrator’s subject matter jurisdiction arise from the agreement of the parties?
- C. Can a party raise the issue of lack of subject matter jurisdiction at any time in a proceeding?
- D. When an arbitrator lacks subject matter jurisdiction, is the arbitrator’s award void?

- E. Must a court vacate an arbitrator's award that contains errors of law on the face of the award?

## II. SUMMARY OF ARGUMENT

Alpacas of America ("AOA") and James Ayers were ordered to proceed to arbitration pursuant to the arbitration clause in the original sales contract where AOA sold the alpaca, Super Nova of Peru D550, to Mr. Ayers. However, that original contract had been superceded twice by two new superceding contracts between the parties. There was the first exchange contract where Mr. Ayers exchanged Super Nova for Atotonilco NT 1019 ("Ato") and there was the second exchange contract where Mr. Ayers gave Ato back to AOA in return for Super Nova. This second exchange contract provided that venue for any dispute concerning the contract would be Thurston County Superior Court, while giving AOA the option to choose arbitration in Thurston County.

The doctrine of merger provides that it is this dispute resolution clause in the last contract between the parties – the second exchange contract – that governs. AOA never opted to choose arbitration. Rather, the Trial Court *sua sponte* ordered the parties to arbitration, a tribunal never elected by AOA, in the wrong county (Snohomish, not Thurston) after Mr. Ayers argued the unbriefed issue of arbitrability at the hearing on

his Motion for Proper Venue and handed the Trial Court an unauthenticated copy of the original, superceded, sales contract when Mr. Ayers knew the contract had been superceded by two separate exchange contracts that contained different venue clauses. The Trial Court, on its own motion, then ordered the parties to arbitration in Snohomish County, based upon the superceded contract. The arbitrator therefore lacked subject matter jurisdiction over the controversy.

AOA never sought arbitration, and even moved the Trial Court to strike arbitration, a motion that the Trial Court denied. Complying with the Trial Court's order, AOA proceeded to arbitration. The arbitrator issued an award of \$10,000.00 to Mr. Ayers. The award had errors of law on its face. Mr. Ayers moved the Trial Court to confirm the award. AOA responded and moved the Trial Court to vacate the award for the arbitrator's lack of subject matter jurisdiction and because he had exceeded his authority by issuing an award with errors of law in its face. The Trial Court did recognize the errors on the face of the award, and also recognized the arbitrator's lack of subject matter jurisdiction. However, he thought that perhaps AOA had waived the issue by participating in the arbitration, even though subject matter jurisdiction can be raised at any time, even on appeal. He remanded the award to the arbitrator for

consideration of AOA's two grounds for vacation. The arbitrator issued an amended award, in which he did not correct the errors in law, but in fact made them worse. He ignored the issue of waiver.

Mr. Ayers again sought to have the amended award confirmed. Likewise, AOA again sought to have it vacated for lack of subject matter jurisdiction and for the errors of law on its face. Instead of vacating the award, the Trial Court confirmed it, despite the continuing errors on the face of the award and the arbitrator's lack of subject matter jurisdiction.

### **III. STATEMENT OF THE CASE**

On February 6, 2002, Mr. Ayers and his then wife purchased the female alpaca Super Nova of Peru D550 from AOA for \$21,500.00, entering into a purchase and sales contract to do so. CP 130-31. The dispute resolution clause in the sales contract provided "Should any dispute arise concerning this Contract, the parties shall submit the matter to arbitration before an arbiter in Snohomish County, Washington, agreed upon by both parties." CP 131. The sales contract required AOA to provide a health certificate and an insurance exam for the animal, which it did. CP 132. Mr. Ayers had the option to examine the alpaca before signing the contract, which he did not. *Id.*

After Super Nova failed to conceive and bear a cria (a baby alpaca) Mr. Ayers grew dissatisfied with her. The sales contract with AOA gave Mr. Ayers a remedy in that case. CP 131. It allowed Mr. Ayers to exchange Super Nova for another animal of equal quality. *Id.* Mr. Ayers exercised that remedy. Since Mr. and Mrs. Ayers already owned several female alpacas, they opted to exchange Super Nova for a male alpaca, Atotonilco NT 1019 (“Ato”), with the intention of breeding him to their females. They entered into an exchange contract, a new contract superceding the original sales contract, with AOA whereby they exchanged Super Nova for Ato. CP 132-33. (Mr. and Mrs. Ayers were, at the time, separated and contemplating divorce. Mr. Ayers signed the exchange contract on April 10, five months before Mrs. Ayers did so, on September 3, 2003. CP 133.) Thereafter the parties were governed by that first exchange contract.

The first exchange contract was similar to the sales contract in that AOA was to provide a health certificate and an insurance exam for Ato, which it did, and in that Mr. Ayers had the opportunity to inspect Ato before signing the contract, which he did not do. CP 133. In other important respects the first exchange contract differed significantly from the sales contract. Where the superceded sales contract made warranties

that Super Nova would be anatomically correct in the reproductive system and capable of conceiving and bearing a live cria (CP 130), the superceding exchange contract expressly disavowed any warranties. “Each alpaca is exchanged ‘AS IS’ WITHOUT ANY WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, EXCEPT AS STATED HEREIN.” CP 132. The dispute clause in this exchange contract also differed slightly from the sales contract: the superceding exchange contract provided “Should any dispute arise concerning this Contract, the parties shall submit the matter to binding arbitration conducted in the State of Washington.” CP 133; *cf.* CP 131.

After Mr. and Mrs. Ayers exchanged Super Nova for Ato, they decided to divorce. At that time, they lived in Colorado in Fremont County. The Fremont County District Court had jurisdiction over their divorce. During the course of their divorce proceedings, Mr. Ayers sought help from AOA in valuing the alpacas owned by the marital community. Mr. Ayers wrote a letter to Randy Snow, AOA’s general manager, in which he provided a range of values for each animal that he owned. He asked Mr. Snow to confirm these values. CP 134-35. Mr. Ayers valued Ato at \$45,000.00 - \$50,000.00. CP 134. Mr. Snow wrote back, confirming Mr. Ayers’s valuation. CP 136-37. Mr. Snow testified, at

Mr. Ayers's request, as an expert witness on Mr. Ayers's behalf in the divorce case as to the values of the alpacas, testifying that Ato was worth between \$45,000.00 and \$50,000.00. The judge in that case divided the marital alpacas. Mr. Ayers received Ato in the divorce, but no females to which he could breed Ato.

Since Ato was useless to Mr. Ayers, he decided to exchange him back for Super Nova. He wrote a letter to AOA, requesting such an exchange. In that letter, he wrote: "I know that I will be losing a great deal of money because Atotonilco is worth twice as much as Super Nova, but I need a female. I know that she is not breed and may never be breed, but that a chance I'm willing to take" [sic]. CP 138. While AOA was not obligated under the first superceding exchange contract to exchange the alpacas a second time (CP 132), in a spirit of generosity and good will – and relying on Mr. Ayers's assurances in his letter that he accepted all the risk – AOA allowed Mr. Ayers to exchange Ato back for Super Nova.

