

Case No. 2015-0494

IN THE SUPREME COURT OF OHIO

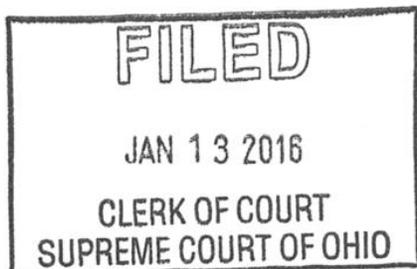
Georgia B. Cox,	:	
<i>Plaintiff-Appellee</i>	:	On Appeal from the
	:	Montgomery County Court of Appeals,
v.	:	Second Appellate District, Ohio
	:	
Dayton Public Schools Board of Education,	:	Court of Appeals
<i>Defendant-Appellant</i>	:	Case No: 26382

MERIT BRIEF OF PLAINTIFF-APPELLEE

GEORGIA B. COX

Georgia B. Cox  
 4191 Mapleleaf Drive  
 Dayton, Ohio 45416  
*Plaintiff-Appellee*  
*Pro se*

Beverly A. Meyer (0063807) – *Counsel of Record*  
 BRICKER & ECKLER LLP  
 118 West First Street  
 Talbott Tower – Suite 850  
 Dayton, Ohio 45402  
 Tel: (937)224.5300/FaxⓉ(937)224.5301  
 e-mail: [bmeyer@bricker.com](mailto:bmeyer@bricker.com)  
 Counsel for Defendant-Appellant  
 Dayton Public Schools Board of Education



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## APPELLANT'S ASSIGNMENT OF ERRORS

**Proposition of Law No. 1:** Rights a public employee may otherwise have under the law are superseded by the obligation, rights, and remedies contained in R.C. Chapter 4117.

**Proposition of Law No. 2:** An employee does not have standing to petition a court to vacate or modify an arbitration award pursuant to R.C. Chapter 2711 unless the collective bargaining agreement under which the award was issued expressly gives the employee an independent right to submit disputes to arbitration.

**Proposition of Law No. 3:** R.C. 3319.16 does not confer standing on a teacher to petition a court to vacate or modify an arbitration award issued under the collective bargaining agreement negotiated by her bargaining representative and her employer unless the agreement expressly makes the teacher a party to the arbitration.

**Proposition of Law No. 4:** The question of whether an employee clearly and unmistakably waived individual statutory rights is not a proper consideration in determining whether an arbitration award issued under a collective bargaining agreement should be vacated or modified pursuant to R.C. chapter 2711,

**Proposition of Law No. 5:** A court reviewing a motion to vacate or modify an arbitration award pursuant to R.C. Chapter 2711 must base its decision solely upon the record of the arbitration proceeding.

**Proposition of Law No. 6:** A petitioner's compliance with each provision of Civ.R. 5 is necessary to vest a court with jurisdiction to hear a motion to vacate or modify an arbitration award pursuant to R.C. 2711.

**Proposition of Law No. 7:** Notice of a petition seeking the vacation or modification of an arbitration award pursuant to R.C. Chapter 2711 must be received by the adverse party or its attorney within the statutory three month period contained in R.C. 2711.13

**Proposition of Law No. 8:** The three month period set forth in R.C. 2711.13 commences upon issuance of the arbitration award.

## RESPONSE TO APPELLANT'S ASSIGNMENT OF ERRORS

Defendant-Appellant submitted a Memorandum in Support of Jurisdiction accompanying a Notice of Appeal postulating, the Court's acceptance of the matter for review on the basis of public or great general interest, affording an opportunity for the Court to address and settle Ohio

law in two important areas: 1) the conflict between collective-bargaining rights and individual statutory rights in the arbitration context; and 2) the procedures that must be followed in asking a court to vacate or modify an arbitration award under R.C. Chapter 2711. Defendant-Appellant submitted, no less than eight propositions of law supposedly based on their interpretation and application of the aforementioned law. The Court accepted the matter for review based on one of the presented proposals, that being Defendant-Appellant's Proposition No. 7.

