

In the
Supreme Court of Ohio

13-0890

CEDAR FAIR, L.P.,

Plaintiff-Appellant,

v.

JACOB FALFAS,

Defendant-Appellee.

Case No. _____

On Appeal from the
Erie County
Court of Appeals,
Sixth Appellate District

Court of Appeals Case
No. E-12-015

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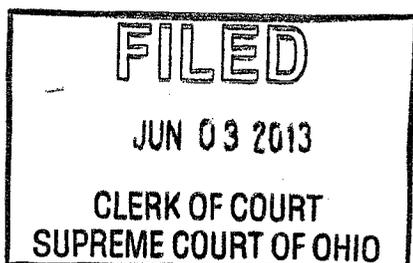


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INTRODUCTION

This case presents two separate questions of great public and general interest, each of which independently justifies this Court's review. *First*, the Sixth District's decision below creates a direct conflict among Ohio's appellate districts on the reach of this Court's long-settled rule—and a basic principle of contract law—that, absent statutory authority, courts may not order specific performance of employment contracts. See *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 311, 112 N.E.2d 15 (1953). For decades, Ohio courts have adhered closely to this rule, which is based on the notion that courts should not “thus interfere with the running of an employer's business” and the recognition that such a remedy lacks mutuality, as a court certainly could not force an employee to continue working for an employer. *Id.* at 312. The trial court in this case complied with the rule, vacating the portion of an arbitral award that ordered reinstatement of an employee. But the Sixth District reversed, adopting the *unprecedented* position that *Masetta*'s rule is “limited to cases seeking class-wide injunctive relief based upon a collectively bargained contract . . .” (Ex. A at ¶ 12), a limitation no other District has ever espoused.

The facts of this case highlight the critical need to reestablish uniformity on this issue. The employee is Jacob Falfas (“Falfas”), and the Sixth District has held that he must be reinstated to the position of Chief Operating Officer of Cedar Fair, L.P. (“Cedar Fair”), which owns Cedar Point and more than a dozen other amusement parks across the country, and is a publicly-traded company with net revenues of more than \$1 billion. The notion that an Ohio court can mandate that a particular person serve as the COO of a publicly-traded company raises troubling issues of corporate governance to say the least.

Even beyond the Sixth District's troubling and unprecedented *Masetta* ruling, the case

raises a *second* question of critical and growing importance in Ohio: When a contract dispute unquestionably falls within an arbitrator's *subject-matter* authority, to what extent can courts enforce the parties' agreed limits on the arbitrator's *remedial* authority under the contract? This question is of increasing importance as more and more parties turn to arbitration, especially in the employment contract setting. And, according to arbitration scholars, challenges to the scope of the arbitrator's remedial authority are among the most frequent claims that parties raise on judicial review of arbitral awards.

In this case, the arbitrators exceeded the remedial authority the parties had granted under the contract in two ways. In ordering reinstatement (and accompanying back pay and benefits "as if the employment relationship had not been severed"), the arbitrators ignored an express and unambiguous provision in the parties' contract that spelled out exactly what Falfas was to receive if he was terminated without cause (over \$1 million in post-termination base salary, plus other benefits and arbitration fees and costs). Instead, the arbitrators provided Falfas a windfall that Falfas appears to claim could amount to over \$10.5 million.

The arbitrators also exceeded their remedial authority in another way. Even aside from the contractual provision above, the contract also expressly limited the arbitrators' remedial authority to that which a court has under Ohio law. As noted above, *Masetta* makes clear that, absent statutory authority, Ohio courts cannot order the reinstatement of the Chief Operating Officer of a public company. Thus, the contract likewise did not grant the arbitrators that power.

Despite all this, the Sixth District found the arbitrators' decision untouchable, reversing the trial court's modification of the arbitral award. This raises important questions regarding the ability of parties to impose enforceable limits on arbitrators' remedial authority. Refusing to enforce the parties' agreed limitations on that authority will allow arbitrators to mete out their

“own brand of industrial justice,” a power that courts in Ohio and across the country have long recognized as invalid. See *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass’n*, 59 Ohio St.3d 177, 180, 572 N.E.2d 71 (1991) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358, 4 L.Ed.2d 1424 (1960)). Moreover, refusing judicial enforcement of the parties’ agreed limits on remedial authority will undercut parties’ willingness to enter arbitration agreements in the first instance. At the very least, clarity regarding the appropriate framework for judicial review of an arbitrator’s remedial authority is essential so parties know what they are getting into when they agree to arbitrate.

This Court should grant jurisdictional review to set the record straight on *Masetta*’s reach and to explicate the framework for enforcing agreed limits on arbitral remedial authority. This case presents the perfect vehicle for addressing both of these critical issues.

STATEMENT OF CASE AND FACTS

On July 20, 2007, Falfas was promoted to the position of Cedar Fair’s Chief Operating Officer. He personally negotiated and signed an employment agreement (“Agreement”) on the same day. The Agreement contained the following arbitration provision:

[A]ny dispute, claim, or controversy arising out of or relating to this Agreement, including but not limited to claims . . . over which [Falfas’s] employment was terminated for ‘Cause,’ . . . shall be settled by final and binding arbitration, and . . . this agreement to arbitrate applies without limitation to any claims of unlawful discrimination, harassment, retaliation, wrongful discharge, constructive discharge, claims related to the payment of wages or benefits, contract claims and tort claims under federal, state or local law.

(Agreement Section 19(c)). The provision added that the presiding arbitration panel “shall have the authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration. The arbitration panel shall not have the authority either to abridge or change substantive rights available under existing law.” (*Id.*).

The Agreement spells out exactly what compensation Falfas is due if his employment is terminated without cause (Section 7), upon death (Section 8), upon disability (Section 9), for cause (Section 10), by resignation, (Section 11), or after a change in control (Section 12). Accordingly, if a dispute arose regarding termination, the parties agreed to resolve that dispute in arbitration, allowing the arbitration panel to decide any disputed facts about the termination and then award the appropriate compensation to Falfas as spelled out in the agreement.

For example, and specifically relevant to this case, Section 7 provides that if Falfas is found to have been terminated “*other than for cause*,” he is entitled to receive his “Base Salary” for the longer of one year or the remaining “Employment Term,” as well as continuing medical and dental insurance during the same time period. (The parties agree that Section 7 would entitle him to post-termination base salary of over \$1 million.) Section 7 clarifies that “[a]ll other benefits provided by Cedar Fair shall end as of the last day of [Falfas’s] active employment.” Conversely, Section 11 provides that if Falfas is found to have *resigned*, “all benefits and compensation shall cease on the last day of [Falfas’s] active employment with Cedar Fair.”

Falfas’s employment ended on June 10, 2010, after a phone conversation between Falfas and then-CEO Richard Kinzel. The parties dispute whether Falfas resigned, or instead was terminated, during that call. The arbitrator ultimately agreed with Falfas that he “was terminated for reasons other than for cause, and that the facts fail to establish resignation.” (Ex. C at ¶ 1). Cedar Fair disagrees with this determination, but recognizing the arbitrators’ power to decide disputed facts, Cedar Fair has not challenged this determination in court.

The problem is that, instead of awarding the compensation that the parties had agreed to in Section 7 for termination without cause, the arbitral panel went much further. In addition to costs, expenses, and attorneys’ fees, the panel “direct[ed] [Cedar Fair] to reinstate Jacob ‘Jack’

Falfas to the position he held prior to his wrongful termination, and to pay back pay and other benefits he enjoyed under the [] Agreement, as if the employment relationship had not been severed.” (Ex. C at ¶ 2). Falfas appears to assert that the relief the arbitrators awarded could amount to “in excess of **\$10.5 million**” (plus arbitration fees and costs), far more than the agreement provides. (See Falfas’s May 23, 2013 Reply in Support of Motion for Hearing; see also Appellant/Cross Appellee’s Brief at 6-7.)

Both parties filed actions to challenge or confirm the arbitration award in the Erie County Court of Common Pleas. Cedar Fair claimed that the arbitrators exceeded their authority in two independent ways. First, the arbitrators ignored the parties’ agreed liquidated compensation provision in Section 7. Second, even setting Section 7 aside, the arbitrators exceeded the broad **general** authority provided to them in Section 19(c) in that the award went beyond the “relief that an Ohio or federal court in Ohio could grant in conformity with applicable law.” The trial court agreed with Cedar Fair on this second point, holding that because, absent statutory authority, a court cannot ““decree specific performance of a contract for personal services,”” neither could the arbitrators here. (Ex. B at ¶ 39 (quoting *Masetta* at 311)).

