

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

* * * *

MERIT BRIEF OF APPELLEE JACOB FALFAS

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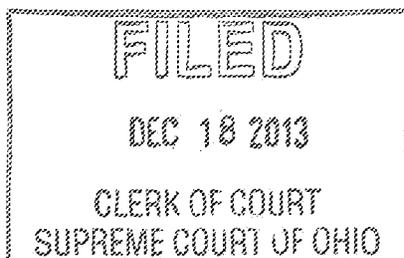


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I. INTRODUCTION

The April 19, 2013 Decision and Judgment of the Sixth District (Appellant's Appendix at A-5) which ostensibly affirmed the February 28, 2011 Findings and Award of the private arbitration between Appellant Cedar Fair, L.P. ("Cedar Fair") and Appellee Jacob Falfas ("Mr. Falfas"), was correct in every respect and, therefore, should be affirmed. Pursuant thereto this Court should -- for the sake of judicial economy -- issue a mandate to the trial court to immediately order Cedar Fair to "reinstate [Mr.] 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." (Findings and Award, Appellant's Appendix at A-23.) In addition, the mandate should instruct the trial court to conduct a hearing, and based thereon, order Cedar Fair to reimburse Mr. Falfas "for reasonable costs, expenses, and attorney's fees." (*Id.*) In so holding, this Court will reinforce the basic principle upon which arbitration rests. The surrender by the parties of their rights to judicial redress contemplates an arbitrator's analysis of the facts and law, not a court's analysis. That is the bargain made by the parties. It is the only holding which insures that the decision of arbitrators will actually be final and binding.

It has been approximately three and half years since Mr. Falfas was wrongfully deprived of his office as Chief Operating Officer of Cedar Fair. It has been almost three years since a private, jointly selected arbitration panel decided that Cedar Fair "breached the covenant of good faith and fair dealing implicit in the Employment Agreement" with Mr. Falfas, by and through "his wrongful termination." (Findings and Award, Appellant's Appendix at A-22, A-23.) During each stage of these proceedings -- despite the rulings from an arbitration panel, a trial court and court of appeals granting and supporting Mr. Falfas' right to monetary compensation -- Cedar Fair originally maintained that Mr. Falfas *resigned* and, as a result, forfeited his right to

any compensation whatsoever. Now, however, after having refused to pay Mr. Falfas for approximately four years, Cedar Fair has grudgingly conceded that Mr. Falfas is entitled to an award of monetary damages, albeit but a fraction of the compensation and the benefits to which he is entitled.

The degree of physical and fiscal pain and anguish Mr. Falfas and his family have endured over the last four years is inexcusable given the fact that this matter was to be resolved through "final and binding arbitration." (2007 Amended and Restated Employment Agreement, Section 19(a), Appellant's Supplement at S-11.) A process which had been touted as an efficient and cost effective alternative to civil litigation and the right to a jury trial. Indeed, by the time this instant appeal is decided, Mr. Falfas will have committed four years of his life and hundreds of thousands of dollars (Affidavit of Mark B. Bober, CPA, ABV, CVA, CFF, Exhibit B to Mr. Falfas' Brief in Opposition to Cedar Fair, L.P.'s Motion to Stay Further Proceedings in the Trial Court Pending Appeal, or in the Alternative Motion for Continuance), arguing before four different tribunals to hold on to the employment, wages, benefits and deferred compensation for which he worked over 39 years.

The use of arbitration clauses in employment contracts has grown steadily in recent years. One source estimates that one out of three nonunion workers is covered by such agreements. Prior to 1925, arbitration agreements were viewed by American courts with judicial hostility. However, as industrialization prompted an increase in the number of business disputes this hostility subsided. So much so that, on February 12, 1925, the Federal Arbitration Act ("FAA") was enacted which "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting

parties agreed to resolve by arbitration."¹ With regard to the benefits of the FAA, Congress noted the following:

It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

Id. at CRS-3. In 1935, Ohio adopted as part of its General Code, an arbitration statute which was essentially identical to the FAA. It is now codified at Section 2711.01 *et. seq.* Ohio Revised Code.

To preserve the timeliness and cost-effectiveness of the arbitration process, courts and commentators alike have recognized that:

When courts are called on to review an arbitrator's decision, the review is very narrow; [it is] one of the narrowest standards of judicial review in all American jurisprudence. [Citations omitted.]

Coffee Beanery, Ltd. v. WW, L.L.C., 6th Cir. No. 07-1830, 300 Fed. Appx. 415, 418, 2008 WL 4899478 (Nov. 14, 2008). Indeed, this Court in *Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum and Plastic Workers of America*, 42 Ohio St.2d 516, 522, 330 N.E.2d 703 (1975) stated:

At common law, 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.] [Emphasis added.]

¹ Report for Congress: The Federal Arbitration Act: Background and Recent Developments, Updated June 17, 2002, Congressional Research Service, The Library of Congress, p. CRS-2.

The rationale for such a stringent limitation on a court's authority to review an arbitration award has been described as follows:

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.* Arbitration, which is intended to avoid litigation, would instead become merely a system of "junior varsity trial courts" offering the losing party de novo review. [Emphasis added.]

Midwest Curtainwalls, Inc. v. Pinnacle 701, LLC, 8th Dist. No. 90591, 2008-Ohio-5134, ¶7, citing *Motor Wheel Corp. v. Goodyear Tire & Rubber Co.*, 98 Ohio App.3d 45, 647 N.E.2d 844 (8th Dist. 1994).

In its Memorandum in Support of Jurisdiction at page 7, Cedar Fair argued that a question of "great and growing importance" presented by this case concerns the "power of Ohio courts to correct or modify arbitration awards that exceed an arbitrator's remedial authority." Cedar Fair states this issue has become "all the more important" after the United States Supreme Court's landmark 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), which held that parties *cannot contract for increased scrutiny* of an arbitrator's decision beyond those grounds expressly provided in the Federal Arbitration Act. Cedar Fair claims *Hall Street* raises the question of whether an arbitrator "exceeds his authority" if he fails to "faithfully observe and apply particular law." Memorandum in Support pp. 8-9.

Notably, there is no reference in Cedar Fair's Merit Brief to *Hall Street* or the scope of the limit on the arbitrators' remedial authority, despite plainly arguing that the arbitrators below exceeded their remedial authority by misapplying this Court's decision in *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953). The reason for this omission is most likely because, the United States Supreme Court gave a

definitive answer to that question in *Oxford Health Plans LLC v. Sutter*, 569 U.S. _____, 133 S.Ct. 2064, 186 L.Ed.2d 113 (2013), decided on June 10, 2013, just *seven days after* Cedar Fair filed its Memorandum in Support of Jurisdiction.

In *Oxford*, 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 same, 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 contract is different from his." [Citation omitted.] ***The arbitrator's construction holds, however good, bad or ugly.*** [Emphasis added.]

Oxford, 133 S.Ct. 2070.

It should be noted that Section 10(a)(4), cited in the above quotation, is a reference to that section of the FAA, which is essentially the same as R.C. 2711.10(D) (Appellee's Appendix at A1) -- the section Cedar Fair relies upon for its challenge to the Arbitrators' Findings and Award (Findings and Award, Appellant's Appendix at A-22) in this case. Not surprisingly, the *Oxford* decision is likewise not cited in Cedar Fair's Merit Brief. The reason for such omission is clear, *Oxford* stands for the proposition that an error of law committed by arbitrators in the course of interpreting a contract is not a matter which is deemed to "exceed" the arbitrators' authority warranting judicial intervention.

In Ohio, one need not look to the United States Supreme Court for guidance, as the same result is mandated by this Court's decision in *Goodyear Tire & Rubber Co.*, 42 Ohio St.2d 516 (a case which Cedar Fair has likewise not cited, distinguished or commented upon in any brief filed at any time, in this action, including its Merit Brief). Cedar Fair's steadfast and continuous refusal to address the *Goodyear* decision bespeaks its importance to this matter.

Mr. Falfas in no way concedes that there is anything improper, arbitrary, fraudulent or corrupt with respect to the Arbitrators' Findings and Award. In fact, Mr. Falfas' position is the exact opposite. He believes the relevant statutory and case law establish the arbitrators acted lawfully and within their discretion and remedial authority in the relief they granted Mr. Falfas including his reinstatement. This is true even if one were to entertain Cedar Fair's assertions that the Sixth District's reading of the *Masetta* decision was erroneous. Under *Goodyear*, "even a grossly erroneous decision will not be set aside absent a clear showing of fraud." *Goodyear*, 42 Ohio St.2d, 522. Cedar Fair has not and cannot make such a showing.

