

IN THE SUPREME COURT OF OHIO

Brian P. Caldwell, : OHIO SUPREME CASE NO. 2023-0809
Appellants, et al., :
-vs- : ON APPEAL FROM THE MARION
Whirlpool Corporation, : COUNTY COURT OF APPEALS,
Appellee. : THIRD APPELLATE DISTRICT
: COURT OF APPEALS
: CASE NO. 9-22-61
:

APPELLEE WHIRLPOOL CORPORATION'S MERIT BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS.....	1
ARGUMENT.....	5
Proposition of Law No. 1: The Five-Year Limitation Under R.C. 4123.52 Does Not Apply to a R.C. 4123.512 Appeal.	5
Proposition of Law. No. 2: The Savings Statue Applies to A R.C. 4123.512 Appeal and R.C. 4123.52 Does Not.	23
CONCLUSION	26
CERTIFICATE OF SERVICE	29

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Armstrong v. John R. Jurgensen Co.</i> , 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568.....	14, 27
<i>Bailey v. Republic Engineered Steels, Inc.</i> , 91 Ohio St. 3d 38, 741 N.E.2d 121 (2001).....	14, 27
<i>Bennett v. Admir.</i> , <i>Ohio Bur. of Workers' Comp.</i> , 2012-Ohio-5639, 134 Ohio St. 3d 329, 982 N.E.2d 666.....	6, 19
<i>Chatfield v. Whirlpool Corp.</i> , 3 rd Dist. Marion No. 9-21-20, 2021-Ohio-4365. 3, 10, 20, 21	
<i>Cocherl v. Ohio Dept. of Transp.</i> , 10th Dist. Franklin No. 06AP-1100, 2007-Ohio-3225.....	10, 15, 23
<i>Collinsworth v. Western Electric Co.</i> , 63 Ohio St.3d 268, 586 N.E.2d 1071 (1992)	9
<i>Dillon v. Farmers Ins. of Columbus, Inc.</i> , 2015-Ohio-5407, 145 Ohio St. 3d 133, 47 N.E.3d 794.....	13
<i>Fowee v. Wesley Hall Inc.</i> , 108 Ohio St.3d 533, 2006-Ohio-1712, 844 N.E.2d 1193....	24
<i>Lewis v. Connor</i> , 21 Ohio St.3d 1, 487 N.E.2d 285 (1985).....	24, 26
<i>Niskanen v. Giant Eagle, Inc.</i> , 2009-Ohio-3626, 122 Ohio St. 3d 486, 912 N.E.2d 595 20	
<i>Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Ass'n</i> , 28 Ohio St. 3d 118, 502 N.E.2d 599 (1986)	22
<i>Perez v. Univ. Hosp. Health Sys.</i> , 8 th Dist. No. 98427, 2012-Ohio-5896.....	10
<i>Perkins v. Indus. Comm.</i> , 106 Ohio St. 233, 140 N.E. 134 (1922)	8, 11
<i>Sechler v. Krouse</i> , 56 Ohio St. 2d 185, 383 N.E.2d 572 (1978)	passim
<i>Snyder v. State Liability Bd. Of Awards</i> , 94 Ohio St. 342, 114 N.E. 268 (1916)....	6, 7, 11
<i>State ex rel. Drone v. Indus. Comm.</i> , 93 Ohio State 151, 753 N.E.2d 185 (2001)	16
<i>State ex rel. Hutton v. Indus. Comm.</i> , 29 Ohio St.2d 9, 278 N.E.2d 34 (1972).....	18
<i>State ex rel. Romans v. Elder Beerman Stores Corp.</i> , 100 Ohio St.3d 165, 2003-Ohio- 5363, 797 N.E.2d 82.....	9, 10, 11, 16
<i>State ex rel. Superior's Brand Meats, Inc. v. Indus. Comm.</i> , 63 Ohio St. 3d 277, 586 N.E.2d 1077 (1992)	17, 18, 19
<i>State ex rel. Westchester Estates, Inc. v. Bacon</i> , 61 Ohio St.2d 42, 399 N.E.2d 81 (1980)	17
<i>Thomas v. Freeman</i> , 79 Ohio St.3d 221, 680 N.E.2d 997 (1997)	24
<i>Ward v. Kroger Co.</i> , 2005-Ohio-3560, 106 Ohio St. 3d 35, 830 N.E.2d 1155	5
<i>Welco Industries, Inc. v. Applied CLS</i> , 67 Ohio St.3d 344, 617 N.E.2d 1129 (1993)	5
<i>Williams v. Bur. of Workers' Comp.</i> , 12 th Dist. Preble No. CA2013-09-006, 2014-Ohio- 1889.....	10
<i>Youghiogheny & Ohio Coal Co. v. Mayfield</i> , 11 Ohio St.3d 70, 464 N.E.2d 133 (1984) 6, 19	
Statutes	
102 Ohio Laws, 531	6
103 Ohio Laws 88	7
G.C. 1465-86.....	7
G.C. 1465-90.....	6, 7, 8
R.C. 2305.19	23, 25, 26

R.C. 4123.512	passim
R.C. 4123.519	6, 18, 24
R.C. 4123.52	passim
R.C. 4123.95	27

Rules

Civ.R. 41(A)(1)(a)	2, 22
Civ.R. 53(D)(3)	3

Treatises

Fulton, <i>Ohio Workers' Compensation Law</i> , Section 5.5 (5 th Ed. 2018)	11, 15
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STATEMENT OF FACTS

The present action is a workers' compensation appeal filed pursuant to R.C. 4123.512. On or about March 23, 2015, Appellant, Brian Caldwell (hereinafter "Appellant") was involved in a workplace accident during the course of his employment at Appellee, Whirlpool Corporation (hereinafter, "Whirlpool"). Record Index No. 5, Complaint ¶1. Appellant filed a claim application for benefits and the Bureau of Workers' Compensation assigned number 15-815939 to the claim. Record Index No. 5, Complaint ¶4. The claim is allowed for right inguinal hernia. *Id.*

