

In the
Supreme Court of Ohio

CEDAR FAIR, L.P.,	:	Case No. 13-0890
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Erie County
v.	:	Court of Appeals,
	:	Sixth Appellate District
JACOB FALFAS,	:	
	:	Court of Appeals Case
Defendant-Appellee.	:	No. E-12-015
	:	

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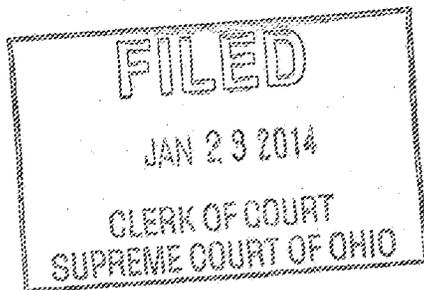


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INTRODUCTION

In its opening brief, Cedar Fair showed that Ohio law has long forbidden the use of specific performance as a remedy for breach of a personal services contract. This Court definitively stated that rule in *Masetta v. National Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 112 N.E.2d 15 (1953), but this state's courts have repeatedly affirmed the principle both before and since. In this respect, Ohio is in line with the vast majority of jurisdictions; forty other states agree with this rule, as do the District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands. Moreover, as Cedar Fair discussed in detail in its brief, this rule is based on sound policy concerns, concerns that apply with full force here. The court below reached a contrary result—calling specific performance not only an available remedy, but the “preferred remedy”—based on a misreading of *Masetta*. It erred in doing so.

Jacob Falfas's response does little to challenge these premises. Falfas makes only a token effort to argue that Ohio law actually allows specific performance of personal services contracts, citing as support (1) two appellate decisions that fail to even cite *Masetta*, and (2) *dicta* from a decision of this Court discussing remedies under federal anti-discrimination laws. He quibbles with Cedar Fair's accounting of other jurisdictions, but acknowledges that the vast majority of those jurisdictions forbid specific performance of personal services contracts, at least as a “general rule.” And he makes no attempt whatsoever to dispute the sound policies underlying that rule or to show that they do not in fact apply equally to this case.

Rather, Falfas dedicates the bulk of his response to three increasingly desperate fallback positions. First, he points out that there are exceptions to *Masetta*'s rule. As he puts it, “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.” (Resp. Br. at 36). Cedar Fair’s opening brief acknowledged these exceptions—cases brought under anti-discrimination statutes, civil-service suits, and workers’ compensation retaliation claims. But Falfas raises no argument that he actually falls within any of these exceptions, nor did the arbitration panel or either lower court find that he did, nor is there any plausible claim that he does. This position therefore fails.

Falfas next argues that this Court should adopt a three-part test to determine when specific performance of personal services contracts would be appropriate. (Resp. Br. at 31). But Falfas cites no decision either adopting or applying this test, and the secondary authorities he cites do not actually support his proposal. Further, Falfas’s newly-minted three-part test would greatly complicate the law and the courts’ administration of it, while simultaneously discouraging settlement and making employers’ hiring and firing decisions significantly less predictable. In any case, as Cedar Fair’s opening brief makes clear, Falfas would fail his own test. His proposal thus does nothing to advance his arguments here.

Finally, having previously asserted that it was inappropriate for Cedar Fair to even discuss the appropriate remedy in this case if the Court agrees that specific performance is not available, Falfas spends the majority of his brief addressing that very topic. In particular, he argues that the arbitrators’ award must stand, *regardless of whether reinstatement falls within a court’s power in Ohio*, because only “corruption, fraud, undue means or an irregularity of equal magnitude” justify vacating an arbitral award. (*Id.* at 19). If accepted, Falfas’s argument would rewrite Ohio’s arbitration statute, which requires courts to overturn arbitral decisions where “[t]he arbitrators exceeded their powers,” R.C. 2711.10(D), a provision whose “essential function” is to “ensure that the parties get what they bargained for by keeping the arbitrator within the bounds of the authority they gave him.” *Internatl. Assn. of Firefighters, Local 136 v.*

Dayton, 2d Dist. Montgomery No. 25423, 2013-Ohio-2759, ¶ 23 (quotation omitted). Consistent with this, in Federal Arbitration Act (“FAA”) cases, while the U.S. Supreme Court has deferred to an arbitrator’s interpretation of the authority granted to him under a contract, it also held that this deference applies only to *actual interpretations* of the contract, not where the arbitrators merely force their own policy choices on the parties. Here, the arbitrators simply ordered Cedar Fair to reinstate Falfas; they made no attempt to find authority for this order in the parties’ contract, nor could they have found such authority if they had looked. Because the arbitrators exceeded their authority under the contract, the only appropriate result is to vacate their award and to order the relief that the contract actually provides.

