

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO.: 11-1588

Appeal from the Court of Appeals  
Ninth Appellate District  
Summit County, Ohio  
Case No. 25582, dated August 3, 2011

MICHAEL L. HAWSMAN, et. al.

Plaintiffs-Appellees

v.

THE CITY OF CUYAHOGA FALLS, et. al.

Defendants-Appellants

**DEFENDANTS/APPELLANTS, CITY OF CUYAHOGA FALLS'  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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RECEIVED  
SEP 19 2011  
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FILED  
SEP 19 2011  
CLERK OF COURT  
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**I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST**

This case arises out of Plaintiff, Michael L. Hawsman ("Plaintiffs" or "Hawsmans") visiting the Defendant, City of Cuyahoga Falls' ("City") Natatorium and allegedly injuring his knee while using the swimming pool's diving board. This is a case of both public and great general interest because the Ohio Court of Appeals, Ninth District, abrogated and effectively overruled this Court's decision in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, in its decision in this case. The Court of Appeals erred by disregarding valid and controlling case law handed down by the highest Court in this State.

The Ninth District ignored the statutory immunity afforded to political subdivisions and in this case denied the City of Cuyahoga Falls that immunity when it reversed the trial court's grant of summary judgment. The trial court based its finding on *Cater, supra*, and on a unanimous Ninth District decision *Hopper v. Elyria*, 2009-Ohio-2517, that followed *Cater*. The Ninth District decided *Hopper* just over two years before it unanimously overruled *Hopper*, and itself, in the case *sub judice*. In so doing, the Ninth District, implicitly overruled this Court.

This case presents an issue of great interest, for the reason that if *Cater, supra*, is no longer good law in this State; it is for the Ohio Supreme Court to determine. The City submits that *Cater* is good law and well reasoned. This Court correctly interpreted the Political Subdivision Tort Liability Act (R.C. 2744.01, *et. seq.*). Users of recreational facilities, where swimming, exercising, and competitive sports are the norm should not expect that injuries will not occur to the same extent as a citizen visiting City Hall or a courthouse. All seven justices in *Cater*, while not agreeing in the opinion, agreed in the judgment.

The Ninth District provided no compelling reason to depart from *stare decisis*. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, sets forth the definitive test for whether a court should depart from *stare decisis*. According to *Westfield*, a prior decision may be overruled where (1) the decision was wrongly decided at the time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, paragraph one of the syllabus.

When applying the above three pronged test to the *Hopper* case, *stare decisis* should not have been ignored by the Court of Appeals. All three points must apply in order for a court to depart from *stare decisis*. None of the points applied to this case below. One, *Hopper* was not wrongly decided because it relied upon this Court's precedent in *Cater*. Two, *Hopper* was not unworkable at all. Finally, abandoning *Hopper* will create an undue hardship upon the political subdivisions that enjoy immunity and have relied upon it and *Cater*.

*Cater* remains precedent in this state and the Ninth District erred in not following it as it did in *Hopper*. *Cater* identified a conflict between the immunity provided by R.C. 2744.01(C)(2)(u) and the exception to immunity in R.C. 2744.02(B)(4). The *Cater* court recognized the conflict and resolved it correctly.

This Court held in *Cater* that although the operation of a municipal swimming pool constitutes a governmental function pursuant to R.C. 2744.01(c)(2)(u), it is not subject to the exception to immunity set forth in R.C. 2744.02(B)(4). *Cater*, 82 Ohio St.3d at 28.

R.C. 2744.02(B)(4) reads:

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. *Id.*

This Court reasoned that the types of buildings listed in R.C. 2744.02(B)(4), “courthouse[s], or office building[s] where government business is conducted,” are distinguishable from recreation centers that house recreational activities like those in the present case. *Cater*, 83 Ohio St.3d at 31. The *Cater* decision implicated the theory of similar classification or *ejusdem generic* (literally meaning, “the same kind”).

In the court below, Plaintiff argued that the Supreme Court’s decision in *Cater* is not binding in Ohio because it represented only a plurality opinion. In its decision, the Ninth District adopted the reasoning of a dissenting opinion rendered in the Ohio Court of Appeals for the Sixth District in *O’Connor v. City of Fremont*, 2010-Ohio-4159. In doing so, the Ninth District’s ignored *stare decisis*.