From April 6, 2015 through July 31, 2015, Whirlpool paid Appellant temporary total disability compensation. On or about August 11, 2016, Whirlpool issued a check to Appellant for a permanent partial disability award of \$3,447.96 in compliance with a staff hearing officer's August 3, 2016 order. Record Index No. 5, Pamela Susan Holland's Affidavit and Exhibit B of the Affidavit, attached in Appellant's Appendix. Because the check was returned to Whirlpool's third party administrator, Whirlpool issued a second check on January 11, 2017. *Id.* Between 2015 and 2016, Whirlpool paid medical bills for treatment related to the claim. Record Index No. 5, Pamela Susan Holland's Affidavit and Exhibit C of the Affidavit attached in Appellant's Appendix. The last medical bill paid in the claim occurred on or about May 2, 2016. *Id.*

On December 5, 2019, Appellant filed a C-86 motion with the Industrial Commission ("Commission") to amend his claim to include disc protrusion and/or bulges at L3-4, L4-5 and L5-S1. Record Index No. 5, Complaint ¶5. Appellant did not request treatment or compensation in the motion. District and staff hearing officers of the

Commission disallowed the claim for said conditions. Record Index No. 5, Complaint ¶7-8. In an order mailed April 21, 2020, the Commission refused Appellant's appeal and on June 16, 2020, Appellant filed a notice of appeal and complaint with the Marion County Court of Common Pleas in Case No. 20-CV-231, vesting the trial court with jurisdiction over the appeal.

Other than the motion to additionally allow the claim for disc protrusion and/or bulges at L3-4, L4-5 and L5-S1, Appellant did not file any motions for compensation or submit any medical bills to Whirlpool after January 11, 2017. Accordingly, Whirlpool paid no compensation or benefits in the claim after January 11, 2017.

On June 19, 2020, the trial court issued a scheduling order, which order set trial for May 20, 2021. On April 30, 2021, before the matter proceeded to trial, Appellant voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a). On January 11, 2022, the claim expired by operation of law under R.C. 4123.52 as five years had elapsed since the last payment of compensation or medical benefits had been made by Whirlpool.

On April 20, 2022, Appellant refiled his complaint in the trial court, where the sole issue before the trial court was Appellant's right to participate in the benefits of Ohio's workers' compensation law for disc protrusion and/or bulges at L3-4, L4-5 and L5-S1. Record Index No. 5. The trial court referred the case to its magistrate. *Id.* On May 27, 2022, Whirlpool answered the complaint as did the Administrator, Ohio Bureau of Workers' Compensation (hereinafter, "Bureau"). *Id.* Because more than five years had passed since Whirlpool had paid medical benefits or compensation in the claim, Whirlpool filed a motion for summary judgment on the ground that the underlying claim expired

under R.C. 4123.52. *Id.* Appellant filed a memorandum in opposition, to which Whirlpool filed a reply memorandum. *Id.* Appellant made two arguments in opposition to summary judgment. First, Appellant argued disposing of the case under R.C. 4123.52 conflicts with Appellant's right to revive his case under R.C. 2305.19. *Id.* Second, Appellant argued Whirlpool's reliance on Third Appellate District precedent, *Chatfield v. Whirlpool Corp.*, 3rd Dist. Marion No. 9-21-20, 2021-Ohio-4365 was misplaced. *Id.* *Chatfield* stands for the proposition that a workers' compensation claim expires after the applicable limitations period contained in R.C. 4123.52 and entitles an employer to judgment in its favor in an R.C. 4123.512 appeal. Appellant made no argument about the constitutionality of R.C. 4123.52 and/or due process in the trial court. The Bureau filed no memoranda with respect to Whirlpool's motion for summary judgment, either in support of Appellant's position or in opposition to Whirlpool's motion.

On August 24, 2022, the magistrate issued a decision granting the motion for summary judgment. *Id.* On August 31, 2022, pursuant to Civ.R. 53(D)(3), Appellant filed objections to the magistrate's decision. The Bureau did not file objections. On October 3, 2022, the court overruled Appellant's objections and entered judgment in favor of Whirlpool, dismissing Appellant's appeal with prejudice. The trial court relied on *Chatfield* in its determination.

On November 2, 2022, Appellant filed an appeal in the Third District Court of Appeals. The Bureau did not file an appeal. After the clerk filed the record, Appellant failed to file a timely brief; however, the court of appeals granted Appellant leave to file a brief, which brief Appellant filed thereafter.

In Appellant's brief, Appellant assigned two errors for the court. The first assignment of error provided the trial court failed to "correctly apply the savings statute" when the court concluded the claim expired under R.C. 4123.52. The second assignment of error provided the application of *Chatfield* created "due process and other procedural issues." Appellant also set forth two issues for the court: 1) whether the savings statute served as an exception to the statute of limitations in R.C. 4123.52 and 2) whether the trial court should have followed *Chatfield*. Appellant did not set forth a constitutional issue under his "Statement of Issues." In the brief itself, Appellant argued in conclusory fashion that application of R.C. 4123.52 created "due process issues." Appellant did not argue that the application of R.C. 4123.52 was unconstitutional or the statute, itself, is unconstitutional. Whirlpool filed a timely brief in opposition to Appellant's brief.

After Whirlpool filed its brief, the Bureau moved the court of appeals for leave to file a brief. The court of appeals granted the Bureau leave to file a brief. However, the Bureau never filed a brief, and consequently, did not participate in oral argument thereafter.

ARGUMENT

Proposition of Law No. 1: The Five-Year Limitation Under R.C. 4123.52 Does Not Apply to a R.C. 4123.512 Appeal.

A. Neither The Trial Court Nor The Court Of Appeals Determined That Their Jurisdiction Over R.C. 4123.512 Appeals Was Mitigated By Applying The Statutory Mandate In R.C. 4123.52.

Appellant argues the five-year statute of limitations does not apply to court appeals. The Bureau makes a similar argument, articulated a different way. The Bureau argues that R.C. 4123.52 controls the Commission's jurisdiction, but, not the court's jurisdiction under R.C. 4123.512. The issue for the court is not whether R.C. 4123.52 operates to intrude on the trial court's jurisdiction. The trial court clearly had jurisdiction over disc protrusion and/or bulges at L3-4, L4-5 and L5-S1. *Ward v. Kroger Co.*, 2005-Ohio-3560, ¶ 10, 106 Ohio St. 3d 35, 38, 830 N.E.2d 1155, 1158. The salient issue is whether the trial court and the court of appeals properly invoked the mandate of R.C. 4123.52 to grant judgment in favor of Whirlpool.