Cedar Fair characterizes the Sixth District's decision below as an anomaly from which all other districts in Ohio must be saved. The fallacy of Cedar Fair's argument becomes manifest on close inspection. Cedar Fair's entire argument rests on one simple principle, under this Court's decision in *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953), in Ohio it is an immutable, *per se* rule of common law, that a court of equity will not enforce a personal service contract. **No exceptions.** Further, according to Cedar Fair, this statement of law is in accord with the "vast majority" of other states, treatises, and other authorities. Cedar Fair is wrong in both respects, and a review of its brief proves it is wrong.

Cedar Fair states that its survey of 49 states, Ohio being excluded, shows that "[f]orty other states ... have explicitly adopted the no-specific-performance of personal services contracts rule." Cedar Fair's Merit Brief, p. 15. The survey presented by Cedar Fair lists all the

states, in alphabetical order, and then purports to quote from either a statute or a case language which Cedar Fair claims definitively shows that state's position with respect to the equitable enforcement of a personal services contract. However, a review of the individual entries for each state establishes that Cedar Fair has clearly overreached in its classifications. In numerous instances, this so called "no-specific-performance of personal services contracts rule" contains a qualifier such as "generally," "the general rule is," "are not as a rule," "ordinarily," "rarely," "almost universal." Such qualifiers mean there *are exceptions*. Exceptions mean the claimed *rule is not absolute*.

As an example, Cedar Fair identifies New Jersey as being a state which has explicitly adopted the "no-specific-performance of personal services contracts rule." As support, Cedar Fair cites *Endress v. Brookdale Community College*, 144 N.J.Super. 109, 130, 364 A.2d 1080 (1976) and quotes the following sentence therefrom: "It is settled law, of course, as the trial judge here readily acknowledged, that personal service contracts are *generally* not specifically enforceable affirmatively." [Emphasis added.] Cedar Fair's Merit Brief, p. 43. Cedar Fair's classification of New Jersey, based on this quote, is plainly wrong and clearly misleading in light of the decision in *American Association of University Professors, Bloomfield College Chapter v. Bloomfield College*, 129 N.J.Super. 249, 322 A.2d 846 (1974), a case where tenured professors were *reinstated*, after having been terminated for economic reasons. In granting that equitable relief, that New Jersey court stated:

Defendants' resistance to the remedy of specific performance rests upon that line of authority denying such relief in the case of contracts for personal services on the ground that equity will not compel the continuation of an obnoxious personal relationship. See *Sarokhan v. Fair Lawn Memorial Hospital*, 83 N.J.Super. 127, 133, 199 A.2d 52 (App.Div.1964); 11 Williston, Contracts (3 ed. 1968), s 1450; 5A Corbin, Contracts, s 1204 (1964); 42 Am.Jur.2d, Injunctions, ss 101, 102.

But the conditions upon which this reasoning rests do not prevail in the case presented. *The rule is not hard and fast, and, as Williston observes, "appealing factual situations may occasionally induce a court to enforce a personal service contract specifically, particularly in the absence of any personal relationship between the parties."* 11 Williston, Contracts, §1424 at 786-787. This is not a case in which termination was based on any dissatisfaction with the services rendered...

Equity never permits a rigid principle of law to smother the factual realities to which it is sought to be applied. Equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. The court of equity has the power of devising the remedy and shaping it so as to fit the changing circumstances of every case and the complex relationship of all the parties. [Citations omitted.]

Specific performance will be granted if it will do more perfect and complete justice. [Citation omitted.] Whatever may be said as to the innovative aspect of granting the remedy of specific performance within this somewhat novel setting, such considerations are clearly outweighed by our duty to find a remedy. [Citation omitted.] [Emphasis added.]

Bloomfield, 129 N.J.Super. 273-274.

Time and again, as one reads through the states that Cedar Fair says do not allow equity to enforce personal services contracts, one sees that such is but a "general rule," which plainly allows for exceptions. When the numbers are tallied with this understanding, at least 23 out of the 49 states reviewed permit specific performance or *do not* have a hard and fast rule prohibiting equitable remedies in contract cases. Indeed, even Cedar Fair acknowledges that nine states "have not prohibited the specific performance of personal services contracts."

More importantly, Cedar Fair has overreached in its interpretation and reliance on *Masetta*, and its criticism of the Sixth District's treatment of the same. Specifically, Cedar Fair claims the Sixth District misread *Masetta* when that court stated that it was "limited to cases seeking class-wide injunctive relief based upon a collectively bargained contract." (Decision and Judgment, Sixth Appellate District, p. 5, Appellant's Appendix at A-9), Cedar Fair's Merit Brief, pp. 8-9. The Sixth District, as support for this proposition, cited to paragraph one of this Court's syllabus in *Masetta*. This reference has significance which Cedar Fair's counsel either does not understand or has simply chosen to ignore.

Specifically, pursuant to Rule 1 (B)(1) and (2) of the Supreme Court Rules for the Reporting of Opinions: "The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided) and its text, including footnotes, (2) if there is disharmony between the syllabus of an opinion and its text or footnotes, ***the syllabus controls.***" [Emphasis added.] (Supreme Court Rules for the Reporting of Opinions, effective 1983-2012, Appellee's Appendix at A5.) Accordingly, in *Masetta*, the controlling law is in the syllabus because there is disharmony with the general nature of the text of the opinion. As a result, the Sixth District was correct in stating the *Masetta* decision is clearly "inapposite" to the case involving Mr. Falfas.

However, it cannot go without notice this Court in *Masetta* quoted the following language from American Jurisprudence as having "well stated," the "general rule":

It may be stated as a ***general rule*** an employee whose employment is not coupled with an interest in the business ***is not ordinarily*** entitled to injunctive relief to prevent his employer from discharging him *** The remedy at law in such cases is ***generally adequate*** to furnish relief, and besides there is a lack of mutuality of equitable remedy, since the employer would not be entitled to similar relief in case the employee left his employment. [Emphasis added.]

Masetta, 159 Ohio St. 312. Thus, even in *Masetta* the door to equitable relief was not fully shut, as issues such as the employee's interest in the business and/or the adequacy of the remedy at law, might lead to the necessity of equitable relief to make the damaged party whole.

As can be seen from a review of Cedar Fair's brief, the proposition that equity will not decree the specific performance of a contract for personal services, is not a concrete, *per se*, rule, but is subject to well recognized exceptions. Those exceptions are present in this case. In light thereof, it cannot be said that the arbitrators' decision was wrong as a matter of law, nor that they exceeded their authority. As a result, the decision of the Sixth District Court of Appeals must be affirmed.

II. STATEMENT OF THE FACTS

A. Mr. Falfas' Employment Relationship with Cedar Fair.

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' then existing Employment Agreement was originally signed on July 20, 2007, and was automatically renewed for three years, commencing on December 1, 2009. The Employment Agreement further provided for automatic renewals "unless one of the parties provides written notice of intent to terminate..." (2007 Amended and Restated Employment Agreement, Appellant's Supplement at S-1.)

At that time, Mr. Falfas' base salary was \$665,000.00. (Appellee's Supplement ("Supp.") 2, Arbitration Transcript ("Tr.") Vol. I, p. 34; Supp. 63, Respondent Cedar Fair Arbitration Exhibit ("Resp. Ex.") D.) He also was entitled to an additional bonus of approximately \$456,000.00 for total cash compensation for 2010 of approximately \$1,121,000.00. (Supp. 2, Tr. Vol. I, p. 34; Supp. 54, Arbitration Joint Exhibit ("Jt. Ex.") 4.). In addition to base pay and bonuses each year of his contract, Mr. Falfas was also to receive ownership units in Cedar Fair. Specifically, he was to receive 33,327.5 units in March 2011, and

an additional 56,700 units in March of 2012. These units are publicly traded. In 2010, they traded at \$29.00 per unit. As of December 4, 2013, they were trading at approximately \$47.00 per unit.² Finally, under his Employment Agreement, Mr. Falfas received miscellaneous benefits including a phone, and automobile and medical expense reimbursements. (2007 Amended and Restated Employment Agreement, Sections 4, 5, & 6, Appellant's Supplement at S-2, S-3.).

