IN THE SUPREME COURT OF OHIO

CASE NO. 2021-1004

THE ESTATE OF JENNINGS FLEENOR,
Plaintiff-Appellee,

-vs-

COUNTY OF OTTAWA, D/B/A OTTAWA COUNTY RIVERVIEW NURSING HOME,
Defendant-Appellant.

ON APPEAL FROM THE SIXTH DISTRICT COURT OF APPEALS, OTTAWA COUNTY, CASE NO. OT-20-023

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEE

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AMICUS CURIAE'S **STATEMENT OF INTEREST**

The Ohio Association for Justice ("OAJ") is devoted to strengthening the civil justice system so that deserving individuals may secure fair compensation by holding wrongdoers accountable. The OAJ comprises approximately one thousand five hundred attorneys practicing in such specialty areas as personal injury, general negligence, medical negligence, products liability, consumer law, insurance law, employment law, and civil rights law. These lawyers seek to preserve the rights of private litigants and to promote public confidence in the legal system.

The OAJ submits this brief to urge this Court to reject the proposition of law of Defendant-Appellant, County of Ottawa, d.b.a. Ottawa County Riverview Nursing Home ("Ottawa"), and hold that counties are *sui juris* and can be sued without naming their boards of commissioners.

STATEMENT OF THE CASE AND FACTS

The OAJ adopts by reference the background statements furnished in the Merit Brief of Plaintiff-Appellee, Estate of Jennings Fleenor ("Estate").

ARGUMENT

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On October 26, 2021, this Court agreed to review the following Proposition of Law:

> **PROPOSITION OF LAW: COUNTIES AND THEIR AGENCIES AND DEPARTMENTS ARE NOT *SUI JURIS*, AND CAN ONLY BE SUED THROUGH THE COUNTY BOARD OF COMMISSIONERS.**

10/26/2021 Case Announcements, 2021-Ohio-3730, p. 2. For the following reasons, this Court should reject this erroneous view of the law and affirm the Sixth Judicial District's decision in all respects.

I. COUNTIES ARE *SUI JURIS*

The Sixth District correctly determined that a county's ability to be sued is intertwined with its sovereign immunity as a political subdivision of the state. *Estate of Fleenor v. Cty. of Ottawa*, 6th Dist. Ottawa No. OT-20-023, 2021-Ohio-2251, ¶ 72. It is undisputed that counties are "political subdivisions" and, as such, are generally immune from suit. *R.C. 2743.01(B); Stack v. Karnes,* 750 F.Supp.2d 892, 895 (S.D.Ohio 2010). As the United States District Court for the Northern District of Ohio has explained, "the State of Ohio decided, on its own sovereign initiative, to divide its territory into county units, while there was no analogous central planning regarding the creation of Ohio cities and other municipal entities." *Turner v. Toledo*, 671 F.Supp.2d 967, 971 (N.D.Ohio 2009). Unlike municipalities, which were formed " 'either at the direct solicitation or by the free consent of the people who compose them,' " counties are instrumentalities of the state. *Id.*, quoting *State ex. rel. Ranz v. Youngstown,* 140 Ohio St. 477, 483, 45 N.E.2d 767 (1942). "Put most simply," a county's ability to be sued "is not conceptually distinct from the county's sovereign immunity as a political subdivision of the state." *Plate v. Johnson*, 149 F.Supp.3d 827, 829 (N.D.Ohio 2016).

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"Absent explicit statutory authorization suggesting otherwise, Ohio counties, by retaining their sovereignty from the state, generally cannot be sued." *Stack,* 750 F.Supp.2d at 895; *see also Pancake v. Wakefield*, 102 Ohio App. 5, 140 N.E.2d 887 (4th Dist.1956), paragraph one of the syllabus (as political subdivisions of the state entitled to sovereign immunity, a county cannot be sued "except as specially authorized by statute"); *Pancake v. Wakefield*, 102 Ohio App. 5, 140 N.E.2d 887 (4th Dist.1956), paragraph one of the syllabus.). However, R.C. 2744.02(B) provides explicit statutory authorization for waiving this political subdivision immunity in civil actions "for injury,

death, or loss to person" in certain circumstances.

