

IN THE SUPREME COURT OF OHIO

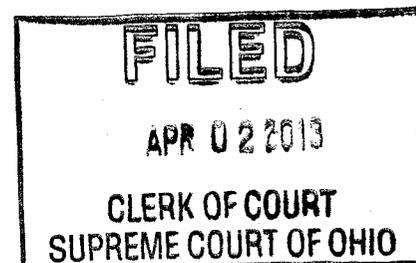
Case No. 2012-1307

On Appeal from the Eighth District
Court of Appeals, Cuyahoga County
Case No. 11-CA-97270

ALESSANDRA RISCATTI, et al.
Plaintiffs-Appellees

v.

CUYAHOGA COUNTY
Defendant-Appellant



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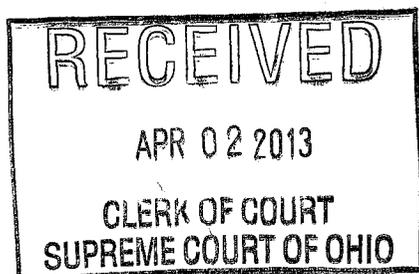


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INTRODUCTION

Defendant-Appellant Cuyahoga County is inviting this Court to upset established procedural rules and fundamental legal principles. The County's proposition of law, which would make the denial of a motion to dismiss based on a statute of limitations defense subject to immediate appeal if the defendant is a political subdivision, was not raised before the trial court or the court of appeals. Moreover, the proposition would obliterate the distinction drawn by the Rules of Civil Procedure between Rule 8(C) defenses, which are raised in answers and then litigated through discovery, and those threshold defenses enumerated by Rule 12(B), which may be raised by a motion to dismiss and in the absence of any discovery.

On the merits, the County's proposition is contrary to elemental canons of statutory interpretation, and would require that this Court both render portions of the Political Subdivision Tort Liability Act redundant and add new language to certain statutory provisions. The County would have this Court re-write hornbook law on the classifications of and relationships between immunity defenses and other affirmative defenses, and would eliminate the unique character of the Act's grant of immunity "from suit." It would also undermine basic pleading practices and the policy of efficient adjudication unencumbered by multiple interlocutory appeals.

For some or all of these reasons, four courts of appeals have reached the same conclusion as that of the panel below: the denial of a motion to dismiss based on a statute of limitations defense is not an "immunity" under the Act, and so it is not a final, appealable order under the Act—and the identity of the defendant as a political subdivision does not alter this analysis. Therefore, the Plaintiffs-Appellees respectfully ask this Court to reject the proposition of law, affirm the court of appeals, and remand this case to the trial court so that discovery can, at long last, commence.

STATEMENT OF THE FACTS

Since this appeal raises purely legal issues (*is this matter properly before this court, and, if so, is the affirmative defense of the statute of limitations an “immunity”*), the underlying facts are irrelevant to resolution of the appellant’s proposition of law. Moreover, there is no evidentiary record in this case, since the litigation had not advanced beyond the pleadings and no discovery had been conducted prior to interlocutory appeal. Therefore, only a brief recitation of the facts set forth in the complaint¹ follows to provide context for the remarkable injustice that would result if the appellant’s proposition were accepted.

The various plaintiffs live in 61 family homes along a stretch of State Road in Parma. See TAC at ¶¶ 2-22; FAC at ¶¶ 10-51.² At one corner of State Road is a gas station, beneath which is an underground petroleum storage tank cavity. See TAC at ¶ 9; FAC at ¶¶ 9, 83. A single system of sanitary sewer lines runs from the tank cavity to the plaintiffs’ homes. See TAC at ¶ 51; FAC at ¶ 9, 82. The County is or has been responsible for maintaining, operating, and keeping up that system of sewer lines pursuant to R.C. 2744.01(G)(2)(d), a “proprietary function” under Ohio law, for which the County is *not* entitled to immunity. See TAC at ¶ 51; FAC at ¶ 80.

On August 28, 2009, flames exploded from the sanitary sewer drain in the basement of the Riscatti home; the Riscattis battled the fire, but it ultimately destroyed much of their home.

¹ This appeal involves two cases that were consolidated by the trial court: the first is styled *Riscatti, et al. v. Prime Properties P’ship, et al.*, No. 10-714827 (brought by 38 plaintiffs); the second is styled *Polakowski, et al. v. Prime Properties P’ship, et al.*, No. 10-735966 (brought by 62 plaintiffs). The operative pleadings are the *Riscatti* Third Amended Complaint (“TAC”) and the *Polakowski* First Amended Complaint (“FAC”), which are substantively identical. See FAC at ¶¶ 7-8.

² All of the pleadings, memoranda, and judgment entries referred to throughout this brief are being submitted in an Appendix for the reader’s convenience. Also, all emphasis is added and citations and internal quotations are omitted unless otherwise indicated.

See TAC at ¶¶ 53-60; FAC at ¶¶ 1-2. The Parma Fire Department, the Environmental Protection Agency, the Cuyahoga County Engineer, the Northeast Ohio Regional Sewer District, and the Bureau of Underground Storage Tank Regulations performed an investigation to determine the source of the fire issuing from the Riscatti's sewer drain. See TAC at ¶¶ 66-74; FAC at ¶¶ 3-4, 85-92.

The investigation eventually discovered that a drain pipe had been shunting water contaminated with toxic gasoline and gas vapors from the State Road gas station's underground petroleum storage tank cavity directly into the sanitary sewer lines and into the plaintiffs' homes. See TAC at ¶¶ 75-76; FAC at ¶¶ 5, 94-96. The drain pipe had served as a direct conduit for contamination of the plaintiffs' properties since as early as 1982. *Id.*

Over the years, a few of the plaintiffs had reported unusual smells to various local authorities. See TAC at ¶ 101; FAC at ¶ 117. Authorities, including the County, repeatedly and firmly assured these plaintiffs that the odors were *not* gasoline and were *not* related to the gas station, but was cooking fumes, natural gas, or ordinary sewer gas. See TAC at ¶¶ 102-103; FAC at ¶¶ 118-119. These plaintiffs reasonably relied on the assurances of governmental agencies—and did not learn until the post-fire investigation that the true source of the odors was gasoline contamination traveling through the sanitary sewer lines and into their homes.

STATEMENT OF THE CASE

Although the plaintiffs' original complaints were filed in early 2010,³ the case did not move beyond the pleadings, the County never filed an answer, and no discovery had been conducted.⁴ The County filed two dispositive motions in response to the amended complaints:

³ The complaints were subsequently amended several times to add or drop parties, but the substantive allegations did not change.

- May 5, 2011 Motion to Dismiss Pursuant to Civil Rule 12(B)(6), which raised the issue of the statute of limitations (“first motion”)(*Appendix 1*)⁵; and
- May 31, 2011 Motion for Judgment on the Pleadings Pursuant to Civil Rule 12(C) or for Summary Judgment Pursuant to Civil Rule 56, which raised the issues of immunity and causation (“second motion”)(*Appendix 2*).

After full briefing and oral argument, Judge Lance Mason (a) denied the first motion, (b) denied the second motion to the extent it was a Rule 12 motion, and (c) held in abeyance the second motion to the extent it was a Rule 56 motion, directing the County to re-file its motion for summary judgment, if warranted, after some discovery had been conducted. *See August 11, 2011 Journal Entry (Appendix 3)*.

The day after the trial court entered its decision, the County filed a motion pursuant to Civil Rule 54(B) to certify for appeal the decision “concerning R.C. 2744.04 (limitation of actions),” that is, the first motion. *See County’s Motion Pursuant to Civil Rule 54(B) (Appendix 4)*. The County did *not* move to certify the trial court’s decisions regarding immunity or causation, which were the subject of the second motion. *Id.* When the County filed its notice of appeal, however, it raised both the statute of limitations and immunity issues. *See County’s Notice of Appeal (Appendix 5)*. This point is critical.

⁴ The underlying action involves several defendants, private and public, and cross-claims amongst them. All of the defendants filed dispositive motions under Rule 12 (only one was granted). This statement of the case, however, only addresses the procedural history relevant to the County, the lone appellant before this Court.

⁵ Although it was captioned as a motion to dismiss under “Rule 12(B)(6) and/or Rule 12(C),” the County had not (and has never) answered the complaints. Therefore, the County’s motion at issue in this appeal is a motion to dismiss under Rule 12(B)(6) and *not* a motion for judgment on the pleadings under Rule 12(C). *Contrast* CIV.R. 12(B) (certain defenses may be raised prior to the filing of an answer) *with* CIV.R. 12(C) (only “[a]fter the pleadings are closed” can a party raise other defenses); *see also, State ex rel. Kaylor v. Bruening*, 80 Ohio St.3d 142, 143, 1997-Ohio-350, 684 N.E.2d 1228 (“The court of appeals erred in treating Kaylor’s dismissal motion as a Civil Rule 12(C) motion for judgment on the pleadings. If all pleadings are not closed, a Civil Rule 12(C) motion is premature and cannot be considered by the trial court.”).

The County understood that Rule 54(B) certification was *not* needed to take an interlocutory appeal over the issue of immunity, since any “order that denies a political subdivision ... the benefit of an alleged immunity from liability as provided in [the Act] is a final order” and subject to interlocutory appeal under R.C. 2744.02(C). But the County appreciated that an order denying a defense premised on the statute of limitations is *not* a final appealable order absent Civil Rule 54(B) certification.

Indeed, when the plaintiffs moved to dismiss the appeal for want of jurisdiction, *see Motion to Dismiss Appeal (Appendix 6)*, the County did *not* argue that the statute of limitations was an “immunity” and thus subject to interlocutory appeal under R.C. 2744.02(C). To the contrary, the County *only* maintained that “the R.C. 2744.04 limitation of actions determination is properly before the court pursuant to R.C. 2505.02 and Civil Rule 54(B).” *See County’s Opposition to Motion to Dismiss Appeal, pp. 7-9 (Appendix 7)*.

The plaintiffs’ motion to dismiss the appeal had two components. First, that, under *Young*, “there is no final appealable order when the trial court does not provide an explanation for its decision to deny a motion to dismiss” premised on immunity. *Young v. Cuyahoga County Bd. of MRDD*, 8th Dist. No. 95955, 2011-Ohio-2291, ¶ 11, *citing State Auto Mut. Ins. Co.*, 108 Ohio St 3d 540, 2006-Ohio-1713. During the pendency of the motion to dismiss, however, the Eighth District overruled *Young*. *See DiGiorgio v. City of Cleveland*, 196 Ohio App.3d 575, 2011-Ohio-5824, ¶ 15. Accordingly, the court of appeals heard the County’s appeal on the issue of immunity and found that, given the proprietary function exception to immunity, the plaintiffs’ complaint stated a claim. *See Riscatti v. Prime Properties Ltd. P’ship*, 8th Dist. Nos. 97270 and 97274, 2012-Ohio-2921, ¶ 32.

The second component of the plaintiffs' motion to dismiss the appeal was that the denial of a motion to dismiss premised on the statute of limitations is not a final appealable order under R.C. 2505.02. Although the court of appeals summarily denied the motion, its final decision ultimately analyzed the issue in ten paragraphs and reached the conclusion that it did *not* have jurisdiction to consider the statute of limitations arguments because the denial of a Rule 12(B) motion premised on the affirmative defense of the statute of limitations is not a final appealable order under R.C. 2505.02. *Id.* at ¶¶ 10-20. It held the "fact that defendants are political subdivisions does not change that analysis." *Id.* at ¶ 17.

Although the County never argued that the statute of limitations for political subdivisions is an "immunity" for purposes of interlocutory appellate jurisdiction, the dissenting member of the panel raised this issue out of the blue: "Because R.C. 2744.04 is not only a special statute but also is a part of the political subdivision 'chapter,' I conclude that it falls within the exception to R.C. 2505.02 that is set forth in R.C. 2744.02(C)." *Id.* at ¶ 49.

The County's appeal to this Court does not raise the issue of political subdivision immunity. Rather, in this appeal, the County claims that the denial of a motion to dismiss premised on the defense of the statute of limitations is immediately appealable when the defendant is a political subdivision. To put this another way, the County is asking this Court to adopt the dissenting judge's opinion that the affirmative defense of the statute of limitations is actually an "immunity" when a political subdivision is involved, such that denial of a motion to dismiss premised on that defense is subject to interlocutory appeal. If this Court were to accept such a proposition (and for the reasons below, both procedural and substantive, it should not), this case must be remanded to the court of appeals to determine whether the County's motion to dismiss should have been granted.

