[Cite as *Mike McGarry & Sons, Inc. v. Marous Bros. Constr., Inc.*, 2010-Ohio-823.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

MIKE MCGARRY & SONS, INC.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-056**
- vs -	:	
MAROUS BROTHERS CONSTRUCTION, INC.,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 CV 002438.

Judgment: Affirmed.

Timothy L. McGarry, Nicola, Gudbranson & Cooper, L.L.C., Republic Building, #1400, 25 West Prospect Avenue, Cleveland, OH 44115 (For Plaintiff-Appellee).

Robert A. Simpson, 1702 Joseph Lloyd Parkway, Willoughby, OH 44094 (For Defendant-Appellant).

Barry J. Miller, Benesch, Friedlander, Coplan & Aronoff, 2300 BP America Building, 200 Public Square, Cleveland, OH 44114 (For Defendant-Appellant).

Robert A. Ranallo, Ranallo & Aveni, L.L.C., 6685 Beta Drive, Cleveland, OH 44143 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Marous Brothers Construction, Inc., appeals the Judgment Entry of the Lake County Court of Common Pleas, in which the trial court denied Marous' Application to Vacate, or in the alternative, to Modify the Arbitration

Award, and granted plaintiff-appellee, Mike McGarry & Sons, Inc.'s, Application to Confirm the Arbitration Award. For the following reasons, we affirm the decision of the trial court.

{¶2} Marous was hired as a general contractor, for the multi-million dollar H. J. Heinz Loft Apartment Project, to rehabilitate and convert five older industrial buildings into loft apartments in Pittsburgh, Pennsylvania. Marous contracted with McGarry in March of 2004 to provide interior and exterior painting for the project.

{¶3} A dispute arose from various issues and events that occurred on the project. McGarry filed a mechanics' lien in Pennsylvania against the Heinz Loft property owners, Progress Street Partners, Ltd., for labor performed and materials furnished for the improvement of the property. Marous was not a party to the action. The Pennsylvania court subsequently approved a surety bond for the mechanics' lien and ordered the discharge of the lien. Pursuant to the court's Order and Pennsylvania statute, a Praecipe to mark lien satisfied was filed by McGarry.

{¶4} The dispute between McGarry and Marous was referred to binding arbitration using a three member arbitration panel pursuant to the rules of the American Arbitration Association. After an arbitration hearing, where numerous witnesses testified and voluminous documents were presented as evidence, the arbitration panel awarded McGarry $953,111.52.

{¶5} McGarry filed an Application to Confirm the Arbitration Award. Marous filed a Motion to Modify Arbitration Award, claiming that the award included "significant computational errors which are in conflict with the articulated basis of the Award." Marous maintained that the award for McGarry's extra work tickets was mathematically incorrect; the award for unperformed "touch-up" work was mathematically impossible;

the prejudgment interest award was incorrect; the award for attorney fees based on the violation of Ohio's Prompt Pay Act was so grossly unreasonable it must be based on a miscalculation; and the panel failed to justify the amount awarded.

{¶6} The panel subsequently granted Marous' motion in part and modified the award, reasoning that the panel had made a computational error. The panel stated that it had "incorrectly computed to include an adjustment for material twice"; therefore, a modification of the award was warranted. Furthermore, the panel provided additional reasoning on other portions of the original award. The panel also stated that "given the re-computation of the awarded amount" recalculation of the interest amount was also warranted. McGarry's award was modified from $953,111.52 to $821,328.52 along with interest at the rate of 8% from July 2, 2008 until date of payment.

{¶7} Marous then filed a Motion to Vacate, or in the Alternative, to Modify the Arbitration Award as modified in the trial court. Marous claimed that the panel lacked subject matter jurisdiction and that the award was arbitrary, capricious, and irrational. A hearing was held on the matter on February 6, 2009.

