

**In the
Supreme Court of Ohio**

OHIO PATROLMEN’S BENEVOLENT ASSOCIATION,	:	Case No. 2021-0724
	:	
Plaintiff-Appellant,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
	:	
v.	:	
	:	
CITY OF CLEVELAND,	:	Court of Appeals Case No. CA-21-110816
	:	
Defendant-Appellee.	:	

**APPELLEE THE CITY OF CLEVELAND’S
MERIT BRIEF**

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I. STATEMENT OF THE CASE AND FACTS

Defendant-Appellee, the City of Cleveland (“City”) and Plaintiff-Appellant, the Ohio Patrolmen’s Benevolent Association (“OPBA”) are parties to a collective bargaining agreement (“CBA”) that covers employees in the classification of Chief Radio Dispatcher. OPBA is the exclusive collective bargaining representative for this unit of City employees. Trial Ct. R.1, Complaint, p.2, ¶¶1-2.¹ On or about May 15, 2019, OPBA filed a grievance under the CBA related to the City’s practice of offering overtime shifts to non-bargaining employees. *Id.*, p.4, ¶12. The grievance was submitted to arbitration. An evidentiary hearing was held before Arbitrator Robert G. Stein on February 18, 2020. *Id.*, p.4, ¶16. On June 24, 2020, the Arbitrator issued his written arbitration decision (the “Award”), denying OPBA’s grievance by stating that OPBA had failed to present preponderant evidence that:

- Article 19 was sufficiently unclear with respect to the scheduling of anticipated overtime shifts;
- A past practice had been established; and,
- The City was sufficiently aware and had accepted the temporary split-shifting overtime schedule as referenced in the July 2017 MOU.

(Trial Ct. R.1, Complaint, Exhibit 2).

OPBA responded by *attempting* to appeal the Award by filing an Application to Vacate in the Cuyahoga County Court of Common Pleas on September 21, 2020. In its initial filing, which OPBA titled as a “Complaint” (*see* Trial Ct. R.1, at p.1), OPBA purported to bring a claim under R.C. 2711.10(C) and (D). OPBA’s “Complaint” referred to an attached “Motion” and on the second page it included the phrase “Motion to Vacate” (*see* Trial Ct. R.1, Complaint, at p.2), but the document is -- in both style and substance -- a textbook civil complaint. It contains various topic headings, numbered factual averments identifying OPBA’s allegations, a defined cause of

¹ References to “Trial Ct. R. _” are to the Record in the Cuyahoga County Court of Common Pleas. References to “R.” are to the Record in the Eighth District Court of Appeals.

action, and a “prayer for relief.” OPBA’s “Complaint” is devoid of any citations to applicable case law, or any legal analysis of the alleged grounds for vacatur, which are required elements for a proper “motion” under the applicable Local Rules. Instead, OPBA’s filing contains only conclusory statements about how the Arbitrator supposedly “erred” in his Award. Trial Ct. R.1, Complaint, p.6, ¶¶23-24. OPBA neglected to attach a memorandum of law in support, which is required for any “motion” under the applicable Local Rules.

Also, notably absent from OPBA’s filing was a “certificate of service.” That omission underscores that OPBA itself did **not** timely serve its attempted vacatur filing on the City -- or more importantly, on the City’s legal representative from the arbitration process, as required by R.C. 2711.13. Instead, OPBA opted to have the Clerk of Court attempt personal service of the Complaint directly on the City via a process server. Trial Ct. R.2 On September 22, 2020, the City received the Summons. Trial Ct. R.3. OPBA never served its Complaint on outside legal counsel for the City within the mandatory three-month time limitation required by R.C. 2711.13, which expired on September 25, 2022, despite OPBA’s knowledge that the City had retained outside legal counsel for the matter. Were there any question as to the identity of the City’s representation for purposes of a legal challenge to the Award, all doubt was removed by the face of the Award itself: the Award plainly lists the undersigned as counsel of record for the City. Trial Ct. R.1, Complaint, Exhibit 2.

On October 26, 2020, the City, through its outside counsel, filed a *Motion to Confirm the Arbitration Award and to Strike and/or Dismiss the Union’s Complaint*. Trial Ct. R.4. The City’s Motion was based, in part, on OPBA failing to serve the City’s outside counsel.

The Cuyahoga County Common Pleas Court initially denied the City’s *Motion to Strike and/or Dismiss*. Trial Ct. R.11. The Trial Court reasoned that OPBA’s filing had satisfied R.C. 2711.13’s requirement of a “motion” notwithstanding that OPBA had captioned the document

as a “Complaint,” structured it as a Complaint (with numbered averments, a prayer for relief, etc.), and failed to meet the bare minimum criteria for a “motion” under the applicable Civil Rules and Local Rules. The Trial Court also “was not persuaded that the plaintiff must always serve the outside counsel attorney who represented the City in the underlying arbitration as the arbitration is a separate proceeding from the subsequently filed court case.” Trial Ct. R.11.

Subsequently, the Eighth District Court of Appeals issued its decision in *Cleveland Police Patrolmen’s Assn. v. City of Cleveland*, 8th Dist. Cuyahoga No. 109351, 2021-Ohio-702 (“*CPPA*”). The Appellate Court’s analysis in *CPPA* directly refuted each of the Common Pleas Court’s stated reasons for denying the City’s *Motion to Strike and/or Dismiss* with respect to the “service” issue in the case *sub judice*. Accordingly, on April 12, 2021, the City moved the Common Pleas Court to reconsider its February 1, 2021 journal entry. Trial Ct. R.14. In its subsequent journal entry, the Trial Court dismissed the Complaint and acknowledged that “[a]ny uncertainty” regarding OPBA’s obligation to serve outside legal counsel for the City was “removed” by the decision in *CPPA*. Trial Ct. R.23. The Trial Court determined that it lacked jurisdiction over OPBA’s non-compliant filing; therefore, it confirmed the Award. *Id.*

OPBA perfected an appeal from the Trial Court’s decision. Trial Ct. R. 24. The City filed a cross-appeal. Trial Ct. R.25. Once again, both parties had a full opportunity to brief the procedural issues on which the Trial Court based its decision. The Eighth District issued a unanimous journal entry and opinion, affirming the judgment of the Trial Court to *confirm* the Arbitration Award. R.22. The Eighth District held that: (1) OPBA had failed to serve the City’s outside legal counsel who represented the City in the arbitration proceedings below; and (2) OPBA’s “Complaint” failed to satisfy the statutory requirement that the application to vacate be a “Motion.” This jurisdictional appeal followed.

II. LAW AND ARGUMENT

Civil actions to confirm, modify, or vacate an arbitration award under the Ohio Arbitration Act, R.C. 2711.01 *et seq.*, (the “Act”) are special statutory proceedings. *City of Galion v. AFSCME, Ohio Council 8, AFL-CIO, Local No. 2243*, 71 Ohio St.3d 620, 623, 1995-Ohio-197, 646 N.E.2d 813 (“R.C. Chapter 2711 provides * * * a special statutory procedure”). Consequently, the procedure to appeal from an arbitration award, by filing an application to vacate under R.C. Chapter 2711, is a distinct process from other civil cases. *See*, Civ.R. 1(C) (the Civil Rules, “to the extent that they would by their nature be clearly inapplicable, shall not apply to * * * special statutory proceedings”).

R.C. 2711.13 prescribes that judicial proceedings to vacate, modify, or correct an arbitration award are initiated by filing a *motion*, not a complaint, in a Court of Common Pleas. Notice of this R.C. 2711.13 motion “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.” R.C. 2711.13 (emphasis added). This Court has previously explained that this statutory language requires service of the motion in accordance with Civ.R 5(B). *Cox v. Dayton Pub. Schools Bd. of Edn.*, 147 Ohio St.3d 298, 2016-Ohio-5505, ¶16.

In its Merit Brief, OPBA weaves a tangled web out of this statutory service requirement, but the procedure in R.C. 2711.13 is straightforward. If the “adverse party” was represented by an attorney during the arbitration proceedings below, service of a motion to vacate must be perfected on that party’s attorney. If the “adverse party” was not represented by an attorney during the arbitration proceedings, service of a motion to vacate must be perfected directly on the adverse party. This binary procedure is clear from the statute’s disjunctive phrasing (“upon the adverse party **or** his attorney”) and also from the statute’s incorporation of Civ.R 5(B) through the language that requires service “as prescribed by law for service of notice of a motion * * *.”

The process for invoking the court’s review under R.C. 2711.13 is both *simple* and *compulsory*. Both steps – filing the motion and serving notice of the motion -- must be completed within three months after the arbitrator(s) issues the award. Failure to comply with this deadline is fatal to the attempted vacatur proceeding: the three-month period is **mandatory** and **jurisdictional**.

In the case *sub judice*, the Eighth District Court of Appeals correctly concluded that OPBA failed to comply with these simple, compulsory requirements in two key ways.

- **First**, OPBA failed to serve the City’s outside counsel with its attempted vacatur filing within the mandatory three-month time period, despite OPBA’s knowledge that the City was represented by outside counsel in the underlying arbitration (the outcome of which OPBA sought to challenge). OPBA instead attempted service directly on the City using a process server from the Clerk of Courts (*i.e.*, serving its filing in the same manner as a complaint under Civ.R 4, not in the manner that a motion must be served under Civ.R 5).
- **Second**, OPBA initiated this civil action by filing a *complaint*, not the “motion” required by R.C. 2711.13. The distinction is not merely one of form, but of substance. OPBA neither attached a memorandum of law in support, as required by Civ.R. 7 (requiring that a motion “shall state with particularity the grounds therefor”) and Cuyahoga County’s Loc.R. 11(B), nor provided proof of service, as required by Civ.R. 5(B)(4).

OPBA demonstrably failed to comply with R.C. Chapter 2711, the Civil Rules, and the applicable Local Rules. The Common Pleas Court properly recognized that, owing to OPBA’s defective service of its filing, the Court lacked subject-matter jurisdiction to do anything other than confirm the Award. The Eighth District correctly affirmed the Common Pleas Court’s decision.

A. Standard of Review

This Court articulated the appropriate standard of review in *Portage Cty. Bd. of Dev. Disabilities v. Portage Cty. Educators' Assn. for Dev. Disabilities*, 153 Ohio St. 3d 219, 2018-Ohio-1590, 103 N.E.3d 804. When reviewing a decision of a common pleas court confirming, modifying, vacating, or correcting an arbitration award, an appellate court should accept findings of fact that are not clearly erroneous but decide questions of law de novo. *Brown v. Nanteeka Gloves, L.L.C.*, 2021-Ohio-1659, 171 N.E.3d 1284, ¶ 13 (8th Dist.).

As set forth *infra*, the Eighth District correctly applied well-settled legal principles to reach the determination that OPBA had failed to timely serve its vacatur filing on the City's outside legal counsel, as required by R.C. 2711.13. The Appellate Court's application of case law principles to this "service" issue was straightforward, well-reasoned, and consistent with its own precedents, the statutory language, and this Court's decision in *Cox*. The Appellate Court likewise concluded that OPBA's filing did not satisfy the requirements of a "motion" under R.C. 2711.13 and the applicable Civil Rules and Local Rules. Dismissal of OPBA's vacatur action was the correct result.

B. Proposition of Law No.1

Proposition of Law No. 1: An individual who represents a party at an arbitration proceeding is not automatically that party's attorney of record for future proceedings under Chapter 2711 of the Ohio Revised Code.
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The operative question that underlies Proposition of Law #1 is straightforward: *does the issuance of an arbitration award **automatically terminate** an existing attorney-client relationship over the subject matter of the arbitration*, such that the party is deemed 'unrepresented' for purposes of service of a motion to vacate the arbitration award?