Defendant Ottawa and *Amicus Curiae* County Commissioners Association of Ohio ("CCAO") emphasize that the protection afforded in R.C. Chapter 2744 is an affirmative defense meant to limit the liability of political subdivisions. *Brief of Amicus Curiae CCAO ("CCAO Brief"), p. 6; see also Merit Brief of Defendant Ottawa ("Ottawa's Merit Brief"), p. 11.* But this recognition simply highlights another way for counties to waive their immunity and be capable of being sued: by failing to properly raise R.C. Chapter 2744 in a responsive pleading. *See Turner v. Cent. Local School Dist.,* 85 Ohio St.3d 95, 100, 706 N.E.2d 1261 (1999) (holding school district waived its right to assert political-subdivision immunity by failing to assert the affirmative defense); *Supportive Solutions, L.L.C. v. Electronic Classroom of Tomorrow*, 137 Ohio St.3d 23, 2013-Ohio-2410, 997 N.E.2d 490, ¶ 17 ("Statutory immunity, including political-subdivision immunity, is an affirmative defense, and it is waived if not raised in a timely fashion.").

Defendant Ottawa and CCAO improperly cite R.C. 301.22 for the proposition that a county cannot be sued unless it "adopt[s] a charter or alternative form of government." *CCAO Brief, p. 3; see also Appellant's Merit Brief, p. 5.* R.C. 301.22 states that "[e]very county adopting a charter or an alternative form of government is a body politic and corporate for the purpose of enjoying and exercising the rights and privileges conveyed under it by the constitution and the laws of this state. Such county is capable of suing and being sued, pleading and being impleaded." Just as R.C. 2744.02(B) removes the protection from litigation for certain civil claims, R.C. 301.22 effectively waives a county's common law, "state-granted immunity from suit" if the county adopts a charter or alternative form of government. *Plate*, 149 F.Supp.3d at 829; *see also Toledo*, 671 F.Supp.2d at 971, fn. 2 (R.C. 301.22 "merely purports to set out the circumstances in

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which a county is deemed to have waived its common law immunity, codifying [the principle that] a county that adopts a separate form of government can no longer claim immunity as a mere instrumentality of the State of Ohio."); *Smith v. Grady*, 960 F.Supp.2d 735, 740 (S.D.Ohio 2013) (identifying R.C. 301.22 as an "example of where the immunity given to a county has been waived"); *Stack,* 750 F.Supp.2d at 894-895 (same). R.C. 301.22 "does not define [a] [c]ounty's capacity (or lack thereof) to sue, or its status as a juridical entity." *Plate*, 149 F.Supp.3d at 829. It "makes no mention of those counties that have not adopted a charter or alternative form of government[.]" *Grady* at 741.

R.C. 305.12, on which Defendant Ottawa and CCAO rely, likewise does not support the principle that a county can be sued only through its board of commissioners. This enactment includes no such language. Instead, the statute identifies activities that boards of county commissioners may perform and includes in its list that the boards "may sue and be sued, and plead and be impleaded, in any court." R.C. 305.12. Consequently, R.C. 305.12 merely "sets forth" another "instance where a slice of a county's immunity is waived." *Grady*, 960 F.Supp.2d at 740. It "does *not* state that the board of county commissioners is the exclusive avenue by which a county may be sued[.]" (Emphasis added.) *Id.*

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Accordingly, this Court should reject Defendant Ottawa's proposition of law and affirm the Sixth District's accurate conclusion that Plaintiff Estate could sue Defendant Ottawa directly, not exclusively through its Board of County Commissioners.

II. SUBSTITUTION OF DEFENDANTS

Even if boards of county commissioners are the only parties that can be sued on behalf of counties, immediate dismissal or the entry of summary judgment is hardly

warranted. Defendant Ottawa's demand for an immediate and final termination of the litigation for naming the purportedly wrong defendant is a technicality of the lowest degree.