LAW AND ARGUMENT

I. THE APPEAL MUST FAIL AS A MATTER OF PROCEDURE

Before this Court considers the County's proposition of law, it must first determine whether this appeal is properly before it. For two independent reasons, it is not. First, the County never raised its proposition before the trial court or the court of appeals; instead, the dissenting judge constructed a novel argument *sua sponte*, which the County has now brought before this Court. Second, the defense the County would like this court to examine—the statute of limitations—has not been put before this or any court in an appropriate motion.

A. The County Failed to Preserve Any Error Regarding Its Proposition of Law

The Tenth District recently and succinctly stated a principle common to virtually every appellate court in this country: namely, that a higher court cannot examine errors or propositions of law that were not first brought before the inferior court:

[T]he burden of affirmatively demonstrating error on appeal rests with the party asserting error. APP.R. 9 and 16(A)(7), and *State ex rel. Fulton v. Halliday*, 142 Ohio St. 548, 53 N.E.521 (1944). It is not the duty of this court to search the record for evidence to support an appellant's argument as to alleged error. ***It is also not appropriate for this 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.

State ex rel. Petro v. Gold, 166 Ohio App.3d 371, 2006-Ohio-942, 850 N.E.2d 1218, ¶ 94.

The County argues that the court of appeals erred based on an argument that the County never raised before that court or any other. Its proposition of law—that the court of appeals had jurisdiction over its motion to dismiss based on the statute of limitations because that defense is actually an “immunity”—was never put before the court of appeals. Rather, the County only adopted this novel argument *after* the Eighth District rendered its decision and the argument

appeared in the dissenting opinion. Failure to preserve any error, or to otherwise submit the proposition to intermediate appellate review, should be fatal to this appeal and result in its dismissal; or, alternatively, affirmance of the court below.

B. The County Was and Is Prohibited From Raising the Statute of Limitations Defense in a Motion to Dismiss

In *Freeman*, this Court held that the affirmative defenses designated by Civil Rule 8(C) may not be raised by a motion to dismiss under Civil Rule 12(B). *State ex rel. Freeman v. Morris*, 62 Ohio St.3d 107, 109, 579 N.E.2d 702 (1991), *citing approvingly Johnson v. Linder*, 14 Ohio App.3d 412, 414, 471 N.E.2d 815 (3rd Dist. 1984) (holding that a party is required to assert Rule 8(C) defenses in an answer, and only those defenses set forth in Rule 12(B) may be asserted in a motion to dismiss). This Court explained that “an affirmative defense must be raised and proved” and a trial court “may not dismiss a case via a motion to dismiss” on the grounds of a Rule 8(C) defense. *Shaper v. Tracy*, 73 Ohio St.3d 1211, 1995-Ohio-37, 654 N.E.2d 1268.

Thus, the “statute of limitations bar is an affirmative defense, CIV.R. 8(C), and is therefore not [to be] raised by a motion to dismiss under CIV.R. 12(B).” *Thomas v. Progressive Cas. Ins. Co.*, 2011-Ohio-6712, 969 N.E.2d 1284 (2nd Dist.), ¶ 36, *citing Freeman*, 62 Ohio St.3d at 109; *see also Five Star Fin. Corp. v. Merchant’s Bank & Trust Co.*, 192 Ohio App.3d 544, 2011-Ohio-314, 949 N.E.2d 1016, ¶ 23 (1st Dist.) (observing that Civil Rule 12(B)(6) is an inappropriate vehicle for raising the statute of limitations, since the defense involves mixed questions of law and fact).

[O]nly those affirmative defenses specifically listed under Civil Rule 12(B) may serve as the basis for dismissing a cause of action because: (1) the burden to plead an affirmative defense is on the defendant, not the plaintiff, (2) pursuant to Civil Rule 8(C), a defendant must plead his affirmative defenses in his responsive pleading, and (3) Civil Rule 12(B) contains seven specific,

enumerated defenses that may be raised by motion prior to a defendant's responsive pleading.... ***[D]efenses such as the statute of limitations are not defenses that are specifically permitted to be raised by Civil Rule 12(B) prior to a responsive pleading; therefore, they may not be asserted on a motion to dismiss pursuant to Civil Rule 12(B).***

Yovanno v. Ryder Sys., Inc., 9th Dist. No. 21258, 2003-Ohio-6824, ¶ 10.

The division of Rule 8(C) and Rule 12(B) defenses makes good sense. Rule 8(C) defines affirmative defenses that must be raised in the defendant's answer (or they are waived). These are defenses which do not dispute that the plaintiff has asserted the *prima facie* elements of a valid claim, but that there is some reason why that claim will fail once the defendant can put on some evidence: *e.g.*, that the plaintiff himself was also at fault (contributory negligence); or that the plaintiff already lost his claims (*res judicata*); or that he resolved them (release, accord and satisfaction); or that the time limit for bringing such claims has expired (**statute of limitations**). All of these defenses depend on facts that go beyond those typically found in a plaintiff's complaint, and the burden is on the defendant to establish those extrinsic facts. *See, e.g., Matrix Acquisitions, LLC v. Hooks*, 5th Dist. No. 10-CA-111, 2011-Ohio-3033, ¶ 14 ("Appellant raised the statute of limitations argument as an affirmative defense and Appellant has the burden of proof with regard to establishing the defense.").

By contrast, Rule 12(B) sets forth grounds on which the defendant may dispute the very nature of the plaintiff's claims, even in the absence of any outside evidence: *e.g.*, that the court does not have jurisdiction over such claims (lack of subject matter jurisdiction); or that the court does not have jurisdiction over the defendant herself (lack of personal jurisdiction); or that what the plaintiff has pled, even if true, does not amount to a cognizable claim (**failure to state a claim upon which relief can be granted**). To put this another way, Rule 12(B)(6), under which the County is proceeding here, allows the defendant to argue that, *even if you take the plaintiff's*

allegations as true, they do not “add up” to a cause of action. The simplest example of this is a failure to plead an element of a common law cause of action. *See, e.g., Estate of Ridley v. Hamilton County Bd. of MRDD*, 102 Ohio St.3d 230, 2004-Ohio-2629, 809 N.E.2d 2, ¶¶ 14-17 (motion to dismiss under Rule 12(B)(6) properly granted because plaintiff’s complaint did not plead the existence of a legally recognized *duty* owed by the defendant, an essential element of a wrongful death claim).

In sum, Rule 8(C) provides that affirmative defenses (*i.e.*, those which accept that the plaintiff has properly stated a *prima facie* claim, but that such claim will be defeated once the defendant has an opportunity to put on its defense) can only be raised in an answer, and not in a motion to dismiss. Rule 12(B), on the other hand, provides a procedural vehicle to adjudicate threshold defenses which challenge the right of a plaintiff to bring a claim (in a certain court, against a certain person, or under a certain theory), independent from any facts. The statute of limitations is an affirmative defense under Rule 8(C) because it usually requires the defendant to set forth facts in support of its argument that the plaintiff ought to have brought a case sooner than it did, based on some knowledge the plaintiff had or should have had.⁶

This case in particular involves a fact-sensitive inquiry to determine the statute of limitations issues. First, the Count’s merit brief to this Court asserts that it did not have

⁶ Unlike the statute of limitations, immunity is *not* a Rule 8(C) defense and can be raised on a motion dismiss. Indeed, immunity fits neatly into this schema. When a defendant claims immunity, it is not presenting facts which provide it a defense, rather, it is asserting that because of who or what it is, it is excused from all claims. For example, when a political subdivision asserts tort immunity, it accepts that the plaintiff may have properly pled the five elements of a common law negligence claim—but that, even if those allegations are true, the subdivision cannot be held liable for it. That is, even a well-pled complaint **fails to state a claim upon which relief can be granted** against an immune political subdivision. *E.g., see generally McDade v. City of Cleveland*, 8th Dist. No. 98415, 2012-Ohio-5515 (failure to plead an exception to immunity applicable to a political subdivision should result in dismissal upon a Rule 12(B) motion). Thus, immunity can be raised on Rule 12(B)(6) motion, while the statute of limitations cannot.

responsibility for maintenance and upkeep of the sanitary sewer line at issue until 2008 (just two years before suit was filed). *See County's Merit Brief, p. 12.* Thus, under the County's version of events (which, again, are based only on its assertions and not an evidentiary record), the earliest date the County could have done something wrong—and the plaintiffs' causes of action accrue—is within the limitations period, or very close to it. The trial court must develop a factual record determining when the County exercised proprietary control of the sewer system and when it failed to maintain that system to determine when the plaintiffs' causes of action accrued.

Second, the plaintiffs' complaint alleges grounds for tolling the statute of limitations under the "discovery rule," since the plaintiffs could not, through the exercise of due diligence, determine that they had claims against the County. *See TAC at ¶¶ 102-103* (some plaintiffs tried to determine whether they had been harmed and had been assured that they had not been, others were not aware of the harm given that it was underground and occult); *see also generally Oliver v. Kaiser Cmty. Health Found.*, 5 Ohio St.3d 111, 449 N.E.3d 438 (1983) (analyzing, accepting, and applying the discovery rule to toll the statute of limitations). The trial court must develop a factual record to determine whether the discovery rule applies in this instance.

Third, the plaintiffs' complaint alleges grounds for tolling the statute of limitations given their reliance on the misrepresentations of the County and others. *See TAC at ¶¶ 102-103* (defendants and other governmental agencies repeatedly assured inquiring plaintiffs that they were not being harmed by the gas station or the sewer system); *see also Bryant v. Doe*, 50 Ohio App.3d 19, 23, 552 N.E.2d 671 (2nd Dist. 1988) (genuine issue of material fact whether plaintiff reasonably relied on misrepresentation of defendant's representative such that statute of

limitations should be tolled). The trial court must develop a factual record to determine whether this tolling rule applies in this instance.

Fourth, the plaintiffs' complaint alleges R.C. 2305.09 tolls accrual of their claims until the identity of the wrongdoer is actually discovered, since the gasoline trespass was underground. *See* TAC at ¶ 149. To prove that the plaintiffs (or any of them) knew that the County was a wrongdoer prior to the Riscatti fire, the County would have to put on evidence well beyond the complaint, which alleges that the plaintiffs did *not* know the identity of the wrongdoers prior to the post-fire investigation. The trial court must develop such a factual record to adjudicate this defense.

Since the County sought to raise the Rule 8(C) affirmative defense of the statute of limitations on a motion to dismiss, which would require the resolution of mixed questions of law and fact, the County's Rule 12(B)(6) motion was and is improper. And this Court should dismiss the appeal for procedural irregularity; or, in the alternative, affirm the judgment of the court of appeals and remand the case to the trial court for further proceedings.

II. THE APPEAL MUST FAIL ON THE MERITS

The County is asking this Court to eliminate the fundamental distinctions between different sorts of defenses in order to make the statute of limitations (an ordinary affirmative defense) subject to interlocutory appeal in the same manner as tort immunity (an extraordinary defense). This proposition should be firmly rejected.

Appellant's Proposition of Law:

An order that denies a political subdivision the benefit of the defense set forth in R.C. 2744.04 is a final appealable order because it denies the subdivision the benefit of an alleged immunity from liability as provided in R.C. 27440.2(C).

A. The Statute of Limitations Defense is Not an “Immunity”

Despite the wording of the proposition of law on which this Court granted review, the County’s merit brief implicitly concedes that the statute of limitations defense is not an immunity. *See County’s Merit Brief, p. 13* (arguing that “it is inaccurate to say that interlocutory appeals under R.C. 2744.02(C) are necessarily limited only to trial court orders that deny the benefit of an alleged ‘immunity.’”). The County’s reluctance to embrace the proposition that the statute of limitations defense constitutes an immunity is understandable. The origin and purposes of immunities for governmental subdivisions demonstrate that the roots of those immunities share no common ground with the purposes of statutes of limitations.

Both historically and continuing through today, immunities have always derived from the status or characteristics of the defendant, which can be resolved as a threshold matter. The basis for sovereign immunity is grounded entirely in the identity of the defendant as a governing entity. While other affirmative defenses require defendants to establish facts that go beyond the pleadings, such proof is not necessary in the context of immunity because immunity is determined by the identity of the defendant itself.

1. Governmental Immunity Derives from the Entity’s Sovereign Status

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-Ohio-204, 750 N.E.2d 554 (“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 the statute of limitations, even when utilized by a political subdivision, depends in no way upon the sovereign identity of the defendant—but on the facts of an individual case. Indeed, the statute of

limitations generally turns on what the *plaintiff* did (or failed to do) in discovering and bringing her claims—*not* who or what the *defendant* is.