From June 12, 2010 through November 30, 2012, Mr. Falfas was due base pay totaling \$1,703,328.17, to wit: \$371,671.22 in 2010; \$684,950.00 in 2011; and \$646,706.95 for the first eleven months of 2012. (2007 Amended and Restated Employment Agreement, Section 4, Appellant's Supplement at S-2.) Further, Mr. Falfas was entitled to bonuses totaling \$1,410,400.67, to wit: \$456,553.00 in 2010; \$469,875.70 in 2011; and \$483,971.97 in 2012. (Supp. 2-3, Tr. Vol. I, pp. 34-35; Supp. 54, Jt. Ex. 4.)

Additionally, on June 10, 2010, as a result of Mr. Falfas' 39 years of employment, Mr. Falfas had 128,170.398 ownership units of Cedar Fair in 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. (Supp. 4, 5, 6, 7, Tr. Vol. I, pp. 36-39; Supp. 45, 46, 49, Falfas Arbitration Exhibits ("Falfas Ex.") 3, 4 & 5.) These three deferred compensation retirement accounts totaled approximately \$4,058,000.00.

B. June 10, 2010 Conversation Between Mr. Falfas and Mr. Kinzel.

On June 10, 2010, while at the Cleveland Airport awaiting a flight which would take him to one of Cedar Fair's amusement parks in Michigan, Mr. Falfas had a 94 second phone

² At \$29.00 per unit, the 90,027.5 units Mr. Falfas was entitled to had a total value of \$2,610,797.50 as of 2012. As of December 4, 2013, those units were trading at approximately \$47.00 per share for a value of \$4,231,292.50.

conversation with Mr. Richard Kinzel ("Mr. Kinzel") who, at the time, was President and Chief Executive Officer of Cedar Fair. As a result of the conversation, Mr. Kinzel maintained that Mr. Falfas *resigned* his position as Chief Operating Officer of Cedar Fair, and thereby *voluntarily divested himself of almost 10 million dollars of salary, benefits and deferred compensation.* (2007 Amended and Restated Employment Agreement, Section 11, Appellant's Supplement at S-5.) Contrary to Mr. Kinzel's conclusion, Mr. Falfas has steadfastly maintained that he never resigned. Mr. Falfas and Mr. Kinzel were the only witnesses to their telephone conversation.

Immediately following the conversation, Mr. Kinzel informed Peter Crage, Chief Financial Officer of Cedar Fair, and Duff Milkie, Cedar Fair's General Legal Counsel, that Mr. Falfas had resigned. (Supp. 22, 31, 32, Tr. Vol. II, pp. 267, 535, 537.) That evening, Mr. Kinzel called six of the eight directors of Cedar Fair's Board of Directors and informed each that Mr. Falfas had resigned. (Supp. 33, Tr. Vol. II, p. 538.) Included in this group so informed was Michael Kwiatkowski, Cedar Fair's "Lead Director." (Supp. 26, 27, Tr. Vol. II, pp. 420, 432), and David Paradeau (Supp. 30, Tr. Vol. II, p. 462.)

C. Unsigned Letter of Resignation.

On Friday, June 11, 2010, Mr. Kinzel prepared a letter of resignation designed to appear as if it had been prepared by Mr. Falfas. (Supp. 25, 34, Tr. Vol. II, pp. 393, 544; Supp. 55, Jt. Ex. 12; Supp. 66, Resp. Ex. H.) The letter of resignation was never authorized by or presented to Mr. Falfas for his review and execution. (Supp. 13-14, 35, Tr. Vol. I, pp. 87-88, Tr. Vol. II, p. 545.) At no time thereafter, did anyone from Cedar Fair request a letter of resignation from Mr. Falfas. (Supp. 50, Falfas Ex. 8.)

D. Mr. Falfas' Last Day in Office.

On Saturday, June 12, 2010, Mr. Falfas, believing he had been terminated, arrived at his office and removed his personal belongings (Supp. 9-16, Tr. pp. 83-90), as is the protocol following the termination of a Cedar Fair employee. (Supp. 43, Tr. Vol. II, p. 561.) Upon learning that Mr. Falfas had removed his personal belongings from his office, Mr. Kinzel, without further contact with Mr. Falfas, at or around noon, Saturday, June 12, 2010, organized and participated in a telephone conference call with Cedar Fair's Vice-Presidents and General Managers of Cedar Fair's 11 amusement parks located throughout the United States and Canada, informing them that Mr. Falfas had resigned. (Supp. 38-39, Tr. Vol. II, pp. 549-550.)

Later that day, at approximately 3:34 p.m., Cedar Fair issued an e-mail notice to all Cedar Fair employees across the country that Mr. Falfas had resigned. The e-mail was signed by Mr. Kinzel. (Supp. 39, Tr. Vol. II, p. 550; Supp. 64, Resp. Ex. G.) At no time after the conversation or before issuing the notice of Mr. Falfas' alleged resignation, did Messrs. Kinzel, Milkie, Crage or any member of Cedar Fair's Board of Directors perform any independent investigation or request a written resignation to confirm the conclusion of Mr. Falfas' resignation reached by Mr. Kinzel during the conversation. (Supp. 23, 24, 28, 29, 35-37, Tr. Vol. II, pp. 312, 313, 449, 451, 545-547; Supp. 50, Falfas Ex. 8.)

E. Drafting of 8-K by Cedar Fair.

The separation of Mr. Falfas, as Chief Operating Officer of Cedar Fair, required Cedar Fair to file a Form 8-K with the Securities and Exchange Commission pursuant to Section 906 of the Sarbanes-Oxley Act (18 U.S.C. 63, Section 1350). The language of Form 8-K was prepared by Cedar Fair's Chief Financial Officer and General Legal Counsel on Sunday, June 13, 2010. On Sunday, at 4:12 p.m., Mr. Milkie sent an e-mail to Mr. Crage concerning the "Falfas Resignation" which stated:

This looks good. Jack [Falfas] actually resigned on June 12 by turning in his keys, etc. I think we use that date throughout and not get into any earlier notification. *Jack never gave any definitive notice.* I think we should send to Dick [Kinzel] for his approval and we can let him know *we will need Jack's sign off.* [Emphasis added.] (Supp. 56, Jt. Ex. 14.)

This e-mail establishes that the basis of Cedar Fair's official position concerning the conclusion that Mr. Falfas resigned, shifted from June 10, the date of the 94-second conversation to June 12, the date Mr. Falfas removed of his personal belongings. The e-mail further establishes that, as of June 13, 2010, no one at Cedar Fair sought to confirm Mr. Kinzel's assertions that Mr. Falfas had in fact resigned, and that Mr. Falfas had to "sign off" on the form 8-K commencing his resignation.

F. Monday, June 14, 2010, Mr. Falfas Asks to Return to Work.

On Monday, June 14, 2010, at 11:54 a.m., Mr. Falfas received an e-mail from Cedar Fair requesting that he review and approve language to be included in the Form 8-K concerning his departure from Cedar Fair. The proposed language stated that he had resigned his position with Cedar Fair. (Supp. 17, Tr. Vol. I, p. 94; Supp. 56, Jt. Ex. 14.) Immediately thereafter, Mr. Falfas, by and through counsel, at 1:39 p.m., notified Cedar Fair's General Legal Counsel, that it was Mr. Falfas' position that he had not resigned. Not only did Mr. Falfas steadfastly deny he resigned, on Monday, June 14, 2010, *he requested he be permitted to return to work.* Mr. Kinzel, however, at that time, refused to permit Mr. Falfas to return as Chief Operating Officer. (Supp. 20-21, Tr. Vol. I, pp. 199-200.)

G. Filing of Form 8-K.

On June 17, 2010, Cedar Fair filed Form 8-K with the Securities and Exchange Commission stating that Mr. Falfas had resigned as Chief Operating Officer of Cedar Fair. (Supp. 23, Tr. Vol. II, p. 312; Supp. 60, Jt. Ex. 15.) Thereafter, Cedar Fair denied Mr. Falfas any

compensation or benefits to which Mr. Falfas was entitled pursuant to his Employment Agreement with Cedar Fair. Moreover, due to the fact that Mr. Falfas had not yet obtained the age of 62, he was immediately divested of all benefits which accrued to him over his 39 years of service pursuant to Cedar Fair's Pension Plans. A written resignation was never requested nor obtained by Mr. Kinzel, and the Board of Directors of Cedar Fair never performed an independent investigation to determine the validity of Mr. Kinzel's resignation allegation. (Supp. 2-7, 8, 13-14, 18-19, 20-21, 26, Tr. Vol. I, pp. 34-39, 77, 87-88, 184-185, 199-200, Tr. Vol. II, p. 313.)