ARGUMENT

A. Ohio Law Remains Clear: As This Court Held in *Masetta*, Specific Performance Is Not Available as a Remedy in Cases Involving Personal Services Contracts.

Masetta’s holding is clear. In paragraph two of its syllabus, this Court stated: “A court of equity will not, by means of mandatory injunction, decree specific performance of a labor contract existing between an employer and its employees so as to require the employer to continue any such employee in its service or to rehire such employee i[f] discharged.” *Masetta v. Natl. Bronze & Aluminum Foundry Co.*, 159 Ohio St. 306, 306, 112 N.E.2d 15 (1953), paragraph two of the syllabus. This statement is not limited to collective bargaining cases or to class-action suits. It does not say that the courts “generally” refuse specific performance or that they will grant such a remedy only when the facts satisfy a multi-part test. It simply lays out a bright-line rule, based on sound policy and intended to set clear expectations for potential employers and employees.

Falfas admits that “[t]he law stated in a Supreme Court opinion is contained within its syllabus,” but he ignores paragraph two’s clear statement in favor of paragraph one, which

addresses specific performance of employment contracts in collective bargaining, class-action cases. (Resp. Br. at 9 (citing Supreme Court Rules for the Reporting of Opinions, Appellee's App'x at A5)). In so doing, Falfas suggests that paragraph one abrogates the rest of *Masetta's* syllabus. But that is not the case. "A syllabus is the law of the case establishing principle and doctrine, binding alike on citizens and courts, both inferior and of equal rank." *Merrick v. Ditzler*, 91 Ohio St. 256, 264, 110 N.E. 493 (1915). A litigant does not get to pick and choose which parts of the syllabus are binding and which are not.

It is true that *Masetta* was a class-action suit involving a collective bargaining agreement. But for Falfas to argue that *Masetta's* ruling actually *allows* specific performance of personal services contracts outside the collective-bargaining context is to entirely misunderstand the Court's reasoning and the import of its decision. Factual differences matter only when they affect the reasoning underlying that decision. There is no relevant distinction where "the reason that would impel the establishment of the rule of proof [is] the same in the one instance as the other." *Merrick*, 91 Ohio St. at 264.

Here, no such distinction exists. In fact, the *Masetta* Court expressly found that the collective bargaining agreement at issue there was analytically identical to an "ordinary employment contract":

The [collective bargaining] contract has no unusual features which distinguished it from an ordinary employment contract and this is true even though it may have been negotiated by the union on behalf of a group of employees.

Masetta, 159 Ohio St. at 311, 112 N.E.2d 15. Thus, the Court looked to this state's "long settled law" regarding personal services contracts. *Id.* (citing *Port Clinton RR. Co. v. Cleveland & Toledo RR. Co.*, 13 Ohio St. 544 (1862); *New York Cent. RR. Co. v. City of Bucyrus*, 126 Ohio St. 558, 186 N.E. 450 (1933); *Hoffman Candy & Ice Cream Co. v. Dept. of Liquor Control*, 154

Ohio St. 357, 96 N.E.2d 203 (1950)). Finding that, under this long-settled law, “equity will not decree the specific performance of contracts for personal services,” the Court found that equity likewise would “not decree specific performance of the provisions of a collective bargaining agreement as to seniority rights.” *See id.* at 312-313 (quoting 31 American Jurisprudence 879, Section 117; punctuation omitted).

Thus, while *Masetta* involved a collective-bargaining agreement, its holding was not limited to such cases. Rather, *Masetta* reiterated Ohio’s standard rule for “ordinary employment contracts” and extended it to collective bargaining agreements. As commentators have noted, some courts have suggested that collective bargaining agreements should constitute an *exception* to the general rule forbidding specific performance. *See, e.g.*, Restatement of the Law 2d, Contracts, Section 367, Comment b. *Masetta rejected* that argument, finding that the same long-standing rule that applied to ordinary employment contract also applied to the collective-bargaining context. Thus, far from *limiting* the rule to such contexts, *Masetta* merely throws collective-bargaining agreements in with the general mix—“ordinary employment contracts.”

