IN THE SUPREME COURT OF OHIO

CASE NO. 2022-0879

RYAN MCCULLOUGH,
Plaintiff-Appellee,

-vs-

JOSEPH E. BENNETT,
Defendant-Appellant.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEALS, MONTGOMERY COUNTY, CASE NO. 20 CA 029390

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEE

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AMICUS CURIAE'S STATEMENT OF INTEREST

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals may secure fair compensation by holding wrongdoers accountable. The OAJ comprises approximately 1,500 attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

The OAJ submits this Brief in full support of the well-reasoned decision that was issued by the Second Judicial District below. *McCullough v. Bennett*, 2022-Ohio-1880, 190 N.E.3d 126 (2d Dist.). Despite the undeserved criticism that has been leveled by Defendant-Appellant, Joseph E. Bennett ("Bennett"), in his effort to avoid legal responsibility for the accident he caused, the unanimous appellate court faithfully adhered to the plain and ordinary language of Ohio's Savings Statute, R.C. 2305.19, as well as the judicial "single-use" restriction that was adopted in *Thomas v. Freeman*, 79 Ohio St.3d 221, 227, 680 N.E.2d 997 (1997). Plaintiff-Appellee, Ryan McCullough ("McCullough"), was required to invoke that provision only once when he filed his third complaint outside the statute of limitations on September 12, 2019. And as had been recognized in *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 8-9, the General Assembly had amended the Saving Statute in 2004 to close off the "malpractice trap" that Defendant is now trying to revive and exploit. Finally, Plaintiff Bennett never violated the requirement imposed by Civ.R. 3(A) to perfect service within one year in the first two actions because the trial court prematurely dismissed both proceedings *sua sponte* without affording him a full and fair

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opportunity to do so.

Defendant Bennett is plainly before this Court seeking tortured constructions of both the Savings Statute and Civ.R. 3(A), which would enable endless procedural gamesmanship in Ohio courtrooms for decades to come. No plausible explanation has been offered for how adopting any of the three Propositions of Law will further a legitimate objective—because there is none. That undoubtably explains the complete absence of any *amici* in support of the extreme defense positions that are being asserted. The OAJ therefore urges this Court to maintain the present state of the law and affirm the Second Judicial District in all respects.

STATEMENT OF THE CASE AND FACTS

The OAJ adopts by reference the statements of the case and facts that has been provided in the Merit Brief of Appellee Ryan McCullough filed December 22, 2022.

ARGUMENT

Defendant Bennett has not actually provided this Court with any propositions of law that "could serve as a syllabus for the case" should he prevail as required by Sup.Ct.Prac.R. 16.02(B)(4). He has furnished three questions instead, to which the OAJ responds as follows.

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PROPOSITION OF LAW I: DOES THE ONE-USE RESTRICTION OF THE OHIO SAVINGS STATUTE (R.C. 2305.19) BAR A PLAINTIFF FROM FILING A THIRD COMPLAINT AFTER THE EXPIRATION OF THE APPLICABLE STATUTE OF LIMITATIONS WHERE THE FILING AND DISMISSAL OF THE SECOND COMPLAINT OCCURRED PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS?

The first question posed in this "Proposition of Law" is founded upon the "single-use" restriction that was adopted over twenty-five years ago in *Thomas*, 79 Ohio St.3d at

227, 680 N.E.2d 997. *Merit Brief of Defendant-Appellant Joseph E. Bennett ("Defs. Brief"), pp. 7-14.* As the Second District properly recognized, Plaintiff McCullough was not required to "use" the Saving Statute when the first two Complaints were filed before the statute of limitations expired on April 27, 2019. *McCullough*, 2022-Ohio-1880, 190 N.E.3d 126, at ¶ 30-33. While this Court was apparently concerned in *Thomas* that this time bar could be extended indefinitely through multiple applications of R.C. 2305.19, no such prospects are present here. Having already used it once to permit the refiling of the third Complaint after the statute of limitations expired, the Savings Statute is no longer available to Plaintiff McCullough. Indeed, the threat of "continuous refilings" by *any* plaintiff is limited by the applicable statute of limitations, as well as corresponding filing fees as this Court recognized in *Thomas*. *Thomas* at 227; *McCullough* at ¶ 36. As the Second District pointed out below, Civ.R. 41(A) still limits plaintiffs to two voluntary dismissals within the statute of limitations, and trial courts remain free to involuntarily dismiss complaints with prejudice in appropriate instances. *McCullough* at ¶ 36