As stated in *Westfield*, *supra* at ¶43 “[t]he doctrine of *stare decisis* is designed to provide continuity and predictability in our legal system. We adhere to *stare decisis* as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs.” *Id.*

This case also presents an issue of public and great general interest for the sake of continuity among the courts of appeals. This Court can take judicial notice that political subdivisions in this state operate hundreds of indoor and outdoor pools, ponds, wading pools, waterslides, water parks and many, many other recreational facilities that under the

statute may constitute “buildings that are used in connection with the performance of a governmental function.” The cities and other political subdivisions that construct and maintain these facilities need to know whether R.C. 2744.02(B)(4) applies to their recreational facilities, inasmuch as their potential liability for injuries, deaths, or loss is contingent upon the answer. The decision in this case, if allowed to stand, presents all interested parties with a conflicting patchwork of liability standards depending upon which judicial district the recreational facility happens to be located in. This cannot be what was intended by the legislature when enacting the Political Subdivision Tort Liability Act.

Other than the Ninth District, the following courts have determined to deny immunity to public recreational facilities because such facilities are “buildings that are used in connection with the performance of a governmental function” under the exception to immunity pursuant to R.C. 2744.02(B)(4):

1. *Thompson v. Bagley*, 2005-Ohio-1921. (Third District)
2. *Mathews v. City of Waverly*, 2010-Ohio-347 (Fourth District)

The following courts have followed *Cater* and held that political subdivisions enjoy immunity from liability for torts occurring at recreational facilities despite the fact that these buildings are used in connection with the performance of a governmental function:

1. *Maxel v. City of Cleveland Heights* (September 30, 1999), Cuyahoga App. No. 74851, unreported. (Eighth District)
2. *O’Conner, supra* at 2010-Ohio-4159. (Sixth District)

Finally, the Eighth District Court of Appeals has held that the legislature’s specific grant of immunity provided for in R.C. 2744.01(C)(2)(u) cannot be abrogated by the general terms of the exception in R.C. 2744.02(B)(4). *Bradley v. Cleveland*, 2004-Ohio-2347.

In *Stacko v. Bedford* (May 13, 1999), Cuyahoga App. No. 74043, unreported, the Ohio Court of Appeals for the Eighth District held:

[a] number of courts have addressed the issue of the apparently irreconcilable provisions of R.C. 2744.01(C)(2)(u) and R.C. 2744.02(B)(3), and held that the more specific language of R.C. 2744(C)(2)(u) prevails over the general language of R.C. 2744.02(B)(3). See *Cater v. Cleveland* (May 8, 1997), Cuyahoga App. No. 70674, unreported; *Horwitz v. Cleveland* (March 16, 1995), Cuyahoga App. No. 67140, unreported; *Nowak v. Ries* (December 19, 1991), Cuyahoga App. No. 59276, unreported. *Id.*

The above cases represent the lack of continuity among the judicial districts in this State and the need for judicial clarity. This Court is now in a position to resolve this issue of significance with finality.

## II. STATEMENT OF THE CASE AND FACTS

### A. Introduction and Background

Plaintiff Michael L. Hawsman claims that on May 12, 2006 he visited the City's Natatorium and Wellness Center ("Natatorium"). See, Complaint at ¶4. Mr. Hawsman alleges that he injured his knee while using the swimming pool diving board at the Natatorium. See, Complaint at ¶4. Michael's parents, Plaintiffs Angela and Michael J. Hawsman claim loss of consortium as a result of the injury to their son. See, Complaint at ¶9.

The Natatorium is owned by the City of Cuyahoga Falls ("City") and is a community recreation center that includes an indoor swimming pool equipped with a diving board (Lohan Affidavit at ¶s 4 and 5 attached to City's Motion for Summary Judgment). The Natatorium is controlled and maintained by the City's Parks and Recreation Department (Lohan Affidavit at ¶4 attached to City's Motion for Summary Judgment).

