

Case No. 2015-0494

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IN THE  
SUPREME COURT OF OHIO

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GEORGIA B. COX,

*Plaintiff-Appellee,*

v.

DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION,

*Defendant-Appellant.*

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On Appeal from the Second District Court of Appeals, Montgomery County, Ohio,  
Appellate Case No. 26382

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REPLY BRIEF OF DEFENDANT-APPELLANT  
DAYTON PUBLIC SCHOOLS BOARD OF EDUCATION

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## STATEMENT OF THE CASE AND FACTS

The essential facts concerning the issue before this court are undisputed. The Dayton Public Schools Board of Education and the Dayton Education Association ("DEA") were parties to an arbitration hearing held on September 17, 18, and 19, 2013. (*Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014, Exhibit 1, Award p.1.) The arbitrator issued his opinion and award on December 10, 2013 and emailed it to counsel for the Board and counsel for the DEA that same day. (*Id.*, Exhibit 1.) On March 10, 2014, Georgia Cox filed a motion to vacate, modify or correct the arbitration award in the Montgomery County Court of Common Pleas. (*Plaintiff's Motion to Vacate, Modify or Correct Arbitration Award*, March 10, 2014.) No completed proof of service accompanied Ms. Cox's filing. (*Id.*) She did not sign a proof of service for it either. (*Id.*) Instead, the clerk of courts placed Ms. Cox's motion in the mail on March 10, 2014 addressed to the Board of Education. (*Instructions for Service on a New Case Via Certified Mail*, March 10, 2014.) The Board received this copy on March 12, 2014. (*Successful Service Notice*, March 17, 2014.) Ms. Cox personally mailed a copy of the motion to counsel for the Board of Education on March 11, 2014, and counsel received that copy on March 13, 2014. (*Defendant's Motion to Dismiss or Strike Plaintiff's Motion to Vacate, Modify, or Correct Arbitration Award and Memorandum in Support*, April 8, 2014, Exhibit 3, Affidavit of Beverly A. Meyer, ¶ 4.) The earliest the Board or its attorney had notice of Georgia Cox's motion to vacate, modify or correct the arbitration award was March 12, 2014 -- three months and two days after the award was delivered to the parties in interest.

Plaintiff-Appellee Cox makes various allegations and arguments in her Merit Brief on a range of issues, the majority of which are neither supported by the record nor relevant to the issue presently before the court. (Plaintiff-Appellee's Merit Brief, pp.1-7, 10, 11-12, 14, 16, and 17-19 of 20.) The Board of Education respectfully objects to the court's consideration of those bare and unrelated assertions and limits its reply to those allegations and arguments bearing on the question of whether 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.

#### **ARGUMENT IN SUPPORT OF 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.**

#### **An Adverse Party or its Attorney Must Receive Notice of a Motion to Vacate, Modify or Correct an Arbitration Award Within Three Months of the Award's Delivery to the Parties.**

Arbitration awards can result from myriad circumstances, including collective bargaining agreements, commercial contracts, and individual employment agreements, but there is only one way by which an arbitrator's award may be challenged under Ohio law. R.C. Chapter 2711 provides the exclusive remedy to a party choosing to contest an arbitration award, and that party must strictly comply with R.C. 2711.13 when filing its motion to vacate, modify, or correct an arbitration award. *City of Galion v. Am. Fedn. of State, Cty., & Mun. Emps., Local No. 2243*, 71 Ohio St.3d 620, 621, 622, 1995-Ohio-197, 646 N.E.2d 813 (1995); accord *Warren Edn. Assn. v. Warren City Bd. Of Edn.*, 18 Ohio St.3d 170, 172, 480 N.E.2d 456 (1985).

