

IN THE SUPREME COURT OF OHIO

ALLESSANDRA RISCATTI, et al.,)	Case No. 2012-1307
)	
Plaintiff/Appellee,)	On Appeal from the
)	Cuyahoga County Court of Appeals,
vs.)	Eighth Judicial District
)	
CUYAHOGA COUNTY,)	Court of Appeals Case No. 11 CA 97270
)	
Defendant/Appellant.)	

REPLY BRIEF OF APPELLANT CUYAHOGA COUNTY

DREW LEGANDO * (0084209)
 * *Counsel of Record*
 JACK LANDSKRONER (0059227)
 TOM MERRIMAN (0040906)
 Landskroner Greco Merriman, LLC
 1360 W. 9th Street, Suite 200
 Cleveland, Ohio 44113
 Tel: (216) 522-9000/Fax: (216) 522-9007
drew@lgmlegal.com

*Counsel for Appellees
 Alessandra Riscatti, et al.*

TIMOTHY J. McGINTY (0024626)
 Prosecuting Attorney of Cuyahoga County, Ohio
 CHARLES E. HANNAN * (0037153)
 Assistant Prosecuting Attorney
 * *Counsel of Record*
 The Justice Center, Courts Tower, 8th Floor
 1200 Ontario Street
 Cleveland, Ohio 44113
 Tel: (216) 443-7758/Fax: (216) 443-7602
channan@prosecutor.cuyahogacounty.us

Counsel for Appellant Cuyahoga County

R. TODD HUNT (0008951)
 Walter | Haverfield LLP
 1301 E. 9th Street, Suite 3500
 Cleveland, Ohio 44114-1821
 Tel: (216) 928-2935
rthunt@walterhav.com

*Counsel for Amicus Curiae Northeast Ohio
 Law Directors Association*

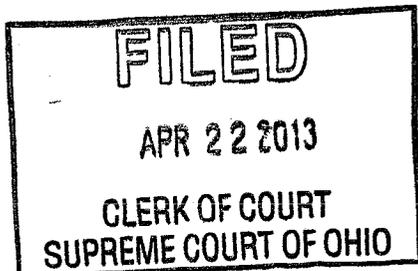


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
REPLY TO APPELLEES’ STATEMENT OF THE FACTS AND STATEMENT OF THE CASE.....	1
ARGUMENT.....	3
I. The appeal does not fail as a matter of procedure.....	3
II. An order that denies a political subdivision’s motion to dismiss claims that accrued more than two (2) years before suit was filed denies the political subdivision the benefit of an immunity from liability.	6
III. The Appellees’ public policy arguments are not well taken.	10
CONCLUSION.....	11
PROOF OF SERVICE.....	12

TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES:</u>	
<i>Anderson v. City of Massilon</i> , 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266	9
<i>Doe v. Archdiocese of Cincinnati</i> , 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268	5
<i>Essman v. Portsmouth</i> , 4 th Dist. No. 08CA3244, 2009-Ohio-3367	9
<i>Ohio Bur. of Workers' Comp. v. McKinley</i> , 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814	5
<i>State v. Wilson</i> , 77 Ohio St.3d 334, 673 N.E.2d 1347 (1997)	8
<i>State ex rel. Cleveland Elec. Illum. Co. v. Euclid</i> , 169 Ohio St. 476, 159 N.E.2d 756 (1959).....	8
<i>State ex rel. Shemo v. Mayfield Hts.</i> , 90 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493	6
<i>Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm.</i> , 74 Ohio St.3d 120, 656 N.E.2d 684 (1995).....	6
 <u>CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES:</u>	
R.C. 2505.02	4
R.C. 2744.02(C).....	<i>passim</i>
R.C. 2744.04(A).....	<i>passim</i>
S.Ct.Prac.R. 16.09(A)	1
Ohio Civil Rule 8(C).....	6
Ohio Civil Rule 12(B)(6)	5, 6
Ohio Civil Rule 54(B).....	4

**REPLY TO APPELLEES' STATEMENT OF THE FACTS AND
STATEMENT OF THE CASE**

The Statement of the Facts and Statement of the Case contained in the Merit Brief of Appellees contains several misstatements that demand a brief but direct reply.

First, the Appellees assert on several occasions that the Appellant never filed an Answer to the Riscatti plaintiffs' Third Amended Complaint or to the Polakowski plaintiffs' First Amended Complaint. See Appellees' Merit Brief at p. 3 (“[T]he County never filed an answer ***); id. at p. 4, fn. 5 (“[T]he County had not (and has never) answered the complaints.”) The Appellees' assertions are wrong.