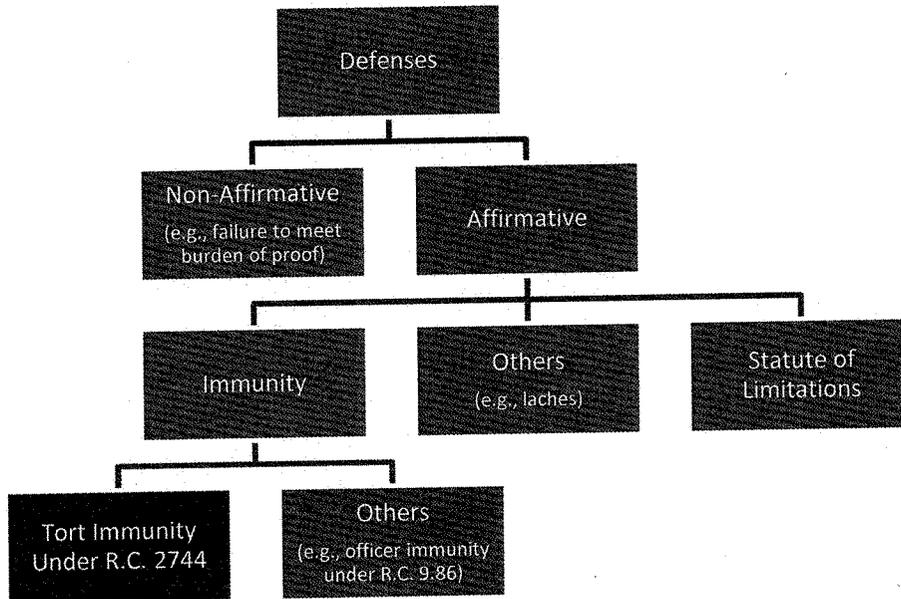
The legislature has provided *no* indication of any intent to redefine the contours of immunity by enacting Chapter 2744. So radical a change would surely have been expressed in the statutory language, legislative history, or public statements regarding the General Assembly's consideration and passing of the Chapter (and lauded by the defense bar, political subdivisions, and groups like the appellant's *amicus* in this case). The mere fact that the legislature defined the period of the statute of limitations applicable to political subdivisions in an Act that governs the tort liability of political subdivisions should come as no surprise. And the mere inclusion of a statute of limitations provision in that chapter in no way transforms that defense into an "immunity."

2. As a Matter of Procedure, Immunity Is Treated Differently from Other Defenses

There are two types of defenses: affirmative and non-affirmative. An affirmative defense is a defendant's "assertion raising new facts and arguments that, if true, will defeat the plaintiff's claim, even if all allegations in the complaint are true." *Black's Law Dictionary*, 7th Ed., p. 343; *see also State ex rel. Plain Dealer Publ'g Co. v. City of Cleveland*, 75 Ohio St.3d 31, 33, 1996-Ohio-379, 661 N.E.2d 187 ("An affirmative defense is a new matter which, assuming the complaint to be true, constitutes a defense to it."). A non-affirmative defense, then, is one which disputes the truth of the plaintiff's allegations or her ability to carry her burden of proving those allegations. *See State v. Ellis*, 2nd Dist. No. 24003, 2011-Ohio-2967, ¶ 28.

There are a variety of affirmative defenses: *inter alia*, laches, duress, the statute of limitations. Immunity is one species of affirmative defense. *See Turner v. Central Local Sch. Dist.*, 85 Ohio St.3d 95, 97, 1999-Ohio-207, 706 N.E.2d 1261. In Ohio, there are various types

of immunity, and that granted by the Political Subdivision Tort Liability Act, Revised Code Chapter 2744, is just one of them; the immunity granted to state officers under R.C. 9.86 is another. Only “an order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability” is a final order subject to interlocutory appeal. R.C. 2744.02(C).



The County would have this Court destroy this well-understood hierarchy and reconstruct it to cram the statute of limitations defense into the definition of immunity under the Act. But there is neither authority nor logic to support this mischief. The dissenting judge who invented the proposition rested his argument on the use of the word “chapter,” and thought that since the statute of limitations for political subdivisions is defined in the same chapter as that which grants them tort immunity, anything in the chapter ought to be subject to interlocutory appeal. Such a reading does great violence to the plain language of the statutes at issue.

B. Canons of Statutory Construction Forbid Accepting the County's Proposition

When interpreting a statute, this Court “rel[ies] on general principles of statutory construction.” *Cline v. Ohio BMV*, 61 Ohio St.3d 93, 97, 573 N.E.2d 77 (1981). The starting point is the statute’s text, and “where the language of a statute is clear and unambiguous, it is the duty of the court to enforce the statute as written, making neither additions to the statute nor subtractions therefrom.” *Hubbard v. Canton City Sch. Bd. of Educ.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543, ¶ 14; *see also Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 128 Ohio St.3d 492, 2011-Ohio-1603, 946 N.E.2d 748, ¶ 24 (a “court should give effect to the words actually employed in a statute, and should not delete words used or insert words not used in the guide of interpreting the statute”); *accord Spencer v. Freight Handlers, Inc.*, 131 Ohio St.3d 316, 2012-Ohio-880, 964 N.E.2d 1030, ¶ 16. Accepting the County’s proposition would require this Court to violate these basic principles and instead make additions or subtractions from the plain language of the statute.

A basic rule of statutory construction requires that “words in statutes should not be construed to be redundant, nor should any words be ignored.” *E. Ohio Gas Co. v. Pub. Util. Comm*, 39 Ohio St.3d 295, 299, 530 N.E.2d 875. Statutory language “must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous ... and the court should avoid that construction which renders a provision meaningless or inoperative.” *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Educ.*, 95 Ohio St. 367, 372-373, 116 N.E. 516 (1917).

D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 26.

The Act recognizes that immunities and defenses are neither coterminous nor synonymous. Section 2744.02(A)(2) uses the phrase “defenses *and* immunities.” Section

2744.03(A) uses the phrase “defenses *or* immunities.” Section 2744.03(B) uses the phrase “immunity *or* defense.” But when it chose which defense(s) could be subject to interlocutory appeal, the legislature only identified one: “immunity.” R.C. 2744.02(C). To hold that the reference to immunity in this provision includes all other “defenses” would render redundant the references to “defenses” in three other provisions of the Act and would constitute an addition to R.C. 2744.02(C) of a word that the legislature chose not to include in that provision (but which it did choose to include in other provisions of the same chapter).

The Act itself appreciates that there are some defenses conferred by the Act which are not “immunities.” To wit, R.C. 2744.05(A) confers upon political subdivisions a complete “defense” against punitive and exemplary damages. In examining different parts of the Act, this Court has also recognized that there is a difference between “full *defenses* to liability for a political subdivision [and] *immunity* from suit for employees of a political subdivision.” *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 19, *interpreting and contrasting* R.C. 2744.02(B)(1)(b) (which provides that a political subdivision is liable for negligent operation of a motor vehicle, but has a *defense* if the operator was a firefighter responding to an emergency) and R.C. 2744.03(A)(6) (which provides that employees are *immune* from liability in carrying out their official duties unless they act in bad faith or in a wanton or reckless manner).

Obliterating the distinction between “defenses” and “immunities” would replace the legislature’s pen with the judiciary’s eraser. Indeed, if this Court re-wrote the word “immunity” in R.C. 2744.02(C) to include any “defense” (like the statute of limitations), *every* conceivable defense available to a political subdivision—whether related to immunity in any way or not—

would be subject to interlocutory appeal, since the Act provides that any order based on “*any* other provision of law” is a final order (not merely those immunities contained in Chapter 2744).

Distilled to its simplest form, the County’s proposition of law asks this Court to add a phrase to R.C. 2744.02(C) that simply does not appear in the plain text of the statute:

[An order that denies a political subdivision ... the benefit of an alleged immunity from liability **or other defense** as provided in this chapter or any other provision of the law is a final order.]

Such violence to the statute would be so dramatic a departure from this Court’s precedents on the statutory canons of non-redundancy, non-insertion, and deference that it would signal a sea-change in principles of judicial restraint.

C. No Court of Appeals Has Endorsed the County’s Proposition

Four other courts of appeals have agreed with the Eighth District panel’s finding in this case that it lacks interlocutory jurisdiction to review the statute of limitations defense of a political subdivision after a trial court denies a motion to dismiss.

In *Essman v. City of Portsmouth*, No. 08-CA-3244, 2009-Ohio-3367, ¶ 10, the Fourth District Court of Appeals found that it lacked jurisdiction to review a decision to deny a political subdivision’s motion for summary judgment premised on the statute of limitations defense:

[B]ecause the trial court’s decision to deny appellant summary judgment on its statute of limitations defense [as opposed to an immunity defense] does *not* deny appellant the benefit of a R.C. Chapter 2744 immunity, there is no exception to the general rule that a denial of a summary judgment is a non-final appealable order. Accordingly, we lack jurisdiction to consider the trial court’s denial of summary judgment on the basis of appellant’s statute of limitations defense.

In *Makowski v. Kohler*, No. 2519, 2011-Ohio-2382, ¶¶ 9-10, the Ninth District Court of Appeals made the same findings: Although summary judgment is not generally a final

appealable order, the denial of an immunity under Chapter 2744 is subject to interlocutory appeal under R.C. 2744.02(C).

Nonetheless, an appeal from such a decision is limited to the review of alleged errors in the portion of the trial court's decision which denied the political subdivision the benefit of immunity.

Here, in concluding that [the plaintiffs'] claims were not barred by the statute of limitations, the trial court did not deny Cleveland Metroparks the benefit of immunity; ***the trial court denied Cleveland Metroparks the benefit of the statute of limitations.*** Therefore, the general rule that an appeal from the denial of a motion for summary judgment is not final applies to this assignment of error.

In *Guenther v. Springfield Twp. Trs.*, No. 2010-CA-114, 2012-Ohio-203, 970 N.E.2d 1058, ¶ 24, the Second District Court of Appeals reached the same conclusion: "The denial of summary judgment based on a statute of limitations, however, does not deny the political subdivision the benefit of immunity."

In *Carter v. Complete Gen. Constr. Co.*, No. 08-AP-209, 2008-Ohio-6308, ¶ 8, the Tenth District Court of Appeals noted that "a denial of summary judgment is generally not a final appealable order" but an exception had been granted for "statutory immunity. All other questions presented in this case and argued by the parties in this appeal are premature." *Accord CAC Bldg. Props., LLC v. City of Cleveland*, 8th Dist. No. 91991, 2009-Ohio-1786, n.1 (finding the court lacked jurisdiction to address five assignments of error "because they pertain to denials of summary judgment on bases other than sovereign immunity").

The lone case of *Estate of Finley v. Cleveland Metroparks*, 189 Ohio App.3d 139, 2010-Ohio-4013, 937 N.E.2d 645, ¶ 1 (8th Dist.), is an aberration. There, two political subdivisions appealed the trial court's denial of their motions for summary judgment—both raised the issue of tort immunity, but one also raised the statute of limitations as a defense. The court of appeals decided the immunity issue as to one defendant and found the plaintiffs' claims were time barred

as to the second defendant. The case does not examine the appealability of the statute of limitations issue, but appears to implicitly take up the issue as a matter of expediency, since it was already considering both defendants' appeals originally taken on grounds of immunity—and with the benefit of a fully developed factual record.⁷ It hardly stands for the proposition that political subdivisions can appeal decisions denying their motions to dismiss premised on the statute of limitations. The case is an anomaly which engages in no jurisdictional analysis.

III. LAW AND GOOD POLICY FAVOR REJECTION OF THE PROPOSITION

The dissenting judge below, upon whose thoughts the proposition before this Court is drawn, based his opinion on a public policy that favors protecting political subdivisions from tort claims.⁸ But on the narrow issue of whether any affirmative defense (like the statute of limitations) can be appealed as an “immunity” simply because it is a political subdivision who raises it, Ohio law and policy disfavor the County’s proposition.

A. The Act’s Immunity “From Suit” Is a Unique Defense Unlike a Statute of Limitations

The dissenting judge below based his opinion on the notion that “R.C. 2744.04 is a special statute that applies to tort actions brought against political subdivision” and arose from a public policy to protect subdivisions from suit—that is, from having to engage in discovery, to litigate, or to go to trial. *Riscatti*, 2012-Ohio-2941 at ¶ 46. Ironically, he identified the primary

⁷ Furthermore, the trial court’s judgment entry arguably contains Civil Rule 54(B) language (“This is a final order.”), so the court of appeals may have taken jurisdiction over the statute of limitations issue since the case had been fully developed and was at the summary judgment stage. There is no clear indication either way.