While Defendant Bennett bases his argument on the puzzling Sixth and Eighth District decisions in *Brown v. Solon Pointe at Emerald Ridge,* 8th Dist. Cuyahoga No. 99363, 2013-Ohio-4903, *Rector v. Dorsey,* 8th Dist. Cuyahoga No. 109835, 2021-Ohio-2675, and *Owens College Nursing Students v. Owens State Community College*, 6th Dist. Wood No. WD-14-012, 2014-Ohio-5210, he points to no authorities from this Court that would support his policy position that plaintiffs must utilize R.C. 2305.19(A) to "save" their subsequent complaints filed within the limitations period. *Defs. Brief, pp. 9-12.* The single-use rule comes not from the text of the Saving Statute itself but rather from case law as articulated in *Thomas*, 79 Ohio St.3d at 227, 680 N.E.2d 997. Yet in *Thomas*, this Court analyzed the pre-2004 version of R.C. 2305.19(A), which expressly applied only to "save"

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actions that had been dismissed after the statute of limitations expired. Under the former Saving Statute, there was no question about whether a plaintiff who refiled a complaint within the limitation period had to do so by "using" the Saving Statute because R.C. 2305.19(A) gave no such option.

Nor is Civ.R. 33's limit on interrogatories instructive here, despite the weak effort to draw an analogy. *Defs. Brief, p. 12.* Defendant Bennett's hypothetical about a defendant who uses one of forty available interrogatories to seek information already received in a deposition is an example of an unwise "use" of an interrogatory, but an example of a "use" nonetheless. *Id.* To the contrary, a plaintiff who refiles a complaint within the statute-of-limitations period does not "use" the Savings Statute at all because nothing needs "saving."

Defendant Bennett's citations to *Hamrick v. Ramalia*, 8th Dist. Cuyahoga No. 97385, 2012-Ohio-1953, and *Linthicum v. Physicians Anesthesia Serv., Inc.*, 1st Dist. Hamilton No. C-180382, 2019-Ohio-3940, are also inapposite. *See Defs. Brief, p. 13.* In both cases, the plaintiffs had voluntarily dismissed and refiled their actions twice after the expiration of the statute of limitations. *Hamrick* at ¶ 3-4; *Linthicum* at ¶ 1-2. Although these cases support the proposition that plaintiffs may use the Savings Statute only once—a proposition that no one is questioning—they have no bearing on whether a complaint that is dismissed and refiled within the limitations period implicates R.C. 2305.19(A).

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Above all else, courts should strive to decide legitimate disputes on their merits and not technical grounds. *DeHart v. Aetna Life Ins. Co.,* 69 Ohio St.2d 189, 431 N.E.2d 644 (1982); *Natl. Mut. Ins. Co. v. Papenhagen,* 30 Ohio St.3d 14, 15, 505 N.E.2d 980 (1987). The first Proposition of Law offers to establish nothing more than unprecedented pitfalls for the unwary that defy both logic and common sense. Rather than adopt

Defendant Bennett's contrived interpretation of *Thomas'* "single-use" rule that accomplishes nothing worthwhile, this Court should affirm the Second Judicial District.

PROPOSITION OF LAW II: CAN A PLAINTIFF INVOKE THE PROTECTIONS OF THE OHIO SAVINGS STATUTE (R.C. 2305.19) WHERE THE PLAINTIFF'S COMPLAINT WAS ADMINISTRATIVELY DISMISSED PRIOR TO THE EXPIRATION OF THE UNDERLYING STATUTE OF LIMITATIONS?

