

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

* * * *

APPELLEE JACOB FALFAS'S MOTION TO STRIKE THE MERIT BRIEF OF APPELLANT CEDAR FAIR, L.P.

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)
Joshua M. Feasel (0090291)
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
jmfeasel@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.

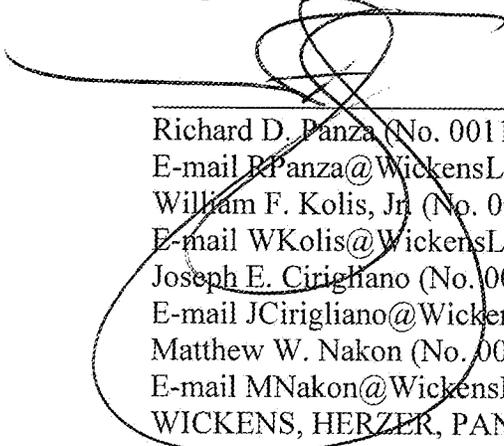
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Appellee Jacob Falfas ("Mr. Falfas") moves this Court pursuant to S.Ct.Prac.R. 4.01(A) to strike the Merit Brief filed by Appellant Cedar Fair, L.P. ("Cedar Fair") which *inter alia*, contains arguments supporting its Proposition of Law II and Proposition of Law III (argued in Memorandum in Support of Jurisdiction of Appellant Cedar Fair L.P. filed in this matter on June 3, 2013 ("Memorandum in Support of Jurisdiction")), neither of which were accepted for review by this Court. The Merit Brief of Cedar Fair should also be struck as it contains factual assertions that are not part of the record at any stage of the proceedings, which in turn are used as a basis for its requested relief, which likewise is outside of the scope of review established by this Court. The reasons for this Motion are more fully explained in the attached Memorandum in Support.

Respectfully submitted,



Richard D. Panza (No. 0011487)
E-mail RPanza@WickensLaw.com
William F. Kolis, Jr. (No. 0011490)
E-mail WKolis@WickensLaw.com
Joseph E. Cirigliano (No. 0007033)
E-mail JCirigliano@WickensLaw.com
Matthew W. Nakon (No. 0040497)
E-mail MNakon@WickensLaw.com
WICKENS, HERZER, PANZA, COOK & BATISTA CO.
35765 Chester Road
Avon, OH 44011-1262
(440) 695-8000 (Main)
(440) 695-8098 (Fax)

ATTORNEYS FOR APPELLEE, JACOB FALFAS

MEMORANDUM IN SUPPORT

I. INTRODUCTION

It is axiomatic that when the Ohio Supreme Court takes jurisdiction of a discretionary appeal, such as is the case here, the appealing party is limited to (1) arguing the issues accepted for review by the Court [S.Ct. Prac.R. 3.6(B)(3)(b)], and (2) the arguments must be based upon the facts contained in the record [S.Ct. Prac.R. 16.02(B)(3)]. This case finds its roots in an arbitration proceeding conducted on January 12th and 13th, 2011, and a written Arbitration Decision dated February 28, 2011. See, Appendix to Merit Brief, pp. A-22-23. Because the arbitration involved the employment status of a highly compensated executive officer of a publicly traded company, who had been with the company for 39 years, substantial formal discovery was conducted over a period of six months prior to the arbitration, and the hearing itself involved 15 witnesses, numerous exhibits and a full and complete transcript. The three arbitrators involved were all seasoned attorneys with substantial experience in conducting arbitrations. By agreement of the parties below, the transcript of the arbitration proceedings, the accompanying exhibits and the pre and post-arbitration briefs of the parties were made part of the record in this case, when the Arbitrators' Decision was presented to the Erie County Court of Common Pleas for confirmation, on the one hand, and/or vacation and modification on the other. Simply stated, there is an extensive and well documented record in this case.