OPBA implicitly argues that this question must be answered in the *affirmative*, despite the total lack of any support for that presumption in either the text R.C. Chapter 2711, in the applicable case law, or in the Rules of Professional Conduct on which OPBA purports to rely. In contrast, both the Trial Court and the Eighth District correctly answered this question in the *negative*,

concluding that outside legal counsel from the underlying arbitration hearing represented the City -- for purposes of service of a “motion to vacate” under the special statutory procedure in R.C. 2711.13 and for purposes of Civ.R. 5(B)(1) -- when OPBA sought to vacate the Award that resulted from that arbitration. The Eighth District correctly applied the law, and its decision is consistent with the statute itself and with case law addressing vacatur proceedings under R.C. Chapter 2711.

1. R.C. 2711.13 Requires Service on Outside Counsel When a Party Chooses to Have Legal Representation at Arbitration.

Ohio long-ago abolished the distinction between suits in law and in equity (*see* Civ.R 2). However, Ohio still recognizes a category of “special statutory proceedings” that are distinct from ordinary civil cases. One such special statutory proceeding, contained in R.C. 2711.13, is the exclusive method prescribed by the General Assembly to perfect a limited “appeal” from an arbitrator’s award, *i.e.*, to seek a Court order that vacates or modifies an award. In the remedial scheme created by R.C. Chapter 2711, a common pleas court functions as a reviewing court, in a role that is analogous (but not identical) to the role of such courts when civil appeals are taken from administrative agency and political subdivision orders. *See e.g.*, R.C. 119.12 and 2506.01.² Owing to its status as a special statutory proceeding, the process for invoking the court’s jurisdiction under R.C. 2711.13 is different than initiating a run-of-the-mill civil case. Pertinent to this case are two distinctions.

First, an action to confirm, modify, or vacate an arbitration award is initiated not by pleading, but by motion. *Mun. Constr. Equip. Operators’ Labor Council v. Cleveland*, 197 Ohio

² The Eighth District drew upon the same comparison used here. OPBA contends that the Eighth District concocted this analogy out of whole cloth (OPBA’s Brief, p.16), but the Eighth District’s decision in this case was not the first to recognize such parallels. *See e.g.*, *Canton Professional Firefighters Assn., Local 249 v. City of Canton*, 5th Dist. Stark No. 2006CA00029, 2007-Ohio-994, ¶ 3 (describing a party’s filing as “an administrative appeal pursuant to R.C. Chapter 2711); *OPBA v. City of Findlay*, C.P. No. CV-13-815571, 2014 Ohio Misc. LEXIS 3539, at *1 (Nov. 10, 2014) (describing the case as “an administrative appeal * * * pursuant to R.C. Chapter 2711).

App.3d 1, 2011-Ohio-5834, 965 N.E. 2d 1040, ¶¶18, 21 (8th Dist.) (“*MCEOLC*”) (“in general, proceedings to confirm or vacate an arbitration award involve neither pleadings nor insufficient claims in pleadings”); *see also*, *Land & Lake Dev. v. Lee Corp. (In re Arbitration Award)*, 3d Dist. Defiance CASE NO. 4-99-10, 1999-Ohio-934 (a party’s written “Response” to a motion to confirm was “in the nature of an answer” and was therefore a responsive *pleading*, and it could not be construed as a timely “motion” to modify an award).

Second, because vacatur proceedings are initiated by motion, it is improper to rely on “the clerk of courts [to] issue summons and perfect service.” *MCEOLC*, 2011-Ohio-5834 at ¶¶18, 21 (“in general, proceedings to confirm or vacate an arbitration award involve neither pleadings nor insufficient claims in pleadings”); *accord*, *Cleveland v. Laborers Internatl. Union Local 1099*, 8th Dist. Cuyahoga No. 92983, 2009-Ohio-6313, ¶18 (“*LIU Local 1099*”). Instead, an application for vacating an arbitration award “is made and heard in the manner provided by law for the making and hearing of motions * * *.” R.C. 2711.05. Service of a vacatur motion under R.C. 2711.13 is governed by Civ.R 5 (service of motions), not Civ.R 4 (service of pleadings).

Both distinctions are evident in the statutory text. R.C. 2711.13 states:

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 proceedings of the adverse party to enforce the award.

(emphasis added).

By its express terms, the statute requires a “motion” to invoke the Court’s limited reviewing

jurisdiction under R.C. 2711.10. (Emphasis added). And with regard to service, the General Assembly made clear that service must be made on “upon the adverse party or his attorney,” depending on which recipient is “prescribed by law” in the applicable rule of civil procedure for service of a motion (*i.e.*, Civ.R 5(B)(1)). R.C. 2711.13 also requires that a vacatur motion be “served * * * within **three months** after the award is delivered to the parties in interest.” This statute of limitations is mandatory and jurisdictional. *MCEOLC*, 2011-Ohio-5384, ¶ 28

In general, “[t]he goal of statutory construction is to ascertain and give effect to the General Assembly’s intent.” *City of Toledo v. Corr. Comm'n of Northwest Ohio*, 2017-Ohio-9149, ¶22, 103 N.E.3d 209. In determining such intent, “courts first look to the statutory language and the purpose to be accomplished,” and “[w]hen a statute’s meaning is clear and unambiguous, **courts apply the statute as written.**” *Id.* (emphasis added). Thus, “[i]n such a situation, courts have no basis for resorting to rules of statutory interpretation, as an unambiguous statute is to be applied, not interpreted.” *Id.* If, on the other hand, “a statute is ambiguous, ‘courts seek to interpret the statutory provision in a manner that most readily furthers the legislative purpose as reflected in the wording used in the legislation.’” *Id.*, quoting *State v. Black*, 142 Ohio St.3d 332, 2015-Ohio-513, ¶38, 30 N.E.3d 918 (further quotation omitted).

R.C. 2711.13 is not ambiguous. It unmistakably requires vacatur proceedings to be initiated by motion, and it requires service of that motion on the “adverse party or his attorney,” depending on which of the two is “prescribed by law.” Were there any doubt as to what “law” was prescribed for this determination, this Court erased it in *Cox*, 2016-Ohio-5505, ¶16. In *Cox*, this Court considered “the requirements for invoking the jurisdiction of a court of common pleas to vacate, modify, or correct an arbitration award.” *Cox*, ¶1. This Court analyzed R.C. 2711.13 and explained that “there is nothing unclear or ambiguous about this provision.” *Cox*, ¶10. The Court explained:

Read in the context of the whole sentence, R.C. 2711.13 requires that “notice * * *

must be served” and that service must be accomplished “as prescribed by law for service of notice of a motion in an action.” The [Board of Education, (“BOE”)] asks us to read the second half of this sentence out of the Revised Code. The General Assembly would not have pointed to the rules of service of a motion in an action (which are found in Civ.R. 5(B)) if it intended notice of service to be completed only when the notice is received by the party being served. Indeed, the Ohio Rules of Civil Procedure are “prescribed by law.” See Ohio Constitution, Article IV, Section 5(B). And R.C. 2711.13 does not otherwise expressly provide for rules conflicting with the Civil Rules, but instead references them.

R.C. 2711.13 requires service as provided in Civ.R. 5(B). This may be accomplished in a number of ways, including by hand delivery, U.S. mail, commercial carrier service, or e-mail. Civ.R. 5(B)(2)(a), (c), (d), and (f). When service is made by mail or commercial carrier, “service is complete upon mailing” or “upon delivery to the carrier.” Civ.R. 5(B)(2)(c) and (d). Further, “[i]f a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.” Civ.R. 5(B)(1). Cox had two letters sent in an attempt to serve the BOE with notice of her motion. The letter sent on March 10, 2014, was mailed directly to the BOE by the clerk of court. Cox sent a second copy of the motion to the attorney for the BOE by certified mail on March 11, 2014. **Because the BOE was represented by counsel, service was accomplished on March 11, 2014.**

Id., ¶¶ 15-16. Applying these principles to the facts in *Cox*, this Court found that the effective service was not the letter sent to the party directly (on March 10, 2014), but rather, the letter sent to the party’s *attorney* the following day (March 11, 2014), and the reason was “[b]ecause the BOE was represented by counsel.” *Id.*, ¶ 16. Since the document being served was the “motion to vacate,” no counsel for the BOE had made any appearance in the Common Pleas Court. It was the BOE’s *arbitration counsel* on whom the statute required service to be perfected.

OPBA erroneously attempts to distinguish *Cox* by stating that only the *timing* of service, and not the method or recipient of service, was at issue before the Court. OPBA is incorrect, and *Cox* speaks for itself.

In the case *sub judice*, the City was represented by counsel in the arbitration. R.C. 2711.13 and Civ.R. 5(B)(1) therefore required OPBA to serve the City’s outside counsel with any vacatur motion. OPBA failed to serve timely the City’s counsel when it initiated this case; indeed, OPBA

never served the City’s counsel at all. OPBA did not comply with the mandatory, jurisdictional requirements of R.C. 2711.13. This ends the analysis.

2. The General Assembly Chose Intentionally the Requirements in R.C. 2711.13 for a “Motion” and Service on the Adverse Party’s Attorney.

Judicial involvement in arbitration is very limited, and that is by design. Notwithstanding, under R.C. 2711.01 through 2711.15, a court may become involved in an arbitration-related dispute either **before** or **after** the issuance of an award. The statute contemplates the filing of (1) petitions to compel arbitration, (2) petitions to compel the testimony of subpoenaed witnesses/deponents, (3) motions to stay judicial proceedings and refer a matter to arbitration, (4) motions to vacate, modify, or correct an award, and (5) motions to confirm.

By default, parties must invoke a court’s limited jurisdiction under R.C. Chapter 2711 via motion practice. R.C. 2711.05, states, in pertinent part:

Any application to the court of common pleas under sections 2711.01 to 2711.15, inclusive, of the Revised Code, shall be made and heard **in the manner provided by law for the making and hearing of motions, except as otherwise expressly provided** in such sections.

(Emphasis added).

With respect to certain filings under the Act, the General Assembly varied the default rule when the receiving party’s legal representation (or lack thereof) has not been established either in court or in a pending, related arbitration proceeding and no record has been established upon which a motion can be based. Specifically, R.C. 2711.03 authorizes parties to commence an action in court to seek an order to compel arbitration (i.e., to seek enforcement of an arbitration agreement). In that scenario, no arbitration proceedings have yet occurred between the parties, neither party (or their counsel) have yet appeared before an arbitrator, and the court action is brand new with no arbitral record below. Accordingly, the statute prescribes the filing of a “petition” that is served by the Clerk via a summons under Civ.R 4 (not Civ.R 5, which regulates service of motions) that

requires service upon a party:

The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration **may petition** any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. **Five days' notice in writing of that petition shall be served upon the party in default. Service of the notice shall be made in the manner provided for the service of a summons.**

R.C. 2711.03.

By contrast, a witness who “refuses or neglects to obey” an arbitral subpoena can be compelled to testify by order of a Common Pleas Court (R.C. 2711.06), and a party who wishes to submit into evidence before the arbitrator(s) the deposition of a witness, in lieu of that person’s live testimony, can seek a Court order that directs the taking of the deposition. (R.C. 2711.07). In both instances, a pending arbitration proceeding already exists, and the legal representation (or lack thereof) of the non-petitioning party already has been established, but there still exists no record to support a motion. Consequently, the mechanism for obtaining such relief in both instances requires filing a “petition,” but in neither instance do those statutes direct that the petition be served upon the non-petitioning party in the same manner as a summons. Instead, neither statute mentions the specific method of service, so the default requirement in R.C. 2711.05 that service should be as a motion applies.

