PROSPECT MEDICAL GROUP, INC., Plaintiff and Respondent, v. ST. JUDE HOSPITAL, INC., Defendant and Appellant; PROSPECT MEDICAL GROUP, INC., Plaintiff and Appellant, v. PACIFICARE OF CALIFORNIA, Defendant and Respondent.

G031410, G031684

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

2005 Cal. App. Unpub. LEXIS 4661

May 26, 2005, Filed

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PRIOR HISTORY: Appeal from a judgment of the Superior Court of Orange County, No. 815670. David R. Chafee, Judge.

DISPOSITION: Affirmed in part and reversed in part, and remanded with directions.

COUNSEL: Paul, Hastings, Janofsky & Walker, Peter M. Stone and Carol S. Zaist for Defendant and Appellant in No. G031410.

Miller & Holguin and Kenneth E. Johnson for Plaintiff and Respondent in No. G031410 and Plaintiff and Appellant in No. G031684.

K & R Law Group, Gary S. Pancer; Greives, Martin, Stein & Richland, Timothy T. Coates and Cynthia E. Tobisman for Defendant and Respondent in No. G031684.

JUDGES: ARONSON, J.; BEDSWORTH, ACTING P. J., IKOLA, J. concurred.

OPINION BY: ARONSON

OPINION:

St. Jude Hospital, Inc. (St. Jude) appeals the trial court's judgment denying its petition to vacate an arbitration award in favor of Prospect Medical Group, Inc. (Prospect), a physicians' association. **[*2]** St. Jude argues the court erred by declining to review alleged legal errors committed by the arbitrator in excess of his authority under an arbitration agreement, which in broad language provided for judicial scrutiny of arbitral "errors of law or legal reasoning." n1 We conclude the issue of whether trial courts are bound to enforce arbitration agreements that expand the court's jurisdiction to review arbitration awards is not necessary to our resolution of this appeal. Because the asserted errors by the arbitrator are factual in nature or are barred by waiver or estoppel, we must affirm the judgment.

n1 The arbitration clause provides in relevant part: "The arbitrator[] shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected pursuant to California *Code of Civil Procedure sections 1286.2* or *1286.6* for any such error." All further statutory references are to this code, unless otherwise specified.

[*3]

I

FACTUAL AND PROCEDURAL BACKGROUND

In August 1993, Prospect and a health maintenance organization, PacifiCare, agreed Prospect physicians would provide medical services for PacifiCare's Medicare and non-Medicare members (the Physician Contracts). The services were to be performed exclusively at St. Jude Hospital, except in emergencies. The contracts also provided for a "Hospital Control Program" that included "risk pools" into which PacifiCare would make annual payments and from which St. Jude would deduct expenses. As an incentive for the physicians and the hospital to manage costs, Prospect and St. Jude agreed to split equally any surplus funds remaining in the risk pool at year's end.

At the same time PacifiCare and Prospect entered into the Physician Contracts, St. Jude entered into agreements with PacifiCare for hospital services for its Medicare and non-Medicare members (the Hospital Contracts). Like the Physician Contracts, these agreements included provisions that Prospect's physicians would offer their services exclusively at St. Jude Hospital, except in emergencies, and that annual risk pools would be created and administered under a Hospital Control Program, **[*4]** with Prospect and St. Jude dividing equally any year-end surplus. The terms of the contracts provided that PacifiCare would manage the risk pools and disburse any surplus, but in actual practice St. Jude administered the Hospital Control Program.

The Physician Contracts and Hospital Contracts contained an identical arbitration clause, section 12.17, which provided, in full: "ARBITRATION - Any controversy, dispute or claim between PacifiCare and [Prospect] arising out of the interpretation, performance, or breach of this Agreement shall be resolved by binding arbitration at the request of either party, in accordance with the rules of the American Arbitration Association. The arbitrator[] shall apply California substantive law and federal substantive law where state law is preempted. Civil discovery for use in such arbitration may be conducted in accordance with the California Code of Civil Procedure and the California Evidence Code, and the arbitrator selected shall have the power to enforce the rights, remedies, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions and penalties as can be imposed in like circumstances in a civil **[*5]** action by a superior court of the State of California. The provisions of California *Code of Civil Procedure sections 1283* and *1283.05* concerning the right to discover and the use of depositions in arbitration are incorporated herein by reference and made applicable to this Agreement. [P] The arbitrator[] shall have the power to grant all legal and equitable remedies and award compensatory damages provided by California law, but shall not have the power to award punitive damages. The arbitrator[] shall prepare in writing and provide to the parties an award including factual findings and the legal reasons on which the decision is based. The arbitrator[] shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected pursuant to California *Code of Civil Procedure sections 1286.2* or *1286.4* for any such error. The cost of arbitration shall be shared equally by both parties."