Neither the trial court nor the court of appeals determined R.C. 4123.52 deprived them of jurisdiction over the court appeal. The trial court and the court of appeals found that Appellant could not prove the essential elements of his claim because the claim expired under R.C. 4123.52. As the court is aware, on summary judgment, where the plaintiff fails to produce evidence supporting the essential elements of his claim, summary judgment is appropriate. *Welco Industries, Inc. v. Applied CLS*, 67 Ohio St.3d 344, 617 N.E.2d 1129 (1993). This is also true in workers' compensation litigation. As this Court has held: "the de novo nature of an R.C. 4123.512 appeal proceeding puts at issue all

elements of a claimant's right to participate in the workers' compensation fund." *Bennett v. Admir.*, *Ohio Bur. of Workers' Comp.*, 2012-Ohio-5639, ¶ 2, 134 Ohio St. 3d 329, 330, 982 N.E.2d 666, 667; see *Youghiogheny & Ohio Coal Co. v. Mayfield*, 11 Ohio St.3d 70, 71 464 N.E.2d 133 (1984). Invariably, an essential element of the right to participate in the workers' compensation law is whether the underlying claim remains viable. With respect to addressing Appellant's and the Bureau's "jurisdiction" argument, a brief examination of the history of R.C. 4123.512 and R.C. 4123.52 is instructive.

R.C. 4123.512 and its predecessor statutes had their inception on May 31, 1911. 102 Ohio Laws 531, granted claimants the right to appeal final decisions of the State Liability Board of Awards (now the Industrial Commission) involving the right to participate in the workers' compensation fund to Ohio's common pleas courts. See *Snyder v. State Liability Bd. Of Awards*, 94 Ohio St. 342, 345, 114 N.E. 268 (1916). In 1913, the appeal statute¹ became G.C. 1465-90, later R.C. 4123.519, then ultimately R.C. 4123.512. While the language of this appeal statute has undergone various amendments in the last 100 plus years, the overriding purpose of what is now codified as R.C. 4123.512, is to provide a remedy in Ohio courts for claimants and employers who have lost an allowance issue in a claim before the Industrial Commission after exhausting their administrative remedies.

R.C. 4123.52 also had its inception on May 31, 1911, and since then, the workers' compensation law has encompassed a statutory provision setting forth the continuing

¹ Because R.C. 4123.52 and R.C. 4123.512 have been in effect in some form since 1911, in Ohio Laws, the General Code of Ohio, and the Revised Code, Whirlpool may refer to such statutes as the "continuing jurisdiction statute," i.e. R.C. 4123.52 and the "appeal statute," i.e. R.C. 4123.512.

jurisdiction of the Industrial Commission over claims. *Snyder* at 345. In 1931, the General Assembly amended the continuing jurisdiction statute (G.C. 1465-86 (103 Ohio Laws 88)) to prescribe time limitations for the Commission's continuing jurisdiction. *Sechler v. Krouse*, 56 Ohio St. 2d 185, 187, 383 N.E.2d 572 (1978)(describing the history of R.C. 4123.52). Under the first time limitation set forth in G.C. 1465-86, the Commission's continuing jurisdiction lasted ten years from the last payment of compensation or benefits, or if no benefits were paid, from the date of the injury. *Id.* Over the decades, the continuing jurisdiction statute has undergone numerous iterations and has been encompassed in R.C. 4123.52 for the better part of five decades.

In *Snyder*, this Court examined the interplay between the appeal statute and the continuing jurisdiction statute. Because the State Liability Board of Awards had granted the claimant compensation in the claim, the Court found the Board had jurisdiction over the claim under G.C. 1465-86, the continuing jurisdiction statute. At the outset of the claim, the Board awarded compensation to the claimant, thereby granting him the right to participate in the fund. Thereafter, the Board made a further award of compensation for hospital service, but, then found the award was made in error and determined no further compensation was due to the claimant. The claimant appealed this order to the common pleas court. However, because the claimant appealed an order which did not involve his right to participate in the fund, this Court held the trial court lacked jurisdiction over the appeal under G.C. 1465-90, yet the Board maintained jurisdiction over the claim under G.C. 1465-86. *Id.* at 348-349.

In *Perkins v. Indus. Comm.*, 106 Ohio St. 233, 140 N.E. 134 (1922), this Court held that the Commission is divested of its continuing jurisdiction if it renders an order which amounts to a final disposition of the claim and which final disposition has been appealed to the common pleas court. The *Perkins* Court focused its holding on the amended language of G.C. 1465-90, which added the words “or continue to participate.”

The 2011 version of R.C. 4123.52 applies to Appellant’s injury date (March 23, 2015), and provides, in pertinent part, as follows:

(A) The jurisdiction of the industrial commission and the authority of the administrator of workers' compensation over each case is continuing, and the commission may make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion is justified. No modification or change nor any finding or award in respect of any claim shall be made with respect to disability, compensation, dependency, or benefits, after five years from the date of injury in the absence of the payment of medical benefits under this chapter or in the absence of payment of compensation under section 4123.57, 4123.58, or division (A) or (B) of section 4123.56 of the Revised Code or wages in lieu of compensation in a manner so as to satisfy the requirements of section 4123.84 of the Revised Code, in which event the modification, change, finding, or award shall be made within five years from the date of the last payment of compensation or from the date of death, nor unless written notice of claim for the specific part or parts of the body injured or disabled has been given as provided in section 4123.84 or 4123.85 of the Revised Code. The commission shall not make any modification, change, finding, or award which shall award compensation for a back period in excess of two years prior to the date of filing application therefor. (Emphasis added)

In *Sechler*, decided in 1978, this Court described R.C. 4123.52 as a statute of limitations, applying equally to all workers. *Id.* at 189. The *Sechler* Court unequivocally held that the claimant alone is responsible for invoking the continuing jurisdiction of the Commission for additional compensation. *Id.* at 190 (citing *Rummel v. Flowers*, 28 Ohio St.2d 230, 236 277 N.E. 2d 422 (1972)). The *Sechler* Court also addressed the unique

nature of the statute of limitations in R.C. 4123.52 as one in which a claimant can seek change, but, not as an eligibility requirement for benefits. *Id.*

