# When Can I Confirm an Arbitration Award?

**June 01, 2021**

## Timeline to Confirm Arbitration Award

***BST Ohio Corp. v. Wolgang*, 2021-Ohio-1785**
In this appeal, the Supreme Court of Ohio reversed the lower court's decision, holding that neither R.C. 2711.09 nor R.C. 2711.13 requires a court to wait three months after an arbitration award is issued before confirming the award.

***The Bullet Point:*** In this matter, the Supreme Court of Ohio determined that trial courts need not wait three months before confirming an arbitration award. In making this determination, the Court analyzed the interplay of the timing requirements of R.C. 2711.09 and 2711.13. Under R.C. 2711.09, a party may file an application to confirm an arbitration award with a court of common pleas within one year after the award is issued. Thereafter, the court must grant an order and issue judgment confirming said award unless it has been vacated, modified, or corrected pursuant to R.C. 2711.10 and 2711.11. As compared to said one-year limit to confirm, R.C. 2711.13 mandates that a party seeking to alter the results of arbitration must move to vacate, modify, or correct the award within three months of the award being issued. In this case, the plaintiff applied to the Cuyahoga County Common Pleas Court (the "trial court") to confirm the arbitration award the same day it was issued. The following day, the defendant filed a petition to vacate or correct the award in the Superior Court of California, County of Los Angeles. The trial court scheduled a hearing on the confirmation application, and the defendant subsequently moved to stay or continue the proceedings in Cuyahoga County. The trial court proceeded with the confirmation hearing, which the defendant contested as premature and argued it had three months under R.C. 2711.13 to move to vacate, modify, or correct the arbitration award. The trial court disagreed, and subsequently confirmed the award.

In analyzing the trial court's confirmation, this Court explained that the time-deadline provisions of R.C. 2711.09 and 2711.13—one year in which to apply to confirm an award and three months in which to move to vacate, modify, or correct an award—coexist and operate both independently and in tandem. However, R.C. 2711.13 is not a guaranteed time period and it "does not operate as a statute of limitations for the purpose of preserving objection time." On the contrary, R.C. 2711.13 provides for a maximum of three months for a party to file a motion to vacate, modify, or correct an arbitration award. Consequently, when a party files an application to confirm, "as with any other motion or application, the onus is then on the other parties to the arbitration to respond, lest the trial court take the action of confirmation, as contemplated by the statute, and "enter judgment in conformity therewith," R.C. 2711.12." Here, despite the plaintiff's pending application to confirm and its appearance at the confirmation hearing, the defendant failed to file a motion to vacate the arbitration award in Ohio until after the trial court's confirmation. The Court noted that R.C. 2711.13 provides that the trial court may stay or continue a pending application for confirmation while a motion to vacate is pending. Therefore,

the trial court has the discretionary power to "balance the interests of the parties through procedures that allow both the arbitration confirmation to be considered and any grievances about the arbitration award to be aired and resolved." As such, when a party files an application to confirm within the three-month period of R.C. 2711.13, fairness to both parties dictates that any motion to alter the award must be filed on or before the hearing date of the application to confirm, and that said motion must be filed within three months of the delivery of the arbitration award.

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## Liquidated Damages

***Quincy Commun. v. Patrick,* 1st Dist. Hamilton No. C-200224, 2021-Ohio-1736**
In this matter, the First Appellate District affirmed the lower court's decision, agreeing that the liquidated damages clause was unenforceable as it failed to specify the amount of damages in clear and unambiguous terms.

***The Bullet Point:*** Under Ohio law, contracting parties may utilize a liquidated damages clause where actual damages would be difficult to prove or calculate in the event of a breach of contract. When negotiating a clause for liquidated damages, it is imperative to include the specific dollar amount to be awarded, so that a reviewing court may easily enforce the clause without having to compute the amount of damages. In this case, the plaintiff brought a breach of contract action against the defendant and asked the court to enforce the liquidated damages clause. In determining the validity of said clause, the court utilized a three-part test set forth by the Supreme Court of Ohio. Specifically, the court analyzed the clause to determine whether the parties' damages would be: "1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." Here, the liquidated damages clause failed to specify the amount of damages that would be imposed if the defendant breached the contract. Instead, the clause stated that the defendant would be required to pay the lesser of the plaintiff's lost profits or 25% of the contract price, plus overhead and profit as determined by the defendant's insurance company. As the court noted, rather than being a specific dollar amount for liquidated damages, this clause included calculations for measuring actual damages. If actual damages are calculable, no liquidated damages clause is necessary. Further, both calculations for damages included amounts that were unknown and purely speculative at the time the parties entered the contract. As the clause failed to specify, in clear and unambiguous terms, the agreed upon amount of damages to be imposed in the event of a breach, the court determined the liquidated damages clause was unenforceable.

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## Confirmation of Arbitration Award

***Brown v. Nanteeka Gloves, L.L.C.*, 8th Dist. Cuyahoga No. 109925, 2021-Ohio-1659**
In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that the arbitration award was properly confirmed as the defendant failed to file a separate motion to vacate.

***The Bullet Point:*** As outlined in R.C. 2711.09, a party may file an application to confirm an arbitration award with a court of common pleas within one year after the award is issued. Thereafter, the court must grant an order and issue judgment confirming said award unless it has been vacated, modified, or corrected pursuant to R.C. 2711.10 and 2711.11. In this case, the plaintiff timely filed an application to confirm an arbitration award pursuant to R.C. 2711.09. In response to said application, the defendant filed an answer and counterclaim. The plaintiff argued that the arbitration award should be confirmed as the defendant's response did not constitute a motion to vacate or modify under R.C. 2711.10 or 2711.11. Both the lower and appellate courts agreed, finding that the defendant failed to timely file a motion to vacate. As this court explained, Ohio law favors resolving disputes through arbitration. Therefore, the authority of courts to vacate an arbitration award is extremely limited. If a party is not satisfied with an arbitration award, it must file a motion to modify, vacate, or correct the award within three months of the award being issued. R.C. 2711.13. It is insufficient to respond to a motion to confirm simply by arguing to vacate the award; a separate, timely motion to vacate is required. If a motion to vacate is not timely filed within the three-month period, the trial court is precluded from vacating, modifying, or correcting the award. Instead of filing a separate motion to vacate, the defendant in this case filed an answer and counterclaim. Consequently, the trial court's confirmation of the arbitration award was proper.

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## Assumption of Risk

***Oliveri v. Osteostrong*, 11th Dist. Lake No. 2019-L-104, 2021-Ohio-1694**
In this appeal, the Eleventh Appellate District reversed and remanded the trial court's decision, finding that the plaintiff did not expressly waive her negligence claim and that she was not injured as a result of an inherent danger of working out at a gym.

***The Bullet Point:*** Contracting parties may expressly assume the risk of injury. Specifically, a party expressly assumes a risk when it "expressly contracts with another not to sue for any future injuries which may be caused by that person's negligence." Stated differently, express assumption of the risk is akin to waiving the right to recover for future harm. Ohio courts are hesitant to enforce releases from liability for future tortious conduct and such releases are narrowly construed. That being said, releases from future tort liability will be enforced if the intent of the parties regarding what kind of liability and what individuals or entities are being released is clear and unambiguous. As such, for express assumption of risk to be enforced to bar the plaintiff's negligence claim, the plaintiff must have expressed a clear and unambiguous intent to release the defendant from liability for its negligence.

In this case, the defendant argued the plaintiff's negligence claims were barred under the theories of primary and implied assumption of risk. Primary assumption of risk prevents a plaintiff from establishing the duty element of a negligence claim. In Ohio, "the test for applying the doctrine of primary assumption of the risk to recreational activities and sporting events requires that "(1) the danger is ordinary to the game, (2) it is common knowledge that the danger exists, and (3) the injury occurs as a result of the danger during the course of the game."" Simply stated, to be barred by the primary assumption of risk doctrine, the risk must be one that is so inherent to the activity that it cannot be eliminated, such as the risk of being hit by an errant golf ball at a driving range. Here, the court reviewed the plaintiff's injuries and found no evidence that she was injured as a result of a danger

inherent in the exercise of or working out at a gym. Lastly, the court noted that the doctrine of implied assumption of risk has merged into Ohio's comparative negligence statute, R.C. 2315.33. Under comparative negligence, "the trier of fact must apportion relative degrees of fault between the plaintiff and the defendant in deciding the issue of negligence."

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**SLIP OPINION NO. 2021-OHIO-1785**

**BST OHIO CORPORATION ET AL., APPELLANTS, *v.* WOLGANG ET AL., APPELLEES.**

**[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *BST Ohio Corp. v. Wolgang*, Slip Opinion No. 2021-Ohio-1785.]**

*Neither R.C. 2711.09 nor R.C. 2711.13 requires a court to wait three months after an arbitration award is issued before confirming the award—The three-month period set forth in R.C. 2711.13 is not a guaranteed time period in which to file a motion to vacate, modify, or correct an arbitration award.*

(No. 2020-0015—Submitted January 27, 2021—Decided May 27, 2021.)

APPEAL from the Court of Appeals for Cuyahoga County, No. CA-19-108130, 2019-Ohio-4785.

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**BRUNNER, J.**

## I. INTRODUCTION

**{¶ 1}** Appellants, BST Ohio Corporation, Pop's Girl Corporation, Doctorbill Management Corporation, WWS Massillon, L.L.C., NSHE Sossaman, L.L.C., SBW Massillon, L.L.C., WC Massillon, L.L.C., William Sperling, Erica Westheimer, Randi Archuleta, Steven Gurevitch, Joyce Gerbosi Divita, Michael Gerbosi Divita, Fred Westheimer, Susan Westheimer, Russell Geyser, Wendy Courtney, and Maya Ruby Smith (individually, in combination, and collectively, "BST"), appeal the judgment of the Eighth District Court of Appeals involving the issue whether under R.C. 2711.09 and 2711.13, a trial court must delay three months before confirming an arbitration award. Appellees, Evan Gary Wolgang and Massillon Management Company (collectively, "Wolgang"), urge that we affirm the Eighth District's judgment, arguing that R.C. 2711.13 requires a trial court to wait three months before confirming an arbitration award when the party opposing confirmation informs the trial court that it intends to file a motion to vacate, modify, or correct under R.C. 2711.10 or 2711.11. We conclude that although R.C. 2711.13 imposes a three-month deadline for motions to vacate, modify, or correct arbitration awards, that period is a maximum time that is not guaranteed.

**{¶ 2}** R.C. 2711.09 requires a trial court to confirm an arbitration award on application proceedings, "unless the award is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code." Concomitantly, R.C. 2711.13 requires a party that wishes to contest the confirmation of an arbitration award to notify the party seeking confirmation that it has filed a motion to vacate, modify or correct the arbitration award, and it requires notice be given within three months after the award is delivered to the parties. As such, R.C. 2711.13 does not operate as an automatic stay on confirmation, but rather, requires parties opposed to the confirmation of an arbitration award to be diligent in seeking to vacate, modify, or correct it.

