

IN THE SUPREME COURT OF OHIO

CARI BUTCHER,

Appellee,

v.

BALLY TOTAL FITNESS  
CORPORATION, JEFFREY  
PATTERSON and SANTINO  
DiBERARDINO,

Appellants.

: Supreme Court Case **08-1307**  
: No.: \_\_\_\_\_  
:  
: On Appeal from The Cuyahoga County Court  
: Of Appeals, Eighth Appellate District  
:  
: EIGHTH DISTRICT CASE  
: NO.: 07-90216  
:  
: CUYAHOGA COUNTY COURT OF  
: COMMON PLEAS  
: CASE NO.: 02-CV-45834

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**MEMORANDUM IN SUPPORT OF JURISDICTION BY APPELLANTS BALLY  
TOTAL FITNESS CORPORATION, JEFFREY PATTERSON AND SANTINO  
DiBERARDINO**

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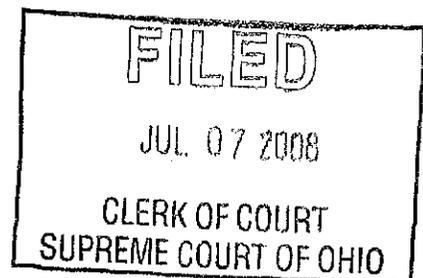


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I. **EXPLANATION WHY THIS IS A CASE OF GREAT PUBLIC AND GENERAL INTEREST.**

Plaintiff-Appellee Cari Butcher engaged in arbitration – using an arbitrator mutually-selected by the parties – and, after losing, challenged the arbitrator’s qualifications. She succeeded in her challenge below, but only after the reviewing courts committed serious errors.

This case, however, presents far more than just the substantive issues involved. It implicates bedrock principles of judicial process, fundamental fairness and due process. Specifically, it presents the following issues:

1. Can an appellate court presented with an assignment of error challenging subject-matter jurisdiction disregard that assignment of error and decline to rule on it?
2. Can an appellate court presented with an assignment of error fail to adhere to on-point Supreme Court authority?
3. Can an appellate court make its determination on a basis not raised before the trial court and of which the opposing party was not given notice and a fair opportunity to address?
4. Can an appellate court presented with an assignment of error disregard *stare decisis* and “the law of the case”?

The answer to all these questions is “no”, and therefore Supreme Court review is required.

A. **THE APPELLATE COURT’S REFUSAL TO ADDRESS SUBJECT MATTER JURISDICTION REQUIRES SUPREME COURT REVIEW.**

The Court of Appeals’ repeated refusal to address Defendants’ challenge to subject-matter jurisdiction literally requires Supreme Court review.

Defendants’ very first assignment of error was that the trial court “exceeded [its] subject-matter jurisdiction.” *Assignment of Error No. 1*. Nevertheless, the Court of Appeals failed to

decide - - or even address - - that assignment of error. *May 22, 2008 Journal Entry and Opinion*. Perplexed, Defendants filed a *Motion for Reconsideration*. In their *Motion*, Defendants pointed-out the Court's oversight. *Motion* at 3-5. Defendants also reminded the Court that Appellate Rule 12 required it to resolve the assignment of error and that it would be reversible error if the Court did not do so. *Id.* Nevertheless, the Court still refused to decide subject-matter jurisdiction. *June 10, 2008 Journal Entry*.

Because the Court of Appeals refused to address Defendants' assignment of error regarding subject-matter jurisdiction, this Court MUST certify the record. Indeed, it is well-established that an appellate court's failure to decide a non-moot assignment of error – and subject-matter jurisdiction can never be moot<sup>1</sup> – automatically-triggers Supreme Court review. *See, e.g., Smith v. Jagers* (1973), 33 Ohio St.2d 1, 2 (“Here, the Court of Appeals failed to comply with the provisions of App. R. 12(A), even after being specifically requested to state in writing its reasons for overruling appellant’s assignments of error....The motion to certify the record is, therefore, allowed”); *Criss v. Springfield Twp.* (1989), 43 Ohio St.3d 83, 84 *citing Lumbermen’s Underwriting Alliance v. American Excelsior Corp.* (1973), 33 Ohio St.2d 37, *State v. Jennings* (1982), 69 Ohio St.2d 389, *Dougherty v. Torrence* (1982), 2 Ohio St.3d 69 and *Danner v. Medical Ctr. Hosp.* (1983), 8 Ohio St.3d 19 (“all errors assigned and briefed shall be passed upon by the [appellate] court in writing, stating the reasons....This court has repeatedly reversed and remanded judgments that failed to comply with this part of [Appellate Rule 12]”); *State v. Evans* (2007), 113 Ohio St.3d 100, 105 at ¶¶26-27 (“App. R. 12(A)(1)(c) requires an appellate court to decide each assignment of error and give written reasons....Based on [its failure to do so,] this matter is remanded to the court of appeals”); *State v. 1981 Dodge Ram Van*

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<sup>1</sup> *See Rosen v. Celebreeze* (2008), 117 Ohio St.3d 241, 249 at ¶49 *quoting Pratts v. Hurley* (2004), 102 Ohio St.3d 81 at ¶11 (“subject matter jurisdiction goes to the power of the court to adjudicate the merits of a case.”)

(1988), 36 Ohio St.3d 168, 171 (“the failure to rule on all errors requires that the court of appeals’ decision be reversed and remanded for compliance with the requirements of App. R. 12(A)”)[emphasis added]; Rothfuss v. Hamilton Masonic Temple Co. (1971), 27 Ohio St.2d 131, 133-34 (“the Court of Appeals failed to perform its statutory obligation [under the precursor to App. R. 12]. Therefore, this court reverses”); and Lumbermen’s, 33 Ohio St.2d at 40 (“in light of the more express requirement of App. R. 12(A) that the Court of Appeals must, in writing, pass upon all errors assigned and briefed...the judgment of the Court of Appeals is reversed....”) Given that long-standing precedent, Defendants’ appeal must be certified and the Court of Appeals’ *Journal Entry and Opinion* must be reversed.

In fact, the only question is whether the case should be remanded or not. Defendants recognize the general rule is to reverse and remand. Nevertheless, remand would be improper here. First, the reason for remand in these cases is so an appellate court can comply with Rule 12. As explained in Rothfuss, 27 Ohio St.2d at 133-34: “Failure by the Court of Appeals to state its reasons for not passing upon all the assignments of error presented to it precludes this court from determining whether there was any merit to the claims of prejudicial error.” However, this cannot be a case where the Court of Appeals simply neglected or forgot to address an assignment of error. The Court of Appeals twice failed without explanation to address Appellants’ assignment of error, the second time after being directed specifically to the rule requiring that it do so and alerting it to the possibility of reversal if it failed to do so.

Second, a reversal without remand is warranted because there is a patent and unambiguous question of subject-matter jurisdiction. In those cases, parties can proceed directly to the Supreme Court. *See, e.g.,* State ex rel. Dannaher v. Crawford (1997), 78 Ohio St.3d 391, 393 (applying the “patent and unambiguous” standard to writs of prohibition and mandamus

because, absent a “patent and unambiguous” lack of jurisdiction, the party “has an adequate remedy on appeal”); State ex rel. Litty v. Leskovyansky (1996), 77 Ohio St.3d 97, 98-99 (same).

In this case, the lower courts determined *ex post facto* that Arbitrator Robert Stein, who issued the underlying award, was not qualified to be an arbitrator *under the terms of the parties' agreement*. Yet, that very agreement vested exclusive jurisdiction to make that determination with Arbitrator Stein: “Any Dispute concerning the formation, applicability, **INTERPRETATION**, or enforceability of this [contract]...shall be resolved hereunder, **and not by any federal, state or local court or agency**, except...to compel the parties to resolve and Disputes pursuant to [this contract.]” Given that clear contractual language, the lower courts unambiguously lacked jurisdiction to determine whether Stein was a qualified arbitrator. *See Hillsboro v. FOP* (1990), 52 Ohio St.3d 174, 176-77 (“the trial court and a majority of the court of appeals erred in substituting their interpretation of the [contract] for that of the arbitrator [and] exceeded their limited power”); Preston v. Ferrer (2008), 128 S.Ct. 978 (“when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA...that national policy...[a]pplies in state as well as federal courts’ and ‘foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.’”) Preston applies because the parties agreement is expressly governed by the Federal Arbitration Act.