{¶8} The trial court concluded that "the doctrine of res judicata does not apply and that the arbitration panel had subject matter jurisdiction", therefore, "the arbitrators [did not] exceed their powers under R.C. 2711.10(D)." Further, "Marous' claim that the arbitration award is arbitrary, capricious and irrational does not meet the criteria of R.C. 2711.10." Accordingly, the court found that Marous' claims were insufficient to vacate the award and denied Marous' Application to Vacate, or in the alternative, to Modify the Arbitration Award.

{¶9} Marous timely appeals and raises the following assignments of error:

{¶10} "[1.] The trial court erred to the prejudice of appellant by denying appellant's Application to Vacate the Arbitration Award because the arbitrators exceeded their powers.

{¶11} "[2.] The trial court erred to the prejudice of Appellant by denying and failing to even consider appellant's Application to Modify the Arbitration Award because the award contains evident material miscalculations."

{¶12} "Before embarking on an analysis of the merits, we first point out that a court has a 'very limited' role in reviewing a binding arbitration award." *Madison Local School Dist. Bd. of Edn. v. OAPSE/AFSCME Local 4*, 11th Dist. No. 2008-L-086, 2009-Ohio-1315, at ¶9 (citation omitted). "The arbitrator is the final judge of both law and facts and we may not substitute our judgment for that of the arbitrator. *** An arbitrator's decision is presumed valid and thus enjoys great deference." Id. (citation omitted).

{¶13} "Judicial deference in arbitration cases is fundamentally based on the recognition that the parties have contracted to have their dispute settled by an arbitrator they have chosen in lieu of committing the matter to the courts. *** It therefore stands to reason that the parties have agreed to accept the arbitrator's view of the facts and the meaning of the contract regardless of the outcome." Id. at ¶10 (citation omitted).

{¶14} Judicial review of arbitration awards is narrowly circumscribed by R.C. 2711.10 and R.C. 2711.11. *Huber Hts. v. Fraternal Order of Police* (1991), 73 Ohio App.3d 68, 75; *Goodyear Tire & Rubber Co. v. Local Union No. 200* (1975), 42 Ohio St.2d 516, at paragraph two of the syllabus.

{¶15} R.C. 2711.10 articulates the limited situations under which an arbitration award may be vacated. That statutory section provides as follows:

{¶16} "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:

{¶17} The award was procured by corruption, fraud, or undue means.

{¶18} Evident partiality or corruption on the part of the arbitrators, or any of them.

{¶19} 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.

{¶20} 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."

{¶21} R.C. 2711.11 codifies the narrow conditions in which an arbitration award may be judicially modified. That statutory section provides as follows:

{¶22} "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:

{¶23} 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;

{¶24} 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;

{¶25} The award is imperfect in matter of form not affecting the merits of the controversy."

{¶26} While R.C. 2711.10 and R.C. 2711.11 pertain to the review of an arbitration award by the court of common pleas, the court of appeals undertakes the same limited review as the trial court. See, *N. Ohio Sewer Contrs., Inc. v. Bradley Dev. Co., Inc.,* 159 Ohio App.3d 794, 2005-Ohio-1014, at ¶17; *Cleveland v. Fraternal Order of Police, Lodge No. 8* (1991), 76 Ohio App.3d 755, 758.

{¶27} "R.C. 2711.10 limits judicial review of arbitration awards to determining whether any of these statutory grounds occurred during the arbitration proceedings." *Samber v. Mullinax Ford East,* 173 Ohio App.3d 585, 2007-Ohio-5778, at ¶43, citing *Oil, Chemical & Atomic Workers Internatl. Union, AFL-CIO, Local 7-629 v. RMI Co.* (1987), 41 Ohio App.3d 16, 20.

{¶28} Marous sets forth six sub-issues in support of its first assignment of error, arguing that the arbitration award should be vacated pursuant to R.C. 2711.10, which limits the review of an arbitration award to claims of fraud, corruption, misconduct, an imperfect award, or that the arbitrator exceeded his authority. All of Marous's claims pertain to the last reason under R.C. 2711.10, that the arbitration panel exceeded their authority.