H. Mr. Falfas' Demand for Arbitration.

On July 23, 2010, in accordance with the express terms of his Employment Agreement, Mr. Falfas requested the issue of his alleged resignation be submitted to final and binding arbitration. In his arbitration demand Mr. Falfas said he would "seek, without limitation, *reinstatement* and damages" [Emphasis added.] Mr. Falfas' demand for reinstatement and back pay and benefits was reiterated at the arbitration hearing by his legal counsel in both opening statement (Supp. 1, Tr. Vol. I, p. 17) and closing statement (Supp. 44, Tr. Vol. II, p. 611), as well as in his pre-hearing and post-hearing briefs.

I. The Arbitration.

Pursuant to a process set forth in Section 19 of the Employment Agreement, three arbitrators were selected by the parties. All were attorneys-at-law with experience in arbitration. For approximately six months prior to the arbitration hearing, the parties conducted discovery by way of the exchange of documents and the sworn depositions of numerous persons.

The arbitration was conducted in Cleveland, Ohio, on January 12-13, 2011. Testimony was taken from 15 witnesses. A complete transcript was made of the proceedings. Pre-hearing briefs were filed. Post hearing briefs containing legal and factual arguments -- with

citations to the transcript of proceedings -- were submitted by the parties. Closing arguments were heard by the arbitration panel on February 8, 2011, and were likewise transcribed.

In his post hearing brief, Mr. Falfas fully set forth his request for back pay, bonus, benefits and perquisites from June 12, 2010, his last day of employment, until "the date of reinstatement." Specifically, Mr. Falfas argued that he was entitled to such damages because "Cedar Fair breached the covenant of good faith and fair dealing implicit in his employment agreement by manipulating his 'resignation' and effectively constructively discharging him by refusing to allow him to return to work." (Supp. 80, Falfas Post-Hearing Brief, p. 14.) Further, Mr. Falfas argued that his reinstatement was supported by the equitable concerns surrounding his termination and was necessary to make him whole. He further argued that the evidence showed his reinstatement was feasible. In the alternative, Mr. Falfas argued that if he was not reinstated he should receive the broadest range of available damages even though such would be insufficient to make him whole. (Supp. 83, 85, 86, Falfas Post-Hearing Brief, pp. 17, 19, 20.)

Cedar Fair never specifically addressed the issue of reinstatement in its Post-Hearing Brief except to allege that the Arbitrators' powers and available remedies were limited by the contract, an argument that has been uniformly overruled by every reviewing body that has exercised jurisdiction over this matter. Further, that issue has not been accepted by this Court for review. What Cedar Fair did acknowledge in its Post-Hearing Brief was the quality of Mr. Falfas' work at Cedar Fair and how he was viewed by his superiors. On page 25 of Cedar Fair's Post-Hearing Brief it admits as follows:

In fact, just 3 days prior to Falfas's resignation, Kinzel met with the Board in executive session to discuss his succession plans and his recommendation that Falfas be promoted to President and eventually succeed Kinzel as CEO. (Tr. 510-15; Resp. Ex. C.)

(Supp. 111, Cedar Fair Post-Hearing Brief, Page 25.)

J. The Arbitrators' Decision.

On February 28, 2011, the arbitrators issued their Findings and Award. By the 2 to 1 vote, the arbitration panel found in favor of Mr. Falfas. Their decision reads 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, Appellant's Appendix at A-22, A-23.)

The Arbitrators' authority for ordering Mr. Falfas' reinstatement and receipt of damages is the express language of Section 19(c) of Mr. Falfas' 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 a federal court in Ohio could grant in conformity with applicable law on the basis of the claims actually made in the arbitration. [Emphasis added.]

(2007 Amended and Restated Employment Agreement, Section 19, Appellant's Supplement at S-11.)

K. Post Arbitration Proceedings.

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

On March 21, 2011, Cedar Fair filed its Complaint and Application to Vacate or Modify/Correct Arbitration Award, in the Erie County Court of Common Pleas. The next day, March 22, 2011, Mr. Falfas filed an Application for Order Confirming Award of Arbitrators. Case No. 2011CV0218. Both cases were thereafter consolidated into Case No. 2011CV0217. The entire record of proceedings before the arbitrators, including a full transcript with exhibits, as well as the pre- and post-hearing briefs of the parties were made part of the record in the Court of Common Pleas.

On February 22, 2012, the trial court issued its ruling vacating that portion of the Arbitration Award ordering Mr. Falfas' reinstatement, but affirming the Arbitration Award as to Mr. Falfas' receipt of back pay, benefits, expenses, costs and attorneys' fees. The trial court Order did not specify the amount of back pay and benefits or for what time period Mr. Falfas was to receive such reimbursement. (February 22, 2012 Judgment Entry, Appellant's Appendix at A-14.)

On March 22, 2012, Mr. Falfas filed his Notice of Appeal to the Sixth District. On March 23, 2012, Cedar Fair filed its Cross-Appeal. (Cedar Fair's Notice of Cross-Appeal is date stamped March 23, 2012. The certified copy of the Docket indicates it was filed on March 26, 2012.)

On April 19, 2013, the Sixth District issued a unanimous Decision and Judgment. (Decision and Judgment, Sixth Appellate District, Appellant's Appendix at A-5.) In its ruling, the Court reversed the Common Pleas Court's modification of the Arbitrators' award reinstating Appellant's employment, and affirmed its order regarding Mr. Falfas' back pay and other benefits, reasonable costs, expenses and attorneys' fees.

III. LAW AND ARGUMENT

- A. **Proposition of Law: An error of law or fact, even an egregious one, is not grounds for vacating an arbitrator's decision under R.C. 2711.10(D), on the basis that the "arbitrators exceeded their powers..." absent a showing of corruption, fraud, undue means or an irregularity of equal magnitude. *Goodyear Tire & Rubber Co. v. Local Union No. 200*, 42 Ohio St. 2d 516 (1975) applied.**

The central issue before this Court, as framed by Cedar Fair, is whether the Arbitrators "exceeded their power" when they chose to reinstate Mr. Falfas. Cedar Fair claims that this act was in derogation of limits contained in its Employment Agreement with Mr. Falfas, and contrary to this Court's holding in *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953). See Cedar Fair's Merit Brief, pp. 2, 15, 26, 31, 37.³ However, even if Cedar Fair's claims are correct -- which they are not -- such does not support a claim of vacature under R.C. 2711.10(D) (Appellee's Appendix at A1) on the grounds that the Arbitrators exceeded their arbitration power.

Cedar Fair's primary argument on this appeal is that the Sixth District misread *Masetta* in affirming the Arbitrator's award of reinstatement, and that such constitutes a "manifest disregard" of the law. According to Cedar Fair, an award constitutes a "manifest

³ Mr. Falfas has challenged Cedar Fair's argument pertaining to this subject as being beyond the scope of the issues accepted for review by this Court. See Appellee's Motion to Strike, filed on December 3, 2013. Without waiving the objections set forth in said Motion, Mr. Falfas has addressed these issues herein.

disregard of the law" if the decision flies in the face of clearly established legal precedent. Put another way, manifest disregard is established if (1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle. *See Cedar Fair's Amended Merits Brief*, filed in the Sixth District at pp. 12-13.⁴

Generally, and as to the remedy of reinstatement, specifically, it is Mr. Falfas' position that the arbitration award and Sixth District's decision affirming the same were correct both procedurally and substantively. Nevertheless, assuming *arguendo* that the Sixth District did misread the *Masetta* decision, such by itself is insufficient grounds for a vacature pursuant to R.C. 2711.10(D).

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:

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.] [Emphasis added.]

⁴ *See Cedar Fair's Memorandum in Support of Jurisdiction*, p. 13, footnote 1. It must be noted that, at the arbitration, while Cedar Fair argued Mr. Falfas was not entitled to be reinstated due to his resignation, at no time did it argue to the Arbitrators that reinstatement was not an available remedy as a matter of law. Nor, despite filing a 29 page Post-Hearing Brief, did Cedar Fair ever cite the *Masetta* decision to the Arbitrators. *See Cedar Fair's Post-Hearing Brief*. (Supp. 87.)

Id. at 520, 522.