Perhaps because he has no good response on this front, Falfas does not spend much time discussing *Masetta* itself. Indeed, he admits that the rule set out in that case is “generally” followed, (Resp. Br. at 33), which belies his argument that the case’s holding was narrow and fact-bound. Instead, Falfas argues that the Court’s holding precluding specific performance was not sufficiently definitive and iron-clad. According to Falfas, “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.” (Resp. Br. at 36). Cedar Fair does not dispute that statement. Ohio’s Revised Code specifically authorizes reinstatement in certain specific situations, such as cases involving

discrimination, civil-service employment, or workers' compensation retaliation claims. *See, e.g.*, R.C. 4112.14(B) (age discrimination); R.C. 4112.05(G)(1) (other forms of discrimination); R.C. 124.327 (civil service); R.C. 4123.90 (workers' compensation). But so what? Statutory exceptions do not show that the rule itself does not exist. And exceptions to a rule are relevant *only if a party arguably fits within one of them*. As Cedar Fair showed in its opening brief, no such exception applies here. Falfas does not claim otherwise, nor did the arbitrators. Thus, Falfas cannot rely on these "exceptions" to justify specific performance here. Rather, the long-settled rule controls: "[A] court of equity will not decree specific performance of a contract for personal services." *Masetta*, 159 Ohio St. at 311, 112 N.E.2d 15.

Nor can Falfas dismiss *Masetta* by pointing to lower-court decisions that ignore that case. For example, he assigns determinative value to the Tenth District's decision in *Ohio Dominican College v. Krone*, which found that a college professor was entitled to reinstatement. 54 Ohio App.3d 29, 34, 560 N.E.2d 1340 (10th Dist.1990). But *Krone* did not distinguish *Masetta*. Nor did it decide that *Masetta* was no longer the law of Ohio. Rather, *Krone* did not mention the case at all, either in the original panel opinion or in the unpublished follow-up decision. *See id.*; *Ohio Dominican College v. Krone*, 10th Dist. Franklin No. 90AP-1164, 1992 WL 10298, at *7 (Jan. 23, 1992). As Falfas notes in his response brief, "appellate level" decisions "do not constitute a controlling statement of the law of Ohio." (Resp. Br. at 40). An appellate court cannot overrule *Masetta*, even by discussing it in great detail. It certainly cannot do so through mere silence.

Finally, Falfas claims support from *Worrell v. Multipress, Inc.*, 45 Ohio St.3d 241, 533 N.E.2d 1277 (1989). As Cedar Fair's opening brief discussed in detail, that case's statement that "reinstatement is the preferred remedy" related only to age-discrimination claims, not to standard

breach-of-contract cases. (*See* Br. at 28-30). Here, Falfas focuses on a slightly different statement: the Court’s declaration that “front pay is an equitable remedy designed to financially compensate employees where ‘reinstatement’ of the employee would be impractical or inadequate.” *See id.* at 246. Presumably, Falfas means to argue that because *Worrell* allowed a limited form of front pay, it implicitly found that reinstatement was also allowed. But again, this statement was made during a discussion of age-discrimination law—where statutes expressly make reinstatement available—and so is not relevant here. *See id.* Even if it were, however, the Court’s ruling allowing limited front pay would show only that it found reinstatement to be an “impractical or inadequate” remedy in that case—hardly a ringing endorsement of Falfas’s request for the same relief here.

B. Falfas’s Proposed Three-Part Test Is Based Neither in Law Nor in Sound Policy.

Ultimately, Falfas cites the above cases not for the proposition that *Masetta* supports his case, but for a more limited claim. As his second proposition of law, Falfas argues that:

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.

(Resp. Br. at 31). That argument, however, fails for two reasons.

First, as a description of Ohio’s law, the proposition is simply wrong. Falfas’s test is not based on any decision by this Court, or any other Ohio court. Indeed, this test flatly contradicts this Court’s statement of law in *Masetta*. Nothing in this state’s jurisprudence suggests that

specific performance of personal services contracts should be analyzed under a multi-part test, let alone Falfas's preferred three-factor version.

Perhaps Falfas is asking this Court to *overrule Masetta* and adopt this test in its place. "Contemporary" authorities, Falfas argues, reflect a "shift in position" from *Masetta*-type rules to fuzzier standards such as his, suggesting that this Court should do the same. (*See id.*). But Falfas fails to back up this claim. As evidence for this "shift in position," he cites a small handful of academic commentators, a trial-court decision from New Jersey, and an appellate decision from New Mexico. This would be an unimpressive collection, even if those authorities actually supported Falfas's proposed test, which they do not.

