

ORIGINAL

IN THE SUPREME COURT OF OHIO

CEDAR FAIR, L.P.,

Appellant,

v.

JACOB FALFAS,

Appellee.

Case No. 13-0890

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

Court of Appeals
Case No. E-12-015

**MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE
JACOB FALFAS**

Richard D. Panza (0011487)
(COUNSEL OF RECORD)
William F. Kolis, Jr. (0011490)
Joseph E. Cirigliano (0007033)
Matthew W. Nakon (0040497)
WICKENS, HERZER, PANZA, COOK &
BATISTA CO.
35765 Chester Road
Avon, OH 44011
(440) 695-8000
Fax No. (440) 695-8098
rpanza@wickenslaw.com
wkolis@wickenslaw.com
jcirigliano@wickenslaw.com
mnakon@wickenslaw.com

COUNSEL FOR APPELLEE,
JACOB FALFAS

Douglas R. Cole (0070665)
Erik J. Clark (0078732)
ORGAN COLE + STOCK LLP
1335 Dublin Road, Suite 104D
Columbus, OH 43215
(614) 481-0900
Fax No. (614) 481-0904
drcole@ocslawfirm.com
ejclark@ocslawfirm.com

Dennis E. Murray, Jr. (0038509)
Dennis E. Murray, Sr. (0008783)
MURRAY & MURRAY CO., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870
(419) 624-3000
Fax No. (419) 624-0707
dmj@murrayandmurray.com
dms@murrayandmurray.com

COUNSEL FOR APPELLANT,
CEDAR FAIR, L.P.

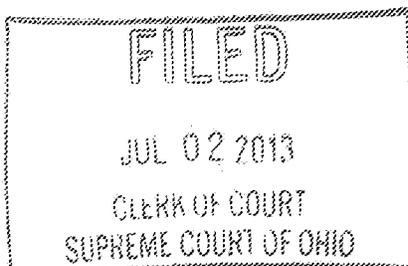


TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF THE FACTS	2
III. LAW AND ARGUMENT	6
A. The Sixth District's Opinion Cannot, as a Matter of Law, Create a Conflict Among Ohio's Appellate Courts Regarding the Holding in <i>Masetta</i>	6
B. The Scope of an Arbitrator's Remedial Authority Has Been Fully Addressed by This Court's Decisions in <i>Goodyear Tire & Rubber Co. v. Local Union No. 200</i> , and Its Progeny.	8
IV. CONCLUSION.....	14
PROOF OF SERVICE.....	16

TABLE OF AUTHORITIES

Page(s)

Cases

Bellaire City Schools Board of Education v. Paxton,
59 Ohio St.2d 65, 391 N.E.2d 1021 (1979) 10

Board of Education of Findlay City School District v. Findlay Education Association,
49 Ohio St.3d 129, 551 N.E.2d 186 (1990) 10

Board of Trustees of Miami Township v. Fraternal Order of Police, Ohio Labor Council, Inc.,
81 Ohio St.3d 269, 690 N.E.2d 1262 (1998) 10, 11, 12

Brennan v. Brennan,
164 Ohio St. 29 (1955)..... 1

City of Rocky River v. State Employment Relations Board,
39 Ohio St.3d 196, 530 N.E.2d 1 (1988) 10

*Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum and
Plastic Workers of America*,
42 Ohio St.2d 516, 330 N.E.2d 703 (1975) 1, 8, 9, 10, 11

Hall Street Associates, L.L.C. v. Mattel, Inc.,
552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008)..... 12, 13

Oxford Health Plans LLC v. Sutter,
569 U.S. ____ (2013)..... 13, 14

*Mahoning County Board of Mental Retardation and Developmental Disabilities v. Mahoning
County TMR Education Association*,
22 Ohio St.3d 80, 488 N.E.2d 872 (1986) 10

Masetta v. National Bronze & Aluminum Foundry Co.,
159 Ohio St. 306, 112 N.E.2d 15 (1953) 1, 6, 7, 8, 12

*Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Association, Local 11,
AFSCME, AFL-CIO*,
59 Ohio St.3d 177, 572 N.E.2d 71 (1991) 10, 11

