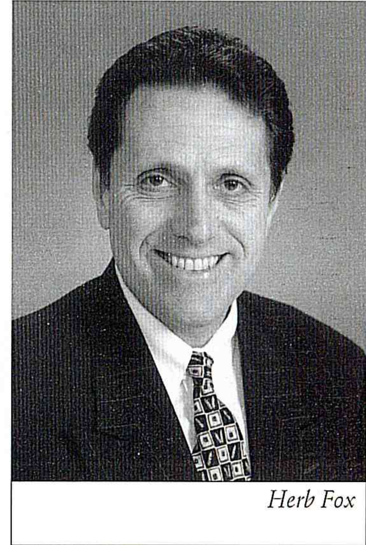
The Walls of *Moncharsh* Keep Tumbling Down

By Herb Fox

Eighteen years ago, an employment dispute between attorney **Phil Moncharsh** and the Ventura law firm where he then worked (the venerable Heily & Blase) marched its way through the appellate courts and became, for a long time, the last word in judicial review of arbitration awards. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1. The case held, in sum, that awards infected with legal error were immune to judicial correction. With apologies to Phil, who has since become a mainstay at **Rogers, Sheffield & Campbell,** the word *Moncharsh* became synonymous with "Get your (judicial) paws off my arbitration award!"

But the walls of *Moncharsh* have begun to tumble. Last year the California Supreme Court ruled that parties to an arbitration agreement can agree to subject the proceeding to judicial review for errors of law. *Cable Connection, Inc, v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334.



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And now, in a Ventura County case involving an arbitration of a dispute over the sale of a house, a majority of our local division of the Court of Appeal affirmed a trial order vacating a $1.5 million award on the ground that the arbitrator erroneously excluded evidence and thereby substantially prejudiced the defendant. See *Civ. Pro.* §1286(a)(5).

In a published opinion, **Justice Arthur Gilbert**, writing for the majority, found that the excluded evidence — of a lot-line adjustment that arguably wiped out the plaintiff's damages — denied the defendant the ability to introduce evidence of an "absolute defense." While careful to hold that "not every evidentiary ruling by an arbitrator 'can or should be reviewed by a court'," Justice Gilbert, joined by **Justice Ken Yegan**, held that under the facts of this case, the denial of the opportunity to present material evidence deprived the defendant of the benefit of the arbitration agreement bargain.

But **Justice Steve Perren**, in a rare dissent for this panel, wrote that the arbitrator's decision to exclude the evidence was a routine legal ruling that, under *Moncharsh*, cannot be reviewed for error. Justice Perren concluded that whether the arbitrator was right or wrong, "affirming the order of the trial court [vacating the award] cuts the heart out of *Moncharsh*."

Sorry. Phil — I'm sure Justice Perren meant that figuratively, and not personally!

The case is *Burlage v. Superior Court,* Court of Appeal case No. B211431, filed on August 31.

The Petitioners were represented by appellate specialist **Wendy Lascher**, and by **Richard M. Hoefflin** and **Jason M. Burrows** of Westlake Village.

The Real Party in Interest was represented by appellate specialists **Lisa Perrochet** and **John A. Taylor, Jr.** of **Horvitz & Levy, John D. Lang** of **Lang, Hanigan & Carvalho** in Woodland Hills; and **Craig R. Smith,** also from Woodland Hills.

Herb Fox is a Certified Appellate Law Specialist with offices in Santa Barbara and Century City.

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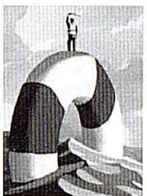

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