Moreover, every other R.C. Chapter 2711 special statutory proceeding is handled via motion practice without the specific requirement that a filing be served upon the non-filing party in the same manner as a summons. For instance, R.C. 2711.02 is the Act’s mechanism to request a stay of court proceedings and a referral to arbitration. This provision is implicated when a civil action is already pending in an Ohio court and the legal representation status of the non-moving party has been established, and either of the parties seeks enforcement of an arbitration agreement concerning the subject matter of that suit. Either party (but typically the defendant) can request a

stay of the court proceedings and an order compelling arbitration, and R.C. 2711.02(B) indicates that such a request is made by “application of one of the parties.” Reading this language in *pari materia* with R.C. 2711.05, this means that a “motion to stay” must be filed and served on the opposing party or his attorney under Civ.R 5(B), as with any other “motion.”

Similarly, after the issuance of an arbitration award, R.C. 2711.13 authorizes either party to the award to file an appeal in which a Court can vacate the award (R.C. 2711.10), or modify the award (R.C. 2711.11). R.C. 2711.13 then requires that a request for either of these outcomes must be made by *motion* and served upon the non-moving party as a motion.

Finally, R.C. 2711.09 authorizes a party to a completed arbitration proceeding to “apply” to a Court to “confirm” an award. Similar to applications/motions filed under R.C. 2711.13, R.C. 2711.09 requires that, “Notice in writing of the application shall be served upon **the adverse party or his attorney . . .**” (Emphasis added)

The General Assembly could have treated motions under R.C. 2711.09 and 2711.13 the same way that it treated enforcement motions under R.C. 2711.03, i.e., it could have prescribed a filing by “petition” and service by summons. But the General Assembly did not do so; instead, it expressly required a “motion” and service under the applicable rules for serving motions (Civ.R 5). The General Assembly prescribed this motion-based appeal process for motions to vacate or modify an award, as well as for motions to confirm an award – in both instances, there is a completed arbitration proceeding with a full record where the parties’ legal representation status has been established, followed by a court filing that seeks an order based on the arbitrator’s ruling.

The General Assembly enacted the Ohio Arbitration Act in 1931, *see* Am. S. B. No. 41 (1931); therefore, a brief review of the terms “petition” and “motion” as those terms were defined in or around 1931 is instructive in determining the General Assembly’s intended use of those terms. *See, Southwest Airlines Co. v. Saxon*, ___ U.S. ___, 142 S.Ct. 1783, 1788, 213 L.Ed.2d 27 (2022)

(interpreting terms in R.C. Chapter 2711's federal law counterpart, the Federal Arbitration Act ("FAA"), and identifying the "ordinary, contemporary, common meaning" of terms by referring to dictionary definitions from the 1910s and 1920s, contemporaneous to the FAA's passage).

In modern civil practice, generally a "motion" is filed to seek an order in an *existing* case. (*See*, Civ.R 7(B)). But when the General Assembly created this special statutory procedure, a "motion" was "an occasional application to a court by the parties or their counsel, in order to obtain some rule or order, which becomes necessary either in the progress of a cause, **or summarily and wholly unconnected with plenary proceedings.**" Black's Law Dictionary, 3d. Ed., p.1208 (1933) (emphasis added). In other words, motion practice was a valid mechanism of seeking a Court order, even in the absence of a preexisting suit between those parties in the same court.

"Petition" referred to a "written address embodying an application or prayer from the person or persons referring it, to the power, body, or person to whom it is presented, for the exercise of his or their authority in the redress of some wrong or the grant of some favor, privilege, or license." *Id*, p.1358. Petitions were used at common law, in states that had not yet adopted a Civil Procedure code -- which utilized a "Complaint" for that purpose, instead. (*Id.*; *see also Id.*, pp.380, 530). The Civil Rules, which were promulgated after passage of the Ohio Arbitration Act, have replaced the term "petition" in general legal parlance with "complaint." *See* Civ.R. 7(A); 84 Ohio. Jur. Specific Performance § 121. "Petition" is still used to refer to filings of certain extraordinary writs (e.g., habeas corpus), but otherwise the "petition" and "complaint" distinction is not of import. *Petitions* and *motions*, however, were distinct filings in the 1930s, just as complaints and motions are distinct today.

A comparison of the Ohio law and its federal counterpart also underscores the General Assembly's manifest intent to use *motion practice* for vacatur proceedings. Historically, arbitration agreements were unenforceable at common law. In 1925, Congress passed the United

States Arbitration Act, which it modeled after a highly-influential arbitration statute enacted by the State of New York in 1920. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16, and now referred to as the “Federal Arbitration Act.”) Six years later, “Ohio repealed its former arbitration laws originally enacted in 1831, 12148 to 12160 GC, and enacted most of the provisions of ‘Draft State Arbitration Act’ * * * effective July 28, 1931.” *Util. Workers Union v. Ohio Power Co.*, 36 O.O. 324, 77 N.E.2d 629, 631 (Tuscarawas County C.P.1947) (analyzing the history of the Ohio Arbitration Act). The Draft State Arbitration Act was written by the American Arbitration Association; it tracked closely, but not identically, with the federal law. As a result, R.C. 2711.13 is very similar to its federal counterpart, 9 U.S.C. § 12. Both statutes require a “motion” to invoke judicial review of an arbitration award, and both require service on “the adverse party **or his attorney**” and that service be “as prescribed by law for service of notice of motion.” However, the FAA has a different rule if the adverse party is a “nonresident” of the federal district in which the award was made; in that situation, “the notice of the application shall be served by the marshal * * * in like manner as other process of the court.” 9 U.S.C. § 12. The General Assembly did not enact a comparable provision for “nonresident” service by process-server in Ohio; all motions to vacate are served by the normal method of serving a motion.

On a practical level, the General Assembly’s choice of *motion practice* to initiate vacatur proceedings is consistent with the overall design of the Act – i.e., as a “relatively expeditious and economical means of resolving a dispute” while “unburdening crowded court dockets.” *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 15. Arbitration is designed to minimize the time and resources expended by litigants and courts. Because the pertinent ‘record’ evidence is generated at an arbitration hearing rather than in civil discovery or at trial, the special statutory proceedings created in R.C. Chapter 2711 rely on motion practice in order to bypass various irrelevant components of other civil cases, e.g., there are no pleadings,

interrogatories, document requests, depositions, summary judgment motions, motions *in limine*, etc. Motion practice helps courts to reach the merits of an R.C. 2711.13 application without delay.

As the Eighth District observed, the statute’s motion-based, streamlined “appeal” process for arbitration awards is both similar and dissimilar from appealing an administrative agency or political subdivision decision (*see*, R.C. 119.12 and R.C. 2506.1 et seq.), or to appellate review of a common pleas court’s decision in a normal civil case. Under R.C. Chapter 2711, the common pleas court performs a narrow, limited ‘reviewing’ function, and the failure to perfect a timely ‘appeal’ divests the court of its reviewing jurisdiction.

Where the R.C. Chapter 2711 process differs from routine appellate practice is in its upfront, expedited briefing. In a civil appeal under the Rules of Appellate Procedure, there is a basic notice of appeal that must be filed within 30 days (App.R 3), followed by a transmission of the record within a set period of time (App.R 10), then merit briefing by the parties (App.R. 16), an oral argument (App.R.21), and then a decision by the appellate panel (App.R 12). Vacatur proceedings, in contrast, are ‘front-loaded’ --- the moving party potentially has longer to initiate its ‘appeal’ (up to three months), but when it does so, that party files the entire Arbitration record (*see* R.C. 2711.14), along with its Motion to Vacate (and accompanying memorandum in support). This initial filing serves a triple-purpose of invoking the court’s review (akin to a “notice of appeal”), transmitting the record, and functioning as the merit brief. The three-month time period covers a similar time period between the filing of a notice of appeal under App.R 3 and the filing of the appellant’s first merit brief.

At this point, subsequent “briefing” deadlines are covered by Civ.R 6; the “adverse party” can file its own Memorandum in Opposition to the Motion to Vacate (akin to an Appellee Brief) within fourteen days. As a matter of course, the adverse party typically files a cross-motion to confirm the award under R.C. 2711.09 at the same time.

Thus, the Civil Rules governing motion practice allow for a full, expeditious briefing of the vacatur and confirmation requests. There is no need for a common pleas court to establish a “briefing schedule.”

In its Merit Brief, OPBA offers no substantive analysis of the text of R.C. 2711.13. However, the reading that OPBA endorses is one that essentially deletes the phrase “or his attorney” from the statute. If OPBA’s interpretation were correct, there would be no need for the General Assembly to have mentioned service on “his attorney” because a non-moving party would never be represented on the trial docket at the time of the vacatur filing. The Eighth District recognized this obvious reality, and its application of R.C. 2711.13 in this case (and in previous decisions, discussed *infra*) is the one that gives effect to the phrase “or his attorney,” and thus comports with the surplusage canon, *verba cum effectu accipienda sunt* (“words are to be construed as to their effect”).

This Court should avoid giving R.C. 2711.13 an interpretation that causes it “to have no consequence.” Scalia and Garner, *Reading the Law: The Interpretation of Legal Texts* (e-book edition) at *150 (2012). “These words cannot be meaningless, else they would not have been used.” *Id.*, quoting *United States v. Butler*, 297 U.S. 1, 65 (1936). The only reasonable interpretation of R.C. 2711.13 is that the reference to “his attorney” refers to the non-filing party’s attorney during the *arbitration proceedings*, in those cases when a party has chosen to retain legal counsel at arbitration. Again, this is consistent with the overall scheme of R.C. Chapter 2711, which treats vacatur proceedings as an extension of (and as a form of limited “appeal” from) the arbitration itself. Arbitration replaces a trial, and the common pleas court performs a limited ‘reviewing’ function analogous to the judicial review conducted during an administrative appeal.

3. Arbitration Awards Do Not Nullify Attorney-Client Relationships.

OPBA characterizes the question before the Court as, “*when is a party represented by an*

attorney for purposes of Civ.R.5.” OPBA posits that no “adverse party” has counsel-of-record at the time a vacatur motion is filed under R.C. 2711.13, and thus its attempted service on the City was proper.

Implicit in OPBA’s argument is an assumption that issuing an arbitration award must automatically terminate the parties’ existing attorney-client relationship(s). This contention is preposterous, and it underscores the lengths to which OPBA has gone to avoid the consequences of its own failure-of-service error in this case. There is no basis in statutory or decisional law to conclude that arbitration involuntarily terminates any party’s legal relationship with its counsel. The argument makes no sense given a fair reading of R.C. 2711.13, which expressly contemplates service upon an “adverse party or his attorney” as a *condition precedent* to appealing an arbitration decision. The controlling language in R.C. 2711.13 clearly contemplates that a non-moving party may be represented by legal counsel when the motion is served, or it may not be represented by legal counsel, depending on *whether counsel-of-record appeared in the underlying arbitration*. No other plausible explanation exists for enacting that language.

This Court already has construed R.C. 2711.13 as requiring service of a motion to vacate as prescribed in Civ.R. 5(B). *Cox*, 2016-Ohio-5505, ¶16. Civ.R. 5(B)(1) states that “[i]f a party is represented by an attorney, service under this rule shall be made *on the attorney* unless the court orders service on the party.” (emphasis added). Applying these well-settled principles, the Eighth District correctly concluded that OPBA had failed to serve timely its vacatur filings on the City’s counsel – who represented the City during the arbitration and who continues to represent the City in this matter to this day.

Throughout its Merit Brief, OPBA ignores that filing a vacatur proceeding under R.C. Chapter 2711 is a special statutory proceeding and that it is procedurally distinct from other civil cases. OPBA puzzlingly denigrates the arbitration process as merely an “informal, quasi-judicial”

proceeding, willfully disregarding that arbitration awards are the end product of evidentiary hearings that often include sworn testimony,³ and that arbitration awards create *binding* and *enforceable* legal obligations on the parties under a highly deferential standard of judicial review.