Ormsby's Adm'rs v. Bakewell and Johnson,
7 Ohio 99 (1835)..... 1

*Queen City Lodge No. 69, Fraternal Order of Police, Hamilton County, Ohio, Inc. v. City of
Cincinnati*,
63 Ohio St.3d 403, 588 N.E.2d 802 (1992) 10, 11

<i>Remmey v. PaineWebber, Inc.</i> , 32 F.3d 143 (4th Cir. 1994)	2
<i>State Farm Mutual Insurance Company v. Blevins</i> , 49 Ohio St.3d 165, 551 N.E.2d 955 (1990)	10
<i>Worrell v. Multipress, Inc.</i> , 45 Ohio St.3d 241, 543 N.E.2d 1277 (1989)	8

Statutes

9 U.S.C. 10.....	1
9 U.S.C. 10(a)(4).....	13
R.C. 2711.10	1
R.C. 2711.10(D).....	8, 13

I. INTRODUCTION

Through misdirection and a myopic view of this case and the applicable law, Cedar Fair seeks to convince this Court that this case presents, not one, but two issues of great general interest which warrant this Court's review. Cedar Fair is wrong.

First, as a matter of procedural and substantive law, because the Sixth District was reviewing the propriety of an arbitration panel's ruling, its Decision cannot constitute a conflict with how other district courts interpret *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953). Second, this Court, in its decisions in *Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum and Plastic Workers of America*, 42 Ohio St.2d 516, 330 N.E.2d 703 (1975), *cert. denied*, 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.2d 303 (1975) and its progeny, has already answered the question raised by Cedar Fair regarding arbitration, to-wit: "[T]o what extent can courts enforce the parties' agreed limits on the arbitrator's *remedial* authority under the contract?" [Emphasis in original.] Cedar Fair's Memorandum in Support of Jurisdiction ("Cedar Fair's Memorandum") at 2. Accordingly, there is no basis whatsoever for this Court to take jurisdiction of this case.

To accept this case would only serve to undermine the public policy announced by this Court over 175 years ago regarding judicial review of arbitration decisions: "[T]he award of the arbitrators is final and can not be impeached for error; and that nothing but fraud in the parties or in the arbitrators can be alleged to avoid the award." *Brennan v. Brennan*, 164 Ohio St. 29, 36 (1955), citing *Ormsby's Adm'rs v. Bakewell and Johnson*, 7 Ohio 99 (1835). Approximately 100 years later, this proposition of law was codified into Ohio's General Code, which is now known as Revised Code Section 2711.10 which, in turn, parallels Section 10 of the Federal Arbitration Act, adopted in 1925; 9 U.S.C. 10.

Time and again courts have cautioned that an overly expansive judicial review of arbitration awards will only serve to undermine the arbitration process:

A policy favoring arbitration would mean little, of course, if arbitration were merely the prologue to prolonged litigation. If such were the case, one would hardly achieve the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation." * * * Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions.

Thus, in reviewing arbitral awards, a district or appellate court is limited to determining "whether the arbitrators did the job they were told to do - not whether they did it well, or correctly, or reasonably, but simply whether they did it."

Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994), *cert. denied*, 513 U.S. 1112 (1995).

Indeed, this memorandum opposing jurisdiction is a filing made in the fourth tribunal, in the fourth year of litigation to force Cedar Fair to adhere to the "final and binding" decision resulting from its agreement to arbitrate its breach of Mr. Falfas' Employment Agreement. Rather than abide by the Arbitrators' decision and thereby mitigate its own, as well as Mr. Falfas' damages, Cedar Fair has chosen to delay and extend the litigation process through this, its third appeal, in the hope that either Mr. Falfas -- as a result of years of unemployment -- capitulates or this Court is convinced to reverse hundreds of years of precedent and proclaim a new policy that arbitration is nothing more than another obstacle to overcome in the judicial process.

II. STATEMENT OF THE FACTS

On June 9, 2010, 59 year old Mr. Falfas was Chief Operating Officer of Cedar Fair. He had worked for the company for 39 years. Mr. Falfas' Employment Agreement as COO

was originally signed on July 20, 2007, and was automatically renewed for three years, commencing on December 1, 2009.

