

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.)	

**APPELLANT CUYAHOGA COUNTY'S MOTION FOR LEAVE TO FILE
SECOND SUPPLEMENT TO MERIT BRIEFS**

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

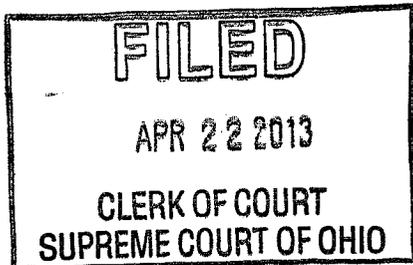
*Counsel for Appellees
 Alessandra Riscatti, et al.*

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*



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.	)	<u>APPELLANT CUYAHOGA COUNTY'S</u>
	)	<u>MOTION FOR LEAVE TO FILE</u>
	)	<u>SECOND SUPPLEMENT TO</u>
	)	<u>MERIT BRIEFS</u>

Appellant Cuyahoga County respectfully moves this Court, pursuant to S.Ct.Prac.R. 4.01(A)(1) and S.Ct.Prac.R. 16.09, for leave to file a Second Supplement to the Merit Briefs.

The tendered Second Supplement will consist solely of a photocopy of each of the following:

- Defendant Cuyahoga County's Answer and Cross Claims to Plaintiffs' Third Amended Complaint, filed at 3:27 p.m. on November 10, 2010 in the matter of Alessandra Riscatti, et al. vs. Prime Properties Limited Partnership, et al., Cuyahoga County Common Pleas Court Case No. 10 CV 714827; and
- Defendant Cuyahoga County's Answer and Cross Claims to Plaintiffs' First Amended Complaint, filed at 3:27 p.m. on November 10, 2010 in the matter of Mary Polakowski, et al. vs. Prime Properties Ltd. Partnership, et al., Cuyahoga County Common Pleas Court Case No. 10 CV 735966.

The grounds in support of this motion are as follows:

On February 11, 2013, appellant Cuyahoga County timely filed its Merit Brief pursuant to S.Ct.Prac.R. 16.02, together with a Supplement to the brief pursuant to S.Ct.Prac.R. 16.09. At the time of those filings, Appellant was not aware that the Appellees would contend that the Appellant had not ever filed an Answer to the Riscatti plaintiffs' Third Amended Complaint or an Answer to the Polakowski plaintiffs' First Amended Complaint. Consequently, the

Supplement to the Merit Brief filed on February 11, 2013 did not include photocopies of the Answers that the Appellant filed in each of those cases.

On April 2, 2013, the Appellees filed their Merit Brief, asserting on several occasions that the Appellant never filed an Answer to the underlying complaints. 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 the Appellant filed Answers on November 10, 2010 in each case.

S.Ct.Prac.R. 16.09(A) permits an appellant to file a supplement to the briefs “that contains those portions of the record necessary to enable the Supreme Court to determine the questions presented.” The rule further states: “The 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.”

In this case, the Appellant respectfully requests leave to file this Second Supplement in order to submit copies of the Answers filed by Appellant in the underlying trial court case proceedings. This request is made solely to facilitate this Court's determination of the questions presented. Granting leave to file this Second Supplement should not prejudice any party inasmuch as the Appellant does not seek to add to the record but rather seeks only to make this Court's review of the existing record most convenient. This request is being made timely with the filing of the Appellant's Reply Brief pursuant to S.Ct.Prac.R. 16.04.

Appellant accordingly requests that this Court grant it leave to file this Second Supplement to the Merit Briefs filed in this case.