Later, in *Collinsworth v. Western Electric Co.*, 63 Ohio St.3d 268, 586 N.E.2d 1071 (1992) this Court grappled with the manner in which R.C. 4123.52 can be tolled. The Court summarized the meaning of the limitations period in R.C. 4123.52 as follows:

This statute establishes the continuing jurisdiction of the commission. The first sentence states the general rule that the Industrial Commission has continuing jurisdiction over each case and may modify its former determination as it deems justified. The second sentence contains three limitations periods affecting the continuing jurisdiction of the commission. First, there is a six-year limitation for medical-expense-only claims, which runs from the date of injury. Second, there is a ten-year limitation for disability claims, which runs from the last payment of compensation. Finally, there is a two-year limitation for retroactive awards.

Id. at 270. Further, the Court held the payment of medical expenses tolled the ten-year statute of limitations in effect at that time. *Id.* at Syllabus.

In 2003, this Court gave more meaning to the purpose and effect of R.C. 4123.52 in *State ex rel. Romans v. Elder Beerman Stores Corp.*, 100 Ohio St.3d 165, 2003-Ohio-5363, 797 N.E.2d 82. The specific issue before the Court was whether the lack of activity over a six-year period caused the claim to “lapse.” Acknowledging the two limitations periods in the statute, the Court wrote that claims for which there has been no activity over the six and ten-year limitations period for the Commission’s continuing jurisdiction in effect at the time are “deemed fatally inactive.” *Id.* at ¶ 9. The Court explained the six and ten-year limitations period for the Commission’s continuing jurisdiction as follows: “[t]he other statutes of limitations are directed at dormant claims, permitting finality through extinguishment after a set period of inactivity.” *Id.* at ¶ 8 (Emphasis added). In

other words, this Court interpreted R.C. 4123.52 (A) to contain a discrete statute of limitations, setting forth the criteria for the life of a claim.

Since *State ex rel. Romans*, four courts of appeals have followed this Court's precedent in interpreting and applying R.C. 4123.52. In *Cocherl v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 06AP-1100, 2007-Ohio-3225, the Tenth Appellate District held If compensation and/or medical benefits are not paid within the applicable limitations period, then the claim expires. *Cocherl* held that because compensation and medical benefits had not been paid during the limitations period, the claimant's claim was "dead by operation of law." *Id.* at ¶30. And while the claimant may have believed it was inequitable when the court found his claim expired, the court cogently wrote: "th[e] court is bound by the statutory mandate of R.C. 4123.52. In *Williams v. Bur. of Workers' Comp.*, 12th Dist. Preble No. CA2013-09-006, 2014-Ohio-1889, ¶ 15, the Twelfth Appellate District held "the claim expires 'six years after the payment of medical benefits'" (citing *Cocherl*)(Emphasis added). In *Perez v. Univ. Hosp. Health Sys.*, 8th Dist. No. 98427, 2012-Ohio-5896, the 8th Appellate District followed *Sechler* in holding the claimant's claim expired because no medical benefits had been paid in accordance with the six-year statute of limitations. Finally, the Third Appellate District twice has granted Whirlpool summary judgment on the ground that the claims at issue expired by operation of law under the five-year statute of limitations in R.C. 4123.52, relying on *State ex rel. Romans*, *Sechler*, *Cocherl*, *Perez*, and *Williams, supra*, for the proposition that the claimant's claim expired by operation of law. See *Chatfield* at ¶ 14-15; Opinion of the Court of Appeals, Third Appellate District at ¶ 11-13.

Notably, there is no conflict among any of Ohio's appellate courts regarding the interpretation of R.C. 4123.52 as a statute of limitations, which establishes the Commission's continuing jurisdiction and the life of a workers' compensation claim. In addition, *Fulton, Ohio Workers' Compensation Law*, Section 5.5, at p. 185 (5th Ed. 2018) a treatise which this Court has cited in at least 20 cases as authoritative, recognizes the interpretation of R.C. 4123.52 in accordance with the above case law. In significant part, Fulton writes: “[t]he § 4123.52 statute of limitations applies to dormant claims and permits extinguishment of a claim at the end of prescribed period of inactivity.” Fulton Section 5.5 at 185, (citing *State ex rel. Romans*). Fulton continues as follows: “[t]he time limit governing continuing jurisdiction prescribed in R.C. § 4123.52 therefore operates as a statute of limitations. Once that period has expired, the Commission has no power to make any further finding, award, or order.” Fulton Section 5.6 at p. 186. Moreover, Fulton recognizes the only mechanism to toll the running of the limitations period in R.C. 4123.52 for claims arising after August 25, 2006 is the payment of compensation or medical expenses. Fulton, Section 5.6 at p. 187.

Implicit in the *Snyder* and *Perkins* decisions is that the continuing jurisdiction statute and the appeals statute may operate both separately or in conjunction with one another. In fact, such has been the case for over a century. It is well known, and requires no citation, that workers' compensation claims may involve multiple claims of injury, which can result in multiple allowances and disallowances within the same claim. Accordingly, a claimant may have an allowed claim, the administrative embodiment of the injuries for which he has the right to participate, over which the Commission has continuing

jurisdiction for the statutory limitations period in effect on the date of the original injury. Often, as is true in the case at bar, R.C. 4123.512 appeals involve requests for additional conditions invariably arising from the underlying claim. In such circumstances, there is effectively concurrent jurisdiction between the Commission and the common pleas court. The Commission maintains jurisdiction over conditions which are in the claim, but, not an allowance issue before the trial court; the trial court has jurisdiction over the appealed conditions, but, not the conditions previously allowed or yet to be determined by the Commission.