### **STATEMENT OF THE CASE'S CRITICAL FACTS**

Very shortly after the allegation by another Intervention Specialist that Plaintiff-Appellee ("Ms. Cox") was to have assaulted a student supposedly sometime between 8:55 and 9:15 a.m. on October 10, 2012, Ms. Cox was summoned to the Principal's Office; informed of the allegation; was explicitly told she was not to speak on the matter then, but would have an opportunity to do so; was placed on paid administrative leave; and was then soon thereafter escorted off the premises by the then, Director of Safety and Security for Dayton City [Public] School (District) ("DPS"), sometime before 11:00 a.m. After days of not hearing anything from her employer and/or the union Ms. Cox lodged complaints to the Ohio Education Association ("OEA"). On October 16, 2012 the Vandalia Municipal Court initiated criminal charges under R.C. Chapter 2903 specifications against Ms. Cox, a state certified teacher employed pursuant to R.C. Chapter 3319 specifications. On October 25, 2012, Ms. Cox received a call informing that a Hearing scheduled for October 30th regarding the alleged incident had been cancelled. Later that day an October 16, 2012 letter was received regarding a "Notice of Charges and Specifications." It also informed of the October 30th hearing before a Hearing Office that had been cancelled. On October 25, 2012, the Ohio Department of Education Office of Professional Conduct sent Ms.

Cox notice of an investigation and discipline pursuant to R.C. 3319.31 and 3319.311, based on allegations from DPS of Ms. Cox engaging “in conduct unbecoming to the teaching profession.”

The next correspondence dated November 6, 2012 told Ms. Cox her paid leave status was ending on November 9, 2012. Cox complained about repeated disciplines without due process. The union pursued only [a] Grievance 12-15, over the untimeliness of the “Notice of Charges and Specifications.” In response on November 12, 2012 DPS rescinded the notice noting the charges “... were not issued pursuant to the AGREEMENT. The District will abide by the AGREEMENT in the future. ” Yet, the October 16<sup>th</sup> “Notice of Charges ...” were reissued for a new hearing at “a yet to be determined date and pending the criminal charges arising out of the same.”

Hearings were reset for December 19, 2012 and January 9, 2013, contrary to DPS’ November 12th rescission letter. Pursuant to DEA’s stance, to not allow Cox to speak during any District disciplinary hearing while the disposition of the criminal case was still pending, Ohio Education Association (“OEA”) attorney, Susan Jansen requested continuances; and without the Union’s support of Cox’s presence on DPS property Cox attended neither hearing. Nonetheless, the hearing was conducted on January 9th in Ms. Cox’s absence. On January 10th the hearing officer recommended Ms. Cox be terminated from her employment effective immediately. A January 15th letter from H.R. to Ms. Cox stated “this letter serves as your notice of termination effective immediately.” After a January 16th e-mail from Ms. Jansen, Ms. Cox was eventually served with a Notice of Intent to Terminate. A subsequent Grievance 12-16 contesting the failure to continue the hearing was soon thereafter filed.

In mid-January Cox contacted the Board Office in an attempt to receive due process; she received no feedback. On January 29 2013 it was publicized that Ms. Cox had been indicted for

assault pursuant to R.C. Chapter 2903 specifications. On February 14, 2013 Ms. Cox was allowed to attend a meeting regarding two grievances 12-16 and 12-17 regarding her salary that had been withheld, even while the District was using resources she had purchased and provided for students she had expected to be working with. The grievances were denied, and the DEA submitted the matters to arbitration. In early March a request from Ms. Cox to attend a union meeting was denied, but on March 28th and 29th Cox was finally granted permission to retrieve her personal and professional resources from her former classroom that had continued to be used in her absence. In an April letter Ms. Cox addressed a false claim from the Principal and inquired about a number of items missing from those she retrieved after months of being allowed to get her belongings. The District never even acknowledged her inquiry.

In response to a May 10th request for “public records,” from the Sheriff’s Office, School Board attorney, Beverly Meyer acknowledged the District was “responding to it with applicable, redacted documents.” The 3-day trial was witnessed by the School Board attorney, DEA and OEA representatives, during which Ms. Meyer, while collaborating with the Assistant Prosecutor forwarded on to the Assistant Prosecutor a copy of the Master Contract Ms. Cox was serving under, and the *Licensure Code of Professional Conduct for Ohio Educators*. The trial based on a video that does not show Ms. Cox hit the student, was based on unsubstantiated circumstantial evidence, and resulted in a conviction which Ms. Cox appealed. The appeal *State v. Cox*, 2014-Ohio-2201, 12N.E.3d 446 (2d Dist.), affirmed that Ms. Cox a teacher pursuant to R.C 3319.09 was also [concurrently] a “caretaker” pursuant to R.C. 2903.10(B) who had intended to cause physical harm in the form of pain to a functionally impaired person pursuant to R.C. 2903.10(A).

Later, Ms. Cox learn arbitration was scheduled for mid-September, to be presided over by the School Board attorney. Testimony presented included that of a number of teachers, some

with multiple cause for discipline, and some instances resulting in harm to students, with each teacher facing some form of progressive discipline. At some point during Ms. Cox's testimony School Board attorney while badgering and berating Ms. Cox stated that the conviction from the criminal trial served as collateral for a "just cause" determination in the arbitration .... The arbitrator called for a break after which he walked outside the Conference room with the School Board attorney and OEA attorney.