While the answer to the second "Proposition of Law" is generally "yes," the argumentation offered in connection with it eliminates any doubt, if there ever were any, that Defendant Bennett's positions in this appeal are both extreme and ill-conceived. This question seeks to enlist this Court's aid in undermining the will of the General Assembly and to return the law to the state that existed four decades ago when *Reese v. Ohio State Univ. Hosps.*, 6 Ohio St.3d 162, 451 N.E.2d 1196 (1983), was issued. *Defs. Brief, pp. 15-18.* That decision had recognized that the former Savings Statute did not apply unless the original action terminated after the controlling statute of limitations expired. But the legislature responded several years later by striking the phrase "and the time limited for the commencement of such action at the date of reversal or failure has expired" from subsection (A) of the provision. *2004 Ohio Laws File 64 (Am.Sub.H.B. 161).* And so that no uncertainty would remain, the 2004 amendment further specified that "the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise then upon the merits or within the period of the original applicable statute of limitations, whichever occurs later." (Emphasis added.) *Id.* The General Assembly's intention to close off the "malpractice trap" could not have been more evident, which this Court specifically recognized in *Eppley*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, at ¶ 9.

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Defendant Bennett's result-driven view is that the 2004 amendments to the Saving Statute were enacted for no reason and may be discarded as superfluous. But such wishful thinking violates R.C. 1.47(B), which states that "[t]he entire statute is intended to be effective[.]" *See, e.g., Whitman v. Hamilton Cty. Bd. of Elections*, 97 Ohio St.3d 216, 2002-Ohio-5923, 778 N.E.2d 32, ¶ 23; *Fincher v. Canton City School Dist. Bd. of Edn.*, 62 Ohio St.3d 228, 231, 581 N.E.2d 523 (1991); *State ex rel. Daily Servs., L.L.C. v. Buehrer*, 10th Dist. Franklin No. 10AP-964, 2012-Ohio-1065, ¶ 16; *State ex rel. Semetko v. Bd. of Commrs.*, 30 Ohio App.2d 130, 134, 283 N.E.2d 648 (6th Dist.1971). A law should never be interpreted in a manner that renders it a nullity. *See Montalto v. Yeckley*, 138 Ohio St. 314, 321, 34 N.E.2d 765 (1941). In *Commonwealth Loan Co. v. Downtown Lincoln Mercury Co.*, 4 Ohio App.2d 4, 6, 211 N.E.2d 57 (1st Dist.1964), the court reasoned:

> It is the duty of a court called upon to interpret a statute to breathe sense and meaning into it; to give effect to all its terms and provisions; and to render it compatible with other and related enactments whenever and wherever possible.

Since Defendant Bennett is attempting to invalidate a lawful legislative enactment, this Court should reaffirm that the General Assembly has successfully closed the "malpractice trap" that had previously been included (likely unwittingly) in the former version of the Saving Statute. *Eppley*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, at ¶ 9.

Defendant Bennett's string cite to post-2004 cases quoting *Reese* is insufficient to turn back the clock to the "good old days" before the General Assembly added the "whichever occurs later" language. *Defs. Brief, pp. 16-17.* Although Defendant Bennett identified opinions that include outdated boilerplate language from *Reese*, none of them analyze the relevant issue. *Taylor v. Burkhart*, 7th Dist. Monroe No. 19 MO 0013, 2020-

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Ohio-3632, ¶ 18-39 (considering whether refiled complaints related back to original); *Vogel v. Northeast Ohio Media Group LLC*, 2020-Ohio-854, 152 N.E.3d 981, ¶ 9-10 (9th Dist.) (finding that Saving Statute did not toll statute of limitations where plaintiff filed first action after limitations period had already expired); *Rosendale v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 08AP-378, 2008-Ohio-4899, ¶ 11 (same). And although the appellate opinion in *Korn v. Mackey*, 2d Dist. Montgomery No. 20727, 2005-Ohio-2768, was published after the 2004 amendments to the Saving Statute, the underlying events occurred before the May 31, 2004, effective date of the revisions, and the Second District thus properly applied the former version of R.C. 2305.19. *Korn* at ¶ 18, fn. 2. That is hardly the situation today.