{¶29} "[A]n arbitrator exceeds his or her authority only when the award fails to draw its essence from the collective bargaining agreement. *** An award draws its essence from the agreement when it is not arbitrary, capricious, or unlawful and there is a rational nexus between the award and the agreement." *Madison Local School Dist.,* 2009-Ohio-1315, at ¶13 (citations omitted). "[A]fter it determines that an arbitrator's award 'draws its essence' from the collective bargaining agreement and is not unlawful, arbitrary or capricious, a reviewing court's inquiry for purposes of vacating an arbitrator's award is at its end." Id. at ¶9 (citation omitted). So long as the arbitrator is

arguably construing the contract, the trial court is obliged to affirm its decision. *Summit Cty. Bd. of Mental Retardation & Developmental Disabilities v. Am. Fedn. of State, Cty. & Mun. Emp.* (1988), 39 Ohio App.3d 175, 176 (citation omitted). This is so because it is the arbitrator's determination for which the parties bargained. *Goodyear*, 42 Ohio St.2d at 520.

{¶30} "This court has further held that in reviewing a common pleas court's confirmation of a binding arbitration award, an appellate court cannot consider the substantive merits of the award unless the record shows that a material mistake or extensive impropriety occurred during the arbitration proceedings." *Samber*, 2007-Ohio-5778, at ¶44, citing *Hacienda Mexican Restaurant of Ohio v. Zadd*, 11th Dist. No. 92-L-108, 1993 Ohio App. LEXIS 5923, at *4.

{¶31} The parties' agreement provided that, should the parties "be unable to resolve said dispute(s), at the sole discretion of [Marous], [the dispute] shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ***. The organization providing arbitration services *** shall have no jurisdiction, power, or authority to decide or award punitive damages. The award(s) rendered by the arbitrators in accordance with this provision shall be final and judgment may be entered upon it in accordance with applicable law."

{¶32} Marous first maintains that the arbitration panel exceeded their power, in violation of R.C. 2711.10(D), because the arbitration panel "was without subject matter jurisdiction to enter the Award." Marous claims that McGarry's arbitration claim "asserts the exact Claims that [McGarry] asserted in its earlier Pennsylvania Mechanics' Lien Action." Furthermore, "[g]iven that [McGarry] dismissed the Claims with prejudice in the Pennsylvania Mechanics' Lien Action by marking them as 'satisfied' pursuant to 49 P.S.

§1704, it may not subsequently reassert those same Claims through the Arbitration Claim as a matter of law."

{¶33} As mentioned previously, the Subcontract Agreement provided for a resolution of dispute through arbitration, stating that any "claim, dispute or other matter in question" arising out of the contract shall be decided by arbitration before the AAA at Marous' option. Moreover, R.C. 2711.01 et seq. provides for parties to contract to resolve disputes via binding arbitration. Thus, the panel had a right to resolve this dispute.

{¶34} Furthermore, as mentioned above, McGarry filed a mechanics' lien claim against Progress Street in the Allegheny County Court of Common Pleas in Pennsylvania, for the sum of $1,225,929 for labor performed and materials furnished to date for the improvement of the property. McGarry sought to obtain a lien for Marous' failure to make timely payment. Marous was not a party to that action. According to Pennsylvania law, a lien may be discharged "whenever a sum equal to the amount of the claim shall have been deposited with the court in said proceedings for application to the payment of the amount finally determined to be due" or "[i]n lieu of the deposit of any such sum or sums, approved security may be entered in such proceedings in double the amount of the required deposit, or in such lesser amount as the court shall approve, which, however, shall in no event be less than the full amount of such required deposit; and the entry of such security shall entitle the owner to have such liens discharged to the same effect as though the required sums had been deposited in court as aforesaid." 49 P.S. 1510(a) and (d).

{¶35} Additionally, Pennsylvania law mandates a "duty of a claimant upon payment, satisfaction or other discharge of the claim *** to enter satisfaction thereof

upon the record upon payment of the costs ***. Upon failure to do so within thirty (30) days after a written request to satisfy, the court *** may order the claim *** satisfied[,] and the claimant shall be subject to a penalty in favor of the party aggrieved *** not exceeding the amount of the claim." 49 P.S. 1704.