Because this Court could have decided the jurisdictional issue on a motion for prohibition, it can decide the issue now. The Court therefore should certify the record and reverse without a remand.<sup>2</sup>

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<sup>2</sup> The Court of Appeals also ignored Defendants’ third and fourth assignments of error. According to those assignments of error -- *even assuming the courts had jurisdiction to decide whether Stein was qualified under the terms of the parties’ agreement* -- Stein was qualified. The undisputed evidence is that Stein was selected by mutual agreement, and arbitrators selected by mutual agreement do not have to be attorneys per the terms of the

**B. THE COURT OF APPEALS' DISREGARD OF ON-POINT SUPREME COURT AUTHORITY WARRANTS REVIEW.**

This is not a case where the Court of Appeals distinguished binding authority. It is a case where the appellate court disregarded binding authority from superior courts. For example, Defendants cited on-point Ohio Supreme Court and United States Supreme Court authority that courts may not substitute their own interpretation of a contract for an arbitrator's interpretation. *Brief of Defendants* at 15 citing Hillsboro, *supra*; *Motion for Leave [Granted] to File Supplemental Authority* citing Freston, *supra*.

In addition, the Court of Appeals rejected Defendants' second assignment of error – that Plaintiff waived her post-award objection to Arbitrator Stein's qualifications. In doing so, the Court of Appeals concluded: "Waiver is an intentional relinquishment or abandonment of a known right or privilege [and] there was absolutely no evidence that plaintiff's counsel knew prior to the arbitration that Stein was not an attorney...." *Journal Entry and Opinion* at 8. In doing so, the appellate court *literally ignored* ABM Farms, Inc. v. Woods (1998), 81 Ohio St.3d 498, 503, which held that even unintentional waivers are binding if plaintiff "could have known the truth by merely looking." *See Brief of Defendants* at 21; *Motion for Reconsideration* at 13 ("ABM Farms, supra...is a binding rule of law established by the Ohio Supreme Court.")

A court of appeals may not disregard binding precedent. Our entire judicial system would be jeopardized if lower courts were allowed to selectively determine when to abide by Supreme Court precedent and when to disregard it. It would destroy confidence in the judicial system since litigants could not rely on Supreme Court precedent.

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agreement. The appellate court's failure to analyze Defendants' third and fourth assignments of error also violated App. R. 12, and that failure also requires reversal. *See Criss*, 43 Ohio St.3d at 84 (compliance with Rule 12 requires the appellate court to "state reasons for its decision so that the parties would not have to speculate on the legal and other obstacles to be overcome on appeal to this Court.")

C. **SUPREME COURT REVIEW IS WARRANTED WHEN LOWER COURTS MAKE DETERMINATIONS BASED ON ISSUES NOT RAISED WITH THE TRIAL COURT AND THE OPPOSING PARTY IS DEPRIVED OF NOTICE AND A FAIR OPPORTUNITY TO ADDRESS THE ISSUE.**

It is a fundamental principle of fairness that parties claiming error must raise their specific allegations of error in the trial court, so that the opposing party has a meaningful opportunity to address the alleged error. As this Court eloquently stated in State ex rel. Quarto Mining Co. v. Foreman (1997), 79 Ohio St.3d 78, 81:

Ordinarily, reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed....These rules are deeply embedded in a just regard for the fair administration of justice. They are designed to afford the opposing party a meaningful opportunity to respond to issues or errors that may affect or vitiate his or her cause. Thus, they do not permit a party to sit idly by until he or she loses on one ground only to avail himself or herself of another on appeal. In addition, they protect the role of the courts and the dignity of the proceedings before them by imposing upon counsel the duty to exercise diligence in his or her own cause and to aid the court rather than silently mislead it into the commission of error.

In seeking to vacate the *Award*, Butcher asserted that it was procured by fraud, that Stein was guilty of evident partiality, and that Stein was guilty of misconduct because he granted certain motions in limine. *Brief in Support of Motion to Vacate* at 11, 15, 18. However, Butcher *did not seek* to vacate the *Award* based on §2711.10(D) – which provides a basis to vacate if the arbitrator “exceeded his powers.”<sup>3</sup> Defendants relied on those grounds actually identified by Butcher – *and on the conspicuous absence of §2711.10(D)* -- as a basis for vacating the *Award*. *Hearing Tr. 179* (“remember what this case is about, fraudulent intent. I haven’t heard a single thing that demonstrates even an iota of fraud.”) Despite §2711.10(D) never having been raised before the trial court, the Court of Appeals affirmed solely on that basis. *Journal Entry and Opinion* at 8.

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<sup>3</sup> Butcher did not assert §2711.10(D) as a basis for error in her appellate brief either.

That is more than just an obvious error of law. It is a manifest denial of the fair administration of justice – the denial of Defendants’ fundamental right to fair notice of the issues in controversy and a meaningful opportunity to prepare and respond. Quarto Mining, supra. As such, the Court of Appeals’ error touches upon a matter of great public interest: Our justice system’s bedrock principles of fair notice and due process.

**D. SUPREME COURT REVIEW IS NECESSARY WHEN LOWER COURTS DISREGARD STARE DECISIS AND THE “LAW OF THE CASE” DOCTRINE.**

As detailed above, the Court of Appeals held Plaintiff’s post-Award challenge to Arbitrator Stein’s qualifications was **not** waived because waivers must be “intentional.” In doing so, the appellate court violated the “law of the case” doctrine and *stare decisis*. Significantly, in Butcher v. Bally Total Fitness Corp. (Cuyahoga Cty. App. Apr. 3, 2003), 2003-Ohio-1734 (“Butcher I”), the Eighth District held in earlier proceedings in this very case that an unknowing waiver is binding if the waiving party could have known the truth by carefully reading (Butcher I at ¶¶27, 41): “[Butcher claimed] she did not knowingly waive her right to a judicial forum...[but the] naked truth is that she did not read the contract. It drives a stake into the heart of [Butcher’s] claim.” Likewise, the Court of Appeals disregarded its own long-standing precedent that any challenge to arbitral or judicial authority must be raised *before* the award or judgment is rendered. See Teramar Corp. v. Rodier Corp. (Cuyahoga Cty. 1987), 40 Ohio App.3d 39, 41: (“conversely...a party’s challenge to an arbitration panel’s jurisdiction...is not waived on appeal where the party repeatedly objected during the proceedings to the panel’s jurisdiction to make an arbitration award”); Martich v. Cleveland (Cuyahoga Cty. 1992), 76 Ohio App.3d 802, 804-05 (post-award objections to the arbitrator’s jurisdiction barred); In re J.L. (Cuyahoga Cty. App. Nov. 17, 2005), 2005-Ohio-6125 at ¶¶38-39, 41-42 *citing* Huffman v.

Shaffer (Cuyahoga Cty. 1984), 13 Ohio App.3d 291, 292 (“it has long been the rule that any challenge to a judge’s authority must be raised at the time the judge is hearing the case”) and citing Dorsky v. Dorsky (Cuyahoga Cty. Dec. 10, 1981), 1981 Ohio App. LEXIS 14072 at \*\*8-9 (“when a judge who adjudicates a case which was not properly transferred to him lacks the actual authority to rule on the case, that judge’s rulings are voidable if a timely objection is raised. Absent a timely objection to the judge’s authority over the case, however, any objection is waived.”)

It is critical to our judicial system that parties be able to rely on the law’s consistency – especially *in the same case*. As this Court stated in Westfield Ins. Co. v. Galatis (2003), 100 Ohio St.3d 216, 217, 226-27 at ¶¶1, 43-44 (“Stare decisis is the bedrock of the American judicial system....Those affected by the law come to rely upon its consistency...[and] departure from the doctrine of stare decisis demands special justification.”) Nevertheless, the Butcher II majority contradicted Butcher I, Teramar, Martich, In re J.L., Huffman, and Dorsky without any analysis or explanation – let alone the “special justification” required by Galatis. Once again, the appellate court’s error goes much deeper than the merits; it threatens long-standing principles designed to protect the judicial system and the public’s confidence in that system.

**E. SUPREME COURT REVIEW IS WARRANTED SO PARTIES CANNOT ENGAGE IN OPPORTUNISTIC, EX-POST FACTO CHALLENGES TO AN ARBITRATOR’S QUALIFICATIONS AFTER LOSING.**

On the substantive merits, the primary issue is whether a party can engage in arbitration – using an arbitrator **it selected** – and challenge the arbitrator’s qualifications after losing the arbitration. Allowing parties to wait and then challenge their hand-picked arbitrator’s qualifications after losing an arbitration will completely undermine the arbitration system. Instead of promoting finality in arbitration, it will encourage parties to take second and third

bites at the apple. After all, parties will know they can sit on their right to challenge an arbitrator's qualifications, arbitrate the matter to conclusion, and then challenge the arbitrator's qualifications if they lose. In contrast to the long history of judicial (and legislative) encouragement of final and binding arbitration, the Court of Appeals' decision encourages litigants instead to turn binding arbitration into a routine, preliminary step in the court process.