On June 10, 2010, Mr. Falfas' base salary was \$665,000.00. He was also entitled to an additional bonus of approximately \$456,000.00 for total cash compensation for 2010 of approximately \$1,121,000.00. Separate and apart from his direct monetary compensation, Mr. Falfas was to receive distributions of 33,327.5 ownership units of Cedar Fair in March 2011, and 56,700 units in March 2012 which -- at their current value of approximately \$41.00 per unit -- would have a total value of \$3.7 million. Further, as a result of his 39 years of employment, Mr. Falfas had a Senior Executive Long-Term Retirement Plan, \$21,303.10 in a Capital Supplemental Retirement Plan, and \$320,033.10 in another Supplemental Retirement Plan.

Mr. Richard Kinzel, President and Chief Executive Officer of Cedar Fair, was Mr. Falfas' direct superior. In fact, it was anticipated that when Mr. Kinzel resigned his position as CEO -- which paid him \$1,433,800.00 per year -- Mr. Falfas would assume that role.

On June 10, 2010, Mr. Falfas had a 94 second phone conversation with Mr. Kinzel. As a result of the conversation, Mr. Kinzel maintained that Mr. Falfas *resigned* his position as Chief Operating Officer of Cedar Fair.

Section 11 of Mr. Falfas' Employment Agreement provided: "In the event Executive *resigns* his employment, all benefits and compensation shall cease on the last day of Executive's active employment with Cedar Fair." [Emphasis added.] Thus, under Cedar Fair's version of the facts, when Mr. Falfas resigned, he *voluntarily divested himself of compensation and benefits in excess of \$6 million.*

Mr. Falfas has steadfastly denied he resigned. Mr. Falfas never submitted a letter of resignation. In fact, Mr. Falfas requested that he be permitted to return to work. Mr. Kinzel,

however, refused this request. Despite the fact that no one at Cedar Fair expected Mr. Falfas would resign and all were surprised by such action, no investigation was ever undertaken by Cedar Fair to confirm that Mr. Falfas actually resigned.

In accordance with the terms of his Employment Agreement, Mr. Falfas requested that the issue of his alleged resignation be submitted to final and binding arbitration. On July 23, 2010, Mr. Falfas submitted his written demand for arbitration which stated, *inter alia*, "[i]n the arbitration Mr. Falfas will seek, without limitation, reinstatement and damages * * *."

On February 28, 2011, after six months of discovery, two days of testimony from 15 witnesses, and the submission of substantial pre and post hearing briefs, three Arbitrators -- all experienced attorneys-at-law, chosen by the parties pursuant to a process established in Mr. Falfas' Employment Agreement -- found 2 to 1 in favor of Mr. Falfas. Their ruling read in pertinent part:

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*,

* * *

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.
[Emphasis added.]

Findings and Award at 1-2.

Cedar Fair has *never* claimed that it terminated Mr. Falfas. Nevertheless, it has argued -- in both the trial court and the appellate court, and now before this Court -- that Section 7 of Mr. Falfas' Employment Agreement constitutes a "specified liquidated compensation award." Cedar Fair's Memorandum at 9. Section 7 provides that if Mr. Falfas is terminated by Cedar Fair other than for cause, he shall receive a severance package consisting of his Base Salary "for either one (1) year or the remaining Employment Term, whichever period of time is longer * * *."¹

As noted, however, Cedar Fair never terminated Mr. Falfas for cause or otherwise. Rather, Cedar Fair maintained Mr. Falfas resigned. Accordingly, Section 7 is irrelevant to this case. The Arbitrators' authority for ordering Mr. Falfas' reinstatement and receipt of damages arose, therefore, not as a result of Section 7, but rather out of Section 19(c) of Mr. Falfas' Employment Agreement, a mutually agreed upon term of his Employment Agreement, as well as Ohio law. Section 19(c) reads in pertinent part:

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. [Emphasis added.]

¹ Section 7 of the Employment Agreement titled "Termination by Cedar Fair Other Than for Cause," provides in pertinent part:

- (a) If * * * Cedar Fair shall terminate Executive's employment * * *
- (i) Executive's Base Salary shall be continued for either one (1) year or the remaining Employment Term, whichever period of time is longer * * *.