OPBA contends that the Eighth District’s decision will have ill-defined and somehow deleterious effects on attorney-client relationships. In reality, it is OPBA’s argument that negatively affects the attorney-client relationship by insisting that the conclusion of an arbitration severs a party’s chosen, voluntary relationship with its legal counsel. Nevertheless, OPBA emphasizes that parties are not *required* to retain an attorney for arbitration: they can choose self-representation or be represented by union representatives who are non-attorneys. That point is true. However, OPBA fails to explain (or to justify by reference to any statutes, rules, or case law) its contention that when a party *does* choose representation at arbitration, that its attorney-client relationship with its designated representative is somehow automatically severed upon the issuance of an arbitration award. This is because no such precedent or legal authority exists. Nothing in R.C. Chapter 2711 terminates attorney-client relationships upon the issuance of an arbitration award; quite the opposite, in fact. R.C. 2711.13 expressly assumes that an attorney who represented a party at arbitration will be served with vacatur filings, as discussed *supra*.

OPBA claims “[t]he use of non-lawyers creates a problem under the bright-line rule established by the Court of Appeals in this case: If a party is represented by a non-attorney, are they still the proper party for service under the Eighth District’s analysis?” (OPBA Merit Brief, p.16). OPBA is tilting at windmills. R.C. 2711.13 and Civ.R. 5(B)(1) are not difficult to parse; only if an **attorney** represents a party must service on that attorney be perfected. The Eighth District’s application of R.C. 2711.13 does not create the “flurry of issues” OPBA attempts to

³ In fact, during the arbitration hearing in this case, OPBA was represented by counsel – and a member of its in-house legal team provided sworn testimony as a witness.

concoct in its Merit Brief. No aspect of this case requires this Court to act to “protect the sanctity of the attorney-client relationship.” (OPBA’s Merit Brief, p.14)

OPBA’s Merit Brief focuses significant attention on a portion of an oral argument before Judge Russo, in which undersigned counsel for the City acknowledged that it is the City’s prerogative to retain *different* counsel for the vacatur proceedings than it had used for the arbitration hearing. (OPBA Merit Brief, p.11) This point is purely hypothetical – that is *not* what happened in this case. Contrary to OPBA’s insinuations, no “guessing” as to the City’s representation was ever required in this situation – the undersigned has personally represented the City from the moment the arbitration started, a fact known by OPBA. OPBA’s alarms about hypothetical ‘bait and switch’ tactics by the City are irrelevant. Moreover, OPBA ignores that the Civil Rules provide mechanisms for the substitution of trial counsel of record. R.C. 2711.13 did not ‘bind’ the parties to unwanted legal representation in this or any other case. The Eighth District easily discarded OPBA’s same argument, writing:

The OPBA argues that a rule requiring the party seeking vacatur to serve outside counsel instead of the party-defendant sets the stage for gamesmanship because the defendant could retain a different lawyer or represent itself and thereby dodge service. However, the rule requires service of the motion on the attorney who represented the party in the arbitration proceedings solely for purposes of perfecting service. The moving party need only prove that it complied with the statutory requirements in order to establish service regardless of whether or not the attorney will represent the defending party in the vacatur proceeding. The defending party is not obligated to retain the same lawyer who represented the party in the arbitration proceeding. And, nothing prevents the moving party from serving both the party and outside counsel in order to avoid any disputes about service.

R.22, ¶26.

OPBA speculates that the Eighth District’s decision somehow undermines or may lead to violations of the Rules of Professional Conduct if “a party’s representative is a lawyer, acting in a non-lawyer capacity” at the arbitration. (OPBA Merit Brief, p.17). This is a new argument, one not developed by OPBA in the proceedings in either court below, and it suffers several serious

defects. First, contrary to OPBA's characterization, Judge Russo's original ruling (which was reversed on reconsideration after the Eighth District issued *CPPA*) was not couched or phrased in terms of safeguarding lawyers' ethics. *See*, Trial Ct. R. 21. Second, as a practical matter OPBA's argument cuts both ways, and a bright-line rule that an arbitration award automatically severs existing attorney-client relationships would impinge on clients' authority to "define the scope of representation" for themselves.

Third, OPBA's assertion relies on a faulty legal premise regarding lawyers acting a non-lawyer capacities, as the Eighth District explained in *SERB v. City of Cleveland*, 106 Ohio App.3d 128, 137, 665 N.E.2d 693 (8th Dist.1995). In that case, a union filed an unfair labor practice charge with the State Employment Relations Board ("SERB") alleging that the City had engaged in 'bad faith bargaining.' Similar to an arbitration hearing, parties to a SERB proceeding may appear on their own behalf, retain legal counsel, or be represented by "any other representative who is knowledgeable about Chapter 4117," including a non-attorney labor union representative. Ohio Admin. Code 4117-1-12. The same law firm that had represented the City during collective bargaining negotiations entered an appearance at SERB. When the City sought to introduce the testimony of one of the attorneys about a disputed issue of fact, the union moved to disqualify the firm as the City's representative at SERB. SERB granted to motion; on appeal, the City argued that SERB had overstepped its authority because of the "explicit directive permitting non-attorneys to represent a party in Board proceedings, the only quasi-judicial nature of Board proceedings, and the lack of any specific Board regulation on the subject." *Id* at 134. The Eighth District considered and rejected the City's arguments, upholding SERB's disqualification decision. The pertinent portion of the Court's analysis follows:

[T]he type of proceeding in which an attorney takes part is irrelevant to the ethical considerations he must make. In a similar situation as that presented in this case, the court in [*SERB*] *v. Springfield Local School District Bd. of Edn.* (1995), 104

Ohio App. 3d 191, 661 N.E.2d 278, stated the attorneys:

did not shed their lawyer's clothes simply by representing the Board before SERB. There is no dispute that JBA was representing the Board in its *professional legal capacity* before SERB. As such, *their representation was governed by the Disciplinary Rules*. Presumably, JBA was aware of this. To prohibit SERB, therefore, from enforcing the Disciplinary Rules *would allow any attorney practicing law before SERB to circumvent his or her ethical obligations*.

(Emphasis added.)

It is thus axiomatic that simply by virtue of his license an attorney becomes subject to the CPR and its accompanying rules of conduct in any professional setting, regardless of its nature.

106 Ohio App.3d 128, 137, 665 N.E.2d 693 (8th Dist.1995).

In summary, OPBA raises the nebulous specter of harm to attorney-client relationships, but only as a smokescreen to obfuscate its own demonstrable failure to comply with the service requirements of Civ.R. 5(B) and R.C. 2711.13. OPBA does not refute, nor can it plausibly argue otherwise, that outside counsel for the City (who represented the City at the arbitration hearing) was **not** served within the required three-month period.

4. OPBA Misconstrues *CPPA* and Relies on Inapposite Decisions

In support of Proposition of Law No.1, OPBA erroneously relies chiefly on this Court's decision in *Ervin v. Patrons Mut. Ins. Co.*, 20 Ohio St.3d 8, 484 N.E.2d 695 (1985). *Ervin* is inapposite: it did not involve a motion to vacate, an arbitration proceeding, or any other type of special statutory proceeding. No arbitration award preceded the civil suit in *Ervin*.

Instead, *Ervin* involved a run-of-the-mill civil complaint filed under a policy of fire insurance. The defendant failed to file a timely Answer; however, the defendant's attorney, Mr. Smith, initiated settlement negotiations with the plaintiffs. Plaintiffs filed an amended complaint and served a copy to Mr. Smith, and then sought a Default Judgment. The Trial Court granted the

default judgment, and the Appellate Court affirmed. This Court concluded that Mr. Smith was not an attorney of record for defendant, and thus the defendant was not properly served with an amended complaint.

Of particular note, this Court criticized the plaintiffs in *Ervin* for their gamesmanship: they chose to treat Mr. Smith as the defendant's attorney of record for purposes of serving the amended complaint, but not for serving a notice of application for default judgment, enabling them to "escape complying with the germane notice requirements of the Civil Rules and to obtain a default judgment as the result of unfair surprise." *Id.* at 698. Indeed, *Ervin* actually supports the City's arguments and repudiates the OPBA's. *Ervin* repudiates the very gamesmanship that OPBA allegedly decries – i.e., parties cannot 'pick and choose' when to recognize an adverse party's legal counsel as a litigation tactic to gain procedural upper-hand – and this Court's holding demonstrates that courts are well-equipped to address such shenanigans.

The Eighth District did not ignore *Ervin*, as OPBA contends. Both parties addressed the *Ervin* decision in their respective briefing, and the Appellate Court **rejected** OPBA's argument that the principle in *Ervin* applied to service under the special statutory proceeding of R.C. 2711.13.⁴

OPBA also relies on an unpublished decision from the U.S. District Court for the Southern District of Ohio. *Champion Chrysler Plymouth v. Dimension Serv. Corp.*, S.D. Ohio No. 2:17-cv-130, 2018 U.S. Dist. LEXIS 48281 (Mar. 23, 2018) involved a motion for attorney fees related to the improper removal of a case from state court. *Champion* did not involve public sector

⁴ The Eighth District has, as recently as two months ago, cited *Ervin* and its progeny with approval *outside* of the arbitration context. See, *Cashelmarra Condominium Unit Owners Assn. v. Kish*, 8th Dist. Cuyahoga No. 111272, 2022-Ohio-3672, ¶ 45.

employees,⁵ nor did it address service of a motion to vacate on a municipality that was represented by outside counsel at an arbitration.

The *Champion* decision attempted to sidestep this Court’s analysis in *Cox, supra*, which deemed a party who was represented at arbitration as being represented by the same counsel for purposes of service of a motion to vacate the arbitration award. In doing so, the *Champion* decision purported to rely on *Ervin* and conflated other types of civil actions (which are initiated by a complaint, and in which service is accomplished by the clerk of courts) with the special statutory proceedings created by R.C. Chapter 2711 (which are initiated by motion, and must be served on the adverse party’s legal counsel from the underlying arbitration). The Eighth District expressly considered *Champion* in the case *sub judice*, and it declined to adopt its reasoning. R.22, fn.1.

Only a single Ohio decision cites *Champion*, and OPBA discusses that case in its Merit Brief, as well. *Owner-Operator Servs. v. Markovic Transp.*, 3d Dist. Van Wert No. 15-21-02, 2021-Ohio-3785, involved a motion for default judgment, not a proceeding under R.C. Chapter 2711. The case arose out of a single-vehicle traffic incident in which a tractor-trailer caught fire; it did not involve an arbitration agreement, an arbitration award, or any proceedings under R.C. Chapter 2711. It did not involve public employees or service on a municipality. *Owner-Operators Servs.* indicated that a party was not represented for purposes of service of a motion for default

⁵ OPBA misidentifies *Champion* as a decision from the Sixth District Court of Appeals, rather than the U.S. District Court for the Southern District of Ohio. In point of fact, *Champion* originated in Common Pleas Court, and the parties invoked R.C. Chapter 2711 based on choice of law language in the arbitration agreement; however, the case involved private parties whose dispute would presumably have been subject to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, which has different procedures for the service of a motion to vacate than those found in R.C. 2711.13. The FAA preempts state law when it applies. *See e.g., Blackburn v. Citifinancial, Inc.*, 10th Dist. Franklin No. 05AP-733, 2007-Ohio-1463, ¶ 13 (“the FAA represents a preemption of substantive law by the federal government, and corresponding state statutes may not vary materially from the federal provision.”). In any event, the Southern District’s analysis of Ohio law in *Champion* is not binding upon this Court, nor is it persuasive.

judgment, in a declaratory judgment and tort action, because the defaulting party's counsel had never made any appearance. *Owner-Operators Servs.* does not nullify R.C. 2711.13's express statutory requirement of service on a party's attorney.