Apparently dissatisfied with its prior representation, Cedar Fair has retained new legal counsel to represent it before this Court. This new firm describes its commitment to litigation matters as "an uncompromising, driving desire to win." (See, <http://www.ocslawfirm.com>). Indeed, when it comes to its clients, "Success is not a goal – it's an expectation." (See, <http://www.ocslawfirm.com/firm.html>). It would appear, that in its zealous

drive to represent Cedar Fair, this new counsel has somehow determined that the axiomatic rules described above do not apply to its endeavors.

The filing of a motion such as this is, generally speaking, anathema to our practice. However, in the instant case the transgressions of Cedar Fair, by and through its counsel, as to those well-established rules are so blatant and pervasive that as counsel for Mr. Falfas, we believe we are compelled to file this Motion, save it later be argued that by failing to do so Mr. Falfas's objections to such behavior have been waived.

Indeed, in a merit brief that consists of 37 pages, one can fairly state that 28 pages of the argumentation, to-wit: Merit Brief, pp. 9-37, support the proposition that: "The [arbitration] panel thus exceeded their authority under the employment agreement, and their award must be vacated." Merit Brief, p. 15. This theme is pervasive in the balance of the brief. Subheading C. of the "Argument" section of the Merit Brief reads as follows:

Because the Principal Set Out in *Masetta Controls Here*, the Arbitrators' Award Was Outside of the Power of Ohio's Courts and Therefore Fails.

Merit Brief, p. 26. Finally, the relief sought in the "CONCLUSION" of the Merit Brief continues this misdirection:

For the above stated reasons, Cedar Fair specifically urges the Court to vacate the Sixth District's Decision and order the lower court to award damages as Section 7 of the Employment Agreement provides.

Merit Brief, p. 37. As will be shown in detail below, all of this argumentation relates directly to Cedar Fair's Second and Third Propositions of Law set forth in its Memorandum in Support of Jurisdiction, *neither of which were accepted for review by this Court.*

Finally, it will be shown that Cedar Fair seeks to enter into the record of this case before this Court - - for the first time - - "factual assertions" which are not in the record of this

matter and, therefore, cannot be considered by this Court. This is especially troublesome in that the relief sought by Cedar Fair is based upon the same. Because of the pervasive nature of all these transgressions, Cedar Fair's Merit Brief must be struck from the record *in its entirety*. Further, this Court should award Mr. Falfas his reasonable attorneys' fees and costs associated with the preparation and filing of this Motion.

II. ARGUMENT

A. **Cedar Fair's Merit Brief Should Be Struck From The Record Of This Case In Its Entirety Because It Presents Substantial and Pervasive Arguments Pertaining To Propositions Of Law This Court Did Not Accept For Review.**

In its Memorandum in Support of Jurisdiction Cedar Fair argued that the instant case "presents two issues of public and great general interest," Pursuant to S.Ct. Prac. R. 5.02(A)(3). According to Cedar Fair, the first issue is its perceived need for this Court "to resolve a conflict among the intermediate appellate courts regarding whether ... Ohio courts have broad authority to order that specific employees be reinstated to specific positions at any time "Memorandum in Support of Jurisdiction, p. 6¹. The second issue is for this Court to use this case to "explicate the authority of Ohio courts to vacate or modify arbitration awards that exceed *remedial* authority that parties have granted to the arbitrator. [Emphasis in original text.] *Id.* In furtherance of these two issues, Cedar Fair presented three propositions of law. The first proposition of law related to the first issue, and the second and third propositions of law related to the second issue.

Only Proposition of Law I was accepted for review. Specifically, that proposition states:

¹ Although Cedar Fair claims there is a conflict in the circuits, as a result of the Sixth District's opinion below, it did not file a Motion to Certify a Conflict under App. R. 25 or claim such as a basis for jurisdiction pursuant to S. Ct. Prac. R. 5.03.

Cedar Fair's Proposition of Law I – Accepted for Review

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.

(Cedar Fair's Memorandum in Support of Jurisdiction, at 10).