Falfas appealed, and Cedar Fair cross appealed the trial court’s separate confirmation of the panel’s award of “back pay and other benefits [Falfas] enjoyed under the [Agreement] as if the employment relationship had not been severed.” The Sixth District reversed in Falfas’s favor, holding that the arbitral award must be confirmed in its entirety. In reversing, the Sixth District specifically held that *Masetta*’s rule precluding the award of specific performance of personal services contracts “is limited to cases seeking class-wide injunctive relief based upon a collectively bargained contract” (Ex. A at ¶ 12). This appeal followed.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case presents two issues of public and great general interest. First, this Court should

grant jurisdiction to resolve a conflict among the intermediate appellate courts regarding whether, as the Sixth District held (but no other court agrees), Ohio courts have broad authority to order that specific employees be reinstated to specific positions at any time, so long as the case is not a class action involving collective bargaining. Second, the Court should accept this case to explicate the authority of Ohio courts to vacate or modify arbitration awards that exceed the *remedial* authority that parties have granted to the arbitrator. Each of these issues alone is worthy of review, and this case presents the Court the opportunity to address both.

A. The Sixth District’s Opinion Creates A Conflict Among Ohio’s Appellate Courts Regarding The Authority Of Ohio Courts To Order That Specific Employees Be Reinstated To Specific Positions, Even At The Highest Levels Of Governance Of Publicly-Traded Companies.

The trial court found that *Masetta* precluded an award of specific performance of a personal services contract—a remedy in this case that would reinstate the Chief Operating Officer of a publicly-traded company in contravention of the company’s own determination of its future interests. The Sixth District, however, held that *Masetta* was “inapposite,” because *Masetta*’s rule precluding courts from awarding such reinstatement is “limited to cases seeking class-wide injunctive relief based upon a collectively bargained contract” (Ex. A at ¶ 12).

To Cedar Fair’s knowledge, no other court *ever* has limited *Masetta* on these grounds. Certainly, neither the Sixth District nor Falfas cited any case that did so. Meanwhile, multiple Districts stand in direct conflict, having expressly relied on *Masetta* to *reject* reinstatement remedies for personal service contracts in cases that have *nothing* to do with collective bargaining *or* class actions. *See, e.g., Townsend v. Antioch University*, 2d Dist. No. 2008 CA 103, 2009-Ohio-2552, ¶ 19 (“Because the appellants essentially sought an injunction requiring Antioch University to rehire them—*i.e.*, specific performance of a personal-service contract—the trial court did not err in dismissing their complaint for failure to state a claim upon which relief

could be granted.”); *Goldfarb v. The Robb Report, Inc.*, 101 Ohio App.3d 134, 146, 655 N.E.2d 211 (10th Dist. 1995) (affirming denial of reinstatement of single franchisee); *Hovis v. The East Ohio Gas Co.*, 8th Dist. No. 42296, 1980 WL 355484, *2 (Dec. 18, 1980) (reversing order enjoining employer from terminating single employee); *Felch v. Findlay College*, 119 Ohio App. 357, 358-360, 200 N.E.2d 353 (3d Dist. 1963) (affirming trial court’s ruling that single faculty member could not seek injunction to force specific performance of employment contract).

Only this Court can resolve this conflict regarding *Masetta*’s scope, and it is vital for the Court to do so, not only to ensure statewide uniformity, but also because the issue is critically important to Ohio businesses. Before the decision below, when Ohio businesses made personnel decisions, they could rely on the well-settled principle that, absent specific, clear exceptions, Ohio courts could not force them to employ specific persons for specific jobs—particularly not policy-making jobs at the highest levels of corporate governance. Now, however, businesses face the possibility that a court could order them to reinstate high-level executives, regardless of what the company’s leadership has determined are the company’s best interests. If Ohio is going to embark on this unprecedented path, it should do so only after review by this Court.

B. This Case Presents Questions Of Great And Growing Importance Regarding The Power Of Ohio Courts To Correct Or Modify Arbitration Awards That Exceed An Arbitrator’s Remedial Authority.

The *Masetta* question alone justifies jurisdictional review, but this case also presents the Court a chance to review a second, independent, and equally compelling question of great—and growing—general interest: To what extent will courts enforce the parties’ agreements regarding the scope of an arbitrator’s *remedial* authority?

Of course, no one can reasonably dispute that courts must step in and vacate or modify awards when “arbitrators exceed[] their powers.” See R.C. 2711.10(D). One question along those lines, for example, is whether the *subject matter* of a dispute falls within the *subject-*

matter scope of a given arbitration provision. See, e.g., *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 5. But another question, and one particularly applicable here, is—where the parties have agreed to certain limits on arbitrators’ *remedial* authority, does an arbitral award outside those boundaries likewise “exceed [the arbitrators’] powers” rendering the award subject to judicial modification?

Questions regarding the ability of courts to police arbitral decisions are on the rise in light of the ever-increasing use of arbitration agreements. And a study of judicial decisions reviewing arbitral awards suggests that claims that the arbitrator “exceeded their powers,” a basis for reviewing arbitral decisions in almost every state, are the single most frequent challenge brought to arbitral awards. Brewer & Summers, *When Arbitrators “Exceed Their Powers”*, 64 *APR Disp. Resol. J.* 46, 48 (2009). Moreover, that same study showed that within this category, one of the most frequent challenges is that the arbitrator exceeded the scope of his or her remedial authority. *Id.*

This issue has become all the more important after the United States Supreme Court’s landmark decision in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 577, 128 S.Ct. 1396, 1399, 170 L.Ed.2d 254 (2008). There, the Court held that parties cannot contract for increased judicial scrutiny of an arbitrator’s decision beyond those bases expressly provided in the Federal Arbitration Act. Given that parties cannot contract for broader review, the precise contours of the expressly-listed categories (e.g., that the arbitrators “exceeded their powers”) take on increased significance, making confusion about those contours especially problematic.

In the wake of *Hall Street*, academics and others have engaged in thorough and careful consideration of the options for parties who agree to arbitrate disputes, but also agree that an overreaching arbitration award should not go without review. For example, if two parties agree

that an arbitrator “exceeds his authority” if he fails “to faithfully observe and apply particular law,” does that allow for closer scrutiny of arbitrators’ legal decisions without running afoul of the FAA as interpreted in *Hall Street*? See Davis, *The End of an Error: Replacing “Manifest Disregard” with A New Framework for Reviewing Arbitration Awards*, 60 Clev.St.L.Rev. 87, 99 (2012), fn. 88 (quoting Stipanowich, *Revelations and Reaction: The Struggle to Shape American Arbitration*, Pepperdine University School of Law Legal Studies Research Paper Studies Series, Paper No. 2011/11, at 15 (Apr. 2011), available at <http://ssrn.com/abstract=1757258>). Courts’ early treatments of such clauses are mixed. See *id.* (collecting cases); see also Christopher R. Drahozal, *The Supreme Court and Arbitration: Contracting Around Hall Street*, 14 Lewis & Clark L.Rev. 905, 916 (2010).

This case presents two questions along these same lines, both of which are certain to recur in Ohio after *Hall Street*. Here, there is no question that the subject matter of the dispute—the dispute regarding Falfas’s termination—was within the arbitrators’ *subject-matter* authority to decide. But the parties had agreed to limit the scope of the arbitrators’ *remedial* authority in any such arbitration in two ways: First, they agreed to a specified liquidated compensation award based on the specific circumstances of any termination. Second, they expressly agreed to limit the remedial authority of the arbitrators by ensuring that any award cannot exceed the remedial powers of Ohio courts applying Ohio law. Both of these limitations are common in arbitration agreements. Indeed, the second limitation often goes without saying (regardless of whether it appears expressly in an arbitration provision), as Ohio courts of course could not enforce an arbitral order, such as an order requiring an individual to return to a particular job, that exceeded the scope of the court’s powers. See U.S. Const. amend. XIII, § 1 (no involuntary servitude).

The arbitrators here exceeded the scope of their contractual authority on both of these

fronts. In ordering that Falfas be *reinstated* to his position and awarded back pay and more “as if the employment relationship had not been severed,” the arbitrators made an award that both (1) vastly exceeds the amounts available to Falfas under the liquidated compensation provision, and (2) that orders a form of relief (reinstatement) that exceeds the remedial authority available to Ohio courts, *see Masetta*. The trial court recognized that this award exceeded the outer bounds of the arbitrators’ contractual authority and thus modified it, but the Sixth District reversed. Accordingly, today, at least in the Sixth District, an arbitrator fashioning a remedy in a wrongful termination case may safely ignore the parties’ agreed contractual limits, and even the limits of Ohio law.

Thus, aside from the *Masetta* question above, this case gives the Court a chance to clarify the ability of parties, after *Hall Street*, to opt for arbitration while still providing judicially-enforceable limits on the scope of an arbitrator’s remedial authority, thereby preventing awards far beyond those that the parties contemplated. As with the *Masetta* question, this issue is worthy of jurisdictional review on its own, if for no other reason than to provide clarity on an issue that may impact whether parties agree to arbitration in the first instance. In short, a grant of jurisdiction here would allow the Court to settle the law on two important fronts.