The parties' relationship eventually soured and ended when the present dispute arose. Prospect alleged St. Jude kept more than its share of surpluses **[*6]** from the risk pools in 1997, 1998, and 1999. St. Jude countered that Prospect had breached the exclusivity provisions of the contracts, and that PacifiCare had underfunded the risk pools. After efforts to resolve the dispute failed, the trial

court granted Prospect's motion to compel arbitration with both St. Jude and PacifiCare. The parties selected arbitrator Campbell M. Lucas, a retired justice of the Court of Appeal.

Once in arbitration, Prospect filed a first amended claim against both PacifiCare and St. Jude for breach of the surplus payout provision under the Hospital Control Program in the Physician Contracts. Prospect alleged: "Respondents have operated the risk pools in a manner which deviates from the express terms of its agreement with Prospect. Specifically, it appears that PacifiCare pays St. Jude the funds which constitute the hospital services budget, which are then commingled with St. Jude's other operating funds. PacifiCare then delegates to St. Jude the duty of calculating the year-end settlement of each risk pool, as well as the duty of paying to Prospect its share of the budget surplus. Because St. Jude has been delegated and accepted these duties by PacifiCare, **[*7]** St. Jude owes Prospect a fiduciary duty to (1) fully account for all monies which it holds on Prospect's behalf, and (2) to fully pay Prospect, in a timely fashion, all monies which are due and owing to Prospect under the contracts between the parties." Prospect also alleged that it was the third party beneficiary of the risk-pool surplus provisions in the Hospital Contracts.

St. Jude counterclaimed against Prospect, but filed no claim against PacifiCare. In its counterclaim, St. Jude asserted Prospect breached the exclusivity provision in both the Physician Contracts and the Hospital Contracts. St. Jude also asserted Prospect was responsible for deficits in the risk-pool program.

Before the arbitration, St. Jude, Prospect, and PacifiCare stipulated to the following: "To avoid PacifiCare's participation in this arbitration relating to any monies owed to Prospect by St. Jude from the Hospital Control Program, St. Jude agrees that any monies owed to Prospect and all of PacifiCare's obligations and liabilities connected with this arbitration stemming from the Hospital Control Program [are] to be completely satisfied by St. Jude." The stipulation recognized that Prospect's claims were **[*8]** based on the Physician Contracts, and that "St. Jude contests that any money is owed to Prospect under the Hospital Control Program for the years 1997, 1998 and the first five months of 1999 under the Commercial Agreement or Medicare Agreements [i.e., the Physician Contracts], other than the amounts previously paid to Prospect for the 1997 risk pools.

The parties also agreed: "This stipulation relates to monies Prospect claims it is owed under the Hospital Control Program administered by St. Jude on behalf of PacifiCare members for the years 1997, 1998 and the first five months of 1999 for both [Physician Contracts]. In the event an award is made in favor of Prospect under the Hospital Control Programs described herein above, St. Jude agrees that it is responsible for satisfying such award." Further, the parties stipulated: "Based on the relationship with PacifiCare, St. Jude is responsible for [disbursing funds in] the Hospital Control Program. Therefore, if at the arbitration hearing the arbitrator finds for Prospect based on his evaluation of the Hospital Control Program and directs an award to Prospect from either St. Jude or PacifiCare, St. Jude agrees to be responsible **[*9]** for payment of any such award and shall make timely payment of such award."

The arbitration was conducted in two phases. In the first phase, the arbitrator dismissed PacifiCare from the proceedings and found St. Jude owed Prospect "the sum of $ 1,200,000, representing its share of the surpluses for the 1997, 1998, and 1999 risk pools, created in accordance with the Hospital Control Program, which have never been paid by St. Jude." A written decision drafted by Prospect and adopted by the arbitrator concluded St. Jude was "liable on the contracts between Prospect and PacifiCare because PacifiCare delegated to St. Jude its contractual duties to administer the risk pools and pay to Prospect its share of the risk pool surplus. In addition, PacifiCare paid to St. Jude the monies from which Prospect's share of the surplus should have been paid. St. Jude has held, and continues to hold, those funds through the present." The arbitrator observed that while PacifiCare was to administer the risk pools under the Physician Contracts, "the actual practice conflicts with the contractual language . . . ." The arbitrator found, "In practice, PacifiCare delegated to St. Jude total responsibility for **[*10]** administering the risk pools. This is confirmed by the pre-

hearing stipulation between St. Jude and PacifiCare, which states that 'PacifiCare delegated to St. Jude the duty of administering the Hospital Control Program . . . and the duty of paying to Prospect its share of the budget surplus.'"