Ohio courts are expected, after all, to resolve cases on their merits whenever possible. *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 431 N.E.2d 644 (1982); *Natl. Mut. Ins. Co. v. Papenhagen*, 30 Ohio St.3d 14, 15, 505 N.E.2d 980 (1987); *Barksdale v. Van's Auto Sales, Inc.*, 38 Ohio St.3d 127, 128, 527 N.E.2d 284 (1988). This Court has cautioned:

> Ohio courts have eschewed the harsh result of dismissing an action because an indispensable party was not joined, electing instead to order that the party be joined pursuant to Civ.R. 19(A) (joinder if feasible), *Kesselring Ford, Inc. v. Cann* (1980), 68 Ohio App.2d 131, 133-134, 22 O.O.3d 162, 164, 427 N.E.2d 785, 787, or that leave to amend the complaint be granted, *Harrier v. Crow* (Dec. 6, 1985), Montgomery App. No. CA 8900, unreported, at 6. * * * Indeed, dismissal due to a party's failure to join a necessary party is warranted only where the defect cannot be cured. 5 Wright & Miller, Federal Practice & Procedure (1969) 628, Section 1359.

State ex rel. Bush v. Spurlock, 42 Ohio St.3d 77, 81, 537 N.E.2d 641 (1989). Pursuant to Civ.R. 21, a trial court must add the correct party whenever the wrong defendant has been sued. *Chibinda v. Depositors Ins.,* 12th Dist. Butler No. CA2012-04-073, 2013-Ohio-526, ¶ 42. In appropriate instances, necessary parties may be joined to an action even after the statute of limitations has run. *Smith v. Klem*, 6 Ohio St.3d 16, 17, 450 N.E.2d 1171, 1173 (1983). This rule thus serves to ensure that legitimate disputes are decided upon their merits and not procedural grounds. *Hardesty v. Cabotage*, 1 Ohio St.3d 114, 117, 438 N.E.2d 431, 434 (1982); *Bentz v. Carter*, 55 Ohio App.3d 120, 121, 562 N.E.2d 925, 927 (8th Dist.1988).

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Additionally, "Civ.R. 15(C) provides a mechanism to substitute misidentified parties by amending the pleadings as long as the claims arose out of the same conduct, transaction, or occurrence as set forth in the original pleadings." *Sidwell v. Allstate Fire and Cas. Ins. Co.*, 8th Dist. Cuyahoga No. 109751, 2021-Ohio-853, ¶ 5. An amendment substituting a party "relates back" if "the party to be substituted, sometime within the year established under Civ.R. 3(A), has both received notice of the action and knew or should have known that but for the mistake the action would have been brought against them[.]" *Id.*

In a situation where a plaintiff names a county instead of its board of commissioners, Civ.R. 15(C)'s requirements are likely to be met. As a practical matter, if a county is sued, its board of commissioners will undoubtedly be actively involved in the lawsuit, thereby receiving both notice of the action and knowledge that but for the mistake the proceeding would have been brought against the board. *See Plaintiff Estate's Memorandum in Response (Against Jurisdiction), p. 7* ("[T]here is no question the County Board of Commissioners are the ones actively involved in this litigation[.]"). For example, in *Toledo*, 671 F.Supp.2d at 972, the Northern District declined to dismiss a complaint against a county on the basis that it could not be sued directly because even if the court were "incorrect" about the county's capacity to be sued, the plaintiff "would be permitted to amend her complaint to substitute the county commissioners." The court explained that the plaintiff's act of naming the county instead of its board of commissioners "appears to be, at the very most, the excusable neglect of a pleading formality." *Id.* at 973.

The pointlessness of the "wrong defendant" defense is apparent. If necessary, the Civil Rules require a correction of the named defendant, and the eventual outcome will

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be the same. Therefore, if this Court accepts the County's proposition of law and decides that counties are not *sui juris*, the mandate should direct that the proper remedy is not dismissal, but rather is to substitute the board as a defendant. As this Court's decision will serve as the prime example any time this issue arises, a carefully crafted explanation of the appropriate remedy will be indispensable to parties in future litigation.

CONCLUSION

For all the foregoing reasons, this Court should reject Defendant Ottawa's Proposition of Law and affirm the Sixth Judicial District. Alternatively, the Court's holding should specify that courts should allow a plaintiff to substitute a county's board of commissioners as a defendant rather than dismiss the proceeding.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Amicus Brief** has been served by e-mail on February 2, 2022, upon:

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