After months of silence, Cox who had primarily received procedural communications from the District and DEA via U.S. Mail or "hand-delivered" documents received notification of what was an e-mail she could not readily access from OEA attorney, who has submitted both a memorandum and a brief of amicus curiae to this Court, in this very matter. Believing a formal copy from either the Board or DEA was forthcoming, Cox waited until days later to seek assistance to access what she found to be the informal looking document, after calls to the union office were not returned. It is undisputed that to date, Ms. Cox has not received any document noted to be the arbitrator's decision from either the DEA or DPS; nor did the informal document retrieved via e-mail inform that the decision was final and binding.

#### **ARGUMENT REGARDING APPELLANT'S PROPOSITION OF LAW NO. VII**

**Proposition of Law No. 7: Notice of a petition seeking the vacation or modification of an arbitration award pursuant to R.C. Chapter 2711 must be received by the adverse party or its attorney within the statutory three month period contained in R.C. 2711.13.**

Defendant-Appellant, Dayton City School District Board of Education ("DPS BOE"), through counsel presented to the court their opinions that Plaintiff-Appellee: 1) is not a party to the arbitration hearing from which the controversy at bar evolved; and 2) did not serve timely notice of the motion to vacate, modify, or correct the arbitrator's award pursuant to law, thereby divesting the Court of Common Pleas of jurisdiction to act pursuant to the tenets of the law in

review. The Court of Common Pleas, in an August 12, 2014 decision ruled Ms. Cox lacked standing to pursue relief from the arbiter's decision, claimed it lacked subject matter jurisdiction to rule on the matter (p.7), and thereby lacked authority to vacate, modify, or correct the arbitrator's award and dismissed the matter under Civ.R. 12(B)(1). In the February 20, 2015 ruling, the Court of Appeals (at ¶¶ 11 and 12) noted the Supreme Court of Ohio, subsequent to the trial court's decision "has clarified that a motion to dismiss based on standing is not a jurisdictional issue, and should therefore be raised under Civ. R. 12(B)(6)" (citing *U.S. Bank Natl. Assn. v. Perdeau*, 6th Dist. Lucas No. L-13-1226, 2014-Ohio-5818, ¶ 23); and that "A complaint may be dismissed pursuant to Civ.R. 12(B)(6) as failing to comply with the applicable statute of limitations when the complaint shows conclusively on its face that the action is time-barred." (Citing *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11). Thereby, making and requiring both criteria for the Board's motion to dismiss founded on Civ. R. 12(B)(6), failure to state a claim upon which relief can be granted.

In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted under Civ. R. 12(B)(6), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling her to recovery. *Ohio Bureau of Worker's Comp. v. McKinley*, 130 Ohio St, 3d 156, 2011-Ohio-4432, 956 N.E.2d 814 ¶ 12 (citing *LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St. 3d 323, 2007-Ohio-3608, 872 N.E.2d 254 ¶ 14; *O'Brien v. Univ. Cmty. Tenants Union, Inc.*, 42 Ohio St. 2d 242, 245, 327 N.E.2d 753 (1975)); see also *Sacksteder v. Senney*, 2nd Dist. Montgomery No. 24993, 2012-Ohio-4452, ¶¶ 35-46 (holding that the traditional standard of review applies to motions to dismiss under Ohio law despite recent cases suggesting application of a "plausibility test" in federal cases). The standard for dismissal under Civ. R.12(B)(6) is consistent with Civ.R.8(A), which requires that a complaint

“contain\*\*\* a short and plain statement of the claim showing that the [plaintiff] is entitled to relief.” Ohio “is a notice-pleading state.” “Ohio law does not ordinarily require a plaintiff to plead operative facts with particularity” *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St. 3d 416, 423-424, 2002-Ohio-2480, 768 N.E.2d 1136. Therefore, to survive a motion to dismiss, in Ohio a plaintiff need not provide “every fact he or she intend to prove; such facts may not be available until after discovery” has been exchanged. *State ex rel. Hanson v. Guernsey County Bd. of Comm’rs.*, 65 Ohio St. 3d 549, 1992-Ohio-73, 605 N.E.2d 378.