Plainly, the Arbitrators found that Mr. Falfas had not resigned, that Cedar Fair had breached the covenant of good faith and fair dealing, and that no provision of the Employment Agreement specifically addressed the appropriate remedy. Accordingly, based upon the authority granted to them under Section 19(c) as well as their interpretation of Ohio law, the Arbitrators ordered the relief which would make Mr. Falfas whole, to-wit: "to *reinstate* [him] * * * 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." [Emphasis added.] Findings and Award at 2.

Despite Cedar Fair's agreement that the decision of the Arbitrators would be final and binding, it refused and continues to refuse to reinstate Mr. Falfas and reimburse Mr. Falfas for back pay, benefits, and the reasonable costs associated with the arbitration.

III. LAW AND ARGUMENT

A. The Sixth District's Opinion Cannot, as a Matter of Law, Create a Conflict Among Ohio's Appellate Courts Regarding the Holding in *Masetta*.

The misdirection engaged in by Cedar Fair is evident in its first claimed basis for accepting review, to-wit: "[T]he Sixth District's decision below creates a direct conflict among Ohio's appellate districts * * * that, absent statutory authority, courts may not order specific performance of employment contracts," citing *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 311, 112 N.E.2d 15 (1953). Cedar Fair's Memorandum at 1. The misdirection is that the Sixth District made no such holding or finding that constitutes binding authority even within the Sixth District. Accordingly, no such conflict exists.

As noted by the Sixth District, the matter before them was a decision of the Erie County Court of Common Pleas that "vacated in part an *arbitration award*." Decision and

Judgment at ¶1. [Emphasis added.] As the Sixth District observed: "Judicial review of arbitration awards is limited in order to encourage parties to resolve disputes through arbitration." *Id.* at ¶8. Further, that court correctly observed, "arbitration awards are presumptively valid," and therefore, a "trial court may not consider the merits or substantive aspects of the arbitration award." *Id.* Finally, and most significantly, the Sixth District accurately stated:

[T]he 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." [Citations omitted.]

Id. Simply stated, when confronted with reviewing the propriety of the trial court's determination that the Arbitrators exceeded their authority because reinstatement is not a remedy for a personal service contract, the Sixth District was compelled by judicial doctrine to grant extraordinary deference to the Arbitrators' decision.

At issue before the Arbitrators was the import of the Ohio Supreme Court's decision in *Masetta*. The *Masetta* decision was issued, at a point in time, when the holding of a Supreme Court case was embodied in the syllabus. In light of this fact, the Sixth District observed:

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 respective rights of seniority of the employees." [Emphasis added.]

Id. at ¶12. The Sixth District then reviewed several other cases including, but not limited to, this Court's decision in *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 543 N.E.2d 1277 (1989). It is in the context of this review of the applicable case law, and the extremely narrow basis for overruling a decision of an arbitrator on issues of law, that the Sixth District properly found:

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.

Decision and Judgment at ¶14. Clearly, Cedar Fair has sought to misdirect this Court on this issue in an attempt to convince this Court that the Sixth District's Decision creates a conflict in the districts when -- given the procedural and substantive nature of its review -- it could not as a matter of law.

B. The Scope of an Arbitrator's Remedial Authority Has Been Fully Addressed by This Court's Decisions in *Goodyear Tire & Rubber Co. v. Local Union No. 200*, and Its Progeny.

The second question of great and general interest which Cedar Fair presents to this Court is the product of its myopic view of the law. The central issue before the courts below was whether the Arbitrators "exceeded their authority" when they chose to reinstate Mr. Falfas. Cedar Fair claims that such act was in derogation of limits contained in its Employment Agreement with Mr. Falfas, and contrary to this Court's holding in *Masetta*. So troubling is this issue to Cedar Fair, it would have this Court assume jurisdiction to "explicate the framework" for evaluating when arbitrators exceed their powers as provided in Section 2711.10(D). Cedar Fair's Memorandum at 3.

The myopia from which Cedar Fair suffers revolves around the fact that in none of its briefing to the trial court, court of appeals, or this Court does it cite this Court's holdings in

Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum and Plastic Workers of America, 42 Ohio St.2d 516, 330 N.E.2d 703 (1975), or any of its progeny.

