

IN THE SUPREME COURT OF OHIO

DANIELLE MOORE, et al.	)	CASE NOS. 2007-2106.
	)	2008-0030
Plaintiffs-Appellees,	)	
	)	
vs.	)	On Appeal from the Lorain
	)	County Court of Appeals,
LORAIN METROPOLITAN HOUSING	)	Ninth Judicial District
AUTHORITY, et al.	)	
	)	Court of Appeals
Defendants-Appellants.	)	Case No. 06CA008995

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MOTION FOR RECONSIDERATION OF APPELLANT  
LORAIN METROPOLITAN HOUSING AUTHORITY

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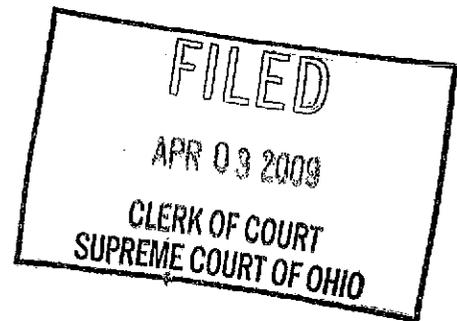
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MOTION FOR RECONSIDERATION OF APPELLANT  
LORAIN METROPOLITAN HOUSING AUTHORITY

Pursuant to Supreme Court Practice Rule XI, Section 2(B)(4), Appellant Lorain Metropolitan Housing Authority (“LMHA”) respectfully requests that this Honorable Court reconsider one aspect of its decision in this matter pronounced on March 25, 2009. Upon reconsideration, we ask the Court to revise and amend its holding by determining that:

- 1) the Court’s holding in Section II(D) of its March 25 decision is in manifest conflict with its rationale in *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 31;
- 2) a scattered-site private tenancy is not within the R.C. 2744.02(B)(4) exception to immunity.

In support of this motion, LMHA respectfully submits that reconsideration of this Court’s March 25, 2009, decision and opinion are warranted because an obvious error contained in the analysis therein causes that decision and opinion to fall within the intent of the reconsideration authorization set forth in S. Ct. Prac. R. XI. A failure to correct said error will cause this Court’s March 25th decision to be in direct conflict with the *Cater* holding, will cause confusion for the bench and bar instead of settling the law in this area, and conflict with longstanding Ohio law in the interpretation of statutes. Support for this motion is attached hereto in an accompanying memorandum.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### I. Introduction.

The fundament of this Court's reconsideration jurisprudence is that reconsideration will be granted – and the original decision in a cause will be set aside – when it is shown that the original decision was premised upon this Court's *misclassification of an outcome determinative fact*, thereby producing one of those “decisions which, upon reflection, are deemed to have been made in error.” See, *State ex rel. Shemo v. Mayfield Hts.* (2002), 96 Ohio St.3d 379, at ¶¶5, 17-21 (misclassification of the time period, March 19, 1992 to June 1995, as being a period for which compensation was due, when it was not); *Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 541, 543-545 (misclassification of city council's function of approving a site plan as being legislative, as opposed to administrative); *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, at 383-385 (misclassification of the provisions of Section 9, Article XVIII, Ohio Const., as being “in irreconcilable conflict with” the provisions of Section 14, Article XVIII, Ohio Const.). It appears such a misclassification has occurred in this case.

This Court has further allowed itself to reconsider and revise its opinions where made improvidently:

We have used our reconsideration authority under S. Ct. Prac.R. XI to “correct decisions which, upon reflection, are deemed to have been made in error.” “*Buckeye Community Hope Found. v. Cuyahoga Falls* (1998), 82 Ohio St.3d 539, 541, 697 N.E.2d 181, quoting *State ex rel. Huebner v. W. Jefferson Village Council* (1995), 75 Ohio St.3d 381, 383, 662 N.E.2d 339.

*State ex rel. Shemo v. City of Mayfield Heights* (2002), 96 Ohio St.3d 379, 380.

## II. Analysis.

### A. Conflict with the *Cater* analysis.

This Court's analysis in Section II(D) of its opinion directly contradicts the Court's analysis of the same statute in *Cater v. City of Cleveland* (1998), 83 Ohio St.3d 24, 31. The *Cater* analysis was not scrutinized in the merit briefs; and, in particular, the analysis of the unreported appellate case upon which this Court relied in *Cater* was not discussed in the merit briefs.

We ask this Court to reconsider its analysis of the statutory language of §2744.02(B)(4) in light of the rationale adopted by this Court in *Cater* when it cited and relied upon the unreported appellate decision *Mattox v. Bradner*, (1997) Ohio App. LEXIS 963, Wood App. No. WD-96-038, unreported, 1997 W.L. 133330. In *Mattox*, the court there stated:

“The rule of *ejusdem generis* provides that where a statute includes both a specific enumeration of things to be included, as well as a more general classification, the general classification is not to be construed broadly, but rather is restricted in scope to include only things similar in kind to these specifically named. *State v. Barker* (1983), 8 Ohio St.3d 39, 41, 457 N.E.2d 312. Therefore, we must interpret “buildings used in connection with the performance of a governmental function” as limited to the class similar to office buildings and courthouses. Office buildings and courthouses are buildings in which the business of government is conducted and are open to the public.”