⁸ This policy statement probably does not accurately reflect reality. Most political subdivisions throughout the state carry insurance coverage or engage in risk-sharing pools in a manner not dissimilar from that of private persons and business entities. The ‘threat’ to the public fisc posed by tort claims is largely theoretical. The plaintiffs are unaware of any actuarial studies that have shown that the Act has saved political subdivisions money.

difference between political subdivision immunity and the whole gamut of affirmative defenses that are available to any ordinary defendant:

[I]mmunity is an *immunity from suit rather than a mere defense to liability*... it is effectively lost if a case is erroneously permitted to go to trial. Qualified immunity provides immunity not only from liability but from the “consequences” of a suit, including the general costs of subjecting officials to the risk of trial, distraction, [etc.].

Id., citing *Mitchell v. Forsyth*, 472 U.S. 511, 525-530, 105 S.Ct. 2806 (1985). This recognition—that governmental immunity “from suit” is something special, unique, and outside the ordinary array of defenses, and thus entitled to early adjudication and appeal—undermines the argument first developed by the dissenting judge below and now adopted by the County. The ordinary defenses of contributory negligence, laches, or the statute of limitations are defenses “to liability,” and not immunities “from suit.” They are different in character, and derive from an entirely different body of law and policy, than the unique defense of immunity from suit. To hold otherwise will allow the exception to swallow the rule.

B. Plaintiffs Have No Burden to Plead Around Affirmative Defenses Like the Statute of Limitations

There is no “authority for a proposition that a plaintiff must anticipate a political subdivision’s defenses and plead specific facts to counteract a possible affirmative defense of sovereign immunity.” *Rogers v. Akron City Sch. Sys.*, 9th Dist. No. 23416, 2008-Ohio-2962, ¶ 19. *A fortiori*, the plaintiffs in the case at bar had no obligation to “plead around” a statute of limitations defense. Rather, their burden is to provide a short and plain statement of their claims. Civ.R. 8(A). The County ought to have then raised its affirmative defense of the statute of limitations in its answer. Civ.R. 8(C). And it could have then moved for summary judgment with evidence supporting its contentions about the accrual of the plaintiffs’ claims—which would have provided a court of appeals a record upon which to reach a decision.

C. The County's Proposition Would Result in Multiple Unnecessary, Duplicative, and Wasteful Appeals

If political subdivisions are given license to appeal ordinary defenses like the statute of limitations under the guise of "immunity," the result will be an expensive and time-consuming scenario in which multiple interlocutory appeals on the same subject become the norm. The political subdivision could appeal (i) the denial of a motion to dismiss, (ii) the denial of a motion for judgment on the pleadings, (iii) the denial of a motion for summary judgment, and (iv) the denial of a motion for a new trial—all premised on the same defense. Surely the legislature did not intend to tie political subdivisions up in the courts of appeals year-after-year on the same case and on the same issue.

CONCLUSION

The County's appeal suffers from fatal procedural irregularities and this Court may dismiss the appeal or affirm the court of appeals on this basis alone. On the merits, the County's appeal is contrary to the plain language of the statute and would require so extensive a re-writing of the statute, the Rules of Civil Procedure, the decisions of multiple courts of appeals, the policy promoting judicial economy, the history of immunity, as well as common sense, that it should be firmly rejected.

Respectfully submitted,



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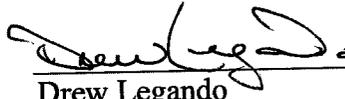
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APPENDIX

1	County's Motion to Dismiss Pursuant to Civil Rule 12(B)(6)
2	County's Motion for Summary Judgment Premised on Immunity and the Causation
3	Judgment Entry Denying (or Holding in Abeyance) the County's Motions
4	County's Motion for Civil Rule 54(B) Certification
5	County's Notice of Appeal
6	Plaintiffs' Motion to Dismiss the Appeal
7	County's Brief in Opposition to the Motion to Dismiss the Appeal

Appendix 1

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARY POLAKOWSKI, ET AL.	)	CASE NO. CV 10 714827
ALESSANDRA RISCATTI, ET AL.	)	CV 10 735966
Plaintiffs)	
	)	Hon. Lance Mason
	)	Defendant Cuyahoga County's
v.	)	Motion to Dismiss
	)	Pursuant to Ohio R. Civ. P. 12
	)	(B) (6) or 12 (C)
CUYAHOGA COUNTY ET AL.)	
Defendants)	

Now comes Cuyahoga County, by and through the undersigned Counsel, who respectfully moves this honorable Court to dismiss this action pursuant to Ohio R. Civ. P. 12(B) (6) or 12(C). A memorandum in support is attached hereto and incorporated herein by reference.

Respectfully submitted,
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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARY POLAKOWSKI, ET AL.)	CASE NO. CV 10 714827
ALESSANDRA RISCATTI, ET AL.	)	CV 10 735966
Plaintiffs)	
	)	Hon. Lance Mason
)	
v.	)	Memorandum In
	)	Support of Motion to Dismiss
	)	Pursuant to Ohio R. Civ. P. 12
	)	(B) (6) or 12 (C)
CUYAHOGA COUNTY ET AL.)	
Defendants)	

FACTS

On January 6, 2010 plaintiff Riscotti filed her first Complaint alleging various torts and injuries resulting from alleged third party drainage of petroleum products into the public sanitary system as far back in time as 1982. On October 7, 2010 Riscotti filed her Third Amended Complaint, naming Cuyahoga County as a defendant. The complaint reasserts the allegations of the first and second amended complaints and further alleges that defendant Cuyahoga County tortuously injured the plaintiffs as a result of third party petroleum products entering into the public sanitary system as far back in time as 1982. Riscotti Third Amended Complaint at ¶77. Defendant Cuyahoga County's timely answer to Riscotti's Third Amended Complaint asserted, inter alia, the statute of limitations as an affirmative defense. Cuyahoga County's Answer and Cross Claims To Plaintiff Riscotti's Third Amended Complaint at ¶20.

On September 3, 2010 plaintiff Polawkowski filed her Complaint alleging identical torts and injuries as pled in Riscotti's complaint. On October 7, 2010 she filed a First Amended Complaint, naming Cuyahoga County as a defendant, alleging torts and

injuries identical to those pled in plaintiff Riscotti's Third Amended Complaint, to wit: tortuous injury as a result of third party petroleum products entering into the public sanitary system as far back in time as 1982. Polakowski First Amended Complaint at ¶ 96.

Pursuant to a May 2008 agreement with the City of Parma, defendant Cuyahoga County became obligated to perform routine maintenance on the public sanitary sewer identified in the Riscotti's and the Polakowski's complaints.

LAW & DISCUSSION

Ohio Rule of Civil Procedure 12 provides, in pertinent part:

(b) How to Present Defenses. Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . .

(6) failure to state a claim upon which relief can be granted. . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . .

(c) Motion for Judgment on the Pleadings, After the pleadings are closed – but early enough not to delay trial --- a party may move for judgment on the pleadings

Ohio R. Civ. P. 12 (b) and (c).

In order to state a claim against a defendant, a complaint must contain “a short and plain statement of the claim showing that the party is entitled to relief,” as required by Civ. R. 8(A)(1). The purpose of Civ. R. 8(A) “is to notify the defendant of the legal claim against him.” *Wilson v. Riverside Hosp.* (1985), 18 Ohio St.3d 8, 10. In determining whether a motion to dismiss for failure to state a claim should be granted, a court must determine whether the complaint's allegations constitute a claim under Civ. R. 8(A), presuming all factual allegations to be true and making all reasonable inferences in

favor of the plaintiff as admitted. *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192.

Determination of a motion for judgment on the pleadings under O. R. Civ. P. 12(C) is restricted to the allegations in the pleadings and any writings attached to the complaint. Dismissal is appropriate where a court (1) construes the material allegations in the complaint, with all reasonable inferences to be drawn there from, in favor of the nonmoving party as true, and (2) finds beyond doubt, that the plaintiff could prove no set of facts in support of their claim that would entitle them to relief. Granting of a judgment on the pleadings is only appropriate where the plaintiff has failed to allege a set of facts which, if true, would establish the defendant's liability. *Cleveland Financial, L.L.C.*, Ohio App. 8 Dist., 2009 WL 1629707, citing *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161; *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570; *Walters v. First Natl. Bank of Newark* (1982), 69 Ohio St.2d 677.

A. Plaintiff Riscotti's Third Amended and Plaintiff Polakowski's First Amended Complaints Are Barred by The Statute of Limitations Set Fort in O.R.C. §2744.04

O.R.C. §2744.04(A) unequivocally states that “an action against a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, . . . shall be brought within two years after the cause of action accrues, or within any applicable shorter period of time for bringing the action provided by the Revised Code.” The Third Amended Complaint of Plaintiff Riscotti and the First Amended Complaint of Polakowski clearly admit that all plaintiffs’ causes of action accrued on or around 1982 -

- twenty five (25) years before Cuyahoga County became obligated, via contract with the City of Parma, to perform routine sewer maintenance on the sanitary sewers sub judge. See Riscotti Third Amended Complaint at ¶77 and Polakowski First Amended Complaint at ¶ 96. Clearly, the allegations in both complaints fail to establish, claim or plead a violation of law that falls within the statutory limitations set forth O.R.C. §2744.04. Plaintiff's complaint clearly fails to state a claim upon which relief can be granted.

Wherefore, for the foregoing reasons, plaintiffs Complaints should be dismissed pursuant to Ohio R. Civ. P. 12(B)(6) or alternatively pursuant to Ohio R. Civ. P. 12(C) at plaintiffs costs. Notice to that effect is earnestly solicited.

Respectfully submitted,

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Appendix 2

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARY POLAKOWSKI, ET AL.
ALESSANDRA RISCATTI, ET AL.
Plaintiffs

v.

CUYAHOGA COUNTY, ET AL.
Defendants

CASE NO. CV 10 714827
CV 10 735966

Hon. Lance Mason

Defendant Cuyahoga County's
Motions Pursuant to
O. R. Civ. P. 12(C) and/or
O. R. Civ. P. 56 On The Issues of
Immunity and Causation

Now comes Defendant Cuyahoga County, by and through the undersigned Counsel, who respectfully moves this honorable Court to dismiss this action pursuant to Ohio R. Civ. P. 12(C) or 56. A memorandum in support is attached hereto and incorporated herein by reference.

Respectfully submitted,

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By:



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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARY POLAKOWSKI, ET AL.)	CASE NO. CV 10 714827
ALESSANDRA RISCATTI, ET AL.	)	CV 10 735966
Plaintiffs)	
	)	Hon. Lance Mason
)	
v.	)	Memorandum In
	)	Support of Motions
	)	Pursuant to Ohio R. Civ. P. 12(C)
	)	and/or O. R. Civ. P. 56 on the
CUYAHOGA COUNTY ET AL.	)	Issues of Immunity and Causation
Defendants)	

FACTS

On May 1, 2008 Cuyahoga County entered into an agreement with the City of Parma for maintenance of sanitary and storm sewerage systems.¹ Exhibit A, Affidavit of William Schneider, Cuyahoga County Sanitary Engineer. Pursuant to this agreement the County provides the following sanitary sewerage core services:

- mainline sanitary sewer cleaning and televising;
- maintenance of sanitary mainlines in the public rights of way;
- engineering (plan review and approval only);
- sanitary sewer lateral cleaning in the public right-of-way.

The County has no responsibility for sanitary sewer maintenance, cleaning or inspection on private property. Id., see also Ohio Plumbing Code (2007); Parma Codified

¹ Cuyahoga County's Motion to Dismiss pursuant to the statute of limitations is currently pending before the Court. Riscotti's Third Amended Complaint and Polakowski's First Amended Complaint naming the Sanitary Engineer as a defendant were both filed more than two years after the commencement of the agreement between Parma in violation of the 2 year statute of limitations set forth in O.R.C. 2744.04

Ordinances, Chapters 1561, 1565 (adopting Ohio Plumbing Code and O.A.C. 4101:2-56 to 4101:2-69), 1571, 1575.

