IN THE SUPREME COURT OF OHIO

C. Graham Carothers, Jr., Esq.	:	
	:	**ON APPEAL FROM THE**
Plaintiff-Appellant,	:	**LUCAS COUNTY COURT**
	:	**OF APPEALS, SIXTH**
v.	:	**APPELLATE DISTRICT**
	:	
Shumaker, Loop & Kendrick, LLP	:	**COURT OF APPEALS**
	:	**CASE NO. {48} L-22-1110**
Defendant-Appellee,	:	
	:	

PLAINTIFF-APPELLANT'S MEMORANDUM IN OPPOSITION TO APPELLEE/CROSS-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

Adam R. Richards (0085335)
Jonathan N. Bond (0096696)
Cooper Elliott
305 West Nationwide Boulevard
Columbus, Ohio 43215
(614) 481-6000
(614) 481-6001 (Facsimile)
adamr@cooperelliott.com
jonb@cooperelliott.com

Attorneys for Plaintiff-Appellant
C. Graham Carothers, Jr., Esq.

J Gerald R. Kowalski (0022323)
Spengler Nathanson P.L.L.
900 Adams Street
Toledo, Ohio 43604
(419) 252-6239
(419) 241-8599 (Facsimile)
gkowalski@snlaw.com

Counsel for Defendant-Appellee/
Cross-Appellant
Shumaker, Loop & Kendrick, LLP

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EXPLANATION OF WHY SLK'S CASE IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST

Unlike Appellants Graham Carothers' case, which implicates Ohio public-policy regarding a client's ability to choose counsel, the professional rules and presents important questions of first impression that impact every lawyer and client statewide, Shumaker, Loop & Kendrick's ("SLK") appeal presents a run-of the mill legal issue that only implicate SLK. SLK's memorandum can be boiled down to one complaint: SLK doesn't like that an arbitrator ruled against it on an issue. And SLK disagrees with the lower courts' refusal to modify the portion of the award that found its Partnership Agreement's non-compete overly restrictive. But SLK cannot in good faith claim the arbitrator exceeded his authority by deciding an issue the parties indisputably and expressly submitted to him and briefed. The lower courts correctly rejected SLK's argument and found itself powerless to modify the relevant portion of the award. There is no public or great general interest in overturning a binding and valid portion of an arbitrator's award just because a party doesn't like it.

STATEMENT OF THE CASE AND FACTS

In the prime of his career and after nearly twenty years of service to SLK, Graham Carothers left SLK and joined another firm in a geographically restricted area. A-2 at ¶ 2; A-29 at ¶ 1.[1] Because Carothers competed in the geographically restricted area, SLK refused to pay Carothers his earned and vested income payment due under SLK's Partnership Agreement. A-29—A-30. The parties' dispute then proceeded to contractual arbitration.

In part, the parties tasked the arbitrator with determining the enforceability of SLK's broad non-compete. A-37—A-38. Carothers' arbitration demand expressly challenged and

[1] Cites are to Carothers' Appendix submitted with his Memorandum in Support of Jurisdiction.

sought to limit the scope of the non-compete. *Id.*; *see also,* Carothers Br. in Resp. to SLK Assignments of Error, filed in 6th Dist. CA on 10/3/22 at 2-3. The parties briefed the issue during the arbitration on summary judgment. *See,* Carothers Br. in Resp. to SLK Assignments of Error, filed in 6th Dist. CA on 10/3/22 at 3-4. Indeed, it "is a stretch" to argue these issues were not submitted to arbitration. A-22 at ¶ 41. Carothers's arbitration demand and subsequent filings expressly challenged and sought to limit the scope of the non-compete in SLK's Partnership Agreement. A-23 at ¶ 44.

Based on the parties submitted arguments, the arbitrator decided this issue. The arbitrator found SLK's non-compete overbroad in geographic and temporal scope, and thus found the non-compete unenforceable as written as is appropriate under Ohio law. A-31—A-32. The award found the 200-mile radius from all partnership offices overly restrictive and ordered that it be eliminated. A-32. The arbitrator also found the 5-year time period overly restrictive and reduced it to two years. *Id*.

Unhappy with the findings, SLK moved to modify the arbitrator's award under R.C. 2711.11(B), claiming the parties did not submit the scope of its non-compete to the arbitrator. *See generally*, SLK Mot. to Modify or Correct Arbitration Award, filed 1/10/22. SLK did not argue the arbitrator exceeded his authority under R.C. 2711.11(D). *Id*. In fact, R.C. 2711.11(D) was not mentioned once in SLK's original appeal of the arbitrator's decision. *Id*.

