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IN THE SUPREME COURT OF OHIO

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

MEMORANDUM OF APPELLEES DANIELLE MOORE, et al., OPPOSING APPELLANT'S MOTION FOR RECONSIDERATION

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RECEIVED
APR 10 2009
CLERK OF COURT
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FILED
APR 10 2009
CLERK OF COURT
SUPREME COURT OF OHIO

MEMORANDUM IN OPPOSITION
TO APPELLANT'S MOTION FOR RECONSIDERATION

I. Introduction

In accordance with S.Ct.Prac.R. XI, Section 3, and for the reasons set forth herein, Appellees Danielle Moore, et al., ("Ms. Moore") respectfully urge this Honorable Court to deny the *Motion for Reconsideration of Appellant Lorain Metropolitan Housing Authority*.

Contrary to the arguments of Appellant Lorain Metropolitan Housing Authority ("LMHA"), Ms. Moore asserts that:

(1) This Court's holding in Section II(D) of its decision in *Moore v. Lorain Metro. Hous. Auth.*, Slip Opinion No. 2009-Ohio-1250, is not in direct or manifest conflict with its previous decision in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 1998 Ohio 421, 697 N.E.2d 610, which interpreted an earlier version of R.C. 2744.02(B)(4).

(2) This Court's holding in Section II(D) of its decision in *Moore v. Lorain Metro. Hous. Auth.*, Slip Opinion No. 2009-Ohio-1250, is not based upon "misclassification of an outcome determinative fact."

LMHA's arguments in support of reconsideration primarily rest on its mistaken position that the exception to political subdivision tort liability set forth in R.C. 2744.02(B)(4) somehow applies only to the government office building and courthouses. LMHA completely ignores the 2002 decision of this Court in *Hubbard v. Canton City Sch. Bd. of Educ.* (2002), 97 Ohio St. 3d 451, 2002 Ohio 6718, 780 N.E.2d 543 at ¶ 18, which clarified the application of R.C. 2744.02(B)(4) and thus limited the holding of *Cater* to its syllabus. *Hubbard* itself concerned employee negligence occurring inside a middle school building, which is obviously neither a government office building nor a courthouse.

Beyond LMHA's mistaken assumptions, the mere fact that a party disagrees with all or part of this Court's holding in a case does not justify reconsideration.

II. Analysis

A. There is no direct or manifest conflict with *Cater v. City of Cleveland*

Contrary to LMHA's arguments, there simply is no direct or manifest conflict between Section II(D) of this Court's decision in *Moore v. Lorain Metro. Hous. Auth.*, Slip Opinion No. 2009-Ohio-1250, and its previous decision in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 1998 Ohio 421, 697 N.E.2d 610, which would justify reconsideration.

In Section II(D) of its decision—considering whether the exception to political subdivision immunity under current R.C. 2744.02(B)(4) was applicable—this Court correctly determined and held that:

> ***[T]he phrase "including, but not limited" denotes a nonexclusive list of building to which the exception may apply. The phrase "buildings that are used in connection with the performance of a governmental function" is the critical phrase. We conclude that a unit of public housing is a building "used in connection with the performance of governmental function" within the meaning of R.C. 2744.01(C)(2). LMHA is therefore liable for negligence if the deaths in this case were due to physical defects occurring on its property within the meaning of R.C. 2744.02(B)(4).

Moore v. Lorain Metro. Hous. Auth., Slip Opinion No. 2009-Ohio-1250 at ¶ 24.

The above-cited determination and holding is consistent with this Court's decisions subsequent to *Cater*. See *Hubbard v. Canton City Sch. Bd. of Educ.* (2002), 97 Ohio St. 3d 451, 2002 Ohio 6718, 780 N.E.2d 543 (interpreting R.C. 2744.02(B)(4) as applying to negligence by political subdivision employees occurring in a middle school building); and *State v. Muncie* (2001), 91 Ohio St.3d 440, 448, 2001 Ohio 93, 746 N.E.2d 1092 (the phrase "including, but not limited to" precedes a non-exhaustive list of examples).