In the second phase, the arbitrator concluded Prospect breached the exclusivity provision of the Physician Contracts and that St. Jude, as a thirdparty beneficiary of the contracts, was entitled to $ 275,000 in damages. The net award due Prospect was thus $ 925,000, and the arbitrator concluded it was the prevailing party, entitled to costs and attorney fees. Following the arbitrator's verbal award, but before the decision had been reduced to writing, St. Jude tendered a check for $ 925,000 to Prospect's counsel. Prospect did not deposit the check until the arbitrator signed the written award. After the arbitrator rejected St. Jude's arguments to reconsider the award, Prospect and St. Jude petitioned the trial court to, respectively, confirm or vacate the award. The trial court granted Prospect's petition to confirm the award and entered judgment accordingly. St. Jude now appeals, and Prospect **[*11]** has filed a "protective" cross-appeal against PacifiCare.

II

WHETHER ST. JUDE'S $ 925,000 PAYMENT WAIVES ITS RIGHT TO APPEAL

As a preliminary matter, Prospect contends St. Jude's voluntary payment of $ 925,000 in accordance with the arbitrator's oral ruling constitutes a waiver of its right to appeal the trial court's judgment confirming the written award eventually entered by the arbitrator. This argument is without merit. In *Reitano v. Yankwich (1951) 38 Cal.2d 1, 3* (*Reitano*), our Supreme Court reiterated: "'In the case of voluntary satisfaction of a judgment, deprivation of the right to appeal ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal.' [Citation.]" The court explained, "'it is difficult to conceive how his [appellant's] payment of the judgment can give rise to any estoppel against his seeking to avoid it for error. . . . The better view, we think, is, that though execution has not issued, the payment of a judgment must be regarded as compulsory, and therefore as not releasing errors, nor depriving the payor of his right to appeal, unless payment **[*12]** be by way of compromise and settlement or under an agreement not to appeal or under circumstances leaving only a moot question for determination.'" (*Id. at pp. 3-4;* accord *Stone v. Regents of University of California (1999) 77 Cal.App.4th 736, 745* (*Stone*).)

The burden rests on the respondent to show the appellant compromised or relinquished its right to appeal. (*Stone, supra, 77 Cal.App.4th at p. 744.)* Prospect fails to meet that burden. The only evidence Prospect cites is the cover letter from St. Jude's trial counsel accompanying the $ 925,000 payment. The letter stated: "As you know, the Arbitrator awarded Prospect $ 1.2 million in the first phase of the case and awarded St. Jude $ 275,000 in the second phase of the case. Thus, this payment represents the net amount due to Prospect, excluding interest, attorney's fees and costs. Your receipt of this payment will stop the running of interest on this base amount and we can address the payment of interest, attorney's fees and costs once the Arbitrator has entered a final order in the case." The letter manifests St. Jude's intent to avoid interest, not to compromise their **[*13]** appellate claims.

Prospect relies on *A.L.L. Roofing & Bldg. Materials Corp. v. Community Bank (1986) 182 Cal. App. 3d 356, 227 Cal. Rptr. 308,* but in that case there was no question the parties intended to settle and, indeed, had done so before entry of the judgment. (*Id. at p. 359.)* Here in contrast, as in *Reitano,* there is "no indication" the appellant's payment was "by way of compromise or pursuant to an agreement not to prosecute an appeal." (*Reitano, supra, 38 Cal.2d at p. 4.)* We therefore turn to the merits.

III

REVIEW OF THE ARBITRATOR'S DECISION FOR LEGAL ERRORS

St. Jude argues the trial court erred by failing to review the arbitrator's decision for legal errors. St. Jude relies on the arbitration clause in the Physician Contracts and the Hospital Contracts, section 12.17, which provided, "The arbitrator[] shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected pursuant to California *Code of Civil Procedure sections 1286.2* or *1286.6* for any such error."