The Merit Brief filed by Cedar Fair, however, contains arguments interwoven throughout its entirety supporting its position that the arbitrators' exceeded their authority as advanced in Proposition of Law II and Proposition of Law III. These issues were expressly denied review by this Court. Notably, Proposition of Law II and Proposition of Law III found in Cedar Fair's Memorandum in Support of Jurisdiction read as follows:

Proposition of Law II – Denied Review by this Court:

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.

Proposition of Law III – Denied Review by this Court:

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.

(Cedar Fair's Memorandum in Support of Jurisdiction, at 12, 14).

By solely accepting for review Proposition of Law I, this Court made it evident that it was only interested in arguments relating to specific performance as an available remedy for personal service contracts and did not want Cedar Fair to address any arguments relating to the authority of the arbitrators. See, The Supreme Court of Ohio Entry dated September 25, 2013. ("Upon consideration of the jurisdictional memoranda filed in this case, the court accepts the appeal on Proposition of Law No. I"). The legal analysis required to resolve whether specific performance is an appropriate remedy for a personal services contract as raised in Proposition of Law I is completely unrelated to the legal analysis required to determine whether the arbitrators

exceeded their authority as alleged in Proposition of Law II and III. Therefore, by accepting for jurisdictional review Proposition of Law I, Cedar Fair was to brief its argument solely on the issue of specific performance as an available remedy for personal service contracts.

Despite the unrelated nature between the propositions of law and this Court's clear and unequivocal decision to grant jurisdiction on Proposition of Law I alone, Cedar Fair incessantly advances arguments throughout its Merit Brief that the arbitrators exceeded their authority. In doing so, Cedar Fair's Merit Brief disregards this Court's explicit rejection from its review that the arbitrators' exceeded their authority and attempts to obfuscate the issue accepted for review by this Court. Cedar Fair, no less than six times throughout its brief, deduces from its argument that the arbitrators exceeded their authority. *See*, Merit Brief, pp. 2, 15, 26, 27, 31 and 37. Notably, Cedar Fair repeatedly requests that this Court vacate the arbitrators' decision. *See*, Cedar Fair Merit Brief at pg. 37 ("The arbitration remedy therefore fails, and this Court should reverse the decision below and order the arbitrators' award replaced with the remedy that the agreement expressly provides... Any other award exceeds the arbitrators' power under the employment agreement.").

Cedar Fair's Merit Brief discusses at length issues relating to arguments contained in its Proposition of Law II and III that are neither proper in form nor substance and were not accepted by this Court for review. By arguing all three propositions of law simultaneously, Cedar Fair attempts to improperly have this Court consider issues outside of its limited grant of jurisdiction. This Court has previously stated that it will not consider issues raised by a party that were not accepted for jurisdictional review. *Zappitelli v. Miller*, 114 Ohio St.3d 102, 2007-Ohio-3251, ¶7 ("We accepted jurisdiction only of proposition of law No. I. *Zappitelli v. Miller*, 110 Ohio St.3d 1437, 2006-Ohio-3862, 852 N.E.2d 186. Accordingly, we will not consider the other issues raised by appellant Karen J. Miller and her counsel.") Cedar Fair should not be

permitted to advance arguments and submit evidence advancing its position that the arbitrators exceeded their authority as the corresponding propositions of law were not accepted by this Court. Consequently, the Merit Brief of Cedar Fair must be struck.

B. Cedar Fair's Merit Brief Should Be Stricken In Its Entirety Because Cedar Fair Introduces Factual Assertions That Are Not Contained In Or Supported By The Record, And Then, Based Thereon Argues That The Decision Of The Arbitrators Should Be Vacated And Modified.