Appellant is correct that trial courts have “exclusive jurisdiction over workers’ compensation appeals. However, the trial courts do not have jurisdiction over the underlying claims. R.C. 4123.512 contemplates its interplay with R.C. 4123.52 in subsections (G) and (H), which sections address situations in which a right to participate issue may be pending in a common pleas court while the claim remains viable under the continuing jurisdiction of the Commission. Under subsection (H)(1), R.C. 4123.512 provides: “action filed in court in a case in which an award of compensation or medical benefits has been made shall not stay the payment of compensation or medical benefits under the award.” This means the Commission maintains jurisdiction over “extent of disability” issues regarding conditions pending in court. More importantly, R.C. 4123.512(G) specifically provides that jury verdicts in favor of claimants are “subject to the power of modification provided by section 4123.52 of the Revised Code.” In other words, determinations under R.C. 4123.512 are subjugated to the Commission’s power

to modify claims, which would include the expiration of the Commission's continuing jurisdiction and ultimately the expiration of the claim.

Considering the General Assembly enacted the continuing jurisdiction statute at the same time it enacted the appeal statute (1911), it can only be presumed the General Assembly intended both statutes to operate in conjunction, although each statute has a different purpose. As this Court previously has held, “[a] guiding principle of statutory interpretation is that the statute must be construed as a whole and each of its parts must be given effect so that they are compatible with each other and related enactments.”

Dillon v. Farmers Ins. of Columbus, Inc., 2015-Ohio-5407, ¶ 17, 145 Ohio St. 3d 133, 139, 47 N.E.3d 794, 799. Certainly, the General Assembly was aware there would be situations in which the Commission may lose its continuing jurisdiction due to the running of the statute of limitations under R.C. 4123.52 while an allowance issue was pending in common pleas court under R.C. 4123.512. See *Dillon* at ¶ 21 (holding “[t]his court ‘must presume that the General Assembly is aware of previously enacted legislation,’” quoting *State v. Conyers*, 87 Ohio St.3d 246, 250–251, 719 N.E.2d 535 (1999)). As enunciated above, the time limitation set forth in the continuing jurisdiction statute has been in effect since 1931, which is ninety-two years. If the General Assembly wanted the filing of an appeal pursuant to R.C. 4123.512 to toll the statute of limitations in R.C. 4123.52, it would have amended either or both sections of the law to provide such. More importantly, there is nothing in either statutory provision to suggest that the jurisdiction conferred by said statutes is affected by enforcement of either statute.

It is noteworthy and undisputed that R.C. 4123.52 is constitutional, and as such, the statute's language must be applied. *Sechler* at 190; *Armstrong v. John R. Jurgensen Co.*, 136 Ohio St.3d 58, 2013-Ohio-2237, 990 N.E.2d 568 ¶12; *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St. 3d 38, 39-40, 741 N.E.2d 121 (2001). The General Assembly chose its words purposefully and "courts must give effect to the words the General Assembly has chosen." *Armstrong* at ¶ 12. Clearly, the General Assembly intended the application of R.C. 4123.52, including its expiration provision, during appeals under R.C. 4123.512. Consequently, Appellant's and the Bureau's "jurisdiction" argument falls flat.

B. The Filing Of An Appeal Pursuant To R.C. 4123.512 Does Not Toll The Limitations Period In R.C. 4123.52.

Appellant and the Bureau also imply there is a conflict between R.C. 4123.52 and R.C. 4123.512, and such conflict should be resolved such that the running of the statute of limitations in R.C. 4123.52 stops/pauses (is tolled) during an appeal under R.C. 4123.512. Interestingly, the Bureau goes so far as to argue that the court of appeals erred by framing the issue before the court as a question of tolling the statute of limitations. It is elementary that the only way to prevent the running of a statute of limitations is to "toll" the statute. Whether the Bureau wants to acknowledge it or not, Appellant is effectively arguing that the filing of an appeal under R.C. 4123.512 tolls the running of the statute of limitations in R.C. 4123.52.² Appellant's and the Bureau's arguments are flawed and demonstrate a curious misunderstanding of the workers'

² Appellant makes the same tolling argument regarding the application of R.C. 2305.19.

compensation law, especially considering Appellant’s counsel is the author of *Fulton, Ohio Workers’ Compensation Law* (5th Ed. 2018).

Appellant’s and the Bureau’s argument that R.C. 4123.512 somehow stops the running of the statute of limitations in R.C. 4123.52 is neither supported by the language of either statute nor the history of such statutes. There is no language in R.C. 4123.512 or R.C. 4123.52 which would support Appellant’s and the Bureau’s arguments: 1) that R.C. 4123.512 mitigates the application of R.C. 4123.52 because R.C. 4123.512 is superior; or 2) that the filing of an appeal under R.C. 4123.512 tolls the limitations period in R.C. 4123.52. Moreover, Fulton’s treatise acknowledges the only means of tolling the running of the limitations period in R.C. 4123.52 is one of the tolling events: payment of compensation or medical benefits. Fulton, Section 5.6 at 187. Fulton’s treatise contains no section standing for the proposition that an appeal under R.C. 4123.512 effects, mitigates, or tolls the running of the limitations period in R.C. 4123.52.

Appellant further contends, without citing any authority, that the “trial court’s holding usurps the authority of a common pleas court to manage its own docket.” This contention turns logic on its head. To wit, how can a court usurp its own power? Appellant also argues the trial court and the court of appeals conflated R.C. 4123.512 and R.C. 4123.52 when each court granted summary judgment to Whirlpool. To the contrary, the trial court and the court of appeals did what they are duty bound to do, which is to apply the law. As the *Cocherl* court wrote: “this court is bound by the statutory mandate of R.C. 4123.52. Consistency and fairness in the application of R.C. 4123.52 are desired and necessary.” *Id.* at ¶ 29.

Furthermore, in contravention of this Court's precedent, the Bureau audaciously argues that R.C. 4123.52 is not, in fact, a statute of limitations because "[a] statute of limitations, by definition, is the time established for a party to file something." Bureau's Brief at p. 23. In *State ex rel. Drone v. Indus. Comm.*, 93 Ohio State 151, 152, 753 N.E.2d 185 (2001), the Court wrote: "[R.C. 4123.52] at times [is] a very confusing statute that intermixes a general grant of continuing jurisdiction with several statutes of limitations."). Still, this Court has made clear that R.C. 4123.52 is a statute of limitations designed for "claimants seeking change or modification of their previously awarded benefits" and "is directed at dormant claims, permitting finality through extinguishment after a set period of inactivity." *Sechler* at 190; *State ex rel. Romans* at ¶ 8. Of note, Fulton is in agreement with this proposition. Fulton, Section 5.6 at 186. Perhaps the Bureau does not understand how R.C. 4123.52 operates, but as a statute of limitations, R.C. 4123.52 runs unless and until it is tolled. R.C. 4123.52, in the context of this case and by its plain language is only concerned with the tolling events. The mere fact that a court case is pending is irrelevant to whether the underlying claim expires. Contrary to the Bureau's contention, R.C. 4123.52 does not operate to "halt a [court] case." The statute operates, in part, to extinguish a claim. If the claim is extinguished, then the claimant cannot move forward with his burden to prove the right to participate in the workers' compensation law.