Riscotti's Third Amended Complaint

The Riscotti's have owned and occupied the residence at 7367 State Road, Parma, Ohio since 1960. Riscotti, Third Amended Complaint at ¶¶1-2. On October 7, 2010 Riscotti filed her third complaint, naming Cuyahoga County as a defendant. It alleges injury to numerous persons and properties resulting from third party drainage of petroleum products into the public sanitary sewer system since 1982. The complaint admits that Cuyahoga County is a political subdivision of the state. It asserts that the Cuyahoga County Sanitary Engineer breached its duty to properly maintain and operate the "sanitary sewer lines servicing. . . . the homes of each of the Plaintiffs." Id. at ¶¶ 50-51; 131-133. The complaint also alleges that Cuyahoga County breached its duty to destroy the offending sanitary sewer drain pipes. Id. at ¶¶ 131 – 133.

Apparently, the ground water drains at a nearby service station were connected to the sanitary sewerage system, allowing ground water contaminated with gasoline to be "repeatedly and illegally . . . discharged into the sanitary sewer main" Id. at ¶75. The alleged illegal discharge occurred for years --- "especially . . . 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. More specifically, the complaint alleges that every day since 1982 there was a physical invasion of Plaintiff's properties by toxic gasoline vapors and substances originating from the service station and entering Plaintiff's homes via the sanitary sewerage system. Id. at ¶77.

Polakowski's First Amended Complaint

On September 3, 2010 plaintiff Polakowski filed her original complaint. On October 7, 2010 she filed a First Amended Complaint naming Cuyahoga County as a defendant. The complaint alleges torts and injuries identical to those pled in plaintiff Riscotti's Third Amended Complaint, to wit: tortuous injury resulting from petroleum products entering into the public sanitary system (as far back in time as 1982) causing a physical invasion of Plaintiff's properties via the sanitary sewer system. Polakowski First Amended Complaint at ¶ 96. The allegations of liability asserted in Polakowski are identical to those asserted in Riscotti. See, Polakowski First Amended Complaint at ¶¶ 79, 80, 94, 96, 115, 117, 120, 121, 135 – 137.

Cuyahoga County timely answered each complaint asserting, inter alia, governmental immunity as an affirmative defense.

LAW & DISCUSSION

A. O. R. Civ. P. 12 (C) and O. R. Civ. P. 56

Ohio Rule of Civil Procedure 12 provides, in pertinent part:

(C) Motion for Judgment on the Pleadings, After the pleadings are closed – but early enough not to delay trial --- a party may move for judgment on the pleadings

Ohio R. Civ. P. 12 (C).

Decisions on Civ. R. 12(B)(6) motions are conclusions of law. *State ex rel. Drake v. Athens Cty. Bd. of Elections* (1988), 39 Ohio St.3d 40. Determination of a motion for judgment on the pleadings under O. R. Civ. P. 12(C) is restricted to the allegations in the pleadings and any writings attached to the complaint. Dismissal is appropriate where a court construes the material allegations in the complaint, with all reasonable inferences to

be drawn there from, in favor of the nonmoving party as true, and finds beyond doubt that the plaintiff can prove no set of facts in support of their claim that entitles them to relief. Granting judgment on the pleadings is appropriate where the plaintiff fails to allege a set of facts which, if true, would establish the defendant's liability. *Cleveland Financial, L.L.C.*, Ohio App. 8 Dist., 2009 WL 1629707, citing *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161; *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570; *Walters v. First Natl. Bank of Newark* (1982), 69 Ohio St.2d 677.

O. R. Civ. P. 56(B) provides, in pertinent part, that “[a] party against whom a claim, counterclaim, or cross-claim is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim. O. R. Civ. P. 56(C) provides that “[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, . . . , if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment shall be rendered if it appears from the evidence or stipulations that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. *Vahila v. Hall* (1997), 77 Ohio St.3d 421; citing, *Dresher v. Burt* (1996), 75 Ohio St.3d 280. The moving party bears the burden of informing the trial court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. *Id.* Thereafter, the burden shifts to the non-moving party to set forth specific facts demonstrating a genuine issue of material fact for trial. *Id.* A

motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media*, (1991), 59 Ohio St.3d 108.

B. The Sanitary Engineer is Immune From Plaintiff's Claims

At bar, Cuyahoga County is entitled to immunity pursuant to O.R.C. §2744.02 on Plaintiffs' theory of liability – that the publicly available sanitary sewerage system facilitated the entry of noxious gas onto plaintiff's property and into their homes. No genuine issue of material fact exists concerning Cuyahoga County's conduct in this action. The public sanitary sewers in question were operating properly at all times. Plaintiffs can produce no evidence to show that the sewers in question were blocked or obstructed in any way at any time. Indeed, Plaintiffs complaint (and their theory of liability) admits that the sanitary sewerage system operated as designed and intended. Finally, Defendant is entitled to judgment as a matter of law because Plaintiffs have admitted that their injuries, if any, were caused by defects in their private household sanitary facilities, not by the public sanitary sewerage facilities.

O.R.C. Chapter 2744 governs political subdivision tort liability. To determine whether a political subdivision is entitled to Chapter 2744 immunity, the court must engage in a three-tiered analysis. *Hubbard v. Canton Cty. Schl. Bd. Of Ed.* (2002), 97 Ohio St.3d 451, citing *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 28; see also *Greene Cty. Agricultural Soc. v. Liming* (2000), 89 Ohio St.3d 551. First, the court must determine whether the entity claiming immunity is a political subdivision and whether the alleged harm occurred in connection with either a governmental or proprietary function. R.C. 2744.02(A)(1); *Hubbard*, at ¶ 10.

Plaintiffs complaints admit that the Cuyahoga County is a political subdivision. The general rule set forth in R.C. §2744.02(B) is that a political subdivisions is not liable in damages unless one or more of the enumerated exceptions to immunity apply. *Id.* at ¶12, citing *Cater*, supra at 28. If an exception to immunity applies, the court must determine if any of the R. 2744.03 defenses or immunities may be asserted to establish non-liability. *Estate of Ridley v. Hamilton Cty. Bd. of Mental Retardation and Developmental Disabilities* (2002), 150 Ohio App.3d 383, citing *Cater*, 83 Ohio St.3d at 28.

Plaintiffs' theory of liability asserts that the public sanitary sewerage system caused injury by permitting noxious gas to enter onto plaintiff's property and into their homes. More specifically, Plaintiffs assert that the Cuyahoga County Sanitary Engineer breached its duty to Plaintiffs' by failing to:

- prevent the transmission of noxious gases onto their properties; and/or
- "destroy the offending drain pipes".

Riscotti, Third Amended Complaint at ¶¶50-51, 131-133.

In order to determine whether Cuyahoga County is entitled to raise the shield of immunity, some discussion of the design and operation of the public and private sanitary sewerage systems is warranted.

1. The Public And Private Sanitary Systems Are Open, Gravity Based Systems

The public and private sanitary sewerage systems serving the Plaintiffs residences are open, gravity based systems as required and prescribed by the Ohio Plumbing Code. Exhibit A, Affidavit of William Schneider, Cuyahoga County Sanitary Engineer; see also Ohio Plumbing Code (2007); Parma Codified Ordinances, Chapters 1561, 1565 (adopting

Ohio Plumbing Code and O.A.C. 4101:2-56 to 4101:2-69), 1571, 1575. Gravity based sanitary systems are designed to facilitate the discharge of household sanitary waste² from a home into the public sanitary sewerage system. Id. When waste is discharged from a sink, toilet or drain, gravity pulls the waste through the private sewerage facilities into the public sanitary sewerage facilities located in the public rights of way.³ Id. The privately owned sanitary system at each residence includes a soil stack (vent pipe) that rises through the structure and extends several feet above the roof.⁴ Id. The soil stack facilitates the discharge of residential sanitary waste by preventing the creation of vacuum pressure to oppose/counteract the forces of gravity. The soil stack is designed to “openly” vent sewer gases from the top of the soil stack (above the roof) into the environment. Id.

2. The Design and Construction of The Public Sanitary System Is An Immune Governmental Function.

A political subdivision’s right to the immunities and defenses set forth in O.R.C. Chapter 2744 is a question of law. *Conley v. Shearer* (1992), 64 Ohio St. 3d 284. The design and construction of a sewer system is expressly defined to be a governmental

² Household sanitary waste includes all discharges from the sinks, toilets and drains within a residential or commercial structure.

³ Public sanitary facilities are designed to be located in public rights of way below (deeper) private sanitary facilities.

⁴ By design, sewer gases continuously travel through the soil stack and vent into the environment at the roof of each structure connected to the system. “Traps”, filled with water, in each drain prevent the passage of noxious gases from the soil stack through each plumbing fixture. This process is well described on video at <http://www.youtube.com/user/bigredhatkids#p/u/27/az9DI-WUcy4>.

Homeowner’s are responsible to construct and maintain their private sanitary sewer lines between the house and the public right of way. Id.

function in O.R.C. 2744.01(C)(2)(1). Therefore, Cuyahoga County (as well as Parma and NEORS) are entitled to R.C. §2744.02(B) immunity because none of enumerated exceptions to immunity set forth in O.R.C. 2744.02(B)(1-4) apply.

Plaintiffs complain that the venting of noxious sewer gases through each residential property connected to the system caused injury. Clearly, they seek to attach liability to the design of the system, an immune governmental function per O.R.C. 2744.01(C)(2)(1). Plaintiffs allegation that the Sanitary Engineer's conduct falls within the plain language of O.R.C. 2744.02(B)(2) is disingenuous⁵, because the complaint fails to identify any conduct that constitutes a proprietary function, let alone a breach of duty associated with a proprietary function. Plaintiffs can produce no facts to show that Sanitary Engineer improperly maintained or negligently inspected the public sanitary sewers. Indeed, Plaintiff's complaint admits that the sewers were open, flowing and functioning properly. Open and flowing public sanitary sewer systems are designed to permit the venting of noxious sewer gases into the environment through private soil stacks (vent pipe). Exhibit A; see also Ohio Plumbing Code (2007); Parma Codified Ordinances, Chapters 1561, 1565 (adopting Ohio Plumbing Code and O.A.C. 4101:2-56 to 4101:2-69), 1571, 1575.

Plaintiff can produce no evidence creating a genuine issue of material fact on the issue of whether the sewers were obstructed, impeded or functioning improperly. Nor can they create a genuine issue of material fact regarding any inspection because the system was admittedly operating properly, as designed and required by law.

⁵ Under O.R.C. 2744.02(B)(2) immunity does not attach "for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions.

Accordingly, judgment as a matter of law is warranted. See *Ezerski v. Medenhall*, 188 Ohio App.3d 126 (2nd App.Dist., 2010, city liable for failure to prevent obstruction) citing *Portsmouth v. Mitchell Mfg. Co.* (1925), 113 Ohio St. 250, 255 (the city's duty to maintain its sewer system requires it to take reasonable steps to prevent obstructions that could cause a backup); *Yetts. v. Toronto*, 1999 WL 689964 (Jefferson Cty. Appeals, sewer backup caused by an obstruction is a maintenance issue); *Steiner v. Lebanon* (1973), 40 Ohio App.2d 219 (city liable to plaintiff for failing to identify and remove obstruction); *Moore v. Streetsboro*, 2009 Ohio 6511 (Ohio App., 11th Dist); see also, *Doud v. Cincinnati* (1949) 152 Ohio St. 123, 137. Accordingly, Plaintiffs claims fail as a matter of law.

3. The Sanitary Engineer Owes No Duty To Plaintiffs To “Destroy The Offending Drain Pipes”

Plaintiffs allegation that the Sanitary Engineer has a duty to “destroy the offending drain pipes” is equally flawed. The law of Ohio is clear. Whenever a public sanitary sewerage system becomes accessible to a property, the property *shall* be connected directly to the sewerage system to protect the health and safety of the public. *DeMoise v. Dowell* (1984), 10 Ohio St. 3d 92, emphasis added. No duty exists requiring the modification or destruction of the sanitary system, especially when the system is operating properly. *Eassman v. Portsmouth* 2010 Ohio 4837 (Ohio App. 4th Dist. 2010). At bar, the County Sanitary Engineer owed no duty to Plaintiffs to “destroy” their connections to the sewerage system or to alter the design and construction of the system.⁶ Contrarily, Defendant’s duty was to take all reasonable steps to make sure the sewers

⁶ Clearly, destruction of plaintiffs sewer connections would create a public nuisance requiring the vacation of all Plaintiffs residences due to a lack of sanitary facilities.

were open, flowing and free from obstruction. No evidence exists to remotely suggest a breach of that duty. Accordingly, the County Sanitary Engineer is entitled to judgment as a matter of law pursuant to Ohio R. Civ. P. 12(C) and 56.

