

IN THE SUPREME COURT OF OHIO

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Case No. 2012-1307

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On Appeal from the Court of Appeals  
Eighth Appellate District  
Cuyahoga County, Ohio  
Case No. 97270

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**ALESSANDRA RISCATTI, et al.**  
*Plaintiffs-Appellees*

v.

**CUYAHOGA COUNTY, OHIO**  
*Defendant-Appellant*

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**APPELLEES' BRIEF IN RESPONSE TO APPELLANT'S MEMORANDUM  
IN SUPPORT OF JURISDICTION**

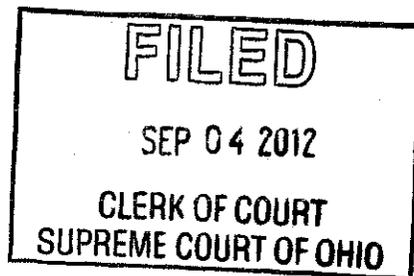
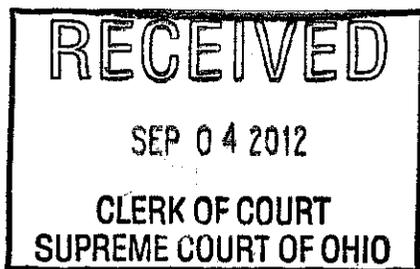
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Drew Legando (0084209)  
*Counsel of Record*  
Jack Landskroner (0059227)  
Tom Merriman (0040906)  
**LANDSKRONER GRIECO MERRIMAN, LLC**  
1360 West 9<sup>th</sup> Street, Suite 200  
P. 216 / 522-9000  
F. 216 / 522-9007  
E. drew@lgmlegal.com

*Counsel for Plaintiffs-Appellees*

Michael A. Dolan (0051848)  
*Counsel of Record*  
**Cuyahoga County Prosecutor's Office**  
Justice Center, Courts Tower  
1200 Ontario Street, 8<sup>th</sup> Floor  
Cleveland, Ohio 44113  
P. 216 / 443-7799  
F. 216 / 443-7602  
E. mdolan@cuyahogacounty.us

*Counsel for Defendant-Appellant*



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## **EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION**

This Court should decline jurisdiction because this case does not involve an issue of public or great general interest or a substantial constitutional question. First, because Appellant never raised its proposition of law in the court below, it has waived the opportunity to ask this Court to review that question. Second, this issue presents no conflict among the courts of appeals, which have unanimously concluded that a statute of limitations defense by a governmental subdivision is not an “immunity.” Third, this Court’s decisions in *Sampson v. Cuyahoga Metropolitan Housing Auth.*, 131 Ohio St.3d 418 (2012), *Summerville v. Forest Park*, 128 Ohio St.3d 221 (2010), and *Hubbell v. City of Xenia*, 115 Ohio St.3d 77 (2007), have no bearing on Appellant’s proposition of law. This Court has never addressed explicitly whether a statute of limitations defense constitutes a basis for immunity under chapter 2744. However, this Court has long recognized that the defendant’s status as a governmental entity provides the basis for both the common law doctrine of sovereign immunity and its modern statutory analog, chapter 2744. *Butler v. Jordan*, 92 Ohio St.3d 354, 358 (2001) (“The history of the doctrine in this country is associated with the English common-law concept that ‘the king can do no wrong.’”). By contrast, the defense of limitations, even when utilized by a governmental subdivision, depends in no way upon the sovereign identity of the defendant. The legislature has provided no indication of any radical intent to redefine the contours of immunity by enacting chapter 2744. The mere inclusion of a statute of limitations provision in that chapter in no way transforms that defense into an “immunity.”