**B. The Trial Court Grants the City the Benefit of Immunity; the Ninth District Reverses the Trial Court.**

On August 17, 2010, the Summit County Court of Common Pleas granted summary judgment in favor of the City. The trial court concluded that the City was entitled to political subdivision immunity as provided by R.C. 2744.02(A)(1) in connection with its operation of a municipal swimming pool. The Court based its decision on the Ninth District's ruling in *Hopper, supra* and this Court's ruling in *Cater, supra*, which held that a swimming pool was not subject to the exception to immunity pursuant to R.C. 2744.02(B)(4).

The Ninth District Court of Appeals reversed the trial court, overruled its own decision in *Hopper* and disregarded the Supreme Court's precedent in *Cater, supra*.

This Memorandum in Support of Jurisdiction and Notice of Appeal followed.

**III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

**Proposition of Law I: As recognized in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, an indoor municipal swimming pool is used for recreational purposes and, as such, is an immune governmental function under R.C. 2744.01(C)(2)(u). It is not similar to an office building or courthouse and therefore the exception to immunity pursuant to R.C. 2744.02(B)(4) does not apply.**

R.C. 2744.02(A)(1) sets forth the general rule that a political subdivision is immune from tort liability for acts or omissions connected with governmental or proprietary functions. Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A). Finally, R.C. 2744.03(A) sets forth several defenses that a political subdivision may assert if R.C. 2744.02(B) imposes liability.

As noted above, R.C. 2744.02(B)(4) reads:

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. *Id.*

Both the trial court and the Ninth District based their decisions on whether or not a swimming pool was subject to the exceptions to general immunity as provided by R.C. 2744.02(B)(4) and this Court's decision in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24. Neither court dealt with whether an employee had been negligent or whether there existed a defect that caused the injury. Certainly, neither court analyzed whether the City could assert defenses pursuant to R.C. 2744.03(A).

In *Cater*, this Court held that although the operation of a municipal swimming pool constitutes a governmental function pursuant to R.C. 2744.01(C)(2)(u), it is not subject to the exception to immunity set forth in R.C. 2711.02(B)(4). *Cater*, 83 Ohio St.3d at 28. This Court reasoned that the types of buildings listed in R. C. 2744.02(B)(4), "courthouse[s], or office building[s] where government business is conducted," are distinguishable from recreation centers that house recreation activities like those in the present case. *Cater*, 83 Ohio St. 3 at 31. This Court in *Cater* held that *although* the operation of a municipal swimming pool is a governmental function pursuant to R.C. 2744.01(C)(2)(u), it is not subject to the exception to immunity set forth in R.C. 2744.02(B)(24). *Cater*, at 28.

By citing examples of the types of buildings where liability may arise, the General Assembly has expressly clarified that not all properties used in a governmental function will fall under the (B)(4) exception to immunity. Rather, buildings and grounds *like* office

buildings and courthouses may be subject to the exception, but other governmental property not of this type will not fall under (B)(4). We must presume that the General Assembly knows and appreciates the rules of statutory construction when it drafts legislation. One of the fundamental rules of statutory construction is "*expression unius est exclusive alterius*" which means "expression of one or more items of a class implies that those not identified are to be excluded." *State v. Drost* (1998), 83 Ohio St3d 36, 39. Had the General Assembly intended that the (B)(4) exception to apply to all governmental property, it would not have inserted the words "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".

The Ninth District's ruling has the effect of abrogating the immunity that the City enjoys without any guidance as to how future questions will be decided, other than to assume that the exception to the rule has now consumed the rule. If there is ambiguity in the statute, clarity must come from an authoritative interpretation, i.e. one from this Court. It is the City's position that this Court has already provided that interpretation at least as to recreational facilities.

An exception should never consume the rule. The general rule, R.C. 2744.01(C)(2)(u) provides that the operation of a municipal swimming pool is an immune governmental function. Clearly, the General Assembly in creating specific exceptions to immunity did not intend to allow an exception to abrogate immunity in its entirety. Yet, this is what the decision of the Court of Appeals does in this case.

As the *Cater* court understood, the exception to immunity provided by (B)(4) does not apply to swimming pools. A swimming pool is an athletic place, and athletic activities

invite injuries. A person doesn't assume the same risk when she walks down the hall of a city administration building to pay her utility bill or parking ticket. The classification made by the legislature and recognized by the court in *Cater* is apparent in the statute.