In addition, Supreme Court review on this issue is needed because there is a conflict between the Eighth District's decision and decisions from other districts. First, every other district that has considered the issue has held that a party may not wait until after an adverse award to challenge an arbitrator's authority. *See, e.g., Creatore v. Baird* (Mahoning Cty. 2003), 154 Ohio App.3d 316, 319-20, 2003-Ohio-5009 at ¶¶10-13; *E.S. Gallon Co., L.P.A. v. Deutsch* (Montgomery Cty. 2001), 142 Ohio App.3d 137, 141-42; *Huffman v. Huffman* (Franklin Cty. App. Nov. 5, 2002), 2002-Ohio-6031 at ¶¶ 25-31; and *M.B. Guran Co. v. Amsdell* (Summit Cty. 1983), 9 Ohio App.3d 201 at Syllabus. It is necessary for this Court to resolve this conflict among the appellate districts.

## II. STATEMENT OF THE CASE

Cari Butcher instituted this lawsuit against her former employer Bally Total Fitness, her former supervisor Santino DiBerardino, and her former General Manager Jeffrey Patterson. Butcher alleged Patterson sexually-harassed her. She also alleged the Defendants were liable for Patterson's sexual harassment and for their sex discrimination, retaliation, negligent retention and supervision, and intentional infliction of emotional distress.

Shortly after Butcher filed her *Complaint*, Defendants demanded she submit the dispute to binding arbitration – as required by their contractual agreement. Nevertheless, Butcher refused to arbitrate – claiming she was tricked into signing the arbitration agreement (the

“EDRP”). However, because a party cannot avoid a written agreement by claiming she failed to read it carefully, the trial court compelled Butcher to arbitrate.

Butcher appealed. The Court of Appeals unanimously rejected Butcher’s claim that she was “tricked.” Butcher I, supra, at ¶¶ 33, 41 *quoting ABM Farms, Inc, supra*:

Appellant contends that the appellee engaged in deception by strategy...in order to divert her attention away from the arbitration clause.

\* \* \*

“[T]he naked truth [is] that she did not read the contract. It drives a stake into the heart of her claim. A person of ordinary mind cannot be heard to say that [s]he was misled into signing a paper which was different from what [s]he intended, when [s]he could have known the truth by merely looking when [s]he signed.”

On July 1, 2003, Butcher filed a *Demand for Arbitration* with the American Arbitration Association. On July 24, 2003, AAA sent the parties’ counsel its roster of Indiana, Ohio and Kentucky arbitrators for employment disputes, along with copies of the arbitrators’ resumes. Each of AAA’s employment arbitrators had a *minimum* of ten years experience in employment matters. Robert Stein was the only arbitrator on the roster who was not an attorney. On August 11, 2003, the parties mutually-agreed to use Stein as their arbitrator.

On August 27, 2004, Defendants filed their *Motion for Summary Judgment*. Arbitrator Stein issued his *Summary Judgment Award* in January 2005. In his thorough and well-reasoned decision, Stein granted summary judgment on Butcher’s sexual discrimination, intentional infliction of emotional distress, and negligent retention claims. But, he denied summary judgment on Butcher’s retaliation claim and her sexual harassment claim for Patterson’s alleged misconduct.

In April and August 2005, Butcher’s remaining claims were presented at a hearing before Arbitrator Stein. The hearing spanned 6 days and included 9 witnesses, 70 exhibits and over

1,000 pages of transcript. The parties submitted post-hearing briefs on February 21, 2006 and post-hearing reply briefs on March 27, 2006. On June 22, 2006, Arbitrator Stein issued his *Award*. Before addressing the merits, Stein acknowledged that *neither party* objected to him ruling on the merits (*Award* at 3): “No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is properly before the arbitrator for a determination on the merits.” Arbitrator Stein then found in Defendants’ favor because Butcher did not prove her allegations by a preponderance of the evidence. Butcher did not file a post-hearing motion with Stein challenging his authority pursuant to the contract terms.

Instead, on September 20, 2006, Butcher filed a motion to vacate the *Award* in the trial court. Similar to her first appeal, Butcher claimed her agreement on Arbitrator Stein was accomplished by trickery. Specifically, she claimed her attorneys were *fraudulently tricked* into believing Stein was an attorney. However, Butcher’s counsel admittedly failed to review Stein’s resume during the arbitrator selection process. *Hearing Tr.* 52, 104. Regardless, the trial court granted Butcher’s *Motion* on July 11, 2007. On May 22, 2008, the Court of Appeals affirmed.

### III. STATEMENT OF FACTS

The parties’ arbitration agreement – the EDRP – is a binding and enforceable contract. *Butcher I, supra*, at ¶¶35, 40. It provides two ways to select an arbitrator. If the parties select an arbitrator by mutual agreement, the parties can pick any arbitrator they want. EDRP §8.2. If they cannot agree on an arbitrator, they alternately strike-out names from a list of practicing Ohio employment attorneys and former judges, and the last person remaining becomes the arbitrator. *Id.* It is undisputed that Stein, a AAA-certified employment arbitrator with more than 10 years experience, was selected by mutual agreement.

After two years of discovery and motion practice, Arbitrator Stein presided over a full

hearing on the merits, and afterwards the parties submitted post-hearing briefs and post-hearing reply briefs. Ultimately, Stein ruled in the Defendants' favor because Butcher did not prove her claims by a preponderance of the evidence.

After losing on the merits, Butcher's counsel claimed they were tricked into selecting Arbitrator Stein, and they moved to vacate the arbitration *Award*. However, the evidence presented at the trial court's hearing was undisputed: The parties selected Stein by mutual agreement, and Butcher's counsel failed to notice Stein's non-attorney status because they did not bother to read Stein's resume. *Hearing Tr.* 52, 104, 123-24, 130-31. Nevertheless, the trial court vacated the arbitration award based on "corruption, fraud or undue means", and the Court of Appeals affirmed.

#### **IV. LAW AND ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

##### **A. PROPOSITION OF LAW NO. 1: Courts Lack Subject-Matter Jurisdiction to Interpret Arbitration Agreements When Exclusive Jurisdiction Is Reserved for The Arbitrator.**

As a matter of law, the lower courts had no subject-matter jurisdiction to interpret the EDRP as requiring that Stein be an attorney. The EDRP **EXPRESSLY PRECLUDES COURTS FROM INTERPRETING ITS TERMS, AND IT RESERVES THAT EXCLUSIVE JURISDICTION TO THE ARBITRATOR** (EDRP §1.6):

Any Dispute concerning the formation, applicability, **INTERPRETATION**, or enforceability of this EDRP, including any claim that all or any part of this EDRP is void or voidable, shall be resolved hereunder, **and not by any federal, state or local court or agency**, except that either party may initiate a legal action in state or federal court to compel the parties to resolve any Disputes pursuant to the EDRP....[Emphasis added]

Accordingly, the lower courts lacked subject-matter jurisdiction to determine whether the EDRP required that Stein be an attorney. See Hillsboro, 52 Ohio St.3d at 176-77 ("the trial court and a majority of the court of appeals erred in substituting their interpretation of [the contract]

for that of the arbitrator [and] exceeded their limited power”); Garfield Heights Firefighters v. City of Garfield Heights (Cuyahoga Cty. Dec. 5, 1996), 1996 Ohio App. LEXIS 5448 at \*7 (Dyke, Judge) quoting W.R. Grace & Co. v. Workers Local 759 (1982), 103 S.Ct. 2177, 2182-83 (“the scope of the arbitrator’s authority is itself a question of contract interpretation that the parties have *delegated to the arbitrator*”)[emphasis added]; and Preston, 128 S.Ct. at 987 (“when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA....That national policy...‘appli[es] in state as well as federal courts’ and ‘foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.’”<sup>4</sup>

**B. PROPOSITION OF LAW NO. 2: The Lower Courts Improperly Relied on R.C. 2711.10(D) Because 2711.10(D) Was Not Raised in Butcher’s Motion to Vacate.**

In seeking to vacate the *Award*, Butcher asserted it was procured by fraud, that Stein was guilty of evident partiality, and that Stein was guilty of misconduct because he granted certain motions in limine. In doing so, she specifically cited to R.C. §2711.10(A)-(C). However, Butcher did not seek to vacate the *Award* based on §2711.10(D) – which provides a basis to vacate if the arbitrator “exceeded his powers.” Defendants relied on the grounds actually identified by Butcher – *and on the conspicuous absence of §2711.10(D)* as a basis for vacating the *Award*. See, e.g., *Hearing Tr. 179* (“remember what this case is about, fraudulent intent. I haven’t heard a single thing that demonstrates even an iota of fraud.”) Even though Butcher did not raise §2711.10(D) as a basis for vacating the *Award*, the trial court vacated and the Court of Appeals affirmed on that basis. See *Journal Entry and Opinion* at 8: “The trial court did not err

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<sup>4</sup> Although it had no jurisdiction, the Court of Appeals seriously erred in interpreting the EDRP’s qualifications for arbitrators. Indeed, as both Defendants’ and Plaintiff’s counsel acknowledged, the EDRP’s alternate strike-out method (and its accompanying requirement that arbitrators on the strike-out list be practicing Ohio employment attorneys) applies only if the parties cannot select their arbitrator by agreement. *Hearing Tr. 53, 122, 134-35.*

as a matter of law and acted within the parameters set forth in R.C. 2711.10[D] in vacating the award because, at minimum, the arbitrator exceeded his powers, and so imperfectly executed them that a mutual, final, and definite award was not rendered.”