{¶36} The trial court concluded that "McGarry's action to comply with Pennsylvania" law could not constitute "a dismissal of its claim with prejudice." Moreover, the court found that "Progress Street Partners, Ltd. merely substituted collateral in place of a lien to avoid the consequences of a lien while the dispute was being litigated." The Praecipe did not state that the claims in the mechanics' lien were "dismissed with prejudice." The court concluded that there was no evidence to suggest McGarry's claim was decided on the merits or dismissed with prejudice. We agree.

{¶37} In addition, "[t]he doctrine of res judicata provides that '[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.'" *Perrine v. Patterson*, 9th Dist. No. 22993, 2006-Ohio-2559, at ¶22, quoting *Grava v. Parkman Twp*., 73 Ohio St.3d 379, 1995-Ohio-331, at syllabus. Further, application of res judicata requires "that the identical cause of action shall have been previously adjudicated in a proceeding *with the same parties* or their privities in the first action, and the party against whom the doctrine is sought to be imposed shall have had a full and fair opportunity to litigate the claim." *Business Data Systems, Inc. v. Figetakis*, 9th Dist. No. 22783, 2006-Ohio-1036, at ¶11(emphasis added), quoting *Brown v. Vaniman*, 2nd Dist. No. 17503, 1999 Ohio App. LEXIS 3821, at *9. Consequently, as Marous was not a party to the lien in Pennsylvania, the doctrine of res

judicata is not applicable either. Moreover, there was no adjudication of the merits on any issue by the trial court in Pennsylvania.

{¶38} Accordingly, the arbitration panel did not exceed their powers in proceeding with the arbitration and award.

{¶39} Marous' second, third, and fourth issues are interrelated and therefore will be discussed together.

{¶40} Marous argues that the arbitration panel "arbitrarily, capriciously, and irrationally refused to adjust the credit for value of the 530 hours of unperformed 'touch-up' work so that it was identical to the value that the Arbitration Panel asserted for the identical 'touch-up' work that [McGarry] claimed as extra work." Moreover, Marous asserts that the panel determined some touch-up work to have a value of $66.55 per hour, while other touch-up work, asserted by McGarry as extra work, was valued at $44.93 per hour. Marous claims that the arbitration panel exceeded its authority by imposing terms that "went beyond the terms of the agreement and not part of the bargain." Furthermore, Marous asserts that the award granted interest on "sums determined to be never due and owing." Marous argues that the Prompt Pay Act interest, pursuant to R.C. 4113.61, awarded to McGarry is incorrect because the subcontract balance due needed to be adjusted prior to making the determination of interest due. Additionally, Marous contends that the award of $53,700 "to collect an unpaid Subcontract balance" was "at the very least, arbitrary, capricious, unlawful and irrational." Marous argues that the award of attorneys' fees under the Prompt Pay Act is incorrect because the subcontract balance was incorrect.

{¶41} McGarry maintains that Marous' arguments are "improper attempts to relitigate the Award" and "[w]ithout a transcript, the arbitration proceedings and the

award must be presumed correct." Furthermore, McGarry maintains that this "same argument was considered and rejected by the arbitrators when issuing the Modified Award. Simply because Marous lost on an issue does not make the Modified Award arbitrary and capricious."

{¶42} As Marous argues, a transcript is not *required* in a proceeding to vacate an award. See *Cincinnati v. Queen City Lodge No. 69, Fraternal Order of Police*, 164 Ohio App.3d 408, 2005-Ohio-6225, at ¶19. However, "[a]bsent a complete transcript, both the trial court and this Court must presume regularity in both the arbitrational proceedings and the decision itself." *Advanced Tech. Incubator, Inc. v. Manning*, 11th Dist. No. 2001-P-0154, 2003-Ohio-2537, at ¶19.