Defendant-Appellant initially submitted to this Court eight proposals. The Supreme Court, supposedly rejected the first opinion, and agreed to review the matter in light of the second based on what had been presented from the Defendant-Appellant’s perspective. The appeal is rooted on the argument that a Notice of a Petition seeking the vacation or modification of an arbitration award pursuant to R.C. Chapter 2711 must be received by the adverse party or its attorney within the statutory three month period contained in R.C. 2711.13 and holds Ms. Cox failed to comply with the applicable statute of limitation imposed by R.C. 2711.13, making the action time-barred, and therefore, was dismissible pursuant to Civ. R. 12(B)(6). However, as already noted pursuant to *Doe v. Archdiocese of Cincinnati*, 849 N.E.2d 268, ¶ 11, and criteria justifying a motion to dismiss, the Court of Appeals, upon de novo review ruled the matter ought not be dismissed, but remanded back to the trial court.

The clutch of Defendant-Appellant’s argument, with which case law from a number of other appellate district are cited are that 1) the notice was not served pursuant to Civ.R. 5 terms, as they hold it should have been, and 2) the notice was not served upon the adverse party in a timely manner as they appreciate R.C. 2711.13 mandates.

R.C. 2711.13 holds that:

After an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code.

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceeding of the adverse party to enforce the award.

In arguing their case Defendant-Appellant cited R.C. 2711.05, which “reinforces the distinct motion practice requirements imposed on a party seeking to vacate or modify an arbitration award... made and heard in the manner provided by law for the making and hearing of motions, except as otherwise expressly provided in such sections.” They referenced *Corrado v. Lowe*, 11th Dist. Geauga No. 2014-G-3239, 2015-Ohio-1993, ¶ 24; *MBNA Am Bank, M.A. v. Anthony*, 5th Dist. Tuscarawas No. 05AP090059, 2006-Ohio-2031, ¶ 13, and *Licking Hts. Local Sch. Dist. Bd. of Edn. V. Reynoldsburg City Sch. Dist. Bd. of Edn.* 10th Dist. Franklin No. 11AP-173, 2011-Ohio-5063, ¶ 15. None of the aforementioned cases were initial actions as was Ms. Cox’s; and therefore, those cases needed to be treated pursuant to service and filing methods for pleadings subsequent to an original complaint. Pursuant to R.C. 2711.05 as expressly provided in Sections 2711.10 and 2711.11 of the Ohio Revised Code, which do not preclude initial actions, Cox filed her initial action as otherwise allowed by Civ.R. 5. Neither Civ.R. 5 nor R.C. 2711.13 require actual delivery of the motion or receipt of the motion by the adverse party prior to the filing deadline in order for service to be complete. In its opinion, the Court of Appeals (¶¶15 and 16) expounded on how Ms. Cox complied with R.C. 2711.13 and cited their holding in *CACV of Colorado, LLC v. Kogler*, 2d Dist. Montgomery case No. 021329, 2006-Ohio-5124.

Interestingly, opposing counsel also cited that case in an effort to present some apparent support for a court rejecting an action because of a *service issue*. However, in that case, plaintiffs had filed a motion for a declaratory judgment instead of a proper motion to vacate or modify, and the court's ruling had been in part due to the impact of that error. Circumstances were similar in *Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040 (8<sup>th</sup> Dist.). In light of that circumstance, it is therefore, improper to use that case as support against Cox who properly filed a motion to vacate or modify. Regarding how notice was served, the variances in the fact patterns of the cases cited by opposing counsel are at best poor, if not deceitful attempts to justify the claim that notice was not properly served. Defendant-Appellant's position must be rejected, and the ruling of Appellate Court upheld.

Defendant-Appellant posits it necessary to evaluate specific phrases in R.C. 2711.13 to determine whether a party must comply with the General Assembly's edict that "notice\*\*\* must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action. ..."

A phrase is comprised of a series of words aimed at conveying single thought, while it serves as part of a [more] complete sentence with a subject and predicate. The second portion of the first phrase cited above, "...after the award is delivered to the parties in interest," qualifies and serves as the basis, or trigger for the action called for in the start of the phrase. It informs of when it is a reasonable and prudent person marks the start of the lapse of time for the *three months* mandated by R.C 2711.13. However, the Appellant failed to acknowledge and include that crucial part of the phrase in its argument (Brief p.6) Therein lies a part of problem with the claim Cox's motion was untimely filed. Excluding the sub-phrases suggests either a failure to appreciate the statute,

or an intentional attempt to misrepresent what is fully understood as the legislature's actions. Not excluding the sub-phrase in another instance (Brief p. 4), suggests the latter intent is at play.