In the nearly 40 years since this Court's decision in *Goodyear*, disaffected parties to the arbitration process have sought time and again to seek to overturn the decisions of arbitrators for myriad reasons. However, the above described directive and the following admonition have well stood the test of time:

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 appears which 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.]

Id. at 523.

Similarly, wise counsel can be found in the following observation from *Goodyear*:

Were the arbitrator's decision to be subject to reversal because a reviewing court disagreed with the findings of fact or with an interpretation of the contract, ***arbitration would become only an added proceeding and expense prior to the final judicial determination.*** [Emphasis added.]

Id. at 520.

Since *Goodyear* was decided in 1975, this Court has expressly revisited that decision eight different times. In four of those decisions, this Court reiterated the policy of limited judicial intervention. *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). At no time during any of those decisions did this Court criticize, limit or alter its decision in *Goodyear*.

Ohio's Arbitration statute, to wit: R.C. 2711.01 *et seq.* is based upon and virtually identical to the Federal Arbitration Act ("FAA"), 9 U.S.C. 1 *et seq.* The FAA was adopted in 1925. Ohio's Arbitration statute was adopted in 1935. Indeed, the text of R.C. 2711.10, the statutory section at issue in this case, is likewise almost identical to its FAA counterpart, to-wit: 9 U.S.C. 10. R.C. 2711.10 reads in pertinent part:

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

* * *

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

(Appellee's Appendix at A1.)

9 U.S.C. 10 reads in pertinent part:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order

vacating the award upon the application of any party to the arbitration –

* * *

(4) where 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.

(Appellee's Appendix at A3.)

Before the Court of Common Pleas, Cedar Fair took, *inter alia*, the following legal positions:

- [Mr. Falfas'] employment agreement ("Agreement") ... [is] governed by both the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, and the Ohio Arbitration Act (OAA), 2711, *et seq.*
- The substantive legal authority interpreting the FAA and the OAA are "virtually identical" and do not conflict with one another.
- A court must vacate an arbitration award under the OAA and the FAA when the arbitrator: (1) exceeds his powers; (2) issues an award in manifest disregard of the law, or (3) issues an award in contradiction to public policy.

See 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 in the Erie County Court of Common Pleas on June 24, 2011, at p. 1. The applicability of the FAA in this matter is confirmed by Section 19(e) of the Employment Agreement which reads in pertinent part:

Where possible, consistent with the procedure, any otherwise invalid provision of the procedure will be governed by the Federal Arbitration Act as will any actions to compel, enforce, *vacate* or confirm proceedings, awards, orders of the arbitration panel, or settlements under the procedure. [Emphasis added.]

(Appellant's Supplement at S-12.)

In 1953, the United States Supreme Court decided *Wilko v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). Specifically, the Court held that Section 14 of the Securities Act of 1933 voided any agreement to arbitrate claims of violations of that Act. *See Id.* at 437-438. A holding which was subsequently overruled. Nevertheless, the *Wilko* Court in explaining that arbitration would undercut the Securities Act's buyer protections, remarked (citing FAA Section 10) that the "[p]ower to vacate an [arbitration] award is limited," 346 U.S. at 436, and went on to say that "the interpretations of the law by the arbitrators in contrast to **manifest disregard** [of the law] are not subject, in the federal courts, to judicial review for error in interpretation." [Emphasis added.] *Id.* at 436-437.

In the years following *Wilko* and in reliance on the above quoted language, dissatisfied parties to federal arbitrations argued that in addition to the explicit grounds for the vacature of an arbitration decision under FAA Section 10, a decision of an arbitrator which was in "manifest disregard of the law" was likewise subject to vacature. Carbonneau, *The Law and Practice of Arbitration* (3d Ed. 2009), pp. 259-260. Under this standard, a showing that the arbitrators ignored or refused to apply a known legal principle that was clearly applicable to the facts of a case constituted non-statutory grounds for vacating arbitration awards. *Id.* at 404.

As noted in the Introduction, Cedar Fair did not argue to the Arbitrators that they lacked the authority to grant reinstatement. At no time did Cedar Fair cite the *Masetta* decision. It was not until the Court of Common Pleas undertook its review that Cedar Fair made its first cite of *Masetta* and argued that the Arbitrators' decision to reinstate Mr. Falfas was in manifest disregard of the law. Cedar Fair also made that argument to the Sixth District Court of Appeals. Indeed, Cedar Fair made that argument in its Memorandum in Support of Jurisdiction. Memorandum in Support of Jurisdiction, p. 13, footnote 1, filed in this Court.

In 2008, the United States Supreme Court issued its 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). In that case, the question presented was whether statutory grounds for vacature and modification as provided in Sections 10 and 11 of the FAA are exclusive, or whether they could be supplemented through contractual agreements. Specifically, Hall Street argued that the grounds set forth for vacating or modifying an award under Sections 10 and 11 were not exclusive, taking the position that the utilization of the manifest disregard of a law standard, in place since the *Wilko* decision, provided for such an expansion.

In rejecting Hall Street's argument, the Supreme Court stated that the text of the statute itself forbade any expansion of judicial review beyond the grounds set forth in the statute. In responding to the question of whether the FAA has textual features at odds with enforcing a contract to expand judicial review following arbitration, the Supreme Court stated:

To that particular question we think the answer is yes, that the text compels a reading of the §§ 10 and 11 categories as exclusive. To begin with, even if we assumed §§ 10 and 11 could be supplemented to some extent, *it would stretch basic interpretive principles to expand the stated grounds to the point of evidentiary and legal review generally.* Sections 10 and 11, after all, address egregious departures from the parties' agreed-upon arbitration: "corruption," "fraud," "evident partiality," "misconduct," "misbehavior," "exceed[ing] ... powers," "evident material miscalculation," "evident material mistake," "award[s] upon a matter not submitted;" the only ground with any softer focus is "imperfect[ions]," and a court may correct those only if they go to "[a] matter of form not affecting the merits." *Given this emphasis on extreme arbitral conduct, the old rule of ejusdem generis has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.* Since a general term included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. *"Fraud" and a mistake of law are not cut from the same cloth.* [Emphasis added.]

Hall Street, 552 U.S. 586.

In the capstone to its argument, the *Hall Street* Court stated:

Instead of fighting the text, it makes more sense to see the three provisions, §§ 9-11, **as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway.** Any other reading opens the door to full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," [citation omitted] and bring arbitration theory to grief in post-arbitration process. [Emphasis added.]

Id. at 588.

After the *Hall Street* decision, most courts and commentators concluded it was the deathnell of the manifest disregard of the law standard. Still, and however, others believed such an argument was still viable. See Carbonneau, *The Law and Practice of Arbitration* (3d Ed. 2009), pp. 268, 412 and 439. Indeed, Cedar Fair in its Memorandum in Support of Jurisdiction stated:

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.** [Emphasis added.]

Memorandum in Support of Jurisdiction, p. 8.

In its Memorandum, Cedar Fair further argued that while the Arbitrators had subject matter authority to decide the Falfas arbitration, the Arbitrators' remedies were restricted, first, by the contract, and second, by the law. *Id.* at 9. Interestingly, there is no reference to *Hall Street* in Cedar Fair's Merit Brief. The primary, if not exclusive, reason for such is the United States Supreme Court's decision in *Oxford Health Plans LLC v. Sutter*, 569 U.S. ____, 133 S.Ct. 2064, 186 L.Ed.2d 113 (2013).

In *Oxford*, a pediatrician entered into a contract with Oxford Health Plans, a health insurance company. The pediatrician agreed to provide medical care to members of Oxford's network and pay for those services. Several years later the pediatrician filed suit against Oxford in New Jersey Superior Court. It was brought as a class action. Oxford moved to compel arbitration pursuant to a clause in their contract which read as follows:

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey ...

Id. at 133 S.Ct. 2067.

The state court granted Oxford's motion and referred the matter to arbitration.

The parties agreed that whether the matter should proceed as a class arbitration turned on the language of the contract. The arbitrator ruled that the matter should proceed as a class arbitration based upon the intent of the arbitration clause. Oxford filed a motion in federal court to vacate the arbitrator's decision on the ground that he had "exceeded [his] powers" under Section 10(a)(4) of the FAA. That motion was denied. The Court of Appeals for the Third Circuit affirmed.