**R.C. 2711.13 Mandates Compliance With All the Requirements of Civ.R. 5  
When Filing a Motion to Vacate or Modify an Arbitration Award.**

Ms. Cox repeatedly likens her motion to vacate, modify, or correct the December 10<sup>th</sup> arbitration award to an original action, referring to it as an “initial action,” but it is not an original action. Instead, R.C. Chapter 2711 is a special statutory procedure. *City of Galion*, 71 Ohio St.3d at 623, 646 N.E.2d at 815. R.C. 2711.13 expressly provides for the filing of a “motion” and requires that notices concerning that motion occur “as prescribed by law for service of notice of a motion in an action.” R.C. 2711.05 similarly provides that application to the court must be made and heard in the manner provided by law for the making of motions. This specification requires that any party filing a motion to vacate an arbitration award also comply with Civ.R. 5. Civ.R. 5 dictates that the motion be accompanied by proof of service signed by the party or her attorney. Civ.R. 5(B) and 11. Civ.R. 5(D) directs that a motion be filed with the court within three days after its service on a party.

Ms. Cox failed to comply with those requirements. She did not include a proof of service with her motion or sign a proof of service. Instead, the clerk of courts mailed the document for her as if her motion was an original action and in a manner not prescribed by Civ.R. 5. Ms. Cox did not serve her motion in a manner recognized by Civ.R. 5 until March 11, 2014, when she personally mailed a copy of her motion to counsel for the Board – one day after R.C. 2711.13’s three month deadline. Because *Ms. Cox* failed to send notice of her motion to either the Board of Education or its attorney within three months of the award’s December 10, 2013 delivery, the courts were without jurisdiction to consider her request to modify, correct or vacate the arbitration award. *City of Sandusky v. FOP Ohio Labor Council*, Erie C.P. 2012-CV-0221, 2012 Ohio Misc. LEXIS 15126, \*\*6-7 (July 27, 2012).

### **The Three Month Period Commences Upon the Arbitrator's Issuance of the Award.**

Ms. Cox argues that a discovery rule applied to her alleged circumstances and delayed the commencement of the three month limitations period set forth in the statute. (Plaintiff-Appellee's Merit Brief, pp.12 and 13 of 20.) Again, Ms. Cox contends that her motion to vacate is an initial action and not the special statutory proceeding dictated by law that it actually is. Ms. Cox states in her Merit Brief that she knew of the arbitration award. (*Id.*; Plaintiff-Appellee's Merit Brief, p.5 of 20.) She also claims, however, that she did not receive "any document noted to be the arbitrator's decision" from the DEA or recognize what she did receive as a "decision" that "was final and binding." (Plaintiff-Appellee's Merit Brief, p.5 of 20.) The date on which Ms. Cox received the arbitrator's award is immaterial. What matters is the date upon which it was disseminated by the arbitrator.

The statute specifies that the three month period begins to run when the arbitrator delivers his award to the parties. R.C. 2711.13. Since this time limitation is jurisdictional, courts use the postmark date of the award and not the date the award is subsequently received in determining when the three month period commences. *Citibank South Dakota, N.A. v. Wood*, 169 Ohio App.3d 269, 2006-Ohio-5755, 862 N.E.2d 576, ¶ 26 (2d Dist.); *City of Girard v. AFSCME Ohio Council 8, Local Union 3356*, 11<sup>th</sup> Dist. Trumbull No. 2003-T-0098, 2004-Ohio-7230, ¶ 16. Where the award is sent by electronic mail, courts use the arbitrator's transmission date. *Mun. Constr. Equip. Operators' Labor Council v. City of Cleveland*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, ¶ 24 (8th Dist.). In the present matter, December 10, 2013 -- the date the arbitrator signed and transmitted his decision and award to counsel for the recognized parties in interest -- is the operative date

that commenced the three month period established by R.C. 2711.13. Whatever time it took for the award to actually reach the parties has no effect on the calculation of the three month period. There is no tolling of the statutory period. See *Greenwald v. Shayne*, 152 Ohio Misc.2d 12, 2009-Ohio-3384, 910 N.E.2d 536 (C.P.).