Ms. Cox was and remains "a party in interest" to the arbitration proceeding. Ms. Cox has stated in a number of court documents that she was not, and still has not received a copy of the award from DPS the opposing party in this matter, or from DEA who was in the role of an agent supposed to be representing her interests. The opposing party has not justly addressed, or verified the start of the lapse of time after it was that the award was delivered to the parties in interest. "Unless contrary to law, decision of the arbitrator shall be final and binding upon the BOARD, the ASSOCIATION, and any Professional Staff Member involved in the matter. DEA and DPS Master Contract Section 3.07.2(D)(5). They had a duty to share the decision /award with her, she relied on them to do so. DPS had regularly forwarded decisions to her of hearings and votes that occurred (even those done in Cox's absence, in which she did not participate). As neither DPS nor DEA a statutory agent, can affirm that the award was delivered to Ms. Cox an indispensable party in the arbitration matter on December 10, 2013, that date cannot serve as the start date for determining the lapse of a three-month period as mandated by R.C. 2711.13. As was common with DPS notice regarding decisions were not mailed until a day or days later to Ms. Cox.

Citing a partial phrase implies citing a partial thought. Partial thoughts are misconstrued thoughts at best, or thoughts purposefully abridged to withhold components so as to attain some ulterior motive, or deceive. Defendant-Appellant's brief directs attention to the intent of the "General Assembly's edict" (p. 6) but then misrepresented the legislature's intent when it gave only a partial quote of the phrase; thereby acted contrary to R.C. 1.47 and the espousals about the legislatures deliberateness with words and phrases (Brief p.7). As the date the award was

delivered to the parties in interest is clearly later than December 10, 2013, Ms. Cox did meet the requirement for timely receipt of the motion in compliance with the General Assembly's edict.

*Welsh Dev. Co. v. Warren Cty. Reg'l Planning Comm.*, 128 Ohio St.3d 471, 2011-Ohio-1604, 946 N.E.2d 215, involved an agency and tribunal and examined whether a notice of appeal filed in a common pleas court was sufficient to perfect an administrative appeal pursuant to R.C. 2505.04. Cox's motion involved a single judge making an order at the court of common pleas file an order regarding findings based on a limited and narrow judicial review of an arbitration proceeding pursuant to terms outlined in R.C. 2711.10 and 2711.11. Contrary to the Appellant's views the circumstances, scope of engagement, and analysis in *Welsh Dev. Co.* are not similar. Moreover, *Welsh Dev. Co. v. Warren Cty. Reg'l Planning Comm.*, did not involve controversy over whether the parties involved received proper and timely notice of the decision they were before the court to settle; nor is there such a controversy in the matters of *Thomas v. Franklin Cty. Sheriff's Office*, 130 Ohio App.3d 153, 719 N.E.2d 977 (10th Dist. 1998), or *Teamsters Local Union 293 v. Mannesmann Demag Corp.*, 8th Dist. Cuyahoga No. 44914, 85-LW-2044, 1985 Ohio App. Lexis 9399 (Nov. 21, 1998), though they also involve a motion to vacate or modify an arbitration order. The Eighth Appellate District's determination in the latter case is neither stated in, nor required by the statute, nor ordinarily binding on a matter in the Second Appellate Court. However, that determination resulted from circumstances in *Teamsters Local Union 293*, where had been functioning in its proper role as an advocate for the employee and the both had pursued action against Defendant, Mannesmann Demag Corporation.

29 U.S.C. 160(b) Section 10(b), of the National Labor Relations Act ("NLRA") limits the time for judicial challenges of arbitration decisions. State statutes limit the timeliness of such proceedings when an employee claims the employer breached the contract without complaining

that the union also breached its duty *Del Costello v. International Brotherhood of Teamsters* (1983), 462 U.S. 150 164-166. The employee benefits when their union wrongfully fails to provide its expertise in complying with local regulations. This is the case scenario with *Cox v. Dayton Pub. Schs. Bd. of Edu.* 2015-Ohio-3958, where DEA failed to inform the Professional Staff Member of the arbitrator's decision as stipulated it shall in the DEA and DPS Master Contract Section 3.07.2(D)(5). Hence, Defendant-Appellant's apparent reliance on the ruling of the Eighth Appellate in *Teamsters Local Union 293*, without regard for that notable difference in the fact patterns is fatal to their defense.