For example, Falfas characterizes Professor Williston's comment that personal services contracts "are *generally* not enforceable by affirmative decree," as implying that Williston believes that specific performance should be available in some cases. But that is simply not true. Williston's statement was merely a summary description of the states' practices, not an argument in favor of wider use of specific performance. 25 Williston, *Williston on Contracts*, Section 67:102 (4th Ed.2013) (emphasis added). Indeed, shortly before that descriptive note, Professor Williston opines that "[e]quity's denial of specific performance of contracts requiring personal services has a firm three-sided foundation," *id.*, suggesting that he agrees that Ohio's rule, a rule shared by the vast majority of other courts, is more theoretically sound.

Similarly, the Restatement (Second) of Contracts does not support the proposition that Falfas cites it for. It is true that Section 357's Introductory Note states that generally, "Courts have been increasingly willing to order performance in a wide variety of cases." Restatement of the Law 2d, Contracts, Section 357. But the Restatement emphatically declines to extend that change to personal services contracts. According to Section 367, which deals specifically with

such contracts, “A promise to render personal service *will not* be specifically enforced.” *Id.* at Section 367(1) (emphasis added). Comment b, which Falfas cites in support, deals only with the well-known exceptions to this rule: anti-discrimination statutes and collective bargaining agreements (and, as to the latter, Ohio has rejected even that exception, *see Masetta*). And Comment c, which Falfas quotes at length, deals not with specific performance of personal services contracts, but rather with injunctions prohibiting employees from working for companies other than their regular employer. *See id.* at Comment c (discussing “duty to forbear from rendering [personal service] to anyone else”). None of this suggests that Ohio should abandon its well-settled law precluding specific performance of personal services agreements.

Falfas’s case law is little better. Neither case he cites comes from the highest court of its respective state—the New Jersey case is a trial court decision, while the New Mexico case issued from its court of appeals. *See Am. Assn. of Univ. Professors, Bloomfield College Chapter v. Bloomfield College*, 129 N.J.Super. 249, 322 A.2d 846 (N.J.Super.Ct.Ch.Div.1974); *Collado v. City of Albuquerque*, 132 N.M. 133, 2002-NMCA-048, 45 P.3d 73 (N.M.Ct.App.2002). Such decisions can hardly show a significant “shift in position” in their own states, let alone nationwide. In any event, neither case is as far-reaching as Falfas suggests. The New Jersey court’s decision to order specific performance appears to have been largely based on the plaintiff’s status as a tenured professor. *See, e.g., Bloomfield College*, 129 N.J.Super. at 267, 272-273 (“Courts have not hesitated to invalidate the dismissal of tenured personnel where the reasons of economy given for their dismissal were shown to have been used as a subterfuge.”). The New Mexico case, for its part, was brought by a discharged firefighter—a civil-service position regularly excepted from the general rule against specific performance. *See Collado*, 132 N.M. at 134; *see also, e.g., R.C. 124.327*. Further, that court made the same mistake as Falfas,

citing case law involving anti-discrimination *statutes* to support specific performance in a common-law breach-of-contract action. *See Collado*, 132 N.M. at 137-38. Thus, neither case provides Falfas much support here.

Not only does Falfas's proposed three-factor test lack any meaningful support from courts or commentators, but Falfas points to no benefits that would flow from its adoption. To the contrary, his proposal would impose significant costs. The bright-line rule reflected in *Masetta* has long guided both employers and employees. Falfas would have this Court throw out that rule in favor of a fuzzy, multi-factor test that differs little from an I-know-it-when-I-see-it-totality-of-the-circumstances standard. Such an approach would create immense uncertainty for employers—not just when considering layoffs, but also in deciding whether to hire employees in the first place. Under the current legal regime, monetary damages for breach of an employment contract are relatively simple to calculate. This promotes settlement, as the parties can easily compare the range of possible outcomes with the likely cost of litigation. Falfas's proposed rule, on the other hand, would offer employees a shot at potentially open-ended reinstatement—a remedy that could continue, theoretically, for as long as the employee cares to work. Such a rule would discourage settlement by giving employees incentives to litigate through trial in hopes of obtaining this windfall. Further, different employees (and employers) could place dramatically different values on this remedy, depending on factors such as the employee's other employment opportunities and the amount of hostility between the parties. This would further complicate the parties' efforts to value (and thus settle) particular cases. For these reasons alone, Falfas's newly-minted three-factor test is a bad idea.