Prospect contends St. Jude's argument **[*14]** is foreclosed by *Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1, 28* (*Moncharsh*), where our Supreme Court concluded: "It is well settled that 'arbitrators do not exceed their powers merely because they assign an erroneous reason for their decision.'" But St. Jude claims that portion of *Moncharsh* is distinguishable by the absence of a clause similar to section 12.17. In any event, according to St. Jude, the following observation in *Moncharsh* supports its position: '"The scope of arbitration is . . . a matter of agreement between the parties' [citation] and '"the powers of an arbitrator are limited and circumscribed by the agreement or stipulation of submission."'" (*Moncharsh, supra, 3 Cal.4th at p. 8;* see *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal.4th 362, 374-376* (*Advanced Micro*) [same]; *Bonshire v. Thompson (1997) 52 Cal.App.4th 803, 811* [same].)

The issue has a gestalt quality to it. We note the federal circuits are split on whether parties to an arbitration agreement may - depending on how the issue is framed - restrict the arbitrator's powers to commit legal error ("yes") **[*15]** or expand the statutory grounds on which a court exercises review jurisdiction over arbitral awards ("no"). (Compare *Lapine Technology Corp. v. Kyocera Corp. (9th Cir. 1997) 130 F.3d 884, 889* (*Lapine I*) [parties' agreement controls] and *Gateway Technologies v. MCI Telecommunications Corp. (5th Cir. 1995) 64 F.3d 993,* with *Kyocera Corp. v. Prudential-Bache Trade Services, Inc. (9th Cir. 2003) 341 F.3d 987* (en banc) [overruling *Lapine I*] and *Chicago Typographical Union v. Chicago Sun-Times (7th Cir. 1991) 935 F.2d 1501, 1505* ["federal jurisdiction cannot be created by contract"].) In any event, there is no dispositive California authority on the issue because *Moncharsh* did not involve a clause like Section 12.17. (See *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (1999) 19 Cal.4th 1182, 1195* ["An opinion is not authority for propositions not considered"].)

Besides *Moncharsh*, Prospect relies primarily on *Crowell v. Downey Community Hospital Foundation (2002) 95 Cal.App.4th 730* (*Crowell*) and two cases from this division. In *National Union Fire Ins. Co. v. Nationwide Ins. Co. (1999) 69 Cal.App.4th 709, 715,* **[*16]** Justice Crosby wrote for the court: "There is *no* such creature as a 'binding arbitration with a right to appeal.' Arbitrations provide an *alternative* method of dispute resolution to legal proceedings. They follow different rules and serve different ends. They are as distinct in their elementary structure as dirt is to water. Mixing the two only produces mud - not the sort of stuff we willingly tread in." And in *Old Republic Insurance Co. v. St. Paul Fire & Marine Ins. Co. (1996) 45 Cal.App.4th 631, 638,* we concluded private parties could not, by stipulation, "empower this court to review the legal correctness of [an arbitration] award." *Crowell,* over a dissent, recently reached the same conclusion regarding trial court review of an arbitrator's alleged legal and factual errors: "Because the Legislature clearly set forth the trial court's jurisdiction to review arbitration awards when it specified the grounds for vacating or correcting awards in [*Code of Civil Procedure] sections 1286.2* and *1286.6,* we hold that the parties cannot expand that jurisdiction by contract to include a review on the **[*17]** merits." (*Crowell, supra, 95 Cal.App.4th at p. 739;* accord *Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal.App.4th 635, 645* (*Oakland-Alameda*) [agreeing with "primary holding of *Crowell*," but distinguishing it on other grounds].) St. Jude responds that these cases are inapposite for various reasons or were wrongly decided.

We must sidestep this hornet's nest. The problem with St. Jude's argument is a threshold one. Simply put, the "legal errors" it claims the arbitrator committed were, at most, factual errors, or

were waived. As such, no basis exists for invoking section 12.17 or testing the validity of its "no errors of law or legal reasoning" language. We do not decide moot or hypothetical questions. (*9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 320,* p. 359.)