Actions taken by the court with regards to confirming the arbitration award were more impactful in the matter of *Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 173, 480 N.E.2d 456 (1985), than any decision having to do with the proposed improper timing of a document. In *City of Cuyahoga Falls v. Fraternal Order of Police*, 9th Dist. Summit No. 23870 2007-Ohio-7060, there are a number of significant fact pattern differences than with the matter at bar. In that matter Plaintiff was determined to have received the arbitrator decision; the trial court could justifiably determine summons issued by the court upon Plaintiff's filing of its motion was not received pursuant to statutory mandate; Plaintiff did not directly serve notice on Defendant; and though not necessary, Defendant had taken actions to confirm the award. In the matter at bar indisputably, Plaintiff-Appellee was not provided the arbitrator decision. In the present matter, the trial court cannot justifiably determine the summons issued by the court upon Cox filing her initial action with the court of common pleas, did not comply with statutory mandate because the award was not delivered to Cox, a party at interest on December 10, 2013. Thus though Cox eventually learned of the decision, the start of the three-month time spans mandated by locale statute fell at a later date for Cox. At the risk of being redundant, to date

neither DPS nor DEA have delivered the arbitrator to Ms. Cox, hence the matter of untimely service remains moot, and cannot be a basis for time-barring her motion. Further unlike the matter of *City of Cuyahoga Falls, Cox*, who filed a prose motion did send notice to counsel for the adverse party. She failed to include a notice of service with her motion as stipulated pursuant to civil rules of practice; however, importantly, Defendant acknowledged receiving notice via U.S. mail directly from the plaintiff, within three days of the filed motion pursuant to Civ.R. 5. As such DPS and their counsel were notified of the action against DPS BOE within the timeline mandated. It is also significant to note, there was, and has been no attempt to confirm the arbitrator award. Though such action is not required, it is doubtful it could be done, given that the arbitrator's decision does not state it is a final and binding order, and contains no statement regarding any post-arbitration remedies to seek review of the decision.

For reasons already expounded on, the matter of *City of Cleveland v. Laborers Internatl. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313, cannot serve to challenge the fact pattern in the matter at bar. Defendant could prevail because service of the notice could not be substantiated within the mandated time. Therefore, regarding service upon the adverse party in a timely manner as R.C. 2711.13 mandates, the variances in the fact patterns of the cases cited by opposing counsel are at best poor, if not misleading attempts to justify the claim that notice was not properly served. Defendant-Appellant's position must be rejected, and the ruling of Appellate Court upheld.

In support of a claim that "This court has repeatedly recognized that legislative inaction in the face of knowledge of the courts' longstanding interpretation of a statute may suggest a legislative intent to retain existing law, Appellant cited *Ohio Neighborhood Finance, Inc., D.B.A. Cashland v. Scott*, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E3d 1115, ¶ 37; *Maitland v. Ford*

*Motor Co.*, 103 Ohio St.3d 463, 2004-Ohio-5717, 816 N.E.2d 1061, ¶ 26; and *State v. Cichon*, 61 Ohio St. 2d 181, 183,-84, 399 N.E.2d 1259 (1980). These cases involved interest bearing loan definition and treatment, a class action lemon law matter, and the conviction of a commercial vehicle operator based on classifying his actions as reckless, respectively.

As this Court reviews this matter on the basis of public or great general interest, the context and spirit of R.C. 2711.13 must remain in the foreground of assumptions, stipulations, any conclusion, and decision. Collective bargaining which developed as a result of the National Labor Relations Act (NLRA), having established workers' rights to organize and bargain collectively with employers through the institution of collective bargaining units *aka* unions. Unions are in turn, agencies formed to negotiate and advocate for interest and rights of the members of the bargaining unit, whose interests it is established to represent. A law-abiding collective-bargaining unit, as an agent, therefore, through designated personnel, has a duty to represent, advocate for, support, or comply with all lawful instructions pertaining to the interest and rights of its [principal] members. Restatement of the Law, Third, Agency, Section 8.09 (2006). Given these established criteria purported conflict between a collective-bargaining rights and individual statutory rights are minimal, as both generally flow together.

There are really no conflicts between collective-bargaining rights and individual statutory rights in the arbitration context. The issues in the controversies this matter presents really pertain to 1) conflicts of interest; and 2) the procedures that must be followed in asking a court to vacate or modify an arbitration award under R.C. Chapter 2711.

The NLRA effectively outlaws groups that appear to represent employees in their dealings with the employer, but are in fact controlled by either the employer, some other coalition that is not representative of the workers' interests, and thus even prohibits employers

from establishing, dominating, or interfering with any labor organization. R.C. 2711.13 enacted and codified by the Ohio Legislature is part of a body of laws that rest on the foundation of the presumption that the objectives of the NLRA are maintained, and that employers are not engaged in unfair labor practices. Where those founding tenets do not hold to be factual and true, R.C. Chapter 2711 mandates are further frustrated, and a fair ruling in such a matter can only be determined by a de novo review. The Second Appellate Court's review led to a determination that can be supported by its decision that the matter be remanded.