## II. FACTS AND PROCEDURAL HISTORY

**{¶ 3}** In 2017, under the terms of an operating agreement between the parties, BST initiated binding arbitration proceedings in Cuyahoga County concerning actions of Wolgang, alleging mismanagement of a warehouse property run by a company owned jointly by Wolgang and BST. Wolgang counterclaimed, accusing BST of not meeting certain payment obligations. On December 6, 2018, after considerable arbitration proceedings, including a nine-day hearing and several rounds of briefing, the arbitrator awarded equitable and monetary relief to various entities involved in the matter.

**{¶ 4}** The same day the arbitrator's award was issued, December 6, 2018, BST applied to the Cuyahoga County Common Pleas Court to confirm the award. The following day, December 7, 2018, Wolgang filed a petition to vacate or correct the arbitration award in the Superior Court of California, County of Los Angeles.[1] Wolgang does not assert in this appeal that the California case has any bearing on the issues in this case. Wolgang did not directly oppose the application to confirm the award in Cuyahoga County.

**{¶ 5}** On December 22, 2018, just over two weeks after BST filed its application for confirmation and Wolgang filed its motion to vacate or correct the arbitration award in California, the Cuyahoga County Common Pleas Court scheduled a hearing on confirmation for December 27 at 3:00 p.m. On December 24, two days after the court entered its order scheduling the hearing, Wolgang moved to stay or continue the proceedings in Cuyahoga County. At no time before the trial court's confirming the arbitration award did Wolgang move to vacate, modify, or correct the arbitration award in Ohio.

**{¶ 6}** In seeking a stay or continuance of the hearing on BST's application to confirm the arbitration award, Wolgang argued that it had not received

1. We discern from the record that a significant number of the parties involved in the matter are situated in California, though the warehouse property at issue is located in Massillon, Ohio.

sufficient notice of the hearing (especially considering the Christmas holiday) to make necessary travel and other arrangements, that its California petition was pending, and that under R.C. 2711.13, it had three months to move to vacate, modify, or correct the award.

**{¶ 7}** BST opposed Wolgang's motion for stay or continuance on December 26, arguing that Wolgang had received plenty of notice of the proceeding (having been served with a copy of the application to confirm on December 6), that the California petition amounted to forum shopping, and that Ohio law does not require a court to delay confirming an arbitration award until after the expiration of the three-month limitation period for filing motions to vacate, modify, or correct.[2] The same day that BST filed its brief in opposition to Wolgang's stay motion, Wolgang replied, arguing that Ohio's statute guaranteed it three months to make its motion.

**{¶ 8}** The following day, BST filed a motion (which the trial court elected to treat as a surreply) again arguing that Ohio law does not require a trial court to delay confirmation for three months to permit the R.C. 2711.13 statutory limitation period to run before ruling on an R.C. 2711.09 application for confirmation of an arbitration award.

**{¶ 9}** On December 27, 2018, the trial-court hearing took place as scheduled, and the parties appeared through counsel, either in person or telephonically. BST argued that Wolgang was served with notice of the confirmation proceeding on December 6, that despite that notice, it had not substantively responded (other than by filing the California petition), and that the award, therefore, should be confirmed. Wolgang argued that Ohio law permits a party to arbitration to file a motion to vacate, modify, or correct an arbitration

2. Not all BST parties joined in filing the application, which was one of Wolgang's arguments for a stay—that not all necessary parties had been joined. BST responded that under Civ.R. 19, all necessary parties had been joined.

award within three months of the award and therefore the confirmation proceeding was premature. Wolgang indicated that it believed California had proper jurisdiction and venue, but if the Cuyahoga County Common Pleas Court were to determine otherwise, Wolgang would, within the three months permitted, move to modify or vacate the award in Ohio. After hearing the arguments, the trial judge stated that regardless of the three-month limitation period in which to move to vacate, modify, or correct an award, the judge believed that the filing of the application to confirm in Cuyahoga County Common Pleas Court should have generated a response in the same court in the form of a motion to vacate, modify, or correct. Wolgang did not file any such motion before the trial judge issued his decision.

**{¶ 10}** Approximately two weeks after the hearing, on January 14, 2019, the trial court denied Wolgang's motion to stay or continue. The following day, January 15, 2019, the trial court confirmed the arbitration award.

**{¶ 11}** Wolgang appealed to the Eighth District Court of Appeals the next day, on January 16, 2019. During the appeal, Wolgang sought to supplement the appellate record with an Ohio-filed motion to vacate the arbitrator's award that Wolgang had filed in a separate, new Cuyahoga County Common Pleas Court case on March 5, 2019, 89 days after delivery of the arbitration award and subsequent to the trial court's confirmation order. The Eighth District denied the motion to supplement because the material was not available to the trial court at the time it made the decision Wolgang had appealed. On November 21, 2019, the Eighth District issued the decision now under review by this court.

**{¶ 12}** The Eighth District concluded that when read together, R.C. 2711.09 and 2711.13 require that a court accord a party intending to move to vacate, modify, or correct an arbitration award a full three months in which to move. 2019-Ohio-4785, 149 N.E.3d 214, ¶ 20-25. Accordingly, the Eighth District determined that the confirmation in this case had been issued prematurely.

**{¶ 13}** BST timely appealed to this court, and we accepted the appeal, 158 Ohio St.3d 1434, 2020-Ohio-877, 141 N.E.3d 242. For the following reasons, we reverse the judgment of the Eighth District.

## III. DISCUSSION

**{¶ 14}** This case requires us to resolve a legal question regarding the way certain arbitration statutes are to be construed together. We review questions of law de novo. *State v. Pettus*, ___ Ohio St.3d ___, 2020-Ohio-4836, __ N.E.3d __, ¶ 10.

**{¶ 15}** R.C. 2711.09 provides that "any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award" and "the court shall grant" that confirmation "unless the award is vacated, modified, or corrected." As this court has held, under R.C. 2711.09, "the court must grant the [application] if it is timely, unless a timely motion for modification[, correction,] or vacation has been made and cause to modify[, correct,] or vacate is shown." *Warren Edn. Assn. v. Warren Bd. of Edn.*, 18 Ohio St.3d 170, 480 N.E.2d 456 (1985), syllabus. R.C. 2711.09 also requires that notice of the application for confirmation be served on the adverse party five days before the hearing on confirmation.

**{¶ 16}** Parties seeking to alter the results of arbitration may move to vacate, modify, or correct the arbitration award, and R.C. 2711.13 prescribes the timing and notice procedure for this: "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" and notice of the motion must be served on the adverse party within three months of the delivery of the arbitration award.

**{¶ 17}** The same statute also provides discretion to the trial court in handling potentially conflicting pleadings or proceedings concerning an

arbitration award: "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." *Id.* The trial court denied Wolgang's motion to stay or continue because Wolgang had not filed a motion to vacate, correct, or modify the arbitration award in the Cuyahoga County Common Pleas Court.

**{¶ 18}** We read the time-deadline provisions of R.C. 2711.09 and 2711.13—one year in which to apply to confirm an award[3] and three months in which to move to vacate, modify, or correct an award—as coexisting and operating both independently and in tandem within the state's statutory scheme. *See Galion v. Am. Fedn. of State, Cty. & Mun. Emps., Ohio Council 8, AFL-CIO, Local No. 2243*, 71 Ohio St.3d 620, 622, 646 N.E.2d 813 (1995). Thus, even though R.C. 2711.09 requires a court to confirm an arbitration award on an application to confirm that is filed within a year of the award, an opposing party may still move that the award be vacated, modified, or corrected, within three months of the award, R.C. 2711.13. Important to this analysis is the fact that in R.C. 2711.13, the General Assembly specifically addressed the discretionary power of the trial court to stay proceedings in the interest of fairness to both parties. The trial court is thus empowered to balance the interests of the parties through procedures that allow both the arbitration confirmation to be considered and any grievances about the arbitration award to be aired and resolved, all toward resolution of the parties' disputes.

3. Some appellate courts have suggested that there may be other remedies to enforce or confirm an arbitration award beyond the one-year period imposed by statute. *United Union of Roofers, Waterproofers & Allied Trades, Local No. 44 v. Kalkreuth Roofing & Sheet Metal*, 2019-Ohio-2797, 139 N.E.3d 1244, ¶ 38 (11th Dist.); *Russo v. Chittick*, 48 Ohio App.3d 101, 104-105, 548 N.E.2d 314 (8th Dist.1988). The question whether the limitation period provided in R.C. 2711.09 is as absolute as a traditional statute-of-limitations period is not presented in this case. We therefore do not address it.

**{¶ 19}** If we were to adopt Wolgang's argument, which essentially applies *Warren*, 18 Ohio St.3d 170, 480 N.E.2d 456, in a vacuum, a hard, three-month limitation on trial courts' confirming arbitration awards would be created in the caselaw, even if not opposed by the filing of a motion to vacate, modify, or correct under R.C. 2711.13. Yet even under the aggressive reading of the holding in *Warren* that Wolgang asserts, if opposition to confirmation *is* timely filed, a trial court still must find that cause to modify, vacate, or correct has been shown before it may refuse to confirm the award. R.C. 2711.10 and 2711.11; *Warren* at syllabus.

**{¶ 20}** Wolgang's motion to stay or continue the confirmation hearing, which is the *only* motion Wolgang filed in this case in Ohio, perhaps could have been granted by the trial court in its discretion. But the fact remains that *no* motion to vacate, modify, or correct under R.C. 2711.13 was filed in Cuyahoga County to serve as an exception to required confirmation under R.C. 2711.09 until after the trial court confirmed the arbitration award and Wolgang filed a notice of appeal of the confirmation of the award. A motion to stay or continue the confirmation of an arbitration award, by itself, is not the same as a motion to vacate, modify, or correct such an award under R.C. 2711.13 and does not operate under either R.C. 2711.09 or 2711.13 to prevent the court from moving forward to confirmation. Thus, the trial court's consideration of Wolgang's motion was explicitly discretionary.

**{¶ 21}** We agree with the Eighth District's determination that it could not consider the motion to vacate, modify, or correct that Wolgang filed in the trial court after Wolgang filed its notice of appeal of the confirmation of the award, even though the motion was filed within three months of delivery of the arbitration award. But we disagree with its holding that R.C. 2711.13 imposes what is in effect a three-month waiting period before a court can confirm an arbitration award. We do not read the statute to permit litigants who oppose

confirmation to wait until after the court has held a hearing on an application for confirmation before filing a motion to vacate, modify, or correct the award, even if within three months of the award.

**{¶ 22}** In short, R.C. 2711.13 contains this simple language: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or [the adverse party's] attorney within three months after the award is delivered to the parties in interest * * *." R.C. 2711.13 does not guarantee a party a three-month period in which to file a motion opposing an arbitration award, especially in the face of other pleadings or court orders that might by the fact of their existence necessitate an earlier filing of that motion. And this is made most evident by the language concerning stays of R.C. 2711.09 enforcement or confirmation proceedings found in R.C. 2711.13.