ARGUMENT

Cedar Fair’s First Proposition of Law:

This Court’s holding in Masetta v. National Bronze & Aluminum Foundry Co., 159 Ohio St. 306 (1953), barring specific performance as a remedy for a personal services contract under Ohio law, is not limited to cases seeking class-wide injunctive relief based on collective bargaining agreements, but rather applies to employment agreements generally.

The Sixth District’s first error was to announce that *Masetta*—which largely eliminates specific performance remedies for personal service contracts—is limited to collective bargaining class actions. As detailed above, multiple districts stand in direct conflict with the Sixth

District's holding, and the Sixth District is wrong. Indeed, *Masetta* *itself rejected* any notion that the union contract at issue in that case should be considered differently than a typical employment contract between one employer and one employee:

The contract has no unusual features which distinguished it from an ordinary employment contract and this is true even though it may have been negotiated by the union on behalf of a group of employees. Whether it be a contract between the defendant and one employee or a large group of employees it is still an employment contract and must be construed and enforced in accordance with the well established law relating to employment contracts.

Id. at 311. *Masetta* made clear that regardless of the scope of the employment contract, “[i]t has long been settled law that a court of equity will not decree specific performance of a contract for personal services. This court has recognized this principle of law whenever occasion arose.” *Id.* The Sixth District's decision turns this long-settled law on its head, and the Court should reverse.

In fact, Falfas himself did not argue for the dramatic limitation of *Masetta* that the Sixth District adopted. Instead, Falfas's equally flawed principal argument was that the rule against reinstatement applies only when employment “is not coupled with an interest in the business.” (Appellant/Cross-Appellee's Br. at 19). Falfas's sole authority for this proposition was 28 Am. Jur. 285, Section 93, which mentions interest in the business as a potential factor to be considered relevant to whether reinstatement could be awarded in lieu of inadequate monetary damages. Falfas asserted that this exception applied to him because his compensation included deferred awards of Cedar Fair stock. But no such exception is found anywhere in Ohio law, and rightfully so. *Masetta* cited an earlier version of this Am. Jur. section without ever analyzing the “business interest” comment therein, and the Am. Jur. section was one of many authorities *Masetta* cited for the rule, none other of which included the “business interest” consideration. Moreover, Falfas has not cited a single Ohio case (and Cedar Fair is aware of none) in which this “business interest” factor was ever considered, let alone held dispositive. Finally, even if some

exception did apply to particular instances in which employment coupled with an interest in the business renders monetary damages inadequate, such an exception would nearly swallow the rule if expanded to cover all employees whose compensation includes publicly-traded stock.

Cedar Fair's Second Proposition of Law:

Where the scope of an arbitrator's remedial authority is limited to the remedial power of courts themselves, Ohio courts must vacate arbitral awards that exceed the scope of that authority.

R.C. § 2711.10(D) requires Ohio courts to vacate arbitration awards, or portions thereof, when arbitrators “exceed[] their powers.” As this Court and the United States Supreme Court have made clear, “an arbitrator is confined to interpretation and application of the . . . agreement; he does not sit to dispense his own brand of industrial justice.” *Ohio Office of Collective Bargaining v. Ohio Civil Serv. Employees Ass’n*, 59 Ohio St.3d 177, 180, 572 N.E.2d 71 (1991) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 80 S. Ct. 1358 (1960)). An arbitrator exceeds the scope of his authority if the award does not “draw its essence from the agreement.” See *Ohio Office of Collective Bargaining* at the syllabus. An award fails to draw its essence from the agreement when *either* (1) “the award conflicts with the express terms of the agreement,” *or* (2) “the award is without rational support or cannot rationally be derived from the terms of the agreement.” *Id.*

Here, as the trial court correctly concluded, “the [a]rbitrators exceeded their authority when they [o]rdered reinstatement of [Falfas] pursuant to Section 19(c),” which—regardless of the limits of Section 7’s liquidated compensation for termination without cause—limits the arbitrators’ remedial power to that which “an Ohio or federal court in Ohio could grant in conformity with applicable law.” As the trial court concluded, “[t]he parties did not bargain for Arbitrators to have authority to award any remedy at all. Instead, their bargain contained the restrictive language that the arbitrator’s authority had to be limited to those that an Ohio or

Federal Court could grant in conformity with applicable law.” Accordingly, “to fashion an award that contravenes this expressed restrictive language would usurp what the parties bargained for in the Employment Agreement.”¹ (Ex. B at ¶ 37).

Nor can the Sixth District’s decision be explained as some sort of “deference” to an arbitrator’s determination of an ambiguous question about permissible remedies under Ohio law. First, courts cannot defer to arbitrators on questions regarding the scope of courts’ own remedial power, as otherwise courts could end up enforcing remedies they themselves lack the power to impose. But, in any event, here there is no ambiguity. Indeed, before the Sixth District’s opinion below, no Ohio appellate District had ever allowed such reinstatement. The best case that Falfas could come up with was *Ohio Dominican College v. Krone*, 54 Ohio App.3d 496, 2009-Ohio-6591 (10th Dist.), in which the Tenth District, without ever considering the issue, allowed for the possibility of reinstatement when a professor’s termination effectively would have rendered her responsible for the cost of her tuition. But even there, the trial court ultimately accepted the appellate court’s alternative invitation to award monetary damages instead. See *Krone* at 35; *Townsend*, 2009-Ohio-2552, at ¶ 22-23 (discussing *Krone*).

Falfas and the Sixth District also cited dicta in *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 543 N.E.2d 1277 (1989), and *Collini v. Cincinnati*, 87 Ohio App.3d 553, 622 N.E.2d 724 (1st Dist. 1993), to support a notion that reinstatement is sometimes a “preferred” remedy over

¹ For many of the same reasons, the arbitrators’ award should be corrected because it is in manifest disregard of settled Ohio law. See, e.g., *Bennett v. Sunnywood Land Dev., Inc.*, 9th Dist. No. 06CA0089-M, 2007-Ohio-2154, ¶¶ 11, 41, 45; *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 Fed. Appx. 415, 418-19 (6th Cir. 2008). Likewise, in ignoring settled law, and purporting to require a court to enforce a remedy that exceeds the court’s own power, the result must be vacated as contrary to public policy. See *W.R. Grace & Co. v. Local 759, Int’l. Union of Rubber, Cork, Linoleum & Plastic Workers*, 461 U.S. 757, 766-767, 103 S. Ct. 2177, 76 L.Ed.2d 298 (1983) (“If the contract as interpreted by [an arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it.”).

monetary damages. But neither of these cases' dicta helps Falfas. *Worrell*'s reference to reinstatement was in relation to age discrimination cases under the ADEA, a statute that expressly provides for equitable relief including reinstatement. *Id.* at 247; *see also* 29 U.S.C. § 626(b), (c)(1). And *Collini* had nothing to do with reinstatement. Instead, that case concerned a dispute between a public employee and a city based on Ohio civil service laws. *Id.* at 556.

In short, the arbitrators' broadest remedial authority under the contract (even ignoring the specific compensation provision governing the appropriate remedy after termination) is coterminous with that of Ohio courts, and Ohio law unambiguously precludes courts from ordering reinstatement here. Accordingly, as the trial court correctly held, the arbitrators' award exceeded their authority and must be corrected.

Cedar Fair's Third Proposition of Law:

Where a contract provides a specific remedy for specific conduct, an arbitrator exceeds his remedial authority if he ignores the parties' command and instead imposes a different remedy.

Separately, the arbitrators exceeded their authority in awarding more than the parties agreed would be awarded in the event that Falfas was found to have been terminated without cause. Section 7 expressly covers that contingency, and it awards Falfas *only* his base salary through the remainder of the contract's term (or one year if longer) plus continuing medical and dental benefits for the same time period. The arbitrators, however, not only reinstated Falfas—which was beyond this plain language and the remedial power of courts in Ohio—but also awarded back pay and benefits “as if the employment relationship had not been severed,” which itself was contrary to the plain language of Section 7.

This error, as well, is a matter of arbitrator authority, and no deference insulates this mistake from judicial correction. While arbitrators may construe *ambiguous* contract language, they are “without authority to disregard or modify plain and unambiguous provisions.” *Ohio*

Office of Collective Bargaining at 180. Instead, arbitrators are “confined to interpreting the provisions of [an agreement] as written and to construe the terms used in the agreement according to their plain and ordinary meaning.” *Int’l Ass’n of Firefighters, Local 67 v. Columbus*, 95 Ohio St.3d 101, 103, 2002-Ohio-1936, 766 N.E.2d 139. Here, by ignoring the applicable liquidated compensation provision and dispensing their “own brand of industrial justice,” *Ohio Office of Collective Bargaining* at 180, the arbitrators deviated from the essence of the agreement and issued an award in conflict with its express and unambiguous language.