A court's paramount concern when construing a statute is the legislative intent in enacting the statute. *Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815, N.E.2d 1107, ¶ 21. Public policy favors arbitration as a means of resolving disputes, use of R.C. 2711.13 and each of its provisions that protect the integrity of issued arbitral awards. Albeit, neither public policy nor a court's interpretation and action should conflict with protecting collective worker interests, and prohibiting employers from interfering with any labor organization. Those basic objectives of R.C. 2711.13 were violated in this matter at bar, both documents of *amicus curiae* submitted under the auspice of the Ohio Education Association ("OEA") when examined would prove such. Neither DEA, DPS, nor OEA have acted or approached the court with *clean hands*.

The Supreme Court of the State of Ohio supports arbitration as a means to help alleviate the clogging and burdening of court dockets, and views it as a much more efficient mean of addressing special issues within a matter and limiting time and the expense of more formal judicial proceedings. Where parties petition a court, the parties must be free from unfair conduct. From the onset of this matter, starting with the allegation that Ms. Cox had engaged in conduct unbecoming, the union and DPS have engaged in unfair conduct evidenced by a number of contract breaches, including the DPS's unjust enrichment effectuated by withholding Cox's

salary without due process, withholding and using her purchased professional resources to serve students without compensation for such action.

Counsel for DPS prior to the arbitration process interfered with the progress of a trial with an ulterior motive to secure a conviction, which was then used as an incentive to dominate the arbitration process, culminating in stating during the hearing that the arbitrator's decision was barred from relying on evidence based on substantiated facts and contractual terms, because pursuant to the doctrine of collateral estoppel it had to be accepted that Cox had indeed assaulted a student and was guilty of a felony. This was in spite of the fact that the charge for which Cox was convicted under R.C. Chapter 2903 is not even legally justifiable, or be binding given that Cox was facing an arbitration hearing pursuant to R.C. Chapter 3319 under the same set of circumstances.

OEA in its brief of amicus curiae present concern that the Second Appellate through its decision was altering the legislative framework for the private resolution of disputes through arbitration when in fact the decision supported an action to cast transparency, fairness and justice on the process. This case, as the brief attempts to support does not extend statutory limitations through the civil rules. The court of appeals justly applied law making the distinction between when service of an action could be based on a mode of service for initiating the courts involvement, as with Cox's motion, as opposed to the furtherance of a motion for a matter that was already under the control of the court. The brief discusses issues already addressed and heralds "a strong state and national labor policy favoring the private resolution of disputes through arbitration," (Brief p.3) *United Steel Workers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36 (1987). However, it must remain clear in court's analysis and decision that the need for

protecting the private resolution of disputes does not and should not negate the court's duty to uphold the law maintain fairness, liberty and justice for all.

The arbitrator's failure to state that the decision was final and binding, and failure to offer a statement regarding post-arbitration remedies was probably rooted in the realization that the award was forced by counsel for DPS who asserted collateral estoppel. Whether collateral estoppel is applicable is a mixed question of law and fact that must be reviewed de novo. *Wolfe v. Perry*, 412 F.3d 707, 716 (6<sup>th</sup> Cir. 2005). "Issue preclusion, or collateral estoppel, bars subsequent relitigation of a fact or issue where the fact or issue was necessarily adjudicated in a prior cause of action and the same fact or action is presented in a subsequent suit." *Cobbins v. Tenn. Dept' of Transp.*, 566 F. 3d 582, 589 (6<sup>th</sup> Cir. 2009). For the doctrine of collateral estoppel to be applied to bar relitigation of an issue four requirements must be met: 1) the precise issue must have been raised and relitigated in the prior action; 2) the determination of the issue must have been necessary to the outcome of the prior action; 3) the prior proceeding must have resulted in a final judgment on the merit; and 4) the party against whom the estoppel is sought must have had a full and fair opportunity to litigate the prior proceeding. *Id.* at 589-90. As requirements 3 and 4 are not met in the matter of establishing that that the four criteria are met the issue maintaining that Ms. Cox was a "caretaker" cannot be collaterally estopped.

Regarding criteria #3, a matter is judged "on the merit" when the issue is granted its "matter of fact" or distinctive value or worth. The Court of Appeals for Ohio Second Appellate District failed in its assessment of that matter to give the distinctions between a teacher and a "caretaker" their value or worth. R.C. 3319.09 distinctively defines what a "teacher" is; and R.C. 2903.10(B) clearly defines what a "caretaker" is. The two definitions are clearly not the same, cannot refer to roles that can be concurrently served and are mutually exclusive. As it is

irrefutable that Ms. Cox was a teacher, she could not have also been a caretaker at the same time, or under the same circumstances while she was working for DPS. The clear and distinct statutes are mandated authority and speak for themselves. The court had no authority to disregard the law and render them one and the same.