Champion and *Owner-Operators Servs.* are inapposite, outlier decisions. This Court's analysis in *Cox* is a well-reasoned interpretation of R.C. 2711.13, and the Eighth District correctly applied the same principles as *Cox* in its decisions in *MCEOLC*, *CPPA*, and the case *sub judice*.

OPBA's reliance on *Citibank S. Dakota N.A. v. Wood*, 169 Ohio App.3d 269, 2006-Ohio-5755 (2d Dist.) is similarly misplaced. *Citibank* involved an arbitration award that was issued in favor of Wood against Citibank. **Wood was not represented in the arbitration proceeding.** Accordingly, when Citibank filed a motion to vacate the arbitration award, it served the motion on Wood. Thereafter, Wood filed a *pro se* answer and counterclaim. After Wood had filed his *pro se* answer and counterclaim, Citibank filed several additional documents, including a motion to dismiss Wood's counterclaim. However, Citibank did not serve the motion to dismiss upon Wood, but, rather, upon an attorney that had represented Wood in an *allegedly*-related municipal court proceeding.

On appeal, Wood argued that he should have been served with the motion to dismiss. Citibank argued that service on the attorney in the related municipal court proceeding was sufficient. The Second District disagreed with Citibank, and specifically contrasted the municipal court proceeding from the arbitration out of which Wood's motion to vacate arose:

Citibank was also incorrect when it asserted that the present action was a "direct result" of the municipal court action. **The motion to vacate the arbitration award arose directly from the arbitration award** that BlueRidge issued on May 22, 2005. It did not directly result from the action in municipal court, whatever that action might have been. . . .

Accordingly, Citibank should have served Wood directly with any pleadings and motions that were filed **after** the motion to vacate was served on Wood.

Id. at 276-77. Far from supporting OPBA's argument, *Citibank* actually undercuts OPBA's position: the *Citibank* decision confirms that service of a motion to vacate on a non-moving party's counsel from the arbitration hearing is required, because vacatur proceedings are a **direct result** of the underlying arbitration.

Additionally, OPBA cites to *Ohio Receivables, LLC v. Rivera*, 197 Ohio App. 3d 694, 968 N.E.2d 589, 2012 Ohio 216 (9th Dist.) and *Steiner v. Steiner*, 85 Ohio App. 3d 513, 620 N.E.2d 153 (4th Dist.) in support of its first proposition of law. Neither case involves a motion to vacate, nor does either case have any bearing on the issues *sub judice*.

This Court should see OPBA's case law argument for what it is – a *post hoc* rationalization to bypass the service requirements under R.C. 2711.05, 2711.13, Civ.R. 5, and *Cox*. OPBA knows that it failed to serve the City's counsel within the required time period. OPBA's first assignment of error is meritless and should be overruled.

5. The Eighth District Followed its Precedents that Require Service on Outside Legal Counsel

In its Merit Brief, OPBA suggests that the Eighth District's decision in this case was based entirely on its recent decision in *CPPA*. But as OPBA knows, *CPPA* was only the latest in a series of decisions that have applied the same principles regarding service under R.C. 2711.13. The City analyzed each of these precedents -- three of which involved the City of Cleveland as a party -- in its briefing to the Common Pleas Court and to the Eighth District. *CPPA* only applied an already well-established principle of decisional law; it did not effect a change in Eighth District precedent. The Trial Court *did* reconsider its decision after *CPPA* was issued, but that decision simply confirmed that the Trial Court should have applied the principles of *MCEOLC* in the first instance. A brief discussion of this trilogy of Eighth District cases follows.

First, in *LIU Local 1099*, *supra*, an arbitration award was issued on February 29, 2008. *Id.*

at ¶3. On May 28, 2008, the City filed a motion to vacate, but did not include a proof of service on its motion, instead instructing the clerk to serve the Union with the motion. *Id.* at ¶4. The Union responded, arguing that the City did not serve a copy of the motion in the time required under R.C. 2711.13. *Id.* at ¶5. The Eighth District upheld the decision of the trial court, holding that the trial court was without jurisdiction to rule upon the City’s motion to vacate because the Union was not served with the motion to vacate within the three-month deadline required. *Id.* at ¶27. The parties in *LIU Local 1099* never addressed whether the Union or its legal counsel should have been served; that precise issue was not before the Appellate Court. However, the Court’s ruling implicitly presumed that a party is represented by his or her counsel *from the arbitration* at the time a vacatur motion is filed, since service is to *precede* filing the vacatur action: “[S]ervice must be perfected by service *on the attorneys* for the respective parties *prior to filing the application * * **.” *Id.*, ¶18 (emphasis added).

Two years later, the Eighth District issued a similar ruling involving another R.C. 2711.13 proceeding. In *MCEOLC, supra*, the Union filed a “complaint” -- seeking to vacate an arbitration award -- within three months after the issuance of the arbitration award. *Id.* at ¶9. Further, the Union had the Clerk of Courts serve this “complaint” on the City, but the City’s outside counsel was never served. *Id.* at ¶10. Shortly after the three-month statute of limitations to file a motion to vacate had expired, the City filed a timely motion to confirm the arbitration award and/or to strike the Union’s motion to vacate, in part, because the Union had not filed a “motion” and that it had failed to serve the City’s outside counsel within the required three-month period. *Id.* at ¶11. Only after the City filed its motions to confirm/strike did the Union file a *motion* to vacate and attempt to serve it on the City’s outside counsel.

The Eighth District held “because the Union did not file its challenge within the three-month filing period, the trial court’s authority was limited to denying the application to confirm

the arbitration award.” *Id.* at ¶37. The Court explained that “in general, proceedings to confirm or vacate an arbitration award involve neither pleadings nor insufficient claims in pleadings” and:

Nonetheless, unlike a complaint, the motion filed under R.C. 2711.13 does not require that the clerk of courts issue summons and perfect service. Instead, service must be perfected by service on the attorneys for the respective parties prior to filing the application. *Cleveland v. Laborers Internatl. Union Local 1099*, Cuyahoga App. No. 92983, 2009 Ohio 6313. Thus, the motion must “be served upon the adverse party or his attorney within three months after the award.” *Id.*; *Thomas v. Franklin Cty. Sheriff's Office* (1998), 130 Ohio App.3d 153, 156, 719 N.E.2d 977. *Galion v. Am. Fedn. of State, Cty. & Mun. Emp.*, 71 Ohio St.3d 620, 1995 Ohio 197, 646 N.E.2d 813.

Id. at ¶18, 21. Therefore, because the Union did not file its motion to vacate and serve it upon the City’s counsel within the statutory time period of three months, “the trial court properly granted the City’s Motion to Strike.” *Id.* at ¶24.

Finally, in *CPPA, supra*, the plaintiff union sought to vacate an arbitrator’s award. The plaintiff union attempted to serve its vacatur filing by sending it to the City directly, via the City’s Law Department. The Eighth District dismissed the appeal, holding that the Court lacked jurisdiction because the plaintiff union had failed to serve the City’s outside counsel who had represented the City during the arbitration. The Eighth District relied on the text of R.C. 2711.13, on this Court’s decision in *Cox*, and on its analyses in *LIU Local 1099* and *MCEOLC* to find, in pertinent part:

Pursuant to Civ.R. 5(B)(1), if a party is represented by an attorney, a motion (including a motion to vacate) “shall be made on the attorney unless the court orders service on the party.” Here, the CPPA served the city’s law department instead of the city’s outside counsel, in violation of Civ.R. 5(B)(1). The CPPA therefore failed to perfect service within three months, and pursuant to R.C. 2711.13, the trial court lacked jurisdiction to consider the motion to vacate.

The CPPA argues that (1) R.C. 2711.13 gave it the option to serve either the city or its outside counsel, and (2) its service on the city’s law department was sufficient because the law department is the city’s attorney and “maintains a role in all work it subcontracts out to other law firms.”

We disagree that R.C. 2711.13 gave the CPPA the option to serve the city directly instead of its outside legal counsel. * * *

Even though R.C. 2711.13 provides that the motion “must be served upon the adverse party or his attorney,” it also states that service must be done “as prescribed by law for service of notice of a motion[.]” The Ohio Supreme Court has made clear that R.C. 2711.13 “requires service as provided in Civ.R. 5(B).” *Cox v. Dayton Pub. Schools Bd. of Edn.*, 147 Ohio St.3d 298, 2016-Ohio-5505, 64 N.E.3d 977, at ¶16. **The Supreme Court held that when a party is represented by an attorney, service of a motion to vacate an arbitration award “must be made on the attorney unless the court orders service on the party.”** *Id.*, quoting Civ.R. 5(B)(1).

....

We also disagree that service on the city’s law department satisfied Civ.R. 5(B)(1). Although the city’s law department provides legal services for the city, the CPPA acknowledges that the city hires other law firms. For this arbitration, outside counsel represented the city. The city’s outside counsel participated in the four-day arbitration hearing, and the arbitrator’s decision identified outside counsel as “appear[ing]” for the city. The arbitrator’s decision does not state that a representative from the city’s law department participated in the arbitration hearing. The trial court’s docket also identifies the city’s law department as the “defendant” in this case and lists separate outside counsel for the city as “attorney.” **We have previously found that when a city hires outside counsel, a party serving an application to vacate an arbitration award must serve the city’s outside counsel.** *See Mun. Constr. Equip. Operators’ Labor Council*, 197 Ohio App.3d 1, 2011-Ohio-5834, 965 N.E.2d 1040, at ¶24 (upheld the trial court’s judgment striking a union’s application to vacate an arbitration award because the application was not served for the purposes of R.C. 2711.13 until it was served on the city’s outside counsel over three months after the award, as opposed to earlier service on the city directly).

Here, the arbitrator issued his arbitration award on December 1, 2018. The CPPA filed its application to vacate the arbitration award on March 1, 2019, and its certificate of service states that the CPPA served the application that day to “all parties.” The certificate of service did not indicate that the CPPA also served the city’s outside counsel. A few days later, the clerk of courts served the application to vacate the arbitration award on the city’s law department. **The record reflects that the CPPA did not serve the city’s outside counsel with its application to vacate the arbitration award at all, let alone within three months of the December 1, 2018 award. The CPPA failed to comply with Civ.R. 5(B)(1) and therefore did not satisfy R.C. 2711.13’s three-month deadline.**

2021-Ohio-702, at ¶¶8-11, 13-14 (Emphasis added). The plaintiff union in the *CPPA* case filed a jurisdictional appeal in this Court, and OPBA filed an *amicus* brief in support of jurisdiction,

asserting many of the same arguments it asserts in the instant case. On July 6, 2021, this Court declined to accept an appeal in *Cleveland Police Patrolmen's Assn. v. Cleveland*, Case No. 2021-0509; *see* R.19, Notice of 07/06/2021 SCO Entry.

OPBA attempts to conjure an error in the Eighth District's analysis in *CPPA* and by extension, in the case *sub judice*. OPBA argues that because the City did not have a specific attorney listed on the docket when the moving parties in these cases filed their respective applications to vacate, the City was *unrepresented* -- and therefore "the City" itself was the appropriate party to serve per Civ.R. 5(B).

This argument is nonsensical, and OPBA certainly knows it. Indeed, just as in the *CPPA* case, it was **impossible** in the case *sub judice* for the City to place the name of a specific attorney on the trial court's docket *before* OPBA filed its Complaint, for two simple reasons: (1) the trial court's docket does not exist until the application to vacate is filed, and (2) the filing party controls the initial pleadings. In cases involving Complaints and/or Applications to Vacate, Plaintiff always has the first opportunity to list Defendant's attorneys.⁶ What mattered in this case, in *CPPA*, and in *MCEOLC* was that the City retained outside counsel for all three arbitrations; the Unions in all three cases knew that fact; and R.C. 2711.13 required outside counsel for all three arbitrations to be served with the application to vacate.