This is a clear error of law. Portage Cty. Bd. of Comm’rs. v. Akron (2006), 109 Ohio St.3d 106, 128 at ¶112 (“we do not address Akron's claim of first public use because Akron improperly raised this claim for the first time on appeal to this court”); State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections (1992), 65 Ohio St.3d 175, 177 (“appellant cannot change the theory of his case and present these new arguments for the first time on appeal”); Abraham v. National City Bank Corp. (1990), 50 Ohio St.3d 175 at fn. 1 (“because she failed to raise the issue at trial and raised it for the first time on appeal...the issue is waived.”) Moreover, it was a manifest denial of Defendants’ fundamental right to fair notice of the issues in controversy and a meaningful opportunity to prepare and respond *in the trial court hearing*. Quarto Mining, supra.

**C. PROPOSITION OF LAW NO. 3: A Party Must Challenge an Arbitrator’s Qualifications Before The Award, and It Waives Its Challenges if It Could Have Known The Truth by Merely Reading Carefully.**

The Court of Appeals held: “A waiver is an intentional relinquishment or abandonment of a known right or privilege....In this matter, there was absolutely no evidence that plaintiff’s counsel knew prior to the arbitration that Stein was not an attorney....” *Journal Entry and Opinion* at 8.

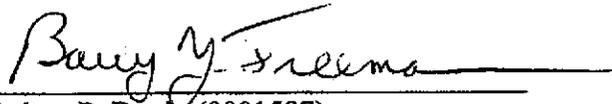
That part of the Court’s decision conflicts with Supreme Court precedent, other Eighth District decisions (*stare decisis*), and the law of the case set forth in Butcher I. Significantly, Butcher raised the issue of waiver her prior appeal (Butcher I at ¶27): “[Butcher claimed] she did not knowingly waive her right to a judicial forum.” Relying on controlling precedent from this Court, Butcher I rejected the assertion that Butcher’s waiver had to be knowing, because

parties cannot avoid a waiver if they fail to carefully read. *Id.* at ¶¶32, 41 *citing and quoting ABM Farms, supra. Also see Teramar, Martich, In re J.L., Huffman and Dorsky, supra* (Eighth District cases requiring challenges to arbitral/judicial authority be raised before the judgment/award.) Nevertheless, the appellate court ignored those holdings and held contrawise. Accordingly, the *Journal Entry and Opinion* must be reversed and the *Award* reinstated.

V. **CONCLUSION**

For all the foregoing reasons, Defendants-Appellants respectfully request that this Court accept jurisdiction so that the aforementioned errors can be reviewed on the merits.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing *Memorandum in Support of Jurisdiction By Appellants Bally Total Fitness Corporation, Jeffrey Patterson and Santino DiBerardino* was served upon the following, by e-mail and regular U.S. mail, this 7<sup>th</sup> day of July 2008:

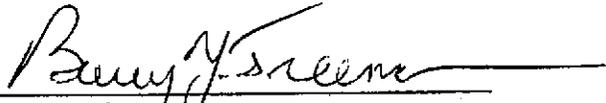
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\_\_\_\_\_  
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85777384

**COURT OF APPEALS' MAY 22, 2008  
JUDGMENT**

JUN 10 2008

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 90216

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**CARI BUTCHER**

PLAINTIFF-APPELLEE

vs.

**BALLY'S TOTAL FITNESS CORP., ET AL.**

DEFENDANTS-APPELLANTS

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**JUDGMENT:  
AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CV-458434

**BEFORE:** Dyke, J., Gallagher, P.J., and Rocco, J.

**RELEASED:** May 22, 2008

**JOURNALIZED:**

JUN 10 2008

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ANN DYKE, J.:

Defendants Bally's Total Fitness Corp. and several of its employees appeal from the judgment of the trial court that vacated an arbitration award entered in favor of Bally's in plaintiff, Cari Butcher's action for sexual harassment and other claims. For the reasons set forth below, we affirm.

On January 8, 2002, Butcher filed this action against Bally's Total Fitness Corp., Bally's Total Fitness of Cleveland, Inc., Bally's area supervisor Santino Bernadino and general manager Jeffrey Patterson (collectively referred to as "Bally's"). Butcher alleged that she was hired as a receptionist at the Brook Park location in August 2000 and was repeatedly subject to unwelcome sexual harassment from Patterson, which created a hostile and abusive environment. She further alleged that, following her objections to Bernadino, she was moved to another Bally's facility where she experienced further sexual harassment before being discharged from her job in February 2001. Butcher set forth claims for sexual harassment (including remarks and physical conduct), sexual discrimination, hostile work environment, respondeat superior, intentional infliction of emotional distress, negligent retention of incompetent employees, and retaliatory discharge.

Defendants moved to dismiss or stay the matter pending arbitration, arguing that Butcher had signed an Employment Dispute Resolution Procedure

which required her to submit the dispute to final and binding arbitration. In opposition, Butcher asserted that she had no bargaining power and was coerced into signing the document, the agreement was not explained to her and was hastily presented before the start of her shift on her first day of employment, and is unconscionable. The trial court subsequently referred the matter to arbitration. Butcher appealed to this court, which affirmed. See *Butcher v. Bally Total Fitness Corp.*, Cuyahoga App. No. 81593, 2003-Ohio-1734.

The matter proceeded to arbitration before Robert Stein. Stein made various evidentiary rulings. In an award dated June 22, 2006, Stein outlined Butcher's testimony concerning various incidents of sexual harassment at the Brook Park facility, her transfer to the Beachwood facility and her experience of harassment there, and the circumstances surrounding her termination. He also outlined Bally's investigation and discipline of some employees. Stein then analyzed the claims for relief in light of United States Supreme Court precedent and other cases. He then concluded that Butcher did not prove her claims by a preponderance of the evidence and noted that Butcher failed to "provide a preponderance of first-hand corroborative testimony from unbiased and disinterested witnesses, who had direct knowledge of the disputed events and verified or supported her claims."

On September 20, 2006, Butcher filed a motion to vacate the arbitrator's award in which she informed the court that she had learned that Stein is not a practicing attorney or former judge and is therefore not competent to arbitrate the matter under Section 8.2 of the Employment Dispute Resolution Procedure, which provides in relevant part as follows:

"The parties will confer and attempt to agree on the selection of the Arbitrator. If the parties cannot so agree within sixty (60) calendar days after the receipt of the Employee's notice \* \* \* the Employer shall request a list of proposed arbitrators from the educational and professional biographies of each. Each proposed arbitrator must reside within the state of the county of venue \* \* \* and must be a practicing attorney or former judge with experience in employment disputes. \* \* \*" (Emphasis added.)<sup>1</sup>

Butcher further asserted that Stein misrepresented that he was qualified to serve as an arbitrator and that the copy of Stein's resume, which her counsel received from the American Arbitration Association (hereafter "AAA"), actually listed the qualifications of Attorney Cynthia Stanley on the back page. In addition, Butcher asserted that various correspondence sent by the AAA to the

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<sup>1</sup> We note that the Local Rules of Cuyahoga County require arbitrators to be attorneys at law. Per plaintiff's exhibits, the AAA requires that an arbitrator "shall be experienced in the field of employment law."

parties and to Stein furthered the incorrect impression that Stein is an attorney and that Stein did not correct this misinformation.