**{¶ 23}** Accordingly, we view the limitation period in R.C. 2711.13 as an upper limit that may be shortened by another party's filing a pleading or motion to which a response is required. Consequently, when a party applies to confirm (or for that matter, moves to vacate, modify, or correct) an arbitration award, as with any other motion or application, the onus is then on the other parties to the arbitration to respond, lest the trial court take the action of confirmation, as contemplated by the statute, and "enter judgment in conformity therewith," R.C. 2711.12. Though caselaw is scant in this area, this view finds some support from the Tenth District Court of Appeals, which has several times stated:

> A reading of R.C. 2711.09 and 2711.13, in such a way as to harmonize their provisions, reveals that the periods provided for therein are periods of limitation within which certain actions must be taken. As with any other period of limitation, appropriate action authorized by statute may be taken at any time within the

> period. Such action may thereafter require a response which is omitted at one's peril.

*Goldsmith v. On-Belay, Inc.*, 10th Dist. Franklin No. 90AP-301, 1990 WL 135879, *2 (Sept. 20, 1990); *see also Amanda Scott Publishing v. Legacy Marketing Group, Inc.*, 10th Dist. Franklin No. 92AP-233, 1992 WL 203232, *2 (Aug. 11, 1992) (quoting *Goldsmith*); *Perrot v. Swad Chevrolet, Inc.*, 10th Dist. Franklin No. 90AP-736, 1990 WL 174020, *2 (Nov. 6, 1990) (quoting *Goldsmith*).

**{¶ 24}** In opposition to this view, Wolgang draws our attention to *Schwartz v. Realtispec, Inc.*, 11th Dist. Lake No. 2002-L-098, 2003-Ohio-6759, in which the court stated:

> Read together, R.C. 2711.09 and R.C. 2711.13 set forth an intelligible procedural scheme. To wit, R.C. 2711.09 requires a hearing on an application to confirm. As a matter of law, a motion to confirm must be granted unless a timely motion to modify or vacate is made and cause to modify or vacate is demonstrated. A party seeking to modify or vacate an arbitration award has up to three months from the date of the award to file its motion. Therefore, the proper way to approach a situation such as the one sub judice, is to conduct a hearing after an adverse party files a motion to modify or vacate. However, if three months have elapsed since the award and a motion to modify or vacate has not been filed, a court should continue forward with a hearing on the motion to confirm.

*Id.* at ¶ 10. We discern no error in that language from *Schwartz* and note that a trial court has discretion to wait to proceed on a confirmation application until after three months have elapsed since the arbitration award or after a motion to modify, vacate, or correct has been filed within that period, R.C. 2711.13. However, discretion that *may* be exercised in favor of delay does not alter the fact that the plain statutory language contains nothing to *require* delay.

**{¶ 25}** BST applied to confirm the award the same day it was issued and provided notice to Wolgang. Rather than respond to the application substantively in the jurisdiction in which it was filed, Wolgang filed an action to vacate or correct the award in the Superior Court of California. More than two weeks after the application to confirm was filed, the trial court in Ohio scheduled a hearing. Only then did Wolgang file a motion in the case. Wolgang requested that the matter be continued in light of the three-month limitation period or stayed pending resolution of the subsequently filed California case.

**{¶ 26}** At the trial-court hearing on December 27, the court made its position abundantly clear about Wolgang's duty to file a response if it wished to oppose confirmation:

> [Counsel for Wolgang]: In this case—in our case, that three-month period of time has not elapsed, and we still have the right to file a motion to vacate.
>
> THE COURT: That's what you say. I'm the one ruling on the case, and what I have is a party that has moved to confirm, which should have generated then a motion to vacate or modify, right? And, in fact, you filed in California when, in my view, you should have filed it here.
>
> * * *
>
> * * * All you had to do is file your motion to vacate here.

Now you want additional time and additional time after that. What is the reason that it wasn't already done? I know you said that California has a different system.

You have got two very competent attorneys here from Ohio that could have worked on this I'm sure and used Ohio law to file this motion to vacate. You all have had—you have been dealing with this thing for a couple of years.

* * *

[Counsel for Wolgang]: Well, perhaps a motion to vacate could still be filed before the end of the day today, but that would be a motion to vacate that would just set forth the names of the parties and say we move to vacate; and since the hearing will be held, we would have to file briefs and everything else to explain why the arbitrator exceeded her authority or the award is otherwise improper, and that's something that, as I have said, we certainly can do.

* * *

We are going to do what is required to be done under the statute, which is to timely file a motion to modify or vacate within the 90 days under the Ohio statute.

THE COURT: Well, it doesn't say that you have 90 days to file it. It says, a notice of a motion to vacate, modify or correct an award must be served upon the adverse party or its attorney within three months.

You could have filed it the day after. You filed one on December 7th in California. You could have filed it here and we wouldn't be having this discussion. We would all be briefing the

> issues that are being raised now with respect to the arbitrator exceeding her powers.
>
> [Counsel for Wolgang]: Well, the time has not elapsed for us to do that. We certainly can do that under the statute. * * * [T]he point is that under the statute we have 90 days. That time has not elapsed.
>
> A motion to vacate would be appropriate. It would be timely, and then we're going to have two competing situations even in Ohio, because we will file a motion to vacate and this motion to confirm will be there and we will resolve it when it's all properly before the Court.
>
> I understand what you're saying, Your Honor, but I do not view the other side's filing of their application to confirm as a curtailment of our statutory rights to move to vacate within 90 days.

**{¶ 27}** Despite that exchange with the trial court, Wolgang still did not file a motion—even a placeholder motion, as discussed during the hearing—to insert some substantive response on the record and pave the way for relevant briefing. Although Wolgang now asserts, "In th[e] Motion to Stay, Wolgang notified the Trial Court that he intended to file and serve a motion to vacate under R.C. 2711.13 within the three-month period therein set forth for such a motion," the reality is that even that expression of intent was conditional and indefinite. The motion to stay actually read, "Ohio Revised Code § 2711.13 allows any party to the arbitration to file a motion to vacate, modify, or correct the award within 90 days of the delivery of the award to the parties in interest, which [Wolgang] fully intends to do in the event this action is not stayed in favor of the California Petition to Vacate." Counsel's statement at the hearing was similarly conditional.

Although counsel said, "[W]e are stating to you right now we intend to move to modify or vacate this award," counsel expressly conditioned that intent on whether the court considered their California filing to be "a sufficient exercise of our rights to seek to vacate or modify this award." Ultimately, the trial court waited more than two additional weeks after the hearing before ruling on the application to confirm. But on January 15, 2020, at which time Wolgang still had not definitively (even in conclusory or placeholder fashion) moved to vacate, modify, or correct the arbitration award, the trial court, complied with the statutory scheme, confirmed the award and entered judgment accordingly. R.C. 2711.09; R.C. 2711.12.

**{¶ 28}** Nothing in R.C. 2711.09 through 2711.13 required the trial court to stay the action or wait for the R.C. 2711.13 three-month period to expire before confirming the award. Just the opposite is true. There being no motion to vacate, modify, or correct appearing in the record, the trial court was required to do what it did—confirm the award and enter judgment. R.C. 2711.09; R.C. 2711.12; *Warren*, 18 Ohio St.3d 170, 480 N.E.2d 456, at syllabus.

**{¶ 29}** R.C. 2711.13 does not operate as a statute of limitations for the purpose of preserving objection time. Rather, we hold that under R.C. 2711.13, a party seeking to alter the results of an arbitration has a maximum of three months to move to vacate, modify, or correct the award. In other words, the three-month period set forth in the statute is not a guaranteed time period in which to file such a motion but is instead the outside time available to an aggrieved party that wishes to vacate, modify, or correct an arbitration award.

**{¶ 30}** When BST applied to confirm the arbitration award, Wolgang failed to substantively respond, at its peril. *See Goldsmith*, 1990 WL 135879 at *2. Even though the statutory three months to move to have the award vacated, modified, or corrected had not yet expired, once the application to confirm was filed, Wolgang needed to put the trial court on notice that it contested the

arbitrator's award and, before confirmation, explain to the trial court why. The application to confirm the arbitrator's award triggered the need to act quickly, no matter how many days remained under the three-month statutory time period. And if this was not abundantly clear to Wolgang before the December 27 hearing, the words of the trial judge on December 27 should have erased all doubt. Well over a month elapsed between the day BST filed the application to confirm the award and the day the trial court granted the application, and despite Wolgang's active interaction with the trial court during that time, Wolgang chose not to file what was needed in Ohio to prevent the award from reaching its judicial fruition. Wolgang now bears the consequences of that choice.

**{¶ 31}** When a party files an application to confirm within the three-month period following an arbitration award, a party that wishes to file a motion to vacate, modify, or correct the award needs to make its intentions known soon thereafter. 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.

## IV. CONCLUSION

**{¶ 32}** R.C. 2711.13 imposes a three-month limitation period for filing motions to vacate, modify, or correct arbitration awards. That limitation period is the maximum amount of time in which to file; it is not a guaranteed amount of time in which to file. When a party to an arbitration applies to confirm the award before the expiration of the three-month period after the award, any party that wishes to oppose confirmation must, within the three-month period, respond with a motion to vacate, modify, or correct the award, on the date of or before the

hearing on the application to confirm. Failing to do so may result in the award's being confirmed. Because the Eighth District held otherwise, we reverse its judgment.

Judgment reversed.

O'CONNOR, C.J., and DONNELLY, J., concur.

FISCHER, J., concurs in judgment only, with an opinion joined by KENNEDY and DEWINE, JJ.

STEWART, J., concurs in part and dissents in part, with an opinion.

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**FISCHER, J., concurring in judgment only.**

**{¶ 33}** Ohio public policy favors arbitration because it is supposed to provide parties with "a relatively expeditious and economical means of resolving a dispute." *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 711-712, 590 N.E.2d 1242 (1992) (plurality opinion). To that end, nearly a century ago, the General Assembly enacted the Ohio Arbitration Act, which is now codified in R.C. Chapter 2711. Am.SB. No. 41, 114 Ohio Laws 137 (effective 1931). This case presents this court with an opportunity to clarify how two provisions within the Ohio Arbitration Act, R.C. 2711.09 and 2711.13, relate to and interact with one another. The short answer is that they do not interact in the way that the Eighth District Court of Appeals determined below.

**{¶ 34}** R.C. 2711.09 deals with the confirmation of an arbitration award and provides that at any time within a year of an arbitration award being made, "any party to the arbitration may apply to the court of common pleas for an order confirming the award." Importantly, upon a court's receipt of such a request, R.C. 2711.09 requires the court to grant the application and confirm the award, unless the award has been vacated, modified, or corrected. *See also Warren Edn. Assn. v. Warren City Bd. of Edn.*, 18 Ohio St.3d 170, 480 N.E.2d 456 (1985), paragraph one of the syllabus.