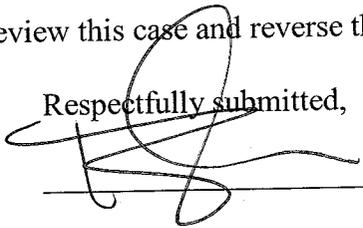
The trial court and Sixth District found that the arbitrators’ decision to ignore Section 7 was insulated from review because “Section 7 could reasonably be interpreted to conflict with Section 19(c),” the general limitation that the arbitrators cannot exceed the remedial authority of courts in Ohio, and the arbitrators were free to resolve this conflict as they saw fit. (*See Ex. B at ¶ 27*). But no reasonable interpretation could find any such conflict or ambiguity. Rather, the relationship between Section 7 and Section 19(c) is nothing more than a typical arrangement whereby one provision (Section 7) governs a particular circumstance (termination without cause) while the other (Section 19(c)) governs circumstances that are not otherwise spelled out. The only way to give Section 7 any meaning at all is to allow it to govern when there is a finding of termination without cause, as Section 7 itself expressly states. Any other reading renders Section 7 meaningless, in conflict with settled Ohio law on contract interpretation. *See, e.g., Farmers Nat’l Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 337, 94 N.E. 834 (1911) (It is a “plain rule of construction . . . that every provision of a contract shall be given effect if possible.”).

CONCLUSION

For the above reasons, the Court should review this case and reverse the decision below.

Dated: June 3, 2013

Respectfully submitted,



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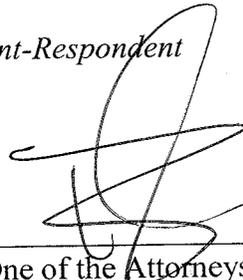
*Counsel for Plaintiff-Appellant
Cedar Fair, L.P.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 3, 2013, a copy of the foregoing was served by regular U.S. mail upon the following:

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Cedar Fair, L.P.

Exhibit A

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ERIE COUNTY, OHIO
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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Cedar Fair, L.P.

Court of Appeals No. E-12-015

Appellee/Cross-Appellant

Trial Court Nos. 2011-CV-0217
2011-CV-0218

v.

Jacob Falfas

DECISION AND JUDGMENT

Appellant/Cross-Appellee

Decided: April 19, 2013

* * * * *

Dennis E. Murray, Jr., Dennis E. Murray, Sr., Susan C. Hastings
and Joseph C. Weinstein, for appellee/cross-appellant.

Richard D. Panza, William F. Kolis, Jr. and Joseph E. Cirigliano,
for appellant/cross-appellee.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal and cross-appeal from a judgment of the Erie County Court of Common Pleas that vacated in part an arbitration award that ordered appellant Jacob Falfas reinstated with back pay as chief operating officer of appellee, Cedar Fair, L.P.

1.

J33/332
4/19/13

For the reasons set forth below, the judgment of the trial court is affirmed in part and reversed in part.

{¶ 2} Appellant/cross-appellee (“appellant”) was employed by appellee/cross-appellant (“appellee”) for 39 years. On June 20, 2007, appellant was promoted to appellee’s chief operating officer, subject to the terms of an employment agreement which would expire on November 30, 2012. On or about June 10, 2010, after a brief telephone conversation with Richard Kinzel, appellee’s chief executive officer, appellant’s employment with appellee came to an immediate end. The parties had differing interpretations of the effect of the telephone conversation, with appellee claiming appellant resigned and appellant claiming he was terminated.

{¶ 3} The relevant employment agreement into which appellant and appellee entered contains a mandatory, final and binding arbitration provision. Pursuant to that provision, the parties arbitrated their dispute. On February 28, 2011, the arbitration panel issued its award finding that appellant “was terminated for reasons other than cause” and that “the facts fail to establish resignation.” In addition, the panel found that “equitable relief was needed to restore the parties to the positions they held prior to the breach” of the employment agreement by appellee. The panel directed that appellant be reinstated to his former position with back pay and all other benefits to which he was entitled under the employment agreement.

{¶ 4} On March 21, 2011, appellee filed an action to vacate, modify or correct the arbitration award. On March 22, 2011, appellant filed a separate action to confirm the award. The two actions were consolidated in the trial court.

{¶ 5} On February 22, 2012, the trial court confirmed the award as it related to the award of back pay, benefits, reasonable costs, expenses and attorney fees, but also modified the award in part by determining that appellant should not be reinstated to his position. Appellant filed a timely appeal, which was followed by appellee's cross-appeal.

{¶ 6} Appellant sets forth the following assignments of error:

1. The trial court erred as a matter of law when it vacated that portion of the award ordering reinstatement of appellant/cross-appellee Jacob Falfas as being in excess of the arbitrators' authority because such relief was not available under Ohio law absent statutory authority.
2. The trial court erred as a matter of law in not remanding the case to the arbitrators for a determination of the exact amount of back pay and benefits, and reasonable costs, expenses and attorneys' fees to which appellant/cross-appellee Jacob Falfas was entitled as a result of appellee/cross-appellant Cedar Fair L.P.'s breach of contract.

{¶ 7} Appellee sets forth the following single cross-assignment of error:

The trial court erred as a matter of law in affirming an arbitration award that conflicted with the express and unambiguous terms of the employment agreement.

{¶ 8} Like court decisions, arbitration awards are presumptively valid. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.*, 49 Ohio St.3d 129, 551 N.E.2d 186 (1990). Judicial review of arbitration awards is limited in order to encourage parties to resolve disputes through arbitration. *Kelm v. Kelm*, 68 Ohio St.3d 26, 27, 623 N.E.2d 39 (1993). Once arbitration has taken place, a trial court has no jurisdiction except to confirm, vacate, modify or enforce the award pursuant to statute. The trial court may not consider the merits or substantive aspects of the arbitration award. *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876 (2d Dist.). That is, the trial court must not review whether the arbitrators made factual or legal errors. “In reviewing an arbitrator’s award, the court must distinguish between an arbitrator’s act in excess of his powers and an error merely in the way the arbitrator executed his powers. The former is grounds to vacate, the latter is not.” *Id.* at ¶ 18.

{¶ 9} R.C. 2711.10 sets forth the statutory grounds under which a trial court may vacate or modify an arbitration award. The trial court in this case determined that the only arguable basis herein was R.C. 2711.10(D), which authorizes disturbing an arbitration award if the arbitrators exceeded the powers conferred upon them by the arbitration agreement. The court found that the arbitrators in this matter had in fact exceeded their powers by reinstating appellant to his former position, and vacated that portion of the award.

{¶ 10} It is well-settled that, absent evidence of material mistake or extensive impropriety, an appellate court cannot extend its review to the substantive merits of the

arbitration award but is limited to a review of the trial court's order. *Cooper v. Secs. Serv., Inc.*, 6th Dist. No. L-09-1127, 2010-Ohio-463, ¶ 11. The standard of review on appeal is whether the trial court erred as a matter of law. *Union Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Valley Lodge No. 112*, 146 Ohio App.3d 456, 766 N.E.2d 1027 (12th Dist. 2001).

{¶ 11} We note that the trial court herein rejected appellee's claim that the arbitrators exceeded their authority in ordering reinstatement because it conflicts with the express terms of the employment as well as appellee's argument that the order of reinstatement violates public policy. Instead, the trial court cited Section 19 of the employment agreement, which states at paragraph (c) that "[t]he arbitration panel shall have authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration." Appellee, in support of its motion to vacate the arbitrators' decision, claimed that the award was beyond the scope of authority of Section 19(c).

{¶ 12} The trial court found that the arbitrators exceeded their authority because reinstatement is not a remedy for a personal services contract. In support, the trial court cited *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953). *Masetta*, however, is inapposite to the case before us. *Masetta* is limited to cases seeking class-wide injunctive relief based upon a collectively bargained contract as can be seen from paragraph one of the syllabus: "1. A court of equity will not in a class action, by means of mandatory injunction, decree specific performance of

an employment contract negotiated between an employer and a union representing its employees, where the issue involves the respective rights of seniority of the employees.”

{¶ 13} The arguments made by appellee and relied upon by the trial court as a basis for vacating the arbitration award ignores Ohio case law precedent as set forth in *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 533 N.E.2d 1277 (1989) and *Collini v. Cincinnati*, 87 Ohio App.3d 553, 622 N.E.2d 724 (1st Dist.1993). In *Worrell*, addressing the details of a breach of employment contract claim, including whether a financial award was considered front pay or back pay, the Ohio Supreme Court stated that “in [certain] circumstances an award of front pay enables the court to make the injured party whole, *although reinstatement is the preferred remedy.*” *Worrell* at 246. (Emphasis added.) Clearly, in *Worrell*, the Supreme Court recognized that reinstatement is not only an available remedy, it is the “preferred remedy.” A similar conclusion was reached in *Collini, supra*, wherein the court cited *Worrell* and stated that “[i]n employment disputes specifically, the court may make equitable remedies to make the injured party whole. For example, the Supreme Court of Ohio expressly held that * * * when a corporation wrongfully discharged an employee, *reinstatement and ‘front pay’ were proper remedies available to the court. See generally, Worrell v. Multipress, Inc. * * *.*” (Emphasis added.) *Collini* at 557.