The Plaintiffs argued below that because of its plurality opinion, *Cater* was, at best, a judgment only. In their brief to the Ninth District, Plaintiffs admitted that all seven justices joined in *Cater's* judgment. However, both the Plaintiffs and the Ninth District chose to ignore that *Cater* was a case involving substantially similar facts-indoor swimming pools and death/injury. Therefore, in that regard, *Cater* stood as clear precedent to be followed by the Ninth District.

In *Johnson v. Microsoft Corp.*, 2004-Ohio-761, the Ohio Court of Appeals for the First District stated:

[a]s the United States Supreme Court has observed, faced with controlling authority by a superior court and another line of decisions, a court of appeals has only one course--to follow the authority of the court to which it is inferior, "leaving to [the higher court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp. Inc.* (1989), 490 U.S. 477, 484. *Id.* at ¶8

The three cases that are consistently relied upon by appellate courts in the analysis of the issue before this Court are *Cater v. Cleveland* (1998), 83 Ohio St.3d. 24, *Hubbard v. Canton City School B.O.E.*, 2002-Ohio-6718 and *Moore v. Lorain County Metropolitan Housing Authority*, 2007- Ohio-2106 and 2008-Ohio-0030.

Courts of Appeals that have criticized *Cater, supra*, have used both *Hubbard* and *Moore* to insist that *Cater* is obsolete, when, in fact, those cases have not affected *Cater's* value as precedent in the least.<sup>1</sup> Neither *Hubbard* nor *Moore* involved a municipal swimming pool or dealt with the distinction between a governmental use and a recreational use.

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<sup>1</sup> See, *Mathews v. City of Waverly*, 2010-Ohio-347; *Thompson v. Bagley*, 2005-Ohio-1921.

In *Hubbard, supra*, Chief Justice Moyer wrote for the majority. He also wrote a concurring opinion in *Cater, supra*. *Hubbard* provided the Chief Justice with the opportunity to overrule *Cater*. Nevertheless, the Chief Justice cited to *Cater*, consequently it can be presumed that he was aware of the *Cater* reasoning and the occasion that his authored opinion presented. *Cater*, however, was left untouched by *Hubbard* and remains binding precedent. In fact, the Ninth District specifically held in *Hopper v. Elyria*, 2009-Ohio-2517 that “[t]he *Hubbard* court did not revisit the distinction between buildings used for governmental purposes and recreational facilities. *Id.* at ¶16.

The court below relied upon this Court’s reasoning in *Moore v. Lorain County Metropolitan Housing Authority*, 2007-Ohio-2106 and 2008-Ohio-0030 and held that *Moore* had implicitly abandoned the Court’s government versus recreational use distinction in *Cater*, 83 Ohio St.3d. 24. *Hawsman v. City of Cuyahoga Falls*, 2011-Ohio-3795 at ¶15. Of course, the Ohio Supreme Court did no such thing, as the Ninth District was obliged to point out in their opinion. *Id.* *Moore* did not involve a swimming pool or the recreational/governmental use distinction set forth in *Cater*.

*Cater v. Cleveland* (1998), 83 Ohio St.3d 24, has not been affected by either the *Hubbard* or the *Moore* case and remains good law and binding as a judgment involving the same or similar facts as presented in this case. The Ninth District court of appeals should have affirmed the trial court’s grant of summary judgment.

#### IV. CONCLUSION

Based on the foregoing, the City respectfully requests that this Court to accept jurisdiction.

Respectfully submitted,

  
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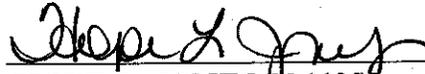
Counsel for Defendant/Appellant  
City of Cuyahoga Falls

**CERTIFICATE OF SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction has been sent by regular U.S. Mail, postage prepaid, September 16<sup>th</sup>, 2011 to the following:

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**APPENDIX**

**Ninth District Court of Appeals Decision and Journal Entry dated August 3, 2011  
Apx. 1**

STATE OF OHIO )  
 ) ss: )  
 COUNTY OF SUMMIT )

COURT OF APPEALS  
 DANIEL M. HORRIGAN

IN THE COURT OF APPEALS  
 NINTH JUDICIAL DISTRICT

AUG -3 AM 7:52

MICHAEL L. HAWSMAN, minor, et al. )  
 ) )  
 ) )

SUMMIT COUNTY  
 CLERK OF COURTS

A. No. 25582

Appellants

v.