It is interesting to note that Defendant Bennett's mindless pursuit of multiple hyper-technical justifications for terminating the lawsuit against him has produced at least one obvious conundrum. If the first two Propositions of Law are correct, then no statute-of-limitations violation could have been committed. The resurrection of *Reese*, 6 Ohio St.3d 162, 451 N.E.2d 1196, would mean that the Savings Statute could not have been invoked as a matter of law when either the first or second Complaints were filed before the two-year time bar lapsed. The extra year would be available only after the statute of limitations expired, which was when the third action was commenced approximately five months later. Since *Reese* would not have allowed R.C. 2305.19 to be used in connection with the first two Complaints, the statute-of-limitations defense cannot prevail even under Defendant's own far-fetched understanding of the controlling law. In other words, the first two Propositions of Law are entirely inconsistent with each other, as Defendant Bennett himself recognizes. *Defs. Brief, p. 15, fn. 1.* He cannot have it both ways. The second Proposition of Law should be answered in the affirmative.

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PROPOSITION OF LAW IV: DOES THE OHIO SAVINGS STATUTE (R.C. 2305.19) EXTEND THE TIME TO COMMENCE AN ACTION UNDER CIV.R. 3(A) WHERE AN ADMINISTRATIVE DISMISSAL OCCURS DURING THE ONE-YEAR COMMENCEMENT PERIOD?

The answer to the final "Proposition of Law" is also generally "yes." In arguing to the contrary, Defendant Bennett is attempting to take unfair advantage of the Common Pleas Court's troubling practice of quickly and prematurely dismissing civil lawsuits *sua sponte* contrary to the accepted approach that is followed by the overwhelming majority of trial courts in the OAJ's experience. As Defendant Bennett himself has acknowledged, an entire year is afforded by Civ.R. 3(A) to serve the defendant and commence the action. *Defs. Brief, p. 19.* But the first Complaint was dismissed for failure to prosecute after only six weeks. *Case No. 2018-CV-203.* And the second lasted just five months before suffering the same quick fate. *Case No. 2018-CV-2944.* As far as the OAJ has been able to determine, no plausible explanation exists for the trial court's refusal to allow the full year for service provided in the Civil Rules. This highly unusual set of circumstances thus serves to distinguish this case from those Defendant Bennett is touting in which service was not perfected within the first 12 months of active litigation, most notably *Moore v. Mt. Carmel Health Sys.*, 162 Ohio St.3d 106, 2020-Ohio-4113, 164 N.E.3d 376.

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"Commencement" of an action requires two events: "filing a complaint with the court" and obtaining service "within one year from such filing." *Civ.R. 3(A).* Where, as here, there has been a dismissal and refiling, perfecting service in the first action is not necessary. *See Thomas*, 79 Ohio St.3d at 227, 680 N.E.2d 997; *Husarcik v. Levy*, 8th Dist. Cuyahoga No. 75114, 1999 WL 1024135, *2-3 (Nov. 10, 1999). The Saving Statute is triggered "[i]n any action that is commenced or attempted to be commenced." (Emphasis added.) *R.C. 2305.19.* An actual commencement thus is not required. *Abel v. Safety*

First Industries, Inc., 8th Dist. Cuyahoga No. 80550, 2002-Ohio-6482, ¶ 42 ("By its express language, the Saving Statute also applies where there has been an attempt to commence an action.").

Although the Savings Statute does not define "attempt," the word is commonly understood to mean:

> The act or an instance of making an effort to accomplish something, esp. without success.

Black's Law Dictionary 123 (7th Ed.1999). And because R.C. 2305.19 "is remedial in nature" and must "be given liberal construction" in order to bring about the " 'resolution of cases upon their merits.' " *Abel*, 2002-Ohio-6482, at ¶ 45, quoting *Peterson v. Teodosio*, 34 Ohio St.2d 161, 175, 297 N.E.2d 113 (1973).