{¶43} "This court has *** held that arbitration awards are presumed valid, and an appellate court may not substitute its judgment for that of an arbitrator." Id. at ¶13 (citation omitted). Moreover, "the request for judicial intervention should be resisted even where the arbitrator has ostensibly made "'serious,' 'improvident' or 'silly' errors in resolving the merits of the dispute." *Madison Local School Dist.,* 2009-Ohio-1315, at ¶12 (citations omitted). "'As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority' a court should not overturn the decision, even if 'convinced th[at] he committed serious error.'" *Painesville City Local Schools Bd. of Edn. v. Ohio Assn. of Pub. School Emps*., 11th Dist. No. 2005-L-100, 2006-Ohio-3645, at ¶37 (citations omitted).

{¶44} R.C. 4113.61 essentially requires a contractor to timely pay its subcontractor undisputed amounts under a contract and sets forth penalties for noncompliance. *Masiongale Elec.-Mechanical, Inc. v. Constr. One, Inc.,* 102 Ohio St.3d 1, 2004-Ohio-1748, at ¶10. Failure to comply with the provisions of R.C. 4113.61,

entitles the subcontractor to prejudgment interest. The statute permits a contractor to withhold "amounts that may be necessary to resolve *** claims involving the work or labor performed or material furnished by the subcontractor." *Masiongale*, 102 Ohio St.3d 1, at ¶16; R.C. 4113.61(A)(1). Courts have interpreted that language to mean that prejudgment interest is not warranted under R.C. 4113.61 where the contractor, in good faith, withholds amounts when there is a disputed claim. See *Consortium Communications v. Cleveland Telecommunications, Inc*., 10th Dist. No. 97APG08-1090, 1998 Ohio App. LEXIS 524, at *7. Thus, if the contractor does not assert a good faith basis to withhold the money, then the subcontractor is entitled to prejudgment interest. Moreover, where a "contractor has not complied with the prompt-payment statute, the court must award the subcontractor the statutorily prescribed interest. *** In addition, the prevailing party is entitled to recover reasonable attorney fees, unless such an award would be inequitable, together with court costs." *Masiongale,* 102 Ohio St.3d at 4. Furthermore, R.C. 4113.61(B)(3) states that "[t]he court shall not award attorney fees under *** this section if the court determines, following a hearing on the payment of attorney fees, that the payment of attorney fees to the prevailing party would be inequitable."

{¶45} A "prevailing party" is one in whose favor the decision or verdict is rendered and judgment entered. See *Collins v. York*, 1st Dist. No. C-000125, 2000 Ohio App. LEXIS 6043, at *5, quoting *Hagemeyer v. Sadowski* (1993), 86 Ohio App.3d 563, 566; *Keal v. Day*, 164 Ohio App.3d 21, 2005-Ohio-5551, at ¶8 (for purposes of a contract providing for reasonable attorney fees for the prevailing party in any dispute over the contract, the term "prevailing party" means "one in whose favor the decision or verdict is rendered and judgment entered").

{¶46} Additionally, a decision is unreasonable where there is no sound reasoning process that would support that decision. *AAAA Ents., Inc. v. River Place Community Redevelopment Corp*. (1990), 50 Ohio St.3d 157, 161. Although Marous maintains that the award of $53,700 in attorney fees was unreasonable, there is nothing for this court to review to determine if the panel possessed reasoning to support its decision. Furthermore, Marous argues that the panel should "have applied the 18% [prompt pay] interest" to the amount of $5,038.02, since this was the "only amount due from appellant to appellee." Marous also asserts that it is "incomprehensive how the Award simultaneously concludes that [Marous] did not withhold the Subcontract balance in good faith to resolve outstanding claims." However, Marous' assertions require a review of evidence beyond the scope of the record submitted to this court.

{¶47} Consequently, since we must presume regularity in both the decision and the proceedings, Marous' claims are insufficient to vacate the award.