## **STATEMENT OF THE CASE AND FACTS**

In the two lawsuits at issue here, Plaintiffs/Appellees Alessandra Riscatti, Mary Polakowski, and 42 other residents of Parma allege that three governmental entities – Defendants

the City of Parma, the Northeast Ohio Regional Sewer District (“the Sewer District”), and Appellant Cuyahoga County -- have negligently failed to fulfill their responsibility for maintenance, operation, upkeep, and/or destruction of the sanitary sewer lines. Plaintiffs allege that, over a period of more than 20 years, those sanitary sewer lines delivered gasoline and other toxic substances and vapors from a leaking underground storage tank at a nearby gas station to a group of homes owned by plaintiffs and others, contaminating them. See Plaintiffs’ Third Amended Complaint in *Riscatti v. Prime Properties*, No. CV 10 714827 (“TAC”) at ¶¶46-51, 63, 76.<sup>1</sup>

The County moved to dismiss Plaintiffs’ claims on two grounds: 1) that the County’s activities that allegedly injured the Plaintiffs were subject to governmental immunity pursuant to R.C. § 2744.02; and 2) that Plaintiffs’ claims were barred by the statute of limitations, pursuant to R.C. § 2744.04. The trial court denied the County’s motions to dismiss, but certified its order pursuant to Ohio R. Civ. P. 54(b) and the County filed an appeal to the 8<sup>th</sup> District Court of Appeals. Plaintiffs/Appellees moved to dismiss the appeal for lack of jurisdiction. In response, the County argued that the trial court’s denial of its immunity argument, based on 2744.02, was a final order pursuant to R.C. § 2744.02(C) (“An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order”). See Brief of Defendant-Appellants City of Parma, Cuyahoga County and Northeast Ohio Regional Sewer District in Opposition to Plaintiff-Appellees’ Motion to Dismiss for Want of Jurisdiction at 4-7. By contrast, however, the County neither invoked R.C. 2744.02(C) as a basis for appellate

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<sup>1</sup> Plaintiffs/Appellees cite here to the Third Amended Complaint in the *Riscatti* action, but identical allegations have also been pleaded in the First Amended Complaint in *Polakowski v. Prime Properties*, **Error! Main Document Only**. No. CV-10-735966. For purposes of this appeal, the trial court’s identical judgments in the *Riscatti* and *Polakowski* lawsuits have been consolidated.

jurisdiction over the denial of its limitations motion, nor argued that the statute of limitations defense set out in 2744.04 creates “immunity from liability” for political subdivisions.<sup>2</sup> Instead, the County argued only that the trial court’s denial of its statute of limitations motion was appealable as the result of the trial court’s certification of the order pursuant to Rule 54(b). *See id.* at 7-9.

The 8<sup>th</sup> District Court of Appeals affirmed the order of the trial court denying dismissal for governmental immunity pursuant to RC § 2744.02, and it dismissed the appeal from the denial of the motion to dismiss based on the statute of limitations in R.C. § 2744.04. The County then asked this Court to exercise jurisdiction to answer the question whether the denial of a motion to dismiss based on the statute of limitations defense in R.C. § 2744.04 is an appealable final order pursuant to R.C. § 2744.02(C) because it denies the benefit of “immunity from liability.”

## **I. THE UNDERLYING FACTS**

Since the early 1980s, families living in the homes connected to the sanitary sewer lines frequently smelled gasoline vapors, apparently coming from their sewer drains. *Id.* at ¶101. Over the years, many of these families complained about the smell. *Id.* Government authorities, however, repeatedly reassured the families that what they smelled was in no way harmful and could not be coming from the gas station. *Id.* at ¶102-103.

In August 2009, 27 years after some of the plaintiffs first complained of gasoline smells, concentrated gas vapors caused the home of plaintiffs Alessandra Riscatti, Elisabetta Riscatti, and Laszlo Beres to explode. *Id.* at ¶53-54. Follow-up investigations by the Sewer District and other authorities confirmed that the explosion was caused by the gasoline vapors that had been

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<sup>2</sup> These arguments were also missing from the County’s opening brief and reply brief on the merits in the Court of Appeals.

carried through Appellant's sanitary sewer lines from the nearby gas station to the Riscattis' home. *Id.* at ¶72-76.