CITY OF CUYAHOGA FALLS, et al.

Appellees

APPEAL FROM JUDGMENT  
 ENTERED IN THE  
 COURT OF COMMON PLEAS  
 COUNTY OF SUMMIT, OHIO  
 CASE No. CV 2009 07 5156

DECISION AND JOURNAL ENTRY

Dated: August 3, 2011

MOORE, Judge.

{¶1} Appellants, Michael Hawsman, a minor, and his parents, appeal from the judgment of the Summit County Court of Common Pleas granting summary judgment against them on the basis of political subdivision immunity. This Court reverses.

I.

{¶2} The relevant facts, for purposes of context, are as follows. On May 12, 2006, Michael Hawsman visited the Cuyahoga Falls Natatorium and Wellness Center. He injured his knee while using the pool and diving board. The City of Cuyahoga Falls maintains and operates the Natatorium. On July 10, 2009, Hawsman and his parents filed suit against the City and five unidentified defendants alleging that the City negligently maintained the diving board. After filing a certification for leave to plead, the City filed its answer on September 9, 2009.

{¶3} On May 26, 2010, the City filed a motion for summary judgment claiming that it was immune from suit. Specifically, it contended that the exception to political subdivision

immunity found in R.C. 2744.02(B)(4), as interpreted in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, did not apply to indoor swimming pools. The Hawsmans filed a brief in opposition to the motion and the City filed a reply brief. On August 17, 2010, the trial court granted summary judgment in favor of the City.

{¶4} The Hawsmans timely filed a notice of appeal and raise one assignment of error for our review.

## II.

### ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED IN FINDING THAT THE EXCEPTION TO POLITICAL SUBDIVISION IMMUNITY PROVIDED IN OHIO REVISED CODE §2744.02(B)(4) DOES NOT APPLY TO THE INDOOR SWIMMING POOL OPERATED BY [THE CITY].”

{¶5} In their first assignment of error, the Hawsmans contend that the trial court erred in granting summary judgment to the City because the exception to political subdivision immunity found in R.C. 2744.02(B)(4) does not apply to the City’s indoor swimming pool. We agree.

{¶6} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. We apply the same standard as the trial court, viewing the facts of the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viocck v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12.

{¶7} Pursuant to Civ.R. 56(C), summary judgment is proper if:

“(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for

summary judgment is made, that conclusion is adverse to that party.” *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327.

{¶8} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292-93. Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once this burden is satisfied, the non-moving party bears the burden of offering specific facts to show a genuine issue for trial. *Id.* at 293. The non-moving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that demonstrates a genuine dispute over a material fact. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

{¶9} We begin by acknowledging that fewer than two years ago in *Hopper v. Elyria*, 9th Dist. No. 08CA009421, 2009-Ohio-2517, this Court decided a nearly identical issue in reliance on the lead opinion from *Cater v. Cleveland*, *supra*. The vitality of the lead opinion in *Cater* has been subjected to increasing skepticism in recent years, particularly with respect to its treatment of municipal swimming pools. In *Cater*, a twelve-year-old boy lost consciousness and nearly drowned in a city-owned indoor pool. *Cater*, 83 Ohio St.3d at 24. He developed pneumonia and was declared brain-dead four days later. *Id.* *Cater*’s family sued. *Id.* At the close of the family’s case, the City of Cleveland moved for a directed verdict on the basis of immunity under R.C. Chapter 2744. *Id.* at 27. The trial court granted the motion and the court of appeals affirmed. *Id.* We begin our analysis of this case with a brief review of the relevant portions of R.C. 2744.02.

