

IN THE SUPREME COURT OF OHIO
CASE NO. 08-1307

CARI BUTCHER,)
) ON APPEAL FROM THE
) CUYAHOGA COUNTY
 Appellee) COURT OF APPEALS,
) EIGHTH APPELLATE DISTRICT
)
 v.) COURT OF APPEALS
) CASE NO. 07-90216
)
 BALLY TOTAL FITNESS CORPORATION,)
 ET AL.,)
)
 Appellants)
)

APPELLEE CARI BUTCHER'S
MEMORANDUM IN OPPOSITION TO JURISDICTION

JAMES T. SCHUMACHER (0046650)
JAMES T. SCHUMACHER CO., LLC
The Hilliard Building – 2nd Floor
1419 West 9th Street
Cleveland, OH 44113
Phone: (216) 861-8888
Fax: (216) 566-8810
E-mail: JTS@JTSchumacherLaw.com

MICHAEL C. HENNENBERG (0007882)
Of Counsel,
DINN, HOCHMAN & POTTER, LLC
5910 Landerbrook Drive, Suite 200
Mayfield Heights, Ohio 44124
Phone: (440) 544-2000
Fax: (440) 544-2002
Email: Hennenberg@aol.com

COUNSEL FOR APPELLEE
CARI BUTCHER

ROBERT DUVIN (0021944)
BARRY Y. FREEMAN (0062040)
BRADLEY A. SHERMAN (0063906)
LITTLER MENDELSON, P.C.
1100 Superior Avenue, 20th Fl
Cleveland, OH 44114
Phone: (216) 696-7600
Fax: (216) 696-2038
Email: BFreeman@littler.com

COUNSEL FOR APPELLANTS

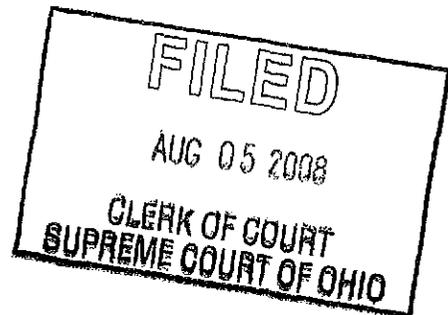


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THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Contrary to Appellants' contention, this is not a case of public or great general interest. Simply put, the Court of Appeals, and the Trial Court before it, correctly applied OHIO REVISED CODE § 2711.10 to vacate an award that was procured by corruption, fraud, or undue means.

This is simply a case based on an application of facts to the law. The Court of Appeals correctly applied existing law to the fact that an arbitrator misrepresented himself to be (or knowingly allowed himself to be misrepresented as) an attorney when in fact, he is not an attorney. The Court of Appeals simply applied existing law to the fact that the misrepresentation was known to one side (the Appellants herein) and unknown to the opponent (the Appellee). The Court of Appeals merely applied existing law to the fact that the misinformed opponent discovered the misrepresentation after the arbitration award, but within such time as to render a motion to vacate timely. There is no public or great general interest to be served by a review of the simple application of existing law to the facts of this case.

The Court of Appeals did not establish a new framework to determine whether an arbitration award could or should be vacated. The Court of Appeals clearly stated its reliance on the express terms of R.C. 2711.10 to supply both jurisdiction and the elements necessary to vacate the improperly obtained arbitration award. The Court of Appeals applied long-standing precedent to the facts in this case, affirming the finding of the Trial Court that the undisputed evidence demonstrating the existence of corruption, fraud or undue means mandated that the award be vacated.

Contrary to Appellants' contention, the decision did not ignore any precedent concerning the means or elements to vacate an arbitration award. Undisputed evidence does not usually demonstrate the existence of corruption, fraud or undue means, as exists here. In fact, as set

forth below, the case to which Appellants refer is not on point with the facts in this matter, and does not even involve an order vacating an arbitration award.