Falfas's test would also be judicially unmanageable. Depending on how his three requirements are interpreted, the test could either be quite broad or quite narrow. Falfas gives no

hint as to which test he is actually proposing here. Further, the requirements would be difficult to evaluate in virtually all cases. Even the first prong—no adequate remedy at law—is not as simple as it appears at first blush. In general, courts are accustomed to deciding this question in cases involving equitable remedies. But because Ohio law has barred specific performance of personal services contracts for decades, no case law exists regarding when money damages are an inadequate remedy for breach of an employment contract. Falfas suggests no such guidelines here, leaving the courts at sea in trying to apply this new requirement. The second and third prongs of Falfas's test are even worse. The second prong—whether specific performance would be “manageable” in the case at hand—involves not just the particulars of a company's business and the personal relationships among its employees, but also a court's prediction about how each of those persons would react to the court's continuing supervision. Such a prediction would be difficult in any situation, let alone in one involving a large, dynamic company with numerous employees. Similarly, because parties are unlikely to admit to their own bad faith, the courts would have to evaluate Falfas's third factor in virtually every case, predicting the parties' likely actions based on, apparently, the sum total of evidence presented in the matter.

Finally, Falfas's proposed test would be inequitable. Its latter two elements would each favor bad actors over companies acting in good faith, as those companies that make specific performance appear unmanageable and difficult to enforce would be freed from the threat of reinstatement. This is hardly a sound basis for a new rule of equity.

In short, Falfas's proposed test would greatly complicate both the law and the courts' administration of it, taking away incentives for parties to settle and making hiring and firing decisions significantly less predictable for employers. In return, Falfas points to no benefits that this test would provide to this state (aside from the potential benefit to himself), and he cites no

persuasive authority in support. For these reasons, this Court should decline Falfas's offer to replace *Masetta* with this untried and unworkable regime.

C. In Any Case, Falfas Cannot Satisfy the Terms of His Proposed Test.

In any event, Falfas makes no attempt to show that the facts of this case would satisfy his proposed test. As Cedar Fair discussed in detail in its opening brief, legal remedies are adequate here, and reinstating Falfas would be unmanageable in numerous respects. (Br. at 21-26). Falfas does not challenge these arguments, and he cannot. Moreover, Falfas's proposed test requires that "a court"—or, presumably here, an arbitrator—determine that the case before it satisfies each of the three requirements. The arbitrators made no such findings here. Falfas appears to read the arbitrators' conclusory statement that "equitable relief is needed to restore the parties to the positions they held prior to the breach" as a finding that legal remedies are inadequate (*see* Appendix at A-23), but that is not clear from the panel's brief discussion. In any case, the panel certainly made no findings regarding the manageability of reinstatement and the good faith of the parties going forward. (*See id.* at A-22 to A-23). Nor have the lower courts done so. (*See id.* at A-5 to A-21). Under any interpretation of his proposed test, therefore, Falfas fails.

D. The Arbitral Award Should Be Vacated Because the Panel Exceeded Its Authority.

Perhaps because he has no sound basis for arguing that Ohio law allows courts to order specific performance of a personal services contract, Falfas instead devotes a significant portion of his response brief to his claim that the arbitrators' decision must be upheld *regardless of* Ohio's law. (Resp. Br. at 19-30). More specifically, Falfas argues that an arbitrator's decision cannot be held to exceed the arbitrator's powers "absent a showing of corruption, fraud, undue means or an irregularity of equal magnitude." (*Id.* at 19 (proposed proposition of law)). Falfas is wrong. Courts have long understood R.C. 2711.10(D)'s exceeding-the-power language as requiring courts to ensure that an arbitrator stays "within the bounds of the authority [the parties]

gave him.” *Internat. Assn. of Firefighters, Local 136 v. Dayton*, 2d Dist. Montgomery No. 25423, 2013-Ohio-2759, ¶ 23 (quotation omitted). To be sure, courts must defer to an arbitrator’s interpretation of an ambiguous contract (even if faulty), but here there was no interpretation, and there is no ambiguity. The contract strictly limits an arbitrator’s remedial authority to the bounds of Ohio law, and on the question of specific performance for employment contracts, those boundaries are clear and unambiguous. In ordering specific performance, the arbitrators clearly exceeded their powers, and vacatur is the only appropriate remedy.

Ohio law provides that a court “*shall* make an order vacating the [arbitral] award” in cases where “[t]he arbitrators exceeded their powers”:

[T]he 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
- (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.