⁶ OPBA's argument invites the very type of service gamesmanship that OPBA criticizes. It opens the door to the backwards scenario where OPBA lists an attorney for the City on their initial pleadings (regardless of who actually represents the City), serves that listed attorney, and subsequently argues the City was on notice because Plaintiff served whomever it decided to list. Precisely that scenario exists. Ever since the City moved to dismiss the application to vacate, OPBA's Certificates of Service on every filing below improperly identified the City's Law Director as the City's counsel of record and stated improperly that it served the City's outside counsel only because "they have filed pleadings in this case." This assertion was both inaccurate and insulting to the City's outside counsel, who unquestionably were the City's counsel of record throughout this case. OPBA changed this practice only when it filed its appeal with this Court, and then failed to serve the City's counsel with its appeal filings.

OPBA erroneously attempts to portray the Eighth District’s decision in the instant case (and its trilogy of predecessors) as anomalous in Ohio law. Tellingly, OPBA does not cite to **any** cases from other Appellate Courts that have grappled with *identical* procedural issues and yet reached different results; in other words, OPBA fails to provide any case law to show any ‘conflict’ between the Ohio Appellate Districts on the issues raised by its first Proposition of Law. And in fact, the Ninth District has construed the applicable statutory language in the same way as the Eighth District. *See, City of Cuyahoga Falls, Ohio v. Fraternal Order of Police, Ohio Labor Council, Inc.*, 2007-Ohio-7060, ¶9.

An application to vacate or modify an arbitration award must be served "as prescribed by law for service of notice *of a motion* in an action." (Emphasis added.) R.C. 2711.13. Consequently, an application filed under R.C. 2711.13 does not require that the clerk of courts issue summons and perfect service. Instead, ***service must be perfected by service on the attorneys for the respective parties prior to filing the application***, as explained by Civ.R. 5(D):

* * * Because the City did not serve its application in accordance with R.C. 2711.13, the trial court lacked jurisdiction to vacate or modify the arbitration award. The City's assignment of error is overruled, and the judgment of the trial court is affirmed.

(emphasis added).

At the same oral argument from which OPBA selectively quotes in its Merit Brief, OPBA conceded that they had not conducted any research about the R.C Chapter 2711 requirements for filing or serving OPBA’s “complaint” before filing it – had OPBA’s counsel done so, it would have surely identified the *MCEOLC* decision and presumably would have complied with its pronouncements rather than openly defying them. (*See Appellant’s Supplement*, pp.092-094). Instead, OPBA relied at its own peril on its own past practices informed by other courts’ misapplications of R.C. 2711.13 and on experience with cases not governed by special statutory procedures.

OPBA demonstrably failed to serve its filings in accordance with well-established

decisional law and with the clear language of R.C. 2711.13 and Civ.R. 5(B). OPBA's first proposition of law must be rejected.

C. Proposition of Law No. 2

Proposition of Law No. 2: An Application to Vacate is sufficient to initiate vacatur proceedings, so long as it contains the necessary documentation as required by R.C. 2711.14.

OPBA's Proposition of Law No.2 challenges the Eighth District's separate and distinct conclusion that:

OPBA failed to comply with the statutory requirements for challenging an arbitration award because it filed a complaint instead of a motion as required by R.C. 2711.13. The OPBA's complaint was captioned as a complaint and included, among other things, a statement of jurisdiction, factual allegations, and a prayer for relief. And, there is no argument supported by legal analysis as required for a motion. The complaint also lacked a certificate of service, which is required for service of a motion pursuant to Civ.R. 5(B). The trial court, therefore, should have granted Cleveland's motion to strike the pleading.

R.22, ¶17.

OPBA's analysis of its second proposition of law is perfunctory and unconvincing. The argument hinges on the fact that R.C. 2711.10, the section of the Act that authorizes motions to vacate, refers to an "application," and that OPBA captioned its filing as "Complaint: *Application to Vacate*" and described it once within the document as a "*Motion to Vacate*." (OPBA Merit Brief, p.18) In conjunction with its "labeling" argument, OPBA contends that because the "right" documents were attached to its vacatur filing pursuant to R.C. 2711.14, the form and the content of the filing itself were immaterial. (*Id*, p.19). OPBA is elevating form over substance to excuse its own noncompliance with clear statutory language, asserting that it satisfied R.C. 2711.13's "motion" requirement merely by inserting the word "Motion" on page two of a document that was captioned as a complaint, read as a complaint, and was *served* as a complaint – not as a motion.

1. R.C. 2711.13 Requires an Initiating Motion.

R.C. 2711.13 is clear on what a party must file to initiate a vacatur action: a “motion.” In its Merit Brief, OPBA emphasizes a reference to “application” in R.C. 2711.10; however, the term “application” is synonymous with “motion.” And importantly, neither “application” nor “motion” means the same thing as “complaint.” As this Court explained:

“[A]pplication” is another word for a motion, and it is not synonymous with the word “pleading.” See Civ.R. 7(A) and (B) (distinguishing between a pleading and a motion, the latter of which is an “application to the court”); Black’s Law Dictionary 124 (11th Ed.2019) (defining the word “application” as “motion”).

DeVore v. Black, 166 Ohio St. 3d 311, 2021-Ohio-3153, ¶21.

The difference here is not procedural or stylistic; it is substantive. The General Assembly (and the courts) recognize the obvious differences between a motion and a complaint, not only in the normative *formatting* of such filings, but also in their substantive content, the applicable response deadlines under the Civil Rules, the differing methods of service, and their impact and role during civil litigation. The General Assembly chose to authorize a “petition” as the means to initiate proceedings to compel arbitration under R.C. 2711.03, but all post-award proceedings under R.C. Chapter 2711 are initiated via motion. *See*, R.C. 2711.05. Had the General Assembly intended for an application to vacate to take the form of, and to be served as, a civil complaint, then it would have enacted different terms in R.C. 2711.10 and 2711.13. The legislature’s choice of “motion” unquestionably manifests an intent for judicial review of arbitration awards to proceed in the form of motion practice, not in the form of notice pleadings with after-the-fact merit briefing.

In this respect, R.C. Chapter 2711 “special statutory proceedings” are unique in Ohio law. Unlike a run-of-the-mill civil case, the parties do not engage in notice pleading practice by filing a Complaint and Answer. And unlike a judicial appeal from a common pleas court decision, the reviewing court’s jurisdiction is not invoked via a “Notice of Appeal,” and there is no *praecipe* for the Record or issuance of a briefing schedule.

This Court has rejected the use of pleadings asserting claims brought under the Declaratory Judgment Act as a means to invoke judicial review of an arbitration award. *City of Galion v. AFSCME, Ohio Council 8*, AFL-CIO, Local No. 2243, 71 Ohio St.3d 620, 623, 1995-Ohio-197, 646 N.E.2d 813 (“[i]f we were to sanction the use of declaratory relief in this case, then parties challenging arbitration awards would be able to bypass the stringent requirements that are needed to overturn, modify, or correct an arbitration award. Such a result would be patently against the clear legislative intent favoring private settlement of grievances.”). Similarly, the Eighth District has held that where a party has initiated confirmation proceedings under R.C. 2711.09, and the adverse party filed an “Answer with Counterclaims” instead of filing a motion to vacate, the Court must reject this attempted ‘responsive pleading’ as non-complaint under R.C. 2711.13. *See Brown v. Nanteeka Gloves, L.L.C.*, 2021-Ohio-1659, 171 N.E.3d 1284, ¶ 16 (8th Dist.) (applying *Asset Acceptance, L.L.C. v. Stancik*, 8th Dist. Cuyahoga No. 84491, 2004-Ohio-6912).

The filing that is necessary to invoke a court’s jurisdiction under R.C. 2711.13 is a “motion.” The normal procedures for motion practice apply, as if that filing were “any other motion before the trial court.” *Geiger, supra*. The motion must be adequately supported by legal argument, it must be properly served on the adverse party’s counsel, and it must be opposed or responded to within the normal timeframes set for motion practice under Civ.R. 6(C)(1).

2. OPBA Filed a “Complaint” that Fell Short of the R.C. 2711.13 Standard for a “Motion”

In the instant case, the Eighth District determined that OPBA did not satisfy the requirements of an R.C. 2711.13 “motion.” This is evident not only in what is *present* in the document that OPBA filed – i.e., the caption, the numbered allegations, and the prayer for relief, as observed by the Eighth District (R.22, ¶17) -- but more importantly in what is *absent* from OPBA’s filing. Specifically, OPBA’s “Complaint” was devoid of any reasoned legal analysis in

support of vacating the award under the limited grounds in R.C. 2711.10(A) through (D).

Whether embodied in a motion itself, or in a separate “memorandum of law in support” of that motion, the Civil Rules require that any motion “state with particularity the grounds therefor” (Civ.R. 7(B)(1)). Likewise, the Cuyahoga County Common Pleas Court Local Rules, which were applicable in this case, require a “brief written statement of reasons in support of the motion” to accompany any motion (Cuyahoga Loc.R. 11(B)).⁷

It is undisputed that OPBA did not attach a “memorandum of law in support” of its “Complaint,” and it failed to cite to any case law authority in the Complaint, let alone to provide a reasoned analysis of how the Award met the narrow, limited vacatur standards of R.C. 2711.10. The omissions in OPBA’s filing are underscored when it is juxtaposed with OPBA’s subsequent filing of a “Supplemental Motion to Vacate” almost seven months after initiating its “appeal” of the arbitrator’s award. (Trial Ct. R. 13). Unlike OPBA’s initial filing, the “Supplemental Motion to Vacate” was not formatted as a complaint and did not include numbered allegations or a prayer for relief; this filing was a motion with a separate memorandum of law containing citations to statutory standards and analysis of decisional law, and OPBA attached several of the components specified in R.C. 2711.14. OPBA’s post-hoc supplemental filing demonstrates that OPBA understands the distinction between a complaint and the statutorily-required motion; however, submitting this document, even by leave of Court, did not excuse its failure to satisfy the “motion” requirements of R.C. 2711.13 within the mandatory, jurisdictional three-month limitation period.

A party’s failure to establish legal authority in support of vacating an award is grounds for rejecting the party’s application. *Binns v. Sterling Jewelers, Inc.*, 9th Dist. Summit No. 25149,

⁷ In the context of a motion to vacate an arbitration award, the failure to follow local rules is reason **alone** to deny motions. *See State v. FOP, Inc.*, Franklin C.P. No. 15-MS-119 (May 19, 2016) 2016 Ohio Misc. LEXIS 6502 at *6.

2010-Ohio-3386, ¶8. The Court is not required to “develop an argument on behalf of an appellant when he or she fails to do so.” *Id.* Nor is a party entitled to “any greater procedural enlargement . . . than would be accorded to any other motion before the trial court.” *Geiger v. Morgan Stanley DW, Inc.*, 10th Dist. Franklin No. 09AP-608, 2010-Ohio-2850, ¶19. Courts have held that “bare contentions are insufficient to satisfy the burden of proof R.C. § 2711.10 imposes on parties filing objections to arbitration awards.” *Citibank S. Dakota, N.A.*, 2006-Ohio-5755 at ¶32, *citing CACV of Colorado, L.L.C. v. Kogler*, Montgomery App No. 21329, 2006 Ohio 5124 at ¶15. In *Citibank*, the court held that even assuming the trial court had jurisdiction, Citibank had failed to present evidence of its claims and instead submitted unverified documents. 2006 Ohio 5755 at ¶32. That is precisely what the Union has done in the instant case.