The record and docket of proceedings reflects that on November 10, 2010, Appellant filed its Answer and Cross Claims to the Riscatti plaintiffs' Third Amended Complaint at 3:27 p.m. and filed its Answer and Cross Claims to the Polakowski plaintiffs' First Amended Complaint also at 3:27 p.m.¹ Each of those Answers expressly asserted that the Appellees' claims were barred by the statute of limitations and by Ohio Revised Code Chapter 2744. See Appellant's Second Supplement at pp. 2, 9. So to the extent that the Appellees contend that the Appellant's supposed failure to plead the statute of limitations as an affirmative defense should defeat this appeal, the Appellees' argument are belied by the record.

Second, the Appellees additionally say that “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.” See Appellees' Merit Brief at p. 2. That is not entirely true either.

¹ Contemporaneous with the filing of this Reply Brief, Appellant has separately sought leave to file a Second Supplement to Merit Briefs that contains time-stamped copies of Appellant's Answers to each of those amended complaints in order to facilitate this Court's review and determination of the questions presented. Appellant further notes that under S.Ct.Prac.R. 16.09(A), “[t]he fact that parts of the record are not included in the supplement shall not prevent the parties or the Supreme Court from relying on those parts of the record.”

The Appellant supported its May 31, 2011 motion for judgment on the pleadings under Civil Rule 12(C) and alternative motion for summary judgment under Civil Rule 56 with the affidavit of William Schneider, on behalf of the Cuyahoga County Sanitary Engineer, who provided evidence concerning the May 1, 2008 sewer maintenance agreement between Cuyahoga County and the City of Parma as well as substantive testimony describing the operation of the sewer lines that are the subject of this case and the fact that the responsibility for maintaining sanitary sewer lines located on private residential property rests not with Cuyahoga County but rather with the individual property owner(s). A *complete* copy of that May 31, 2011 court filing, including the Schneider affidavit and sewer maintenance agreement, were included in the Appellant's February 11, 2013 Supplement to Merit Brief at pp. 7-36.

For their part, the Appellees say that the Appellant's assertion that it did not have responsibility for maintenance and upkeep of the sanitary sewer line at issue until 2008 was "based only on its assertions and not an evidentiary record ***." See Appellees' Merit Brief at pp. 10-11. While that assertion is belied by the Schneider affidavit and supporting documentation that is part of the record, it should be noted that Appendix 2 to the Appellees' Merit Brief includes a copy of Appellant's May 31, 2011 motion for judgment on the pleadings and alternative motion for summary judgment but *omits* the Schneider affidavit that was referenced in and attached to that court filing. As indicated previously a *complete* copy of that document may be found in the Appellant's initial Supplement at pp. 7-36.

Third and last, it is at least instructive that in their seven (7) page recitation of facts in which the allegations in the Appellees' underlying complaints must be accepted as true solely for purposes of these proceedings, the Appellees do not set forth any factual allegations suggesting

that the damages they sustained occurred because of any failure by Cuyahoga County to maintain the sewer line or otherwise keep it in operation.

ARGUMENT

The Appellees' Merit Brief advances three (3) lines of argument to contest the Appellant's proposition of law. Appellant will respond to each of those lines of argument. For the reasons that follow, Appellant respectfully submits that the Appellees' contentions are without merit.

I. The appeal does not fail as a matter of procedure.

The Appellees first contend that the appeal should fail as a matter of procedure, arguing that the Appellant did not raise its proposition of law in the trial or appellate court and that the statute of limitations issue "has not been put before this or any court in an appropriate motion." See Appellees' Merit Brief at p. 7. The Appellees are wrong on both points.

First, as to whether the Appellant raised its issues in the courts below, the record establishes that, contrary to the Appellees' assertions, the Appellant *did* file Answers to the Riscatti plaintiffs' Third Amended Complaint and the Polakowski plaintiffs' First Amended Complaint on November 10, 2010, each of which asserted that the Appellees' claims were barred by the statute of limitations. And as to whether the trial court's denial of that contention denied Appellant "the benefit of an alleged immunity from liability" so as to be immediately appealable under R.C. 2744.02(C), the Appellant had no reason to raise that issue in the trial court inasmuch as that issue fundamentally presents a jurisdictional question for the Court of Appeals. The trial court had no reason to consider that issue.