In the interim, the United States Supreme Court determined that a party may not be compelled under the FAA to submit to a class arbitration unless there is a contractual basis for concluding the party agreed to do so. *Stolt-Nielsen S.A. v AnimalFeeds International Corp.*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). Oxford immediately asked the arbitrator to reconsider his decision as to class arbitration in light of the same. On reconsideration, the arbitrator determined again that the matter should proceed as a class arbitration. The matter went before the district and appellate courts for a second time. The decision of the arbitrator was upheld. In its ruling, the Court of Appeals first underscored the limited scope of judicial review

that Section 10(a)(4) allows stating: so long as an arbitrator "makes a good faith attempt" to interpret a contract, "*even serious errors of law or fact will not subject his award to vacature.*" [Emphasis added.] *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 220 (3d Cir. 2012).

In reviewing the matter, the United States Supreme Court affirmed the decision of the Court of Appeals stating:

Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." [Citation omitted.] That limited judicial review, we have explained, "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time consuming judicial review process." *Ibid.*

Here, Oxford invokes § 10(a)(4) of the Act, which authorizes a federal court to set aside an arbitral award "where the arbitrator exceeded [his] powers." A party seeking relief under that provision bears a heavy burden. "It is not enough ... to show that the [arbitrator] committed an error – or even a serious error." [Citation omitted.] *Because the parties "bargained for the arbitrator's construction of their agreement," an arbitral decision "even arguably construing or applying the contract" must stand, regardless of a court's view of its (de)merits.* [Citations omitted.] Only if "the arbitrator act[s] outside the scope of his contractually delegated authority" – issuing an award that "simply reflect[s] [his] own notions of [economic] justice" rather than "draw[ing] its essence from the contract" – may a court overturn his determination. [Citation omitted.] *So the sole question for us is whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong.* [Emphasis added.]

Oxford, 133 S.Ct. 2068.

Summarizing its position, the *Oxford* Court, after acknowledging the arbitrator's decision may have been "mistaken," stated:

But still, Oxford does not get to rerun the matter in a court. Under § 10(a)(4), the question for a judge is not whether the arbitrator construed the parties' contract correctly, but whether he

construed it at all. ***Because he did, and therefore did not "exceed his powers," we cannot give Oxford the relief it wants.*** [Emphasis added.]

Id. at 2071.

The decision in *Oxford* was issued seven days *after* Cedar Fair filed its Memorandum in Support of Jurisdiction. In light of the decision in *Oxford* and its reliance on *Hall Street*, it is abundantly clear why Cedar Fair has abandoned its citation to and reliance upon *Hall Street* altogether. Under the authority of this Court's decision in *Goodyear* and the United States Supreme Court's decisions in *Hall Street* and *Oxford*, it is plain that Cedar Fair has not and cannot satisfy the requirements for vacating the decision of the Arbitrators in this case, to-wit: a showing of corruption, fraud, undue means, or an intentional act or activity of equal magnitude.

The contractual restrictions upon which Cedar Fair rests its argument that the Arbitrators exceeded their authority are found in Section 19(c) and Section 7 of Mr. Falfas' Employment Agreement. The pertinent portion of Section 19(c) reads 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.

(Appellant's Supplement at S-11.)

Section 7(a) of the Employment Agreement is extensive and will not be quoted in full here. (See Appellant's Supplement at S-3.) However, Mr. Falfas acknowledges that it does provide for the type and amount of compensation to be paid to him ***had Cedar Fair terminated his employment pursuant to the terms of the Employment Agreement, which it did not do.*** The Arbitrators in fact undertook to interpret Mr. Falfas' Employment Agreement which included not only Section 19(c) but also Section 7(a) and in the absence of any evidence showing corruption, fraud, undue

means, or an irregularity rising to that level, "the question for [this Court] is not whether the arbitrator[s] construed the parties' contract correctly, but whether [they] construed it at all. Because [they] did, and therefore did not "exceed [their] powers," Cedar Fair is not entitled to the relief it requests. *See Oxford*, 133 S.Ct. 2071.

Indeed, the record in this case unequivocally shows that the arbitrators listen to two days of testimony from 15 witnesses, were provided with pre and post arbitration briefs raising and addressing all factual and legal issues the parties deemed relevant to this matter, listened to closing arguments and then issued a written award encompassing their decision. Plainly, the arbitrators fulfilled their duties as arbitrators, and contrary to the claims of Cedar Fair, their decision was both substantively and procedurally correct. Accordingly, the decision of the Sixth District Court of Appeals should be affirmed.

B. Proposition of Law: In a proper case Ohio law allows the reinstatement of an employee who has been wrongfully terminated if a court determines, in its sound discretion, that:

- (1) An adequate remedy at law does not exist;**
- (2) The decree of specific performance will be manageable; and**
- (3) The employer and employee appear to be prepared to continue the employment in good faith.**

Contemporary case law and commentators recognize that an appealing factual situation may occasionally induce a court to use its equitable powers to specifically enforce a contract of employment where the court in its discretion finds:

- (1) There is no adequate remedy at law,
- (2) The decree of specific performance is manageable, and
- (3) The employer and employee are prepared to continue the employment relationship in good faith.

See, American Association of University Professors, Bloomfield College Chapter v. Bloomfield College, 129 N.J. Super. 249, 332 A.2d 846 (1974); *see also* 25 Williston, *Williston on Contracts* (4th Ed. 2002), Section 67:103, p. 576; *Collado v. City of Albuquerque*, 132 N.M. 133, 2002-NMCA-048, 45 P.3d 73 (2002); 82 Am. Jur. 2d Wrongful Discharge § 220.

In *Bloomfield*, tenured professors were reinstated after being terminated for economic reasons. That court in addressing the resistance of courts and commentators to support the remedy of specific performance of personal service contracts, stated:

Defendants' resistance to the remedy of specific performance rests upon that line of authority denying such relief in the case of contracts for personal services on the ground that equity will not compel the continuation of an obnoxious personal relationship. [Citations omitted.]

But the conditions upon which this reasoning rests do not prevail in the case presented. *The rule is not hard and fast, and as*

Williston observes, "appealing factual situations may occasionally induce a court to enforce a personal service contract specifically, particularly in the absence of any personal relationship between the parties." 11 Williston, Contracts, s 1424 at 786-787. [Emphasis added.]

Bloomfield, 129 N.J. Super. 273.

A similar shift in position can be noted in the Restatement of the Law 2d, Contracts, which was published in 1981. Specifically, in its Introductory Note, Section 357, the Restatement 2d recognizes that "there has been an increasing disposition to find that damages are not adequate and the Courts have been increasingly willing to order performance in a wide variety of cases ... The Restatement 2d further recognizes that "policies against compelling an employer to retain an employee have not, however, prevented courts from ordering reinstatement of employees discharged in contravention of statutes prohibiting discrimination or in violation of collective bargaining agreements." Comment b to Section 367. Indeed Comment c to Section 367 reads in pertinent part as follows:

[I]f the probable result of an injunction will be the employee's performance of the contract, it should appear that the employer is prepared to continue the employment in good faith so that performance will not involve personal relations the enforced continuance of which is undesirable. *These issues are for the exercise of judicial discretion based on such factors as the character and duration of the service, the probability of renewal of good relations, the extent to which other remedies are adequate, and the probable hardship that will result from the injunction.* [Emphasis added.]

Id.

As noted in *Bloomfield*:

Equity never permits a rigid principle of law to smother the factual realities to which it is sought to be applied. Equitable remedies are distinguished for their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. [Emphasis added.]

Specific performance will be granted if it will do more perfect and complete justice. [Emphasis added.]

Id. at 274.

The primary reasons for refusing to specifically enforce an employment agreement have been delineated as follows:

- (1) There is an adequate remedy at law;
- (2) The difficulties of carrying out a decree of specific performance under the circumstances of the case; or
- (3) The resistance to the idea of compelling the continuance of a close personal relationship which has grown bitter and hostile as a result of the controversy and resulting litigation.

Accordingly, in situations where these elements are present, such promises are "generally" not enforced by an affirmative decree. 25 Williston, *Williston on Contracts* (4th Ed. 2002), 67:102, pp. 567-569. However, logic and sound legal policy dictate, and this Court should so find, that where the opposite is true -- there is no adequate remedy at law, the decree of specific performance will be manageable and it appears the parties' employment relationship can continue in good faith -- then a court in its sound discretion should have available the equitable remedy of specific performance.

There is no controlling law in Ohio on this issue. However, as argued by Mr. Falfas before the Arbitrators, there is authority for the proposition that the reinstatement of an employee has been recognized as a remedy where his employment has been terminated, citing *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 543 N.E.2d 1277 (1989).