C. Plaintiffs Have Admitted That Their Private Sewerage Facilities Directly and Proximately Caused Their Alleged Injuries.

Defendants' are also entitled to judgment as a matter of law in light of Plaintiffs admissions that their privately owned and maintained residential sewerage facilities directly and proximately allowed noxious sewer gas to enter into each residence. More specifically, Plaintiffs' answered Defendant's Request For Admissions as follows:

Request For Admission No.1.

Admit that on the evening of August 28, 2009 the sanitary system and the sanitary plumbing drainage systems in the residential structure located at 7367 State Road in Parma were functioning properly.

Answer:

**Objection, the phrase "functioning properly" is ambiguous and plaintiffs do not understand what the question is asking. Without waiving this objection,
Deny, because the sanitary sewer system was delivering toxic gasoline particles and vapors into each plaintiff's home.**

Request For Admission No.2

For each plaintiff admit that, at all times relevant to the events set forth in the Complaint herein, the sanitary system and the sanitary plumbing drainage systems in the residential structure were functioning properly.

Answer:

**Objection, the phrase "functioning properly" is ambiguous and plaintiffs do not understand what the question is asking. Without waiving this objection,
Deny, because the sanitary sewer system was delivering toxic gasoline particles and vapors into each plaintiff's home.**

Request For Admission No.4

For each plaintiff, admit that, at all times relevant to the complaint, the sanitary and/or plumbing drainage system within each residence functioned/operated to properly permit the discharge of sanitary waste from the residence into the public sanitary sewerage system.

Answer:

Objection, the phrase “functioned/operated to properly permit” is ambiguous and the plaintiffs do not understand what the question is asking. Also, the question arguably calls for an expert opinion. Since the question is unclear, Deny.

Exhibit B, Plaintiffs’ Response to Cuyahoga County’s Requests for Admissions.

The plain, simple language of each request asks the Plaintiffs to admit that the sanitary systems *in their residential structures* were functioning properly *by permitting the discharge of sanitary waste from each residence into the public sanitary sewerage system*, as required by law. In each response, Plaintiffs admit that the residential plumbing systems, *exclusively owned and controlled by the Plaintiffs*, failed by permitting noxious gas to escape into their homes. Therefore, because Plaintiffs can produce no evidence to deny their exclusive control over their respective residential plumbing systems, systems they admit malfunctioned, no genuine issue of material fact exists concerning the direct and proximate cause of Plaintiff’s alleged injuries. Summary judgment is clearly warranted in favor of the Defendants.

WHEREFORE, for the foregoing reasons, plaintiffs Complaints should be dismissed pursuant to O.R. Civ. P. 12(C) and/or O.R. Civ. P. 56. Notice to that effect is earnestly solicited.

Respectfully submitted,

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Certificate of Service

Cuyahoga County's Motion To Dismiss Pursuant to O. R. Civ. P. 12 (B)(6) or (C) and Memorandum In Support Thereof was sent this 4th day of May, 2011, via electronic mail to:

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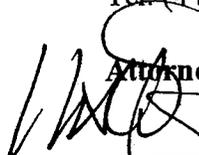
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Appendix 3

Drew Legando

From: CLERK_E-NOTICE@CUYAHOGACOUNTY.US
Sent: Thursday, August 11, 2011 9:30 AM
To: Drew Legando
Subject: Cuyahoga County Clerk of Courts Notification [CV-10-714827]

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Case: CV-10-714827

Case Caption: ALESSANDRA RISCATTI ETAL vs. PRIME PROPERTIES LIMITED PARTNERSHIP ETAL

Judge: LANCE T MASON

Room: 16C JUSTICE CENTER

Docket Date: 08/11/2011

Notice Type: (JEPC) JOURNAL ENTRY NOTICE Notice ID/Batch: 17933451 - 950262

To: DREW LEGANDO

DEFT CUYAHOGA COUNTY'S MTNS PURSUANT TO O.R.C. P. 12(C) AND / OR O.R.C. P. 56 ON THE ISSUES OF IMMUNITY AND CAUSATION MICHAEL A DOLAN (0051848), FILED 05/31/2011, IS DENIED IN PART. DEFENDANT CUYAHOGA COUNTY'S MOTION TO DISMISS PURSUANT TO CIVIL RULE 12(C) IS DENIED. THE COURT SHALL HOLD IT RULING AS TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IN ABEYANCE UNTIL THE CLOSE OF DISCOVERY. AT THAT TIME DEFENDANT SHALL BE PERMITTED TO RENEW ITS MOTION FOR SUMMARY JUDGMENT.

PLAINTIFF(S) ALESSANDRA RISCATTI(P1), ELISABETTA RISCATTI(P2), LASZLO BERES(P3), STEVEN CSOLLAK(P4), HELEN CSOLLAK(P5), JOHN DESSOFFY(P6), PHILOMENA DESSOFFY(P7), MARGARITA HARSOULAS(P8), PAUL HOFFMAN(P9), GAE HOFFMAN(P10), RICHARD KINZEL(P11), WENDY KINZEL(P12), DANIEL KINZEL(P13), TIMOTHY KINZEL(P14), TIMOTHY PODANY(P15), DANIEL PODNAY(P16), BENJAMIN PODANY(P17), ANDREW KINZEL(P18), WILLIAM KINZEL(P19), LAURA O'NEILL(P20), RALPH SCHILLO(P21), LAURA SCHILLO(P22), MIKE STANACZYK(P23), LINDA STANACZYK(P24), ROBERT STANACZYK(P25), KATHERINE STANACZYK(P26), CHARLES WHITE(P27), FRANCES WHITE(P28), EARNEST GALES(P29), JACQUELINE GALES(P30), ILEEN GALES(P31), MARIO TOMMASINI(P32), SHARON TOMMASINI(P33), SCOTT WILSON(P34) and CRYSTAL WILSON(P35) MOTION FOR LEAVE TO PLEAD TO RESPOND TO CUYAHOGA COUNTY'S MOTION FOR JUDGMENT ON THE PLEADINGS OR FOR SUMMARY JUDGMENT DREW LEGANDO 0084209, FILED 06/30/2011, IS GRANTED.

DEFT CITY OF PARMA'S MTN FOR JUDGMENT ON THE PLEADINGS MICHAEL P MALONEY (0038661), FILED 05/03/2011, IS DENIED.
D19 CITY OF PARMA SECOND MOTION FOR JUDGMENT ON THE PLEADINGS MICHAEL P MALONEY 0038661, FILED 06/30/2011, IS DENIED.
PLTFS MTN FOR ADMISSION PRO HAC VICE OF STEPHANIE N. BROOKS DREW LEGANDO (0084209), FILED 08/19/2010, IS GRANTED.
PLTFS MTN FOR ADMISSION PRO HAC VICE OF ALLEN M. STEWART DREW LEGANDO (0084209), FILED 08/19/2010, IS GRANTED.
PLTFS MTN FOR ADMISSION PRO HAC VICE OF STEVEN BAUGHMAN JENSEN DREW LEGANDO (0084209), FILED 08/19/2010, IS GRANTED.
P1 ALESSANDRA RISCATTI MOTION FOR ADMISSION PRO HAC VICE OF CHRIS NIDEL..... DREW LEGANDO 0084209, FILED 11/16/2010, IS GRANTED.
D10 NORTHEAST OHIO REGIONAL SEWER DISTRICT MTN TO DISMISS PLTFS' THIRD AMENDED COMPLAINT BY DEFT NORTHEAST OHIO REGIONAL SEWER DISTRICT JULIE A BLAIR 0077696, FILED 10/12/2010, IS DENIED.
D20 CUYAHOGA COUNTY OHIO MOTION TO DISMISS..... MICHAEL A DOLAN 0051848, FILED 05/05/2011, IS DENIED.
NOTICE ISSUED

On Copy:

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Appendix 4

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

2011 AUG 12 PM 12:40

MARY POLAKOWSKI, ET AL.	)	CASE NO. CV 10 714827
ALESSANDRA RISCATTI, ET AL.	)	CV 10 735966
Plaintiffs	)	GERALD E. FUERST
	)	CLERK OF COURTS
	)	CUYAHOGA COUNTY
	)	Hon. Lance Mason
)	
	)	Defendant Cuyahoga County's
v.	)	Motion Pursuant to
	)	Ohio R. Civ. P. 54(B)
	)	§ 2744.04 – Limitations of
CUYAHOGA COUNTY, ET AL.	)	Actions
Defendants)	

Now comes Cuyahoga County, by and through the undersigned Counsel, who respectfully moves this honorable Court to certify that there is no just reason for delay with regard to the Court's journal entries of August 11, 2011 concerning O.R.C. §2744.04 (limitations of actions). Defendant submits that a no just reason for delay determination is consistent with the interests of sound judicial administration given other appellate issues present as well as by the complexity of issues raised by the parties' motions and the Court's rulings herein. *Wisintainer v. Elcen Power Strut Co. (1993)*, 67 Ohio St. 3d 352.

Respectfully submitted,

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By: _____



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Certificate of Service

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A handwritten signature in black ink, appearing to be 'MAD', with a horizontal line underneath.

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

MARY POLAKOWSKI, ET AL.	)	CASE NO. CV 10 714827
ALESSANDRA RISCATTI, ET AL.	)	CV 10 735966
)	
Plaintiffs)	
	)	Hon. Lance Mason
)	
)	
	)	ORDER
)	
CUYAHOGA COUNTY ET AL.)	
)	
Defendants)	

Upon defendant Cuyahoga County's motion pursuant to Ohio R. Civ. P. 54(B), the Court hereby finds that there is no just reason for delay concerning the August 11, 2011 journal entries concerning O. R. C. §2744.04 (limitation of actions) and that this determination furthers the principles of sound judicial administration in this matter.

IT IS SO ORDERED.

Date:

HON. LANCE T. MASON

Appendix 5

In The
Supreme Court of Ohio

ALLESANDRA RISCATTI, ET AL

Plaintiffs-Appellees,

v.

PRIME PROPERTIES LIMITED
PARTNERSHIP, ET AL

Defendants

Case No. _____

On Appeal from the Cuyahoga County
Court of Appeals, Eighth Appellate
District

Court of Appeals
Case No. 97270

NOTICE OF APPEAL OF
DEFENDANT-APPELLANT CUYAHOGA COUNTY

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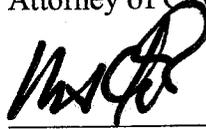
*Attorneys for Defendant-Appellant
Cuyahoga County*

Defendant Appellant Cuyahoga County gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule 2.1(A)(3), from a decision of the Eighth Appellate District Court of Appeals journalized in Case No. 97270 on June 28, 2012. Date stamped copies of the Eighth District's Journal Entry and Opinion and the Cuyahoga County Common Pleas Court's Opinion and Judgment Entries are attached as Exhibits A and B, respectively, to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons sets forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

William D. Mason, Prosecuting
Attorney of Cuyahoga County



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CERTIFICATE OF SERVICE

A copy of the forgoing Notice of Appeal of Defendant Appellant Cuyahoga County was served upon the following by regular U.S. Mail this 1st day of August, 2012.

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Appendix 6

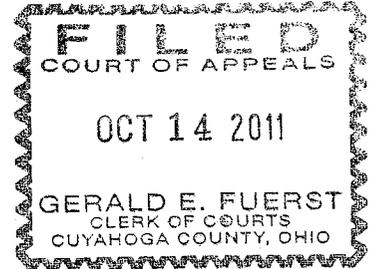
IN THE OHIO COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY

CASE NO. 11-097274

ALLESSANDRA RISCATTI, *et al.*
Plaintiff-Appellees

vs.

CITY OF PARMA, *et al.*
Defendant-Appellants



**MOTION TO DISMISS APPEAL
FOR WANT OF JURISDICTION**

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INTRODUCTION

Three of the defendants below filed motions to dismiss premised on (a) the statute of limitations and (b) sovereign immunity. The trial court denied these motions. *See Journal Entry of August 10, 2011.* The defendants requested the trial court certify its journal entry to make it appealable.¹ Over the plaintiffs' objection, the trial court amended its journal entry to say "there is no just reason for delay." *See Journal Entry of October 5, 2011.* Despite this Rule 54(B) certification, the journal entry denying the motions to dismiss does not constitute a final order because (a) a denial of a motion to dismiss premised on the statute of limitations does not satisfy the definition of final order set forth in R.C. § 2505.02, and (b) a denial of a motion to dismiss premised on sovereign immunity cannot be appealed under R.C. § 2477.02(C) when the trial court does not provide written analysis of the immunity issue in its judgment entry. Therefore, this Court has no jurisdiction to review the matter and the appeal must be dismissed.