The *Cater* case involved a lawsuit against the City of Cleveland, which alleged that the city acted negligently and/or recklessly in operating an indoor swimming pool and causing the death of twelve-year-old Darrall A. Cater. The trial court granted the City's motion for a

directed verdict on grounds of political subdivision immunity from liability under R.C. Chapter 2744 and the Ohio Eighth District Court of Appeals affirmed. This Court reversed and held that "the operation of a municipal swimming pool, although defined as a governmental function in R.C. 2744.01(C)(2)(u), is subject to the exceptions to immunity set forth in former R.C. 2744.02(B) and to the available defenses enumerated in R.C. 2744.03." *Cater*, *supra.* at syllabus.

In the *Cater* decision authored by Justice F. E. Sweeney, it was asserted that "the operation of an indoor municipal swimming pool, although defined as a governmental function under R.C. 2744.01(C)(2)(u), is still subject to the exception to immunity found in former R.C. 2744.02(B)(3), but not to the exception contained in former R.C. 2744.02(B)(4)." *Cater*, *supra* at 27. Former R.C. 2744.02(B)(4) provided that:

> Political subdivisions are liable for injury, death, or loss to persons or property that is caused by the negligence of their employees and that occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

In determining that the above-cited exception did not apply to indoor municipal swimming pools, Justice F.E. Sweeney's opinion stated that:

> Although former R.C. 2744.02(B)(4) may be applicable to other governmental functions, not specifically listed in the statute, we believe that it does not apply to an indoor swimming pool. (See, also, *Mattox v. Bradner*, 1997 Ohio App. LEXIS 963 [Mar. 21, 1997], Wood App. No. WD-96-038, unreported, 1997 WL 133330, which held that the exception enumerated in R.C. 2744.02[B][4] is inapplicable to injuries sustained in a municipal swimming pool.) Unlike a courthouse or office building where government business is conducted, a city recreation center houses recreational activities. Furthermore, if we applied former R.C. 2744.02(B)(4) to an indoor swimming pool, liability could be imposed upon the political subdivision. However, there would be no liability if the injury occurred at an outdoor municipal swimming pool, since the injury did not occur in a building. We do not believe that the General Assembly intended to insulate political subdivisions from liability based on this distinction. Therefore, we reject appellants' contention that former R.C. 2744.02(B)(4) applies to an indoor municipal swimming pool.

Cater, *supra.* at 27.

Although technically a unanimous 7-0 decision, none of the six concurring Justices in *Cater* expressed agreement with Justice F.E. Sweeney's legal analysis and rationale concerning the applicability or non-applicability of former R.C. 2744.02(B)(4). In his opinion concurring in the syllabus and judgment only, which was joined by two other Justices, Chief Justice Moyer stated his belief that the City's potential liability was based on former R.C. 2744.02(B)(4), and not on former R.C. 2744.02(B)(3). *Cater*, *supra.* at 34-36. The Chief Justice wrote that "in my view both indoor and outdoor pools exist "within or on the grounds" of buildings used in connection with the performance of the governmental function of operating a pool." *Cater*, *supra.* at 34-36. Justice Pfeiffer concurred in Justice Sweeney's opinion solely "because of my belief that Ohio's sovereign immunity statute is unconstitutional. See *Garrett v. Sandusky* (1994), 68 Ohio St. 3d 139, 141, 624 N.E.2d 704, 706 (Pfeifer, J., concurring)." *Cater*, *supra.* at 34. The remaining two Justices concurred in judgment only. *Cater*, *supra.* at 34. Given that only one Justice of this Court ever expressly adopted the rationale and legal analysis concerning former R.C. 2744.02(B)(4) set forth in *Cater*, that case is obviously of little or no value as precedent in Ohio concerning the application of current R.C. 2744.02(B)(4).

In its *Motion for Reconsideration of Appellant Lorain Metropolitan Housing Authority*, LMHA fails to mention that, four (4) years after its decision in *Cater*, this Court held, in a 5-to-2 decision authored by Chief Justice Moyer, that "the exception to political-subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function." *Hubbard v. Canton City Sch. Bd. of Educ.* (2002), 97 Ohio St. 3d 451, 2002 Ohio 6718, 780 N.E.2d 543 at ¶ 18. Justice F.E.