The Second Judicial District's unerring decision below faithfully complies with *Moore*, which was explicitly limited to the situation where there "was no failure other than on the merits and there has been no filing of a new action." *Moore,* 162 Ohio St.3d 106, 2020-Ohio-4113, 164 N.E.3d 376, at ¶ 29. This Court in *Moore* did not reason that R.C. 2305.19 failed to save the plaintiff's claim because he did not "commence" or "attempt to commence" timely service as Defendant Bennett suggests. *Moore* at ¶ 30; *Defs. Brief, pp. 19-20.* Rather, as the Second District recognized below, the majority in *Moore* held that the Savings Statute was inapplicable because "the plaintiff's complaint remained pending on the docket when the statute of limitations expired" and "the action did not fail 'otherwise than on the merits' (by being dismissed without prejudice)" and refiled. *McCullough*, 2022-Ohio-1880, 190 N.E.3d 126, at ¶ 23, quoting *Moore* at ¶ 36.

In the case *sub judice*, the trial court's hurried *sua sponte* dismissals of the first two lawsuits before Civ.R. 3(A)'s one-year period had expired were admittedly without

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prejudice. And there were two subsequent refilings below, only one of which was outside the applicable statute of limitations. In reaffirming *Thomas*, 79 Ohio St.3d 221, 680 N.E.2d 997, the *Moore* Court observed that there is "an attempt to commence the action" at a minimum when the complaint is filed and service requested. *Moore* at ¶ 29. That undoubtably occurred in all three of the civil actions that were submitted to the Clerk on Plaintiff McCullough's behalf, which means *Thomas* applies to permit the Savings Statute to be invoked as to the final filing. Although Defendant Bennett tries to factually distinguish *Thomas* on the basis that the opinion does not "concern[] an 'attempt to commence' under the savings statute," the plaintiff in *Thomas*—much like Plaintiff McCullough—had her complaint dismissed specifically for lack of prosecution because the plaintiff "attempted service" but the "service failed." *Thomas* at paragraph two of the syllabus; *Defs. Brief, p. 20.* This Court specifically held that the plaintiff "properly utilized the saving statute to refile" because she "filed her initial complaint and *demanded service*" before the statute of limitations expired. (Emphasis added.) *Thomas* at 227. The unsuccessful service *attempt* was sufficient to trigger the Saving Statute. *Id.*

In an apparent last-ditch effort to preclude any judicial resolution of the merits of Plaintiff's personal-injury claim, Defendant Bennett spends multiple pages comparing the facts of this case to *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, 894 N.E.2d 25, a decision that he did not cite in his brief before the Second District. *Defs. Brief, pp. 20-24; McCullough v. Bennett*, 2d Dist. Montgomery No. CA 029390, *Brief of Defendant-Appellee Joseph E. Bennett filed April 4, 2022, pp. 1-13.* In *LaNeve*, this Court held that the plaintiff did not "attempt to commence" an action to trigger the Saving Statute because he failed to attempt service by a method that was proper under the Ohio Civil Rules. *LaNeve* at ¶ 17-20. The plaintiff had filed his complaint against John Doe defendants, but

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when he later learned their identity and amended his complaint, he served them by certified mail even though Civ.R. 15(D) requires personal service in this context. *Id.* at ¶ 15. This Court specifically explained that "this is not a situation in which LaNeve attempted personal service on [the defendants] but was unable to perfect it. Rather, the only method of service attempted or obtained by LaNeve, in contravention of the specific requirements of Civ.R. 15(D), was by certified mail." *Id.* at ¶ 19. Although Defendant Bennett attempts to stretch this holding to Plaintiff McCullough's repeated failed attempts to serve him via FedEx, certified mail, regular U.S. mail, and publication, these methods of service are all proper under the Civil Rules. *Defs. Brief, pp. 21-24.* Consistent with established precedent, this final Proposition of Law should be answered in the affirmative.

CONCLUSION

For all the foregoing reasons, this Court should affirm the Second Judicial District's decision in all respects.

Respectfully Submitted,

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I certify that a copy of the foregoing **Amicus Brief** has been served by e-mail on January 5, 2023, upon:

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