On June 14, 2007, the trial court held an evidentiary hearing on the matter. Counsel for Butcher testified that the AAA sent the parties a list of potential arbitrators. Counsel for Bally's recommended that they select Stein because he believed that Stein was fair and competent. At no point did he advise Butcher's counsel that Stein was not an attorney, however, and Stein was subsequently selected. Counsel for Butcher later received a facsimile transmission from the AAA in which Stein disclosed a conflict of interest and advised the parties that "Mr. Duvin [had once been] his opposing counsel." On September 11, 2003, in an effort to select dates for the arbitration, the AAA sent another facsimile to the parties and to Stein, which again falsely indicated that Stein was a practicing attorney. Two days later, the AAA sent another facsimile transmission in which it corrected the hourly rate for Stein. At no point did Stein advise the parties that he was not an attorney. Later, in delivering the award, Stein noted that he "had been designated in accordance with the \*\*\* employment agreement entered into by the parties." Based upon Stein's pre-hearing rulings and portions of the award, counsel for Butcher became suspicious of Stein's credentials and later learned that he was not an attorney.

Butcher's counsel also introduced an e-mail from Bally's counsel which demonstrated that Bally's counsel knew that Stein was not an attorney.

Counsel for Butcher conceded however, that the initial list of potential arbitrators did not identify Stein as "Esq.," and that he did not specifically inquire as to whether Stein was a practicing attorney. A former co-counsel also testified that they wanted the arbitrator to be an attorney in light of the complexities of employment discrimination law and that she never suspected that Stein was not an attorney. She also stated that neither Stein nor Bally's counsel ever corrected the misunderstanding which had been created.

Counsel for Bally's testified that he did not specifically know that the Employment Dispute Resolution Procedure required the arbitrator to be a practicing attorney or former judge. He maintained that section 8.2 permits the arbitrator to be a practicing attorney or former judge or, in the alternative, someone such as Stein who is on a list compiled by the AAA.

In a written judgment entry, the trial court vacated Stein's award. The trial court noted that the resumes of potential arbitrators, which was supplied to Butcher's counsel from the AAA, was "scrambled" with the resume from attorney Cynthia Stanley, and therefore incorrectly indicated that he was an attorney. Although counsel for Bally's knew that Stein was not an attorney, Butcher's counsel was unaware of this fact until after the arbitration.

Bally's now appeals and assigns four errors for our review. Bally's maintains that the trial court exceeded its powers of review pursuant to R.C. 2711.10(A), that Butcher waived the right to object to Stein's qualifications, that the trial court made an error of fact in determining that Stein had to be a practicing attorney and that the trial court erred as a matter of law in concluding that the arbitrator is required to be a practicing attorney.

It is well-settled that the jurisdiction of courts in the area of arbitration is limited. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St.3d 129, 551 N.E.2d 186.

Pursuant to R.C. 2711.10, a trial court may vacate an arbitration award where:

“(A) The award was procured by corruption, fraud, or undue means.

“(B) Evident partiality or corruption on the part of the arbitrators, or any of them.

“(C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

“(D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. \*\*\*”

Under this statute, a trial court will grant relief from an adverse arbitration award only when the arbitrators were corrupt or committed gross procedural improprieties described in R.C. 2711.10. See *Schiffman v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, Cuyahoga App. No. 86723, 2006-Ohio-2473, citing *Cleveland v. Assn. of Cleveland Firefighters* (1984), 20 Ohio App.3d 249, 253, 485 N.E.2d 792; *Huffman v. Valletto* (1984), 15 Ohio App.3d 61, 63, 472 N.E.2d 740.

The standard of review on appeal is whether the trial court erred as a matter of law in rendering its decision. *Cuyahoga Metro. Hous. Auth. v. SEIU Local 47*, Cuyahoga App. No. 88893, 2007-Ohio-4292, citing *Dayton v. Internatl. Assn. of Firefighters, Local No. 136*, Montgomery App. No. 21681, 2007-Ohio-1337; *Union Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Valley Lodge No. 112* (2001), 146 Ohio App.3d 456, 459, 2001-Ohio-8674, 766 N.E.2d 1027, citing *McFaul v. UAW Region 2* (1998), 130 Ohio App.3d 111, 115, 719 N.E.2d 632.

In this matter, we cannot conclude that the trial court erred as a matter of law in vacating the arbitration award. From the undisputed facts, a gross

procedural error occurred in that plaintiff's counsel received erroneous information which identified Stein as a practicing attorney and relied upon this erroneous information, as well as Bally's counsel's recommendation in selecting him to arbitrate this matter. The trial court also determined that Bally's counsel "had experience with this individual and knew he wasn't an attorney." Neither Stein nor Bally's counsel corrected any of the erroneous statements which caused plaintiff's incorrect impression. Moreover, under the parties' agreement, the arbitrator was required to be a practicing attorney or a former judge, and because the decision at issue involved multiple complex and detailed legal analyses, as well as evidentiary rulings, Stein does not have the necessary education or credentials to render a mutual, final, and definite award. The trial court did not err as a matter of law and acted within the parameters set forth in R.C. 2711.10 in vacating the award because, at minimum, the arbitrator exceeded his powers, and so imperfectly executed them that a mutual, final, and definite award was not rendered.

As to the issue of waiver, we note that a waiver is an intentional relinquishment or abandonment of a known right or privilege. *Rocky River v. Glodick*, Cuyahoga App. No. 89302, 2007-Ohio-5705. In this matter, there was absolutely no evidence that plaintiff's counsel knew prior to the arbitration that Stein was not an attorney, and to the contrary, numerous documents suggested

or stated that Stein was a practicing attorney. In addition, there was no evidence that plaintiff elected to have this matter determined by a layperson. The claim of waiver was therefore properly rejected by the trial court.

The assignments of error are without merit.

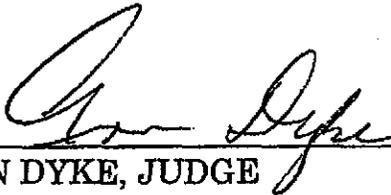
Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



ANN DYKE, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS.  
KENNETH A. ROCCO, J., DISSENTS.  
(SEE ATTACHED DISSENTING OPINION)

KENNETH A. ROCCO, J., DISSENTING:

I would hold that the common pleas court erred by finding the arbitration award was obtained by corruption, fraud or undue means. The court's factual findings do not support the conclusion that any malice, fraud or corruption

induced plaintiff's mistaken belief that the arbitrator was an attorney when he was not. Accordingly, I dissent.

R.C. 2711.10(A) allows the common pleas court to vacate an arbitration award if it determines that the award was obtained by corruption, fraud or undue means. The common pleas court limited its analysis to this provision. Our review should be limited to the grounds discussed by the common pleas court. See *Citigroup Global Markets, Inc. v. Masek*, Trumbull App. No. 2006-T-0052, 2007-Ohio-2301, ¶25.

None of the common pleas court's factual findings support the proposition that the arbitration award was obtained by fraud. Fraud generally requires a misrepresentation of a material fact, knowingly made, with the intent to deceive, upon which the other party reasonably relies, to his detriment. See, e.g., *Gaines v. Preterm-Cleveland, Inc.* (1987), 33 Ohio St.3d 54, 55. Plaintiff's counsel received and relied upon a resume which belonged to another arbitrator to identify Stein as a practicing attorney. There is no indication that the American Arbitration Association, Stein or opposing counsel intentionally jumbled the arbitrators' resumes, knowing that it would mislead plaintiff's counsel. Moreover, I find it difficult to conclude that counsel reasonably relied upon the jumbled resumes to reach the conclusion that Stein was an attorney. The resume page on which counsel supposedly relied on its face was identified as belonging

to "Cynthia Stanley, Esq." Furthermore, Stein was the only person on the list of arbitrators who did not have the designation "Esq." after his name. Based upon the facts it found, the common pleas court could not have concluded that the arbitration award was obtained by fraud.

The court also could not have concluded that the award was obtained by "undue means." Undue means requires proof of malice. *Bennett v. Sunnywood Land Dev. Inc.*, Medina App. No. 06CA0089-M, 2007-Ohio-2154, ¶62. There is no evidence that the resumes were jumbled intentionally, much less maliciously.

There is no evidence of any corruption, either. While this ground for vacating an arbitration award has not been developed in the case law, corruption is generally defined as dishonesty or a lack of integrity. Again, there is no evidence that anyone intentionally misled plaintiff's counsel with respect to Mr. Stein's qualifications.

I am not unsympathetic to plaintiff's argument that she selected Mr. Stein on the mistaken belief that he was an attorney when he was not. However, the grounds for vacating an arbitration award are extremely limited and do not include parties' mistakes as to the arbitrator's qualifications. Therefore, I would reverse the common pleas court's decision and remand with instructions to deny plaintiff's motion to vacate the award.