R.C. 2711.10 (emphases added). Falfas would have this Court limit sub-part (D)—“exceeded their powers”—to situations where there has been “corruption, fraud, undue means or an irregularity of equal magnitude,” but even a rudimentary examination of the statutory structure shows that is wrong. “Corruption, fraud, or undue means” are addressed in R.C. 2711.10(A); “exceeding their powers” appears in R.C. 2711.10(D). To require the same showing for sub-part (D) as for sub-part (A) would effectively remove sub-part (D) from the statute, a result directly contrary to this Court’s command that “[t]he role of the judiciary is to interpret statutes and give meaning to *every word* used by the legislature.” *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-

542, 882 N.E.2d 899, ¶ 33 (emphasis added). *See also E. Ohio Gas Co. v. Pub. Util. Comm.*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875 (1988) (calling it a “basic rule of statutory construction—that words in statutes should not be construed to be redundant, nor should any words be ignored”).

In any event, Ohio courts have clearly explained that sub-part (D) is not redundant, but rather plays a vital role in preserving the viability of arbitration as an alternative dispute resolution tool. In particular, “[t]he essential function of R.C. 2711.10(D) is to ‘ensure that the parties get what they bargained for by keeping the arbitrator within the bounds of the authority they gave him.’” *Internatl. Assn. of Firefighters*, 2013-Ohio-2759, ¶ 23 (quoting *Piqua v. Fraternal Order of Police*, 185 Ohio App.3d 496, 2009-Ohio-6591, 924 N.E.2d 876, at ¶ 21). *See also Stow Firefighters, IAFF Local 1662 v. Stow*, 193 Ohio App.3d 148, 2011-Ohio-1559, 951 N.E.2d 152 (9th Dist.), ¶ 26 (same). Stated alternatively, courts must step in when an arbitrator enters an award that “conflicts with the express terms” of the parties’ agreement. *See Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSCME, AFL-CIO*, 59 Ohio St.3d 177, 572 N.E.2d 71 (1991), syllabus.

In short, arbitrators are free to act within the scope of the discretionary power that the parties delegated to them (including interpreting ambiguous bounds on that authority), but where a contract expresses clear boundaries, arbitrators are not free simply to ignore that limitation. Here, the parties expressly limited the arbitrators’ remedial authority to that available to Ohio courts under Ohio law. (*See* Employment Agreement, Section 19(c), Supplement at S-11). As described above and in Cedar Fair’s opening brief, the arbitrators’ award directly transgresses that unambiguous command. Accordingly, the arbitrators exceeded their powers, and the courts “shall make an order vacating [that] award.” R.C. 2711.10. Indeed, failing to enforce the

General Assembly's mandate would leave parties defenseless against the arbitrators' unbridled, essentially lawless, exercise of discretion, in turn making parties less willing to arbitrate, a result that runs contrary to Ohio's "strong policy in favor of arbitration of disputes." *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 16.

Falfas bases his contrary argument—that R.C. 2711.10(D) is essentially subsumed within and limited by R.C. 2711.10(A)—on a misreading of this Court's decision in *Goodyear Tire & Rubber Co. v. Local Union No. 200, United Rubber, Cork, Linoleum & Plastic Workers of America*, 42 Ohio St.2d 516, 522, 330 N.E.2d 703 (1975). (Resp. Br. at 20-21). According to Falfas, *Goodyear* limits a court's vacatur power to cases of fraud, corruption or misconduct. In pressing this argument, however, Falfas falls prey to the very error of which he accuses Cedar Fair: paying insufficient attention to the Court's syllabus. *Goodyear's* syllabus expressly recognizes "exceeding authority" as a *separate* ground for vacatur: "R.C. 2711.10 limits judicial review of arbitration to claims of fraud, corruption, misconduct, an imperfect award, *or that the arbitrator exceeded his authority.*" *Id.* at syllabus paragraph two (emphasis added).

Nor does *Goodyear's* reasoning support Falfas's attempt to read part (D) out of the statute. The question there was whether an arbitrator had run astray of R.C. 2711.10 by modifying a collective bargaining agreement to comply with an EEOC regulatory Guideline. *See id.* at 517-518. Under the agreement's terms, the arbitrator had the power to modify the agreement "where necessitated by federal or state sta[t]ute or regulation." *Id.* at 519. Though the EEOC Guideline at issue was entitled to great deference, it was "not legally binding per se." *Id.* at 521. Yet the arbitrator found that the Guideline still was "a federal regulation within the meaning of [the agreement]" and modified the agreement accordingly. *Id.*

Goodyear then asked Ohio's courts to vacate the award, arguing that because the Guideline was not binding, the arbitrator exceeded his authority by modifying the agreement to comply with it. *Id.* at 518. The Court rejected Goodyear's argument. According to the Court, the arbitrator's statement in his decision was ambiguous. "It could mean either that the arbitrator [wrongly] believed the Guideline to be binding, or that he [permissibly] interpreted the term 'regulation,' as used in the contract, to include an administrative Guideline such as this one." *Id.* The Court thus upheld the award, as "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award." *Id.* at 522 (quotation omitted).