Sweeney concurred in that majority opinion. *Hubbard v. Canton City Sch. Bd. of Educ.*, supra at ¶ 20. The building in question in *Hubbard* was a middle school building, and **not** a government office building or courthouse. The *Hubbard* decision both clarified *Cater* and supports Section II(D) of this Court's recent decision in *Moore v. Lorain Metro. Hous. Auth.*, Slip Opinion No. 2009-Ohio-1250 at ¶¶ 22-25.

Given this Court's subsequent decision in *Hubbard*, it is clear that *Cater* has been limited to the legal proposition stated in its syllabus—namely, that "the operation of a municipal swimming pool, although defined as a governmental function in R.C. 2744.01(C)(2)(u), is subject to the exceptions to immunity set forth in former R.C. 2744.02(B) and to the available defenses enumerated in R.C. 2744.03." *Cater*, *supra.* at syllabus. It is obvious that a unit of public housing is **not** an indoor municipal swimming pool. The rationale and legal analysis concerning former R.C. 2744.02(B)(4) set forth in *Cater*, which were never expressly accepted by more than one Justice of this Court, are no longer applicable. Thus, contrary to LMHA'a argument, there is and has been no "quandary" for the General Assembly, bench, or bar with respect to *Cater*—at least since *Hubbard* was decided in 2002.

LMHA's contention that exception in R.C. 2744.02(B)(4) is limited to only government office building and courthouses is simply wrong. In light of the *Hubbard* decision, it is now clear that *Mattox v. Bradner* (March 21, 1997), 6th Dist. No. WD-96-038, unreported, 1997 Ohio App. LEXIS 963, 1997 WL 133330, which interpreted and limited the application of R.C. 2744.02(B)(4) to government office buildings and courthouses, was incorrectly decided.

Similarly, LMHA's reliance on Hackathorn v. Springfield Local Sch. Bd. of Educ. (1994), 94 Ohio App.3d 319, 640 N.E.2d 882; Neelon v. Conte (Nov. 13, 1997), 8th Dist. No. 72646 , unreported, 1997 Ohio App. LEXIS 5088; and Perry v. City of East Cleveland, 8th Dist.

No. 95-L-111, unreported, 1996 Ohio App. LEXIS 507, is misplaced. Those cases involved injuries to persons engaged in governmental functions at privately-owned residences—specifically, cheerleading practice, police dog training, and remodeling work by a vocational school class. The instant case, on the other hand, involves a unit of public housing owned by LMHA and directly used to conduct one of LMHA's primary governmental functions of providing housing to low-income tenants and their families.

LMHA's concern about unlimited application of the exception set forth in R.C. 2744.02(B)(4) to all buildings connected to governmental function is likewise misplaced. The current version of R.C. 2744.02(B)(4) provides that:

> Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is **caused by the negligence of their employees** and that occurs within or on the grounds of, **and is due to physical defects within or on the grounds of**, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

(Emphasis added). By its very terms, the exception to political subdivision tort immunity is strictly limited to injuries, death or losses "caused by the negligence of their employees" and which are "due to physical defects within or on the grounds of" buildings that are used in connection with performance of a governmental function. See *Jones v. Lucas Metro. Hous. Auth.* (Aug. 29, 1997), 6th Dist. No. L-96-212, 1997 Ohio App. LEXIS 3807 at *12-13. Furthermore, given that this Court's decision eliminates altogether the application of the R.C. 2744.02(B)(2) and (B)(5) exceptions to public housing authorities, it is very unlikely that there will be an increase in new tort claims against LMHA and other public housing authorities in Ohio.

In conclusion, given the subsequent 2002 decision by this Court in *Hubbard, supra.*, which clarified the application of R.C. 2744.02(B)(4) and limited *Cater* to its syllabus, there is

no direct or manifest conflict between Section II(D) of this Court's decision in *Moore v. Lorain Metro. Hous. Auth.*, Slip Opinion No. 2009-Ohio-1250 at ¶¶ 22-25, and its previous decision in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 1998 Ohio 421, 697 N.E.2d 610, which would justify reconsideration.

B. There is no "misclassification of an outcome determinative fact" in this Court's decision.

Contrary to LMHA's arguments, there is no "misclassification of an outcome determinative fact" in this Court's decision in *Moore v. Lorain Metro. Hous. Auth.*, Slip Opinion No. 2009-Ohio-1250, which would justify reconsideration.