On January 28, 2005, the parties entered into a second superceding exchange contract. CP 139-40. Thereafter, they were governed by the second exchange contract. As in the first superceding (and now superceded) exchange contract, AOA made no warranties: "The alpaca(s) exchanged to the Buyer is (are) exchanged 'AS IS' WITHOUT ANY

WARRANTY OF ANY KIND, EXPRESS OR IMPLIED.” CP 139. The dispute resolution clause, however, was different:

Should any dispute arise concerning this Contract, the parties agree that venue of any action shall be in the Superior Court of Washington for Thurston County,; [sic] provided at Seller’s option, the parties shall submit the matter to binding arbitration conducted in Thurston County, State of Washington. . . . Seller may give notice of intent to arbitrate and file a demand for arbitration. . . .

CP 140. This contract provision placed the option to submit any contract dispute to arbitration squarely with AOA; Mr. Ayers had no such option under the contract. Further, any arbitration elected by AOA was to occur in Thurston County.

Despite having assured AOA that he knew that Super Nova had never been bred and might never be bred (CP 138) and accepting all risk of any infertility, Mr. Ayers grew dissatisfied once again with Super Nova for her failure to conceive. He had her examined by a veterinarian, who diagnosed her as having “what is believed to be an endocrine induced, congenitally defective, non-functional reproductive tract.” CP 33. He began a campaign of defamation, printing out flyers that appropriated AOA’s business likeness that it used for its alpaca auctions on which he accused AOA of selling “*genetically* defective” alpacas and of having poor customer service. CP 234-35; 237-39; 247; 249; 251-52 (emphasis

added). He mailed out these flyers to members of the alpaca community in the United States. *Id.* As a direct result, AOA suffered a high number of cancellations at its next alpaca auction and its revenues sharply decreased. CP 253-54.

AOA filed suit against Mr. Ayers in Thurston County Superior Court, seeking an injunction against Mr. Ayers as well as damages for breach of contract, defamation, intentional interference in contract, and tortious intermeddling in business dealings. CP 4-8. AOA's one breach of contract claim was that Mr. Ayers had failed to pay agistment for the alpaca boarding at AOA's ranch. CP 5. Pursuant to the second exchange contract, jurisdiction and venue were proper in Thurston County Superior Court. *Id.* The doctrine of merger meant that it was the second exchange contract – with its dispute resolution clause – that governed. Mr. Ayers decided to appear *pro se* and defend himself.

Mr. Ayers chose to contest jurisdiction and venue. He brought a “Motion for Proper Venue” to the Court. CP 17-18. He argued that the correct venue for contract claims was Washington State but that AOA's tort claims needed to be heard in the state of his residence, New Mexico. CP 18. Mr. Ayers did not raise the issue of arbitrability in his motion, nor did he seek arbitration. AOA opposed this motion and briefed the issues

that Mr. Ayers raised, on venue in Washington versus venue in New Mexico, but did not address arbitrability, as it was not at issue. CP 65-70.

At the hearing on Mr. Ayers's Motion for Proper Venue, Mr. Ayers spontaneously produced an unauthenticated copy of the original, superceded, sales contract, but not the first superceding exchange contract or the second superceding exchange contract, even though the doctrine of merger meant that the second superceding exchange contract governed. CP 151. Pointing to the original, superceded sales contract, Mr. Ayers argued that the contract matter should be before an arbitrator in Snohomish County. *Id.* This issue was not even before the Trial Court that day. AOA's attorney, not having briefed arbitrability, was unprepared to address the issue, but nonetheless made appropriate and timely, if inartfully worded, objections. AOA's attorney said, "it also states arbitration in one [contract], but he hasn't brought a motion to compel arbitration and you can also waive an arbitration clause in a contract" *Id.*

In fact, there were two other contracts that Mr. Ayers did not give the Trial Court: the first superceding (and superceded) exchange contract, which provided for arbitration in Washington state, not specifically in Snohomish County, and the second superceding exchange contract in which the parties *agreed* that the Thurston County Superior Court had

jurisdiction and venue over any contract disputes. The second superceding exchange contract also gave AOA the option to demand arbitration in Thurston County. By entering into the first superceding exchange contract and the second superceding exchange contract, Mr. Ayers *waived* the arbitration clause in the original superceded sales contract.

The Trial Court walked Mr. Ayers through the appropriate steps to request arbitration (appropriate, that is, where the parties have agreed to contractual arbitration, as *had* been the case between Mr. Ayers and AOA before they superceded the original sales contract and the first exchange contract by entering into the second, superceding exchange contract that put venue and jurisdiction with the Thurston County Superior Court). The Trial Court said:

The contracts say that if there are issues in regard to contract, they're to be dealt with by arbitration. Now, Mr. Cushman is correct. You haven't moved to have this matter go to arbitration. I'm not going to tell you what you should do or you shouldn't do, I want you to understand that, but that is what the contract says. Do you want to waive the issue of arbitration? Do you want more time to think about it or do you want to request that arbitration take place as to the contract claim?

CP 153. In court, acting on the legal counsel from the bench, Mr. Ayers requested arbitration. "I'd like to request – abide by the contract that I went to for arbitration." *Id.* *AOA did not request arbitration. Id.*

The hearing continued with the Trial Court instructing Mr. Ayers how to proceed:

THE COURT: It's quite clear that that arbitration is to occur in Snohomish County with an arbitrator that's mutually agreed upon and it is binding. And so as to the contract disputes, based on your request, and I would ask that you make that in a written motion --

MR. AYERS: For the arbitration, Your Honor?

*Id.* Next, the Trial Court indicated how it would decide the motion for arbitration that Mr. Ayers had not yet made and to which AOA had had no chance to respond: "I'm going to stay the contract matter before the court pending arbitration that will take place pursuant to the contract." *Id.*

In fact, Mr. Ayers made no written motion for arbitration, then or ever. On the same day that Mr. Ayers first raised the issue of arbitrability, the Trial Court signed an order directing the parties to arbitration. CP 71.

While obeying the Trial Court's order, AOA never consented to arbitration in any way. AOA never agreed with Mr. Ayers on choosing an arbitrator. Mr. Ayers, in fact, moved the Trial Court to appoint an arbitrator. CP 72-73. The Trial Court did so.

On June 29, 2007, Mr. Ayers sent AOA's attorneys a check for \$1,000.00 in payment for Super Nova's agistry fees, AOA's claim for which was \$1,639.68. CP 155. AOA accepted this check in compromise

and settled its one contract claim against Mr. Ayers. CP 156. With its one contract claim settled, it was AOA's position that there was nothing left to arbitrate. Mr. Ayers had filed a counterclaim against AOA. CP 57-64. In his counterclaim, he alleged that AOA breached its contract with Mr. Ayers, "Plaintiff Alpacas of America was breeched original Sales Contract, terms, conditions, warranties of its contracts in its business dealings which has damaged Defendant in an amount to be proven at trial." CP 62. He did not, however, allege how AOA supposedly breached the contract nor did he allege any contractual duties that AOA breached. Having settled its one contract claim, and seeing that Mr. Ayers had no cognizable contract claims under the superceded contract or either of the two superceding contracts, AOA moved that the arbitration be stricken. CP 85-93. The Trial Court denied the motion. CP 121-22.