It must be noted that Appellants do not dispute the existence of the facts upon which the Trial Court based its finding of corruption, fraud or undue means to vacate the award. Further, the Appellants do not dispute that that evidence was (as the Trial Court held) undisputed. The Appellants' argument appears to be that this Honorable Court should review this matter to set forth that an arbitration award concededly procured by corruption, fraud or undue means ought to stand even where R.C. 2711.10 requires that it be vacated.

Appellants argue that the Court of Appeals, based on the facts peculiar to this case, should not have affirmed an Order vacating this particular arbitration award, procured in these unique circumstances, despite the fact that the award was procured by corruption, fraud or undue means. Appellants argue that an individual who has demonstrated – by the undisputed evidence – such improper conduct as to mandate an Order vacating his award based on corruption, fraud or undue means, ought to be the fact-finder as to whether his conduct constituted corruption, fraud or undue means. Appellants argue that an arbitrator's award ought to stand – even where procured as a result of corruption, fraud or undue means – as long as the misrepresentation remains undiscovered until after the award. The Court of Appeals, and the Trial Court below, rejected these arguments as meritless.

BRIEF CORRECTION OF FACTS

The most concise way to review the pertinent facts is to set forth the Trial Court's recitation of the undisputed facts in the opinion. After an extensive evidentiary hearing, the Trial Court held:

The hearing held on the motion yielded no evidence contradicting these facts:
the parties did not agree on their own to an arbitrator and therefore the procedure

under paragraph 8.2 of the Defendant Employer's Employment [Dispute] Resolution Procedure ("EDRP") was engaged; the Employer requested a list of proposed arbitrators from the American Arbitration Association ("AAA"); the list generated by the AAA did not comply with paragraph 8.2's requirements for seven proposed arbitrators who were practicing attorneys or former judges with employment disputes experience living in the state containing the county where the dispute was located; the list contained some individuals who were non-attorneys and individuals residing outside of Ohio; the resumes of the proposed arbitrators when supplied by AAA to the Employee's counsel had the first and second pages of the arbitrators' resumes scrambled with a proposed arbitrator "A" being described by the first page of his/her resume, but by the second page of the resume of arbitrator "B"; the resumes' mis-compilation was not particularly evident upon cursory examination by an interested participant in the process; the parties came to agree on one Robert G. Stein as the arbitrator and requested him of AAA; Plaintiff's counsel relied upon an incorrect copy of his resume (as described above); the employer's counsel concedes they received an accurately compiled set of resumes for the proposed arbitrators including Stein; Defendant's counsel did not have to rely on the AAA-supplied Stein resume but Plaintiff's counsel being unacquainted with Stein did have to rely upon the AAA-supplied Stein resume; as a result the chosen arbitrator was not a practicing attorney; Defendant's counsel had experience with this individual and knew he wasn't an attorney, but Plaintiff's counsel had no such experience or knowledge; and Plaintiff's counsel did not learn of the arbitrator's true background until after the arbitration.

The Court concludes that under the above facts, the parties bargained for an arbitrator they did not receive. It is no answer to the AAA's failure to properly select proposed arbitrators and its failure to properly compile and deliver the proposed arbitrators' resumes to the participants that in any event, AAA procedures are to be followed when they conflicted with the parties' chosen procedures. That concept carried to its extreme would render private arbitration agreements meaningless documents entitled to no serious enforcement in court. Individuals agreeing to arbitration could not rely upon their arbitration agreements' procedures; they would be compelled to endure whatever procedures AAA imposed on them. In effect the procedural safeguards of arbitration agreements would be meaningless since the AAA's procedures could be substituted for them without recourse. In addition, here we have the problem that the miscommunication of the arbitrators' characteristics was unilateral with one side getting correct information and the other side receiving misleading and incorrect information. (Emphasis added).

It is important to note, however, that Appellants claim that "Butcher's counsel admittedly failed to review Stein's resume during the arbitrator selection process," citing to two pages of

transcript. Those pages provide no support for Appellants' false representation to this Honorable Court and, in fact, the very next page (Hrg. Tr. 105) demonstrates that counsel paid "very close attention" to Robert Stein's resume. (Testimony of Lewis Zipkin at 105: "I'm – I'm saying that that's [Stein's resume is] probably, as I recall, the only resume I paid very close attention to specifically because after you had made the recommendation of Robert Stein, that's when I paid more attention to a specific resume.") Appellants' claim that counsel "did not bother to read Stein's resume" is simply and undeniably false.