The lower courts rejected SLK's attempts to modify the award. Both courts held that the parties did submit the issue to the arbitrator and thus, they were powerless to disturb the arbitrator's decision on this issue. A22—A-26; A-37—A-38

RESPONSE TO SLK'S ARGUMENTS IN SUPPORT OF JURISDICTION

SLK's appeal does ***not*** broadly impact the scope of arbitration in Ohio, and it does not raise any issues that could have far-reaching consequences for law firms or the business community. Instead, SLK is simply advocating for a different result, one that will uniquely benefit SLK and is inconsistent with the facts and law. SLK's argument detracts from, not enhances, arbitration and Ohio's public policy supporting arbitration.

Also, all of SLK's arguments suffer from a fundamental flaw, they were not properly raised in the lower courts. SLK only moved to modify the award under R.C. 2711.11(B). *See*, SLK Mot. to Modify or Correct Arbitration Award, filed 1/10/22. SLK did not argue the arbitrator exceeded his authority under R.C. 2711.11(D).

Thus, focusing on R.C. 2711.11(B), this provision specifies the limited circumstance where a court will modify an arbitration 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.

R.C. 2711.11 (emphasis added). R.C. 2711.11(B) permits modification only where "the arbitrators have awarded upon a matter not submitted to them." *Allen v. Hucousky*, 10th Dist. Franklin No. 85AP-250, 1985 Ohio App. LEXIS 9330, *12.

The lowers courts concluded that the scope of SLK's non-compete **was certainly submitted to arbitration** and thus this statutory provision does not give SLK grounds to undo the award. The lower courts were not confused and did not analyze the wrong statute. This ends SLK's appeal.

PROPOSITION OF LAW 1: The portion of the arbitrator's remedy narrowing the temporal and geographic scope of Section 14.5 of the Partnership Agreement is consistent with Ohio law and draws its essence from the Arbitrator's reading of the Partnership Agreement.

If the Court gets past the fundamental flaw with SLK's appeal, it should next notice that SLK distorts the law to make its arguments. Also, for the first time, SLK makes an argument that the Partnership Agreement cannot be amended unless approved by "a super-majority of the equity partners." Because SLK never moved under R.C. 2711.10(D), courts didn't need to even address SLK's argument. *CACV of Colo., LLC v. Kogler*, 2d Dist. Montgomery No. 021329, 2006-Ohio-5124, ¶ 7 (holding that when a party makes no objection under R.C. 2711.10(D) that the arbitrator exceeded his or her powers, the party waives that issue for purposes of the error they assign on appeal.). But, even more, their request is improper. Absent certain narrow exceptions like the public policy example at issue in Carothers' appeal, courts do not rewrite the award or substitute its own judgment or interpretation of the facts or Partnership Agreement because the arbitrators are "the final judge of both law and facts." *Goodyear Tire & Rubber Co. v. Local Union No. 220, United Rubber, Cork, Linoleum and Plastic Workers of Am.*, 42 Ohio St. 2d 516, 522, 330 N.E.2d 703 (1975).

It is clear Carothers expressly sought to have the arbitrator limit and narrow the scope of the non-compete at arbitration. *See* Proposition of Law 3, *infra*. Thus, if the issue was submitted to arbitration and the award draws its essence from the agreement at issue, it may not be modified or vacated. *Cedar Fair, L.P. v. Falfas*, 140 Ohio St.3d 447, (2014) ¶ 6 ("[A]rbitrators

have 'broad authority to fashion a remedy, even if the remedy contemplated is not explicitly mentioned' in the applicable contract."); *id*. at ¶ 7 (stating, "[s]o long as there is a good-faith argument that an arbitrator's award is authorized by the contract that provides the arbitrator's authority, the award is within the arbitrator's power); *Patrolmen's Benevolent Ass'n v. City of Findlay*, 149 Ohio St.3d 718, (2017) ¶ 16 (arbitrators "act within their authority so long as the award *'draws its essence'* from the contract—i.e. there is a rational nexus between the agreement and the award.").

Here, the arbitrator simply fashioned a remedy based on the language of the Partnership Agreement that he believed was unenforceable. A-23—A24 at ¶¶ 44—46. This is appropriate under Ohio law. *See Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 25-26 (stating that when a restrictive covenant is unreasonable, the decision maker is "empowered to reform the agreement so that it is reasonable."); *Castillejo v. Assocs. in Anesthesiology, Inc.*, 2013 Ohio Misc. LEXIS 7252, *11 (same); *Life Line Screening of Am., Ltd. v. Calger*, 145 Ohio Misc. 2d 6, 16 (same). So, the arbitrator did not disregard the plain language of the Partnership Agreement—he found it to be overbroad and unenforceable. An arbitrator deciding an issue against SLK, that was submitted to him and briefed doesn't require this Court's intervention.