Goodyear offers Falfas no support here. There is no ambiguity in the contract here akin to the term "regulation" there. Because "regulation" could be interpreted to include non-binding orders, it was not clear that the arbitrators had exceeded their authority. Here, by contrast, the contract unequivocally limits the arbitrators' remedial authority to that provided by Ohio law, (*see* Employment Agmt., Section 19(c), Supp. at S-11), which clearly forbids the use of specific performance with regard to personal services contracts.

Nor can Falfas escape this result by reliance on the United States Supreme Court's decisions in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), and *Oxford Health Plans LLC v. Sutter*, 569 U.S. ____, 133 S.Ct. 2064, 2067, 186 L.Ed.2d 113 (2013). (*See* Resp. Br. at 25-30). The first case, *Hall Street*, merely held that Sections 10 and 11 of the Federal Arbitration Act (which are substantially similar to Ohio's arbitration statute) specified the exclusive grounds for vacating an arbitration award. *See Hall Street*, 552 U.S. at 584. In particular, the Court rejected the idea that courts could vacate arbitral awards under a separate "manifest disregard of the law" standard. *See id.* at 585. Falfas tries to

hammer Cedar Fair’s arguments into something resembling “manifest disregard of the law,” but Cedar Fair’s main argument before each court below has always been that the arbitrators “exceeded their authority.” (See Appendix at A-8 (Sixth District); *id.* at A-16 (Court of Common Pleas)). “Exceeding authority” is specifically identified as a ground for vacatur in both Ohio’s R.C. 2711.10(D) and Section 10 of the Federal Arbitration Act. See 9 U.S.C. 10(a)(4). Nothing in *Hall Street* affected the viability of such a claim—indeed, *Hall Street* specifically acknowledged that “manifest disregard” may simply be “shorthand” for the “exceeding their powers” standard. 557 U.S. at 585. Moreover, while *Hall Street* stated that the FAA did not provide review for “just any legal error,” the Court at least suggested that “egregious departures from the parties’ agreed upon arbitration” could fall within the FAA—a question the Court did not need to answer in that case, as the parties there had tried to contract for review of *simple* legal errors. *Id.* at 586. Thus, the case offers no guidance on the ability to vacate here, where the arbitrators ordered relief that clearly falls well outside the scope of settled Ohio law.

Oxford likewise offers no help to Falfas. That case involved pay-for-services contracts between various physicians and a health insurance company. *Oxford*, 133 S.Ct. at 2067. Each contract called for arbitration of “any dispute arising under this Agreement.” *Id.* When the physicians filed a class action suit in state court, that court referred the suit to arbitration. *Id.* The parties then “agreed that the arbitrator should decide whether their contract authorized class arbitration.” *Id.* The arbitrator construed the parties’ contract and determined that under both the intent and the plain language of the parties’ agreements, the class-action suit should be arbitrated. *Id.* The doctors then asked a federal court to vacate the arbitrator’s decision under

the Federal Arbitration Act, *id.*, which like R.C. 2711.10 instructs courts to vacate arbitral decisions “where the arbitrators exceeded their powers.” 9 U.S.C. 10(a)(4).¹

The doctors lost, *see Oxford*, 133 S.Ct. at 2068, but only because it was clear that the arbitrator’s decisions were, “through and through, *interpretations of the parties’ agreement*”:

The arbitrator’s first ruling recited the “question of construction” the parties had submitted to him: “whether [their] Agreement allows for class action arbitration.” . . . To resolve that matter, *the arbitrator focused on the arbitration clause’s text, analyzing (whether correctly or not makes no difference) the scope of both what it barred from court and what it sent to arbitration.* The arbitrator concluded, based on that textual exegesis, that the clause “on its face . . . expresses the parties’ intent that class action arbitration can be maintained.” . . . When Oxford requested reconsideration in light of *Stolt-Nielsen*, the arbitrator explained that his prior decision was “concerned solely with the parties’ intent as evidenced by the words of the arbitration clause itself.” . . . He then ran through his textual analysis again, and reiterated his conclusion: “[T]he text of the clause itself authorizes” class arbitration.

Id. at 2069 (emphasis added). Thus, the arbitrator “considered the[] contract and decided whether it reflected an agreement to permit class proceedings.” *Id.* “That suffices,” the Court concluded, “to show that the arbitrator did not ‘exceed[] [his] powers.’” *Id.* (alterations in original).