**The Plain Language of R.C. 2711.13 Requires That the Adverse Party or its Attorney Know of the Motion to Vacate Within the Three Month Period.**

Ms. Cox's allegedly delayed receipt of the award does not alter the requirement that the Board or its counsel receive notice of her motion on or before March 10, 2014. Since it is presumed that every word in a statute is designed to have legal effect, R.C. 1.47, the General Assembly's inclusion of the word "notice" in R.C. 2711.13's second paragraph cannot be ignored. "Notice" connotes warning and awareness and is essential to the jurisdictional requirements set forth in R.C. 2711.13. The statute's concomitant requirement that notice of the motion "be served upon" the adverse party or its attorney<sup>1</sup> "within three months" emphasizes that the adverse party be in possession of that notice within the three month period. R.C. 2711.13 (Emphasis added.) The plain language of the statute requires more than mere placement of the motion in the mail; it requires actual receipt. Without an adverse party's receipt of a motion to vacate an arbitration award, it cannot be aware that the award is being challenged. Neither the Board of Education nor its

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<sup>1</sup> The fact that R.C. 2711.13 alternatively allows the adverse party's attorney to be notified of the motion to vacate demonstrates the legislature's intent that the statutory process is an extension -- an administrative appeal of sorts -- of the parties' arbitral process in which that attorney likely participated. This court has already determined that an adverse party must actually receive notice of an administrative appeal within the time prescribed for that appeal for the appeal to be considered. *Welsh Dev. Co. v. Warren Cty. Reg'l Planning Comm.*, 128 Ohio St.3d 471, 2011-Ohio-1604, 946 N.E.2d 215, *reconsideration denied*, 128 Ohio St.3d 1517, 2011-Ohio-2686, 948 N.E.2d 452.

attorney was aware that Georgia Cox was challenging the arbitrator's December 10, 2013 award until March 12, 2014 – after R.C. 2711.13's three month period had expired.

**Ohio Courts Require Actual Receipt of Notice Within the Three Month Period.**

Ohio's appellate courts have consistently required strict and timely compliance with R.C. 2711.13's service mandates. Ms. Cox contends that the cases cited in support of the Board's position are so factually dissimilar as to render them inapplicable. (Plaintiff-Appellant's Merit Brief, pp.12-13 of 20.) However, the Eighth, Ninth and Tenth appellate courts have all evaluated the jurisdictional prerequisites of R.C. 2711.13 and agree that the statute requires a party to both file a motion to vacate an arbitration award and notify the other party of the motion within R.C. 2711.13's three month period. *Mun. Constr. Equip. Operators' Labor Council*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, ¶ 21; *City of Cleveland v. Laborers Internatl. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313; *City of Cuyahoga Falls v. Fraternal Order of Police*, 9th Dist. Summit No. 23870, 2007-Ohio-7060; *Thomas v. Franklin Cty. Sheriff's Office*, 130 Ohio App.3d 153, 719 N.E.2d 977 (1998); *Teamsters Local Union 293 v. Mannesmann Demag Corp.*, 8<sup>th</sup> Dist. Cuyahoga No. 44914, 85-LW-2044, 1985 Ohio App. LEXIS 9399 (1985). Untimely receipt of notice by the adverse party -- even by a matter of days -- divests the court of jurisdiction over the motion to vacate. *City of Cleveland* at ¶ 26; *City of Cuyahoga Falls* at ¶¶ 9, 10. These various appellate decisions collectively dictate that a court only has jurisdiction to entertain a motion to vacate, modify or correct an arbitration award if the adverse party or its attorney actually receives notice of the motion within the statutory three month period. Notice that is timely postmarked but not timely received will not suffice. The General Assembly does not intend otherwise.

### **The Civil Rules Do Not Extend the Three Month Notification Period.**

Just as Ms. Cox's allegedly late receipt of the arbitration award does not delay commencement of R.C. 2711.13's three month period, her failure to properly serve and notify the Board of her motion to vacate in accordance with Civ.R. 5 does not extend it. Ohio's legislature requires an arbitrating party's complete compliance with Civ.R. 5 when filing a motion to vacate an arbitration award. The legislature did not intend the Rule to be applied in a manner that relieves a party of the notification obligations it expressly included in the statute. The Eighth Appellate District recognized as much in *City of Cleveland v. Laborers Internatl. Union Local 1099*, when it stated that "the Civil Rules cannot be applied to extend the statutory and jurisdictional limitations set forth in R.C. 2711.13." 2009-Ohio-6313, ¶ 26. There, the appellate court refused to recognize the clerk of courts' mailing of the city's motion to vacate as satisfying Civ.R. 5's requirements for service of a motion where the city neither included a proof of service nor served the union with the motion.<sup>2</sup> *Id.*

Civ.R. 5 requires service of a motion to vacate with signed proof of such service by the party filing the motion. R.C. 2711.13 requires that the party make and the adverse party receive service of the motion within three months of the award's issuance. Full compliance with each part of Civ.R. 5 is mandated by the statute's terms and should not be excused by a court. Civ.R. 5 should also not be applied in any manner that effectually extends the jurisdictional statutory period.