A. Whether Prospect Committed Anticipatory Breach Is a Factual Question

St. Jude contends the arbitrator committed legal error by refusing to determine the exact date Prospect breached the exclusivity provision. According to St. Jude, Prospect's breach occurred sometime in 1997 or "late spring" 1998, **[*18]** *before* St. Jude breached the surplus provision for the first time in May 1998. On its view of the facts, St. Jude could not be liable to Prospect for breach of contract because its performance was excused under the anticipatory breach doctrine. (*Civ. Code, § 1440*; see *County of Solano v. Vallejo Redevelopment Agency (1999) 75 Cal.App.4th 1262, 1276* ["Due to [defendant's] anticipatory breach, [plaintiff] was excused from fulfilling any conditions . . . under the contract"]; see *Machado v. Machado (1961) 188 Cal. App. 2d 141, 147, 10 Cal. Rptr. 347* [""An anticipatory breach of contract occurs on the part of one of the parties to the instrument when he positively repudiates the contract by acts or statements indicating that he will not or cannot substantially perform essential terms thereof""].) St. Jude relies on *Gold Mining & Water Co. v. Swinerton (1943) 23 Cal.2d 19, 33* (*Gold Mining*): "After the total breach by the defendants, plaintiff was excused from performance."

The flaw in St. Jude's argument is that it assumes anticipatory repudiation is a question of law. But "as stated in *Gold Min* **[*19]** [*ing*], *. . . 'repudiation is ordinarily a question of fact and intent, and must be determined by the facts in the particular case*.'" (*Machado v. Machado, supra, 188 Cal. App. 2d at p. 147,* italics added.) The arbitrator rejected St. Jude's anticipatory repudiation theory, concluding: "Based upon all of the evidence[,] St. Jude did not carry its burden of proof to show that Prospect breached the contracts prior to the breach of St. Jude." Even if this conclusion were erroneous - which we do not suggest - *as a factual determination* (see *ibid.*), it is outside the scope of the claimed right of review for "errors of law or legal reasoning" under section 12.17 and well beyond judicial second-guessing. (*Moncharsh, supra, 3 Cal.4th at p. 11* ["a court may not review the sufficiency of the evidence supporting an arbitrator's award"]; *Oakland-Alameda, supra, 101 Cal.App.4th at p. 638* [arbitrator's factual findings are binding and unreviewable].)

B. St. Jude Waived Its Claim There Were Multiple Prevailing Parties

Next, St. Jude claims the arbitrator committed legal error by "failing to identify a prevailing **[*20]** party on each contract." Requesting that the arbitrator reconsider his decision that Prospect alone prevailed, St. Jude quoted *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 Cal.App.4th 464, 491* (*Arntz*): "When an action involves multiple, independent contracts, each of which provides for attorney fees, the prevailing party for purposes of *Civil Code section 1717* must be determined as to each contract regardless of who prevails in the overall action. [Citation.] The fact that a party 'obtained a higher net recovery in the lawsuit is irrelevant to the determination of which party prevailed on any particular action on a contract.' [Citation.]" The arbitrator denied the motion, concluding the Physician Contracts and Hospital Contracts were not "independent" agreements under *Arntz* but rather "one big intertwined set of transactions."

Conceding that Prospect prevailed on the risk-pool surplus provision in the Physician Contracts, St. Jude nevertheless contends it is the prevailing party on the Hospital Contracts based on the arbitrator's finding Prospect breached the exclusivity provision obliging Prospect's physicians **[*21]** to provide care only at St. Jude Hospital. As St. Jude puts it, "In this case a proper finding may have been that each party prevailed on two of the four contracts, entitling both sides to their fees." But the identical exclusivity provision contained in the two Hospital Contracts was also contained in the two Physician Contracts. In essence, St. Jude's claim is that, for purposes of determining a prevailing party, the arbitrator had to resolve its exclusivity claim against Prospect under the Hospital Con-

tracts, and could not treat it as a third party beneficiary of the exclusivity provision in the Physician Contracts. The arbitrator found Prospect breached the exclusivity provision in the Physician Contracts; the arbitration decision says nothing about the Hospital Contracts. Even if the arbitrator erred, and we do not suggest he did, the award discloses on its face that St. Jude sought third party beneficiary status under the Physician Contracts, effectively inviting the arbitrator to consider the parties' competing claims under a single contract. Any error was therefore invited and waived. (*Harris v. Sandro (2002) 96 Cal.App.4th 1310, 1314.)*

C. The Gravamen **[*22]** *of the Parties' Dispute Is Factual, Not Legal*

Finally, St. Jude argues the arbitrator "erred as a matter of law in finding that St. Jude could be liable on the [Physician Contracts], to which it was not even a party." Phrased differently: "Because St. Jude was not a party to the [Physician Contracts], it had no duties under the contracts, and could not be held liable for breaching those non-existent duties."