{¶ 14} Considering such precedent, the trial court’s finding that the arbitrators’ decision “[f]lies in the face of clearly established legal precedent” or otherwise exhibited

a “manifest disregard” for the law in granting reinstatement to appellant is without merit and wrong as a matter of law.

{¶ 15} Based on the foregoing, we find appellant’s first assignment of error well-taken.

{¶ 16} In his second assignment of error, appellant asserts that the trial court erred by not remanding the case to arbitration for a determination of the exact amount of back pay, benefits, costs, expenses and attorneys’ fees to which he is entitled. Appellant asserts that a remand to arbitration is required because the trial court’s judgment entry does not quantify the award of damages. We note, however, that the arbitrators clearly stayed silent on the issue of exact amounts to be awarded appellant, leaving that determination for the trial court. Likewise, this court finds that the trial court is best situated to resolve this issue and, accordingly, this matter is remanded to that court for further hearing on “back pay and other benefits he enjoyed under the 2007 Amended Restated Employment Agreement as if the employment relationship had not been severed” as well as “any reasonable costs, expenses and attorney’s fees incurred by him * * *,” to which he is entitled pursuant to the trial court’s order. Accordingly, appellant’s second assignment of error is not well-taken as to his argument that this matter should be remanded to arbitration for resolution of the amounts awarded.

{¶ 17} In support of its cross-appeal, appellee asserts that the arbitration award conflicted with the express and unambiguous terms of the employment agreement. Once the parties have authorized an arbitrator to give meaning to the language of an agreement,

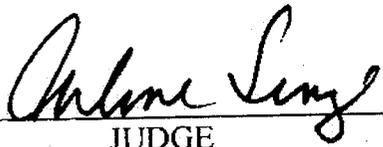
a court should not reject an award on the ground that the arbitrators misread the contract. *Stow Firefighters v. City of Stow*, 193 Ohio App.3d 148, 2011-Ohio-1559, 951 N.E.2d 152 (9th Dist.) Appellee suggests that the trial court should have vacated the award on that basis. "Contracting parties who agree to submit disputes to an arbitrator for final decision have chosen to bypass the normal litigation process. If parties cannot rely on the arbitrator's decision (if a court may overrule that decision because it perceives factual or legal error in the decision), the parties have lost the benefit of their bargain." *Id.* at ¶ 24, citing *Automated Tracking Sys. Inc. v. Great Am. Ins. Co.*, 130 Ohio App.3d 238, 243, 719 N.E.2d 1036 (9th Dist.1998).

{¶ 18} Based on the foregoing, appellee's cross-assignment of error is not well-taken.

{¶ 19} On consideration whereof, the judgment of the Erie County Court of Common Pleas is reversed as to its modification of the arbitrators' award reinstating appellant's employment, and affirmed as to its order regarding appellant's back pay and other benefits, reasonable costs, expenses and attorney fees. This matter is remanded to the trial court for further proceedings consistent with this decision. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed in part
and affirmed in part.

Arlene Singer, P.J.



JUDGE

Thomas J. Osowik, J.



JUDGE

Stephen A. Yarbrough, J.
CONCUR.



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.

Exhibit B

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

COPY

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Cedar Fair, L.P. : Case No. 2011-CV-0217
Plaintiff :
vs : Judge Roger E. Binette
Jacob Falfas : JUDGMENT ENTRY
Defendant ::::

This matter is before this Court on cross-motions relative to an Arbitration Award. Cedar Fair, L.P. ("Plaintiff") seeks to have that portion of the Arbitration Award Ordering Jacob Falfas ("Defendant") reinstated as Chief Operating Officer ("COO") vacated, modified or corrected. Defendant, in turn, seeks to have the Arbitration Award confirmed.

This Court has carefully considered Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award ("Motion to Vacate") (filed on or about May 20, 2011); Jack Falfas' Brief In Opposition To Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award And In Support Of Jack Falfas' Application To Confirm Arbitration Award ("Motion to Confirm") (filed on or about June 10, 2011); Cedar Fair's Reply Brief In Support Of Motion To Vacate Or Modify/Correct Award And Brief In Opposition To Jacob Falfas' Application to Confirm Award (filed on or about June 24, 2011); the record, including, but not limited to, the Employment Agreement, and applicable law.

This Court FINDS and HOLDS:

1. Jacob "Jack" Falfas ("Defendant") was a long time employee of Cedar Fair, L.P. ("Plaintiff"), having worked his way up Plaintiff's corporate ladder to Chief Operating Officer ("COO"). Defendant was employed pursuant to a 2007 Amended and Restated Employment Agreement ("Employment Agreement");
2. The Employment Agreement was effective July 20, 2007 and ran for a period ending November 30, 2009, with an automatic renewal for three (3) years, commencing December 1, 2009 and on every three (3) year anniversary of December 1, 2009, unless one of the parties provided advance written notice of intent to terminate¹;
3. On or about June 10, 2010, after a very short telephone conference with Richard Kinzel, Plaintiff's Chief Executive Officer, Defendant's employment with Plaintiff ceased. The parties had differing positions on the effect of that telephone conversation and subsequent events. Plaintiff took the position Defendant resigned, while Defendant deemed he was terminated;
4. The Employment Agreement has a mandatory, final and binding Arbitration provision. The Arbitration was to be conducted by a panel of three (3) arbitrators in accordance with the American Arbitration Association rules ("AAA");
5. Pursuant to the Arbitration provision, the parties did arbitrate this dispute. On February 28, 2011, in a 2-1 decision, the Arbitration Panel ("Arbitrators") issued its award finding that Defendant "was terminated for reasons other than cause" and "the facts fail to establish resignation." In addition, the Arbitrators found "that equitable relief was needed to restore the parties to the positions they held prior to the breach of the Employment Agreement by the Employer". Further, they directed that Defendant be reinstated to his former position with back pay and other benefits Defendant enjoyed under the Employment Agreement. In addition, the Arbitrators awarded Defendant his reasonable costs, expenses and attorney fees, per the Employment Agreement.²;
6. Plaintiff filed this action to vacate, modify or correct the Arbitration Award. Defendant filed a separate action (Erie Co. Common Pleas Case No. 2011 CV 0218) to confirm the Arbitration Award. This Court consolidated the two actions and they proceed in this case (Erie Co. Common Pleas Case No. 2011 CV 0217);

¹ This type of continuing contract for successive terms, terminable through advance notice before the succeeding term begins is frequently referred to as an "Evergreen Contract."

² The parties have deferred resolution of the amount of attorney fees while the underlying dispute proceeds.

7. In Plaintiff's *Motion To Vacate*³ they contend that the Arbitrators "exceeded their authority" by awarding reinstatement. This argument has two (2) components: 1) the award conflicted with the express and unambiguous terms, and 2) the award was beyond the scope of their authority in Section 19(c). Plaintiff's other contention is that the award violates Public Policy;
8. This Court will address individually all of these issues. However, the analysis necessarily begins with a discussion of the role of this Court and the legal standards which apply in reviewing an Arbitration Award;

"Arbitration in General and a Reviewing Court's Role"

9. Arbitration is strongly encouraged by Ohio and Federal Courts to settle disputes. *Kelm v Kelm* (1993), 68 Ohio St. 3d 26, 27; *ABM Farms, Inc. v. Wood* (1998), 81 Ohio St. 3d 498, 500; *Southland Corp. v. Keating* (1984), 465 U.S. 1, 10, 104 S. Ct. 852, 858, 79 L. Ed 2d 1, 12. Judicial review of arbitration awards is limited in order to encourage parties to resolve disputes through Arbitration. *Kelm* supra at 27; *Piqua v. Fraternal Order of Police* 2009-Ohio-6591, ¶ 16; 185 Ohio App. 3d 496. This is long standing Ohio public policy. See e.g., *Springfield v. Walker* (1885), 42 Ohio St. 543, 546 ("Arbitration is favored.") Arbitration avoids needless and expensive litigation. It "provides parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets." *Mahoning Cty. Bd. of MRDD v. Mahoning Cty. Trainable Mentally Retarded, Edn. Assn.* (1986), 22 Ohio St. 3d 80, 83. Trial courts must be careful not to exceed the scope of their review, lest "[a]rbitration, which is intended to avoid litigation, would instead merely become a system of 'junior varsity trial courts' offering the losing party complete and rigorous de novo review." *Dayton v. Internatl. Assn. Of Firefighter, Local No. 136* 2007-Ohio-1337; ¶ 13 quoting *Motor Wheel Corp. v. Goodyear Tire & Rubber* (1994), 98 Ohio App. 3d 45, 52. This would frustrate the purpose and intent of Arbitration. Therefore, the scope of a Trial Court's review is strictly limited;
10. Arbitration is a creature of private contracts. Where sophisticated parties enter into an arms length transaction to have disputes between them determined by Arbitration, in order to value and honor freedom of contract, reviewing courts must be deferential to the mechanism the parties freely and voluntarily chose. By agreeing to Arbitration, the parties implicitly agree to resolve their disputes and be bound by mistakes the arbitrators make while carrying out their duties;
11. As succinctly stated in *In The Matter of Jefferson Cty. Sheriff*, (7th Dist.) 2009-Ohio-6758 at 66:

"This Court may not necessarily agree with the arbitrator's decision to modify Scott's termination... However, that is not the standard that we must apply. [A]s long as the arbitrator is even arguably Construing or applying the contract and acting within the scope of his authority, that a Court is Convinced he committed serious error does not suffice to overturn his decision." *United Paperworks Intl. Union, AFL-CIO v. Misco, Inc.* (1987) 484 US 29, 38. Here, the arbitrator acted within the scope Of his authority and did not exceed his power... Consequently, the trial court should not have vacated The arbitrator's award even though it disagreed with the arbitrator's decision."

12. Once Arbitration has completed, a trial court has no jurisdiction except to confirm, vacate, modify or enforce the award pursuant to statute. In general, several key principles limit court review. Courts are to strive to uphold an Arbitration Award whenever possible to do so. *Hillsboro v. Fraternal Order of Police* (1990), 52 Ohio St. 3d 174, 178; *Mahoning Cty. Bd. MRDD v. Mahoning Cty. TMR Edn. Assn.* (1986), 22 Ohio St. 3d 80, 84 (courts "will make every reasonable indulgence to avoid disturbing an arbitration award.") There is a presumption of validity of Arbitration Awards. *Piqua* supra at ¶ 17. The trial court may not consider the merits or substantive aspects. *Id* That is, the trial court must not review whether the arbitrators made factual or legal errors. "Because the parties contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does reviewing decisions of lower courts. To resolve disputes about the application of a [collective-bargaining] agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract." *Southwest Ohio Regional Transit Auth. (SORTA) v. Amalgamated Transit Union, Local 627* (2001), 91 Ohio St. 3d 108, 110, quoting *United Paperworkers Internatl. Union, AFL-CIO v. Misco, Inc.* (1987), 484 U.S. 29, 37-38, 108 S. Ct. 364, 98 L. Ed. 2d 286;

³ In reality its a motion to modify.

13. "These principles of law, however, do not completely insulate an arbitrator's award from modification or vacation by a reviewing court. As the Supreme Court of the United States said: 'an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of justice'". *Clark Co Sheriff Gene Kelley v. FOP* (2nd Dist), No. 94-CA-53, 1995 Ohio App. LEXIS 558 citing *United Steel Workers of America v. Enterprise Wheel & Car Corp* (1960) 363 U.S. 593;
14. "[I]n reviewing an arbitrator's award, the court must distinguish between an arbitrator's act in excess of his powers and an error merely in the way the arbitrator executed his powers. The former is grounds to vacate; the later is not." *Piqua* supra at ¶ 18;
15. The grounds upon which a trial court may vacate or modify an Arbitration Award are narrow and few. R.C. §2711.10 sets forth the statutory grounds for doing so. The only arguable basis here is R.C. §2711.10 (D), which authorizes disturbing an Arbitration award if "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." If a common pleas court finds that the arbitrators 'exceeded the powers' conferred upon them by the arbitration agreement, the award may be vacated or modified;
16. "The essential function of paragraph (D) is to ensure that the parties get what they bargained for by keeping the arbitration within the bounds of the authority they gave him." *Piqua* supra at ¶ 21. *Stow Firefighters Iaff Local 1662 v. City of Stow* (9th Dist.) 2011-Ohio-1559 at 157. The authority conferred comes from, "is limited in and rooted in the arbitration agreement." *Id*
17. The trial court's inquiry into whether the arbitrators exceeded their powers is also limited. *Bd. of Educ. Of Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.* (1990), 49 Ohio St. 3d 129, syllabus; *Piqua* supra at ¶ 22;
18. R.C. §2711.10 (D) is not violated if the arbitration award 'draws its essence from' the collective bargaining agreement and is not unlawful, arbitrary or capricious. *Findlay* supra, syllabus; *SORTA* supra at 110; *Hillsboro* supra at 176. Generally, if the arbitration award is based on the language and requirements of the agreement, the arbitrators have not exceeded their powers. *Miami Twp. Bd. Trustees v. FOP, Ohio Labor Council, Inc.* (1998), 81 Ohio St. 3d 269, 273;
19. An Arbitrator's Award draws its essence from an agreement when (1) the award does not conflict with the express terms of the agreement and (2) the award has rational support or can be rationally derived from the terms of the agreement. *Ohio Office of Collective Bargaining v. Ohio Civil Emps. Assn., Local 11, AFSCME, AFL - CIO* (1991), 59 Ohio St. 3d 177, syllabus; *Findlay* supra at 132, *Miami City School BOE v. Miamisburg Teachers Assoc.* (2nd Dist.) 2010-Ohio-4759 at 16-17, *Lowe v. Oster Homes aka Oster Construction* (9th Dist.) 2006-Ohio-4927 at 7.

"The Employment Agreement"

20. With these standards and principals in mind, this Court turns to the Employment Agreement itself;
21. The Employment Agreement includes several provisions relevant to the substantive dispute. Specifically,
 - Section 7 is entitled "Termination by Cedar Fair Other Than for Cause." It provides, in relevant part:
 - (a) If, other than pursuant to Section 10 or Section 12⁴ hereof, Cedar Fair shall terminated Executive's employment ..., then, subject to Sections 7 (b), 7 (c) and 7 (d):
 - (1) Executive's Base Salary shall be continued for either one (1) year or the remaining Employment Term, whichever period of time is longer, payable in accordance with Cedar Fair's then effective payroll practices, and

⁴ Neither Section 10 (Termination for Cause) or Section 12 (Change in Control) apply here.

- (2) Executive shall continue to receive medical and dental insurance coverage during such Base Salary continuation period...

All other benefits provided by Cedar Fair shall end as of the last day of Executive's active employment.

22. In effect, Section 7 provides for damages if termination was "for other than cause". Hence, if that the only relevant language (i.e., Section 7), this Court's task would be easy. Under this provision, a termination without just cause (which the Arbitrators found) would result in a compensatory award of Defendant's base salary for the longer period of time on the remaining term of employment (i.e. from June 11, 2010 until December 1, 2012) plus continuation of medical and dental insurance coverage. However, that is not the case. There is another provision in the Employment Agreement that exist concerning Arbitration and the authority to award relief;

23. Section 19 of the Employment Agreement which is entitled "Arbitration". That paragraph includes a provision which appears to be in contrast to Section 7. Specifically, subparagraph (c) states:

The arbitration panel shall have authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration.

24. In looking at the Employment Agreement, the critical question then, is whether the Arbitrators exceeded their authority by Ordering Defendant reinstated;

25. Plaintiff makes three arguments in support of its *Motion To Vacate*: 1) the Award Conflicts with the Express and Unambiguous Terms of the Agreement; 2) the Award is beyond the Scope of Authority of Section 19 (c) and 3) the Award violates public policy;

"The Award Conflicts with the Express and Unambiguous Terms of the Agreement"

26. Under this argument, Plaintiffs argue that the Arbitrators exceeded their authority by Ordering reinstatement under Section 19 (c) instead of awarding damages via Section 7. In general, they assert Section 7 is specific, as compared to Section 19 (c), as to what award can be given when a termination occurs as it did with Defendant (i.e., 'termination other than for cause'). Section 7 is the expressed and unambiguous terms of the Employment Agreement, and therefore the only award available is the damages award – not reinstatement;

27. As previously noted, the Employment Agreement is not clear and unambiguous. Section 7 could reasonably be interpreted to conflict with Section 19 (c). While Section 7 sets forth remedies for termination based on 'other than for cause' (which the Arbitrators held), Section 19 (c) is an "omnibus provision". Which, arguably provides broader remedies than the more narrow remedy called for in Section 7;

28. Where disputes arise from ambiguous provisions in a contract, which is submitted for Arbitration, deference is given to the decision of the Arbitration. *supra Hillsboro v. Fraternal Order of Police* at 177, *New Par aka Verizon v. Misuraca* (9th Dist.) 2007-Ohio-3300. Further, said "where the provisions of the written agreement are susceptible of more than one reasonable interpretation and the parties have agreed to Arbitration, the arbitrator's interpretation of the contract and not that of the Trial Court governs. *Hillsboro*, *supra* at 177- 178; *In the Matter of Jefferson Cty. Sheriff* *supra* at 54. Additionally, a Trial Court may not reject an arbitrator's interpretation of a contract simply because it disagrees with the interpretation. *Southwest Ohio* *supra* at 110. Thus, this Court will give proper deference to the Arbitrators decision that Section 19 (c) afforded remedies which otherwise do not exist under Section 7.