As this discussion shows, the key to *Oxford* was that the arbitrator *actually interpreted* the parties’ contract in reaching his decision. Where, by contrast, an arbitrator is *not* interpreting the contract, but rather imposing his own preferred remedy without regard to, or in derogation of, contractual terms, courts do not hesitate to find the award “exceeded the arbitrator’s powers.” Indeed, in *Oxford*, the Court distinguished its earlier decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corporation*, 559 U.S. 662, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), where the U.S. Supreme had Court vacated an arbitral decision imposing class arbitration, on the grounds that in *Stolt-Nielsen*, the arbitrator’s decision had not been based on contractual

¹ In fact, the parties went through this process twice, as the U.S. Supreme Court issued a relevant decision partway through the proceedings. *See Oxford*, 133 S.Ct. at 2067-2068.

interpretation. See *Oxford*, 133 S.Ct. at 2069-2070 (“We overturned the arbitral decision [in *Stolt-Nielsen*] because it lacked any contractual basis for ordering class procedures.”). In *Stolt-Nielsen*, the Court observed that “the task of an arbitrator is to interpret and enforce a contract.” 559 U.S. at 672. Where the arbitrator veers from that interpretive task, it does nothing more than “impose its own view of sound policy” on the parties, “thus exceed[ing] its powers.” *Id.* at 672, 676-677.

The First District Court of Appeals recently made this same distinction clear in *H.C. Nutting Co. v. Midland Atlantic Development Co., L.L.C.*, 2013-Ohio-5511, ___ N.E.2d ___ (1st Dist.). There, the contract at issue required arbitration, but precluded recovery in that arbitration for “consequential damages,” which expressly included “loss of profits or revenues.” *Id.* at ¶ 15. The arbitrator nonetheless awarded “lost revenue.” Both the trial court and the First District held that the arbitrator’s award must be vacated because it did not reflect an interpretation of the contract:

Had the arbitrator discussed the contract language or provided some basis for the award, his decision might have at least rested upon an interpretation of the parties’ contract. In the absence of some evidence that he was dispensing his own brand of justice, we would be obliged to confirm the award, even if we disagreed with his reasoning and conclusion. Here, however, the arbitrator failed to discuss the probative terms of the contract and offered no clear basis for how he construed the contract. ***Without such consideration, and with an award, which on its face awards Midland consequential damages, damages which are expressly precluded by the parties’ contract, we cannot conclude that the award was based upon the four corners of the contract or that it drew its essence from the parties’ agreement.***

Id. at ¶ 18 (emphasis added).

As in *H.C. Nutting*, the arbitrators’ decision here contains no contractual interpretation and no discussion of relevant law. Indeed, the arbitrators’ sole reference to the contract is their introductory claim that their award is issued “in accordance with Section 19 of the applicable

Employment Agreement.” But nowhere in their decision did the arbitrators discuss how that clause grants them the authority to order specific performance of Falfas’s personal services contract. Rather, the arbitrators merely found that “equitable relief is *needed*,” without addressing whether it is contractually *authorized*. This is not an interpretation of the parties’ contract, “even arguably.” *Oxford*, 133 S.Ct. at 2068.

For similar reasons, Falfas cannot now insulate the arbitrators’ decision by pointing to irrelevant exceptions to *Masetta*’s rule or by asking this Court to replace that rule with his proposed three-part test. The arbitrators did not determine, after interpreting the contract, that they had authority to order specific performance because Falfas satisfied some exception to *Masetta*. Nor did they find that Falfas’s proposed three-part test would give them authority under that contract to order specific performance. The problem here is not that the arbitrators incorrectly decided that the contract provided authority for their position; rather, the problem is that they *failed* to address that crucial issue *at all*, and as a result, selected a remedy that directly contradicts that contract.

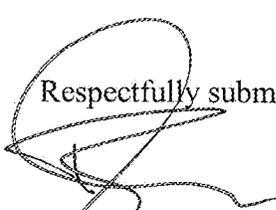
The arbitrators here clearly exceeded their authority. Their decision must be vacated.

CONCLUSION

For the above-stated reasons, as well as those set forth in its opening brief, Cedar Fair respectfully urges the Court to vacate the Sixth District’s decision and order the lower courts to award damages as Section 7 of the Employment Agreement expressly provides.

Dated: January 23, 2014

Respectfully submitted,



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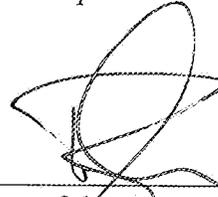
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 23, 2014, a copy of the foregoing was served by regular U.S. mail upon the following:

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