Plaintiffs/Appellees, the Riscattis and other families living in homes contaminated with toxic substances from the County's sanitary sewer lines, filed this lawsuit against the County and others, seeking damages resulting from living for many years with toxic and noxious substances leaking into their homes and properties through the sewer lines they shared with the nearby gas station. *Id.* at ¶127-132. Plaintiffs have specifically alleged that the County negligently breached its statutory duty to maintain, operate, upkeep, and/or destroy those same sewer lines for both the gas station and for the Plaintiffs' homes. *Id.* at ¶128-133.

Since the early 1980s, families living in the homes near the Station Property frequently smelled gasoline vapors, apparently coming from their sewer drains. *Id.* at ¶101. Over the years, many of these families complained about the smell. *Id.* Authorities, however, repeatedly reassured the families that what they smelled was in no way harmful and could not be coming from the gas station. *Id.* "Plaintiffs were repeatedly advised the gasoline odor came from other sources, including cooking, natural gas, or sewage gasses." *Id.* at ¶103. Since in or about 1982, despite their knowledge of Plaintiffs' ongoing complaints, Defendants made no effort to determine whether or not toxic substances originating from the Station Property were penetrating Plaintiffs' homes. *Id.* at ¶104.

In August 2009, 27 years after some of the plaintiffs first complained of gasoline smells, concentrated gas vapors caused the home of plaintiffs Alessandra Riscatti, Elisabetta Riscatti, and Laszlo Beres to explode. *Id.* at ¶53-54. In September 2009, follow-up investigations by authorities confirmed that the explosion was caused by the gasoline vapors that had been carried through the sanitary sewer lines from the nearby gas station to the Riscattis' home. *Id.* at ¶72-74.

Following the explosion at the Riscatti home, an investigation found a sanitary sewer drain pipe originating in the underground storage tank cavity created by Marathon Oil. *Id.* at ¶73. The investigating authorities determined that the purpose of this sewer drain “was to keep the tank from floating if the ground-water table rose in response to rain or snowmelt.” *Id.* at ¶74. The drain pipes were intended to regulate the groundwater level within the underground cavity. As the water level within the cavity rose, the drain pipes flushed the excess contents of the cavity into the sanitary sewer main. Thus, groundwater that had been contaminated with gasoline from the Tank System had repeatedly and illegally been discharged into the sanitary sewer main. This condition especially occurred during and after rainfall, and whenever run-off water from surface cleaning operations was sufficient to raise the water level above the drain pipes. *Id.* at ¶75.

## **LAW AND ARGUMENT**

### **I. Appellees’ Response to Appellant’s Proposition of Law**

#### **A. The County Waived This Argument by Failing to Raise It in the Court of Appeals.**

As a threshold matter, this Court should decline to exercise jurisdiction to decide a proposition of law that Appellant failed to raise in the court below. After the County filed its notice of appeal to the 8<sup>th</sup> District, Plaintiffs/Appellees moved to dismiss the appeal for lack of jurisdiction. In response, the only argument the County offered in support of the exercise of appellate jurisdiction from the denial of its statute of limitations defense was that the trial court had certified its order pursuant to Ohio R. Civ. P. 54(b). Indeed, throughout the briefing and oral argument in the 8<sup>th</sup> District, the County *never* argued that the statute of limitations defense in R.C. § 2744.04 creates an “immunity from liability” pursuant to R.C. § 2744.02(C). Instead, that argument first emerged in the dissenting opinion of Judge Kenneth Rocco. *See Riscatti v. Prime Properties Ltd. Partnership*, 2012 –Ohio- 2921 at ¶¶44-52 (8<sup>th</sup> Dist. 2012) (Rocco, J.,

dissenting). The majority opinion responded accordingly, by citing the unanimous decisions by several courts of appeals that have rejected this argument. *Riscatti* at ¶¶17-18.