This argument has superficial appeal, especially when read in conjunction with portions of the arbitrator's decision couched in terms of "liability." The written decision observes: "In practice, PacifiCare delegated to St. Jude total responsibility for administering the risk pools. This is confirmed by the pre-hearing stipulation between St. Jude and PacifiCare, which states that 'PacifiCare delegated to St. Jude the duty of administering the Hospital Control Program . . . and the duty of paying to Prospect its share of the budget surplus.' . . . Indeed, all parties understood from the inception of these contracts that St. Jude had the responsibility to manage and pay any and all amounts that were due to Prospect under the risk pools." Immediately following these observations **[*23]** is the written decision's first "finding": "St. Jude is *liable on the contracts* between Prospect and PacifiCare because PacifiCare delegated to St. Jude its contractual duties to administer the risk pools and pay to Prospect its share of the risk pool surplus." (Italics added.)

St. Jude contends this conclusion is erroneous as a matter of law, relying on hoary precedent holding an agent cannot be held personally liable on a contract signed only by the principal and not the agent. (*Johnson v. Benton (1925) 73 Cal.App. 571, 575.)*

We need not reach this issue. Read in its entirety, the arbitration award reveals the nature of the arbitrator's conclusion was one of accounting - not duty, breach, or liability. The full context of the arbitrator's decision is important. As noted by the arbitrator: "Both the [Physician Contracts] and Hospital [Contracts] contain an attachment, titled 'Hospital Control Program,' which created a 'risk pool' in which both Prospect and St. Jude were involved. According to the Hospital Control Program, a 'Hospital Services Budget' is established on an annual basis. The Hospital Control Program further provides that, over the course of **[*24]** the year, certain 'Hospital Expenses' incurred by St. Jude may be charged against the Hospital Services Budget, at a specified contractual rate. Further charges and credits result from reinsurance, which St. Jude is required to purchase from an outside carrier in order to limit risk pool loss from catastrophic medical care costs. Finally, any financial recoveries from third-party sources, such as coordination of benefit and co-payment revenues, are credited to the risk pool. Prospect is then entitled, on an annual basis, to 50% of the 'Budget Surplus,' representing the difference between the 'Hospital Services Budget' and the 'Hospital Expenses.'" The arbitrator also noted that "PacifiCare paid to St. Jude the monies from which Prospect's share of the surplus should have been paid. St. Jude has held, and continues to hold, those funds through the present."

Against this background, the arbitrator found St. Jude miscalculated the risk pool balances in 1997, 1998, and 1999. In fact, there were surpluses for those years, which had not been apparent because St. Jude "(a) erroneously underreported the risk pool budget figures, (b) overcharged the risk pool for the purchase of reinsurance, **[*25]** (c) erroneously overcharged the risk pool for expenses, (d) failed to effectively collect coordination of benefit revenues on behalf of the risk pool, and (e) failed to provide Prospect with accurate risk pool settlement reports, on a timely basis, for

any of the years in question." As a result, of the funds paid by PacifiCare and retained by St. Jude, Prospect was due "the sum of $ 1,200,000, representing its share of the surpluses for the 1997, 1998, and 1999 risk pools, created in accordance with the Hospital Control Program, which have never been paid by St. Jude."

True, the written arbitration decision, drafted by Prospect and adopted by the arbitrator, makes liberal use of contract language, purporting to find St. Jude "breached" the Physician Contracts and the implied covenant of good faith and fair dealing. But we are no more willing to exalt form over substance with an arbitration award than with a judicial decision. (See, e.g., *Espinoza v. Rossini (1967) 257 Cal. App. 2d 567, 572, 65 Cal. Rptr. 110.)* Rather, the face of the arbitration award discloses that this proceeding turned on factual findings regarding whether the risk pool balance was zero or less, **[*26]** in which case Prospect would receive nothing, or a positive sum, in which case Prospect would receive half. St. Jude does not dispute the arbitrator's accounting findings, nor does it dispute the Physician Contracts between PacifiCare and Prospect and, indeed, its own Hospital Contracts with PacifiCare mandate that Prospect was entitled to 50 percent of any risk pool surplus.