Pursuant to the Trial Court's order, the parties proceeded to arbitration on October 2, before the court-appointed arbitrator. At the arbitration, it became clear that the breach alleged by Mr. Ayers was that Ato was worth less than Super Nova. Hence, Mr. Ayers argued, the first exchange was unfair. While there was a question of fact as to the value of Ato (Mr. Ayers's expert at arbitration valued Ato at \$1,000.00 (RP 10/26/07 at 11), contradicting Mr. Ayers's own valuation of Ato at

\$45,000 - \$50,000 in his divorce), if Ato was worth less than Super Nova, then any unfairness in the first exchange was cured by the second exchange, under which Mr. Ayers got Super Nova back. It was indeed true, then, that Mr. Ayers had no cognizable contract claims – even on the evidence Mr. Ayers submitted to the arbitrator – and that it was unnecessary for the parties to have proceeded to arbitration. His claim at arbitration was that Ato, who he got in the first exchange, was not worth what he paid for Super Nova originally. By then, however, he had gotten Super Nova back under the second superceding exchange contract and had assumed the risk she was not worth as much as Ato.

On October 9, 2007, the arbitrator issued his award. His award contained errors of law on its face. CP 157-58. The most fundamental problem was that he awarded \$10,000.00 to Mr. Ayers because he held that Ato was of less value than Super Nova. *Id.*; RP 10/26/07 at 11. However, Mr. Ayers no longer owned or possessed Ato, making Ato's value or alleged lack thereof immaterial. Mr. Ayers owned Super Nova, and presented no evidence of her value at arbitration. CP 218. In addition, the arbitrator held that there was a mutual mistake of fact concerning Super Nova's gender, and recited the wrong legal remedy for mutual mistake of fact: "In such an instance, the trier should try to do

equity to correct the mistake to the extent practicable.” CP 157.

Further, the arbitrator ignored the actual terms of the sales contract, which only required AOA to provide Mr. Ayers with a health certificate and an insurance exam for Super Nova, which it did, and gave Mr. Ayers the option of inspecting Super Nova, which he did not do. CP 131.

Instead, he held that both parties “breached the sales contract by failing to properly inspect Supernova [sic] before the sale.” CP 157. He made an inaccurate and erroneous holding: “Mr. Ayers has had the use of the alpacas for the intervening period and will retain ownership of Ato 1019 after this award.” *Id.* Both alpacas were actually at AOA’s facility (where Super Nova incurred agistment fees) until Super Nova was returned to Mr. Ayers sometime after the second exchange. Pursuant to the second exchange contract, AOA, not Mr. Ayers, acquired ownership of Ato. CP 139-40.

Mr. Ayers moved the Trial Court for confirmation of the arbitrator’s award. CP 123-27. AOA responded, raising the issue of the arbitrator’s lack of subject matter jurisdiction. AOA argued that the doctrine of merger meant that the second superceding exchange contract, with its dispute resolution clause, governed. Pursuant to the second superceding exchange contract, jurisdiction and venue were proper in

Thurston County Superior Court. The second exchange contract gave AOA the option of choosing arbitration in Thurston County, which AOA never did. Since AOA never chose arbitration, the arbitrator lacked subject matter jurisdiction. AOA also argued that the arbitrator exceeded his authority by issuing an award that contained errors of law on its face. CP 162-75. AOA requested that the Trial Court vacate the award instead of confirming it.

At the hearing on Mr. Ayers's Motion for Confirmation, the Trial Court declined to vacate the award for lack of subject matter jurisdiction. While he recognized that the arbitrator lacked subject matter jurisdiction, he explained that AOA's argument was not compelling "in that they submitted themselves to arbitration." RP 10/26/07 at 16. The Trial Court did agree with AOA that there were errors of law on the face of the award. "And the most glaring concern that this Court has is that it appears that the arbitrator awarded \$10,000 to Mr. Ayers because he felt that Ato was of less value than Super Nova, and yet, Mr. Ayers has Super Nova, not Ato." *Id.* The Trial Court remanded the matter to the arbitrator for him to consider both grounds for vacation that AOA urged. *Id.*

The Trial Court noted that if, indeed, the arbitrator lacked subject matter jurisdiction in the case of contractual arbitration under RCW

Chapter 7.04A as AOA maintained, that the amount in controversy was such that the case would be subject to mandatory arbitration under RCW Chapter 7.06. *Id.* at 17. In that event, as well, concluded the Trial Court, the arbitrator could still have heard the case. *Id.* Knowing that parties have different rights and remedies in the different classes of arbitration, contractual and mandatory, and unsure as to whether the Trial Court had actually held that the arbitration was mandatory, not contractual, AOA sought clarification. CP 176. Mr. Ayers responded, CP 177-78, and AOA replied, CP 194-95.

In the hearing on AOA's Motion for Clarification, the Trial Court stated that it appeared that "even if there was not jurisdiction under contract, that there would be jurisdiction for arbitration under the mandatory arbitration rules of this Court." RP 11/02/07 at 10. Further, "if, indeed, there is mandatory arbitration and there is an award, the losing party or the party that does not prevail has the right to request a trial de novo. Well, we haven't gotten there yet. The matter is going back to the arbitrator." *Id.* at 10-11.

The Trial Court also expanded on its decision to not vacate the award for the arbitrator's lack of subject matter jurisdiction. The Trial Court explained that AOA's counsel "suggested to me that an issue

regarding jurisdiction can be raised at any time. While that's generally true, I think that the issue of jurisdiction to arbitrate may very well be waived, as well." RP 11/02/07 at 8-9. Finally, the Trial Court stated what it wanted the arbitrator to consider on remand:

I want the arbitrator not only to look at the situation of what was argued about which contracts and whether or not there is jurisdiction, but I want the arbitrator to consider what I believe may very well be a mistake as far as facts, and I've already outlined what that would be. It involves the two different alpacas, and that is whether or not the arbitrator was mistaken as to which alpaca was in the possession of Mr. Ayers at the time. He seems to think that it was Ato. . . .

*Id.* at 9. The Trial Court saw that the only way the arbitrator could have awarded \$10,000.00 based on Ato's perceived lack of value was if he mistakenly thought that Mr. Ayers owned Ato, not Super Nova.

After Mr. Ayers resubmitted the matter to the arbitrator and the arbitrator considered the parties' pleadings, the arbitrator issued an amended award. CP 202-205. In the amended award, the arbitrator corrected what he deemed a "scrivener error." CP 202. He wrote, "Mr. Ayers has had the use of the alpacas for the intervening period and will retain ownership of ~~Ato~~<sup>1019</sup> Supernova after this award" (emphasis as in original). *Id.* His use of the term "scrivener error" is telling. He knew that Mr. Ayers owned Super Nova, not Ato, yet he based his award to Mr.

Ayers on Mr. Ayers's expert's testimony on Ato's value.

In the amended award, he did not change the amount of the award to Mr. Ayers, nor did he address the Trial Court's fundamental concern with the award (how he could award damages to Mr. Ayers based upon the value of an alpaca Mr. Ayers did not own). Instead, he explained that his award was further based on a finding that the waiver of warranty language in the two superceding exchange contracts was unconscionable, a finding he did not make in his original award: "if the replacement animal is as inadequate as the original, fairness dictates that the seller make the buyer whole regardless of the inclusion of a limitation of liability provision." CP 203. Unconscionability was not even an issue at the arbitration. Further, if the arbitrator was basing his determination of unconscionability on the two superceding contracts, then logic compels that he must also apply the jurisdiction and venue clauses in the contracts, including the clause in the second superceding contract (that superceded all other contracts) that conferred jurisdiction and venue on the Thurston County Superior Court!