BUTCHER I

Service: Get by LEXSEE®

Citation: 2003 Ohio App. LEXIS 1639

2003 Ohio 1734, \*; 2003 Ohio App. LEXIS 1639, \*\*

CARI BUTCHER, Plaintiff-Appellant vs. BALLY TOTAL FITNESS CORP. ET AL., Defendants-Appellees

No. 81593

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2003 Ohio 1734; 2003 Ohio App. LEXIS 1639

April 3, 2003, Date of Announcement of Decision

**PRIOR HISTORY:** [\*\*1] CHARACTER OF PROCEEDINGS: Civil appeal from Common Pleas Court. Case No. CV-458434.

**DISPOSITION:** Affirmed.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff, an employee, sued defendant, a fitness center, for prohibited conduct under Ohio Rev. Code Ann. § 4112.02 et seq., alleging claims of sexual harassment, sexual discrimination, and related claims. The center moved to dismiss or compel arbitration and to stay proceedings under state and federal law. The Court of Common Pleas (Ohio) granted the motion to compel arbitration and stay proceedings, and the employee appealed.

**OVERVIEW:** When the employee was hired, she signed documents which contained an arbitration clause for work-related disputes. The employee conceded that she had not read the documents in their entirety. The employee was also given an employee handbook which set out the dispute resolution procedures. The appellate court held that the trial court did not abuse its discretion in granting the motion to compel arbitration pursuant to Ohio Rev. Code Ann. §§ 2711.02(B), 2711.03(A). The offer of employment was sufficient consideration to support the contract. The fact that the employee failed to read the arbitration agreement did not preclude a meeting of the minds. The employee was given an opportunity to pose questions immediately, or take the employment documents home to have another person review them. The appellate court held that the employee could not claim that failing to read the terms of a contract when given the express opportunity to do so amounted to an unconscionable contract. The appellate court further held that the trial court properly limited the questioning at the hearing to claims of whether there was a meeting of the minds to arbitrate employment-related disputes.

**OUTCOME:** The judgment was affirmed.

**CORE TERMS:** arbitration, arbitration agreement, unconscionable, orientation, signing, hire, arbitration clause, employment-related, signature, abuse of discretion, formation,

questioning, compel arbitration, assignments of error, employee handbook, acknowledgment, arbitrator, pertaining, packet, stay proceedings, standard of review, announcement, arbitrate, unaware, mutual, assent, dispute resolution, bargaining power, discovery, handbook

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[Civil Procedure](#) > [Alternative Dispute Resolution](#) > [Mandatory ADR](#) 

**HN1**  See [Ohio Rev. Code Ann. § 2711.02\(B\)](#).

[Civil Procedure](#) > [Alternative Dispute Resolution](#) > [Mandatory ADR](#) 

**HN2**  See [Ohio Rev. Code Ann. § 2711.03\(A\)](#).

[Civil Procedure](#) > [Alternative Dispute Resolution](#) > [Mandatory ADR](#) 

[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) 

**HN3**  The standard of review when the lower court grants a motion to compel arbitration and stay proceedings under [Ohio Rev. Code Ann. § 2711.02](#) is an abuse of discretion. The standard of review for such matters is to determine whether the trial court abused its discretion in reaching its judgment. Absent a clear abuse of that discretion, the lower court's decision should not be reversed. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) 

**HN4**  An abuse of discretion involves far more than a difference in opinion. The term discretion itself involves the idea of choice, of an exercise of will, of a determination, made between competing considerations. In order to have an abuse in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias. An abuse of discretion implies more than an error of law or judgment. Rather, abuse of discretion suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. [More Like This Headnote](#)

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**HN5**  Both federal and Ohio courts favor the settlement of disputes through arbitration. [More Like This Headnote](#)

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[Contracts Law](#) > [Contract Conditions & Provisions](#) > [Arbitration Clauses](#) 

[Labor & Employment Law](#) > [Collective Bargaining & Labor Relations](#) > [Arbitration](#) > [Enforcement](#) 

**HN6**  Substantive rights are not forfeited by the enforcement of an arbitration clause, the distinction is merely the type of forum utilized to enforce rights, an arbitration forum rather than a judicial forum. [More Like This Headnote](#)

[Civil Procedure](#) > [Alternative Dispute Resolution](#) > [Arbitrations](#) > [General Overview](#) 

[Contracts Law](#) > [Contract Conditions & Provisions](#) > [Arbitration Clauses](#) 

[Labor & Employment Law](#) > [Collective Bargaining & Labor Relations](#) > [Arbitration](#) > [Enforcement](#) 

**HN7**  The courts will not enforce an arbitration agreement when (1) the arbitration clause is not applicable to the dispute or issues at hand, or (2) the parties did not

agree to the clause. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Contracts Law](#) > [Formation](#) > [Acceptance](#) > [General Overview](#) 

[Contracts Law](#) > [Formation](#) > [Meeting of Minds](#) 

[Contracts Law](#) > [Formation](#) > [Offers](#) > [General Overview](#) 

**HN8** ↓ In order for a valid contract to exist, there must be mutual assent, an offer and acceptance of the offer, and consideration. An enforceable contract requires these elements to be met. Therefore, if there is no meeting of the minds, the contract has not been formed. [More Like This Headnote](#)

[Contracts Law](#) > [Consideration](#) > [General Overview](#) 

**HN9** ↓ The definition of consideration is that a promisor received something of value in exchange for what was given up. If there is no consideration, a promise is illusory and void. [More Like This Headnote](#)

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[Contracts Law](#) > [Consideration](#) > [Sufficient Consideration](#) 

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**HN10** ↓ A court does not inquire into the adequacy of consideration to support the contract. A company's offer of employment is sufficient legal consideration to support the contract. [More Like This Headnote](#)

[Contracts Law](#) > [Formation](#) > [General Overview](#) 

**HN11** ↓ A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed. [More Like This Headnote](#)

[Contracts Law](#) > [Formation](#) > [General Overview](#) 

**HN12** ↓ The parties to an agreement should be able to rely on the fact that affixing a signature which acknowledges one has read, understood, and agrees to be bound by the terms of an agreement means what it purports to mean. The parties to a contract must be able to rely on the statements enclosed in the documents asserting the other party understood the terms and conditions of the agreement. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Contracts Law](#) > [Contract Conditions & Provisions](#) > [Arbitration Clauses](#) 

[Labor & Employment Law](#) > [Collective Bargaining & Labor Relations](#) > [Arbitration](#) > [General Overview](#) 

**HN13** ↓ Indiana courts have rejected the formation of contracts where a modification has unilaterally changed existing employment terms and conditions. However, because a candidate for employment is free to look elsewhere for employment, and he/she is not obligated to consent to an arbitration agreement, an agreement to arbitrate is not unconscionable. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [Abuse of Discretion](#) 

[Evidence](#) > [Procedural Considerations](#) > [Rulings on Evidence](#) 

**HN14** ↓ The trial court has discretion over the relevancy of certain lines of questioning permitted in a hearing. The standard of review is abuse of discretion. [More Like This Headnote](#)

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**JUDGES:** FRANK D. CELEBREZZE, JR., JUDGE. KENNETH A. ROCCO, A.J., AND MICHAEL J. CORRIGAN, J., CONCUR.

**OPINION BY:** FRANK D. CELEBREZZE, JR.

## **OPINION**

### JOURNAL ENTRY AND OPINION

FRANK D. CELEBREZZE, JR., J.:

**[\*P1]** Appellant, Carl Butcher, appeals the lower court's granting of appellees' alternative motion to compel arbitration and stay proceedings.

**[\*P2]** Butcher, in her early twenties, recently returned to classes at Cuyahoga Community College (Tri-C) in Parma, Ohio after her child turned the age of one. While attending classes at Tri-C, she discovered a job posting for Bally Total Fitness Corp. ("Bally"). On August 28, 2000, Butcher applied for a receptionist position at a Bally in Brook Park, Ohio, where she completed an application and agreed to a urine test in consideration **\*\*\*2** of employment with Bally.

**[\*P3]** The employment application contained an acknowledgment with a signature line advising that Bally utilized an employment dispute resolution procedure ("EDRP") to handle work-related disputes. The acknowledgment stated: "\* \* \* the Company has established an alternative dispute resolution procedure to resolve disputes arising out of the employment context, referred to as Bally Employment Resolution Procedure (EDRP). I agree to be bound by the terms of the EDRP as a condition of employment concerning any disputes or claims covered under the EDRP. I understand that I have the right to request and review a copy of the EDRP."

**[\*P4]** Bally provided an advisement that "if you have any questions regarding this statement, please ask a Company representative before signing." This advisement was located above the signature line and was underlined. An admonition, which was in capital letters and underlined, followed stating, "DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE STATEMENT AND AGREEMENT." Butcher signed the application, but conceded in the hearing before the lower court that she had not read the application in its entirety. She admittedly only read **\*\*\*3** what she deemed necessary to complete the information blanks in the application.