The arbitration strongly resembled an interpleader action. PacifiCare deposited the contested stake (the risk pool surplus, if any) and withdrew to the sidelines while the two putative stakeholders, St. Jude and Prospect, asserted their claims to the prize. Unlike the usual interpleader, the disputed sum remained in control of one of the parties - St. Jude - rather than with the court. But St. Jude stipulated it would make any payouts directed by the arbitrator. Importantly, neither St. Jude nor Prospect contributed any monies to the risk pools, so St. Jude, in essence, was simply agreeing to turn over PacifiCare's money earmarked for Prospect. Another crucial aspect of this interpleader was the uncertain existence of the "stake," i.e., the risk pool *surplus*: if the arbitrator determined there was indeed **[*27]** a risk pool surplus, St. Jude did not dispute Prospect was entitled to half; but if there was no surplus, Prospect received nothing. So, the question for the arbitrator was essentially a factual one: was there a surplus?

The arbitrator found there was, and St. Jude does not dispute the predicate findings for that conclusion, namely that St. Jude "(a) erroneously underreported the risk pool budget figures, (b) overcharged the risk pool for the purchase of reinsurance, (c) erroneously overcharged the risk pool for expenses, (d) failed to effectively collect coordination of benefit revenues on behalf of the risk pool, and (e) failed to provide Prospect with accurate risk pool settlement reports, on a timely basis, for any of the years in question."

St. Jude makes no attempt to challenge these findings on any grounds, legal or factual, and they therefore must be deemed accurate. In any event, factual challenges to the arbitrator's accounting would be foreclosed by *Moncharsh*. And once a surplus is established, St. Jude's attack on the arbitration award must fail because St. Jude does *not* challenge Prospect's entitlement to half of any surplus under the Physician Contracts (and **[*28]** the Hospital Contracts for that matter, which St. Jude signed). St. Jude relies on the fact it did not sign the Physician Contracts. But the very purpose of an interpleader proceeding is to resolve conflicting claims to a disputed stake where the parties may have signed separate agreements with the depositor but not with each other.

St. Jude steadfastly maintains it cannot be "liable" for surplus payouts under a contract with Prospect that St. Jude did not sign. But estoppel bars this claim because St. Jude itself invoked the Hospital Control Program provision in the Physician and Hospital Contracts, seeking to establish a risk-pool deficit. St. Jude cannot be heard to complain that the arbitrator reached the conclusion there was no deficit but rather a surplus. (Cf. *Metalclad Corp. v. Ventana Environmental Organizational Partnership (2003) 109 Cal.App.4th 1705, 1713-1714* [applying equitable estoppel where nonsignatory third party sought selective enforcement of contract terms]; *McBro Planning and Development Co. v. Triangle Electric Construction Co., Inc. (11th Cir. 1984) 741 F.2d 342* [applying estoppel in context of interrelated contracts between **[*29]** three parties].) Here, estoppel is especially appropriate because St. Jude signed the Hospital Contracts, expressly agreeing to the terms of

the Hospital Control Program. Moreover, "liability" is a misnomer where St. Jude must disgorge not its own money but PacifiCare's. If only all defendants had it so. In sum, for the foregoing reasons and particularly because the arbitrator's award is based on undisputed, dispositive, accounting-type factual findings that are not subject to review (*Moncharsh, supra, 3 Cal.4th at p. 11; Oakland-Alameda, supra, 101 Cal.App.4th at p. 638),* there is no occasion to evaluate the validity of section 12.17's prohibition on "errors of law or legal reasoning." n2

n2 The issue remains intriguing. Before concluding our answer on the issue would be merely dicta for the reasons discussed, we asked the parties for supplemental briefing, posing the question: "Assuming arguendo the existence of an arbitration clause in which the principals have agreed that 'errors of law or legal reasoning' are outside the scope of the arbitrator's authority and one party therefore seeks judicial review to vacate the award: Would judicial review in such circumstances negatively impact the court's institutional integrity? (See generally Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution (2000) 51 Hastings L.J. 1199.)*" The parties tackled the question and our numerous, lengthy sub-questions admirably.

Motivating our concern in part was the potential use of private proceedings to make public law, in the event a novel, putatively "purely legal" question arising in an arbitration eventually resulted in a published appellate opinion, or a court reviewing an arbitral decision concluded existing precedent should be overruled in favor of a new rule. The genius of the common law is its recognition, paraphrasing Roscoe Pound, that "precepts of law" are not abstract at all but rather attach a definite detailed consequence to a definite detailed state of facts. Might the authority of, and public confidence in, judicial law suffer where the facts underpinning a new rule were developed in a proceeding shielded from the public eye and exempt from uniform rules?

We note section 1296 provides: "

The parties to a construction contract with a public agency may expressly agree in writing that in any arbitration to resolve a dispute relating to the contract, the arbitrator's award shall be supported by law and substantial evidence. If the agreement so provides, a court shall, subject to section 1286.4, vacate the award if after review of the award it determines either that the award is not supported by substantial evidence or that it is based on an error of law."