The arbitrator addressed the issue of subject matter jurisdiction as well, but not the issue of waiver. He found that the entire claim arose "from the breach of the 2002 original sales contract." CP 202. He ignored the subsequent superceding exchanges between the parties and Mr.

Ayers's acceptance of risk (CP 138) in his letter requesting the second exchange. He ignored the doctrine of merger and the dispute resolution clause in the second superceding exchange contract. He decided that the matter was before him on the first contract's arbitration clause, and hence, he concluded, the arbitration was contractual, not mandatory, and found therein what he believed to be a basis for jurisdiction. He did not address the Trial Court's question as to whether AOA had waived the right to raise the issue of subject matter jurisdiction by participating in the arbitration.

Mr. Ayers moved the Trial Court to confirm the amended award, CP 208-09, and AOA once again opposed the motion and asked the Trial Court to vacate the award for lack of subject matter jurisdiction and errors of law on the face of the award. CP 210-17. The Trial Court did not vacate the award, but confirmed it and entered judgement for Mr. Ayers. CP 220. AOA filed a notice of appeal and asks this Court to reverse the Trial Court's orders sending the parties to arbitration and the Trial Court's confirmation of the award and entry of judgment.

#### IV. ARGUMENT

##### A. The Trial Court Erred in Ordering the Parties to Arbitration

The Trial Court erred in ordering the parties to arbitration. The Trial Court did so at a hearing at which arbitrability was not even at issue. Mr. Ayers had submitted a Motion for Proper Venue where he argued that the courts of Washington State had jurisdiction over AOA's contract claim, but that the courts of New Mexico – the state of Mr. Ayers's residence – had jurisdiction over AOA's tort claims. CP 18. AOA, in its response, briefed the issues that Mr. Ayers raised.

At the hearing, Mr. Ayers produced what purported to be a copy of the original sales contract. CP 151. The Trial Court should not have admitted this document, inasmuch as it was not authenticated nor attached to a sworn affidavit or declaration. AOA, even though it was not on notice that it had to argue the issue of arbitrability, did argue that the dispute resolution clause in the original sales contract had been superseded and waived. It was error for the Trial Court to have *sua sponte* ordered the parties to arbitration based on this document. Further, the Trial Court realized that Mr. Ayers had made no motion for arbitration, as AOA's counsel pointed out. Instead of requiring the matter to be presented on

five days' notice, the Trial Court accepted an oral motion from Mr. Ayers – untimely and objected to by AOA – and *sua sponte* ordered arbitration in Snohomish County at that very hearing. CP 153; CP 71.

**B. The Trial Court Erred in Confirming an Arbitration Award that was Void for the Arbitrator's Lack of Subject Matter Jurisdiction**

After having been ordered, over AOA's objection, to arbitration by the Trial Court, AOA and Mr. Ayers proceeded to arbitration. After the arbitration, AOA continued to argue (AOA correctly cited to the second exchange contract in its complaint, CP 5) that the second exchange contract was the governing contract between the parties, and that pursuant to the second exchange contract, jurisdiction and venue were with the Thurston County Superior Court. Since the arbitrator lacked subject matter jurisdiction, his award was void. Lack of subject matter jurisdiction can be raised at any time, and AOA did not waive the issue by participating, under protest to the Trial Court, in the arbitration.

**1. The Doctrine of Merger Holds that Arbitration is at AOA's Option**

The doctrine of merger holds that it is the last contract between Mr. Ayers and AOA – the second superceding exchange contract – that is controlling as to the contractual rights and obligations of the parties.

“[W]hen parties adopt a written agreement as the expression of their intentions, that instrument becomes the contract, and all negotiations and understandings previous thereto become merged into the agreement.” Dix Steel Co. v. Miles Constr., Inc., 74 Wn.2d 114, 118, 443 P.2d 532 (1968); Vance v. Ingram, 16 Wn.2d 399, 410-11, 133 P.2d 938 (1943) (*citing* 3 Williston on Contracts, Rev. Ed., 1801, § 628). AOA and Mr. Ayers entered into three contracts during the course of this one Super Nova saga: the original sales contract, the first exchange contract, and finally, the second exchange contract.

Here, therefore, the original superceded sales contract and the first superceding (and later superceded) exchange contract merged into the second superceding exchange contract, a contract that specifically provides that jurisdiction and venue would be in Thurston County Superior Court. It is only at AOA’s option that the parties could submit any contract dispute to arbitration, and then only in Thurston County. AOA never exercised this option, never filed a demand for arbitration, and opposed arbitration, arguing for jurisdiction in Thurston County Superior Court. AOA only proceeded to arbitration because the Trial Court had so ordered, over AOA’s objection.

Often, under the doctrine of merger, the “negotiations and

understandings” that are merged into the final contract take the form of oral agreements or preliminary writings. However, the fact that the negotiations and understandings in this case are signed writings does not prevent the doctrine of merger from applying. The second exchange contract by its terms was intended to replace the first exchange contract which by its terms had replaced the original sales contract. Therefore, it is this second exchange contract that governs. Pursuant to the second superceding exchange contract, arbitration – only in Thurston County – was at the option of AOA, not Mr. Ayers. AOA chose not to exercise this option, but instead sued on all its claims in Thurston County Superior Court as the contract provided.

**2. Absent AOA’s Election, the Arbitrator Lacks Subject Matter Jurisdiction**

It is a truism to state that contractual arbitration is a creature of contract. The Court in Price v. Farmers Insurance Co. states “[a]rbitration traces its existence and jurisdiction first to the parties’ contract and then to the arbitration statute itself.” 133 Wn.2d 490, 496, 946 P.2d 388 (1997). Here, the parties’ contract put jurisdiction and venue with the Thurston County Superior Court but gave *AOA* the option to submit any contractual dispute to arbitration in Thurston County. AOA did not exercise that

arbitration option but sued in Thurston County Superior Court and opposed arbitration at the hearing on March 9.

The jurisdiction of an arbitrator (in the case of contractual arbitration, not mandatory arbitration) is directly parallel to that of a judge pro tem. Caselaw states: “A judge pro tem. . . is appointed to hear one particular case. He does not derive his authority from a general election, nor from an appointment by an executive officer, but his power to act is based upon the consent of the parties litigant to his appointment.” Nat’l Bank of Wash. v. McCrillis, 15 Wn.2d 345, 357, 130 P.2d 901 (1942); *see also* State v. McNairy, 20 Wn. App. 438, 440, 580 P.2d 650 (1978).

An arbitrator, like a judge pro tem, is appointed to hear one particular case. His power to act is based upon the parties’ consent to his appointment, in contrast to the power of the courts, the basis for which is constitutional and statutory. In National Bank, the Court held that since the basis of the judge pro tem’s appointment is the consent of the parties, “if there has been no consent, either in writing or orally in open court, he is without jurisdiction to hear the case, and the entire proceedings before him are void.” *Id.* at 359. This is on point. Here, the only contractual basis for the appointment of an arbitrator is found in the second exchange contract: a demand for arbitration by AOA. AOA made no such demand and never

consented to arbitration. AOA even refused to agree upon an arbitrator with Mr. Ayers, and the Trial Court had to appoint one. CP 72-73. Any arbitrator was without jurisdiction to hear the case.