A. Chapter 2744 Analytical Structure

{¶10} *Cater* set forth an oft-cited explanation of the appropriate analysis of cases falling under R.C. 2744.02. *Cater* observed that “[t]he Political Subdivision Tort Liability Act, as codified in R.C. Chapter 2744, sets forth a three-tiered analysis for determining whether a political subdivision is immune from liability.” *Id.* at 28. The first tier is the premise under R.C. 2744.02(A)(1) that: “[e]xcept as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.” (Emphasis omitted.) *Id.* at 28.

{¶11} The second tier involves the five exceptions set forth in R.C. 2744.02(B), any of which may abrogate the general immunity delineated in R.C. 2744.02(A)(1). *Id.* Lastly, under the third tier, “immunity can be reinstated if the political subdivision can successfully argue that one of the defenses contained in R.C. 2744.03 applies.” *Id.* The Supreme Court of Ohio has repeatedly endorsed this approach. See, e.g., *Hubbard v. Canton City School Bd. of Ed.*, 97 Ohio St.3d 451, 2002-Ohio-6718.

B. Applicability of R.C. 2744.02(B)(4) to Municipal Pools

{¶12} In this case, the parties agree that maintenance of the pool and diving board is a governmental function. Thus, the single issue for our determination is whether the exception to immunity set forth in R.C. 2744.02(B)(4) applies. The exception to immunity found in R.C. 2744.02(B)(4) provides that “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 \* \* \*.”

{¶13} In the court below, the City based its motion for summary judgment upon the Supreme Court’s decision in *Cater*, which interpreted the applicability of R.C. 2744.02(B)(4) to municipal pools, and this Court’s decision in *Hopper*, which followed the lead opinion. Justice Sweeney, writing only for himself in the lead opinion, said that operation of an indoor municipal swimming pool was subject to the immunity exception found in former R.C. 2744.02(B)(3), which addressed nuisance conditions, but was not subject to the exception found in former R.C. 2744.02(B)(4).<sup>1</sup> *Cater*, 83 Ohio St.3d at 30-32. The opinion examined the statutory language from R.C. 2744.02(B)(4) including “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 \* \* \*.” The lead opinion then distinguished recreational locations from business activity locations, saying that “[u]nlike a courthouse or office building where government business is conducted, a city recreation center houses recreational activities.” *Id.* at 31. The opinion continued in dicta that “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.” *Id.*

{¶14} Chief Justice Moyer concurred in the syllabus and judgment, expressing his belief that R.C. 2744.02(B)(4) clearly applies to indoor and outdoor pools. *Id.* at 35. The Chief

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<sup>1</sup> The version of R.C. 2744.02(B)(4) in effect at the time did not include the clause “and is due to physical defects within or on the grounds of.”

Justice's concurrence reasoned that indoor pools are naturally found within buildings and outdoor pools "invariably are located on land that includes buildings[.]" *Id.* Two justices concurred in this opinion and the syllabus, creating a plurality opinion. *Id.* at 34. The syllabus is broad and states that municipal swimming pools are subject to the exceptions to immunity set forth in R.C. 2744.02(B). *Id.* at the syllabus. The final two justices concurred in judgment only. *Id.* at 34. Overall, four justices concurred in the broad syllabus statement that the operation of municipal swimming pools is subject to the immunity exceptions found in R.C. 2744.02(B), one justice in the lead opinion agreed that R.C. 2744.02(B)(4) did not provide an exception to immunity in the case of municipal pools and distinguished between recreational and governmental business buildings, two justices concurred in judgment only, and three justices opined that R.C. 2744.02(B)(4) should apply to indoor and outdoor municipal pools. Against this background, the holding of Justice Sweeney's lead opinion in *Cater* has limited precedential effect.

{¶15} Further, the Supreme Court has since implicitly abandoned a distinction between places of business and places of recreation in interpreting the applicability of R.C. 2744.02(B)(4). In *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, two children died as a result of a fire in an apartment owned by the housing authority. *Id.* at ¶2. The lawsuit claimed that a housing authority employee removed the lone working smoke detector in the apartment. *Id.* at ¶3. The housing authority argued that R.C. 2744.02(B)(4) only applied to buildings similar to offices and courthouses. *Id.* at ¶23. The majority analyzed the phrase "including, but not limited to" and observed that it "denotes a nonexclusive list of buildings to which the exception may apply." *Id.* at ¶24. On appeal, the Supreme Court seized on the phrase "buildings that are used in connection with the performance of a governmental

function” and concluded that units of public housing are used in connection with the performance of a governmental function. *Id.* For that reason, the Court held that R.C. 2744.02(B)(4) created an exception to immunity in that case. *Id.* Although the Court did not explicitly abandon the governmental-business-versus-recreational-use distinction, a housing authority apartment is not a place where the public generally appears and government business takes place.