With regard to the Court of Appeals, it should be noted that when the Appellees moved to dismiss the political subdivisions' appeals, the Appellees did not argue that the Court of Appeals

lacked jurisdiction under R.C. 2744.02(C) to review trial court order denying the political subdivisions' motions based on the statute of limitations. The Appellees' October 14, 2011 motion to dismiss argued simply that the order was not final under R.C. 2505.02, notwithstanding the trial court's certification that there was no just reason for delay under Civil Rule 54(B). See Appendix 6 to Appellees' Merit Brief. It is thus ironic for the Appellees to say the Appellant failed to raise an issue that the Appellees themselves failed to raise. At any rate, the Court of Appeals in fact denied the Appellees' motion to dismiss on November 10, 2011, only to reverse course seven (7) months later when, in a split decision, the court majority determined that it lacked jurisdiction under R.C. 2744.02(C) to review the trial court's statute of limitations ruling. With the announcement of that final ruling, there was little reason for Appellant to pursue further argument in the Court of Appeals.

Perhaps most fundamentally, the reason for wanting to have issues be presented to a lower court is that it may provide that court with the opportunity to consider the issue fully and then rule accordingly. In this case, there can be no doubt that the Court of Appeals fully considered the issue of whether the trial court's order denying Appellant the benefit of the two (2) year limitations period prescribed in R.C. 2744.04(A) was immediately appealable pursuant to R.C. 2744.02(C), as is evident by that court's majority and dissenting opinions. Regardless of whatever else the parties might have argued below, the issue was unmistakably before the Court of Appeals and it determined that issue. With this Court now having accepted review of that ruling, the Appellees do not provide any good reason why anything that was or was not argued below would have made any difference there such that this Court should reconsider having accepted this appeal.

The Appellees second argument maintains that the statute of limitations is an affirmative defense that must be asserted in a responsive pleading, not in a motion to dismiss under Ohio Civil Rule 12(B). The Appellees' contention is not well taken for several reasons.

First, to the extent the Appellees insist that a complaint cannot be dismissed for failure to state a claim upon which relief can be granted under Ohio Civil Rule 12(B)(6) when dismissal is sought based on the running of the statute of limitations, the Appellees' argument is contrary to this Court's precedent. In *Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, 956 N.E.2d 814, the court declared:

A complaint may be dismissed under Civ.R. 12(B)(6) for failing to comply with the applicable statute of limitations when the complaint on its face conclusively indicates that the action is time-barred. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 11.

Id. at ¶ 13. Thus the allegations in a complaint may themselves establish that the claims are barred by the running of the applicable statute of limitations.

Indeed, in the trial court proceedings below, the trial court granted the Marathon co-defendants' motion to dismiss the complaints, based in part on that court's determination from the complaints themselves that the Appellees' claims accrued no later than March 1, 2001 – more than seven (7) years before Appellant entered into its May 1, 2008 agreement with the City of Parma under which Cuyahoga County agreed to thereafter provide for the maintenance of Parma's sanitary sewers. Given the trial court's determination that the Appellees' claims accrued no later than March 1, 2001, it is inexplicable that the Appellees' October 6, 2010 amended complaints that first named Appellant as a defendant would not likewise be time-barred.

Second, to the extent that the Appellees' argument here assumes that the Appellant did not file Answers asserting that the Appellees' claims were barred by the statute of limitations and

that the Appellant only raised that issue by a motion to dismiss under Ohio Civil Rule 12(B)(6), the Appellees' assumption is wrong. As has been noted, the record establishes that Appellant filed Answers on November 10, 2010 asserting that the plaintiffs' claims were barred by the statute of limitations. Appellant later filed its motion to dismiss based on R.C. 2744.04 on May 5, 2011.

Finally, to the extent that the Appellees maintain that their claims are not time-barred and/or are subject to tolling, those issues ultimately concern the merits of this issue, an issue that the Court of Appeals did not address based on its belief that it lacked jurisdiction. Appellant respectfully submits that the Court of Appeals erred in declining to hear that aspect of the Appellant's appeal and that its judgment should be reversed with the case remanded so that that Court may consider the issue fully on its merits.