### **3. Lacking Subject Matter Jurisdiction, the Arbitrator's Award is Void**

Lacking jurisdiction, a Snohomish County arbitrator could not exercise his power as arbitrator: "Jurisdiction over the subject matter of an action is an elementary prerequisite to the exercise of judicial power." In re Adoption of Buehl, 87 Wn.2d 649, 655, 555 P.2d 1334 (1976); Bour v. Johnson, 80 Wn. App. 643, 646, 910 P.2d 548 (1996). Since the arbitrator lacked subject matter jurisdiction and could not exercise his power, his award is void. "[A] court either has subject matter jurisdiction or it does not; if it does not, any judgment entered is void, and is, in legal effect, not judgment at all. In re Marriage of Furrow, 115 Wn. App. 661, 667, 63 P.3d 821 (2003); *citing* Wesley v. Schneckloth, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959). *See also* National Bank, 15 Wn.2d at 359 (without jurisdiction to hear the case, the entire proceedings before a judge pro tem are void) *and* McNairy (appellate court reversed the judgment of the judge pro tem for lack of jurisdiction and remanded the case for a new trial), 20 Wn. App. at 440. The Trial Court erred in not holding that the arbitrator's

award is void and in failing to vacate the award.

**4. AOA’s Challenge to the Arbitrator’s Subject Matter Jurisdiction Was Timely**

AOA objected to the Trial Court’s ordering arbitration at the March 9 hearing, arguing that Mr. Ayers had waived the first arbitration clause by the superceding contracts. AOA had already elected to file its claims in Thurston County Superior Court as provided under the second exchange contract. Even if AOA had not done everything possible, as it did, to object to the ordered arbitration, it would be immaterial if AOA had raised the issue of lack of subject matter jurisdiction after the close of arbitration proceedings. Washington’s civil rules “allow a party to raise lack of subject matter jurisdiction at any time: before there is a final judgment, CR 12(h)(3)<sup>1</sup> and RAP 2.5(a)(1),<sup>2</sup> and after a final judgment has been entered, CR 60(b)(5).<sup>3</sup>” Bour, 80 Wn. App. at 646-47 (footnotes as

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“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” CR 12(h)(3).

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“[A] party may raise the following claimed error [] for the first time in the appellate court: (1) lack of trial court jurisdiction . . .”. RAP 2.5(a).

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Under CR 60(b)(5) a court may vacate a void judgment at any time. CR 60(b)(5) states in pertinent part: “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final

in original). Here, AOA objected to hearing the issue of arbitrability without notice on March 9, and argued waiver under the later contract clauses. It is immaterial if AOA did not raise the issue of lack of subject matter jurisdiction before the arbitrator; an arbitrator, like any other tribunal, cannot confer jurisdiction on itself. When the Trial Court asked the arbitrator to consider whether AOA had waived the issue of subject matter jurisdiction (when it remanded the matter to the arbitrator instead of vacating the award), AOA again raised the subject matter jurisdiction issue. The arbitrator did not address it. The Trial Court had made an error in ordering the parties to arbitration. AOA had to obey that order while it awaited a final order subject to appeal.

In a similar case, a party did not raise a jurisdictional statute before the Board of Industrial Insurance Appeals, yet raised it before the trial court. The appellate court held that the trial court had a duty to notice and apply all pertinent statutes. Hunter v. Dep't of Labor and Indus., 19 Wn. App. 473, 476, 576 P.2d 69 (1978). Here, even if AOA had not objected at the March 9 hearing, arguing lack of notice and waiver as it did, the Trial Court had a duty to notice and apply the contractual provision giving

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judgment, order, or proceeding for the following reason []: . . . (5) The judgment is void[.]”

AOA and AOA alone the option to choose arbitration, even after the close of arbitration proceedings. The Trial Court erred in not doing so.

**5. AOA is not Estopped From Arguing Lack of Subject Matter Jurisdiction, Nor Did AOA Waive the Issue**

AOA and Mr. Ayers appeared before the arbitrator and each argued the case on its merits. This appearance before the arbitrator does not estop AOA from raising the issue of the arbitrator's lack of subject matter jurisdiction, nor has AOA waived the issue. The arbitrator himself could not properly decide the issue; a tribunal cannot confer jurisdiction on itself. The Trial Court had already ordered arbitration, wrongly, over AOA's objection, and AOA had to obey that order while waiting for a final decision subject to appeal. At the first opportunity, AOA argued the arbitrator's lack of subject matter jurisdiction, in response to Mr. Ayers's motion to confirm.

Subject matter jurisdiction is of such vital importance to the legitimacy of a tribunal that a party's appearance does not constitute waiver. That this is so can be easily seen by looking at Washington's civil and appellate rules. CR 12(h)(3), RAP 2.5(a), and CR 60(b)(5) allow a party to raise the issue of subject matter jurisdiction at any time, including after appearing before the tribunal lacking subject matter jurisdiction.

Nor does it matter that the tribunal in this case is an arbitrator, whose authority is founded on consent, rather than a court, whose authority is constitutionally or statutorily based. AOA did not consent. In McNairy, one party did not consent to the appointment of the judge pro tem, either in writing or orally in open court, yet appeared before the judge pro tem and argued the case on the merits. This appearance *did not constitute consent* to the appointment of the judge pro tem and *did not estop* the party from raising the issue of lack of consent. 20 Wn. App. at 440. The court found that there “was no agreement [to the appointment of the judge pro tem] on the record or apart from it.” *Id.* Consent being lacking, the court found that the judge pro tem lacked subject matter jurisdiction. *Id.*

This case is on point. Just as the party’s consent was necessary for the legitimate appointment of a judge pro tem, AOA’s demand for arbitration was necessary for the legitimate appointment of an arbitrator. AOA never demanded the arbitration – not orally, in court, nor in writing. AOA did not ever “consent” to arbitration. In fact, AOA actively opposed the arbitration. AOA objected to the matter even being considered without notice at the March 9 hearing, and argued waiver of the first arbitration clause in the original superceded sales contract. AOA had elected, as was

its right under the second superceding exchange contract, to litigate in Thurston County Superior Court. Therefore, just as the party's appearance before the judge pro tem did not constitute consent or a waiver of the issue, neither did AOA's appearance before the arbitrator constitute a demand for arbitration, consent to arbitration, or a waiver of the issue of subject matter jurisdiction.

**6. The Trial Court Should Have Vacated the Award, Since it was Void for Lack of Subject Matter Jurisdiction**

The second exchange contract provided that arbitration was at AOA's option, and then only in Thurston County. AOA chose not to exercise this option. AOA elected to sue, and did sue, in Thurston County Superior Court. AOA never demanded arbitration, and in fact actively opposed arbitration, objecting to lack of notice and arguing waiver at the March 9 hearing. Without AOA's demand for arbitration or consent to arbitration, the arbitrator lacked subject matter jurisdiction over the matter. Without subject matter jurisdiction, the arbitrator's award is void.