OPBA’s filing was not only deficient under the applicable Civil Rules and Local Rules; it also failed to meet the statutory requirements for a fully-formed R.C. 2711.13 motion. In *NCO Portfolio Mgt. v. Reese*, 8th Dist. Cuyahoga No. 92804, 2009-Ohio-4201, the Eighth District construed R.C. 2711.14 (which lists the required elements to be submitted with a motion to vacate) as inclusive of the requirement to submit a **brief in support** of the R.C. 2711.13 “motion” at the same time the special statutory proceeding is initiated. This was a reasonable extrapolation from the language of the statute, which requires the moving party to file, with his or her motion, “[e]ach * * * **paper used upon** an application to confirm, modify, or correct the award.” R.C. 2711.14 (emphasis added) Since a memorandum in support is a required element for making a motion in Ohio civil practice, it is necessarily a “paper used upon” the application to vacate.

There is a paucity of case law squarely addressing what constitutes a “motion” for purposes of R.C. 2711.13. The closest analogous case appears to be *State v. FOP, Inc.* C.P. No. 15-MS-119, 2016 Ohio Misc. LEXIS 6502, at *3-5 (May 19, 2016), *affirmed* No. 16AP-457 (10th Dist. 2017). The trial court explained the various filings by both parties in that case:

The filings in this matter are procedurally puzzling at best. On February 20, 2015, the State filed their “Application and Motion to Vacate Arbitration Award” to the Court’s docket as a complaint. ***Like a complaint, it contains number paragraphs setting forth the State’s claims, a statement alleging proper venue, and a concise statement of the relief sought.*** In response the FOP filed a motion to confirm the arbitration award and a separate “answer and counterclaim”, generally denying the allegations in the State’s motion and seeking interest on the money owed to Gales. The State filed an “answer to [the FOP’s] counterclaim.” Then on May 14, 2015, the State filed a “Motion for Summary Judgment and Opposition to, Defendant’s Motion to Confirm the Arbitration Award.” The FOP filed a “response” and thereafter the State replied.

(*Id.* at *3) (Emphasis added).

In *State v. FOP, Inc.*, the defendant-union argued that, although the State had “timely filed a motion to vacate under R.C. 2711.13, ***it failed to include a memorandum in support*** as required by the local rules.” (*Id.* at *4) (Emphasis added) The State argued that its Motion for Summary Judgment (“MSJ”) should be treated as a substitute for the missing brief in support, and that the State was “not required to file its brief at the time it filed its application to vacate the arbitration award, because a memorandum is not listed as one of the documents required to be filed with the motion” in R.C. 2711.14. (*Id.*)

The Court rejected the State’s arguments. (*Id.*) The State’s MSJ (which was filed two months after the statute of limitations in R.C. 2711.13 had expired) could not substitute for the missing brief. The Court noted that “the parties must conform to the applicable local rules and the Ohio Rules of Civil Procedure pertaining to motion[s].” (*Id.* at *5) The applicable rules required a brief in support, and the State had failed to comply: **“[t]his alone is reason to deny the state’s motion.”** (*Id.*)

The trial court in *State v. F.O.P. Inc.* did not ***dismiss*** the State’s motion on jurisdictional grounds. However, the Court also did not reward the State for its non-compliance by establishing a briefing schedule. Instead, the Court reviewed the State’s motion to vacate *as submitted* (*i.e.*, in Complaint format, with no accompanying “brief in support”). The Court denied the State’s motion

to vacate on substantive grounds, noting that “the State fails to cite any law or authority in support of its motion.”

Failure to provide adequate legal support at the time a motion is filed results in the denial of the motion. Motions under R.C. Chapter 2711 are no exception.

3. A “Placeholder” Motion is Not Contemplated by R.C. 2711.13.

In its Merit Brief, OPBA cites language from the plurality opinion in this Court’s decision in 2019 in *BST Ohio Corp. v. Wolfgang*, 165 Ohio St.3d 110, 2021-Ohio-1785, 176 N.E.3d 31, for the proposition that a “placeholder” complaint may be used to initiate vacatur proceedings. However, OPBA’s reliance on *obiter dictum* from *BST Ohio Corp.* is misplaced, and the City believes the instant case affords this Court an opportunity to provide much-needed clarity for practitioners in this niche area of Ohio law.

To say that *BST Ohio Corp.* involved a complicated procedural history would be an understatement. The case began with the filing of a Motion to Confirm immediately after an arbitration award was issued; although the moving party had up to one year after issuance of the award to file said motion, it chose to do so after just one day. The non-moving party (Wolfgang) filed a motion to vacate, but did so in California state court rather than in Ohio. The Ohio court scheduled a hearing on the Motion to Confirm just two weeks after the action was filed (providing a minimum five days’ notice as required by R.C. Chapter 2711). However, Wolfgang failed to file anything remotely in the vein of a motion to vacate before that *hearing* date. Instead, Wolfgang moved to stay/continue the hearing, and later, filed a reply in support of its motion to stay/continue. Wolfgang appeared at the hearing, but inexplicably still failed to file a motion to vacate for another *two weeks*. When the trial court at last issued a decision (denying the motion to stay/continue and granting the motion to confirm), Wolfgang immediately perfected an appeal to the Eighth District.

Wolgang then attempted to file a separate vacatur action in Ohio, and to supplement the appellate record with details of the newly-filed motion. The Eighth District denied the motion to supplement and held that the Trial Court’s granting of the motion to confirm was premature. This Court granted discretionary review and reversed the Eighth District in a split decision.

The key takeaway of *BST Ohio Corp.* is that R.C. 2711.13 does not impose a three-month *waiting period* before a Court can confirm an arbitration award. *Id.* at ¶21. In the absence of a timely motion to vacate, at the time of the hearing set by the Court pursuant to R.C. 2711.09, the trial court in *BST Ohio Corp.* had no choice but to confirm the award.

In a plurality opinion announcing the judgment of the Court, Justice Brunner, joined by Chief Justice O’Connor and Justice Donnelly, observed that Wolgang had failed to file even a “placeholder or conclusory motion” to avoid being in default at the time of the scheduled hearing. *Id.*, ¶27. This opinion further stated:

R.C. 2711.09 contemplates a minimum of five days' notice before a hearing on an application to confirm an arbitration award. A party seeking to oppose confirmation must file a motion to vacate, modify, or correct the award on or before the hearing date of the application to confirm, and that motion must be filed within three months of the delivery of the arbitration award. Even a placeholder or conclusory motion will suffice, subject to the guidance of the trial court as to when a fully formed motion must be filed.

Id., ¶31.

The foregoing discussion in *BST Ohio Corp.*, on which OPBA relies in the instant case, is *obiter dictum* drawn from a plurality opinion (but not the ruling of the Court); it does **not** stand for the proposition that “placeholder” motions or a “Complaint” are sufficient in and of themselves under R.C. 2711.13, nor is it an *endorsement* of that practice in the run of cases. *BST Ohio Corp.* does not establish as normative the issuance of “briefing schedules” in R.C. Chapter 2711 proceedings. It bears noting that Wolgang was evidently engaged in ‘playing the system’ and/or forum-shopping. Wolgang pursued its California vacatur filing but tarried in responding to the

confirmation proceedings in Ohio. *BST Ohio Corp.* illustrates that parties to a vacatur proceeding who engage in dilatory tactics or procedural hijinks, do so at their own peril.

Wolgang’s situation is factually distinct from OPBA’s situation in the instant case. Wolfgang still had ample time left on the R.C. 2711.13 “clock” to file its Motion to Vacate prior to the scheduled hearing (and indeed, during the weeks that followed it). OPBA filed its “Complaint” at the end of the statutory three-month period, and did not attempt to file a “fully formed motion” (see *BST Ohio Corp.*, ¶31) to remedy the deficiencies of its “Complaint” until April 2, 2021 – which was well outside the three-month period set forth in R.C. Chapter 2711. Although OPBA had obtained leave of court to file this “Supplemental Motion to Vacate,” it was radically reformatted to meet the criteria of a “motion” – this was done presumably in direct response to the Eighth District’s decision in *CPPA* (released March 11, 2021).

Justice Fischer concurred in judgment only, joined by Justices Kennedy and DeWine. In a concurring opinion, Justice Fischer concluded that nothing in R.C. 2711.13 “requires a court to wait three months before confirming an award under R.C. 2711.09,” and no further analysis was required to reverse the Appellate Court’s decision. *Id.*, ¶38. Justice Stewart concurred in part and dissented in part. In her separate opinion, Justice Stewart criticized the lead opinion’s seeming approval of “placeholder motion” tactics in R.C. Chapter 2711 proceedings:

The lead opinion suggests, without going into detail, that the filing of a “placeholder” or “conclusory” motion might be appropriate if a more thorough motion cannot be accomplished prior to the hearing date. **Nothing in R.C. 2711.01 et seq. speaks in terms of a placeholder or conclusory motion. Furthermore, this suggestion is unsound. When parties have used similar tactics, appellate courts have upheld the denial of the request to vacate the award on the grounds that the request was not properly asserted.** See *Brookdale Senior Living v. Johnson-Wylie*, 8th Dist. Cuyahoga No. 95129, 2011-Ohio-1243, ¶ 11-12 (denial of request to vacate upheld when party asserted grounds for vacatur in response to the application to confirm instead of in separate motion); *Peck Water Sys. v. Cyrus Corp.*, 5th Dist. Stark No. 1999CA00151, 2000 Ohio App. LEXIS 333, *10-12 (Jan. 31, 2000) (denial of motion to stay proceedings upheld when motion asserted that a stay was needed to procure the transcript of the arbitration proceeding that

was still being transcribed, because the motion to vacate filed concomitantly with the motion to stay did not specify what evidence the arbitrator refused to admit during arbitration and whether that evidence was both relevant and admissible). **The parties before the court today and those that might be in the same position in the future need a clear answer to the procedural question before us.** The lead opinion's suggestion that a conclusory or placeholder motion—the same kind of motion that trial and appellate courts have deemed insufficient—could be filed is not helpful guidance.

2021-Ohio-1785, 176 N.E.3d 31, ¶ 43, fn. 5 (emphasis added).

While the City maintains that the instant case was not of great general or public interest, the upshot of this Court's acceptance of discretionary review is that this case can serve as a vehicle for the "clear answer" invited in Justice Stewart's concurring/dissenting opinion in *BST Wolfgang Corp.* Nothing in the text of R.C. Chapter 2711 sanctions the filing of "placeholder" motions;" instead, it was the intent of the General Assembly that the moving party under R.C. 2711.13 must provide its complete rationale for vacatur when it files and serves the R.C. 2711.13 motion.

4. Briefing Schedules Were Not the General Assembly's Intent.

R.C. 2711.14 lists the documents that must be filed with the R.C. 2711.13 "motion" in order to properly invoke the Court's jurisdiction. The concept behind R.C. 2711.14 is that *everything* on which a party intends to rely when seeking to confirm, modify, or vacate and award, needs to be filed along with the case-initiating motion. The statute uses mandatory language, "Any party * * * **shall** * * * also file the following papers with the Clerk," and it requires that all of these papers be filed concurrent with the case-initiating R.C. 2711.09 or 2711.13 motion, *i.e.*, the papers must be filed "*** * * at the time** the application is filed with the clerk * * *". R.C. 2711.14 (emphasis added).

Parties who file "placeholder" motions in vacatur cases and seek leave of court to set a briefing schedule, do so at their own peril; nothing in the statute permits this practice, and Ohio

courts do not have authority to allow late submissions to meet the R.C. 2711.14 requirements. The statute is clear that these papers **must** be filed at the time of the vacatur application.