Furthermore, if this Court were to accept Appellant's and the Bureau's argument that a court case can continue after a claim has expired, such would lead to an enormous waste of judicial resources and would result in a vain act. If a claimant prevailed in court after his claim expired, he would be unable to receive any medical benefits or

compensation because of the Commission's lack of jurisdiction over the claim. A self-insured employer also would be powerless to act in the claim as the self-insured employer must adhere to the workers' compensation law. Essentially, under this scenario, a jury verdict in the claimant's favor would be a nullity because, as set forth above, R.C. 4123.512(G) provides that jury verdicts are subject to the modification provision of R.C. 4123.52. Accordingly, there is no purpose in trying a case in an expired claim, and therefore, Appellant's and the Bureau's argument is untenable from a practical standpoint.

C. Appellant's Argument That Whirlpool Was Required To Move The Commission To Declare The Claim Dead By Operation Of Law Is Unsupported By The Law.

Appellant argues that only the Commission can terminate a claim under R.C. 4123.52. Appellant contends it was incumbent upon Whirlpool to file a motion with the Commission to enforce the expiration of the claim. Appellant relies on *State ex rel. Superior's Brand Meats, Inc. v. Indus. Comm.*, 63 Ohio St. 3d 277, 586 N.E.2d 1077 (1992) for this contention. For the reasons that follow, Appellant's reliance on *State ex rel. Superior's Brand Meats, Inc.* is misplaced.

State ex rel. Superior's Brand Meats, Inc., was a mandamus action in which the employer challenged a Commission order awarding temporary total compensation ("TTC") to the claimant. As the Court is aware, mandamus is a proceeding in which the relator has no adequate remedy at law and requests a court to issue a writ commanding the inferior tribunal to perform a ministerial duty. See *State ex rel. Westchester Estates, Inc. v. Bacon*, 61 Ohio St.2d 42, 399 N.E.2d 81 (1980). This Court has original jurisdiction over matters pertaining to the Commission on all issues which do not pertain to the right to participate in the workers' compensation system. Ohio Constitution, Article IV,

Sections 2-3. Generally, Ohio courts review mandamus actions in workers' compensation according to an abuse of discretion standard, which is measured by a "some evidence" test. *State ex rel. Hutton v. Indus. Comm.*, 29 Ohio St.2d 9, 278 N.E.2d 34 (1972). In *State ex rel. Superior's Brand Meats, Inc.*, the employer raised an argument in mandamus which argument the employer did not present to the Commission administratively: that is, the Commission lacked continuing jurisdiction to adjudicate the request for TTC because the claim lapsed pursuant to R.C. 4123.52.

This Court rejected the employer's argument because the Commission never addressed the continuing jurisdiction issue in the first instance. In other words, the Commission could not have abused its discretion by failing to address its continuing jurisdiction if the issue had not been presented to the Commission. *Id.* at 280. This Court reasoned additionally that a question regarding the Commission's continuing jurisdiction is a "right to participate" issue, which can only be challenged on an appeal pursuant to R.C. 4123.519 (the former version of R.C. 4123.512). This Court held "[a] decision by the commission upon the question of its continuing jurisdiction, being appealable, may not be presented to an appellate court by way of an original action such as mandamus." *Id.* When this Court wrote that the Commission must first make a decision on the continuing jurisdiction issue before there can be an appeal of the jurisdiction issue, the Court was referring to an appeal in an original action because in an original action, the court reviews the administrative record to determine whether the Commission abused its discretion. *Id.* at 280-281.

Contrary to Appellant's contention, this Court did not make a broad pronouncement that the Commission must first address its continuing jurisdiction before the jurisdictional issue can be raised in any context. *State ex rel. Superior's Brand Meats, Inc.*'s holding regards extent of disability issues in mandamus. The present case involves the right to participate, and therefore, *State ex rel. Superior's Brand Meats, Inc.*'s holding generally is inapplicable to the resolution of the present controversy. However, in the broader scheme, *State ex rel. Superior's Brand Meats, Inc.* contravenes Appellant's position and supports Whirlpool's motion for summary judgment because the Court explicitly reasoned that questions regarding the Commission's continuing jurisdiction are appealable issues under R.C. 4123.512. *Id.* at 280. As argued above, the viability of Appellant's claim is a relevant and essential issue in an appeal pursuant to R.C. 4123.512. *Bennett, Youghiogheny, supra.*

In sum, there is nothing in R.C. 4123.52 or any other section of the Workers' Compensation Statute which would require Whirlpool first to file a motion with the Commission to address its continuing jurisdiction and the expiration of a claim, as opposed to Whirlpool's raising the issue in a dispositive motion in an R.C. 4123.512 appeal. The Commission's continuing jurisdiction ends according to the terms of R.C. 4123.52 and a claim will lapse by operation of law under R.C. 4123.52. Because the expiration of the claim is an issue bearing on Appellant's right to participate, the trial court and court of appeals properly considered and granted Whirlpool's motion for summary judgment.

D. Appellant Waived His Due Process Argument. However, To The Extent The Court Entertains Appellant's Due Process Argument, The Courts' Granting Of Summary Judgment Under R.C. 4123.52 Did Not Deprive Appellant Of Due Process Of Law.

Appellant argues he was deprived of due process because the trial court granted summary judgment before Appellant went forward with a trial on his right to participate for disc protrusion and/or bulges at the L3-4, L4-5, and L5-S1. The Bureau joins Appellant in this argument, suggesting that Appellant lost a footrace to his trial date. Before Whirlpool addresses the merits of Appellant's and the Bureau's arguments, Whirlpool will address the proverbial elephant in the room: Appellant's waiver of argument.