In *Worrell*, the plaintiff sued his employer for, *inter alia*, breach of an employment contract and breach of a contract for the purchase of stock. Under the contracts, the plaintiff was promised a position in the company as well as 10 percent of the stock of the

business. The plaintiff went to work for Multipress but was never provided his stock. Subsequently, a dispute arose between plaintiff and a majority stockholder. Plaintiff was fired.

Plaintiff sued and obtained a verdict of \$500,000 on his claim for breach of employment contract, without any designation as to what portion of the award was considered back pay versus front pay. In addressing this issue, this Court stated:

First, front pay is an equitable remedy designed to financially compensate employees *where "reinstatement" of the employee would be impractical or inadequate*. In such circumstances an award of front pay enables the court to make the injured party whole, although reinstatement is the preferred remedy. [Citations omitted.] [Emphasis added.]

Worrell, 45 Ohio St.3d 241, 246.

The utilization of reinstatement as a remedy in a breach of contract action has been addressed in other Ohio cases. In *Ohio Dominican College v. Krone*, 54 Ohio App.3d 29, 560 N.E.2d 1340 (10th Dist. 1990) ("Krone I"), when faced with the alleged wrongful termination of a tenured college professor, that court found the wrongly terminated professor was "entitled to reinstatement in order to meet her thirty-six-month teaching obligation ..." *Id.* at 34.

In response, Cedar Fair cites a subsequent appellate case between the same parties, to-wit: *Ohio Dominican College v. Krone*, 10th Dist. No. 90AP-1164, 1992 WL 10298 (Jan. 23, 1992) ("Krone II") for the proposition that upon remand after Krone I, the trial court "treated reinstatement as only one option, not a necessary or preferred remedy." Cedar Fair's Merit Brief, p. 35. This statement is misleading to say the least. In Krone II, the appellate court states with respect to its above quoted remand instruction from Krone I, as follows:

O.D.C. assumes that this was a direction to it to make a new offer of employment to Krone and that, if Krone refused such employment, damages were to be assessed against her. A reading of the prior opinion and order indicates that O.D.C. has misinterpreted it.

There was nothing in the remand order requiring O.D.C. to make a new offer of employment to Krone. Rather, there was a direction to the trial court to order Krone's reinstatement under proper terms and conditions, the express language being "further proceedings to institute appellant's reinstatement." The alternative "to determine the amount of damages" was with respect to Krone's damages against O.D.C., not damages in favor of O.D.C.

Krone, 1992 WL 10298 at *5.

Plainly, reinstatement was the approved, if not preferred remedy in *Krone I* and *Krone II*. Cedar Fair further states: the court in *Krone I* "said nothing about the rule set out in *Masetta*. It did not distinguish that case – or any other, for that matter," (Cedar Fair's Merit Brief, p. 35) suggesting that somehow two separate judicial panels of the 10th Appellate District and all the participating lawyers misread, what Cedar Fair contends to be the single most important Ohio Supreme Court case on this subject. Perhaps it is not the judicial panels which fail to understand the limited nature of the *Masetta* opinion. *Krone*, 1992 WL 10298 at *5.

To be sure, there are cases in Ohio where a court would not specifically enforce a personal services contract, and Cedar Fair has cited these cases to this Court. None of them, however, constitute controlling law.

In the instant case, when the arbitration panel undertook consideration of this matter, it was confronted with Mr. Falfas' request for the specific performance of his employment contract. Briefly described, the evidence showed that due to the various forms of his deferred, collateral and executive compensation, as well as his potential for advancement in the company, traditional monetary damages would not adequately compensate him for his loss. The evidence also showed that Mr. Falfas' reinstatement was feasible. In this regard, the evidence established that his separation from Cedar Fair appeared to be the result of a misunderstanding arising out of a 94-second telephone conversation. In that conversation, Cedar Fair's CEO thought Mr. Falfas had resigned, while Mr. Falfas thought he had been terminated.

Further, the evidence established that Mr. Falfas was a highly respected member of the management team of Cedar Fair, so much so that the Chief Executive Officer of the company had, just three days earlier, submitted Mr. Falfas' name for consideration as the next President and ultimately Chief Executive Officer. Importantly, the evidence established that Mr. Falfas' position had not been filled in the seven months preceding the arbitration and there were no plans to take such action in the near future. (Supp. 40-42, Tr. Vol. II, pp. 554-556.) Notably, Cedar Fair presented no evidence that Mr. Falfas' reinstatement would be a problem nor did it make such an argument to the Arbitrators. Indeed, Cedar Fair did not address that issue whatsoever, but instead argued Mr. Falfas had, in fact, resigned.

The arbitration award establishes the panel plainly considered whether Mr. Falfas had resigned when they found "the facts fail to establish resignation." (Findings and Award, Appellant's Appendix at A-22.) The award also shows the Arbitrators considered the issue of reinstatement and concluded reinstatement was an appropriate equitable remedy. That decision is beyond the scope of review of any court, absent evidence of corruption, fraud or an irregularity of equal magnitude. *See Goodyear, Hall Street, Oxford.*

Cedar Fair's Merit Brief implicitly, if not expressly, acknowledges that there is no controlling authority in Ohio which definitively and without exception holds that an Ohio court cannot, under any circumstances, specifically enforce on behalf of an employee, a contract of employment against his employer. Nevertheless, Cedar Fair states at page 8 of its Merit Brief: "Ohio law is clear: Ohio courts may not award specific performance of personal services contracts." As previously noted, the primary source for this contention is this Court's decision in *Masetta*.

In *Masetta*, this Court *reversed* the Eighth District Court of Appeals. Specifically, in *Masetta v. National Bronze & Aluminum Foundry Co.*, 107 N.E.2d 243 (8th Dist.

1952), that court, when confronted with the issue as to whether a class action could be brought to specifically enforce a collective bargain agreement, stated:

The only case we have found directly in point in Ohio on the right to seek remedy in equity for specific enforcement of a labor contract by class action is the nisi prius case previously referred to and cited in 18 A.L.R.2d 354. The case is *Leveranz v. Cleveland Home Brewing Co.*, 1922, 24 Ohio N.P., N.S., 193. Although that case was decided prior to enactment of the National Labor Relations Act and Labor Management Relations Act, *we have pointed out that in our opinion Congress by these measures showed no intent to take away previously existing rights to maintain in state courts either individual or class actions to enforce labor agreements.* [Emphasis added.]

Masetta, 107 N.E.2d 248-249.

The Eighth District then went on to quote from *Leveranz* as follows:

If a court of equity cannot enjoin an attempted breach of such a contract, then the system of collective bargaining may as well be abandoned, and such advantages as come to both the employer and employee by reason of such system, *will be lost, as the legal remedy is wholly inadequate.* The expense of obtaining it would render it valueless. [Emphasis added.]

Id. at 249.

Indeed, in the treatise, 12 Corbin, *Corbin on Contracts* (Interim Ed. 1964), the Eighth District's decision is referenced as being in accord with the law as it pertains to the specific enforcement of collective bargaining agreements. In fact, that treatise specifically questions the rationale of the Ohio Supreme Court's decision which reversed the lower court's granting of specific performance. See 12 Corbin, *Corbin on Contracts*, Volume 12, Section 1204, pp. 445-446, footnote 24.

Notwithstanding this and other infirmities in the *Masetta* decision discussed previously, Cedar Fair nevertheless continues to rely upon *Masetta*. In fact, it trots out as support for the *Masetta* decision the three Ohio Supreme Court cases cited and relied upon by

this Court in that opinion. A review of each of these cases clearly shows the inapposite nature of the underlying facts and/or law of each of them to the instant matter between Cedar Fair and Mr. Falfas.

The first case is *The Port Clinton Railroad Co. v. The Cleveland & Toledo Railroad Co.*, 13 Ohio St. 544 (1862). The Court described that case as follows:

The object of the petition filed by the Port Clinton Railroad Company is to obtain a specific performance of the covenant, on the part of the Cleveland and Toledo Railroad Company, as to the [rail] road finished under the lease, to **"operate and manage the same in such a manner as will not forfeit or endanger the franchises and corporate rights" of the Port Clinton Company.** [Emphasis added.]

Id. at 547.

Plainly, the issue in that case did not involve the specific performance of a personal service contract. The Court in that case did, however, in a general survey of the common law of other states and England, with respect to the scope of equitable powers of courts to specifically enforce contracts, discuss the reluctance of those courts to specifically enforce personal service contracts. However, as noted, this was not part of the holding in this case and was based upon a limited review of case law from outside of Ohio.