**[\*P5]** On August 30, 2000, Butcher reported to the Beachwood facility for work and an employment orientation. Upon her arrival, the manager directed her to sign some employment papers. She was directed to an empty room where a training video was playing to fill out her "new hire" papers. The new hire packet contained information which explained policies, procedures and benefits of Bally.

**[\*P6]** The new hire packet also contained an Employee Handbook, which clearly explained that in exchange for Bally's consideration of her application and offer of employment, Butcher agreed to resolve all employment-related disputes through Bally's Employment Dispute

Resolution Procedure (EDRP). New employees were also provided with a brochure entitled "Alternatives to Litigation." The brochure informs the employee that he/she may ask questions immediately or at a future date about the information provided, and he/she may direct questions to the Human Resources personnel. New employees are informed that they may take the documents home and discuss them with their personal, legal counsel prior to signing.

**[\*P7] [\*\*4]** Bally markets its EDRP by presenting it as a benefit to its employees, providing a cost-effective and speedy resolution to employment-related disputes. The terms of the EDRP bind Bally employees to arbitration in the event of an employment-related dispute, and prevents the filing of lawsuits regarding all covered disputes, including "tort claims; claims for discrimination; and/or claims for violation of any federal, state or other governmental constitution, statute, ordinance or regulation." Likewise, in exchange for the employee's consent to be bound by the terms of the EDRP, Bally also agrees to arbitrate covered disputes against the employee through the EDRP.

**[\*P8]** Under the EDRP, the parties are entitled to a neutral arbitrator chosen from a panel provided by the American Arbitration Association (AAA). The parties engage in adequate discovery, including the right to take depositions and exchange documents. The parties may subpoena witnesses and submit post-hearing briefs on all issues. The arbitrator has the authority to enforce discovery rights through sanctions and penalties as provided in the Federal Rules of Civil Procedure. The arbitrator must issue a written award containing **[\*\*5]** findings of fact and conclusions of law. The arbitrator may award any remedies allowed under federal or state anti-discrimination laws. Finally, if the dispute involves federal or state statutory discrimination claims, Bally agrees to pay the entire cost of arbitration except the employee's attorneys' fees and other personal expenses.

**[\*P9]** In contrast, the EDRP stipulates that the employer may modify the terms of the agreement unilaterally during the course of employment, it limits the time to file a claim to one year for most claims, it is silent pertaining to the cost of arbitration, limits depositions for discovery, allows Bally to litigate specified claims in any forum while limiting the employee's right to do the same and precludes the right to a jury trial.

**[\*P10]** The Bally representative who conducted the orientation process at the Beachwood location was Paula Tinsley. Ms. Tinsley was unavailable to testify during the hearing in the lower court and is no longer employed by Bally; however, Ira Katz, another witness employed by Bally, advised the trial court of the orientation procedures. He testified that during the orientation, a new hire checklist is completed **[\*\*6]** which highlights the forms issued to the new employee prior to commencement of their employment. Ms. Tinsley had checked off on Butcher's new hire checklist that the EDRP agreement was provided, the employee handbook was provided, and the application for employment was completed. The employee is also asked to sign and date the last page of the handbook, which also explains the EDRP process. Bally retains the last signed page of the handbook in the employee's personnel file, and the employee retains the handbook.

**[\*P11]** Further, after reading the EDRP itself, the employee is asked to sign a Voluntary Agreement acknowledging he/she has read the EDRP, understands its terms and is bound to resolve all employment-related disputes through the EDRP process.

**[\*P12]** Butcher signed the Voluntary Agreement, the last page of the employee handbook, and the employment application. These documents were admitted as exhibits pertaining to the binding terms of the EDRP. Incidentally, the EDRP is also posted in the break room at the facility where Butcher worked. Butcher, however, alleges she never received a copy of the EDRP.

**[\*P13]** Butcher's employment with Bally ended on February 22, 2001. On **[\*\*7]** January

8, 2002, she filed a complaint in the common pleas court against Bally for prohibited conduct under R.C. 4112.02 et seq. seeking damages and other relief. She alleged claims of sexual harassment, sexual discrimination, hostile work environment, negligent retention in the workplace and related claims. Bally moved to dismiss or compel arbitration and stay proceedings under the Federal Arbitration Act 3 and 4, Ohio Revised Code 2711.02, 2711.03 and 4112.14(C) and Ohio Rules of Civil Procedure 12(B)(1) and (6).

**[\*P14]** On June 14, 2002, the lower court held an evidentiary hearing on the issue of contract formation. Jacqueline Pethel, an office manager who is currently a supervisor of the Beachwood office, and Ira Katz, Regional Director of Human Resources in Maryland, testified on behalf of Bally. Butcher testified on her own behalf. The lower court granted Bally's motion to stay, and Butcher appealed to this court on July 26, 2002.

**[\*P15]** The appellant alleges five assignments of error. Assignments one, three, four and five have a similar factual and legal basis, **[\*\*8]** thus they will be addressed together.

**[\*P16]** "I. The trial court erred in granting Defendants' Motion to Compel Arbitration and Stay Proceedings, in finding that the parties had formed a valid contract despite abundant evidence presented that Defendants created unconscionable circumstances surrounding the signing process which showed there was no meeting of minds or voluntary and mutual assent, elements necessary for contract formation."

**[\*P17]** "III. The trial court erred to the prejudice of Plaintiff- Appellant in enforcing an arbitration agreement despite manifest evidence in the record which indicated the making of the agreement was procedurally unconscionable as it showed adhesion, surprise and lack of meaningful choice and unequal bargaining power between the parties."

**[\*P18]** "IV. The trial court erred to the prejudice of Plaintiff- Appellant in enforcing an arbitration agreement where evidence showed its terms are substantively unconscionable: The terms of the proposed contract were one-sided and lacked mutuality, they were drafted to benefit the interests of the offeror at the expense of the offeree, and they failed to provide an adequate forum for the redressing **[\*\*9]** of Plaintiff's grievances."

**[\*P19]** "V. The trial court erred to the prejudice of Plaintiff- Appellant in upholding the arbitration clause, which abridges Plaintiff's Constitutional and statutory rights to which she is entitled as established by the Ohio General Assembly and as a member of a class protected by those policies and statutes, because Plaintiff could not make a knowing, voluntary or intelligent waiver of those rights, by an arbitration clause which Defendants obfuscated, rather than made clear."

**[\*P20]** Under R.C. 2711.02(B), **HN1** " \* \* \* if any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration."

**[\*P21]** R.C. 2711.03 (A) reads in pertinent part:

**[\*P22]** **[\*\*10]** **HN2** " \* \* \* The court shall hear the parties, and, upon being satisfied that the making of the agreement of arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement."

**[\*P23]** <sup>HN3</sup> The standard of review when the lower court grants a motion to compel arbitration and stay proceedings under R.C. 2711.02 is an abuse of discretion. The standard of review for such matters is to determine whether the trial court abused its discretion in reaching its judgment. Absent a clear abuse of that discretion, the lower court's decision should not be reversed. Mobberly v. Hendricks (1994) 98 Ohio App.3d 839, 845, 649 N.E.2d 1247. The Ohio Supreme Court has explained as follows:

**[\*P24]** <sup>HN4</sup> "An abuse of discretion involves far more than a difference in opinion. The term discretion itself involves the idea of choice, of an exercise of will, of a determination, made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences **[\*\*11]** not the exercise of will but the perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." Id. at 845-846, quoting Huffman v. Hair Surgeons, Inc. (1985), 19 Ohio St. 3d 83, 87, 19 Ohio B. 123, 482 N.E.2d 1248. An abuse of discretion implies more than an error of law or judgment. Rather, abuse of discretion suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. In re Jane Doe 1 (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181; Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 5 Ohio B. 481, 450 N.E.2d 1140.

**[\*P25]** In general, <sup>HN5</sup> both federal and Ohio courts favor the settlement of disputes through arbitration. See ABM Farms, Inc. v. Woods, 81 Ohio St.3d 498, 1998 Ohio 612, 692 N.E.2d 574; Kelm v. Kelm (1993), 68 Ohio St.3d 26, 1993 Ohio 56, 623 N.E.2d 39; Southland v. Keating (1984), 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852. In Circuit City Stores v. Adams (2001), 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302, the Supreme Court held the Federal Arbitration Act applies to arbitration agreements similar in composition to the appellee's **[\*\*12]** EDRP in this case. The Supreme Court has also stated that <sup>HN6</sup> substantive rights are not forfeited by the enforcement of an arbitration clause, the distinction is merely the type of forum utilized to enforce rights, an arbitration forum rather than a judicial forum. Circuit City Stores v. Adams (2001), 532 U.S. 105, 149 L. Ed. 2d 234, 121 S. Ct. 1302, citing Gilmer v. Interstate/Johnson Lane Corp. (1991), 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647.