When faced with the argument that an arbitrator "may have exceeded his powers" in issuing a decision which one party claimed to be a "manifest error of law," this Court in *Goodyear* stated:

Were the arbitrator's decision to be subject to reversal because a reviewing court disagreed with findings of fact or with an interpretation of the contract, *arbitration would become only an added proceeding and expense prior to final judicial determination. This would defeat the bargain made by the parties and would defeat as well the strong public policy favoring private settlement of grievance disputes arising from collective bargaining agreements.*

* * *

The Company argues [sic], however, that the arbitrator made a *manifest error of law and thereby exceeded his authority.*

* * *

At common law, the courts have almost uniformly refused to vacate an arbitrator's award because of an error of law or fact. It has been held that the arbitrator is the final judge of both law and facts, and that an award will not be set aside except upon a clear showing of fraud, misconduct or some other irregularity rendering the award unjust, inequitable, or unconscionable. [Citation omitted.], *and that even a grossly erroneous decision is binding in the absence of fraud.* [Citations omitted.]

* * *

In the instance case, we need not consider whether such gross errors might be said to exceed the arbitrator's powers, within the meaning of R.C. 2711.10. It is far from clear in the instant case that the arbitrator made any error at all, or that his decision would have in any way differed absent the claimed error.

* * *

How this or another court might have decided the issue presented to the arbitrator is irrelevant; that decision, by voluntary contract, was left to arbitration and no abuse of authority would justify the

courts in reversing that decision. ***"The arbiter was chosen to be the Judge. That judge has spoken. There it ends."*** [Citation omitted.] [Emphasis added.]

Goodyear Tire & Rubber Co., 42 Ohio St.2d at 520, 522-523.

In the more than thirty years since this Court's decision in *Goodyear*, this Court has cited and commented upon that decision on no less than eight occasions.² Of those eight decisions, Cedar Fair cites but one. Cedar Fair notes that in *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177,

² *Bellaire City Schools Board of Education v. Paxton*, 59 Ohio St.2d 65, 391 N.E.2d 1021 (1979) (confirms policy of limiting judicial intervention into contractually agreed upon arbitration process); *Mahoning County Board of Mental Retardation and Developmental Disabilities v. Mahoning County TMR Education Association*, 22 Ohio St.3d 80, 488 N.E.2d 872 (1986) (policy of law is to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceeding and to favor the regularity and integrity of the arbitrator's act; mere ambiguity in arbitration opinion which permits inference that arbitrator may have exceeded authority is not reason for vacating the award when award draws its essence from collective bargaining agreement); *City of Rocky River v. State Employment Relations Board*, 39 Ohio St.3d 196, 530 N.E.2d 1 (1988) (mere ambiguity in opinion accompanying an arbitration award giving inference that arbitrator may have exceeded authority, is not reason for vacating award when award draws its essence from a collective bargaining agreement); *Board of Education of Findlay City School District v. Findlay Education Association*, 49 Ohio St.3d 129, 551 N.E.2d 186 (1990) (mere ambiguity in opinion which permits inference that arbitrator may have exceeded authority is not reason for vacating award which draws its essence from a collective bargaining agreement); *State Farm Mutual Insurance Company v. Blevins*, 49 Ohio St.3d 165, 551 N.E.2d 955 (1990) (an arbitrator's powers are limited by bounds of the agreement from which he draws his authority); *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 572 N.E.2d 71 (1991) (arbitrator departs from essence of collective bargaining agreement when (1) an award conflicts with the express terms of the collective bargaining agreement or (2) an award is without rational support and cannot be rationally derived from the terms of the agreement); *Queen City Lodge No. 69, Fraternal Order of Police, Hamilton County, Ohio, Inc. v. City of Cincinnati*, 63 Ohio St.3d 403, 588 N.E.2d 802 (1992) (once a violation of collective bargaining agreement is found, an arbitrator is presumed to possess implicit remedial power, unless the agreement contains restrictive language withdrawing a particular remedy from the jurisdiction of the arbitrator); *Board of Trustees of Miami Township v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269, 690 N.E.2d 1262 (1998) (an arbitrator has broad authority to fashion a remedy, even if the remedy contemplated is not explicitly mentioned in the labor agreement).