II. **An order that denies a political subdivision's motion to dismiss claims that accrued more than two (2) years before suit was filed denies the political subdivision the benefit of an immunity from liability.**

In discussing the merits of this appeal, the Appellees say that the statute of limitation is "an ordinary affirmative defense" whereas immunity is "an extraordinary defense." See Appellees' Merit Brief at p. 12.² Contrary to Appellees' contention, however, there is nothing "extraordinary" about pleading the defenses and immunities conferred under R.C. Chapter 2744. Like any other affirmative defense, they must be raised as such in the pleadings. See *State ex rel. Shemo v. Mayfield Hts.*, 90 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 25 (R.C. 2744.04); *Whitehall ex rel. Wolfe v. Ohio Civil Rights Comm.*, 74 Ohio St.3d 120, 123, 656 N.E.2d 684 (1995) (R.C. 2744.03 immunity). And in this case, the Appellant's Answers asserted

² In discussing immunity as a "defense," the Appellees' Merit Brief is practically at war with itself, asserting at one point – and without authority – that "immunity is not a Rule 8(C) defense," see Merit Brief at p. 10, fn. 6, but then later saying that "[i]mmunity is one species of affirmative defense," see *id.* at p. 14.

that the Appellees' claims were barred by the statute of limitations and by Ohio Revised Code Chapter 2744.

The Appellees say that the Appellant "implicitly concedes that the statute of limitations defense is not an immunity." See Appellees' Merit Brief at p. 13. The Appellant has made no such concession. To the contrary, the Appellant's argument has been and remains that an order that denies a political subdivision's motion to dismiss based on the two (2) year statute of limitations established by R.C. 2744.04 denies the political subdivision the benefit of an immunity from liability.

The Appellees assert that unlike immunity that depends on the defendant's identity, the statute of limitation does not depend on the defendant's identity and is therefore different. See Appellees' Merit Brief at p. 13. Contrary to Appellees' assertion, the immunities and defenses conferred on political subdivisions under R.C. Chapter, including but not limited to the two (2) year statute of limitations prescribed by R.C. 2744.04(A), do depend on the defendant's identity as a political subdivision or an employee thereof. And R.C. 2744.04(A) establishes rights unique to political subdivisions inasmuch as it prescribes a maximum two (2) year statute of limitations – regardless of whether the general law may prescribe a greater statute of limitations for other defendants – and a lesser statute of limitations if other law so provides.

The Appellees assert that "[t]he legislature has provided *no* indication of any intent to redefine the contours of immunity by enacting Chapter 2744" merely by defining "the period of the statute of limitations applicable to political subdivisions." See Appellees' Merit Brief at p. 14 (emphasis sic). Contrary to the Appellees' assertion, the General Assembly's enactment of Chapter 2744 completely redefined the contours of political subdivision liability following this Court's abrogation of the judicial doctrine of sovereign immunity.

And contrary to the suggestion at p. 14 of Appellees' Merit Brief that the General Assembly's "mere inclusion of a statute of limitations in that chapter" was a perfunctory no-brainer, the General Assembly plainly saw a need to craft special statute of limitations law as it pertains to political subdivisions by prescribing a two (2) year maximum limitations period no matter what other general law may provide. "It is a basic tenet of statutory construction that 'the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose.'" *State v. Wilson*, 77 Ohio St.3d 334, 336, 673 N.E.2d 1347 (1997), quoting *State ex rel. Cleveland Elec. Illum. Co. v. Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756 (1959).

The Appellees say that as a matter of procedure, immunity is treated differently from other defenses. See Appellees' Merit Brief at p. 14. Notwithstanding whatever esoteric distinctions may exist between "affirmative defenses" that raise some substantive or independent matter to defeat a claim and "non-affirmative defenses" that essentially deny the claim, there is no different procedural treatment when such defenses are asserted other than the substantive law applicable to each such defense. So contrary to the Appellees' assertion that the Appellant seeks to "destroy" what the Appellees say is a "well-understood hierarchy" of defensive pleading, see Appellees' Merit Brief at p. 15, this appeal only seeks to establish that an order that denies a political subdivision's motion to dismiss claims that accrued more than two (2) years before suit was filed denies the political subdivision the benefit of an immunity from liability that is specifically conferred by Ohio law.

The Appellees' argument essentially rests on whether the terms "immunity" and "defenses" have talismanic significance for purposes of determining whether an order denying such matters is subject to appeal under R.C. 2744.02(C). Under the Appellees' construct,

“immunity” and “defense” stand in separate silos such that a court’s ruling as to one is appealable immediately but a ruling as to the other is not. Appellant respectfully submits that it is incorrect to accord such talismanic significance to terms that fundamentally relate to the common question of *liability*, that is, whether there is an immunity *from liability* or a defense *to liability*. In either formulation of that inquiry, an affirmative answer means the same thing: there is *no liability*.