29. If Plaintiff wanted it clear that Section 7 was the only remedies available for "other than for cause" termination, it could've drafted the Employment Agreement differently. Instead, pursuant to the written Employment Agreement, the Arbitrators found that Plaintiff had agreed to give them (the Arbitrators) additional authority under Section 19 (c).⁵ This Court defers to their interpretation, and thus the Arbitrators decision did not exceeded its powers by interpreting Section 19 (c) as controlling (versus Section 7);

⁵ "authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in arbitration;"

30. Assuming arguendo that the Arbitrators “got it wrong” about contract interpretation law, it is the Arbitrators’ interpretation of the contract, and not this Courts, which governs the parties. Their interpretation prevails regardless of whether that interpretation is the most reasonable under the circumstances. *New Par aka Verizon supra* at 11;

“The Award is beyond the Scope of Authority of Section 19(c)”

31. Plaintiff’s second argument is that reinstatement could not be Ordered pursuant to Section 19 (c) because Ohio law does not authorize reinstatement of employees. More specifically, Plaintiff argues that it is well settled Ohio law that “a court of equity will not decree specific performance of a contract for personal services.” *Masetta v. National Bronze & Aluminum Foundry Co.* (1953) 159 Ohio St. 306, 311; *Port Clinton Railroad Co. v. Cleveland & Toledo Railroad Co.* (1862), 13 Ohio St. 544, 552; *Townsend v. Antioch Univ.* 2009-Ohio-2552, ¶ 19;
32. Defendant counters arguing that reinstatement is an available remedy. *Worrell v. Multipress, Inc.* (1989), 45 Ohio St. 3d 241; *Collini v. Cincinnati* (1993), 87 Ohio App. 3d 553. Defendant also cites the general rule that the duty of a tribunal in cases where it is found there was wrongful discharge is to make the injured party whole. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.* (2005), 105 Ohio St. 3d 476, 481;
33. Each side attempts to distinguish, degrade or criticize the cases cited by the other. This Court has reviewed each case cited by both parties. Additionally, this Court has done its ‘own independent research’ of this issue. Specifically, whether reinstatement is an available remedy, given the Arbitrators’ authority pursuant to Section 19 (c) of the Employment Agreement;
34. As previously stated, to determine if the Arbitrators exceeded their power in granting the award, this Court must first determine whether the Arbitrators award “draws its essence from the Employment Agreement”. Accordingly, there must be a rational nexus between the Employment Agreement and the award, and the award cannot be arbitrary, capricious or unlawful. The Arbitrators award departs from the essence of the Employment Agreement when it conflicts with the expressed terms of it and/or is without rational support or cannot be rationally derived from the terms of it. Finally, although the Arbitrators may construe ambiguous terms, they are not allowed to disregard or modify the plain unambiguous provisions of it. Finally, in order to vacate the Arbitrators award, their decision must fly in the face of clearly established legal precedent. Further, the Arbitrators powers are limited by the Employment Agreement. In sum, this is what the parties bargained for when pursuing Arbitration. *City of Portsmouth v. FOP Scioto Lodge 33* (4th Dist.) 2006-Ohio-4387 at 18 - 19, *Lowe supra* at 7, *Bennett v. Sunnywood Land Development* (9th Dist.) 2007-Ohio-2154 at 11, *Association of Cleveland Fire Fighters #93 v. City of Cleveland* (8th Dist.) 2004-Ohio-3608 at 11, *Stow Firefighters supra* at 157;
35. The expressed terms of the Arbitrators authority, concerning awards in Section 19 (c), is:
- “The arbitration panel shall have authority to award any remedy or relief that an Ohio or federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration.”
36. This Court has already held that it would not interfere with the Arbitrators’ finding that they were empowered to grant more relief under Section 19 (c) than was available under Section 7. However, the expressed language in the Employment Agreement under that section has to be taken in toto;
37. Section 19 (c) requires that the award / remedy had to be what “an Ohio or federal court in Ohio could grant in conformity with applicable law.” That is what the parties bargained for and nothing else. The parties did not bargain for Arbitrators to have authority to award any remedy at all. Instead, their bargain contained the restrictive language that the Arbitrators’ authority had to be limited to those that an Ohio or Federal Court could grant in conformity with applicable law. It was even more definitive is stating that it had to be an Ohio or Federal Court ‘in Ohio’. That is the allowable remedies that the parties explicitly bargained for in the Employment Agreement. Therefore, to fashion an award that contravenes this expressed restrictive language would usurp what the parties bargained for in the Employment Agreement;
38. The question then is ‘according to applicable law can an Ohio or Federal court in Ohio Order reinstatement on a personal services contract – especially when there is an adequate remedy by way of damages are available;

39. Without revisiting all the cases again, case law demonstrates that - unless statutorily available - reinstatement is not a remedy for a personal services contract. "The Ohio Supreme Court has held that a court of equity will not, by means of mandatory injunction, decree specific performance of a labor contract existing between an employer and its employees so as to require the employer to continue any such employee in its service or to rehire such employee if discharged". Further, "a court of equity will not decree specific performance of a contract for personal services". Additionally, "this rule is based upon the fact that the mischief likely to result from an enforced continuance of the relationship after it has become personally obnoxious to one of the parties is so great that the interests of society require the remedy be denied." *Masetta* supra at syllabus; *Townsend v. Antioch* supra at 19, *Sololowsky v. Antioch College* (2nd Dist). No. 863 1975 Ohio App. LEXIS 5951, *Felch v. Findlay College* 119 Ohio App. 357, 358 - 361, *Standen v. Smith* (9th Dist.) 2002-Ohio-760 at 36-37; and *Podlesnick v. Airborne Express, Inc.* 627 F. Supp. 1113 (Jan. 13, 1986) at 1115 - 1121;
40. Herein there is no statutory basis in which to rely on reinstatement. Moreover, in Section 7 there is an adequate remedy available for damages. By virtue of the Arbitrators' own language that it was based on 'equity' that Defendant be reinstated, they implicitly confirm that no statutory authority. There decision to reinstate was based on equity principles, which case law demonstrates is not an available remedy that a 'an Ohio or federal court in Ohio could grant in conformity with applicable law'. Which again, is the remedy(s) that the parties bargained for in Section 19 (c) of the Employment Agreement. Consequently to grant this award or remedy - even under equity principles - is to undermine what the parties bargained for;
41. Because the law in this area is so long standing and clear, the Arbitrators decision is not a mere error in the interpretation or application of the law, but rather it "Flies in the face of clearly established legal precedent" *Bennett* supra at 11, *Lowe* supra at 7, *New Par aka Verizon* at 11;
42. The Arbitrators' decision conflicts with the express terms of the Employment Agreement, and it is not rationally support/ nor rationally derived from the terms of the Employment Agreement. In effect, the Arbitrators' Order of reinstatement fails to be drawn from the essence of the Employment Agreement. *City of Stow* supra at 106 -161;
43. Finally, although the principles of law regarding arbitration limit this Court's review, they do not completely insulate the award from modification or vacation. The Arbitrators were confined to interpretation and application of the Employment Agreement they could not dispense their own brand of justice, which included the reinstatement. *Clark Co. Sheriff* supra at 18-19, *City of Portsmouth* supra at 20,
44. Therefore, this Court finds that the Arbitrators exceeded their authority when they Ordered reinstatement of the Defendant pursuant to Section 19 (c);

"The Award Violates Public Policy"

45. Plaintiff's final argument is that the Arbitration Award reinstating Defendant should be vacated on the grounds it violates public policy. In addition to the basis provided in R. C. §2711.10, a Court may also vacate an Arbitration Award when it is contrary to the well-defined and dominant Public Policy of Ohio or the United States. *Southwest Ohio* supra at 112; *Cleveland Bd. of Edn. v. Intl. Bhd of Firemen & Oilers Local, 701* (1997), 120 Ohio App. 3d 63, 69. However, this power is narrowly limited and does not sanction broad judicial power to set aside arbitration awards. *Southwest Ohio* supra at 112 quoting *Misco* supra at 43. Furthermore, the Public Policy "must be well defined and dominant and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *Id.*
46. In addition to the previous discussion of case law relating to whether the Arbitrators exceeded their power, this Court has reviewed a wealth of case law and Ohio statutes;
32. On the one hand, the Revised Code is peppered with statutes specifically authorizing reinstatement of employees. See e.g. R.C. §124.327 (B) (reinstatement rights for laid off classified public employees); R.C. §4123.90 (reinstatement for employees wrongfully terminated for making Worker's Compensation claim); R.C. §4112.05 (6); R.C. 4112.14 (B); (discrimination); R.C. §4113.52 (E) (reinstatement for employees who report violations of federal, state or local law); R.C. §5903.02 (those absent from work due to military service); R.C. §4167.13 (employees retaliated against for reporting employee risk reduction); R.C. §4117.12 (B) (3) (unfair labor practice); R.C. §1513.39;