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<sup>2</sup> Courts have also refused to apply the three day rule contained in Civ. R. 6(E) to lengthen R.C. 2711.13's jurisdictional three month period. *Citibank South Dakota, N.A.*, 169 Ohio App.3d 269, 2006-Ohio-5755, 862 N.E.2d 576, ¶ 26; *City of Girard*, 11<sup>th</sup> Dist. Trumbull No. 2003-T-0098, 2004-Ohio-7230, ¶ 17 (Citations omitted.)

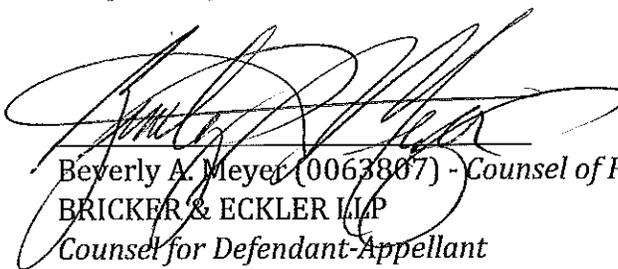
## CONCLUSION

Ohio's General Assembly has long recognized the important role arbitration plays in providing contracting parties a mechanism by which they may efficiently and economically resolve their disputes. The notice, service, and time requirements the legislature inserted in R.C. 2711.13 are the gatekeepers of Ohio's policy favoring the arbitration of disputes, and only a stringent application of those requirements will ensure the continued viability of the arbitral process in accordance with the legislature's clear intent.

The plain words of R.C. 2711.13 required Ms. Cox to include a signed proof of service with her motion to vacate and personally serve her motion upon the Board or its counsel on or before March 10, 2014. The plain words of the statute further required that either the Board of Education or its attorney actually receive notice of Ms. Cox's motion on or before that date as well. It is undisputed that Georgia Cox failed to include a signed proof of service with her motion to vacate, modify or correct the December 10<sup>th</sup> arbitration award or serve her motion upon the Board or its counsel by March 10, 2014. It is also undisputed that the Board and its representative first received notice of her motion two days after the statutory period had lapsed. Ms. Cox failed to satisfy the jurisdictional prerequisites for judicial review of the arbitration award.

This court should hold that an adverse party or its attorney must receive notice of a motion to vacate, modify or correct an arbitration award within three months of the award's delivery to the parties and, accordingly, reverse the decision of the Second Appellate District.

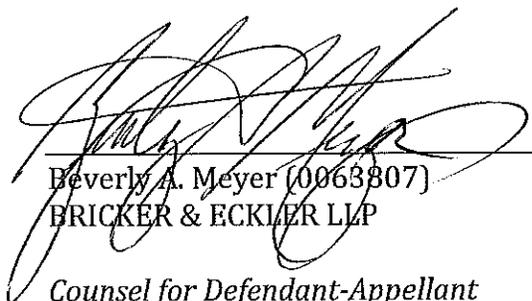
Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This certifies that a true and accurate copy of Defendant-Appellant's **Reply Brief** was sent to Georgia B. Cox, Plaintiff-Appellee, 4191 Mapleleaf Drive, Dayton, Ohio 45416 and Susan D. Jansen, Counsel for Amicus Curiae Ohio Education Association, Doll, Jansen & Ford, 111 West First Street, Suite 1100, Dayton, Ohio 45402, by regular U.S. mail, postage prepaid, this 1<sup>st</sup> day of February, 2016. This also certifies that on this same date, a true and accurate copy of Defendant-Appellant's **Reply Brief** was sent to Susan D. Jansen, Counsel for Amicus Curiae Ohio Education Association, via electronic transmission to sjansen@djflawfirm.com.



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