“[T]he burden of affirmatively demonstrating error on appeal rests with the party asserting error.” *State ex. rel. Petro v. Gold*, 166 Ohio App.3d 371, 403 ¶94 (10<sup>th</sup> Dist. 2006). It is “not appropriate for [an appellate] court to construct the legal arguments in support of an appellant’s appeal. ‘If an argument exists that can support this assignment of error, it is not this court’s duty to root it out.’” *Id.* (quoting *Cardone v. Cardone* (May 6, 1998), Summit App. No. 18349); *see also Haynes v. Ohio Turnpike Comm’n*, 177 Ohio App.3d 1, 7 (8<sup>th</sup> Dist. 2008) (“A party may not raise issues or assert new legal theories for the first time before an appellate court.”). Merely because the dissenting opinion, on its own initiative, addressed this argument in the court below does not mean that it was properly preserved for review by the County. Because the County waived this argument below, this Court should decline jurisdiction to review the County’s proposition of law now.

**B. There Is No Conflict Among Ohio Courts on This Issue.**

None of the authorities cited by the County support the proposition that the statute of limitations defense in R.C. § 2744.04 provides for “immunity from liability.” To the contrary, the only courts that have explicitly addressed this issue have unanimously reached the opposite conclusion. *See Riscatti*, at ¶18 (“we conclude that an order denying a political subdivision’s motion based on the statute of limitations defense is not an order denying that political subdivision ‘the benefit of alleged immunity.’”); *Guenther v. Springfield Township, Makowski v. Kohler*, 2011 –Ohio– 2382 at ¶8 (9<sup>th</sup> Dist. 2011) (“in concluding that Mr. and Mrs. Makowskis’ claims were not barred by the statute of limitations, the trial court did not deny Cleveland Metroparks the benefit of immunity”); *Essman v. City of Portsmouth*, 2009 –Ohio– 3367 at ¶10 (4<sup>th</sup> Dist. 2009) (“because the trial court’s decision to deny appellant summary judgment on its

statute of limitations defense does not deny appellant the benefit of R.C. Chapter 2744 immunity, there is no exception to the general rule that a denial of summary judgment is a non-final appealable order”).

Contrary to the County’s contentions, this Court’s decisions in *Sampson v. Cuyahoga Metropolitan Housing Auth.*, 131 Ohio St.3d 418 (2012), *Summerville v. Forest Park*, 128 Ohio St.3d 221 (2010), *Sullivan v. Anderson Township*, 122 Ohio St.3d 83 (2009), and *Hubbell v. City of Xenia*, 115 Ohio St.3d 77 (2007), have nothing to do with this case.

*Sampson* involved a claim by an employee of the Cuyahoga Metropolitan Housing Authority, who had been arrested for a false charge of misusing credit cards issued by his employer. The housing authority sought dismissal pursuant to the general rule of governmental immunity under R.C. §2744.02. The plaintiff argued that dismissal was inappropriate because of the exception to governmental immunity in R.C. § 2744.09(B), which excepts claims by employees of a political subdivision based on any matter that arises out of the employment relationship. The trial court denied the motion, and both the court of appeals and the Supreme Court affirmed on the basis of the exception to immunity in 2744.09(B). *Sampson*, 131 Ohio St.3d at 424 ¶23. Thus, in *Sampson*, this Court approved the exercise of appellate jurisdiction from an appeal denying a governmental immunity provided by 2744.02. This Court said nothing about the exercise of appellate jurisdiction over an order denying a statute of limitations defense.

*Summerville* involved a federal civil rights claim brought under § 1983 by the family of a decedent allegedly killed by the use of excessive force by police officers. The officers were sued individually and sought the protection of qualified immunity under federal law. This Court ruled that R.C. § 2744.02(C) created appellate jurisdiction from the trial court’s denial of the officers’ motion to dismiss for qualified immunity, even though that doctrine was not created by Ohio

law. “2744.02(C) specifically provides that an order denying an employee of a political subdivision the benefit of an alleged immunity from liability under any provision of law (including federal law.....)” *Summerville*, 128 Ohio St.3d at 228. Thus, as in *Sampson*, the *Summerville* decision also involved invocation of appellate jurisdiction under R.C. § 2744.02(C) to an order denying the benefit of an alleged *immunity*. Contrary to the County’s contention, *Summerville* does not support application of R.C. § 2744.02(C) to an appeal from an order denying an affirmative defense (such as a statute of limitations defense) that is unrelated to the defendant’s status as a sovereign entity.