PROPOSITION OF LAW 2: SLK never raised the issue of Carothers' standing during the arbitration and this issue is a red herring.

SLK complains that the arbitrator altered their Partnership Agreement even though the alteration would not have an impact on Carothers. But this issue was submitted to him. One of Carothers' main points during the arbitration about why the Partnership Agreement violates public policy was due the Partnership Agreement's broad and far-reaching impact on SLK's lawyers *and* on a client's right to counsel. The Partnership Agreement was not just an agreement

entered into with Carothers and SLK. Rather, it was a group agreement that applied to all partners (and departing partners and their clients)—so this issue was before the arbitrator.

The arbitrator clearly recognized this and the Partnership Agreement's broad and overreaching impact and tried to fashion a remedy. The problem in this case is that the arbitrator did not go far enough because the Partnership Agreement still violates Ohio's clear public policy, and he should have stricken the provision in its entirety. And, most importantly, the Court cannot now assess this issue and why the arbitrator did what he did because, absent a clearly established public policy being at stake, court must be "deaf" to claims of arbitrator factual or legal errors. A-23 at ¶ 43, citing *Sicor Secs., Inc. v. Albert*, 2d Dist. Montgomery No. 22799, 2010-Ohio-217, at *3.

The above aside, the lower courts each assessed and rejected SLK's argument. A-24—A-25 at ¶¶ 47—49 Also, R.C. 2711.11(B) would not be the proper vehicle to make this argument. Under R.C. 2711.11(B), courts can overturn awards "when 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[.]" The scope of the non-compete was indeed submitted to the arbitrator, so this provision does SLK no help. *See* Proposition of Law 3, *infra*. That said, even if the issue was not submitted, the lower courts didn't err because SLK concedes the determination did not affect the merits of the decision so there's no reason for those courts to step in. R.C. 2711.11.

<u>PROPOSITION OF LAW 3</u>: The scope and enforceability of Section 14.5 of the Partnership Agreement was clearly submitted to the arbitrator.

Carothers expressly sought to have the arbitrator limit and narrow the scope of the non-compete at arbitration. One issue the arbitrator had to decide specifically was related to whether the non-compete was enforceable as written. As part of this issue, Carothers' arbitration demand expressly challenged and sought to limit the scope of the non-compete and the parties briefed the

issue on summary judgment. Carothers Br. in Resp. to SLK Assignments of Error, filed in 6th Dist. CA on 10/3/22 at 2-4. Indeed, it is a stretch to argue these issues were not submitted to arbitration. A-22 at ¶ 41. Carothers's arbitration demand and subsequent filings expressly challenged and sought to limit the scope of the non-compete. A-23 at ¶ 44.

In fact, here are some of the ways in which Carothers raised this issue in his arbitration demand.

- Respondent refused and has unequivocally stated that it intends seeking to enforce Section 14.5 of the Agreement, which is illegal, overbroad, unreasonable, unenforceable, void, voidable, violates Ohio law, constitutes an illegal and unenforceable penalty, is contrary to Ohio's public policy and violates Ohio's Rules of Professional Conduct. (Arb. Demand, ¶ 33.)

- The Management Committee is required and obligated to approve, and cannot enforce a contractual provision that it knows or has reason to know is illegal, unreasonable, unenforceable, void, voidable, violates Ohio law, constitutes an illegal and unenforceable penalty, is contrary to Ohio's public policy and violates Ohio's Rules of Professional Conduct. (*Id*., ¶ 35.)

- Section 14.5 of the Agreement is a restrictive covenant, that attempts to restrict Claimants right to practice law and represent clients in certain territories. (Id., ¶38.) Section 14.5 deprives individuals of the right to select counsel of their choice. (Id., ¶ 39.) The provisions of Section 14.5 purport to "apply regardless of age." (Id., ¶ 40.) The provisions of Section 14.5 purport to apply regardless of whether or not any person, including Claimant, is retiring from the practice of law or is at a retirement age. (Id., ¶ 41.) The provisions of Section 14.5 purport to apply regardless of whether or not Respondent is actively paying Claimant any of the retirement income. (Id., ¶ 42.) If Claimant competes with Respondent in violation of Section 14.5, Respondent claims that the Agreement purports to impose an improper financial penalty on Claimant and result in a forfeiture of the "retirement income" that Claimant otherwise had already earned and was due. (Id., ¶ 43.) Thus, Section 14.5 as construed, drafted and attempted to be enforced by Respondent is unreasonable and unenforceable because it purports to restrict Claimant from competing with Respondent for more than 10 years or he forfeits the retirement income that he otherwise had already earned and was due, and because the forfeiture clause is not related to a benefit conferred to Claimant upon retirement. (Id., ¶ 44.)