{¶48} Next, Marous claims that the award of prejudgment interest contained in the modified award is incorrect. Marous claims that the panel should have used simple, not compound, interest to compute the interest award. Further, "[t]he granting of compound interest goes beyond the authority granted [to] the arbitrators and Ohio law and therefore constitutes arbitrary, capricious, and irrational conduct." Marous cites to case law holding that compound interest in a contract case could not be compounded absent an agreement or statutory provision permitting the compounding. Additionally, in his final issue under the first assignment of error, Marous contends that the arbitration panel exceeded its authority by "inexplicably changing the Initial Award's accrual date of post-judgment interest *** to an earlier, arbitrary, and arguably punitive, date of July 2, 2008."

{¶49} This court has previously stated that it is "abundantly clear that an appellate court will not reverse the affirmance of an arbitration award on the basis that the award was against the manifest weight of the evidence, *or that the arbitrator's legal analysis was incorrect*." *Manning*, 2003-Ohio-2537, at ¶15 (emphasis added). Moreover, "the arbitrator is the final judge of both law and fact." *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932, at ¶18 (citation omitted).

{¶50} Additionally, "[m]ere error in the interpretation or application of the law will not suffice [to vacate an arbitration award]." *Automated Tracking Sys., Inc. v. Great Am. Ins. Co.* (1998), 130 Ohio App.3d 238, 244. "[E]ven if this court were to conclude that the legal analysis applied by the arbitrators was incorrect, the judgment of the court of common pleas would still be affirmed because this is not a basis for vacating the award under the statute." *Samber*, 2007-Ohio-5778, at ¶47 (citation omitted) (emphasis omitted).

{¶51} "Moreover, it is the law in Ohio that '[w]hen disputing parties agree to submit their controversy to binding arbitration, they agree to accept the result, even if it is legally or factually wrong. *** If the parties could challenge an arbitration decision on the ground that the arbitrators erroneously decided the legal or factual issues, no arbitration would be binding.'" *Miller v. Mgt. Recruiters Internatl., Inc*., 180 Ohio App.3d 645, 2009-Ohio-236, at ¶27 (citation omitted).

{¶52} Accordingly, these claims are insufficient to vacate the award.

{¶53} Marous' first assignment of error is without merit.

{¶54} In the second assignment of error, Marous argues that in the event this court does not vacate the award, this court should "at the very least, modify the evident, gross, and material miscalculation errors in the Award." Specifically, Marous contends

that “this Court must modify or correct the Award so that the same value is applied to the same ‘touch-up’ work regardless of to whom the Award is directed. *** Second, the Court must modify or correct the Arbitration Panel’s award of 8% prejudgment interest under the Prompt Payment Act because the Award somehow failed to deduct the awarded charge orders totaling $112,235.00 from the subcontract balance. *** Third, the Court must modify or correct the Arbitration Panel’s award under the Prompt Payment Act of $53,700.00 in attorney fees on an unpaid Subcontract balance of only $5,038.02. *** Finally, the court must correct the Arbitration Panel’s unilateral change of the accrual date for post-judgment interest.”

{¶55} “While R.C. 2711.11 allows appeals from arbitration awards, judicial review of an arbitrator's decision is still limited. A trial court may not evaluate the actual merits of an award and must limit its review to determining whether the appealing party has established that the award is defective within the confines of R.C. 2711.11.” Id. at ¶21.

{¶56} As stated above, R.C. 2711.11 codifies the narrow conditions in which an arbitration award may be judicially modified. That statutory section provides for modification if:

{¶57} “(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;

{¶58} (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;

{¶59} (C) The award is imperfect in matter of form not affecting the merits of the controversy.”

{¶60} Ohio courts have held in cases where "it may not be clear from a review of the arbitrator's award that the calculated award is correct in its arithmetic, [if] it is not unambiguously incorrect *** it should not be modified by a reviewing *** court." *Woodbridge Homes, Inc. v. Lombardy*, 8th Dist. Nos. 88087 and 88138, 2007-Ohio-1290, at ¶20. Moreover, "[t]he fact that the arbitrator's award does not clearly connect the dots in articulating its findings is not fatal to the validity of the award. Ohio law does not require an arbitrator to issue findings of fact or conclusions of law at all. The validity of an arbitration award is unaffected by the lack of written findings of fact and conclusions of law." Id.