{¶16} In recent years, the rationale of *Cater*'s lead opinion has come under increasing criticism from several appellate districts. In 2005, the Third District Court of Appeals in *Thompson v. Bagley*, 3d Dist. No. 11-04-12, 2005-Ohio-1921, questioned the continuing validity of *Cater*. The *Bagley* court observed that, like in *Moore*, the Supreme Court in *Hubbard* considered only the plain language of R.C. 2744.02(B)(4) and made no mention of a distinction between recreational and governmental uses. *Id.* at ¶34. The *Bagley* court, however, distinguished the case from *Cater* on the basis that Thompson was a fourth-grade student involved in a school swim class at the time of his death. *Bagley* at ¶36. The court noted that even teaching students how to swim “is much more akin to the governmental business conducted in a courthouse or office building than the recreational activities of a municipal swimming pool.” *Id.* On that basis, the Third District reversed the trial court's grant of summary judgment in favor of the school district. *Id.* at ¶59.

{¶17} The Sixth District Court of Appeals addressed political subdivision immunity related to a city-operated swimming pool in *O'Connor v. City of Fremont*, 6th Dist. No. S-10-008; 2010-Ohio-4159. The majority affirmed the grant of summary judgment in favor of the city on the basis of political subdivision immunity. *Id.* at ¶1. The majority relied upon *Cater*'s lead opinion and *Hopper*, specifically repeating that *Cater* constitutes binding precedent. *Id.* at ¶12.

The majority also relied on *Hopper's* determination that *Bagley* was distinguishable on the basis that a school is a place of governmental business as opposed to recreational activity, quoting that “the analysis by the *Thompson* court does not implicate the reasoning in *Cater*.” *Id.* at ¶13. Judge Cosme, however, wrote a comprehensive dissent. First, the dissent observed that plurality opinions are not binding authority and cited, among others, *Hedrick v. Motorists Mut. Ins. Co.* (1986), 22 Ohio St.3d 42, 44. *Id.* at ¶17, 22. The dissent further observed that *Cater's* lead opinion did not obtain even plurality status because the lone concurring judge did not join on the issue of R.C. 2744.02(B)(4)'s applicability. *Id.* at ¶22. The dissent also criticized *Hopper's* reliance on *Cater's* governmental-business-versus-recreational-use distinction in light of *Moore's* implicit abandonment of this approach. *Id.* at ¶30. In light of the inherent conflict between *Cater's* lead opinion and *Moore*, the dissent would have relied upon the more recent precedent and denied the city's summary judgment motion. *Id.* at ¶32.

{¶18} The Fourth District Court of Appeals faced an analogous situation in *Mathews v. City of Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-347. Although a municipal pool was not involved, the two-judge majority affirmed a trial court's order denying summary judgment to the city on the basis that the exception in R.C. 2744.02(B)(4) applied to the negligent maintenance of public parks. *Id.* at ¶36. The third judge dissented without opinion. In that case, “a tree limb fell on Ms. Mathews while she stood in the parking lot of Canal Park, which the City of Waverly owns and operates.” *Id.* at ¶3. The city moved for summary judgment on the basis that R.C. 2744.02(B)(4) does not apply as an exception to immunity because Mathews could not “show that any building within the park was used in connection with the performance of a government function.” *Id.* at ¶4. The *Mathews* court acknowledged the tension between *Hopper* and *Bagley*. *Id.* at ¶33-34. The court also observed the tension between *Cater* and *Moore*. *Id.* at ¶32. The