As Whirlpool set forth in its Memorandum in Opposition of Jurisdiction and above in the statement of facts, Appellant did not raise a due process or constitutional argument in the trial court. Appellant made two arguments when he opposed summary judgment: 1) disposing of the case under R.C. 4123.52 conflicts with Appellant's right to revive his case under R.C. 2305.19; and 2) Whirlpool's reliance on *Chatfield* was misplaced.

As this Court unequivocally has held: "it is well settled that '[a] party who fails to raise an argument in the court below waives his or her right to raise it here.'" *Niskanen v. Giant Eagle, Inc.*, 2009-Ohio-3626, ¶ 34, 122 Ohio St. 3d 486, 494, 912 N.E.2d 595, 603 (quoting *State ex rel. Zollner v. Indus. Comm.* (1993), 66 Ohio St.3d 276, 278, 611 N.E.2d 830). Appellant's due process issue was ripe before the trial court because his due process concern was that the application of the court of appeals' decision in *Chatfield* deprived Appellant of a trial to which he believes he is entitled. Whirlpool argued *Chatfield* extensively in its motion for summary judgment and reply memorandum. Considering Appellant knew the very same trial court and court of appeals decided *Chatfield* about

one year before Whirlpool filed summary judgment, Appellant had no excuse not to make the due process argument in opposition to summary judgment. Appellant's failure to raise the due process issue timely precluded consideration of the issue in the court of appeals and precludes consideration here.

Notably, Appellant also failed to present the due process issue in the court of appeals. Appellant may argue he raised due process in the court of appeals because his second assignment of error provided the application of *Chatfield* created "due process and other procedural issues." However, Appellant's assignment of error was rendered moot by his failure to make the argument in the trial court. Waiver of the argument already had occurred. Moreover, the assignment of error was directed more toward the trial court's alleged erroneous reliance on *Chatfield* than an actual due process issue. Of course, the court of appeals declined to revisit *Chatfield* because Appellant provided no compelling reason to do so. It can be inferred the court of appeals elected to ignore the due process issue because Appellant waived the argument. In the alternative, the court of appeals may not have addressed the due process issue because Appellant failed to make a fulsome argument in his brief. As Whirlpool set forth in its statement of facts, Appellant's due process argument was conclusory at best. Regardless, it is clear Appellant waived the argument in the trial court, where it counts. Accordingly, this Court should not consider Appellant's due process argument here.

Assuming, arguendo, the court considers Appellant's due process argument, said argument is undermined by the uncontested facts. As the Court is aware, "[a]n elementary and fundamental requirement of due process in any proceeding * * * is notice

reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Ass'n*, 28 Ohio St. 3d 118, 124–25, 502 N.E.2d 599, 604 (1986)(citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)). Appellant alleges he did not have the opportunity to present his case because the trial court found his claim expired. However, a review of the facts reveals Appellant had the opportunity to try his case on May 20, 2021, well before the expiration of his claim. On April 30, 2021, before the matter proceeded to trial, Appellant, of his own accord, voluntarily dismissed his complaint pursuant to Civ.R. 41(A)(1)(a).

Because it was Appellant's responsibility to ensure that the statute of limitations in R.C. 4123.52 did not continue to run, it was incumbent on him to find a way to try his case before January 11, 2022, when his claim was set to expire. As a practical matter, if Appellant was not ready to try his case on May 20, 2021, he could have invoked the savings statute and refiled his case immediately. Clearly, there is nothing in R.C. 2305.19 that prevents a litigant from refileing a complaint well in advance of the one year deadline. Moreover, assuming Appellant refiled shortly after his voluntary dismissal, there is no reason Appellant could not have asked the trial court to docket the case for an early trial, as discovery essentially had been completed in Case No. 20-CV-231. Of note, this Court's reporting guidelines recommend workers' compensation cases be tried within one year. The guidelines do not preclude a court from trying a workers' compensation case before that deadline.

By waiting to refile his case until April 20, 2022, Appellant sat on his remedy and he did so at his own peril. See *Cocherl* at ¶ 28 (writing: “it is clear that his nonaction was to his peril. Under the circumstances here, plaintiff must be accountable for the consequences of his failure to timely act.”). Appellant’s and the Bureau’s attempt to blame Whirlpool, the trial court, the court of appeals, and the operation of R.C. 4123.52 should not be countenanced by the Court. Appellant had every opportunity to try his case and avoid the consequences of the running of the limitations period in R.C. 4123.52. As this Court has held, the limitations period in R.C. 4123.52 “is not harsh or oppressive.” *Sechler* at 190. It is disingenuous for Appellant to cry foul when he controlled his own fate. The Bureau’s assertion that Appellant’s right to a trial was “cut off” because of factors beyond his control rings hollow. This Court has held the control resides with the claimant to prevent the running of the limitations period in R.C. 4123.52. *Sechler* at 190. Appellant, alone, is to blame for the expiration of his claim during his R.C. 4123.512 appeal.

Proposition of Law. No. 2: The Savings Statute Applies to a R.C. 4123.512 Appeal and R.C. 4123.52 Does Not.

Appellant argues the savings statute in R.C. 2305.19 prevents the running of the statute of limitations in R.C. 4123.52. Essentially, Appellant is arguing that once a case is revived under the savings statute, the underlying claim cannot expire under R.C. 4123.52.