In the instant case, OPBA was banking on an assumption that the Trial Court would issue a briefing schedule and allow the parties to “supplement their argument.” (*See* OPBA’s Memo, pp.18-20). OPBA attempted to identify to this Court several anecdotal examples of Ohio courts issuing a “briefing schedule” in R.C. Chapter 2711 cases and permitting the parties to submit merit briefs on their respective motions to vacate and/or confirm. Whether that practice occurs in Ohio, and whether it is sporadic or ubiquitous, are immaterial (and evidence pertaining thereto is not in the Record before this Court).⁸ What matters is how the *statute* defines the special statutory proceeding. Nothing in R.C. Chapter 2711 entitles a party to file a placeholder “motion” – or a “Complaint” for that matter -- to initiate a vacatur proceeding, and then to await a briefing schedule from the Court to file its brief in support. That is particularly true here, where the moving party’s “brief” was not filed until *after* the three-month limitations period of R.C. 2711.13 had expired.

From a practical standpoint, the use of a briefing schedule had the effect of giving OPBA a proverbial “second bite of the apple” after failing adequately to develop its arguments in its initial “Complaint.” Requests for briefing schedules in vacatur proceedings are improper and a form of sandbagging. The City is not simply splitting hairs. There are real-life consequences to OPBA’s reliance on a placeholder complaint instead of a properly-supported motion to vacate. A cunning litigant could potentially employ OPBA’s tactics to create a “heads I win, tails you lose” situation for their opponent. Consider this scenario: an employer files a placeholder complaint to vacate an award, making only conclusory averments as to the legal and factual grounds for the motion (e.g., that the arbitrator “exceeded his powers”). The non-moving party, a union, now faces a

⁸ This case affords the Court an opportunity to provide the necessary corrective guidance to lower courts that have not adhered to the statutory procedural requirements.

dilemma. If the union waits for the Court to set a briefing schedule and fails to file a “memorandum in opposition,” the employer could pursue a default judgment after the time for opposing a motion has passed. But if the union wishes to submit a timely opposition, it is a tough row to hoe: there is nothing of substance to “oppose” in a placeholder complaint. This leaves the union to *guess* at the employer’s arguments when formulating its “memorandum in opposition.” Now the union is *creating* arguments for the employer *and* also handing the employer a complete playbook of the union’s rebuttals to those arguments.

Placeholder complaints and requests for a “briefing schedule” give the moving party an undue advantage. Under R.C. Chapter 2711, the *moving party* has the burden to show that an arbitration award must be vacated. OPBA’s placeholder filing tactic shifts improperly that burden to force the *non-moving party* to show its proverbial “cards” first.

OPBA erroneously claims that it was not *prohibited*, and was in fact specifically *allowed*, to “expand[] on” its initial cursory, bare-bones complaint at a later time. OPBA cites no authorities for this “trial by ambush” approach to vacatur proceedings. OPBA contends that it should have been entitled to an extension of time under Civ.R. 6(B) in which to comply with the local rule by supplying a memorandum in support. The OBPA’s contention ignores that the procedural requirements of R.C. Chapter 2711 are mandatory and *jurisdictional*. It is not a matter of discretion: if all the requisite elements are not filed within the three-month window, the Court has *no jurisdiction*. This is in stark contrast to an appeal filed in the state’s Courts of Appeal, where the appellant’s failure to take “any step other than the timely filing of a notice of appeal does not affect the validity of the appeal * * *.” App.R. 3(A). An Appellate Court has discretion to allow “amendment of a notice of appeal,” so long as the amendment does not attempt to invoke appellate jurisdiction over matters that can no longer be timely appealed. App.R. 3(F).

R.C. Chapter 2711 contains no provisions comparable to these appellate procedural rules. Failure to comply strictly with R.C. Chapter 2711 deprives the trial court of its jurisdiction over the vacatur request. “[P]arties must strictly comply with Chapter 2711, no matter what the circumstances are.” *Greenwald v. Shayne*, 10th Dist. Franklin No. 09AP-599, 2010-Ohio-413, ¶17. Because OPBA did not strictly comply with R.C. Chapter 2711 by submitting a proper vacatur filing within three months of the Award’s issuance, OPBA failed to timely file a vacatur action under R.C. Chapter 2711.

It would certainly be within the General Assembly’s power to define a briefing process for vacatur proceedings that more-closely mirrors Ohio’s appellate briefing rules (e.g., filing of a notice of appeal, followed by certification of the record and a schedule of merit briefs), or to prescribe that R.C. 2711.13 proceedings be initiated like R.C. 2711.03 proceedings (i.e., by complaint and service of a summons) But, that is not the law that the General Assembly enacted. Since its inception, the Act has called for vacatur proceedings to be handled by *motion practice*. This makes sense, as one of the primary objectives of private arbitration is to avoid the delays that can result from congested judicial dockets. The more streamlined the process of judicial review of awards, the more the parties benefit from their arbitration bargain. Judicial review of awards was intended to be expedited, and to minimize the commitment of judicial and party resources.

5. OPBA’s Argument Misapplies Eighth District Precedent

For the balance of its argument on Proposition of Law No. 2, OPBA does little more than rehash the same case law on which it relied in the Trial Court and the Eighth District. OPBA emphasizes that the Eighth District, in *MCEOLC*, had noted *two* instances where a “complaint” had been used to initiate vacatur proceedings: *Bailey v. Ohio State Dept. of Transp.*, Franklin App. No. 07ap-849, 2008 Ohio 1513, and *Gonda & Assocs. v. Flynn*, 8th Dist. Cuyahoga No. 93566, 2010-Ohio-679. While the Court acknowledged in *MCEOLC* that other courts *had* accepted a

“complaint” under R.C. 2711.13, that statement was a far cry from a ringing *endorsement* of this practice – and indeed, the Court noted a paucity of the case law authorities for that proposition. Neither case stands for the proposition that initiating vacatur proceedings by Complaint is *appropriate* or consistent with the statutory requirement of a “motion.” The Eighth District made this abundantly clear in its decision in the instant case:

[N]one of the adverse parties in these cases [, *Gonda* and *Bailey*,] challenged the adequacy of filing a complaint in lieu of a motion as Cleveland does now. The adequacy of filing a complaint instead of a motion was not an issue in those cases. Therefore, they do not support the proposition that a party seeking to challenge an arbitration award may do so by filing a complaint instead of a motion, especially since the statute expressly states that such challenges must be made by motion.

(R.22, ¶15) (parenthetical added).

In *Gonda*, the trial court and this Court did not address the adequacy of the application (although it was titled as a Complaint) as the ultimate issue in the case involved the filing being past the three-month limitation. *Gonda & Assocs. v. Flynn*, 2010-Ohio-679, ¶13 (“As this court recently recognized, a party’s failure to serve an adverse party with notice of a motion to vacate within the three-month statutory period will deprive the trial court of jurisdiction even when the moving party timely filed the motion with the court and requested service by the clerk of courts.”) This Court held plaintiff: (1) failed to file its application within three months and (2) failed to provide notice to the opposing parties. *Id.* at ¶14. There is no indication the “Complaint” was challenged at the trial court level nor that the case permits a complaint as a sufficient method to vacate an arbitration award.

In *Bailey*, the Tenth District held the Ohio savings statute could not be utilized a second time to attempt to vacate an arbitration award, and, as a result, Plaintiff’s “re-filed complaint” was barred by the statute of limitations. *Bailey*, 2008-Ohio-1513 at ¶ 17. Again, there is no indication that the adequacy or format of the plaintiff’s “Complaint” was challenged by the defendant in the

trial court. In the instant case, unlike the *Gonda* and *Bailey* cases described above, the City did challenge the adequacy of OPBA's Complaint **and** that OPBA's filings were beyond the three-month limitation provided in R.C. 2711.13.

Based on past briefings, OPBA may rely in its Reply Brief to this Court on *Corrado v. Lowe*, 11th Dist. Geauga No. 2014-G-3239, 2015 Ohio 1993. *Corrado* is clearly distinguishable from the case *sub judice*. On December 20, 2013, Corrado filed two documents simultaneously: a "Complaint" (with numbered averments, similar to OPBA's filing in this case) and a "Motion to Vacate or in the Alternative Modify Arbitration Award." Both documents were attached to the City's Reply Brief in the Eighth District. R.16. The latter document in *Corrado* satisfied the requirements of R.C. Chapter 2711: it was a proper motion, and it was accompanied by a seventeen-page memorandum in support, complete with case law citations and a thorough explanation of the factual and legal basis of the motion. That a "complaint" was also filed simultaneously did not **negate** the existence of the motion; the complaint was superfluous. With respect to the "Complaint," the Court clearly stated that this "procedure was irregular." Notwithstanding, the Court found the "***Motion to Vacate or Modify*** was properly before the Court." (emphasis added).

6. Motions Require a Certificate of Service

OPBA also challenges the Eighth District's observation that a certificate of service was a required component of a motion to vacate under R.C. 2711.13. The Court had previously explained that a motion to vacate must contain proof of service, and it must be attached to the motion. *LIU Local 1099*, at ¶¶19, 22 (court struck motion to vacate that did not include proof of service). In this case, OPBA's complaint (Trial Ct. R.1) contained no such certification. That is because OPBA opted to have its complaint served via process server through the Clerk's office (Trial Ct. R.2), which is **not** the correct process for serving a motion under Civ.R. 5(B).

A certificate of service is typically not used when service is to be accomplished by the Clerk of Courts – instead, a praecipe may be filed to specify whom to serve and the manner of service. Here, it bears noting that OPBA in fact it served **no one at all** -- at least as Civ.R 5 defines service of a motion. OPBA’s vacatur filing was served directly on the City, along with a Summons, by a process server from the Clerk of Courts; this is the manner of service for a *Complaint*, not a *Motion*. Such service fails to comply with Civ.R. 5(B)(4) which requires:

Proof of service. The served document shall be accompanied by a completed proof of service which shall state the date and manner of service, specifically identify the division of Civ.R. 5(B)(2) by which the service was made, and **be signed in accordance with Civ.R. 11.** Documents filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. (Emphasis added)

The process server’s verification of service does not suffice under Civ.R 5(B)(4), because a Certificate of Service must be “signed in accordance with Civ.R. 11.” That did not occur because Civ.R 11 signatures must be signed by an **attorney or the party**, not a process server. OPBA’s Application to Vacate contained no valid Certificate of Service, much less one that complies with Civ.R. 5(B)(4). For this additional aspect of procedural noncompliance, OPBA’s vacatur filing was defective under R.C. 2711.13.⁹

⁹ OPBA’s dismissive approach to its procedural obligations has not been ameliorated by the ongoing course of this litigation; indeed, OPBA’s Merit Brief to this Court contains no signature line (in contravention of Civ.R 11) and an inaccurate certificate of service. OPBA attempted to fax its entire 215-page Merit Brief, Appendix, *and* Supplement to the undersigned counsel – no less than **four times**. All four transmissions were incomplete (stopping after approximately 170-75 pages) due to the size of the transmission. The enormous size of these fax transmissions resulted in a temporary suspension of the undersigned counsel’s facsimile account and the payment of additional charges to the fax provider before the account could be restored. After the first two failed attempts, OPBA’s counsel successfully emailed without incident the Merit Brief to the undersigned counsel. Notwithstanding the request of the City’s counsel to perfect service in the future via electronic mail (which has become the preferred method), OPBA attempted to fax its 215-page filing twice more, with the same lack of success.

III. CONCLUSION

Based on the foregoing, Appellee the City of Cleveland respectfully asks this Court to affirm the decision of the Eighth District Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11, a true copy of the foregoing was served by e-mail and certified mail on this 19th day of December, 2022, upon:

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