Pursuant to S.Ct.Prac.R. 16.10, the documents tendered for inclusion in the requested Second Supplement have been indexed as follows:

<u>INDEX</u>	<u>Page</u>
Defendant Cuyahoga County's Answer and Cross Claims to Plaintiffs' Third Amended Complaint, filed at 3:27 p.m. on November 10, 2010 in <u>Alessandra Riscatti, et al. vs. Prime Properties Limited Partnership, et al.</u> , Cuyahoga County Common Pleas Court Case No. 10 CV 714827.....	1
Defendant Cuyahoga County's Answer and Cross Claims to Plaintiffs' First Amended Complaint, filed at 3:27 p.m. on November 10, 2010 in <u>Mary Polakowski, et al. vs. Prime Properties Ltd. Partnership, et al.</u> , Cuyahoga County Common Pleas Court Case No. 10 CV 735966.....	8

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

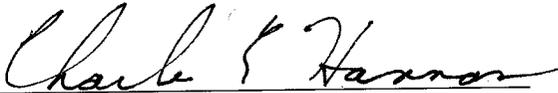
Pursuant to S.Ct.Prac.R. 3.11, a true copy of the foregoing Appellant Cuyahoga County's Motion for Leave to File Second Supplement to Merit Briefs was served this 22nd day of April 2013 by ordinary U.S. Mail, postage pre-paid, upon:

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*

Plaintiff's Complaint. Defendant denies all remaining allegations contained in paragraph 51 of Plaintiff's Complaint.

9. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 52 - 119 and therefore denies the same.
10. Defendant denies the allegations of paragraph 120.
11. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 121 - 130 and therefore denies the same.
12. Defendant admits sometime after May 2008 it became obligated to perform routine maintenance on the State Road sewer system. Defendant further admits that O.R.C 2744.01(G)(2)(d) states that the "[t]he maintenance, destruction, operation and upkeep of a sewer system" is a proprietary function. Defendant denies all remaining allegations contained in paragraph 131.
13. Defendant denies the allegations of paragraph 132 and 133 of plaintiffs Complaint.
14. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 134 - 150 and therefore deny the same.

Affirmative Defenses

15. Plaintiffs have failed to state a claim upon which relief can be granted.
16. Plaintiffs' claims against this defendant are barred by the doctrine of estoppel, assumption of the risk, laches, license, waiver.
17. Plaintiffs' claims against this defendant are barred by plaintiffs' contributory negligence.
18. Plaintiffs' claims are barred by O.R.C. Chapter 2744.
19. Plaintiffs alleged injuries are not the proximate result of this Defendant's alleged conduct.
20. Plaintiffs' claims against this Defendant are barred by the statute of limitations.

21. Plaintiffs' alleged injuries are the proximate result of the acts of third parties outside the control of this Defendant.
22. Defendant reserves the right to add additional defenses as they become known or available.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant Cuyahoga County respectfully asserts that Plaintiffs' claims as to this Defendant lack merit, fail to state a claim upon which relief can be granted and requests that all claims against this Defendant be dismissed with prejudice at Plaintiffs cost.

CROSS CLAIM AGAINST ALL "OWNER/OPERATOR" DEFENDANTS
- PRIME PROPERTIES LTD. PARTNERSHIP, HIGH POINT
MARATHON, LTD., UNITED PETROLEUM MARKETING, LLC,
PETROLEUM STATION PROPERTIES, SPEEDWAY SUPERAMERICA,
LLC, MARATHON OIL COMPANY, NORTHEAST OHIO REGIONAL
SEWER DISTRICT AND CITY OF PARMA "

Now comes the Defendant Cuyahoga County and for its Cross Claim against the "Owner/Operator" Defendants, the Northeast Ohio Regional Sewer District (NEORS), the City of Parma and/or the other Defendants, asserted individually and collectively against all co-defendants, states as follows:

COUNT I - INDEMNITY & CONTRIBUTION

23. The Defendant Cuyahoga County hereby incorporates the allegations of both the original Complaint, First, Second and the Third Amended Complaint in this matter, without admitting in the least part the truth of said allegations, as well as its responses and affirmative defenses in the Defendant's Answer to the Third Amended Complaint as set forth above, as if the full text of all three of said pleadings were fully re-written here.
24. Due to the conduct of the "Owner/Operator" Defendants, NEORS, the City of Parma and/or the other remaining Defendants as set forth in the Complaint, the

Plaintiffs in this matter seek redress for injuries directly and proximate caused by the "Owner / Operator" defendants, NEORSD, the City of Parma and/or the other Defendants and for which liability for said injuries is expressly denied by this Defendant.