LAW AND ARGUMENT

"It is well established that an order must be final before it can be reviewed by an appellate court. If an order is not final, then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. That is, "Ohio law provides that appellate courts have jurisdiction to review only the final orders or judgments of

¹ The defendants, the City of Parma, Cuyahoga County, and the Northeastern Ohio Regional Sewer District have each filed a separate notice of appeal. The plaintiffs have moved to have these appeals consolidated, and the plaintiffs are filing identical motions to dismiss under each appellate case number.

inferior courts in their district. See, generally, Section 3(B)(2), Article VI of the Ohio Constitution; R.C. § 2505.02. If an order is not final and appealable, then an appellate court has no jurisdiction to review the matter and it must be dismissed." *Beisel v. Pavlick*, 2004-Ohio-6759 (5th Dist.), at ¶ 14.

"Generally, an order denying a motion to dismiss is not a final order." *Polikoff v. Adam* (1993), 67 Ohio St.3d 100, 103. Revised Code § 2505.02(B) defines a final appealable order as one of the following:

- (1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
- (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;
- (3) An order that vacates or sets aside a judgment or grants a new trial;
- (4) An order that grants or denies a provisional remedy ...
- (5) An order that determines that an action may or may not be maintained as a class action.

Since "a motion to dismiss is a procedural mechanism that tests the sufficiency of the allegations in the complaint," an order denying a motion to dismiss does not constitute a final order. *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, at ¶ 8. Indeed, the defendant "still has the opportunity to prevail at trial on the merits of her case. Furthermore, should she not prevail at trial, she will then have the occasion to appeal that judgment." *Hughes v. Zordick*, 2001-Ohio-3523, 2001 Ohio App. Lexis 1913 (7th Dist), at *4-5.

In *Hughes*, the court of appeals held that a trial court's judgment denying "a motion to dismiss for failure to comply with the statute of limitations was not a final appealable order," *Beisel*, 2004-Ohio-6759 at ¶ 23, because "[t]he trial court's order denying appellant's motion to dismiss does not fit into any of the categories listed in R.C. § 2505.02(B). Such a ruling does not determine the action or prevent a judgment." *Hughes*, 2001 Ohio App. Lexis 1913 at *4. In *Beisel*, the Fifth District reached the same result: the denial of a motion to dismiss or for summary judgment premised on the statute of limitations "does not meet any of the criteria identified in R.C. § 2505.02(B)." *Beisel*, 2004-Ohio-6759 at ¶ 23. And the trial court could not transform a non-final order into a final appealable order. As the court of appeals held,

We are cognizant of the fact that the trial court included language pursuant to Civil Rule 54(B) in its ... Judgment Entry. Specifically, the trial court included language which states that "this is a final appealable order, and there is no just reason for delay."

However, "the mere incantation of the required language does not turn an otherwise non-final order into a final appealable order. *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 96. To be final and appealable, the judgment entry must also comply with R.C. § 2505.02. *Id.*

Id. at ¶ 24, 27. In the case *sub judice*, the defendants have noticed for appeal the issue of the statute of limitations. The trial court's order denying their motions to dismiss on that issue, however, is not final and cannot be appealed until after judgment. Therefore, the appeal should be dismissed.

The defendants have also noticed for appeal the issue of sovereign immunity. For the reasons set forth above, the journal entry denying their motions to dismiss on this issue is not final under R.C. §2505.02. Presumably, however, the defendants are relying on R.C. § 2744.02(C) to render this issue ripe for appeal. That section says, “[a]n order that denies 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.”

“The Ohio Supreme Court has held, however, that there is no final appealable order when the trial court does not provide an explanation for its decision to deny a motion to dismiss” premised on immunity. *Young v. Cuyahoga County Bd. of MMRDD*, 2011-Ohio-2291 (8th Dist.), at ¶ 11 (citing *State Auto. Mut. Ins. Co.*, 108 Ohio St.3d 540). Here, since the trial court’s judgment entry “does not set forth the reasons for the trial court’s decision [it] is therefore not a final appealable order, regardless of the [appellants’] reliance on R.C. § 2744.02(C) as the basis for jurisdiction.” *Id.* at ¶ 8, 16. This Court has been consistent in this holding. In *Wade v. Stewart*, 2010-Ohio-164, at ¶ 8, this Court held “there is no final appealable order when the trial court provides no explanation for its decision to deny a motion to dismiss” premised on immunity. In *Grassia v. Cleveland*, 2008-Ohio-3134, at ¶ 8, this Court held “regardless of whether R.C. § 2744.02(C) applies, there is no final, appealable order. The trial court provided no explanation for its decision to deny the motion to dismiss.”

Here, the trial court “provided no explanation for its decision to deny the motion to dismiss. The court made no determination as to whether immunity applied, [or] whether

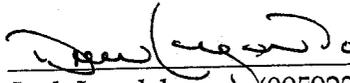
there was an exception to immunity ..." *State Auto. Mut. Ins. Co.*, 2006-Ohio-1713 at ¶ 10. Indeed, it is inappropriate for a court of appeals to consider "the issue of immunity prematurely. The record below must be developed in order to reach this issue." *Id.* at ¶ 12. "At this juncture, the record is devoid of evidence to adjudicate the issue of immunity because it contains nothing more than [the pleadings]. No fact-finding or discovery has occurred. The trial court's denial of the motion to dismiss merely determines that the complaint asserted sufficient facts to state a cause of action." *Id.* at ¶ 11. Thus, there is no final order and the appeal must be dismissed for lack of jurisdiction.

Once again, the trial court's application of the Civil Rule 54(B) language cannot make this issue ripe for appeal because the phrase "is not a mystical incantation which transforms a non-final order into a final appealable order." *Wisintainer v. Elcen Power Strut Co.*, 67 Ohio St.3d 352, 354, 1993-Ohio-120.

CONCLUSION

The trial court's denial of the defendants' motions to dismiss premised on the statute of limitations is not a final order under R.C. § 2505.02 because it does not determine the action. The trial court's denial of the defendants' motions to dismiss premised on sovereign immunity is not a final order under R.C. §2744.02(C) because it does not contain an analysis of the immunity issue. Since neither order is final, they cannot be made appealable under Civil Rule 54(B). As such, this court lacks jurisdiction and this appeal must be dismissed.

Respectfully submitted,



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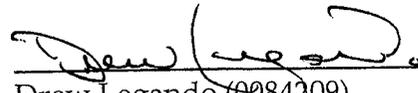
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Appendix 7

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY, OHIO

CASE NO's. CA – 11 097254, 097270, 097274

MARY POLAKOWSKI, ALESSANDRA RISCATTI, et al,

Plaintiff-Appellees

v.

PRIME PROPERTIES LIMITED PARTNERSHIP, et al.

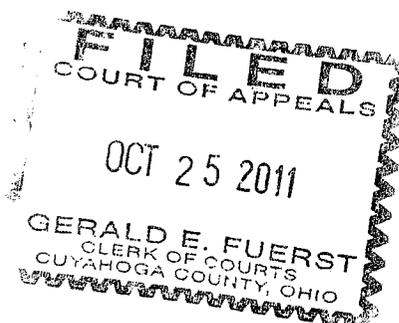
Defendant-Appellants

APPEAL FROM THE CUYAHOGA COUNTY COURT OF COMMON PLEAS
CASE Nos. CV 10-741827, CV 10-735966

BRIEF OF DEFENDANT-APPELLANTS CITY OF PARMA, CUYAHOGA COUNTY AND
NORTHEAST OHIO REGIONAL SEWER DISTRICT IN OPPOSITION TO PLAINTIFF
APPELLEE'S MOTION TO DISMISS FOR WANT OF JURISDICTION

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CERTIFICATE OF SERVICE11

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INTRODUCTION, BACKGROUND AND PROCEDURAL HISTORY

This matter involves over one hundred individual Plaintiffs who have filed a trespass action against fourteen corporate and governmental Defendants. Plaintiff's originally filed two separate actions¹ alleging that since 1982 groundwater contaminated with gasoline drained from a gas station at 7149 State Road, Parma, Ohio into the public sanitary sewerage system. More specifically, the complaints allege that a groundwater overflow drain beneath the gasoline storage tanks regularly discharged contaminated ground water into the sanitary sewerage system since 1982. Once discharged, gasoline and other sewer vapors entered onto Plaintiffs properties through their individual private sanitary connections to the public sanitary sewerage system. The vapors then allegedly travelled through each Plaintiff's private sanitary lines into their homes.

Riscatti: Case No. 10-714827:

Plaintiff Appellees commenced the Riscatti lawsuit on January 6, 2010 against Emro Marketing Co., Speedway SuperAmerica, LLC, United Petroleum Marketing LLC, Petroleum Station Properties, LLC, High Point Marathon, Ltd., Prime Properties Limited Partnership, Marathon Petroleum Company, Marathon Oil Company, Chevron and the Northeast Ohio Regional Sewer District (herein "NEORS"). On March 12, 2010, Appellees filed a first amended complaint adding Texaco Inc. as a defendant. In response, NEORS, Emro, Speedway and Marathon filed Ohio R. Civ. P. 12(B)(6) motions.

On July 20, 2010 Appellees filed an amended complaint naming additional defendants.² NEORS, BBP, Pratt, Speedway and Marathon filed motions to dismiss the amended complaint as well. On October 6, 2010 Appellees filed a third amended complaint adding the City of Parma (herein

¹ Riscatti et al. v. Prime Properties LLC, et al. and Polakowski et al. v. Prime Properties, LLC, et al. Cuyahoga County Common Pleas Case Nos. CV 10 714827 and CV 10 735966 respectively.

² BBP Partners, LLC., Thomas Pratt, inter alia; these defendants were voluntarily dismissed on Sept. 28, 2010;

“Parma”) and Cuyahoga County (herein “Cuyahoga”) as defendants. NEORSD, Speedway and Marathon renewed their Ohio R. Civ. P. 12(B)(6) motions in response. On November 10, 2010 Cuyahoga answered. Parma answered on November 29, 2010. Both parties subsequently filed motions pursuant to Ohio R. Civ. P 12(B)(6), 12(C) and 56 asserting O.R.C. Chapter 2744 immunity and limitations defenses. After responding to Appellee’s written discovery in January 2011, Cuyahoga filed a 12(B)(6) motion raising the statutory limitations period set forth in O.R.C. §2744.04 on May 5, 2011, and a Rule 12(C)/56 motion raising the shield of governmental immunity on May 31, 2011. Cuyahoga’s Ohio R. Civ. P. 12(C) / 56 motion included the affidavit of the Cuyahoga County Sanitary Engineer attesting that the public sanitary sewers in suit were, at all times relevant to the allegations of the complaint, open, unobstructed and operating properly. The Sanitary Engineer also attested that the public and private sanitary sewerage systems in question were gravity based systems designed to vent noxious gases through each private sanitary connection in order to facilitate the proper functioning of each private sanitary system. NEORSD joined Cuyahoga’s motion for summary judgment.

Polakowski: Case No. 10-735966

The Polakowski complaint was filed on September 3, 2011 naming all Riscatti defendants (except Parma and Cuyahoga) and alleging identical facts and circumstances. All parties filed identical motions to dismiss pursuant to Ohio R. Civ. P 12(B)(6). On October 6, Appellees filed a first amended complaint naming Parma and Cuyahoga as defendants. Parma and Cuyahoga timely answered. At the close of the pleadings and exchange of written discovery, Parma and Cuyahoga moved to dismiss the complaint under Ohio R. Civ. P 12 B(6), 12(C) and 56 as previously stated.

The Consolidated Cases:

A pretrial was held on May 24, 2011 wherein the trial court directed all parties to continue written discovery pending oral arguments on the defendants various immunity and limitations motions.³ Oral arguments were held on July 12, 2011. On August 11, 2011, the Appellant's 12(B)(6) and (C) motions were denied by the court. Cuyahoga's Rule 56 motion raising the shield of immunity under O.R.C. §2744.02 was "*denied in part.*" On the same date, the court granted co-defendant Marathon Oil's Rule 12 motions asserting the general four (4) year statute of limitations.⁴ The trial court specifically held that Appellee's were aware of their injuries since 1982 and were under a duty to investigate the cause of their injuries since that time. As a result, Appellee's trespass claims against Marathon were "unquestionably time barred" by the four (4) year statute of limitations, that personal injury claims against Marathon were barred by the general two (2) year statute of limitations, and that the four year limitations period expired "no later than March 1, 2005".