This Court's reference in the Case Background section of its decision to the units of public housing owned by LMHA for lease to low-income tenants and their families as "apartments," as opposed to the terminology "scatter–site pagoda units" urged by LMHA, does **not** constitute "misclassification of an outcome determinative fact." *Moore v. Lorain Metro. Hous. Auth.*, Slip Opinion No. 2009-Ohio-1250 at ¶¶ 2, 4.

Whether the units of public housing in this case are referred to as "apartments," or as "scatter-site pagoda units", it simply does **not** change this Court's legal analysis and conclusion that:

> ***[T]he phrase "including, but not limited" denotes a nonexclusive list of building to which the exception may apply. The phrase "buildings that are used in connection with the performance of a governmental function" is the critical phrase. We conclude that a unit of public housing is a building "used in connection with the performance of governmental function" within the meaning of R.C. 2744.01(C)(2). LMHA is therefore liable for negligence if the deaths in this case were due to physical defects occurring on its property within the meaning of R.C. 2744.02(B)(4).

Moore v. Lorain Metro. Hous. Auth., Slip Opinion No. 2009-Ohio-1250 at ¶ 24. Such inconsequential semantic differences clearly fail to rise to the level of "outcome determinative

facts."

As previously noted, LMHA mistakenly relies on the rationale and legal analysis set forth in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 27, 1998 Ohio 421, 697 N.E.2d 610, and *Mattox v. Bradner* (March 21, 1997), 6th Dist. No. WD-96-038, unreported, 1997 Ohio App. LEXIS 963, 1997 WL 133330, to support its incorrect assertion that R.C. 2744.02(B)(4) applies only to government office buildings and courthouses. However, the subsequently decided case of *Hubbard v. Canton City Sch. Bd. of Educ.* (2002), 97 Ohio St. 3d 451, 2002 Ohio 6718, 780 N.E.2d 543 at ¶ 18, which involved a middle school building, clarified the application of R.C. 2744.02(B)(4) and limited the holding of *Cater*. Based on this Court's decision in *Hubbard*, it is now abundantly clear that the exception to political subdivision tort immunity set forth in R.C. 2744.02(B)(4) is **not** limited to only government office buildings and courthouses.

C. Remand to the trial court is appropriate.

Given this Court's legal conclusion that "a unit of public housing is a building used in connection with the performance of a governmental function" and that "LMHA is therefore liable for negligence if the deaths in this case were due to physical defects occurring on its property within the meaning of R.C. 2744.02(B)(4)", remand back to the trial court is appropriate to determine whether the absence of a required smoke detector is a "physical defect" occurring on the grounds of LMHA's property.

Contrary to LMHA's arguments, the two dissenting Justices urged remand back to the Court of Appeals because they believed the majority's determination that a public housing unit is a building "used in connection with the performance of a governmental function" was premature. In light of the 5-2 majority decision, however, it would be inappropriate to remand to the Court

of Appeals, because the trial court itself never addressed the issue of whether there was a "physical defect" in Ms. Moore's pagoda unit.

Conclusion

Based on the foregoing, there simply is no direct or manifest conflict between Section II(D) of this Court's decision in *Moore v. Lorain Metro. Hous. Auth.*, Slip Opinion No. 2009-Ohio-1250, and its previous decision in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 1998 Ohio 421, 697 N.E.2d 610, which would justify reconsideration. There is also no "misclassification of an outcome determinative fact" in this Court's decision, but merely an inconsequential difference of semantics between the term "apartment" and "pagoda unit" which had no bearing on this Court's legal analysis and conclusion. Thus, LMHA's motion for reconsideration must be denied.

Where this Court has already determined that a public housing unit is a building "used in connection with the performance of a governmental function" within the meaning of R.C. 2744.02(B)(4), remand to the trial court is most appropriate to address the previously undetermined issue of whether there was a physical defect in Ms. Moore's pagoda unit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing ***Memorandum of Appellees Danielle Moore, et al., Opposing Appellant's Motion for Reconsideration*** were served by ordinary U.S. mail on this __9th__ day of April, 2009, upon the following:

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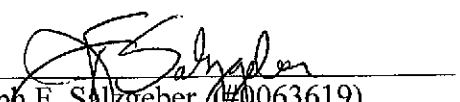

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