4. If Cuyahoga County is found liable to the Plaintiffs (which liability is expressly denied), such liability will be secondary and passive to the primary and active misconduct and negligence of the "Owner/Operator" Defendants, NEORSD, the City of Parma and/or the other Defendants.

5. Therefore, if Defendant Cuyahoga County is found liable to the Plaintiffs (which liability is expressly denied), or if Defendant Cuyahoga County is required to make payments of any type to the Plaintiffs, then Defendant Cuyahoga County is entitled to complete indemnity and/or contribution from the "Owner / Operator" Defendants, NEORSD, the City of Parma and/or the other Defendants.

PRAYER FOR RELIEF

WHEREFORE, the Defendant Cuyahoga County hereby demands that judgment be entered on its cross claims in its favor and against the co – Defendants herein, jointly or severally, as follows:

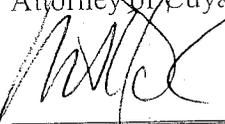
1. Indemnification and Contribution from the Defendants against all claims of the Plaintiffs for monetary damages and/or relief against Defendant Cuyahoga County;
2. A legal defense and/or reimbursement for the costs of a legal defense from the Owner Operator Defendants, NEORSD and/or the City of Parma against all claims of the Plaintiffs or Defendants;

3. The costs of this action, including attorney's fees;
4. Such additional relief against the Owner Operator Defendants, NEORS, the City of Parma and/or the other Defendants as this Court deems proper.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting
Attorney of Cuyahoga County, Ohio

By:



Michael A. Dolan (0051848)
Assistant Prosecuting Attorney
The Justice Center, Courts Tower
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Tel: (216) 443-7795/Fax: (216) 443-7602

ATTORNEYS FOR DEFENDANT
CUYAHOGA COUNTY

Certificate of Service

The foregoing Answer was sent this 12 day of November, 2010 via Regular Mail to:

Counsel for Plaintiffs

Jack Landskroner
Landskroner, Greico, Madden, LLC
1360 West 9th, Ste. 200
Cleveland, Ohio 44113

Allen M Stewart
Allen Stewart, P.C.
325 North St. Paul St., Ste. 2750
Dallas, Texas, Ste 2750

Chris Nidel
Nidel Law, PLLC
1225 15th Street, NW

Washington D.C. 20005

Counsel for Emro Marketing Co., Speedway Super America LLC, Marathon Petroleum co., LLC and Marathon Oil Co.

Michael R. Blumenthal
Waxman Blumenthal
29225 Chagrin Blvd.
Cleveland, Ohio 44122

Robert B. Casarona
Roetzel & Andress
1375 East Ninth Street, 9th Floor
Cleveland, Ohio 44114

Counsel For NEORSD

Julie A. Blair
Regina M. Massetti
NEORSD
3900 Euclid Avenue
Cleveland, Ohio 44115

Counsel For BBP Partners, LLC and Thomas E. Pratt

Colette M. Gibbons
Schottenstein, Zox & Dunn Co.
1350 Euclid Avenue, Ste. 1400
Cleveland, Ohio 44115

Steven D. Forry
250 West Street
Columbus, Ohio 43215

Counsel For Chevron Corporation

Robert S. Walker
901 Lakeside Avenue
Cleveland, Ohio 44115

Miscellaneous Parties:

High Point Marathon, Ltd.
17593 Fairfax Lane
Strongsville, Ohio 44136

United Petroleum Marketing, LLC
9391 Chesapeake Road
North Royalton, Ohio 44133

Timothy Dobeck, Director

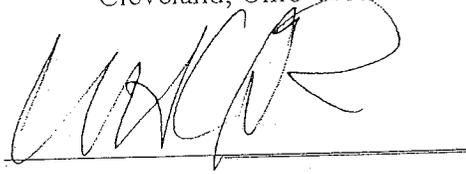
Petroleum Station Properties
101 W. Prospect, Ste. 1800
Cleveland, Ohio 44115

Kelsi Harrison
7149 State Rd.
Parma, Ohio 44134

City of Parma – Dept. of Law
6611 Ridge Road
Parma, Ohio 44129

Chuck Nemer
101 W. Prospect Ave., Ste. 1800
Cleveland, Ohio 44115

By:

A handwritten signature in black ink, appearing to read "C. Nemer", is written over a horizontal line. The signature is stylized and cursive.