The Appeal:

The City of Parma ("Parma"), Cuyahoga County ("Cuyahoga") and NEORS D appealed the trial court's August, 2011 order denying their separate motions raising O.R.C. 2744 immunity and the two (2) year limitations period set forth in O.R.C. §2744. On October 6, 2011 pursuant to Appellants' Ohio R. Civ. P. 54(B) motion, the Court amended its judgment entry to reflect that no just cause for delay existed with regard to an appeal of its determination of the O.R.C. §2744.04 limitation issues.

³ Parma and Cuyahoga and Appellees complied with the trial court's directive and issued written discovery. Cuyahoga responded to Appellees R33-34 discovery requests on January 19, 2011. Parma and NEORS D also answered Appellees written discovery well in advance of Appellee's response to Appellants various motions for summary judgment and judgment on the pleadings.

Appellees timely answered Cuyahoga's Rule 33, 34 and 36 requests on April 1, 2011 but did not respond to Cuyahoga's document requests until August 24, 2011.

⁴ O.R.C. §2305.09.

Appellee's now assert that no final appealable order has been entered by the trial court concerning immunity or limitations, and that the present appeal should be dismissed for want of jurisdiction.

LAW AND ARGUMENT

1. AN ORDER DENYING A POLITICAL SUBDIVISION THE BENEFIT OF AN ALLEGED IMMUNITY FROM LIABILITY IS A FINAL ORDER UNDER O.R.C. §2744.02(C).

It is well established that an order must be final before it can be reviewed by an appellate court. If it is not final, then the appellate court has no jurisdiction. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17. Generally, the denial of summary judgment is not a final, appealable order. *Hubbell v. City of Xenia* (2007), 115 Ohio St.3d 77. However, denial of a political subdivision's motion for summary judgment seeking immunity is an exception to that general rule. *Id.* In *Hubbell*, the Supreme Court expressly determined that the denial of R.C. 2744 immunity upon summary judgment is a final and appealable order. *Id.*

The facts in *Hubell* are virtually identical to the facts sub judice. *Hubbell* filed a negligence action against the City of Xenia after sewage backed up in her home. Xenia moved "for summary judgment on all claims on the grounds there was no evidence and Xenia was otherwise entitled to immunity under O.R.C. §2744.02(A)(1) and 2744.03." *Id.* at 77, 78. The trial court denied the city's motion on the "basis that there was a question of fact as to whether Xenia was entitled to immunity under O.R.C. Chapter 2744." *Id.* Xenia appealed and the "Court of Appeals for Greene County dismissed the appeal, concluding that the trial court's decision denying summary judgment on Xenia's claim of immunity from liability was not a final, appealable order under O.R.C. §2744.02(C)." *Id.*, citing *Hubbell v. Xenia*, (2006) 167 Ohio App. 3d 294. The Supreme Court accepted a discretionary appeal after determining that a conflict existed between *Hubell*, *supra*; *Lutz v. Hocking Technical College*,

1999 WL 355187 (Athens Co., May 18, 1999) and *Estate of Grave v. Circleville*, 2006 WL 3691609 (Ross Co., 2006).

In finding that a denial of immunity under O. R.C. §2744.02 was a final appealable order in *Hubbell*, the Supreme Court expressly distinguished the procedural difference between Ohio R. Civ. P. 12(B)(6) motions and substantive dispositive motions under Ohio R. Civ. P. 12(C) and 56 concluding that where the record “contained evidence upon which the trial court denied the motion for summary judgment” a final, appealable order was present. *Id.* More specifically, the *Hubbell* court held that “[a] court of appeals must exercise jurisdiction over an appeal of trial court’s decision overruling a Ohio R. Civ. P. 56(C) motion in which a political subdivision” seeks immunity. *Id.* at 81. “Absent some other procedural obstacle, a court of appeals must conduct a de novo review of the law and facts. If, after that review, only questions of law remain, the court of appeals may resolve the appeal” or remand the case if material facts remain. *Id.*

Subsequent to *Hubbell*, the 8th District addressed the issue of final appealable orders under O.R.C. Chapter 2744 in no less than three (3) cases: *Grassia v. City of Cleveland*, 2008 WL 2536059⁵, *Wade v. Stewart*, 2010 WL 194475⁶, and *Young v. Cuyahoga County Board of MRDD, et al.*, 2011 WL 1844188.⁷ In *Grassia*, the court concluded that no final appealable order was present as the city’s Civil Rule 12(B)(6) motion and the trial court “provided no explanation for its decision to deny the motion to dismiss. . . . At this juncture, the record is devoid of evidence to adjudicate the issue of immunity because it contains nothing more than [the] third party complaint. . . .” *Grassia* at p. 2.

In *Wade*, the trial court denied the Cuyahoga Metropolitan Housing Authority’s Civil Rule 12(B)(6) motion asserting immunity under R.C. §2744.01. Upon appeal, this Court contrasted the

⁵ Before Judges McMonagle, Cooney and Dyke

⁶ Before Presiding Judge Cooney, Judges Gallagher and Kilbane

⁷ Before Judges E. Gallagher, Keough and Presiding Judge J. Sweeney

Supreme Court's decision in *Hubbell* with its decision in *State Auto Mut. Ins. Co. v. Titanium Metals Corp.* (2006), 108 Ohio St. 3d 540 and determined that no final appealable order resulted from the denial of a Civil Rule 12(B)(6) motion finding that "the record [was] devoid of evidence to adjudicate the issue of immunity because it contains nothing more than the . . . complaint and [the] motion to dismiss."⁸ Ultimately, the *Wade* panel found that no final appealable order was present because the claimed injuries occurred before the enactment date of O.R.C. §2744.02 – April 9, 2003, and the statute is not retroactive.⁹

In *Young*, the trial court denied the Cuyahoga County Board of Mental Retardation's Rule 12(B)(6) motion "without elaboration". *Young*, at p. 1, ¶5. The appeal was dismissed for lack of a final appealable order because no record on the issue of immunity was present. More specifically, the Court stated "[b]ecause the court denied the board's motion in this case without elaboration and there is therefore, no record on the issue of immunity, . . . there is no final appealable order and we must dismiss." *Id.*

At bar, a final appealable order exists because the record contains substantial evidence on the issue of immunity. Appellants and Appellees exchanged written discovery well in advance of Appellant's dispositive motions and the trial court's August 11, 2011 decision. Additionally, Cuyahoga's motion pursuant to Ohio R. Civ. P. 12(C)/56 included the affidavit of its Sanitary Engineer asserting that the public sanitary systems in suit were unobstructed and operating properly at all times relevant to the allegations of the complaint. The affidavit also asserted that the sanitary systems were

⁸ Judge Gallagher's concurrence expressly recognized the Supreme Court's decision in *Hubbell* "was not limited to summary judgment rulings."

⁹ At bar, the court's order with respect to Cuyahoga can only be considered final as Cuyahoga's alleged conduct commenced after the enactment of R.C. §2744.02(C) upon the execution of its contract with Parma in 2008. Likewise, the trial court's judgment as to Parma and NEORSD's is final and appealable as the alleged tortious conduct of those parties occurred both before and after the effective date of the statute.

gravity based and designed to transmit noxious gas and odors through each Appellee's private sanitary systems to permit proper functioning of the each household sanitary system and that Appellants were not responsible for the private sanitary facilities on Appellee's property.

Appellee's response did not challenge or otherwise contest the Sanitary Engineer's affidavit. They offered no evidence tending to show that public sanitary facilities in question were blocked or otherwise malfunctioning. They offered no evidence to contradict the Engineer's testimony that the sanitary system was designed to vent noxious gas through each plaintiff's private sanitary facilities. Indeed, their brief in opposition was completely unsupported, asserting only that the motion was premature. Appellee's response also failed to comply with Ohio R. Civ. P. 56 (E) which expressly prohibits a party from resting "upon the mere allegations or denials" in its pleadings to rebut proper affidavit testimony on critical material elements of a claim. As a result, the record contains substantial uncontroverted evidence on the issue of immunity specifically addressing the design, condition and operation of the public sanitary sewerage systems in question. Accordingly, a final appealable order as defined and required by *Hubbell, Grassia, Wade and Young*, supra, is before this Court.

2. THE O.R.C. §2744.04 LIMITATIONS OF ACTION DETERMINATION IS PROPERLY BEFORE THE COURT PURSUANT TO O.R.C. §2505.02 AND OHIO R. CIV. P. 54(B).

"A trial court is authorized to grant final summary judgment upon the whole case, as to fewer than all of the claims or parties in a multi-party or multi-claim actions, only upon an express determination that there is no just reason for delay. . . In that event, the judgment is reviewable upon the determination of no reason for delay, as well as for the error in granting of judgment." *Alexander v. Buckeye Pipeline Company* (1977) 49 Ohio St. 2d 158, citing *Whitaker-Merrell v. Geupel Co.* (1972), 29 Ohio St.2d 184 syllabus; *Imagine Nation Books, Ltd. v. STG Ents, Inc.*, 2011 WL 4090222 (8th Dist.); *Daniels v. Schottenstein Stores Corp.* 2011 WL 4489257 (8th Dist.).

An order must fit within any of the categories delineated in O.R.C. §2505.02 to be considered final. It must affect a substantial right in an action and prevent a judgment for or against a party on any issue or claim. *Id.* An order effects a substantial right if a party is foreclosed from appropriate relief. *Bell v. Mt. Sinai Med. Ctr.* (1993) 67 Ohio St.3d 60. The order must also contain a certification that no just reason for delay exists under Civil Rule 54(B). *Jenkins v. State Farm Mut. Auto. Ins. Co.* 2011 WL 4541364. “The general purpose of civ. R. 54(B) is to make a reasonable accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeal. *Id.* The trial court must make an express determination that no just reason for delay exists with respect to a specific journal entry affecting or terminating a party’s substantial rights.¹⁰ *State ex rel. A&D Limited Partnership v. Keefe* (1996), 77 Ohio St. 3d 50. A ruling under Rule 54(B) is the trial court’s “factual determination that the interests of sound judicial administration warrant an immediate appeal, and should not be disturbed absent an abuse of discretion. *Jenkins supra*; *Wisintainer v. Elcen Power Strut Co.* (1993), 67 Ohio St. 3d. 352.

At bar, the Court’s denial the two year statute of limitations in O.R.C. §2744.04 eviscerates a critical and substantial legal right, claim and defense of the Appellants. The dismissal of defendant Marathon via a separate two year statute of limitations also extinguishes all parties right to proceed against Marathon. The Court’s August 8, 2011 journal entry determined the four (4) year statute of limitations for trespass, as well as the two (2) statute of limitations for personal injuries, expired no later than 2005. Clearly, the court’s determination of the limitations period bars substantial statutory claims, rights and protections afforded the Appellants, while shielding other parties from identical claims under similar statutes.

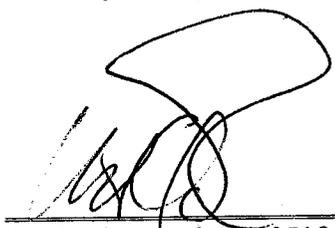
¹⁰ O.R.C. §2505.02

The Court's October 6, 2011 journal entry clearly satisfies Ohio R. Civ. P. 54(B) as it unequivocally determined that no just reason for delay exists with regard to its O.R.C. §2744.04 limitations determination. Clearly, the trial court's belief that sound judicial administration warrants the review of the limitations issues herein should be acknowledged and respected. The trial court's August 11, 2011 ruling is, therefore, a final, appealable order. Jenkins, supra, citing *Jacobs v. Jones*, 2011 Ohio 3313, ¶¶42-43 (concluding that an order granting some claims, but leaving other claims unresolved, constituted a final order); *Price v. Jilisky*, 2004 Ohio 1221, ¶12 (10th App. Dist., grant of summary judgment on a claim would necessarily prevent a judgment of that claim and would be final). Accordingly, the limitations issue is properly before the Court pursuant to O.R.C. §2505.02(A)(1) and Ohio R. Civ. P. 54(B).

WHEREFORE, for the forgoing reasons, Appellants respectfully request that Appellee's Motion to Dismiss be denied. Notice to that effect is earnestly solicited.

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