{¶61} Furthermore, as mentioned above, "[r]egularity of the arbitration proceedings and the award must be presumed by a court when a complete record of the evidence and arguments presented at the arbitration hearing is not provided to the court." *Samber*, 2007-Ohio-5778, at ¶57 (citation omitted). "Therefore, we must presume the regularity of the proceedings before the arbitration panel. In so doing we presume that evidence was presented which would support the arbitrators' conclusion." Id. at ¶58.

{¶62} Since any error the arbitration panel may have made in arriving at the value for "touch-ups", prejudgment interest, attorney fees, and the accrual date are not evident from the face of the award and cannot be corrected without engaging in factfinding, Marous' requested modification does not fall within the scope of R.C. 2711.11. See *Miller*, 180 Ohio App.3d 645, at ¶25 ("[b]ecause the trial court did not have a transcript, it had no way of knowing how the arbitrator calculated the award, or what figures were presented to the arbitrator as evidence of damages; therefore, we cannot conclude the trial court erred by failing to conclude the arbitrator incorrectly

calculated the award") and ¶26 ("[a]ny error the arbitrator may have made in deciding these issues could not be corrected without the trial court engaging in factfinding; thus, these requested modifications do not fall within the parameters of R.C. 2711.11")

{¶63} Marous' second assignment of error is without merit.

{¶64} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, denying Marous' Application to Vacate, or in the alternative, to Modify the Arbitration Award and granting McGarry's Application to Confirm the Arbitration Award, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J., concurs,

TIMOTHY P. CANNON, J., concurs in judgment only in part and dissents in part, with Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring in judgment only in part, and dissenting in part.

{¶65} I concur in most of the majority's ultimate judgment, and dissent in one aspect. For the reasons set forth herein, I believe the trial court was correct in confirming the arbitration award with the exception of the award under the prompt payment statute.

{¶66} The standard of review to be used when Ohio courts review arbitration cases needs to be clarified. The case law cited on this issue by numerous courts has taken on a life of its own, and I believe it is being used to improperly limit judicial review in many arbitration cases. For example, the Eighth Appellate District has held that arbitration decisions should not be vacated even if they are "'legally or factually wrong.'"

Miller v. Mgt. Recruiters Internatl., Inc., 180 Ohio App.3d 645, 2009-Ohio-236, at ¶27. (Citation omitted.) As the trial court pointed out in the instant case, this court has previously held that a reviewing court should "'not pass on the substantive merits of the arbitration award absent evidence of material mistake or extensive impropriety.'" *Advanced Tech. Incubator, Inc. v. Manning*, 11th Dist. No. 2001-P-0154, 2003-Ohio-2537, at ¶14. (Citation omitted.) The trial court noted that "material mistake" and "extensive impropriety" have not been defined by the courts of the state. They should be.

{¶67} I completely agree that courts should defer to the factual findings of an arbitration panel. In addition, I think it is clear that interpretation of contractual provisions should remain within the sole province of the arbitration panel. However, I believe that courts shirk their statutory and constitutional responsibilities when they approve awards that are clearly and convincingly contrary to law. How could an error be more "material" or improper than if it does not comport to established law? When a party agrees to a binding arbitration provision in a contract, does that party agree to allow the arbitration panel the discretion to follow whatever law they choose? Of course not. I believe it should be clarified that if an arbitration decision is clearly and convincingly contrary to law, the arbitration panel, by definition, "exceeded their powers." R.C. 2711.10(D).

{¶68} Many courts have relied on a bit of dicta by the Supreme Court of Ohio in *Goodyear v. Local Union No. 200* (1975), 42 Ohio St.2d 516. The quote typically cited is that "courts have almost uniformly refused to vacate an arbitrator's award because of an error of law or fact." Id. at 522. However, this limited quote belies the true nature of

the court's analysis. The court prefaced that remark by stating, "[a]t common law, the courts have almost uniformly held ***." Id. It went on to say:

{¶69} "In other cases, courts have vacated an arbitrator's decision, where the central fact underlying an arbitrator's decision is concededly erroneous (*Electronics Corporation of America v. I. U. E., Local 272* (C.A. 1, 1974), 492 F.2d 155), or suggested that '*** if the reasoning (of an arbitrator) is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling, then the court can strike down the award ***.' *Safeway Stores v. American Bakery & Confectionary Workers, Local 111* (C.A. 5, 1968), 390 F.2d 79, 82. In the instant case, we need not consider whether such gross errors might be said to exceed the arbitrator's powers, within the meaning of R.C. 2711.10." *Goodyear v. Local Union No. 200*, 42 Ohio St.2d at 523.