**{¶ 35}** As relevant here, R.C. 2711.13 details the procedure for asking a court to vacate, modify, or correct an arbitration award pursuant to R.C. 2711.10 and 2711.11 and provides a party with a three-month window for doing so.

**{¶ 36}** Given the text of these provisions, when the Eighth District concluded that an arbitration award could not be confirmed under R.C. 2711.09 before the three-month period set forth in R.C. 2711.13 had passed, 2019-Ohio-4785, 149 N.E.3d 214, ¶ 25, that court added a requirement to the Ohio Arbitration Act that simply is not there.

**{¶ 37}** Courts in this state are not, however, free to rewrite laws passed by the General Assembly. *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St.2d 24, 27-28, 263 N.E.2d 249 (1970). Instead, when the language used by Ohio's legislature is plain and unambiguous, the courts of this state must humbly apply the law as written. *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 128 Ohio St.3d 492, 2011-Ohio-1603, 946 N.E.2d 748, ¶ 22-23.

**{¶ 38}** As this court rightly decides, R.C. 2711.09 and 2711.13 are clear. And nothing in the plain and unambiguous text of those provisions requires a court to wait three months before confirming an award under R.C. 2711.09.

**{¶ 39}** Consequently, I respectfully concur in this court's judgment reversing the Eighth District's judgment in this case.

KENNEDY and DEWINE, JJ., concur in the foregoing opinion.

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**STEWART, J., concurring in part and dissenting in part.**

**{¶ 40}** I agree with the majority's holding that R.C. 2711.13 does not require a trial court to wait three months from the date an arbitration award is issued before the court can grant an application to confirm the award and enter a judgment thereon. I also agree that the time provisions in R.C. 2711.09 and 2711.13 operate both independently and in tandem with each other and that trial courts have discretion to grant requests to stay confirmation proceedings and

otherwise control their dockets to fairly and appropriately rule on competing motions. However, I disagree with the lead opinion's conclusion that a motion to vacate, modify, or correct an arbitration award *must* be filed prior to a hearing on an application to confirm. Furthermore, when an application to confirm is filed within three months of an arbitration award's being issued—that is, during the time in which a party may move to vacate, modify, or correct the award—the central question becomes: What is the trial court's responsibility in reconciling the parties' competing rights under the statutes? I think the clearest and most equitable answer is that the court must set a reasonable deadline for the filing of a motion to vacate, modify, or correct the award.

**{¶ 41}** In this case, the trial court denied the motion of appellees, Evan Gary Wolgang and Massillon Management Company (collectively, "Wolgang"), to stay the proceedings and confirmed the arbitration award within the three-month period that R.C. 2711.13 provides for moving the court to vacate an award. The Eighth District Court of Appeals did not address whether this amounted to an abuse of discretion, because the appellate court found as matter of law that a trial court must wait three months before confirming an arbitration award. Accordingly, although I agree with the majority's decision to reverse the judgment of the court of appeals, I would remand the matter to the court of appeals to consider Wolgang's remaining assignment of error, which argues that the trial court abused its discretion by not granting a stay or continuance.

**{¶ 42}** The lead opinion states that a motion to vacate, modify, or correct an arbitration award must be filed on or before the hearing date on an application to confirm. How the lead opinion reaches this conclusion is unclear. Certainly nothing in R.C. 2711.01 et seq., the Ohio Arbitration Act, requires a party to file a motion to vacate, modify, or correct an award prior to the hearing. And it would be a stretch for this court to infer such a requirement, given that R.C. 2711.09 requires that only five days' notice of the hearing be given to the adverse party.

What the lead opinion's statement would mean in practice is that, notwithstanding the three-month statutory time period for filing a motion to vacate, modify, or correct an award, a party adverse to confirmation of an award would have only five days to do so, and during that time, in addition to composing the motion, the party would have to research the law and gather and prepare evidence in support of the motion. Under the best of circumstances this would be extremely difficult for even the most sophisticated and resourceful parties. Arguments in support of a motion to vacate, modify, or correct can be difficult to prove. *See Goodyear Tire & Rubber Co. v. Local Union No. 200*, 42 Ohio St.2d 516, 522, 330 N.E.2d 703 (1975). And when the party who opposes confirmation is a lay person and the party in favor of confirmation is a sophisticated entity, as is commonly the case, the difficulty is compounded to the point of practical impossibility.

**{¶ 43}** Although the grounds upon which a court may grant a motion to vacate, modify, or correct are limited, *see* R.C. 2711.10 and 2711.11, the legislature has still seen fit to give the parties an opportunity to file such a motion. Applying the lead opinion's interpretation of the statutes essentially would take away any meaningful opportunity that a party in Wolgang's position would have to contest an award by requiring that a motion to vacate, modify, or correct be filed on such short notice.[4] Indeed, it would not be unreasonable to suppose that the confirmation hearing might be the first opportunity that a party has to object to the confirmation and give notice of its intent to file a motion to vacate, modify, or correct. But under the lead opinion's interpretation, a court would be precluded

4. It is important to note that any party, not just a prevailing one, may file an application to confirm the arbitration award. *See* R.C. 2711.09. And any party, not just a losing party, may file a motion to vacate, modify, or correct the award. *See* R.C. 2711.10 and 2711.11. That any party may file these motions suggests that the legislature intended that arbitration awards be confirmed and rendered into enforceable judgments when they fairly and correctly reflect the arbitration proceedings and the arbitrator's final decision. To that end, all parties must be given a fair opportunity to contest the award.

from doing anything other than confirming an award on the day of the hearing if the adverse party has not filed a motion before then.[5] The language of the statutes does not suggest this is what the legislature intended. After all, why, under such circumstances, would R.C. 2711.09 still require that a confirmation hearing proceed if no oral objections can be lodged at the hearing and the court has no ability to stay proceedings so that formal motions may be filed? Why have a hearing at all when the matter can apparently be decided on the application alone? Accordingly, contrary to the lead opinion, I would determine that a party may file a motion to vacate, modify, or correct an arbitration award even after the court holds a hearing on the application to confirm.

**{¶ 44}** This brings us back to the question: What is required of the trial court when an application to confirm an arbitration award has been filed within three months of the award's being issued? That question cannot be answered simply by looking to the language of R.C. 2711.09 through 2711.13, because none of those provisions indicate how long a party has to file a motion to vacate, modify, or correct under these circumstances. A different section of Ohio's arbitration law, R.C. 2711.05, *is* helpful however. It states:

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5. 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.

> Any application to the court of common pleas under section 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.

*Id.*

**{¶ 45}** Thus, both an application to confirm under R.C. 2711.09 and a motion to vacate, modify, or correct under R.C. 2711.13 are to be styled and ruled on as motions before the court and they must comply with the rules of motion practice. Although the Rules of Civil Procedure set deadlines for other types of motions, such as Civ.R. 12(B) dispositive motions, nothing in the Rules of Civil Procedure says when motions like the ones at issue in this case need to be filed. In the absence of a specific rule, courts have discretion to set deadlines for when motions must be filed. *See, e.g.*, *State ex rel. Haber Polk Kabat, L.L.P. v. Sutula*, 2018-Ohio-2223, 114 N.E.3d 649, ¶ 8 (8th Dist.) ("A court has broad discretion to control the flow of its docket and the judicial resources entrusted to it"); *Brown v. Bowers*, 1st Dist. Hamilton No. C-070797, 2008-Ohio-4114, ¶ 13 ("the court is vested with broad discretion in determining whether to grant or deny a motion for a continuance"); *see also Clinton v. Jones*, 520 U.S. 681, 706, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) (A "[d]istrict [c]ourt has broad discretion to stay proceedings as an incident to its power to control its own docket").

**{¶ 46}** In a case like this one, i.e., a case in which an application to confirm is filed when the parties still have time to exercise their statutory right to file a motion to vacate, modify, or correct under R.C. 2711.13, it is incumbent on the trial court to do what R.C. 2711.09 and 2711.13 do not: provide clear guidance to the parties by establishing a deadline for filing the motion before the

court rules on the application to confirm the award. Doing so is not only in keeping with the rules of motion practice and the laws that guide trial courts in conducting their proceedings but is also fair and equitable to both sides in that the trial court can balance the competing rights the parties have under the statutes. As our holding in this case establishes, a party moving the trial court to confirm an arbitration award is not required to wait three months for an adverse party to file a motion to vacate, modify, or correct the award. On the other hand, a party who has the right to move the court to vacate, modify, or correct must be given a reasonable and fair opportunity to do so and also be given notice of the time frame in which the party must operate when that time period is less than the statutorily prescribed three months. When a trial court provides a clear and reasonable deadline for the filing of such motions, there is no error when it confirms the award within three months of the award's issuance. *See, e.g.*, *Kanuth v. Prescott, Ball & Turben, Inc.*, D.D.C. No. 88-1416, 1990 U.S. Dist. LEXIS 7406, *3-8, 11 (June 19, 1990) (denying party's request for full three months to file motion to vacate after opposing party filed motion to confirm; instead giving two months to file, which was deemed a "reasonable" amount of time); *McLaurin v. Terminix Intl. Co., L.P.*, S.D.Ala. No 1:19-00553-JB-M, 2020 U.S. Dist. LEXIS 117869, *2-5, 14 (July 6, 2020) (confirming arbitration award within three months of its issuance, after court gave opposing parties two weeks to file motion to vacate or modify but they missed deadline).[6]

**{¶ 47}** Although the appellants in this case argue that Wolgang had plenty of time to file a motion and the trial court appears to have been frustrated with Wolgang for not filing a motion to vacate prior to the hearing, the court nevertheless provided no concrete guidance or instruction when it failed to set a

6. Although these are federal cases, because the Ohio Arbitration Act is based on the federal Arbitration Act, federal case law is persuasive authority. *See Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶ 15.

deadline for Wolgang to file its motion. Instead, the court waited an indiscriminate amount of time before denying Wolgang's motion to stay and confirming the award. And whether the trial court's denial of the motion to stay was an abuse of discretion is a question that is still outstanding and one that the appellate court should decide on remand. Accordingly, I concur in the judgment reversing the judgment of the court of appeals, but I would remand the case for consideration of Wolgang's second assignment of error.

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Ulmer & Berne, L.L.P., and Michael N. Ungar; and Ciano & Goldwasser, L.L.P., Phillip A Ciano, Brent S. Silverman, and Sarah E. Katz, for appellants.

Calfee, Halter & Griswold, L.L.P., Colleen M. O'Neil, and Alexandra R. Forkosh; and Hamburg, Karic, Edwards & Martin, L.L.P., and Steven S. Karic, for appellees.