*Sullivan* involved nothing more than this Court’s determination that R.C. § 2744.02(C) authorizes appeal from an order denying the benefit of alleged immunity even in the absence of the trial court’s certification of that order pursuant to Ohio R. Civ. P. 54(b). *Sullivan*, 122 Ohio St.3d at 85. *Sullivan* has no bearing on whether the statute of limitations set out in R.C. § 2744.04 creates an immunity. Similarly, *Hubbell* also involved straightforward application of R.C. § 2744.02(C) in the context of an appeal from an order denying summary judgment sought on the basis of sovereign immunity. Again, this Court made no pronouncement providing any indication that 2744.02(C) could be applied in the context of denying a motion based on a statute of limitations defense.

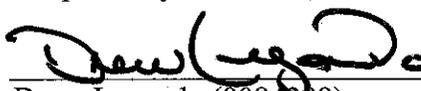
Of all of the decisions cited by the County, only one even arguably supports its position. In *Estate of Finley v. Cleveland Metroparks*, 189 Ohio App.3d 139 (8<sup>th</sup> Dist. 2010), the 8<sup>th</sup> District Court exercised jurisdiction over an appeal from a denial of a motion for summary judgment that had been sought by a political subdivision on two grounds: 1) immunity under R.C. § 2744.02; and 2) the statute of limitations. In *Finley*, the court of appeals reached the merits of both the immunity issue *and* the limitations issue, which contrasts with the approach

taken by the same court in this case. However, it is apparent from *Finley* that the court did *not* base its exercise of appellate jurisdiction on the claim that the statute of limitations defense set out in R.C. § 2744.04 creates an “immunity.” Rather, the court apparently believed it was appropriate to reach all of the grounds on which summary judgment had been sought, in light of the fact that R.C. § 2744.02(C) authorized jurisdiction over the appeal from denial of the motion with respect to governmental immunity. *See Finley*, 189 Ohio App.3d at 143 n.1 (“Because this appeal involves an issue of governmental immunity, the denial of the city’s motion for summary judgment constitutes a final, appealable order”). Thus, the *Finley* decision rested on the fact that both the limitations defense and the immunity defense had been urged in a single motion for summary judgment. This contrasts to the facts here, where the County presented separate motions to dismiss based on immunity and the statute of limitations.

### **CONCLUSION**

For all the foregoing reasons, Plaintiffs/Appellees respectfully pray this Court decline to exercise jurisdiction.

Respectfully submitted,



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Drew Legando (0084209)

*Counsel of Record*

Jack Landskroner (0059227)

Tom Merriman (0040906)

**LANDSKRONER GRIECO MERRIMAN, LLC**

1360 West 9<sup>th</sup> Street, Suite 200

P. 216 / 522-9000

F. 216 / 522-9007

E. drew@lgmlegal.com

*Counsel for Plaintiffs-Appellees*

**CERTIFICATE OF SERVICE**

A copy of this jurisdictional memorandum was served on appellant's counsel by regular mail on August 31, 2012, at the following address:

Michael A. Dolan (0051848)

*Counsel of Record*

**Cuyahoga County Prosecutor's Office**

Justice Center, Courts Tower

1200 Ontario Street, 8<sup>th</sup> Floor

Cleveland, Ohio 44113

P. 216 / 443-7799

F. 216 / 443-7602

E. mdolan@cuyahogacounty.us

*Counsel for Defendant-Appellant*

Certified by,



Drew Legando (0084209)

*Counsel of Record*

Jack Landskroner (0059227)

Tom Merriman (0040906)

**LANDSKRONER GRIECO MERRIMAN, LLC**

*One of the Attorneys for the Plaintiffs-Appellees*