Citing legislative history, St. Jude argues section 1296 merely clarified existing, generally applicable law regarding the parties' ability to specify the terms of arbitration and grounds for vacatur. *Crowell* rejected this argument, concluding it would render the enactment superfluous. (*Crowell, supra, 95 Cal.App.4th at p. 731.)* We defer further consideration of these riddles to the proper case, where the issue is more than hypothetical and our answer more than dicta. We therefore deny St. Jude's motion for judicial notice of legislative history regarding section 1296 as moot.

[*30]

IV

THE ARBITRATOR ERRED IN REQUIRING ST. JUDE ALONE TO PAY HIS FEE

The parties agreed in the arbitration clause, section 12.17, that "the cost of arbitration shall be shared equally by both parties." St. Jude argues the arbitrator exceeded his authority by awarding Prospect reimbursement for sums it advanced during the arbitration for its share of his fees. Prospect responds that St. Jude waived this claim by failing to object to the arbitration order that pro-

vided the prevailing party could recover its share of the arbitrator's fee. But this contention lacks merit, since "an order compelling arbitration . . . cannot be appealed or reviewed until after the arbitration is completed . . . ." (*Southeast Resource Recovery Facility Authority v. Montenay International Corp. (9th Cir. 1992) 973 F.2d 711, 713* [applying California law]; accord *Muao v. Grosvenor Properties Ltd. (2002) 99 Cal.App.4th 1085, 1088-1089.)*

Prospect also argues St. Jude waived the issue by failing to object when the arbitrator granted Prospect an interim award of costs, including reimbursement of $ 21,159.97 in arbitrator's fees. But St. Jude's counsel later alerted the **[*31]** arbitrator "that was a mistake on my part" and argued, "I don't think that that changes the underlying language of the agreement. It was a mistake on my part." Under the plain terms of the parties' agreement, we agree with St. Jude the arbitrator exceeded his authority by awarding Prospect reimbursement of its share of his fees. (See *Advanced Micro Devices, supra, 9 Cal.4th at p. 381* ["arbitrators may not award remedies expressly forbidden by the arbitration agreement or submission"].)

Resisting this conclusion, Prospect relies on contract language allowing the prevailing party to recover its "reasonable attorneys' fees *and costs*" (italics added), but Prospect conceded below this meant the items listed in section 1033.5, which did not include the expert witness fees and hearing transcript costs it sought. Nor does section 1033.5 include an arbitrator's fees. We therefore direct the trial court to correct the judgment to reflect that Prospect must bear an equal share of the arbitrator's fees.

V

CROSS-MOTIONS FOR SANCTIONS ARE DENIED

Upon completion of briefing, Prospect moved for sanctions against St. Jude for filing a frivolous appeal. Citing **[*32]** *Moncharsh*, Prospect repeated its argument that "California courts are not authorized to review either the factual or legal merits of an arbitration award," and asserted "St. Jude's refusal to abide by this rule of law is frivolous as a matter of law." St. Jude, in turn, sought sanctions against Prospect for filing a frivolous sanctions motion. As St. Jude points out, *Moncharsh* recites language supporting its position: "'[*I*]*n the absence of* some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute.'" (*Moncharsh, supra, 3 Cal.4th at p. 25*, italics added.) Section 12.17, purporting to eliminate the arbitrator's "power to commit errors of law or legal reasoning" is an example of precisely such a limiting clause, according to St. Jude. Because both parties find reasonable support for their positions in *Moncharsh*, in the interests of justice, we deny both motions for sanctions. (*Cal. Rules of Court, rule 27(e)*.)

VI

CROSS-APPEAL IS MOOT

Prospect filed a "protective" cross-appeal against PacifiCare, seeking **[*33]** review of certain issues only if this court were to reverse the underlying judgment against St. Jude. As we affirm the judgment in all respects that involve PacifiCare, it is unnecessary to consider the cross-appeal.

VII

DISPOSITION

We direct the trial court to correct the judgment to reflect that Prospect is not entitled to reimbursement for advancing portions of the arbitrator's fee, but rather must bear an equal share of those fees. The judgment is affirmed in all other respects.

The cross-appeal against PacifiCare is dismissed as moot. In the interests of justice, no appellate costs are awarded. (*Cal. Rules of Court, rule 27(a)(4)*.)

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.