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**[Cite as *Quincy Communication v. Patrick*, 2021-Ohio-1736.]**

# IN THE COURT OF APPEALS
# FIRST APPELLATE DISTRICT OF OHIO
# HAMILTON COUNTY, OHIO

| | | |
|---|---|---|
| QUINCY COMMUNICATION, d.b.a. TAZZ ROOFING, | : | APPEAL NO. C-200224<br>TRIAL NO. 20CV-00218 |
| Plaintiff-Appellant, | : | *O P I N I O N.* |
| vs. | : | |
| DONNA PATRICK, | : | |
| Defendant-Appellee. | : | |

Civil Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 21, 2021

*Christopher P. Frederick,* for Plaintiff-Appellant,

*Keating Muething & Klekamp PLL, James R. Matthews* and *Sophia R. Holley,* for Defendant-Appellee.

**MYERS, Presiding Judge.**

**{¶1}** Plaintiff-appellant Quincy Communication, d.b.a. Tazz Roofing ("Tazz") appeals from the trial court's entry granting judgment to defendant-appellee Donna Patrick following trial on Tazz's claim for breach of contract.

**{¶2}** In two assignments of error, Tazz challenges the sufficiency and the weight of the evidence supporting the trial court's decision, specifically arguing that the trial court erred in determining that the liquidated-damages clause in the contract was unenforceable. Because we find that the trial court correctly determined that the liquidated-damages clause was unenforceable, and that its decision was supported by both the sufficiency and the weight of the evidence, we affirm the trial court's judgment.

### *Factual and Procedural Background*

**{¶3}** Tazz and Patrick executed a contract for Tazz to repair Patrick's roof. The contract authorized Tazz to advocate on behalf of Patrick with her insurance company, and it provided that "I agree to allow Tazz to complete all prescribed repairs at prices determined by my insurance carrier with no additional costs except my insurance deductible, code upgrades (if applicable), and any non-recoverable depreciation that is not covered by my insurance carrier." An addendum to the contract contained a liquidated-damages clause, which stated that:

> If the work is approved by the insurance company and this contract is cancelled by the customer later than (3) days from entering this agreement (if applicable), the customer shall pay to Tazz liquidated damages of the lesser of either 1) loss of profits or 2) 25% of the

> contract settlement price and all overhead and profit (if applicable) as determined by the insurance company. In either case, customer to pay any reasonable attorney fees[.] Interest shall accure [sic] at a rate of 18% upon any unpaid balances from the date of the breach., [sic] This is not a penalty. Lastly, Tazz shall be paid separately for any services that have been provided for by Tazz. If a portion of the settlement is modified out, Tazz shall receive as a fee of 25% of those funds [sic].

**{¶4}** Tazz contacted Patrick's insurance carrier and obtained approval to perform the repairs on Patrick's roof. The relationship between Patrick and Tazz deteriorated prior to Tazz performing the physical repairs on the roof, and Patrick informed Tazz that she would no longer be using its services. Tazz filed a complaint alleging breach of contract in the Small Claims division of Municipal Court. Pursuant to the liquidated-damages clause in the contract, Tazz sought $1,450 in damages, which it alleged was "25% of the gross claim plus attorney fees."

**{¶5}** At a trial before a Municipal Court magistrate, Tazz representative Ron Dick testified that Tazz and Patrick executed a "service agreement contract," which Dick explained meant that "whatever the insurance company says we're going to do, that's what we're going to do for that price." Dick testified that Tazz obtained an insurance adjuster's approval to make repairs to Patrick's roof, but that Patrick instructed the adjuster not to provide Tazz with a copy of the authorized scope of repairs and also failed to attend a scheduled meeting to endorse and turn over to Tazz the check that she had received from her insurance company. With respect to the estimated cost of making the repairs to Patrick's roof, Dick testified that "all we know is that when we were there that we were able to see it was about $4,400 for the

job in that range, but we still don't have a scope for it." He conceded that no physical work had been done on Patrick's roof, but explained that Tazz had done background work to get the repairs approved.

**{¶6}** Patrick testified that she cancelled the roofing contract because she felt that Tazz was more interested in getting a check from her than it was in the condition of her roof. She referenced a conversation with a Tazz employee in which the employee had "raised his voice at [her] and disrespected [her]." According to Patrick, she attended the scheduled meeting at which she was supposed to hand over the endorsed check from her insurance company, but was unable to find a Tazz employee at the scheduled meeting spot.

**{¶7}** The magistrate issued a decision finding that the liquidated-damages clause in the parties' contract was unenforceable because it did not contain an agreed upon amount of damages and only alluded to a percentage of lost profits or a percentage of the contract price as damages. The magistrate further found that no physical work had been done on Patrick's roof and that Tazz had failed to establish any actual damage caused by Patrick's breach, and it entered judgment for Patrick.

**{¶8}** Tazz filed objections to the magistrate's decision. The trial court overruled the objections, adopted the magistrate's decision, and entered judgment in favor of Patrick.

### *Sufficiency and Weight of the Evidence*

**{¶9}** In two assignments of error, Tazz argues that the trial court's judgment in favor of Patrick on its breach-of-contract claim was not supported by sufficient evidence and was against the manifest weight of the evidence.

**{¶10}** The elements of a breach-of-contract claim are a contract, the plaintiff's performance, a breach by the defendant, and damages. *White v. Pitman*, 2020-Ohio-3957, 156 N.E.3d 1026, ¶ 37 (1st Dist.). Our review of the sufficiency of the evidence requires us to determine whether some evidence exists on each element. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 19; *State v. Jones*, 1st Dist. Hamilton No. C-160735, 2017-Ohio-5517, ¶ 15. When reviewing the manifest weight of the evidence in a civil case, "[w]e weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts in the evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that its judgment must be reversed and a new trial ordered." *United States Fire Ins. v. Am. Bonding Co., Inc.*, 1st Dist. Hamilton Nos. C-160307 and C-160317, 2016-Ohio-7968, ¶ 16.

**{¶11}** Tazz specifically challenges the sufficiency and weight of the evidence supporting the trial court's determination that the liquidated-damages clause in the contract was unenforceable and that Tazz had no damages.

**{¶12}** Ohio law permits parties to a contract to provide for liquidated damages in cases where actual damages would be difficult or impossible to prove or calculate. *Samson Sales, Inc. v. Honeywell, Inc.*, 12 Ohio St.3d 27, 465 N.E.2d 392 (1984), syllabus. In such cases, the parties recognize that damages would be appropriate if one party breaches their agreement and they provide for a specific, agreed upon amount. Usually, this is a specific dollar amount.

**{¶13}** As set forth above, the liquidated-damages clause in this case provided that if Patrick cancelled the contract more than three days after it was executed, she was required to pay Tazz the lesser of its loss of profits or "25% of the contract

settlement price and all overhead and profit (if applicable) as determined by the insurance company." Both of these calculations involve actual damages and neither involve a specific dollar amount. The Supreme Court of Ohio has set forth a test to determine the validity of a liquidated-damages clause. Where parties have agreed on the amount of damages in clear and unambiguous terms, the specified amount of damages will be treated as liquidated damages, rather than as a penalty, if the damages would be "(1) uncertain as to amount and difficult of proof, and if (2) the contract as a whole is not so manifestly unconscionable, unreasonable, and disproportionate in amount as to justify the conclusion that it does not express the true intention of the parties, and if (3) the contract is consistent with the conclusion that it was the intention of the parties that damages in the amount stated should follow the breach thereof." *Id.* at syllabus; *Drake Townhomes, LLC v. Woodberry*, 1st Dist. Hamilton No. C-160632, 2017-Ohio-6968, ¶ 22.

**{¶14}** The liquidated-damages clause in this case failed to specify in clear and unambiguous terms the amount of damages that would be imposed if Patrick breached the contract. Instead of providing a specific amount of damages that would be assessed, the contract stated that Patrick would be required to pay the lesser of Tazz's lost profits or 25% of the contract settlement price, along with all overhead and profit if applicable. As discussed above, this calculation, rather than being a specific amount for liquidated damages, includes concepts for measuring actual damages (lost profits, overhead) and therefore is not a proper liquidated-damages clause. If actual damages were calculable, then no liquidated-damages clause would be needed. In addition, both of the contractual options for calculating damages included amounts that were unknown at the time that the contract was entered into.

The contract referenced that Tazz was allowed to complete all repairs at a price determined by Patrick's insurance carrier, but it failed to specify either the determined price or Tazz's anticipated profits. Thus, any amount was purely speculative and unknown at the time the contract was entered into. Because the liquidated-damages clause failed to set forth the agreed upon amount of damages, the trial court did not err in determining that it was unenforceable.

**{¶15}** When a liquidated-damages clause is found to be unenforceable, "the recovery of damages is limited to the amount of actual damages proven." *Drake Townhomes* at ¶ 23. Here, Tazz failed to establish that it incurred any damages resulting from Patrick's breach. It is undisputed that Tazz did not complete any physical work on Patrick's roof or purchase any roofing materials. Dick testified that Tazz had contacted Patrick's insurance company and obtained approval to make the necessary roof repairs, and that a Tazz employee had met with an insurance adjuster at Patrick's home. But he failed to testify as to the cost Tazz incurred in taking these steps.

**{¶16}** Because Tazz failed to establish that it had incurred damages caused by Patrick's breach, an element of a breach-of-contract claim, we hold that the trial court's judgment in favor of Patrick was supported by both the sufficiency and the weight of the evidence.

**{¶17}** The first and second assignments of error are overruled, and the judgment of the trial court is affirmed.

Judgment affirmed.

**WINKLER** and **BOCK, JJ.,** concur**.**

Please note:

The court has recorded its own entry on the date of the release of this opinion.

**[Cite as *Brown v. Nanteeka Gloves, L.L.C.*, 2021-Ohio-1659.]**

# COURT OF APPEALS OF OHIO

## EIGHTH APPELLATE DISTRICT
## COUNTY OF CUYAHOGA

| | | |
|---|---|---|
| CHARLES T. BROWN, | : | |
| Petitioner-Appellee, | : | No. 109925 |
| v. | : | |
| NANTEEKA GLOVES, L.L.C., | : | |
| Respondent-Appellant. | : | |

JOURNAL ENTRY AND OPINION

**JUDGMENT:** AFFIRMED
**RELEASED AND JOURNALIZED:** May 13, 2021

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-20-932308

***Appearances:***

Roetzel & Andress, L.P.A., and E. Mark Young, *for appellee*.

Dinn, Hochman & Potter, L.L.C., Thomas A. Barni, and Andrew J. Yarger, *for appellant*.

EMANUELLA D. GROVES, J.:

**{¶ 1}** Appellant, Nanteeka Gloves, L.L.C., ("Nanteeka"), appeals the trial court's judgment granting appellee, Charles T. Brown's ("Brown"), application to confirm arbitration awards. For the reasons that follow, we affirm the trial court's judgment confirming the arbitration awards.