Since subject matter jurisdiction can be raised at any time, AOA would be timely in raising this issue now – on appeal. However, it raised it at every opportunity before the Trial Court. On March 9, AOA objected to the issue being heard without notice, and argued waiver. At both of Mr.

Ayers's confirmation hearings, AOA argued lack of subject matter jurisdiction and errors of law. When the matter was remanded to the arbitrator, AOA argued that there was no subject matter jurisdiction. The Trial Court should have denied Mr. Ayers's motions to confirm the award. A court "has no jurisdiction to enter a void judgment and no jurisdiction to confirm a void arbitration award under [RCW 7.04A.220]." Davidson v. Hensen, 85 Wn. App. 187, 192 n.3, 933 P.2d 1050 (1997). Instead, the Trial Court should have vacated the award. Failing to do so was error.

Alternatively, the Trial Court should have vacated the award pursuant to statute. RCW 7.04A.230(1)(e) provides that a court shall vacate an arbitration award upon a party's motion if "[t]here was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing." AOA objected at the March 9 hearing on the grounds of lack of notice and waiver by superceding contracts. AOA never made the demand for arbitration that was required by the second exchange contract. AOA never consented to the appointment of the Snohomish County arbitrator, which the Trial Court did *sua sponte*. There is no agreement to arbitrate.

AOA did participate in the arbitration proceeding, but it would

have been inappropriate for AOA to raise an objection under RCW 7.04A.150(3) to the arbitration. That statute is concerned with *lack of notice*, not lack of subject matter jurisdiction. The statute says, “Unless a party to the arbitration proceeding interposes an objection to lack of or insufficiency of notice not later than the commencement of the hearing, the party’s appearance at the hearing waives the objection.” *Id.* A party can waive lack of notice or insufficiency of notice by appearing before a tribunal, but a party can *never waive lack of subject matter jurisdiction*, and an arbitrator cannot confer jurisdiction on himself, which is ultimately what he did at the Trial Court’s invitation.

AOA certainly had notice of the arbitration; the Trial Court had ordered the parties to proceed to arbitration over AOA’s objection as to notice, waiver of the original superceded sales contract, and refusal to consent to the arbitration. An objection pursuant to RCW 7.04A.150(3) would therefore have been inappropriate (moreover, that statute is silent as to lack of subject matter jurisdiction). The arbitrator lacked subject matter jurisdiction because AOA did not demand arbitration, a demand which the second exchange contract required, that is, the arbitrator lacked subject matter jurisdiction because there was no agreement to arbitrate. The Trial Court should have vacated the award under RCW 7.04A.230(1)(e).

**7. The Arbitrator's Amended Award Did Not Resolve the Subject Matter Jurisdiction Issue**

The Trial Court remanded the issue of subject matter jurisdiction to the arbitrator. This, too, was error because a tribunal cannot confer jurisdiction on itself. The Trial Court's biggest concern was whether AOA had waived the issue of jurisdiction by participating in the arbitration. RP 10/26/07 at 16; RP 11/02/07 at 8-9. The arbitrator, in his amended award, determined that he had subject matter jurisdiction in a logically incoherent decision: he determined that he had subject matter jurisdiction *because*, he decided, the arbitration in which the parties participated was contractual, not mandatory.<sup>4</sup> He did not examine the issue of waiver and ignored the doctrine of merger. The arbitrator found that the parties had submitted themselves to contractual arbitration because "[t]he original 2002 sales contract provides for contractual arbitration in Snohomish County." CP 203. The arbitrator ignored the rest of the transaction: he did not consider

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The arbitrator here misunderstood the Trial Court's point. The Trial Court had noted, if AOA was correct in contending that the arbitrator lacked subject matter jurisdiction in the case of contractual arbitration, that the amount in controversy was such that Mr. Ayers's counterclaim would have been subject to mandatory arbitration. The arbitrator would then have had a basis for subject matter jurisdiction, said the Trial Court, and could have heard the case in *that* event. In the case of mandatory arbitration, of course, AOA has the right to demand trial de novo. RCW 7.06.050(1).

the first superceding (and later superceded) exchange contract, the second superceding exchange contract, not Mr. Ayers's letter assuming risk, nor any of the subsequent dealings between the parties.

After finding that the parties had agreed to contractual arbitration based only on the original sales contract, the arbitrator looked at the issue of fees. He found that AOA had paid the private retainer to the arbitrator and had paid his residual fees, and that the parties had treated the arbitration as contractual arbitration, not mandatory arbitration, finding therein what he believed to be a basis for subject matter jurisdiction. This ignores the principle that jurisdiction for contractual arbitration is based on the consent of the parties. AOA opposed arbitration but was ordered by the Trial Court to proceed to arbitration. Thereafter, AOA even refused to agree to an arbitrator and the Trial Court appointed one. AOA's actions, pursuant to court order, cannot constitute consent to contractual arbitration absent AOA's election or affirmative demand – which it never made – for arbitration. AOA only went to arbitration at the Trial Court's order.

After the arbitrator amended his award and Mr. Ayers moved the Trial Court for confirmation, the Trial Court should have vacated it then, too, just as it should have done the original award. It was error for the Trial Court to have confirmed it.

**C. The Trial Court Should Have Vacated the Award Pursuant to RCW 7.04A.230(1)(d)**

Alternatively, the Trial Court should have vacated the award because the arbitrator exceeded his authority. RCW 7.04A.230(1)(d) provides that a court shall vacate an award if the arbitrator exceeded the arbitrator's powers. This statute is on point. First, since the arbitrator had no subject matter jurisdiction over the contract dispute between AOA and Mr. Ayers, he exceeded his powers merely by conducting the arbitration, let alone by issuing an award. Second, courts have interpreted this statutory provision as meaning that an arbitrator exceeds the arbitrator's powers when the award, on its face, shows the adoption of an erroneous rule or mistake in applying the law. Here, the arbitrator's award shows the adoption of an erroneous rule and mistakes in applying the law on its face.

**1. An Arbitrator Exceeds His Powers When He Mistakenly Applies the Law**

Washington adopted the Uniform Arbitration Act on January 1, 2006, and codified it under RCW Chapter 7.04A. Before Washington's adoption of the act, it had another set of statutes governing arbitration; they were codified under RCW Chapter 7.04. Under the old set of statutes, RCW 7.04.160 provided in part: "In any of the following cases the court shall after notice and hearing make an order vacating the award,

upon the application of any party to the arbitration: . . . (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.” This contains some of the exact same language that is in the current statute. RCW 7.04A.230 provides in part: “(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if: . . . (d) An arbitrator exceeded the arbitrator’s powers.”

Washington courts have interpreted this old statute that is so strikingly similar to the new statute. “RCW 7.04.160(4) has been interpreted as encompassing cases in which the arbitrators have adopted an erroneous rule of law or have mistakenly applied the law.” Groves v. Progressive Cas., 50 Wn. App. 133, 135, 747 P.2d 498 (1987); Marine Enterprises, Inc. v. Security Pac. Trading Corp., 50 Wn. App. 768, 774-75, 750 P.2d 1290 (1988); Lent’s, Inc. v. Santa Fe Engineers, Inc., 29 Wn. App. 257, 264-65, 628 P.2d 488 (1981); Moen v. State, 13 Wn. App. 142, 143-45, 533 P.2d 862, *review denied*, 85 Wn.2d 1018 (1975), *overruled on other grounds*, Architectural Woods, Inc. v. State, 92 Wn.2d 521, 598 P.2d 1372 (1979). The award on its face must reveal the adoption of the erroneous rule or mistake in applying the law. Marine Enterprises, 50 Wn. App. at 776, Lent’s, 29 Wn. App. at 265. Since the language of the old

statute and the new statute are the same, this caselaw applies to the new statute. An arbitrator exceeds his powers when he adopts an erroneous rule of law or mistakenly applies the law. A court shall vacate the award when such a mistake appears on the face of the award.