First, in its Statement of Facts, at pp. 2-3 of its Merit Brief, there is a description of Cedar Fair's operations. The only support for that description is a website containing a Security and Exchange filing dated 2013, that according to the Merit Brief was "accessed on November 18, 2013." pp. 2-3. Needless to say this material could not be in the record made before the arbitrators because it did not come into existence until *more than a year after* the arbitrators rendered their decision on February 28, 2011. (See, Appendix to Cedar Fair's Merits Brief, pp. A. 22-23.) Similarly, on page 22 of its Merits Brief Cedar Fair states:

But whatever the reason for his original departure, it is clear that Cedar Fair no longer wants him [Mr. Falfas] around. The company confirmed this in November 2011 and again in February 2012, when the chairman of the board of directors told Falfas that, subject to Cedar Fair's legal arguments on appeal, Cedar Fair intended to terminate for all time Falfas's employment.

On pages 22-23, Cedar Fair states:

Maintaining the confidence and trust of one's peers and subordinates is particularly important for high-level executives, whose effectiveness is heavily dependent on maintaining good personal relationships, both with subordinates and with the Board of Directors. As chief operating officer of Cedar Fair, Falfas would be heavily involved in all aspects of Cedar Fair's business, and he would have to work closely with many people helping to run that business. Poor relationships with these people, including the board members who have repeatedly confirmed he is no longer welcome as COO, would make him significantly less able to do his job.

Then again on page 24 Cedar Fair states:

The company has hired a new COO and has made numerous changes to its business since Falfas left. Surely, Falfas understands that a compelled return to Cedar Fair would significantly disrupt the company and cause it harm.

Here, Cedar Fair has a new COO, and given the circumstances, there can be little doubt that Falfas' reinstatement would result in hostility between the parties. There are numerous problems associated with these factual assertions. First, these factual assertions are *not* contained in the Statement of Facts of Cedar Fair's Merits Brief. This is extremely problematic. S.Ct. Prac.R. 16.02(B)(3) which describes the mandatory contents of an appellant's brief reads as follows:

A statement of the facts with page references, in parenthesis, *to supporting portions of both the original transcript of testimony and any supplement filed* in the case pursuant to S.Ct. Prac.R. 16.09 through 16.10;

[Emphasis added.] It cannot be ignored that there are no citations to the original transcript of testimony before the arbitrators in this matter with respect to these particular statements. Interestingly, at no point in its 37 page Brief does Cedar Fair cite to *any evidence* introduced at the arbitration save and except the 2007 Amended and Restated Employment Agreement between Cedar Fair and Mr. Falfas.

As noted in the above quoted subsection, a party pursuant to S.Ct. Prac.R. 16.09 can file a supplement. That rule of practice reads in pertinent part as follows:

(A) Appellant's Supplement

In every civil case on appeal to the Supreme Court from a court of appeals ... the appellant *may* prepare and file a supplement to the brief that contains those portions of the record necessary to enable the Supreme Court to determine the questions presented. *Parties to an appeal are encouraged to consult and agree on the contents of the supplement to minimize the appellee's need for filing a supplement.*

[Emphasis added.] Plainly, under the above, the filing of a supplement is optional and not mandatory. It is noteworthy, however, that Cedar Fair did in fact file a supplement. Interestingly, there is only one document contained in the supplement and that is a copy of the 2007 Amended and Restated Employment Agreement between Cedar Fair and Mr. Falfas. Of further import to the instant argument, there is no material contained in the supplement which supports the factual assertion that Cedar Fair let Mr. Falfas know that notwithstanding his apparent success at arbitration and the appellate level, he was not wanted at the company, he had been replaced as COO, he would be terminated, or that his return would disrupt the company and cause it harm. Coincidentally, Cedar Fair did not consult with Mr. Falfas as to the contents of the supplement.

This Court has held that "[a] reviewing court cannot add matter to the record before it, which was not part of the trial court's proceeding, and then decide the appeal on the basis of the new matter." See, *State v. Ishmail*, 54 Ohio St.2d 402 (1978). As shown, Cedar Fair attempts to advance the argument that "Cedar Fair no longer wants [Mr. Falfas] around" (without citing to any evidence in support) so it can argue that the reinstatement of Mr. Falfas would be difficult and counter to what the company wanted. However, the evidence at the arbitration hearing was that, *inter alia*, Mr. Falfas was such a long term, dutiful and trusted Chief Operations Officer, that he was the acknowledged successor to Richard Kinzel, the President and Chief Executive Officer of the company. Tr. pp. 31, 194-195, 509, 530-531. Further and most importantly reinstatement was available because as of the arbitration - - seven months *after* Mr. Falfas was locked out of his employment - - Cedar Fair had not hired a replacement COO. Tr. p. 554.