## Procedural History and Factual Background

{¶ 2} Nanteeka is a California limited liability company, with a principal place of business in San Francisco, California, owned jointly by Brown, a California resident, and Bradford Peterson ("Peterson"), a Colorado resident.[1] In 2010, Brown and Peterson, who had been friends since their youth, formed Nanteeka, with each taking on various responsibilities over the life of the company. Nanteeka manufactured and sold custom gloves and mittens.

{¶ 3} In the passage of time, Brown and Peterson became estranged for various and complicated reasons. Their deep friendship and affection added an emotional layer, with its own challenges and complications. As a result, their enthusiasm for their joint venture diminished and their deep mutual affection began to unravel. Lost was the harmony and energy that once drove this joint endeavor, and it became obvious that their venture together would be dissolved.

{¶ 4} Brown and Peterson unsuccessfully attempted, through various channels, to reach an accord on some form of sale. In October 2019, having reached an impasse, Brown and Peterson met with mediator Jerome Weiss ("Weiss") of Mediation, Inc. ("Mediation"). As mediation ensued, it became apparent, viewed through the back and forth between parties, that Brown would be the party selling

[1] The trial court's jurisdiction was contractually authorized pursuant to the parties binding Letter of Intent, dated December 13, 2019, wherein they consented to the entry of any arbitration award by any Ohio court. Absent the parties' consent, the trial court would have neither general nor subject matter jurisdiction over Brown, a California resident, Nanteeka, a California limited liability company with a principal place of business in San Francisco, California, and Peterson, a Colorado resident.

his interest in Nanteeka. Thus, the need arose for them to negotiate a detailed framework, wherein a sale could be effectuated.

**{¶ 5}** On December 13, 2019, Brown and Peterson executed a Letter of Intent ("LOI"), which laid the groundwork geared toward a final resolution, highlighting that Brown would sell his 50 percent interest back to Nanteeka. Pursuant to the LOI, Brown and Peterson agreed that the exclusive means of resolving any disputes, concerning the LOI, would be through a binding arbitration ruling issued by Mediation. In addition, by executing the LOI, Brown and Peterson expressed their intent that every provision of the LOI was a binding obligation.

**{¶ 6}** On February 28, 2020, the arbitrator issued a binding determination or ruling, which indicated that the closing of Brown's sale of his 50 percent stake, back to Nanteeka, would be extended to April 17, 2020. The determination also outlined Nanteeka's payment schedule as follows: (1) $100,000 at closing; (2) $60,000 by February 28, 2021; (3) $60,000 by February 28, 2022; and (4) $50,000 by September 30, 2022, for a total sale and purchase price of $270,000. On April 21, 2020, the arbitrator reconfirmed its determination.

**{¶ 7}** On May 4, 2020, Brown filed an application, pursuant to R.C. 2711.09, to confirm the arbitration award. On May 19, 2020, Nanteeka filed an answer, requesting a jury trial, and a counterclaim attacking the arbitration award and the arbitration process. In the counterclaim, Nanteeka raised allegations of fraud, breach of fiduciary duty, and civil conversion against Brown and requested money damages.

**{¶ 8}** On May 22, 2020, Brown filed a motion to strike Nanteeka's response to his application to confirm the arbitration awards. Brown argued that Nanteeka's response did not constitute a motion to vacate or motion to modify as required by R.C. 2711.10 or 2711.13. In addition, Brown argued that Nanteeka's active participation in the arbitration process, through its agent Peterson, factually and legally estopped Nanteeka from subsequently challenging the validity of the arbitration process.

**{¶ 9}** On August 3, 2020, after significant motion practice between the parties, the trial court issued an order confirming the arbitration awards.

**{¶ 10}** Nanteeka now appeals and assigns the following errors for our review:

**Assignment of Error No. 1**

The trial court's decision is against the manifest weight of the evidence.

**Assignment of Error No. 2**

The trial court erred in failing to address Nanteeka's motion to vacate.

**Assignment of Error No. 3**

The trial court erred when it did not hold a hearing to allow the parties to present evidence.

**Assignment of Error No. 4**

The arbitration award is incomplete and unenforceable without the required closing documents as written.

**Assignment of Error No. 5**

Nanteeka continued to work towards required closing documents to finalize the deal and to exchange assets, equipment, and inventory, Brown refused to comply.

**Assignment of Error No. 6**

Brown failed to complete the closing documents for the sale of his member units of the business or failed to exchange documents, assets, equipment, and inventory.

**Law and Analysis**

**{¶ 11}** For judicial clarity, we will address the assignment of errors out of sequence and collectively, where appropriate.

**{¶ 12}** In the second assignment of error, Nanteeka argues the trial court erred in failing to address its motion to vacate.

**{¶ 13}** Preliminarily, we note, 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, the Supreme Court of Ohio held that 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. *Id.* at syllabus.

**{¶ 14}** We begin our discussion of this appeal by noting that voluntary termination of legal disputes by binding arbitration is favored under the law. *Cleveland v. Cleveland Police Patrolmen's Assn.*, 8th Dist. Cuyahoga No. 2016-Ohio-702, ¶ 21, citing *Cleveland v. Internatl. Bhd. of Elec. Workers Local 38*, 8th Dist. Cuyahoga No. 92982, 2009-Ohio-6223, ¶ 16, citing *Kelm v. Kelm*, 68 Ohio St.3d 26, 27, 56, 623 N.E.2d 39 (1993).

**{¶ 15}** Arbitration "provides the parties with a relatively speedy and inexpensive method of conflict resolution and has the additional advantage of unburdening crowded court dockets." *Internatl. Bhd. of Elec. Workers Local 38*, at

*id.*, citing *Mahoning Cty. Bd. of Mental Retardation & Dev. Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80, 83, 488 N.E.2d 872 (1986). As a result, the authority of courts to vacate an arbitration award is "extremely limited." *Cedar Fair, L.P. v. Falfas*, 140 Ohio St.3d 447, 2014-Ohio-3943, 19 N.E.3d 893, ¶ 5.

**{¶ 16}** In the instant case, Brown filed his application to confirm the arbitration award with the trial court pursuant to R.C. 2711.09, which provides:

> At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. Thereupon the court shall grant such an order and enter judgment thereon, unless the award is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code.

*Id.*

**{¶ 17}** Pursuant to R.C. 2711.13, if a party is not satisfied with the arbitration award, they may file a motion to modify, vacate, or correct the award within three months after they receive the award. The motion must be based on one of the circumstances outlined in R.C. 2711.10 and 2711.11. *Galion v. Am. Fedn. of State, Cty., & Mun. Emp., Ohio Council 8, AFL-CIO, Local 2243*, 71 Ohio St.3d 620, 622, 646 N.E.2d 813 (1995). Once the party fails to file the appropriate motion within the three-month period, the trial court is precluded from modifying or vacating the award. *NCO Portfolio Mgmt. v. Reese*, 8th Dist. Cuyahoga No. 92804, 2009-Ohio-4201, ¶ 9, citing *FIA Card Servs., N.A. v. Wey*, 8th Dist. Cuyahoga No. 90072, 2008-Ohio 2353, ¶ 7, citing *Galion, supra*.

**{¶ 18}** However, Nanteeka did not timely file a motion to vacate. As previously stated, Nanteeka filed an answer and counterclaim.

**{¶ 19}** The trial court's well-reasoned opinion stated in part that:

> [i]nstead of filing a motion to vacate, [Nanteeka] filed an answer and counterclaim attacking not only the award, but the process as well. In its counterclaim, [Nanteeka] raised allegations against [Brown] of fraud, breach of fiduciary duty, and civil conversion, and moved for an award of money damages.

**{¶ 20}** A trial court has no jurisdiction to vacate, modify, or correct an arbitration award where a party argues to vacate the award in response to a motion to confirm the award without a separate, timely motion to vacate. *Cleveland Police Patrolmen's Assn. v. Cleveland*, 8th Dist. Cuyahoga No. 109351, 2021-Ohio-702, ¶ 17, citing *FOP, Ohio Labor Council v. Halleck*, 143 Ohio App.3d 171, 175, 757 N.E.2d 831 (7th Dist.2001) (reversing the trial court's judgment vacating an arbitration award where the appellee did not file a motion to vacate but "only filed an answer to appellant's motion to confirm"); *Brooklyn Estates Homeowners' Assn. v. Miclara, L.L.C.*, 2018-Ohio-2012, 113 N.E.3d 9, ¶ 13-15 (4th Dist.) (trial court lacked jurisdiction to vacate an arbitration award where the appellee filed only an answer to appellant's motion to confirm instead of a motion to vacate).

**{¶ 21}** Relying on our well-established precedent, in *Asset Acceptance, L.L.C. v. Stancik*, 8th Dist. Cuyahoga No. 84491, 2004-Ohio-6912, the trial court found that because Nanteeka did not file a motion to vacate, it failed to comply with the statutory mandate for challenging an arbitration award. In *Asset*, where a respondent filed a counterclaim for damages in response to an application to

confirm an arbitration award, we stated: "the only recourse in challenging an arbitration award was to file a motion to vacate under R.C. 2711.10. Even then, his challenge would have been limited by the confines of that statute." *Id*. at ¶ 16.

**{¶ 22}** Nonetheless, Nanteeka argues the trial court should have considered its July 15, 2020 filing styled "motion to vacate" and requesting the trial court to consider it as "a further formal Motion to Vacate the Arbitration Award."

**{¶ 23}** In this regard, the trial court's opinion stated in part that:

> [o]n July 15, 2020, [Nanteeka] filed its motion to vacate. Under R.C. 2711.13, [n]otice of 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. Here, the arbitration award was delivered on February 28, 2020. Accordingly, as [Nanteeka's] motion was filed late, after the three-month notification period had run, the Court cannot consider [Nanteeka's] motion.

**{¶ 24}** The trial court's determination was in accordance with the statute. In *Galion*, 71 Ohio St.3d 620, 622, 646 N.E.2d 813 (1995), the Supreme Court of Ohio stated, "[I]n our view, the language of R.C. 2711.13 is clear, unmistakable, and above all mandatory." The court held that "R.C. 2711.13 provides a three-month period within which a party must file a motion to vacate, modify, or correct an arbitration award under R.C. 2711.10 or 2711.11." *Id.* at paragraph one of the syllabus. If such an application is not filed within that period, the trial court lacks jurisdiction to vacate, modify, or correct the award. *Id. See also BST Ohio Corp. v. Wlgang*, 8th Dist. Cuyahoga No. 108130, 2019-Ohio-4785, ¶ 17, citing *Galion* at *id*.

**{¶ 25}** Based on Nanteeka's failure to properly file a motion to vacate the arbitration award, the trial lacked jurisdiction to vacate, modify, or correct the award.

**{¶ 26}** Accordingly, we overrule the second assignment of error.

**{¶ 27}** In the third assignment of error, Nanteeka argues the trial court erred when it did not hold a hearing to allow the parties to present evidence.