ARGUMENTS IN RESPONSE TO APPELLANTS' PROPOSITIONS OF LAW

Appellants' Proposition of Law No. 1: Courts Lack Subject Matter Jurisdiction to Interpret Arbitration Agreements When Exclusive Jurisdiction Is Reserved for The Arbitrator.

Response to Appellants' Proposition of Law No. 1:

The Trial Court properly exercised its jurisdiction under Ohio Revised Code § 2711.10 to vacate an arbitration award that was procured by corruption, fraud or undue means. What is at issue here is not an interpretation of the EDRP, but whether the conduct exhibited by various individuals rose to the level of corruption, fraud or undue means. The active participation in misrepresenting the proposed and ultimately selected arbitrator, Robert Stein, as a lawyer, is the subject of the Court's review under R.C. § 2711.10.

As a part of the evidence of that corruption, fraud or undue means, the Court was provided with a copy of Bally's Employment Dispute resolution Procedure ("EDRP"). Section 8.2 of the EDRP stated that "[e]ach proposed arbitrator . . . must be a practicing attorney or former judge with experience in employment disputes." Even assuming Appellants' argument -- *i.e.*, that this statement is not a requirement for particular credentials -- it remains that this language provides a basis for Plaintiff's counsel to rely on the truth of the misrepresentation in

Stein's resume. The fact that Section 8.2 of the EDRP called for arbitrators with certain credentials certainly provided evidence of the deception and of the justification for Plaintiff's counsel's reliance on the active misrepresentation in Stein's resume.

None of the cases cited by the Appellants presents facts similar to those here. For example, in *Hillsboro v. FOP* (1990), 52 Ohio St. 3d 174, the arbitrator made determinations based on the language in the arbitration agreement that were pertinent to the subject matter in the dispute. Here, the language of the EDRP at issue had no immediate bearing on the underlying dispute. Rather, the Appellants seem to argue that it was up to the arbitrator to decide whether the arbitration award was procured by corruption, fraud or undue means, when the arbitrator was a primary participant in the wrongful conduct.

The question presented to the Trial Court actually does not arise out of the EDRP, but the EDRP is evidence of the wrongful conduct determinative of the issue presented to the trial Court. That is, the question presented to the trial Court was not an employment dispute as governed by the EDRP. The question was whether the award was procured by corruption, fraud or undue means. Accordingly, Appellee respectfully requests that this Honorable Court decline jurisdiction over this matter.

Appellants' 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.

Response to Appellants' Proposition of Law No. 2:

Actually, the Trial Court was very clear. In the very first sentence of the Order upon which this appeal is based, the Trial Court stated:

The motion to vacate arbitration award is granted under R.C. §2711.10 on the grounds that the award was procured by corruption, fraud or undue means.

The sentence refers to the grounds set forth in R.C. §2711.10(A). In affirming the Trial Court's Order, the Court of Appeals discusses (at pp. 7-8) the ample evidence supporting the Trial Court's Order vacating the award expressly based on "corruption, fraud or undue means:"

From the undisputed facts, a gross procedural error occurred in the 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.

The Court of Appeals also discussed that the arbitrator at minimum may have exceeded his authority. This Honorable Court ought not to consider *dicta* as an appropriate basis for reviewing an otherwise clear decision. This is especially so here, where the Motion to Vacate was based on R.C. 2711.10 as a whole, with specific arguments made throughout the lower courts that were fully argued and may fall within the ambit of more than one subsection of the statute properly relied upon by all parties. Accordingly, Appellee respectfully requests that this Honorable Court decline jurisdiction over this matter.

Appellants' Proposition of Law No. 3: A Party Must Challenge an Arbitrator's Qualification Before the Award, and it Waives Its Challenges if it Could Have Known The Truth by Merely Reading Carefully.