R.C. 2305.19, known as the savings statute, pertains to lawsuits filed in Ohio’s courts, as the statute falls under Title 23 of the Ohio Revised Code. The purpose of R.C. 2305.19 is to permit the refiling of a case after the statute of limitations for the

commencement of an action in court has expired. The statute provides, in relevant part, as follows:

In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, 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 than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

(Emphasis added); See *Lewis v. Connor*, 21 Ohio St.3d 1, 487 N.E.2d 285 (1985); *Thomas v. Freeman*, 79 Ohio St.3d 221, 680 N.E.2d 997 (1997). If a party initiates a lawsuit within the applicable statute of limitations and the case is later dismissed without prejudice, then the party may utilize the savings statute to refile the complaint within one year of the dismissal. In the workers' compensation context, the Ohio Supreme Court has held a claimant may utilize the savings statute to revive his case where the complaint was voluntarily dismissed without prejudice. *Lewis*, 21 Ohio St.3d at 4; *Thomas* 79 Ohio St.3d at 227. In *Lewis*, the Ohio Supreme Court examined whether R.C. 4123.519 (the predecessor to R.C. 4123.512) operated to prevent claimants from utilizing the savings statute. The Court reasoned that R.C. 4123.519 was a remedial statute providing a limitation of a claimant's rights under the workers' compensation statute. Consequently, because there was no provision in R.C. 4123.519 preventing the refiling of a complaint, the savings statute applies to complaints in worker's compensation appeals. *Lewis*, 21 Ohio St.3d at 4.

Appellant cites *Lewis* and *Fowee v. Wesley Hall Inc.*, 108 Ohio St.3d 533, 2006-Ohio-1712, 844 N.E.2d 1193 (holding a claimant's failure to refile a complaint within one

year in an employer-initiated workers' compensation appeal entitles the employer to judgment in its favor) in support of his second proposition of law. However, neither case addressed the expiration of a claim in the context of an R.C. 4123.512 appeal and neither case stands for the proposition that R.C. 2305.19 tolls the statute of limitations in R.C. 4123.52.

In the case at bar, Appellant availed himself of his rights under R.C. 2305.19. Whirlpool did not challenge Appellant's right to refile his complaint and the trial court took no action, *sua sponte* or otherwise, to nullify the refiling of the complaint. In fact, the court of appeals specifically noted that Appellant availed himself of the savings statute and refiled his complaint with the trial court. See Opinion of the Court of Appeals, Third Appellate District at ¶ 14. Whirlpool raised a dispositive issue after Appellant utilized the savings statute and the trial court dismissed the case accordingly based on the mandate in R.C. 4123.52, as did the court of appeals.

Application of the savings statute is irrelevant to a determination of the claim's life under R.C. 4123.52 and Appellant's right to continued benefits in his claim. R.C. 2305.19 merely provided a mechanism for Appellant to bring his original complaint back to the court. *Lewis* at 4. Appellant had a right to, and in fact did, re-commence his court action under the savings statute, but, the fact that the case landed back in the trial court is not probative of whether the underlying claim had expired. As the court of appeals wrote: “[t]he savings statute does not change the fact that this type of claim expires by operation of law after the five-years allotted under the conditions set forth R.C. 4123.52.” Opinion of the Court of Appeals, Third Appellate District at ¶ 14. Appellant has cited no case

holding that R.C. 2305.19 saves the expiration of a claim under R.C. 4123.52. Moreover, R.C. 2305.19 does not operate to extend the five-year limitation period in R.C. 4123.52. *Lewis* held: “the savings statute is neither a statute of limitation nor a tolling statute extending the statute of limitations.” *Id.*

To keep the underlying claim alive under R.C. 4123.52, it was Appellant’s responsibility alone to ensure that compensation or medical benefits were paid within five years of the last payment of compensation and medical benefits. Again, the *Sechler* Court held that the onus is on the claimant to keep a workers’ compensation claim alive and prevent the running of the statute of limitations. *Sechler, supra.*

Appellant’s argument that R.C. 2305.19 saves the extinguishment of his claim misses the mark, badly. The Bureau’s argument that “[a] case does not ‘expire’ from any continuing five-year clock” and “that clock no longer ‘runs’ once the notice of appeal is filed” misses the mark worse. There is simply no case law to support this argument and the Bureau cites none. Moreover, Appellant’s argument that the court of appeals failed to “acknowledge” *Lewis* is undermined by the court’s opinion at ¶ 14. The court of appeals simply disagreed with Appellant’s position.

CONCLUSION

The undisputed evidence unequivocally provides that the last payment of medical expenses and compensation occurred on January 11, 2017. Applying the five-year limitation period in R.C. 4123.52, Appellant’s claim expired on January 11, 2022. Consequently, Appellant’s claim lapsed by operation of law on such date. Neither

Appellant nor the Bureau has set forth any compelling argument to the contrary or cited any authority that would lead to another conclusion.

The tenor of Appellant's arguments is that the system has been applied unfairly to him. However, this Court has found R.C. 4123.52 constitutionally valid and the limitations period contained therein is reasonable. *Sechler* at 190. Constitutional and unambiguous statutes must be applied. See *Bailey* at 39-40 (holding, “[i]f the meaning of the statute is unambiguous and definite, it must be applied as written.”). As such, the trial court and the court of appeals performed their judicial function in accordance with the law.

Not surprisingly, Appellant and the Bureau make a plea to this court to find in their favor under the liberal construction provision of R.C. 4123.95. However, as this Court recognized in *Armstrong*, “R.C. 4123.95 does not, however, license alteration of unambiguous statutory language” nor does it “authorize this court to effectively rewrite the statutory system in favor of claimants and their lawyers to assure them favorable results”. *Id.* at ¶ 13 (quoting, in part, *Kilgore v. Chrysler Corp.*, 92 Ohio St. 3d 184, 189 (2001)). Neither Appellant nor the Bureau have argued that R.C. 4123.52 is ambiguous, and as such, there is no basis upon which this court would need to interpret the statute.

For all the foregoing reasons and authority, the present action is barred by the statute of limitations contained in R.C. 4123.52(A). Therefore, the Court should affirm the court of appeals' judgment in favor of Whirlpool, finding Appellant not entitled to participate in the benefits of the Ohio workers' compensation law for disc protrusion and/or bulges at the L3-4, L4-5 and L5-S1 on the ground that the claim expired by operation of law.

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CERTIFICATE OF SERVICE

This is to certify that a copy of Appellee Whirlpool Corporation's Merit Brief was served on Chelsea F. Rubin, Esq., Philip J. Fulton Law Office, attorneys for Appellant, Brian P. Caldwell, 89 East Nationwide Boulevard, Suite 300, Columbus, OH 43215 and on T. Elliot Gaiser, Solicitor General, attorneys for Appellant, Administrator, Ohio Bureau of Workers' Compensation, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215 by electronic mail this the 8th day of December, 2023.

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