**2. The Arbitrator Adopted Erroneous Rules of Law and Misapplied the Law**

On October 2, 2007, the arbitrator arbitrated Mr. Ayers's contract claim. On October 9, 2007, he issued his award. His award contained errors of law on its face. CP 157. The most glaring error of law was that he based his award of \$10,000.00 to Mr. Ayers on a determination that the replacement animal, Ato, was not worth as much as Super Nova's purchase price, while Mr. Ayers did not even own Ato. RP 10/26/07 at 11. He had already exchanged him back for Super Nova after making a written request to AOA in which he accepted all risk for any infertility on Super Nova's part.<sup>5</sup> CP 138.

Moreover, the arbitrator held that there was a mutual mistake of

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It is not possible for the arbitrator to have awarded Mr. Ayers \$10,000.00 based on a determination that *Super Nova*, the alpaca that Mr. Ayers owned, was not worth as much as her purchase price of \$21,500.00. Mr. Ayers produced not a scintilla of evidence to the arbitrator as to Super Nova's worth. CP 218.

fact concerning Super Nova's gender, and *recited the wrong legal remedy* for mutual mistake of fact: "In such an instance, the trier should try to do equity to correct the mistake to the extent practicable." *Id.* In fact, a trier has no authority to "try to do equity to correct the mistake." The legal remedy for mutual mistake of fact is rescission. Matter of Marriage of Schweitzer, 132 Wn.2d 318, 328, 937 P.2d 1062 (1997); Chemical Bank v. Wash. Pub. Power Supply Sys., 102 Wn.2d 874, 898-99, 691 P.2d 524 (1984); Rigos v. Cheney Sch. Dist. No. 360, 106 Wn. App. 888, 892, 26 P.3d 304 (2001); Restatement (Second) of Contracts § 152 (1981). In fact, the original contract had already been rescinded by the parties, and a subsequent superceding exchange contract was entered into (twice!).

The arbitrator also failed to apply the doctrine of judicial estoppel. Judicial estoppel arises in equity and serves to preclude a party from gaining an advantage by asserting one position before one tribunal and then later taking a clearly inconsistent position before another.

Cunningham v. Reliable Concrete Pumping, 126 Wn. App. 222, 224-25, 108 P.3d 147 (2005). This doctrine should have estopped Mr. Ayers from alleging before the arbitrator that the replacement animal, Ato, was worth anything less than he testified in his divorce proceedings. There, Mr. Ayers testified, as did Mr. Snow at Mr. Ayers's request, that Ato was

worth between \$45,000.00 and \$50,000.00. *See, e.g.*, CP 134-37. Mr. Ayers alleged to the arbitrator that Ato was worth \$1,000.00. RP 10/26/07 at 11. It is only through failing to apply the doctrine of judicial estoppel that the arbitrator could possibly hold “[t]he replacement alpaca, Ato 1019, was not of quality comparable to an alpaca in Supernova’s price range.” CP 157. Thus, the arbitrator’s failure to apply the doctrine of judicial estoppel is clear from the face of the award.

Further, the arbitrator ignored the actual terms of the sales contract, which required AOA to provide Mr. Ayers with a health certificate and an insurance exam for Super Nova, which it did, and gave Mr. Ayers the option of inspecting Super Nova, which he did not do. Instead, he held that both parties “breached the sales contract by failing to properly inspect Supernova [sic] before the sale.” *Id.* That the arbitrator made this error is apparent from comparing the face of his award with the contract. There is no such term in the contract. *Cf.* CP 157 *with* CP 130-31.

Finally, the arbitrator made a factually inaccurate and irrelevant holding: “Mr. Ayers has had the use of the alpacas for the intervening period and will retain ownership of Ato 1019 after this award.” *Id.* The alpacas were actually at AOA’s facility until Super Nova was returned to Mr. Ayers after the second exchange (that was where Super Nova incurred

agistment fees). Pursuant to the second exchange contract, AOA acquired ownership of Ato: not Mr. Ayers. Here the arbitrator exceeded the scope of his powers; the ownership and use of the alpacas were not even at issue, nor was the value of the alpaca, Ato, that Mr. Ayers did not own.

### **3. The Arbitrator's Amended Award Did Not Cure These Defects, but Compounded Them**

After Mr. Ayers, at the Trial Court's order, moved the arbitrator to correct or modify the award, the arbitrator issued his amended award. He made only one correction, which he deemed a correction of a "scrivener error": "Mr. Ayers has had the use of the alpacas for the intervening period and will retain ownership of ~~Ato~~ 1019 Supernova after this award" (emphasis as in original). CP 202. This did not cure the most glaring error of law on the face of the original award. Though the arbitrator *knew* that Mr. Ayers owned Super Nova, not Ato, he based his award to Mr. Ayers on a finding that Ato was worth less than an animal of Super Nova's price range.

The arbitrator explained that his award was based on his finding that "the entire claim arises from the breach of the 2002 original sales contract. . . . [T]he seller breached its duty to provide a breedable female alpaca that was worth the \$21,500 purchase price." CP 202-03. There are

several problems with this finding (which finding the arbitrator did not make in his original award). It ignores the complete history of the transactions between the parties. Where AOA warranted, in the original sales contract, that Super Nova would be capable of conceiving and bearing a live cria, the contract provided a remedy in the event that Super Nova was not so capable. CP 130. The remedy was that Mr. Ayers could exchange her for another animal of equal quality. *Id.* Mr. Ayers exercised that remedy, exchanging her for Ato, an animal that he valued at \$45,000 - \$50,000 in his divorce proceedings. If AOA had breached the original contract, any such breach was cured by the first superceding exchange contract, which rescinded the original sales contract.

Even if Ato were not worth as much as Super Nova's purchase price of \$21,500 – meaning that the first exchange, as Mr. Ayers alleges, was unfair – that defect would have been cured by the second exchange. Mr. Ayers persuaded AOA to enter into the second superceding exchange by expressly assuming the risk that Super Nova was not breedable: “I know that I will be losing a great deal of money because Atotonilco is worth twice as much as Super Nova, but I need a female. *I know that she is not breed and may never be breed, but that a chance I'm willing to take.*” CP 138 (emphasis added). Moreover, the arbitrator had no basis

for his finding that Super Nova was not worth her original \$21,500 purchase price. Mr. Ayers produced no evidence as to Super Nova's value. CP 218.