*Mattox*, \*7, citing *McCloud v. Nimmer* (1991), 72 Ohio App.3d 533, 539.

Having implicitly adopted this analysis in *Cater*, the Court has expressly eschewed it here in this case. We wish to point out the two different analytical approaches and explain how the Court's approach in its March 25 decision will greatly unsettle the law of Ohio if allowed to remain.

B. The two differing analyses.

As reflected in the above quotation from *Mattox*, many appellate courts expressly, and this Court implicitly in *Cater*, acknowledged that the phrase in the (B)(4) exception “including, but not limited to, office buildings and courthouses” is language that was intended by the General Assembly to provide guidance to the courts in limiting the (B)(4) exception to immunity. There are many cases that have relied on this language to hold that the (B)(4) exception does not apply to all buildings and premises connected to governmental functions, e.g., private dwellings where police dogs are trained/housed, and residences where students learn vocational skills. *Hackathorn v. Springfield Local Sch. Bd. of Educ.* (1994), 94 Ohio App.3d 319 (private dwelling being remodeled by a public school vocational class “was not open to the public generally and is not similar in kind to an office building or courthouse.”); *Perry v. City of Cleveland*, 1996 Ohio App. LEXIS 507 (boarding/training a police dog was “not carrying out a proprietary function”, i.e., it was governmental, but doing so in a private residence did not make it a “governmental building” under (B)(4)); *Neelon v. Conte*, 1997 Ohio App. LEXIS 5088 (Ohio Ct. App., Cuyahoga County Nov. 13, 1997), (a high school cheerleader injury occurring in an extracurricular activity, although involved in a “governmental function”, did not fall within the (B)(4) exception where the injury occurred in a private residence.)

Upon reading the analysis in Section II(D), there are a number of factors that will make the bench and bar believe that the reference in (B)(4) to “office buildings and courthouses” is mere excess verbiage and that the exception to immunity applies to all buildings and premises connected to governmental functions. First, the Court in its March 25 slip opinion stated that “the critical phrase” in the analysis of the (B)(4) exception is the phrase “buildings that are used

in connection with the performance of a governmental function.” Upon reading this analysis, the bench and bar will believe that the exception will apply to all buildings that have a connection to a governmental function inasmuch as this is the critical language. The Court has downplayed the two examples provided by the General Assembly as not factoring into the analysis of legislative intent. Rather, the only critical review is whether the building is connected to a governmental function.

Another reason that the bench and bar will consider the two examples as mere excess verbiage and apply the (B)(4) exception to all buildings connected to governmental functions is the type of building involved herein. The Court incorrectly categorized the building herein as an “apartment”; in fact the unit herein was a scattered-site unit, i.e., a free-standing unit in which Plaintiff Danielle Moore held a leasehold interest. This was not an apartment building with its connotation of many apartments in a building connected by common area hallways, lobbies, etc. While an apartment building might be likened in some ways to an office building (at least it has common areas the public might frequent and which are under day-to-day governmental control), the pagoda units herein are nothing like apartments. They are essentially free-standing houses. We cannot imagine a building less like an office building or courthouse than these scattered-site pagoda units in which LMHA only has a landlord’s possessory interest. If such units as these small private houses fall within the (B)(4) exception under the analysis of the March 25 decision, all governmentally owned buildings having any connection to governmental functions will fall within the (B)(4) exception.

The appellate courts as well as this Court in *Cater* have consistently stressed that the (B)(4) exception applies to premises and buildings “open to the public” where “government

business is conducted”. *Hackathorn*, at 325; *Cater*, at 31. We cannot imagine any property so clearly falling outside these criteria than a privately leased house in which LMHA has only a landlord’s possessory ownership.

C. Misclassification.

As set forth above, the Court will reconsider a decision where its rationale is based on a “misclassification”. That appears to be the case here. By describing the scattered-site pagoda units herein as “apartments” with its connotation of an apartment building with common areas visited by members of the public, the Court has evidently classified the location of the incident herein as similar to an office building or courthouse. Was this intentional?

We ask the Court to reexamine this issue. The appellate court at page one of its opinion, simply described the subject property as “an apartment owned and operated by Lorain Metropolitan Housing Authority”. Inasmuch as the appellate court did not make a ruling on the (B)(4) exception in this case, it is understandable that the appellate court did not reference the true nature of the subject premises.

The Trial Court correctly albeit imprecisely described the subject premises as a “scattered site, single housing unit, known and referred to as a ‘pagoda’...” (Trial Court Findings of Fact, para. 1) The subject premises is called a “pagoda” probably because of its shape and eaved roof. It is a “scattered site” because it is not located in a housing authority project. And the Trial Court called it a “single housing unit” because, like a small house, it is free-standing and houses one family.

Once a clearer understanding of the nature of the subject premises is garnered, it will be evident that the pagoda unit herein is the type of building that the General Assembly had intended should not fall within the (B)(4) exception. The public does not visit these units and the housing authority has no day-to-day control over them. In fact, if these types of premises fall within the (B)(4) exception, then we submit that every governmentally owned building will be swallowed up by the (B)(4) exception and the reference to “office buildings and courthouses” will be excess verbiage in the statute.