33. Yet, on the other hand, case law has been long standing and clear that – absent statutory authority - reinstatement is not a (equitable) remedy for a personal services contract, especially when another remedy in damages is available;
33. One argument could be made that the enactment of such statutes was needed because otherwise there'd be no protection from unscrupulous employment actions. Therefore, where the legislature hasn't acted there's no Public Policy precluding discharge (i.e.. and in effect not requiring reinstatement);
34. However, a counter argument can be made that since the General Assembly has acted in so many circumstances to afford reinstatement and yet has never specifically passed legislation that generally precludes reinstatement, there is no dominant, explicit, well defined Public Policy which precludes a Court of law, or an arbitration panel, from Ordering reinstatement;
35. In instances where Arbitration Awards were vacated on this basis, the Public Policy was clear and by reinstatement there'd be a clear violation of that policy. See e.g. *Firemen & Oilers Local, 701* supra (reinstatement undermined "zero tolerance"policy of illegal drug use by transportation employees); *City of Ironton v. Rist* 2010-Ohio-5292 (reinstatement of police officer who falsified a police report violates Public Policy); *Jones v. Franklin Cty. Sheriff* (1990), 52 Ohio St. 3d 40 (reinstatement of deputy sheriff who engaged in off duty vigilante activity could bring disrepute on department and violates Public Policy). Cf. *City of Cleveland v. Cleveland Assoc. of Firefighters* 2011-Ohio-4263 (not violative of Public Policy to reinstate paramedic accused of sexual contact with patients which arbitration panel found the acts not proven); *Rough Brothers, Inc. v. Bischel* 2011-Ohio-2005 (rejection of argument arbitration award against Public Policy because it eliminates competition); *Piqua* supra (reversed Trial Court's finding that reinstatement of police officer with checkered past history violated Public Policy when the employee did nothing wrong);
36. Based on this comprehensive review, it is apparent that there is legal precedent on both sides of this issue, both for and against reinstatement. Specifically, statutes and cases that allow/require reinstatement – especially when the employee had been terminated without cause. Albeit, in some of these cases which required reinstatement the CBA contained a reinstatement provision. Yet, on the other side there is long standing case precedent that holds reinstatement is not the remedy for personal services contracts, especially if there is an adequate damages remedy- as there is in the instant case;
37. Therefore, it is apparent that 'by reference to the laws and legal precedents and not from general considerations of supposed public interests', 'there is no clear, well-defined and dominant Public Policy of Ohio or the United States' regarding reinstatement;
38. Again, this Court's 'power is narrowly limited and does not sanction broad judicial power to set aside arbitration awards.' If this Court would vacate the Award in this instant case it would require this Court to step beyond the bounds of its function; ignore established law; undermine the strong Public Policy behind arbitration and dishonor freedom of contract. That is something this Court is not willing to do.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that, based on the foregoing, Plaintiff *Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award* (filed on or about May 20, 2011) is **GRANTED in part** and **DENIED in part**. Accordingly,

- 1) As to Plaintiff's basis that the Arbitrators exceeded their authority in Ordering reinstatement because it conflicts with the express and unambiguous terms of the Employment Agreement it is **DENIED**.
- 2) As to Plaintiff's basis that the Arbitrators exceeded their authority in Ordering reinstatement because it was beyond the scope of their authority in Section 19(c) it is **GRANTED**.
- 3) As to Plaintiff's basis that the Arbitrators Order of reinstatement violates Public Policy it is **DENIED**.

IT IS FURTHER ORDERED that Jack Falfas' *Brief In Opposition To Cedar Fair's Motion To Vacate Or Modify/Correct Arbitration Award And In Support Of Jack Falfas' Application To Confirm Arbitration Award* (filed on or about June 10, 2011) - in accordance with and consistent with this Court's Decision /Order regarding Plaintiff Cedar Fair's *Motion To Vacate Or Modify/Correct Arbitration Award* (filed on or about May 20, 2011) as contained herein - is **GRANTED in part and DENIED in part.**

IT IS FURTHER ORDERED that the Arbitration Award dated February 28, 2011 is **VACATED** and/or **MODIFIED** in favor of Plaintiff Cedar Fair L. P. and against Defendant Jacob Falfas as to award of "reinstatement of his employment".

IT IS FURTHER ORDERED that Defendant Jacob Falfas shall be awarded his back pay and other benefits he enjoyed under the 2007 Amended and Restated Employment Agreement as if the employment relationship had not been severed (pursuant to Arbitration Award paragraph 2).

IT IS FURTHER ORDERED that Defendant Jacob Falfas shall be awarded any reasonable costs, expenses and attorney's fees incurred by him in (pursuant to Arbitration Award paragraph 3).

IT IS FURTHER ORDERED that Defendant Jacob Falfas shall be awarded the benefits set forth under Section 7 of the 2007 Amended and Restated Employment Agreement.

IT IS FURTHER ORDERED that each party shall bear their own 'costs' of this action.

IT IS SO ORDERED.

 2/22/12

JUDGE

"The Erie County Clerk Of Courts is ORDERED to enter this Judgment Entry on its journals, and shall serve upon all parties not in default for failure to appear Notice of this Judgment Entry and its date of entry upon the journal. Within 3 days of journalizing this Judgment Entry, the Clerk shall serve the parties. Civ. R. 58(B) & 5(B)"

Susan C. Hastings/Joseph C. Weinstein
Dennis E. Murray, Jr./ Dennis E. Murray, Sr.
Richard D. Panza/William F. Kolis, Jr./ Joseph E. Crigliano/ Matthew W. Nakon

Exhibit C

PRIVATE ARBITRATION PROCEEDINGS

James J. McMonagle, Panel Chair

David L. Beckman, Panel Member

J. Michael Monteleone, Panel Member

In the Matter of Arbitration Between:

CEDAR FAIR, L.P.)
Employer)

FINDINGS AND AWARD

)
)
JACOB "JACK" FALFAS)
Employee)

IN ACCORDANCE with Section 19 of the applicable Employment Agreement of 2007 which automatically renewed for a period of three years commencing December 1, 2009, the undersigned arbitrators make the following findings and award:

WHEREAS, the undersigned arbitrators have duly entered upon their duties and have heard the proofs and allegations of the parties, and

WHEREAS, Employer claims that Employee voluntarily resigned his position as Chief Operations Officer of the Employer, and

WHEREAS, Employee claims that he did not resign, nor was he terminated in accordance with the terms of the agreement, and further claims that the Employer breached the covenant of good faith and fair dealing implicit in the Employment Agreement,

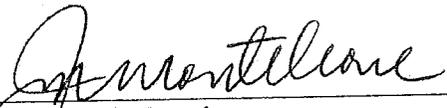
NOW, THEREFORE, IN ACCORDANCE WITH THE APPLICABLE LAWS AND THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION, THE ARBITRATION PANEL MAKES THE FOLLOWING FINDINGS AND AWARDS AS FOLLOWS:

1. We find that the facts establish that Mr. Falfas was terminated for reasons other than cause, and that the facts fail to establish resignation.

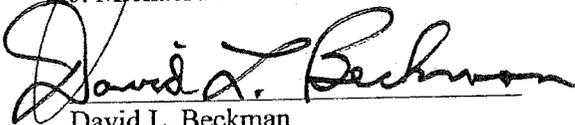
2. Pursuant to the authority vested in this Arbitration Panel, we find that equitable relief is needed to restore the parties to the positions they held prior to the breach of the Employment Agreement by the Employer. Accordingly, we direct the Employer to reinstate Jacob "Jack" Falfas to the position he held prior to his wrongful termination, and to pay back pay and other benefits he enjoyed under the Employment Agreement, as if the employment relationship had not been severed.

3. Additionally, we direct the Employer to reimburse Mr. Falfas "for reasonable costs, expenses, and attorney's fees" incurred by him in accordance with Section 19 (c) of the Employment Agreement.

FOR THE ARBITRATION PANEL:

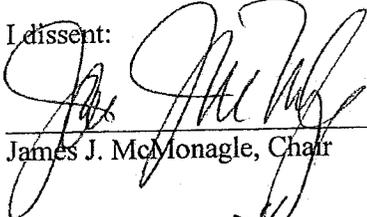


J. Michael Monteleone



David L. Beckman

I dissent:



James J. McMonagle, Chair

DATE: February 28, 2011