In his amended award, the arbitrator further explained that the reason for his award was that he found AOA's waiver of warranty language in the subsequent two exchange contracts to be unconscionable,<sup>6</sup> a finding that he did not make in his original award: "if the replacement animal is as inadequate as the original, fairness dictates that the seller make the buyer whole regardless of the inclusion of a limitation of liability provision." CP 203. The arbitrator's finding of unconscionability did not cure the errors on the face of the award, any more than did his explanation that Mr. Ayers's claim arose out of the original sales contract. The fact remains that Mr. Ayers does not own "the replacement animal," Ato, but owns the "original," Super Nova. Any award to Mr. Ayers based on a finding that Ato was not worth as much as Super Nova would only be tenable if Mr. Ayers still owned Ato.

Furthermore, the warranty provisions to which the arbitrator

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Mr. Ayers did not brief the issue of unconscionability in his pleadings to the arbitrator, nor did he raise it at the hearing. The arbitrator raised the issue *sua sponte*. CP 219.

objected in the first superceding and second superceding exchange contracts ran only to the second animal offered in exchange, not the first animal. The arbitrator rewrote the contracts by declaring the warranty provisions to be unconscionable. If he effectively struck out the waiver of warranty language, then what warranty replaced the deleted language? The only possible replacement is one that the arbitrator himself created – that is, language to which AOA and Mr. Ayers did not agree.

Moreover, the arbitrator’s finding of unconscionability is premised on the same error as is his award to Mr. Ayers: it is as if the second exchange never happened. The doctrine of unconscionability, in Washington, is governed by caselaw as well as, in commercial settings like this one, by statute. RCW 62A.2-302(2) states: “[w]hen it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.” Likewise, caselaw holds: “[t]he doctrine of unconscionability involves scrutiny of all the circumstances surrounding the transaction in question.” Christiansen Bros., Inc. v. State, 90 Wn.2d 872, 877, 586 P.2d 840 (1978).

Here, the arbitrator was concerned that the waiver of warranty

language in the exchange contracts was unconscionable, yet his amended award did not consider the commercial setting, purpose, or effect of the language, nor the totality of the circumstance surrounding the transaction. Nor were these matters even addressed at the arbitration (though they would have been clear to the arbitrator from the contracts themselves and from Mr. Ayers's letter, documents that were submitted to the arbitrator; CP 130-31, 132-33, 138, 139-40), since the issue of unconscionability was never before the arbitrator. CP 219.

As to the first exchange contract, the effect of the waiver of warranty language was absolutely null, because AOA did not attempt to hold Mr. Ayers to the terms of the contract. Instead, when Mr. Ayers asked to exchange Ato for Super Nova a second time, AOA agreed. A contract term cannot be unconscionable in its effect if the parties do not observe it.

As to the second exchange contract and its waiver of warranty language, one piece of evidence that is uncontrovertibly part of the record – both before the Trial Court and before the arbitrator – is the letter that Mr. Ayers wrote to AOA inducing AOA to exchange Ato for Super Nova a second time. *“I know that I will be losing a great deal of money because Atotonilco is worth twice as much as Super Nova, but I need a female. I*

*know that she is not breed and may never be breed, but that a chance I'm willing to take.*" CP 138 (emphasis added). Here, Mr. Ayers himself affirmatively accepted all risk of Super Nova's infertility in the letter he wrote persuading AOA to make the exchange. The waiver of warranty language in the second exchange contract cannot be unconscionable if AOA only agreed to enter into the contract based on Mr. Ayer's representations that he was voluntarily accepting all risk. The arbitrator's finding of unconscionability in his amended award compounded his errors of law and did not cure them.

**4. The Trial Court Should Have Vacated the Award For the Arbitrator's Mistakes of Law**

The arbitrator desired to do "equity" for Mr. Ayers, a pro se defendant for whom he felt sympathy. This sympathy caused him to make an error of law: he stated that in the case of a mutual mistake of fact, "the trier should do equity to correct the mistake to the extent practicable." CP 157. All of his subsequent errors stemmed from this first error. It was in his attempt to "do equity" that he adopted other erroneous rules of law, made mistakes applying the law, and rewrote the contracts. An arbitrator exceeds his powers when it is clear from the face of the award that he adopts erroneous rules of law or makes mistakes in applying the law.

Pursuant to RCW 7.04A.230(1)(d), the Trial Court should have vacated the arbitrator's award for the mistakes of law on the face of the award. It was error not to do so.

## V. CONCLUSION

The Trial Court erred in ordering AOA to arbitration at a hearing where arbitrability was not at issue, pursuant to a contract that had been superceded by two later contracts. AOA made the proper objections at the time: lack of notice and waiver. In fact, the governing superseding second exchange contract between AOA and Mr. Ayers vested the Thurston County Superior Court with jurisdiction and venue and gave AOA the option of submitting a contract dispute to arbitration. Absent AOA's demand for arbitration, any arbitrator would lack subject matter jurisdiction. AOA never so demanded, but elected to sue Mr. Ayers in Thurston County Superior Court. After being ordered, over objection, to arbitration, AOA never consented to arbitration and actively opposed it.

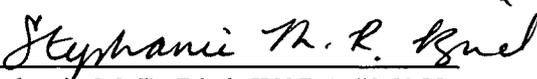
When the arbitrator had issued his award, in which he exceeded his arbitrator's powers by making errors of law on the face of the award, Mr. Ayers moved the Trial Court to confirm the award. AOA moved to vacate the award for the arbitrator's lack of subject matter jurisdiction and for his

exceeding his arbitrator's authority by issuing an award with errors of law on its face. The Trial Court recognized the errors of law and recognized the arbitrator's lack of subject matter jurisdiction, but thought that AOA had perhaps waived the issue by participating in the arbitration, although subject matter jurisdiction can be waived at any time. The Trial Court remanded the matter to the arbitrator so that he could consider AOA's two grounds for vacation. The arbitrator made one "correction" of what he deemed a "scrivener error," and compounded his original errors of law. He ignored the question of waiver. Upon Mr. Ayers's motion, the Trial Court confirmed the amended award and entered judgment.

AOA respectfully asks this Court to reverse the court below, to vacate the Trial Court's judgment and the arbitrator's award, and to remand the matter to Thurston County Superior Court for trial.

Respectfully Submitted this 13<sup>th</sup> day of May, 2008.

CUSHMAN LAW OFFICES, P.S.

  
Stephanie M. R. Bird, WSBA #36859  
Attorney for Alpacas of America

Maegen McAuliffe, certifies and declares as follows:

1. I am a legal assistant at Cushman Law Offices, P.S. I am over the age of 18, and not a party to this action.

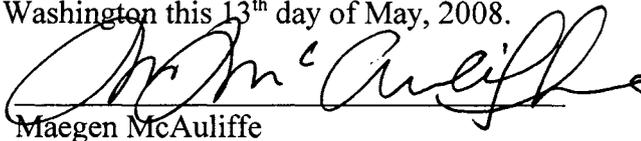
2. On May ~~13~~<sup>14</sup>~~th~~, 2008, I sent via ABC Legal Messengers, for next day business delivery/filing, Appellant's Opening Brief to:

Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

3. On May ~~13~~<sup>14</sup>~~th~~, 2008, I sent via certified U.S. Mail, a copy of the above-described document to:

James Ayers  
P.O. Box 322  
Penrose, Colorado 81240

DATED at Olympia, Washington this 13<sup>th</sup> day of May, 2008.

  
Maegen McAuliffe

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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