572 N.E.2d 71 (1991), this Court stated an arbitrator is not free to "dispense his own brand of industrial justice." Cedar Fair's Memorandum at 3. Interestingly, Cedar Fair does not cite the holding in that case:

We recognize that an arbitrator departs from essence of a collective bargaining agreement when: "(1) an award conflicts with express terms of the collective bargaining agreement, * * * [or] (3) an award is without rational support or cannot be rationally derived from the terms of the agreement * * *."

Id. at 183.

Further while Cedar Fair raises the question as to the extent to which courts enforce the parties' agreed limits on the arbitrators' *remedial* authority under the contract, it does not cite or discuss the holdings of this Court in two cases derivative of the *Goodyear* decision. The first case is *Queen City Lodge No. 69, Fraternal Order of Police, Hamilton County, Ohio, Inc. v. City of Cincinnati*, 63 Ohio St.3d 403, 588 N.E.2d 802 (1992):

We hold that once a violation of a collective bargaining agreement is found, an arbitrator is presumed to *possess implicit remedial power, unless the agreement contains restrictive language withdrawing a particular remedy from the jurisdiction of the arbitrator.* Thus we find that the arbitrator in this case was authorized to award a remedy. We further find that the remedy awarded was properly confirmed by the trial court.

Id. at 407-408. In accord with the forgoing is this Court's decision in *Board of Trustees of Miami Township v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 81 Ohio St.3d 269, 690 N.E.2d 1262 (1998), likewise derivative to the *Goodyear* decision and likewise not cited by Cedar Fair:

An arbitrator has broad authority to fashion a remedy, even if the remedy contemplated is not explicitly mentioned in the labor agreement. [Citations omitted.]

Id. at 273. Thus, this Court has answered Cedar Fair's second question. Plainly, an arbitrator is "presumed to possess" "broad," "implicit remedial power," "*unless* the agreement contains restrictive language withdrawing a particular remedy from the jurisdiction of the arbitrator." [Emphasis added.]

Under this standard, it is clear that Cedar Fair's argument that the Arbitrators' ordering of reinstatement is beyond the authority of the contract is simply wrong. First, as noted above, Section 7 of the Employment Agreement, by its own terms, addresses the scope of awardable damages, only in the context of Cedar Fair discharging an employee other than for cause. Here, Cedar Fair never claimed it discharged Mr. Falfas. Rather, it claimed -- but could not prove -- he resigned. Further, when Cedar Fair steadfastly refused to allow Mr. Falfas to return to work, the Arbitrators could justifiably find Cedar Fair breached the implied covenant of good faith and fair dealing thereby breaching the contract.

Once the contract was breached, the Arbitrators -- under their implied power to provide a remedy, as well as Section 19(c) -- were required to fashion a remedy which made Mr. Falfas whole. Here, Cedar Fair claims the Arbitrators engaged in a manifest error of law in ordering reinstatement, citing this Court's decision in *Masetta*. However, the Arbitrators' granting of reinstatement does not plainly run afoul of the syllabus of *Masetta* in light of this Court's holding in *Worrell*. Moreover, since any claimed error arises out of the Arbitrators' effort to interpret and apply the contract, such does not constitute a reviewable event under the law as it pertains to arbitrations. A simple remedy available to Cedar Fair was to include in its Employment Agreement a provision removing reinstatement as a remedy.

Cedar Fair directs this Court's attention to the United States Supreme Court decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 170

L.Ed.2d 254 (2008), holding that parties cannot contract for increased judicial scrutiny of an arbitrator's decision beyond those basis expressly provided in the Federal Arbitration Act. In light of such ruling, Cedar Fair claims that there is now an uncertainty as to the ability of parties to limit the remedies available. It would seem that the above referenced decisions of this Court have answered that question.

Further, this Court should note the United States Supreme Court's recent decision, decided on June 10, 2013, in *Oxford Health Plans LLC v. Sutter*, 569 U.S. ____ (2013). In that case, an arbitrator ruled that the language of the arbitration agreement, though silent on the point, could be interpreted as providing the right to a class action arbitration. The United States Supreme Court, although it openly disagreed with the arbitrator's decision, nevertheless affirmed the decision, stating:

Nothing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error -- even his grave error -- is not enough. So long as the arbitrator was "arguably construing" the contract -- which this one was -- a court may not correct his mistakes *under §10(a)(4)*. [Citation omitted.] ***The potential for those mistakes is the price of agreeing to arbitration.*** As we have held before, we hold again: "It is the arbitrator's construction [of the contract] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contact is different from his." [Citation omitted.] ***The arbitrator's construction holds, however good, bad or ugly.***

In sum, Oxford chose arbitration, and it must now live with that choice. [Emphasis added.]