Next in line is *The New York Central Rd. Co. v. City of Bucyrus*, 126 Ohio St. 558, 186 N.E. 450 (1933). In this case, the City of Bucyrus sought and received a court order which was described as follows:

The order of the Court of Appeals in the instant case compelled performance of the contract; and it decreed that, "until further order of the court," ***the railroad company should "fully man" and operate at Bucyrus its shops, machinery and other equipment as its sole construction and principal repair shops.*** [Emphasis added.]

Id. at 567.

Once again, one is hard pressed to see the relevancy of this case to that between Cedar Fair and Mr. Falfas. However, this Court, after surveying case law from around the country, refused to enforce the ruling of the Court of Appeals, stating:

Except in cases of great emergency or when used as a temporary measure during litigation or for the preservation of property, a court of equity *is not justified in retaining future control of a railroad and its facilities and in supervising its operations.*
[Emphasis added.]

Id. at 559.

Based on the foregoing, it can safely be stated that this case has no precedential value with respect to the issues before this Court.

The next case referenced by Cedar Fair is *Hoffman Candy & Ice Cream Co. v. Department of Liquor Control*, 154 Ohio St. 357, 96 N.E.2d 203 (1950). In that case, *Hoffman* sued the Department of Liquor Control for breach of contract and specific performance when the department refused to furnish liquor to Hoffman for sale after entering into a contract to provide such liquor and after Hoffman expended funds to remodel its facility to sell liquor. Both the trial court and court of appeals sustained Hoffman's entitlement to specific performance under the contract. This Court, based upon its decisions in *Port Clinton Railroad Co.* and *New York Central Rd. Co.*, *supra*, reversed those judgments.

In reaching its decision in *Hoffman*, this Court noted that the plaintiff had not referred the Court to any authority which would authorize specific performance in such a case. *Id.* at 362-363. The Court then went on to state that it would be inexpedient from the standpoint of public policy, to attempt to enforce such a contract specifically. Here the Court noted that to be of value to either party, their relationship must be one accompanied by mutual confidence, loyalty and satisfaction. It concluded that these were gone and their places had been taken by dislike and distrust. *Id.* at 363. It further noted that it would be inconvenient or even impossible

for the court to conduct and supervise the operations incident to the request for specific performance. Finally, the Court noted that while Hoffman had no adequate remedy at law -- which is a necessary element in considering to grant specific performance -- the reason for the same was a statute enacted by the General Assembly granting immunity to the department.

Noteworthy is the fact that three Justices dissented from the majority opinion.

Each concurred in one dissenting opinion, which reads in pertinent part as follows:

No cases are cited in the majority opinion based upon facts such as are involved here. At common law a principal may discharge his agent even though there is a contract that such agency should continue for a definite period of time. In cases where resulting damages might have been collected by an action at law specific performance is denied, ***but in situations such as presented in this case equitable relief should be awarded.***

This is not a question of mere personal service. The plaintiff, at considerable expense, remodeled its store and devoted a portion of its space and the services of its employees to the performance of the duties prescribed by the terms of the contract entered into with the Department of Liquor Control. ***The carrying out of the decree of specific performance in this case does not represent any of the difficulties which led courts in the cases cited in the majority opinion to refuse relief.*** A complete answer to that contention is found in the record in this case. It is disclosed that for a period of more than a year this agency has operated under decrees of the Court of Common Pleas and of the Court of Appeals and there is nothing to show that the operation could not continue in the same manner as heretofore. [Emphasis added.]

Id. at 367.

This dissenting opinion effectively foreshadows where courts have gone with specific performance of employment contracts thereafter.

As stated above, the remaining Ohio cases cited by Cedar Fair in support of the proposition that equity will not specifically enforce a personal services contract, are from the appellate level. Plainly, those cases do not constitute a controlling statement of the law of Ohio. Indeed, the cases themselves are inconsistent. At least two acknowledge reinstatement as an

available remedy. Further, despite an *ad hominen* attack on this Court's decision in *Worrell*, Cedar Fair cannot refute the fact that *Worrell* recognizes that reinstatement is an available remedy in a breach of employment contract case. Indeed, the only substantive attack by Cedar Fair on *Worrell* is to cite back to *Masetta*. However, as shown, *Masetta* is inapposite to the case between Mr. Falfas and Cedar Fair. Similarly, Cedar Fair is left with little to say in response to the fact that the Tenth District Court of Appeals recognized the availability of reinstatement in the termination of employment context, to wit: Krone I and Krone II. Specifically, Cedar Fair states with respect to the same that "it treated reinstatement as only one option, not a necessary or preferred remedy." Cedar Fair Merit Brief, p. 35. That may be so, but the plain fact is, it recognized reinstatement as *a remedy*.

IV. CONCLUSION

For the reasons stated hereinabove, Mr. Falfas respectfully requests that the Court affirm the Sixth District's Decision. In furtherance thereof, this Court should -- for the sake of judicial economy -- issue a mandate to the trial court to: (1) order Cedar Fair to immediately reinstate Mr. Falfas to the position he held prior to his wrongful termination; (2) order Cedar Fair to immediately pay back pay and other benefits Mr. Falfas enjoyed under the Employment Agreement, as if the employment relationship had not been severed and, if necessary, conduct an expedited hearing, the sole and exclusive purpose of which is to determine the amount and/or type of back pay and other benefits to which Mr. Falfas is entitled; and (3) conduct an expedited hearing, the sole and exclusive purpose of which is to determine the amount Cedar Fair is to

reimburse Mr. Falfas for reasonable costs, expenses and attorneys' fees incurred in this matter, up to and including the hearings conducted pursuant to this order.

Respectfully submitted,



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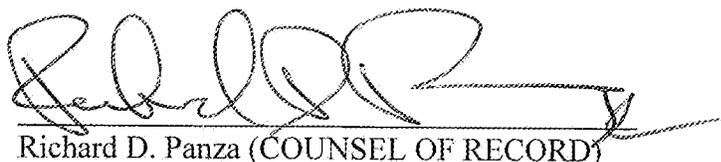
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This is to certify that a copy of the foregoing Merit Brief of Appellee Jacob Falfas has been sent by ordinary United States mail, postage prepaid, on this 18th day of December, 2013, to:

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APPENDIX

2711.10 Court may vacate award.

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

- (A) The award was procured by corruption, fraud, or undue means.
- (B) There was evident partiality or corruption on the part of the arbitrators, or any of them.
- (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may direct a rehearing by the arbitrators.

Effective Date: 03-18-1969

2711.11 Court may modify award.

In any of the following cases, the court of common pleas in the county wherein an award was made in an arbitration proceeding shall make an order modifying or correcting the award upon the application of any party to the arbitration if:

- (A) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;
- (B) The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;
- (C) The award is imperfect in matter of form not affecting the merits of the controversy.

The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Effective Date: 10-01-1953

§10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration-

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where 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.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101-552, §5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102-354, §5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107-169, §1, May 7, 2002, 116 Stat. 132.)

9 USC 11:

§11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration-

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch. 392, 61 Stat. 673.)

SUPREME COURT RULES FOR THE REPORTING OF OPINIONS

RULE 1. Opinions and Syllabus of the Supreme Court; Syllabus of Opinions by Courts Other Than the Supreme Court; Numbering or Lettering of Paragraphs of Text and of Footnotes.

(A) All opinions of the Supreme Court shall be reported in the advance sheets and bound volumes of the Ohio Official Reports and posted to the Supreme Court website.

(B)(1) The law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes.

(2) If there is disharmony between the syllabus of an opinion and its text or footnotes, the syllabus controls.

(3) A Supreme Court opinion may be signed by a justice, with or without a syllabus, or be *per curiam*, with or without a syllabus. "*Per curiam*" means "by a majority of the Court."

(C) A syllabus of an opinion, or a summary under Rules 6(C) and 10(C) of these rules by a court other than the Supreme Court, is not the controlling statement of the points of law decided, but is merely a research and indexing aid.

(D) All opinions of the Supreme Court shall have paragraphs of text and footnotes consecutively numbered or lettered to assist in the "pinpoint" citation of specific portions of the opinion in electronic format. Numbering and lettering shall exclude paragraphs of the syllabus and editorial content from legal publishers. In all respects, the format of opinions shall conform to the conventions adopted by the Supreme Court Reporter.