{¶70} The Supreme Court of Ohio then went on to state the basis for its decision:

{¶71} "It is far from clear in the instant case that the arbitrator made any error at all, or that his decision would have in any way differed absent the claimed error.

{¶72} "The parties to the Pension Agreement specifically agreed that it could be modified as necessitated by statute or regulation. The arbitrator's decision shows that this is what he did. 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.' *Safeway Stores v. American Bakery & Confectionary Workers, supra*, at 84." *Goodyear v. Local Union No. 200*, 42 Ohio St.2d at 523.

{¶73} There are two important things stated in this analysis. First, the review depends in large measure on what the parties specifically agreed to in the applicable arbitration clause. Second, it is clear that the Supreme Court of Ohio concluded there are circumstances when a court could, and ostensibly *should*, strike down an arbitration award when it is clear that "'no judge, or group of judges, could ever have conceivably made such a ruling ***.'" Id. at 523. (Citation omitted.)

{¶74} In the instant case, the vast majority of findings and the award of the arbitrators were based on their interpretation of the evidence and the intention of the parties. As the majority concludes, they should neither be reviewed nor disturbed. However, the arbitration panel invoked the Ohio prompt payment statute. I believe it is clear, even in view of the limited record before us, that in doing so, the arbitrators acted contrary to law and therefore "exceeded their powers." R.C. 2711.10(D).

{¶75} Initially, I note, as did the Supreme Court of Ohio in *Goodyear*, supra, that we must first look to the arbitration provision of the contract. Page 22 of the Subcontract Agreement, Article 32.1.3, clearly states that no arbitrator shall have "jurisdiction, power or authority to decide or award punitive damages." It further provides that the arbitration shall be governed by Ohio law.

{¶76} Ohio's prompt payment statute is clearly a punitive statute. It severely penalizes a contractor for not promptly paying a subcontractor an undisputed invoice when a request for payment is submitted. The legislature has provided contractors with a defense to this penalty, as a contractor "may withhold amounts that may be necessary to resolve disputed liens or claims involving the work or labor performed or material furnished by the subcontractor or material supplier." R.C. 4113.61(A)(1).

{¶77} The record reflects that after the dispute between the parties remained unresolved, appellee filed a lien against appellant for an amount in excess of $1,500,000. Subsequently, after filing the demand for arbitration and releasing the lien, appellee restated this claim in its arbitration Statement of Claim. Appellant's position was that appellee's claim was overstated and, in addition, that appellant was entitled to set-offs. While the ultimate award amount varied from the position taken by both parties, appellant's contentions were both determined to have merit.

{¶78} The record reflects that the ultimate award granted to appellee, exclusive of the penal provisions of the prompt payment statute, was approximately $738,284, or roughly 45% of appellee's claim. As is clear from the arbitrators' award, the dispute between these two parties was complex. Both parties had claims and issues that had merit. Both parties had claims and issues that had no merit. Invocation of the prompt payment statute in this circumstance is inappropriate. Requiring a contractor to pay amounts that are legitimately in dispute to avoid these penalties has serious implications in the construction industry. It is both contrary to law and, because of the punitive nature of the statute, clearly contrary to the agreement of the parties. The express language of the arbitration clause states that the arbitrators had "no jurisdiction" to enter such an award. They clearly "exceeded their powers" in this respect.

{¶79} Therefore, I would affirm the award with the exception of the $53,700 of attorney fees and the $45,492 of "interest on interest" awarded under the prompt payment statute.