Id., Slip Opinion at 8. It should be noted that Section 10(a)(4), cited in the above quotation, is a reference to that section of the Federal Arbitration Act, which is essentially the same as Section 2711.10(D) -- the section Cedar Fair relies upon for its challenge to the Arbitrators' Decision and

Award in this case. In light of the decision in *Oxford*, it seems appropriate to state: "Having chosen to arbitrate this matter, Cedar Fair must now live with that choice."

IV. CONCLUSION

It is clear that this case does not present a matter of great public interest raising questions heretofore unaddressed by this Court or the U.S. Supreme Court. To the contrary, the instant matter is a parochial dispute between Cedar Fair and Mr. Falfas. That dispute was resolved by and through arbitration. The Arbitrators' decision plainly drew its essence from the Employment Agreement at issue. Under the substantive law of Ohio, both with respect to contracts and arbitrations, there is no basis to overturn the arbitration decision in this case. In light of this Court's prior decisions, Cedar Fair's issue with respect to Mr. Falfas' reinstatement could have been avoided by placing in its Employment Agreement with Mr. Falfas a simple and plain statement prohibiting that remedy. Interestingly, that is exactly what Cedar Fair has done.³

³ According to Exhibit – 10.1, of Cedar Fair's Form 8-K filed with the U.S. Securities and Exchange Commission on October 18, 2011, Section 12.8(d) of Mr. Zimmerman's employment agreement with Cedar Fair reads in its entirety as follows:

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. The arbitration panel shall not have the authority either to abridge or change substantive rights available under existing law. Notwithstanding the foregoing, given the nature of Executive's position with Cedar Fair, *the arbitrator [sic] shall not have the authority to order reinstatement, and Executive waives any right to reinstatement to the full extent permitted by law.* [Emphasis added.]

<http://www.sec.gov/Archives/edgar/data/811532/000081153211000086/richardzimmermancooemploym.htm>

Accordingly, Cedar Fair's request for jurisdiction should be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Richard D. Panza", written over a horizontal line.

Richard D. Panza (0011487) (COUNSEL OF RECORD)
William F. Kolis, Jr. (0011490)
Joseph E. Cirigliano (0007033)
Matthew W. Nakon (0040497)
WICKENS, HERZER, PANZA, COOK & BATISTA CO.
35765 Chester Road
Avon, OH 44011
(440) 695-8000
Fax No. (440) 695-8098
rpanza@wickenslaw.com
wkolis@wickenslaw.com
jcirigliano@wickenslaw.com
mnakon@wickenslaw.com

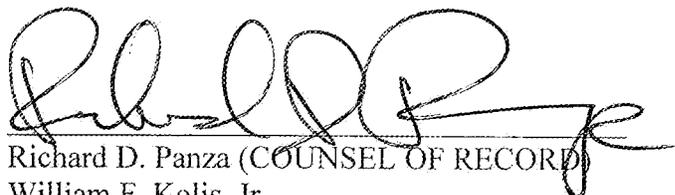
COUNSEL FOR APPELLEE,
JACOB FALFAS

PROOF OF SERVICE

This is to certify that a copy of the foregoing Memorandum in Opposition to Jurisdiction of Appellee Jacob Falfas has been sent by ordinary United States mail, postage prepaid, on this 21st day of July, 2013, to:

Dennis E. Murray, Jr., Esq.
Dennis E. Murray, Sr., Esq.
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870-2517

Douglas R. Cole, Esq.
Erik J. Clark, Esq.
Organ Cole + Stock LLP
1335 Dublin Road, Suite 104D
Columbus, OH 43215-7084



Richard D. Panza (COUNSEL OF RECORD)
William F. Kolis, Jr.
Joseph E. Cirigliano
Matthew W. Nakon