**[\*P26]** However, <sup>HN7</sup> the courts will not enforce an arbitration agreement when: 1. the arbitration clause is not applicable to the dispute or issues at hand; or 2. the parties did not agree to the clause. Ervin v. American Funding Corp. (Claremont Cty. 1993), 89 Ohio App.3d 519, 625 N.E.2d 635; Estate of Lola Brewer v. Dowell & Jones, et al., Cuyahoga App. No. 80563, 2002 Ohio 3440.

**[\*P27]** In the instant case, the appellant is asserting alternative arguments: there is no agreement to be bound by the terms of the EDRP, or the agreement is unconscionable, or she did not knowingly waive her right to a judicial forum.

**[\*P28]** <sup>HN8</sup> In order for a valid contract to exist, there must be mutual assent, **[\*\*13]** an offer and acceptance of the offer, and consideration. Nilavar v. Osborn (1998), 127 Ohio App.3d 1, 711 N.E.2d 726. An enforceable contract requires these elements to be met; therefore, if there is no meeting of the minds, the contract has not been formed. McCarthy, Lebit, Crystal & Halman Co. L.P.A. v. First Union Management (1993), 87 Ohio App.3d 613, 622 N.E.2d 1093.

**[\*P29]** The appellant asserts there is no meeting of the minds because an employee may not modify the language of the EDRP prior to being hired; therefore, there is unequal or widely disparate bargaining power between the parties. She asserts there was no mutual assent to the terms of the EDRP for the following reasons: She was unaware the arbitration clause existed and was unfamiliar with the terms of the EDRP; the appellee rushed the

orientation process, did not explain the arbitration policy and did not personally hand her a copy of the document which she signed; and the appellee is in a superior bargaining position.

**[\*P30]** Furthermore, the appellant asserts there was no consideration for the contract. <sup>HN9</sup> ¶ The definition of "consideration" is that a promisor received something of value in exchange for **[\*\*14]** what was given up. If there is no consideration, a promise is illusory and void. Floss v. Ryan's Family Steakhouses, Inc. (6th Cir. 2000), 211 F.3d 306.

**[\*P31]** Generally, <sup>HN10</sup> ¶ the court does not inquire into the adequacy of consideration to support the contract. The court has held in Morrison v. Circuit City Stores, Inc. (S.D. Ohio 1999), 70 F. Supp. 2d 815 and Koveleskie v. SBC Capital Mkts. Inc. (CA 7 1999), 167 F.3d 361 cert. denied, (1999), 528 U.S. 811, 145 L. Ed. 2d 40, 120 S. Ct. 44, the company's offer of employment is sufficient legal consideration to support the contract.

**[\*P32]** Next, appellant claims that she was unaware of the arbitration agreement. The Ohio Supreme Court in ABM Farms, Inc. v. Woods, (1998), 81 Ohio St.3d 498, 1998 Ohio 612, 692 N.E.2d 574, rejected the argument that if one fails to read what they have signed, then they are not held to the agreement. In that case, the plaintiff signed an Account Acceptance Form that stated she had received, read and understood the terms of the Account Agreement booklet describing the terms of the arbitration agreement. The plaintiff later claimed she was unaware of the existence of the arbitration **[\*\*15]** agreement. The court held there was no misrepresentation of facts, only a failure of the defendant to inform the plaintiff of the content of the contract, which it was under no obligation to do. The court explained: <sup>HN11</sup> ¶ "a person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed." Id.

**[\*P33]** The appellant contends that the appellee engaged in deception by strategy by instructing her to appear at work dressed and ready to begin, then, upon her arrival, having her sign eighteen different papers prior to commencement of the job in order to divert her attention away from the arbitration clause. The appellant further claims it was the terms of the contract that were unconscionable when viewing the respective intelligence, experience, age and mental and physical condition of the parties.

**[\*P34]** The appellant alleges that unconscionability of a contract requires an analysis of both substantive and procedural unconscionability. E. Allen Farnsworth, Contracts 4.28 (3rd ed. 1999). She alleges the procedural analysis focuses on factors relative to **[\*\*16]** the comparative bargaining position of the parties, and the substantive analysis involves the commercial reasonableness of the contract terms.

**[\*P35]** We disagree that the signing of the contract did not meet the fundamental elements of contract formation. The appellant's action of signing the Voluntary Agreement acknowledges she read and understood the terms of the EDRP. <sup>HN12</sup> ¶ The parties to an agreement should be able to rely on the fact that affixing a signature which acknowledges one has read, understood, and agrees to be bound by the terms of an agreement means what it purports to mean. The parties to a contract must be able to rely on the statements enclosed in the documents asserting the other party understood the terms and conditions of the agreement.

**[\*P36]** The appellant desires an interpretation of contract law that, although one party acknowledges in writing he/she consents to be bound by the terms of an agreement, the subjective state of mind of the individual should prevail at a later time and date when the terms of the agreement now seem unfavorable to that party's position.

**[\*P37]** It is clear in this case that the EDRP was introduced to the appellant at

several **[\*\*17]** instances prior to her employment and was also displayed in plain sight after she began employment. The appellant claims she was completely oblivious to the existence of the EDRP agreement, but it was posted in the break room at the Beachwood facility. The EDRP agreement was identified in the application for employment, and the EDRP agreement in its entirety was included in the new hire packet with a separate page upon which an acknowledgment form was displayed explaining the EDRP and requiring a signature of the potential employee to commence work. This was not a clause hidden among numerous pages of forms. The EDRP was presented in the application, the employee handbook and the agreement itself.

**[\*P38]** The EDRP agreement required a signature of acknowledgment to be bound by its terms. The appellant was given an opportunity to pose questions immediately or take the documents home to have another person review them. The appellant admitted she read only part of the new hire packet, the page to which she must affix a signature, to speed up the orientation process herself. Although there may have been distracting elements present, such as an orientation video playing, there is no **[\*\*18]** evidence that the appellee rushed her to sign the papers and deprived her of any information pertaining to the agreement. The appellant further stated during the orientation that she asked a question of another employee regarding her deductions on the W2 forms.

**[\*P39]** <sup>HN13</sup> The court has rejected the formation of contracts where the modification has unilaterally changed existing employment terms and conditions. *Harmon v. Philip Morris, Inc.* (1997), 120 Ohio App.3d 187, 697 N.E.2d 270. However, because the candidate for employment is free to look elsewhere for employment, and he/she is not obligated to consent to the arbitration agreement, the agreement to arbitrate is not unconscionable. *EEOC v. Frank's Nursery & Crafts, (E. D. Mich. 1997), 966 F. Supp. 500.*

**[\*P40]** This court acknowledges that the appellant is young, inexperienced and was subjected to inappropriate and provocative displays and gestures in the workplace. However, she was free to find other employment rather than agree to be bound by the terms of the EDRP to address any employment-related disputes. Whether she read the paperwork or disregarded the paperwork, she signed the papers **[\*\*19]** stating she agreed to the terms of the EDRP in order to be hired. The appellant cannot now claim that failing to read the terms of a contract when given the express opportunity to do so amounts to an unconscionable contract.

**[\*P41]** The crux of appellant's appeal here centers around the unavoidable fact of "the naked truth that she did not read the contract. It drives a stake into the heart of her claim. A person of ordinary mind cannot be heard to say that he was misled into signing a paper which was different from what he intended, when he could have known the truth by merely looking when he signed." *ABM Farms, supra* (citation omitted). The above stated assignments of error are without merit.

**[\*P42]** Appellant's second assignment of error states:

**[\*P43]** "II. The trial court erred to the prejudice of Plaintiff-Appellant in not allowing questioning and testimony, on grounds of irrelevance, highlighting Defendants' superior financial strength and business experience in relation to Plaintiff, and in not allowing questioning regarding the cost of arbitration, both of which should have been central to the court's determination on questions of adhesiveness **[\*\*20]** and disparity of bargaining power, as it impacts contract formation issues."

**[\*P44]** <sup>HN14</sup> The court has discretion over the relevancy of certain lines of questioning permitted in a hearing. The standard of review is abuse of discretion. The lower court limited the questioning to claims of whether there was a meeting of the minds to arbitrate employment-related disputes by the terms of the EDRP. The court did not allow certain lines

of questioning pertaining to indirect knowledge of the witnesses, which is within its discretion. This assignment of error is without merit.

Judgment affirmed.

It is ordered that appellees recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR.

JUDGE

KENNETH A. ROCCO, A.J., AND

MICHAEL J. CORRIGAN, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26 (A); Loc. App.R. 22. [\*\*21] This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22 (E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

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