FILED

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO
2010 NOV 10 P 3:27

MARY POLAKOW	)	CASE NO. CV10 735966
)	
v.	)	Judge Lance Mason
)	
PRIME PROPERTIES, et al	)	Defendant Cuyahoga County's
	)	Answer and Cross Claims
Defendant	)	To Plaintiffs First Amended
	)	Complaint

Now comes Defendant Cuyahoga County, by and through the undersigned Counsel, and for its answer to Plaintiffs First Amended Complaint avers that:

1. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 1 – 51 and therefore, denies the same.
2. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 52 - 74 and therefore denies the same.
3. Defendant admits the allegations contained in paragraph 75.
4. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 76 and therefore denies the same.
5. Defendant admits the allegations contained in paragraph 77 - 79.
6. Defendant denies the allegations contained in paragraph 80.
7. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph 81 and therefore denies the same.
8. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 82 - 123 and therefore denies the same.

9. Defendant denies the allegations of paragraph 124.
10. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 125 - 134 and therefore denies the same.
11. Defendant admits that sometime after May 2008 it became obligated maintain the State Road sewer system. Defendant further admits that O.R.C 2744.01(G)(2)(d) states that the "[t]he maintenance, destruction, operation and upkeep of a sewer system" is a proprietary function. Defendant denies all remaining allegations contained in paragraph 135 and 136.
12. Defendant denies the allegations of paragraph 137 of plaintiffs Complaint.
13. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraphs 138 - 154 and therefore denies the same.

Affirmative Defenses

14. Plaintiffs have failed to state a claim upon which relief can be granted.
15. Plaintiffs' claims against this defendant are barred by the doctrine of estoppel, assumption of the risk, laches, license, waiver.
16. Plaintiffs' claims against this defendant are barred by plaintiffs' contributory negligence.
17. Plaintiffs' claims are barred by O.R.C. Chapter 2744.
18. Plaintiffs alleged injuries are not the proximate result of this Defendant's alleged conduct.
19. Plaintiffs' claims against this defendant are barred by the statute of limitations.
20. Plaintiffs' alleged injuries are the proximate result of the acts of third parties outside the control of this Defendant.
21. Defendant reserves the right to add additional defenses as they become known or available.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant Cuyahoga County respectfully asserts that Plaintiffs' claims as to this Defendant lack merit, fail to state a claim upon which relief can be granted and requests that all claims against this Defendant be dismissed with prejudice at Plaintiffs cost.

CROSS CLAIM AGAINST ALL "OWNER/OPERATOR" DEFENDANTS
- PRIME PROPERTIES LTD. PARTNERSHIP, HIGH POINT
MARATHON, LTD., UNITED PETROLEUM MARKETING, LLC,
PETROLEUM STATION PROPERTIES, SPEEDWAY SUPERAMERICA,
LLC, MARATHON OIL COMPANY, NORTHEAST OHIO REGIONAL
SEWER DISTRICT AND CITY OF PARMA "

Now comes the Defendant Cuyahoga County and for its Cross Claim against the "Owner/Operator" Defendants, the Northeast Ohio Regional Sewer District (NEORS), the City of Parma and/or the other Defendants, asserted individually and collectively against all co-defendants, states as follows:

COUNT I - INDEMNITY & CONTRIBUTION

22. The Defendant Cuyahoga County hereby incorporates the allegations of both the original Complaint, First, Second and the Third Amended Complaint in this matter, without admitting in the least part the truth of said allegations, as well as its responses and affirmative defenses in the Defendant's Answer to the Third Amended Complaint as set forth above, as if the full text of all three of said pleadings were fully re-written here.
23. Due to the conduct of the "Owner/Operator" Defendants, NEORS, the City of Parma and/or the other remaining Defendants as set forth in the Complaint, the Plaintiffs in this matter seek redress for injuries directly and proximate caused by the "Owner / Operator" defendants, NEORS, the City of Parma and/or the other Defendants and for which liability for said injuries is expressly denied by this Defendant.