**{¶ 28}** We have previously rejected the notion that a hearing is required before confirming an arbitration award under R.C. 2711.09, stating,

> These hearings are governed by Civ.R. 7(B), which is grounded on the premise that the parties should be given adequate notice and an opportunity to be heard. The law of this district is clear that where, as here, a party is provided ample opportunity to be heard through the pleadings process and pretrial conferences, a hearing is not required by R.C. 2711.09.

*Brookdale Senior Living v. Johnson-Wylie,* 8th Dist. Cuyahoga No. 95129, 2011-Ohio-1243, ¶ 15, citing *Strnad v. Orthohelix Surgical Designs, Inc.,* 8th Dist. Cuyahoga No. 94396, 2010-Ohio-6161, ¶ 38. *See also White v. Fitch,* 8th Dist. Cuyahoga No. 102725, 2015-Ohio-4387, ¶ 13-14.

**{¶ 29}** In the instant case, the record reveals the parties had ample opportunity to be heard through the arguments raised in their respective pleadings. As we noted previously, significant motion practice occurred before the trial court confirmed the arbitration award. Thus, a hearing was not required.

**{¶ 30}** Accordingly, we overrule the third assignment of error.

**{¶ 31}** Assignments of error Nos. 1, 4, 5, and 6 attack the underlying arbitration award and will be addressed collectively.

**{¶ 32}** As we have previously recognized, the arbitration procedure set forth in R.C. Chapter 2711 authorizes a limited and narrow judicial review of an arbitration award, and a de novo review of the merits of the dispute is not within the contemplation of the statute. *Hausser & Taylor, L.L.P. v. Accelerated Sys. Integration, Inc.*, 8th Dist. Cuyahoga No. 84748, 2005-Ohio-1017, ¶ 38, citing *Asset Acceptance L.L.C.,* 8th Dist. Cuyahoga No. 84491, 2004-Ohio-6912. Thus, a trial court may not evaluate the merits of an award. *Brookdale*, 8th Dist. Cuyahoga No. 95129, 2011-Ohio-1243, at ¶ 6. Instead, the review determines whether the appealing party has established that the award is defective within the confines of R.C. Chapter 2711. *Id.*

**{¶ 33}** Because the sum and substance of Nanteeka's attacks were outside the confines of the statute, the trial court properly declined to address those claims.

**{¶ 34}** Accordingly, we overrule assignments of error Nos. 1, 4, 5, and 6.

**{¶ 35}** Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____

EMANUELLA D. GROVES, JUDGE

MICHELLE J. SHEEHAN, P.J., and
MARY EILEEN KILBANE, J., CONCUR

KEYWORDS: Motion to vacate; arbitration award; application to confirm arbitration award; motion to vacate arbitration award; R.C. 2711.13; order confirming award.

Pursuant to R.C. 2711.13, if a party is not satisfied with the arbitration award, they may file a motion to modify, vacate, or correct the award within three months after they receive the award. The motion must be based on one of the circumstances outlined in R.C. 2711.10. Once the party fails to file the appropriate motion within the three-month period, the trial court is precluded from modifying or vacating the award.

Because appellant did not file a motion to vacate, the trial court properly found that it failed to comply with the statutory mandate for challenging an arbitration award. Based on appellant's failure to properly file a motion to vacate the arbitration award, the trial lacked jurisdiction to vacate, modify, or correct the award.

**[Cite as *Oliveri v. OsteoStrong*, 2021-Ohio-1694.]**

**IN THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

| | | |
|---|---|---|
| BEATRICE OLIVERI, | : | **O P I N I O N** |
| Plaintiff-Appellant, | : | **CASE NO. 2019-L-104** |
| - vs - | : | |
| OSTEOSTRONG, et al., | : | |
| Defendant-Appellee. | : | |

Civil Appeal from the Lake County Court of Common Pleas, Case No. 2018 CV 000781.

Judgment: Reversed and remanded.

*Mitchell A. Weisman* and *R. Matthew Weisman*, Weisman Law Firm, 25201 Chagrin Boulevard, Suite 270, Beachwood, Ohio 44122 (For Plaintiff-Appellant).

*Carol K. Metz*, Travelers Insurance, P.O. Box 64093, St. Paul, Minnesota 55164 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

**{¶1}** Appellant, Beatrice Oliveri, appeals the decision awarding summary judgment in favor of appellee, OsteoStrong. We reverse and remand.

**{¶2}** In May 2016, Oliveri was given two free sessions to work out at OsteoStrong after attending a presentation at a senior center. Before she went to OsteoStrong, Oliveri, who suffers from osteoporosis, consulted her doctor who advised her to be careful.

**{¶3}** At her first session, Oliveri completed a wellness assessment that includes participant information and a release from liability. The end of the assessment states:

> I am physically capable of participating in an exercise program or the OsteoStrong system. I have either received permission from my doctor to perform the exercise and the OsteoStrong system or I decided to participate in the OsteoStrong program without consulting my physician and I assume all responsibilities for my decision to engage in the OsteoStrong program. I waive my right to pursue legal action against OsteoStrong, its owners, partners, and agents for any physical or mental anguish that I may incur as a result of my participating with the OsteoStrong system.

**{¶4}** After signing the assessment, Oliveri met with an instructor and told him that she was afraid to try the exercises. The instructor assured her that the program was "completely different" and "there was minimal, very minimal risk." Oliveri completed the first session in two to five minutes and experienced no pain.

**{¶5}** At her second session, Oliveri's instructor was Justin Ramey. This session consisted of four exercises. As she completed her fourth exercise, Ramey told her to repeat it and to "do it harder, harder." When Oliveri attempted to do so, she felt and heard a "pop" that took her breath away. She was eventually diagnosed with a thoracic compression fracture.

**{¶6}** Oliveri filed suit against OsteoStrong; Bill Atterbury and Dennis Durkin, the owners of OsteoStrong; and True Wellness, LLC, the manufacturer of the OsteoStrong machines. She alleged they were negligent by failing to warn of a known dangerous condition; by failing to instruct her on the use of the machine; by allowing its employees, agents, and consumers to use dangerous machines; by failing to supervise employees on the proper methods to use the machines; and by failing to inspect and maintain the equipment.

**{¶7}** Oliveri eventually voluntarily dismissed her claims against True Wellness, LLC, Bill Atterbury, and Dennis Durkin. OsteoStrong, the sole remaining defendant,

moved for summary judgment claiming (1) that Oliveri waived her right to pursue legal action against it by signing the written waiver and (2) that she assumed the risk of injury under the theories of express assumption of the risk, primary assumption of the risk, and implied assumption of the risk.

**{¶8}** Oliveri argued in opposition that the written waiver was ambiguous and therefore invalid. She also argued she did not assume the risk of her injuries and that genuine issues of material fact remained as to whether the OsteoStrong program is inherently dangerous.

**{¶9}** The trial court held that summary judgment was warranted on the grounds of waiver and express assumption of the risk, finding the waiver clear and unambiguous. In light of its decision finding Oliveri expressly waived her right to sue for her injuries, it did not address the arguments regarding primary and implied assumption of the risk.

**{¶10}** We collectively address Oliveri's assignments of error:

**{¶11}** "[1.] The trial court erred by granting summary judgment based on its determination that Appellee's 'waiver' is clear and unambiguous, the interpretation of which is a question of fact for a jury since reasonable minds could come to different conclusions.

**{¶12}** "[2.] The trial court erred by granting summary judgment on the grounds of express assumption of risk because Appellee did not expressly specify that Ms. Oliveri was waiving her right to sue for injuries due to Appellee's negligence."

**{¶13}** Oliveri contends there are genuine issues of material fact as to whether the waiver she signed is clear and unambiguous and whether she expressly assumed the risk of her injury.

**{¶14}** "Summary judgment is appropriate when (1) no genuine issue as to any material fact exists; (2) the party moving for summary judgment is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can reach only one conclusion adverse to the nonmoving party." *Allen v. 5125 Peno, LLC*, 11th Dist. Trumbull No. 2016-T-0120, 2017-Ohio-8941, 101 N.E.3d 484, ¶ 6, citing *Holliman v. Allstate Ins. Co.*, 86 Ohio St.3d 414, 415, 715 N.E.2d 532 (1999). "The initial burden is on the moving party to set forth specific facts demonstrating that no issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Allen* at ¶ 6, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). "If the movant meets this burden, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial." *Id.*

**{¶15}** Not every factual dispute precludes summary judgment; only disputes as to material facts that may affect the outcome preclude summary judgment. *Bender v. Logan*, 4th Dist. Scioto No. 14CA3677, 2016-Ohio-5317, 76 N.E.3d 336, ¶ 49, citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

**{¶16}** Oliveri contends the trial court erred in finding that the waiver in her wellness assessment was clear and unambiguous. She argues the contract language does not mention negligence or liability and that "physical anguish" has more than one meaning. Thus, she claims summary judgment was not warranted.

**{¶17}** "Express assumption of risk * * * arise[s] where a person expressly contracts with another not to sue for any future injuries which may be caused by that person's negligence." *Anderson v. Ceccardi*, 6 Ohio St.3d 110, 114, 451 N.E.2d 780 (1983). Express assumption of the risk is the same as waiving the right to recover. *See Holmes*

*v. Health & Tennis Corp. of Am.*, 103 Ohio App.3d 364, 367, 659 N.E.2d 812 (1st Dist.1995).

**{¶18}** "For express assumption of risk to operate as a bar to recovery, the party waiving his right to recover must make a conscious choice to accept the consequences of the other party's negligence." *Id.* at 367, citing *Anderson* at 114. "It follows that in order for a conscious acceptance to be made, an agreement purporting to constitute an express assumption of risk must state a clear and unambiguous intent to release the party from liability for its negligence." *Holmes* at 367, citing *Tanker v. N. Crest Equestrian Ctr.*, 86 Ohio App.3d 522, 621 N.E.2d 589 (9th Dist.1993).

**{¶19}** Further, "'[r]eleases from liability for future tortious conduct are generally not favored by the law and are narrowly construed.'" *Reo v. Allegiance Admrs. LLC*, 11th Dist. Lake No. 2017-L-112, 2018-Ohio-2464, ¶ 20, quoting *Brown-Spurgeon v. Paul Davis Sys. of Tri-State Area, Inc.*, 12th Dist. Clermont No. CA2012-09-069, 2013-Ohio-1845, ¶ 50, citing *Glaspell v. Ohio Edison Co.*, 29 Ohio St.3d 44, 46-47 (1987). However, courts routinely apply releases from future tort liability if the intent of the parties regarding what kind of liability and what individuals or entities are being released is clear and unambiguous. *Reo* at ¶ 20. The words "release" or "negligence" are not necessary to clearly and unambiguously waive a right. *See Hall v. Woodland Lake Leisure Resort Club, Inc.*, 4th Dist. Washington No. 97CA945, 1998 WL 729197, *6 (Oct.15, 1998).