The General Assembly’s enactment of R.C. 2744.02(C) surely evinces a legislative intent to permit interlocutory appeals when a trial court issues an order that may subject a political subdivision to liability that is arguably precluded by R.C. Chapter 2744. Because the trial court’s order here subjected Appellant to liability in spite of the defenses and immunities conferred by R.C. Chapter 2744, that order was properly subject to interlocutory appeal under R.C. 2744.02(C) and the Court of Appeals erred in refusing to consider that appeal in its entirety.³

The Appellees say that to permit an appeal under R.C. 2744.02(C) from an order denying a mere “defense” would be a “dramatic departure from this Court’s precedents” on the statutory canons of “non-insertion.” See Appellees’ Merit Brief at p. 18. Two (2) paragraphs later, the Appellees purport to quote from the Court of Appeals’ opinion in *Essman v. Portsmouth*, 4th Dist. No. 08CA3244, 2009-Ohio-3367, but then, in an attempt to buttress their argument, proceed to insert in brackets the following phrase that cannot be found anywhere in the actual *Essman* opinion – “[as opposed to an immunity defense].” Notwithstanding the Appellees’

³ Appellees cite this Court’s decision in *Anderson v. City of Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, ¶ 19, for the proposition that certain code sections provide an immunity from liability while others provide a defense to liability. But that decision did not determine that rights of appeal differed depending on whether an order denied a defense or an immunity.

apparent equivocation, an order denying a political subdivision's motion to dismiss claims that are time-barred under R.C. 2744.04(A) is functionally no different from an order that denies a political subdivision's motion to dismiss claims that are subject to the defenses and immunities conferred by R.C. 2744.02 and/or 2744.03. There is accordingly no sound reason to deny a political subdivision's appeal under R.C. 2744.02(C) from an order that denies its motion to defeat liability.

III. The Appellees' public policy arguments are not well taken.

The Appellees lastly advance public policy arguments in support of their contentions. There, and elsewhere in their Brief, they level unfair criticism at the dissenting judge below who gave a thoughtful and reasoned analysis of his views on this matter.

Despite that unfair criticism, the resolution of this case must ultimately rest on whether the trial court's order denying Appellant's motion to dismiss based on R.C. 2744.04(A) denied Appellant the benefit of an alleged immunity from liability as provided in Chapter 2744. There can be no doubt that the trial court's order did deny Appellant of the benefit of an alleged immunity from liability under Chapter 2744 because it subjects the Appellant to liability on claims that should be precluded by R.C. 2744.04(A). Notwithstanding the Appellees' policy arguments, the General Assembly established Ohio public policy by establishing a two (2) year maximum statute of limitations and then granting political subdivisions the right to take an immediate interlocutory appeal from orders that deny the political subdivision of a claimed immunity from liability.

Appellant respectfully submits that the trial court ruling denying Appellant's motion to dismiss under R.C. 2744.04(A) is an order that meets the test of R.C. 2744.02(C) and was therefore subject to immediate interlocutory appeal. Because the Court of Appeals' majority

erred in concluding that the court lacked jurisdiction to hear the full appeal, Appellant respectfully urges this Court to reverse the judgment of the Court of Appeals and to remand this matter to that court with instructions to consider fully the issues raised by Appellant in its interlocutory appeal.

CONCLUSION

Appellant Cuyahoga County respectfully requests that the judgment of the Court of Appeals be reversed and that the matter be remanded to the Court of Appeals with instructions to consider fully the issues raised by appellant in its interlocutory appeal.

Respectfully submitted,

TIMOTHY J. MCGINTY, Prosecuting Attorney
of Cuyahoga County

By: 

CHARLES E. HANNAN * (0037153)

Assistant Prosecuting Attorney

** Counsel of Record*

The Justice Center, Courts Tower, 8th Floor

1200 Ontario Street

Cleveland, Ohio 44113

Tel: (216) 443-7758/Fax: (216) 443-7602

channan@prosecutor.cuyahogacounty.us

Counsel for Appellant Cuyahoga County

PROOF OF SERVICE

Pursuant to S.Ct.Prac.R. 3.11, a true copy of the foregoing Reply Brief of Appellant Cuyahoga County was served this 22nd day of April 2013 by ordinary U.S. Mail, postage pre-paid, upon:

Drew Legando
Jack Landskroner
Tom Merriman
Landskroner Greco Merriman, LLC
1360 W. 9th Street, Suite 200
Cleveland, Ohio 44113

Counsel for Appellees Alessandra Riscatti, et al.

R. Todd Hunt
Walter | Haverfield LLP
1301 E. 9th Street, Suite 3500
Cleveland, Ohio 44114-1821

Counsel for Amicus Curiae Northeast Ohio Law Directors Association


CHARLES E. HANNAN *
Assistant Prosecuting Attorney
* *Counsel of Record*