D. Did the Court intend to overrule *Cater v. City of Cleveland sub silentio*?

The Court’s analysis will in effect read the phrase “including, but not limited to office buildings and courthouses” out of the statute inasmuch as the Court in its March 25 decision did not conduct an analysis of whether the subject premises had any similar characteristics to office buildings or courthouses. In the future, we assume the lower courts will only determine if the governmentally owned property has a “connection to a governmental function” and will likewise not perform an analysis whether the property has characteristics similar to office buildings and courthouses.

In the past, the appellate courts and this Court in *Cater* had indeed conducted such an analysis. Thus, although the phrase “buildings that are used in connection with a governmental function” is a critical phrase in the prior analyses performed by this Court in *Cater* and in the other appellate decisions, it was not the only important phrase in the (B)(4) exception. Prior

decisions had always performed some analysis of the phrase “including but not limited to office buildings and courthouses”.

Did the Court in its March 25 decision intend to rule that the *Cater* analysis of (B)(4) and the analysis by Ohio’s appellate courts was wrong? Did the Court intend to overrule *Cater sub silentio*. There can be no mistake that the March 25 decision is an overruling of *Cater*.

In *Cater*, this Court held that, “The operation of a municipal swimming pool [is] defined as a governmental function....” *Cater v. City of Cleveland*, 83 Ohio St.3d at 30.<sup>1</sup> The municipal swimming pool was thus by definition “connected with a governmental function.” Under this Court’s March 25 analysis, this “critical phrase” would have terminated the analysis: a municipal swimming pool would fall under the (B)(4) exception. But, as we know, the Court in *Cater* was not concluded in its analysis at that point. The Court went on to state that, “Unlike a courthouse or office building where government business is conducted, a city recreation center houses recreational activities.” *Id.* at 31.

Likewise, these scattered-site units do not involve the conduct of governmental business. Rather, it is a private family living in a leased home conducting their private activities. Clearly, the two decisions, *Cater* and the March 25 decision herein, are irreconcilable. Did the Court intend such a result? The bench and bar will need guidance on this question.

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<sup>1</sup> R.C. §2744.02(B)(4) has been modified since the *Cater* decision to add the “physical defects” requirement, thereby tending to further limit this exception to immunity. However, as it regards the remainder of the language of (B)(4), it has not substantially changed since its enactment in 1985 or, more germanely, since the *Cater* decision.

E. The affect on the interpretation of Ohio's statutes.

The General Assembly in the language it chose for §2744.02(B)(4) provided non-limiting examples of governmental buildings to which it intended application of the (B)(4) exception. We can all agree that it is not uncommon for the legislature to do so. Citing examples is generally not exclusive, but it is "illustrative" of legislative intent. *See, e.g., State v. Chambers*, 2006 Ohio 4889, P15 (Ohio Ct. App. 2006)

Whether the legislature intends examples to be exclusive or merely illustrative, all commentators agree that such language is not merely excess verbiage. The examples may not be the critical words in the statute, but they are words that deserve some level of analysis. The Court's March 25 decision may potentially change all of that. In the future, the bench and bar may erroneously rely on the March 25 decision for the proposition that statutory examples are not "critical" to statutory analysis and should be glossed over.

Unfortunately, this will leave the General Assembly in a quandry. Can it ever use statutory examples as illustrative of intent if such examples are given no meaning by the courts?

To avoid this result, we ask the Court to reconsider its March 25 decision as to Section II(D) and give some analysis in comparing the examples of office buildings and courthouses to the scattered-site houses herein. This will assist the bench and bar in the analysis of the (B)(4) exception as well as prevent future confusion in the analysis of other statutes containing statutory examples.

F. Remand.

Two of the dissenting justices in this case opined that this matter should be remanded to determine the applicability of the (B)(4) exception by the Court of Appeals inasmuch as it had not done so. Should the Court determine that the misclassification of the scattered-site pagoda units herein as “apartments” may be a determining factor in its March 25 decision, and particularly if the Court feels the record is unclear on this issue, then we urge the Court to remand this issue to the appellate court for a determination of the nature of these units and whether they fall within the (B)(4) exception.

Conclusion

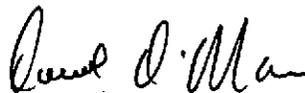
We ask the Court to reconsider Section II(D) of its March 25 slip opinion. We are sure the Court will come to the conclusion that the Court has inadvertently overruled *Cater v. City of Cleveland* and dramatically changed all prior case law in the interpretation of R.C. §2744.02(B)(4). We do not believe it was the intention of the Court to do so.

If the Court agrees that it has possibly misclassified the subject premises herein due to the imprecise nature of the descriptions in the lower court’s decisions, we urge the Court to remand the matter to the lower courts to better develop the record to determine if the (B)(4) exception is applicable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Motion for Reconsideration of Appellant was sent by regular U.S. Mail, postage prepaid, this 2<sup>nd</sup> day of April, 2009, to:

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