- Also, **the territory, time, and scope restrictions of Section 14.5 are overboard and unreasonable with respect to the facts of this case**. (*Id.*, ¶ 45, emphasis added.)

See Carothers Br. in Resp. to SLK Assignments of Error, filed in 6th Dist. CA on 10/3/22 at 2-3. Also, in Carothers demand for declaratory judgment, he described the parties' disputes as:

> 69. Active disputes among the parties exist regarding the Agreement, including, but not limited to (i) whether or not the forfeiture provision in Section 14.5 of the Agreement is reasonable, void, voidable, an improper penalty, or enforceable, *** (v) **that the time and scope restrictions in Section 14.5 are unreasonable, unenforceable, and not narrowly tailored to protect only legitimate, enforceable and legal interests of Respondent**; *** and (viii) all other appropriate determinations and relief associated with (i) through (iv) above.

Id. at 3. Carothers' demand also prays for "[a]ny further relief that is *** just and proper." *Id*. Carothers also raised this issue on summary judgment. *Id*. at 3-4. In response, SLK never argued the Arbitrator did not have the authority to address this issue in its Answer or in response to the submissions by Carothers.

Thus, when reviewing this issue that was submitted, the arbitrator found that the practice restrictions in the non-compete were too broad. He then fashioned a remedy by narrowing the practice restrictions, which is appropriate under Ohio law. *See* Proposition of Law 1, *supra*.

PROPOSITION OF LAW 4: SLK never moved under R.C. 2711.10(D), and the Trial Court did not err in refusing to modify the award. Further, the standard applicable to R.C. 2711.10(B) is clear and the Court need not review this matter due to SLK's failure to challenge the award under the correct Section of the Ohio Revised Code.

SLK admits it only moved to modify the award under R.C. 2711.11(B). That provision clearly allows a trial court to modify an award only when "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." There is nothing unclear about this standard that warrants this court's review and there are actually two requirements for SLK to prevail. First, must prove that the mater they complain about was not submitted to the arbitrator. Then, if SLK shows this, which it

cannot do, the court still may not disturb the award unless SKL shows the issue it is a matter "affecting the merits of the decision upon the matters submitted." SLK cant show this either.

Next, the standard applicable is immaterial because every single court that has reviewed this issue found the arbitrator decided an issue that was clearly submitted. The trial court even noted that it "is a stretch" to argue these issues were not submitted to arbitration. A-22 at ¶ 41; A-38. Carothers's arbitration demand and subsequent filings expressly challenged and sought to limit the scope of the non-compete. A-23 at ¶ 44; A-37—A-38.

Finally, applying the clear R.C. 2711.11(B) standard, the lower courts investigated the record and pleadings submitted during the arbitration. After conducting this invasive review of the arbitrator's decision, the lower courts correctly found that the issue the arbitrator decided was indeed submitted to him. Because SLK never moved under R.C. 2711.10(D), the courts didn't need to analyze whether the arbitrator exceeded his authority. *Kogler*, 2006-Ohio-5124, ¶ 7.

CONCLUSION

In sum, SLK has no basis for jurisdiction. The arbitrator acted properly in constraining its overbroad non-compete, and the lower courts properly found themselves powerless to modify the arbitrator's award. SLK is merely unhappy with the result of an award that affects only itself, and its arguments are sour grapes. The Court should deny review of SLK's appeal.

Respectfully submitted,

/s/ Jonathan N. Bond
Adam R. Richards (0085335)
Jonathan N. Bond (0096696)
Cooper Elliott
305 West Nationwide Boulevard
Columbus, Ohio 43215
(614) 481-6000
(614) 481-6001 (Facsimile)
adamr@cooperelliott.com
jonb@cooperelliott.com

Attorneys for Plaintiff-Appellant
C. Graham Carothers, Jr., Esq.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Memorandum in Opposition of Jurisdiction was filed electronically and served on the following counsel of record, by email transmission, this 15th day of September, 2023:

Gerald R. Kowalski, Esq.
Spengler Nathanson P.L.L.
900 Adams Street
Toledo, Ohio 43604
gkowalski@snlaw.com

Counsel for Defendant-Appellee/Cross-Appellant
Shumaker, Loop & Kendrick, LLP

/s/ Jonathan N. Bond