Response to Appellants' Proposition of Law No. 3:

Appellants' Proposition of Law No. 3 would benefit those who successfully deceive an opponent as to the qualifications of a proposed arbitrator until the incompetence of that arbitrator is discovered. In fact, Plaintiff's counsel did read the resume, as did Mr. Stein and counsel for Appellants. The plain language of Mr. Stein's resume – mailed to Appellants and Appellee and faxed to all parties and Mr. Stein himself – actively misrepresented that Stein had graduated from Indiana University Law School. Mr. Stein himself corrected his fee structure as referenced in a

paragraph just below his misrepresented law school credential. However, both Mr. Stein and Appellants' counsel knew that Mr. Stein was not a lawyer, and both chose not to correct this misinformation. Appellants seek to benefit from the timing of the discovery of this deception being after the award. This Honorable Court must not permit the Appellants to benefit from the fact that they were able to conceal this deception until the language and logic of the arbitration award triggered a deeper investigation as to the truth of the assertions in Mr. Stein's resume.

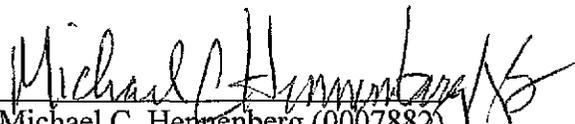
Of course, Appellants' argument also disregards the requirement that for an Award to be vacated, there must first be an actual Award. Appellants' argument further disregards the requirement that for an award to be vacated based on fraud; there must be a discovery of that fraud. Finally, Appellants disregard that the triggering event – the event that caused counsel to re-examine the misrepresentations explicit in Stein's resume and implicit in Stein's and Appellants' collusive silence in not correcting those misrepresentations (while correcting other misrepresentations on the same page) – was the language of the Award itself.

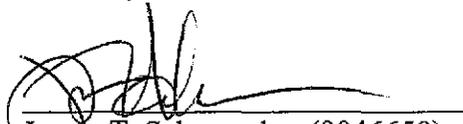
For support, Appellants rely on several cases where a party executed a contract without first reading that contract. Their reliance is misplaced. In *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, a plaintiff signed an agreement without reviewing the agreement to see what rights were being waived. *See also, Butcher v. Bally Total Fitness Corp.* (Cuy. Cty. April 3, 2003) 2003-Ohio-1734 (Plaintiff signed a paper agreeing to a clause that she had not read). Here, Plaintiff's counsel actually read the resume and based the acceptance of Mr. Stein on his misrepresented credentials. It was Plaintiff's counsel's reliance on the misrepresentation contained within the written materials that resulted in the harm done. Accordingly, Appellee respectfully requests that this Honorable Court decline jurisdiction over this matter.

CONCLUSION

Accordingly, for the foregoing reasons, Appellee Cari Butcher respectfully requests that this Honorable Court decline jurisdiction in the matter, that the decision of the Court of Appeals for the Eighth District of Ohio may stand.

Respectfully submitted,


Michael C. Hermenberg (0007882)
Of Counsel, Dinn, Hochman & Potter, LLC
5910 Landerbrook Drive, Suite 200
Mayfield Heights, Ohio 44124
(440) 544-2000
(440) 544-2002 FAX


James T. Schumacher (0046650)
James T. Schumacher Co., LLC
1419 West 9th Street – 2nd Floor
Cleveland, Ohio 44113
(216) 861-8888
(216) 566-8810 FAX

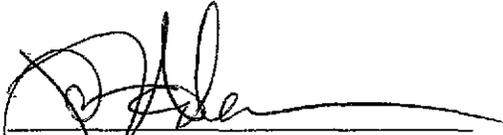
Attorneys for Appellee Cari Butcher

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum in Opposition to Jurisdiction was sent by ordinary U.S. mail to counsel of record on this 4th day of August, 2008:

Robert P. Duvin, Esq.
Barry Y. Freeman, Esq.
Bradley Sherman, Esq.
Littler Mendelson, PC
1100 Superior Avenue, 20th Floor
Cleveland, Ohio 44114

Counsel for Appellants


James T. Schumacher, Esq. (0046650)
Counsel for Appellee