4. If Cuyahoga County is found liable to the Plaintiffs (which liability is expressly denied), such liability will be secondary and passive to the primary and active misconduct and negligence of the "Owner/Operator" Defendants, NEORSD, the City of Parma and/or the other Defendants.

5. Therefore, if Defendant Cuyahoga County is found liable to the Plaintiffs (which liability is expressly denied), or if Defendant Cuyahoga County is required to make payments of any type to the Plaintiffs, then Defendant Cuyahoga County is entitled to complete indemnity and/or contribution from the "Owner / Operator" Defendants, NEORSD, the City of Parma and/or the other Defendants.

PRAYER FOR RELIEF

WHEREFORE, the Defendant Cuyahoga County hereby demands that judgment be entered on its cross claims in its favor and against the co – Defendants herein, jointly or severally, as follows:

1. Indemnification and Contribution from the Defendants against all claims of the Plaintiffs for monetary damages and/or relief against Defendant Cuyahoga County;
2. A legal defense and/or reimbursement for the costs of a legal defense from the Owner Operator Defendants, NEORSD and/or the City of Parma against all claims of the Plaintiffs or Defendants;
3. The costs of this action, including attorney's fees;
4. Such additional relief against the Owner Operator Defendants, NEORSD, the City of Parma and/or the other Defendants as this Court deems just and proper.

Respectfully submitted,

WILLIAM D. MASON, Prosecuting
Attorney of Cuyahoga County, Ohio



By:

Michael A. Dolan (0051848)
Assistant Prosecuting Attorney
The Justice Center, Courts Tower
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
Tel: (216) 443-7795/Fax: (216) 443-7602

ATTORNEYS FOR DEFENDANT
CUYAHOGA COUNTY

Certificate of Service

The foregoing Answer was sent this day of 12 November, 2010 via Regular Mail to:

Counsel for Plaintiffs

Jack Landskroner
Landskroner, Greico, Madden, LLC
1360 West 9th, Ste. 200
Cleveland, Ohio 44113

Allen M Stewart
Allen Stewart, P.C.
325 North St. Paul St., Ste. 2750
Dallas, Texas, Ste 2750

Chris Nidel
Nidel Law, PLLC
1225 15th Street, NW
Washington D.C. 20005

Counsel for Emro Marketing Co., Speedway Super America LLC, Marathon Petroleum co., LLC and Marathon Oil Co.

Michael R. Blumenthal
Waxman Blumenthal
29225 Chagrin Blvd.
Cleveland, Ohio 44122

Robert B. Casarona
Roetzel & Andress
1375 East Ninth Street, 9th Floor
Cleveland, Ohio 44114

Counsel For NEORS D

Julie A. Blair
Regina M. Massetti
NEORS D
3900 Euclid Avenue
Cleveland, Ohio 44115

Counsel For BBP Partners, LLC and Thomas E. Pratt

Colette M. Gibbons
Schottenstein, Zox & Dunn Co.
1350 Euclid Avenue, Ste. 1400
Cleveland, Ohio 44115

Steven D. Forry
250 West Street
Columbus, Ohio 43215

Counsel For Chevron Corporation

Robert S. Walker
901 Lakeside Avenue
Cleveland, Ohio 44115

Miscellaneous Parties:

High Point Marathon, Ltd.
17593 Fairfax Lane
Strongsville, Ohio 44136

United Petroleum Marketing, LLC
9391 Chesapeake Road
North Royalton, Ohio 44133

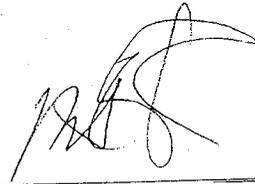
Petroleum Station Properties
101 W. Prospect, Ste. 1800
Cleveland, Ohio 44115

Timothy Dobeck, Director
City of Parma – Dept. of Law
6611 Ridge Road
Parma, Ohio 44129

Kelsi Harrison
7149 State Rd.
Parma, Ohio 44134

Chuck Nemer
101 W. Prospect Ave., Ste. 1800
Cleveland, Ohio 44115

By: _____

A handwritten signature in black ink, appearing to be 'R.S. Walker', written over a horizontal line.