**{¶20}** When a writing is clear and unambiguous, the interpretation is a question of law. *Pruitt v. Strong Style Fitness,* 8th Dist. Cuyahoga No. 96332, 2011-Ohio-5272, ¶ 8, citing *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978). "Ambiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-

4838, 896 N.E.2d 666, ¶ 16. Moreover, we must read the clauses as a whole, not piecemeal. *Gomolka v. State Auto. Mut. Ins. Co.*, 70 Ohio St.2d 166, 172, 436 N.E.2d 1347 (1982).

**{¶21}** In interpreting contracts, "Courts must give common words their ordinary meaning unless manifest absurdity would result or some other meaning is clearly evidenced from the face or overall contents of the written instrument." *JP Morgan Chase Bank, Natl. Assn. v. Heckler*, 3d Dist. Union No. 14-12-26, 2013-Ohio-2388, ¶ 20, citing *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, 821 N.E.2d 159, ¶ 29. And, although not always explicitly referenced or relied on, the rules of grammar are elemental whenever reading and understanding any writing, especially a contract. "Proper contract interpretation includes the application of ordinary rules of grammar." 17A C.J.S. Contracts § 406; *see Gahanna v. Ohio Mun. Joint Self-Ins. Pool*, 10th Dist. Franklin No. 20AP-265, 2021-Ohio-445, ¶ 12 ("The court must read words and phrases in context and apply the rules of grammar and common usage.").

**{¶22}** As stated, the wellness assessment includes a waiver before Oliveri's signature:

> I am physically capable of participating in an exercise program or the OsteoStrong system. I have *either* received permission from my doctor to perform the exercise and the OsteoStrong system *or* I decided to participate in the OsteoStrong program without consulting my physician and I assume all responsibilities for my decision to engage in the OsteoStrong program. I waive my right to pursue legal action against OsteoStrong, its owners, partners, and agents for any physical or mental anguish that I may incur as a result of my participating with the OsteoStrong system.

(Emphasis added.)

**{¶23}** With respect to the provision: "I assume all responsibilities for my decision to engage in the OsteoStrong program," this language alone is so general as to have no meaning. *See Tanker*, 86 Ohio App.3d at 524-526 (agreement "[t]o assume full responsibility and liability for any and all * * * personal injury * * * associated with the riding * * * of any horse or horses at North Crest Equestrian Center * * *" held to be "so general as to be meaningless"), and *Isroff v. Westhall Co.*, 9th Dist. Summit No. 14184, 1990 WL 15192, *2 (Feb. 21, 1990) ("It is a well-recognized rule that a release that is so general that it includes within its terms claims of which the releasor was ignorant, and thus not within the contemplation of the parties when the release was executed, will not bar recovery of such claims.").

**{¶24}** This language, however, is not determinative. It is the next sentence that dictates the breadth of the waiver: "I waive my right to pursue legal action against OsteoStrong, its owners, partners, and agents for any physical or mental anguish that I may incur as a result of my participating with the OsteoStrong system."

**{¶25}** Here, as previously stated, the trial court read this clause as waiving actions for physical and mental "injury" through its use of the term "anguish," but the words clearly import different meanings.

**{¶26}** "Anguish" is defined as "extreme pain, distress, or anxiety." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/anguish (accessed Apr. 2, 2020). "Injury" is defined as "hurt, damage, or loss sustained," "an act that damages or hurts," or "a violation of another's rights for which the law allows an action to recover damages." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/injury (accessed Apr. 15, 2020).

**{¶27}** Although we recognize that a waiver need not use the word "negligence" to effectively waive such a claim, the waiver at issue here is ineffective by its own terms to waive a negligence action, as damages in negligence are not required to rise to the level of "anguish" to be recoverable. Oliveri's assigned errors have merit because the release language does not waive and release OsteoStrong from claims for all injury.

**{¶28}** Notwithstanding, OsteoStrong raised alternative grounds for summary judgment that the trial court did not address. And OsteoStrong urges us to affirm the court's summary judgment decision based on its alternative arguments raised and briefed to the trial court.

> "[We apply] the same summary judgment standard as the trial court and [will] affirm the trial court's judgment if any valid grounds are found on appeal to support it, even if the trial court failed to consider those grounds." *Coventry Twp. v. Ecker*, 101 Ohio App.3d 38, 41-42 (9th Dist.1995); *see also Ludwigsen v. Lakeside Plaza, LLC*, 12th Dist. Madison No. CA2014-03-008, 2014-Ohio-5493, ¶ 39; and *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 51 ("We have consistently held that a reviewing court should not reverse a correct judgment merely because it is based on erroneous reasons."). *But see Bowen v. Kil-Kare, Inc.*, 63 Ohio St.3d 84, 89 (1992) (where the trial court *specifically* declined to address an alternative ground for its decision to grant summary judgment in favor of appellees, the issue was not properly before the court of appeals), and *B.F. Goodrich Co. v. Commercial Union Ins.*, 9th Dist. Summit No. 20936, 2002-Ohio-5033, ¶ 38."

(Emphasis sic.) *Reo*, 2018-Ohio-2464, at ¶ 25. *But see Adlaka v. N.Y. Life Ins. & Annuity Corp.*, 7th Dist. Mahoning No. 13 MA 171, 2015-Ohio-605, 27 N.E.3d 871, ¶ 9 (declining to review alternative basis for summary judgment in the first instance).

**{¶29}** The two alternative grounds for summary judgment argued to the trial court are primary assumption of the risk and implied assumption of the risk. Each of Oliveri's claims is based on negligence.

**{¶30}** "To establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom." *Peterson v. Martyn*, 10th Dist. Franklin No. 17AP-39, 2018-Ohio-2905, ¶ 28, citing *Menifee v. Ohio Welding Prods. Inc.*, 15 Ohio St.3d 75, 77 (1984) and *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981). "A defendant's duty to a plaintiff depends upon the relationship between the parties and the foreseeability of injury to someone in the plaintiff's position." (Citation omitted.) *Peterson* at ¶ 28.

**{¶31}** "[P]rimary assumption of risk, when applicable, prevents a plaintiff from establishing the duty element of a negligence case and so entitles a defendant to judgment as a matter of law * * *." *Gallagher v. Cleveland Browns Football Co.*, 74 Ohio St.3d 427, 433, 659 N.E.2d 1232 (1996).

**{¶32}** "'The test for applying the doctrine of primary assumption of the risk to recreational activities and sporting events requires that "(1) the danger is ordinary to the game, (2) it is common knowledge that the danger exists, and (3) the injury occurs as a result of the danger during the course of the game."'" *Morgan v. Kent State Univ.*, 10th Dist. Franklin No. 15AP-685, 2016-Ohio-3303, 54 N.E.3d 1284, ¶ 12, quoting *Morgan v. Ohio Conference of the United Church of Christ*, 10th Dist. Franklin No. 11AP-405, 2012-Ohio-453, ¶ 13, quoting *Santho v. Boy Scouts of Am.*, 168 Ohio App.3d 27, 2006-Ohio-3656, 857 N.E.2d 1255, ¶ 12 (10th Dist.); *Peterson* at ¶ 32.

> "'To be covered under the [primary-assumption-of-the-risk] doctrine, the risk must be one that is so inherent to the sport or activity that it cannot be eliminated.'" *Horvath v. Ish,* 134 Ohio St.3d 48, 2012-Ohio-5333, 979 N.E.2d 1246, ¶ 19, quoting *Konesky v. Wood Cty. Agricultural Soc.,* 164 Ohio App.3d 839, 2005-Ohio-7009, 844 N.E.2d 408, ¶ 19 (6th Dist.), citing *Westray v. Imperial Pools & Supplies, Inc.,* 133 Ohio App.3d 426, 432, 728 N.E.2d 431 (6th Dist.1999).

> "Where the risk at issue is not inherent, then a negligence standard applies." *Id.*

*Morgan v. Kent State Univ.* at ¶ 13. Some examples of risks inherent to a sport or recreational activity include the risk of being hit by an errant golf ball at a driving range, the risk of colliding with another horse when harness racing, and the risk of falling on the ice at an ice-skating rink. *Bundschu v. Naffah*, 147 Ohio App.3d 105, 768 N.E.2d 1215 (7th Dist.2002); *Sugg v. Ottawa Cty. Agricultural Soc.*, 6th Dist. Ottawa No. 90-OT-005, 1991 WL 59877 (Apr. 19, 1991); *Santho* at ¶ 13.

**{¶33}** "'Because of the great impact a ruling in favor of a defendant on primary assumption of risk grounds carries, a trial court must proceed with caution when contemplating whether primary assumption of risk completely bars a plaintiff's recovery.'" *Morgan v. Kent State Univ.* at ¶ 16, quoting *Gallagher* at 432.

**{¶34}** According to her testimony, Oliveri was injured while exercising on an OsteoStrong machine under an OsteoStrong employee's supervision. She was injured while evidently correctly performing the exercise. There is no evidence that she was injured as a result of a danger inherent in the exercise or of some inherent danger faced while working out at a gym. Oliveri was not injured after stumbling off a treadmill, from an unsecured weight falling on her foot, or from getting hit by an errant ball. Because she was not injured by a danger ordinary to the sport or exercise, we disagree that the doctrine of primary assumption of the risk applies to these facts, and as such, summary judgment on this basis was not warranted.

**{¶35}** Last, we address OsteoStrong's final summary judgment argument, i.e., that Oliveri impliedly assumed the risk of suffering a fracture when exercising with osteoporosis.

**{¶36}** "Implied assumption of risk has been merged into Ohio's comparative negligence statute, R.C. 2315.33." *Peterson*, 2018-Ohio-2905, at ¶ 37, citing *Anderson*, 6 Ohio St.3d 110, at paragraph one of the syllabus. "Pursuant to the comparative negligence statute, the trier of fact must apportion relative degrees of fault between the plaintiff and the defendant in deciding the issue of negligence. * * * Thus, implied assumption of risk 'ordinarily involves questions of fact that generally are to be decided by the fact finder.'" *Peterson* at ¶ 37, quoting *Durnell v. Raymond Corp.*, 10th Dist. Franklin No. 98AP-1577, 1999 WL 1084205, *2 (Nov. 16, 1999).

**{¶37}** Here, OsteoStrong claims that Oliveri knew that she was high risk for suffering from bone fractures when exercising, and as such, summary judgment is warranted in its favor because she assumed the risk. Oliveri contends, however, that she relied on OsteoStrong's assurances about the safety of the equipment and the exercises and that she was under the supervision of an OsteoStrong employee who was encouraging her to do the exercise "harder." Summary judgment based on implied assumption of the risk is not warranted because questions of fact remain.

**{¶38}** In conclusion, Oliveri's assigned errors have merit. As stated, Oliveri did not expressly waive a claim in negligence. Thus, summary judgment in favor of OsteoStrong was not warranted on this basis.

**{¶39}** The trial court's decision is reversed and remanded.

MARY JANE TRAPP, P.J., concurs,

CYNTHIA WESTCOTT RICE, J., concurs in judgment only.