It thus becomes clear that Cedar Fair's unsupported factual assertions are being advanced at this stage of these proceedings to convince this Court that Mr. Falfas' reinstatement

is not feasible when, in fact, at the time of the arbitrators' ruling it was feasible. This information is clearly outside the scope of the record and is being injected into this matter at this time, as an integral fact supporting Cedar Fair's argument that the decision of the arbitrators was beyond its authority, an issue which this Court expressly did not accept for review.

None of the above noted arguments made by Cedar Fair are part of the record in this case and therefore, are not properly before this Court for consideration in reviewing Cedar Fair's Merit Brief. Instead of relying on evidence that was within the record, Cedar Fair is attempting to bring before this Court arguments and "factual assertions" that have never been part of the record of this case. Accordingly, as these references outside the record appear throughout Cedar Fair's Merit Brief, Mr. Falfas respectfully requests that this Court strike Cedar Fair's Merit Brief in its entirety.

III. CONCLUSION

For the foregoing reasons, Falfas respectfully requests that this Court strike Cedar Fair's Merit Brief. Further, the Court should award Mr. Falfas his reasonable attorneys' fees and costs associated with the preparation and filing of this Motion.

Respectfully submitted,

Richard D. Panza (No. 0011487)
E-mail RPanza@WickensLaw.com
William F. Kolis, Jr. (No. 0011490)
E-mail WKolis@WickensLaw.com
Joseph E. Cirigliano (No. 0007033)
E-mail JCirigliano@WickensLaw.com
Matthew W. Nakon (No. 0040497)
E-mail MNakon@WickensLaw.com
WICKENS, HERZER, PANZA, COOK & BATISTA CO.
35765 Chester Road, Avon, OH 44011-1262
(440) 695-8000 (Main)
(440) 695-8098 (Fax)

ATTORNEYS FOR APPELLE, JACOB FALFAS

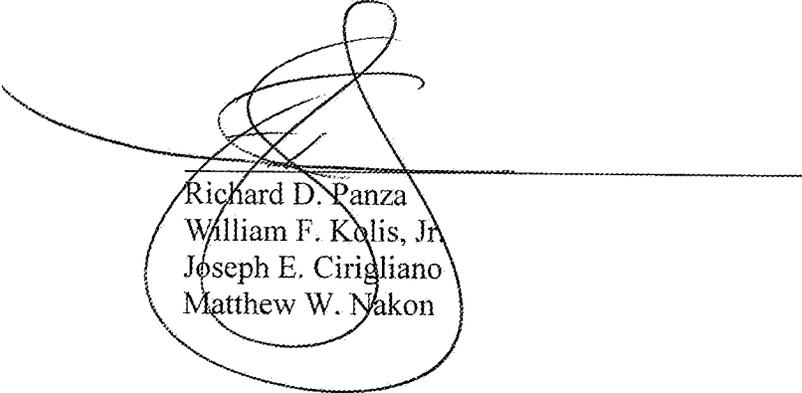
PROOF OF SERVICE

This is to certify that a copy of the foregoing Appellee Jacob Falfas's Motion to Strike the Merit Brief of Appellant Cedar Fair, L.P. has been sent by ordinary United States mail, postage prepaid, on this 2nd day of December, 2013, to:

Susan C. Hastings, Esq.
Joseph C. Weinstein, Esq.
Squire Sanders (US) LLP
4900 Key Tower
127 Public Square
Cleveland, OH 44114-1284

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

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



Richard D. Panza
William F. Kolis, Jr.
Joseph E. Cirigliano
Matthew W. Nakon