majority criticized *Cater* because it “ignore[d] principles of statutory interpretation.” *Id.* at ¶30. In interpreting R.C. 2744.02(B)(4) the court observed that “[t]he plain meaning of a ‘governmental function’ includes the operation of a swimming pool. Inserting this latter definition into R.C. 2744.02(B)(4) would mean that the statute applies to ‘buildings used in connection with the performance of the operation of a swimming pool.’” *Id.* The court further observed that *Cater’s* lead opinion never explained how it could “avoid a seemingly plain application of the statute to conclude that that the General Assembly did not intend to include buildings that house a municipal swimming pool from the reach of R.C. 2744.02(B)(4).” *Id.* If the General Assembly intended a distinction between governmental business and recreational use it could have used language to that effect. *Id.* The Fourth District determined that *Moore* was more recent and its approach to R.C. 2744.02(B)(4) was more consistent with the plain language of the statute. *Id.* at ¶35. The court held that “[a]lthough the city does not literally ‘maintain’ or ‘operate’ the park from the shelter houses or the roofed pagodas, those buildings are used in connection with the performance of the operation of the park.” *Id.* at ¶36. Consequently, Mathews was not barred by political subdivision immunity from pursuing a claim because the plain language of the statute and the Supreme Court’s straightforward interpretation of that language in *Moore* were held not to support a distinction between buildings used for recreational purposes and those used for government business. *Id.*

{¶19} *Hopper* is presently binding precedent in this district. *Hopper’s* son drowned in a city-owned pool. *Hopper*, at ¶6. The case was disposed of on a motion to dismiss pursuant to Civ.R. 12(B)(6), but the complaint alleged that the city failed to post proper warning signs and failed to secure the premises against unauthorized entry. *Id.* The trial court declined to dismiss the suit and the city appealed. *Hopper* contended that *Hubbard* calls into question the reasoning

behind *Cater*. Id. at ¶15. This Court observed that *Hubbard* cited *Cater* as authority for the three-tiered analysis used in determining immunity and that *Hubbard* did not attempt to discuss or distinguish its reasoning from *Cater*. Id. This Court also rejected the conclusion reached in *Bagley*, reasoning that *Bagley* involved an office building, a school, in which a governmental function is performed, the education of children. Id. at ¶17. In *Hopper* this Court reaffirmed the authority of *Cater* and reversed the trial court's denial of the city's motion to dismiss on the basis of immunity. Id. at ¶18. Upon considered review, the criticisms of *Cater* by the various courts of appeal, however, are well-reasoned and compelling.

### C. *Hopper* Overruled

{¶20} Because *Hopper* relied on the lead opinion in *Cater*, an opinion not joined by any other justice, as binding authority, it was wrongly decided. *Hopper* is overruled. In so holding, we rely on the authority of *Moore* and the applicable statutory language of R.C. 2744.02(B)(4). *Moore* implicitly discarded the distinction between recreational use and governmental business. *Moore* at ¶24. *Moore* instead focused on the clear language of R.C. 2744.02(B)(4): “buildings that are used in connection with the performance of a governmental function.” Id. *Moore* observed that the additional language of R.C. 2744.02(B)(4) “including, but not limited to,” office buildings and courthouses “denotes a nonexclusive list of buildings to which the exception may apply.” Id. It held that injuries occurring within or on the grounds of these buildings, in that case public housing authority apartments, are not subject to immunity. Id. R.C. 2744.01(C)(2)(u)(iv) defines the “\* \* \* repair, maintenance, and operation of \* \* \* [a] swimming pool, \* \* \* water park, \* \* \* wave pool, water slide, or other type of aquatic facility[,]” as a governmental function. The facility in which Hawsman was injured, the Cuyahoga Falls Natatorium, contains a swimming pool that the City repairs, maintains, and operates, and is,

therefore, a building used in connection with the performance of a governmental function. Accordingly, the exception to immunity found in R.C. 2744.02(B)(4) applies and the City is not immune from suit by the Hawsmans. Although the trial court could not have predicted that we would overrule *Hopper*, its judgment must be reversed.

{¶21} The Hawsmans' single assignment of error is sustained.

III.

{¶22} The Hawsmans' single assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed  
and cause remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.



CARLA MOORE  
FOR THE COURT

BELFANCE, P. J.  
DICKINSON, J.  
CONCUR

APPEARANCES:

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