Regarding criteria #4, Ms. Cox was not granted a full and fair opportunity to litigate the prior issue. It is a material fact Ms. Cox was teacher. A fact is material when the determination of its truth or falsity will “affect the outcome or the suit under the governing laws.” *Turner v. Turner* (1993), 67 Ohio St. 3d. 337, 340. 617 N.E.2d 1123, 1126 (1993). Ms. Oliver in the trying of the case against Cox, made a series of statements based on hearsay and falsities that were somewhat appealing to the Second Appellate that seemed to rely on them in an earlier decision. The idea that a teacher is a “caretaker” was never the law of the land; nor has it been in Ohio that R.C. 3319.09 is the same as R.C. 2903.13(B). Although the court’s decision was contrary to law under the doctrine of stare decisis a number of decisions and actions have been made and levied, that have been adversarial to Ms. Cox. The Supreme Court acknowledged that *Plessy v. Ferguson*, 163 U.S. 537, 41 L. ed 256, 16 S Ct 1138 (that was once law in the land) violated the Fourteen Amendment rights of children of color and had no place in public education. The Court established a [new] precedent with *Brown v. Bd. of Education*, 347 U. S. 483; 74 S. Ct. 686; 98 L. Ed. 873; 1954 U.S. Lexis 2094. It is high time The Court of Appeals Second Appellate District Court of Ohio which, contrary to law had ruled that R.C. 3319.09 is the same as R.C. 2901.10(B) address its own error, and upon doing so clarify actions that relied on that ruling.

Having established that criteria 3 and 4 were not properly met barring the issue of whether Ms. Cox was a “caretaker” and upon the court’s determination that R.C. 3319.19 and R.C. 2903.10(B) do not speak to the same person, and being that a determination of the issue is

necessary to the outcome of these matters, the court is to also determine whether that standard, the trial court had relied on in determining some of its criteria for establishing legal malpractice is contrary to law in such an egregious manner so as to obstruct justice.

The trial court dismissed Cox's motion claiming it lacked subject matter jurisdiction. Subject matter jurisdiction "is the power conferred upon a court, either by constitutional provisions or by statute, to decide a particular matter or issue on its merits." In *re B.P.*, 11th Dist. Trumbul No. 2011-T-0032, 2011-Ohio-2334, ¶ 30 (citing *State ex rel. Jones v. Suster*, 84 Ohio St. 3d 70, 1998-Ohio-275, 701 N.E.2d 100). "Subject matter defines the competency of a court to render a valid judgment, it cannot be waived." *Id.* at ¶ 31 (citing *Time Warner AxS v. Pub. Util. Comm.*, 75 Ohio St. 3d 229, 1996-Ohio-224, 661 N.E.2d 1097 (1996)). A "motion to dismiss for lack of subject matter jurisdiction is made pursuant to Civ.R.12(B)(1), and '[t]he standard of review for such a dismissal \*\*\* is whether any cause of action cognizable by the forum has been raised in the complaint.'" *Id.* at ¶ 30 (citing *State ex rel. Bush v. Spurlock*, 42 Ohio St. 3d 77, 80, 537 N.E.2d 641 (1989)); accord *Carter v. Trotwood-Madison City Bd. of Educ.*, 181 Ohio App. 3d 364, 2009-Ohio-1769, 910 N.E.2d 1088, ¶ 26 (2d (Dist.))

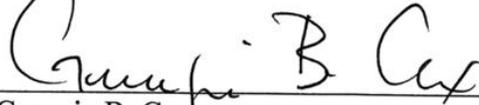
### CONCLUSION

The trial court erred in its preliminary analysis of the matter and the court of appeals upon de novo review gained a better perspective of the matter, and thus reversed the lower court's decision. Upon an examination of substantiated facts in this matter in their proper context, this court should render a decision consistent with that of the Court of Appeals Second Appellate District, and reverse the decision to dismiss Plaintiff-Appellee's motion.

Respectfully submitted,

Georgia B. Cox

Pro se



Georgia B. Cox  
4191 Mapleleaf Dr.  
Dayton, OH 45416  
(937) 275-0969

### CERTIFICATE OF SERVICE

I certify that a copy of this Plaintiff-Appellee's Brief was sent by ordinary mail, on January 13, 2016 as follows:

Beverly A. Meyer  
BRICKER& ECKELER LLP  
118 West First Street, Suite 850  
Dayton, OH 45402  
*Counsel for Defendant-Appellant*  
*Dayton Public Schools Board of Education*

Susan D. Jansen  
DOLL, JANSEN, & FORD  
111 West First Street, Suite 1100  
Dayton, OH 45402  
*Counsel for Amicus Curiae.*



Georgia B. Cox