

IN THE SUPREME COURT OF OHIO

11-1588

Michael L. Hawsman, minor, et al.,

Appellees,

v.

The City of Cuyahoga Falls, et al.,

Appellants.

Case No. 2001-1588

On Appeal from the Summit
County Court of Appeals,
Ninth Appellate District

Court of Appeals
Case No. 25582

MEMORANDUM OF APPELLEES, MICHAEL L. HAWSMAN,
MINOR, ET AL., OPPOSING JURISDICTION

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Proposition of Law No. 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.3

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**EXPLANATION OF WHY THIS CASE DOES NOT PRESENT AN ISSUE OF PUBLIC
OR GREAT GENERAL INTEREST**

Despite Appellees' insistence to the contrary, this case presents absolutely no issue of public or great general interest meriting review by this Court. The Ninth District appropriately overruled its own erroneous precedent and issued a well-reasoned opinion following both long-standing principles of statutory construction as well as this Court's holding in *Moore v. Lorain Metro. Hous. Auth.* (2009), 121 Ohio St.3d 455; 905 N.E.2d 606.

Specifically, the court below properly reversed the trial court's grant of summary judgment as being in direct conflict with the clear and unambiguous statutory language of R.C. 2744.02. At the trial court level, the Defendants-Appellants sought summary judgment solely on the ground that the exception to immunity set forth in R.C. §2744.02(B)(4) did not apply to indoor swimming facilities. The Ninth District appropriately relied on the plain language of the statute, and this Court's precedent, and identified only two requirements for the exception to immunity to apply: 1) negligent acts of employees within buildings used in connection with a governmental function; and 2) physical defects within those buildings. Both requirements being met in the case at bar, the court appropriately reversed the trial court's grant of summary judgment.

The Appellants' lone argument to both the trial and appellate courts was that they were entitled to immunity based on this Court's holding in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, 697 N.E.2d 610 and its progeny *Hopper v. Elyria* (2009), 192 Ohio App.3d 521, 913 N.E.2d 997. This argument failed to recognize that the opinion in *Cater* did not express a majority holding, and therefore lacked binding precedential value. *Hedrick v. Motorists Mut. Ins. Co.* (1986), 22 Ohio St. 3d 42, 44, 488 N.E.2d 840. In fact, inasmuch as the portion of the lead

opinion at issue did not enjoy concurrence by even a plurality of the court, even its persuasive value is limited. Further, it completely ignored this Court's more recent abandonment of the *Cater's* analysis in *Moore*.

The Ninth District's determination that its reliance on *Cater* was in error in, for precisely those same reasons, is perfectly proper and presents no issue for this Court to review. In fact, its decision to correct its own flawed holding in *Hopper* was a necessary and appropriate exercise of their duty and obligation to review and correct their own holdings where they are found to be incorrect or no longer applicable. See, generally, *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 797 N.E.2d 1256.

Finally, Appellants seek to invoke the discretionary jurisdiction of this Court partially on the grounds that other Districts in Ohio have misapplied the holding in *Cater* and reached inconsistent conclusions on similar questions. Appellants cannot be permitted to impose upon this court to invoke discretionary jurisdiction to entertain what is essentially a certified conflict issue where that issue has been waived by their own inaction. S.Ct. Prac. R. 4.1 requires that a court of appeals issue an order certifying a conflict pursuant to the Section 3(B)(4), Article IV, Ohio Constitution, prior to the institution of an appeal to this Court. Appellants herein failed to seek such certification within the time proscribed by the rules. Clearly, this issue has not been properly brought before this Court and, therefore, should not be considered in a review to invoke its discretionary jurisdiction.

As such, the decision of the lower court in this matter, standing alone, does not present this Court with a question of great public or general interest sufficient to warrant review.

STATEMENT OF THE CASE AND FACTS

Michael L. Hawsman is a minor child who suffered injury to his knee on May 12, 2006 while using a defective diving board at the Natatorium and Wellness Center owned, operated and maintained by the City of Cuyahoga Falls (“City”) and its Parks and Recreation Department. Plaintiff-Appellee Michael L. Hawsman, along with his parents Michael and Angela Hawsman, filed a Complaint in the Summit County Court of Common Pleas alleging that Michael’s injury was a direct result of improper maintenance of the diving board, which created an unsafe surface condition. Plaintiffs-Appellees offered the trial court expert testimony by way of Affidavit to support its allegation that improper maintenance was the cause of the unsafe condition.

On August 17, 2010 the trial court granted summary judgment in favor of the Defendants-Appellants, concluding that the swimming pool was not covered by the immunity exception provided in R.C. 2744.02(B)(4). On August 3, 2011 the Summit County Court of Appeals reversed the trial court’s grant of summary judgment and remanded the matter for further proceedings consistent with that judgment. Defendants-Appellants now seek review by this court of the reversal and remand.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW OF APPELLANTS

Proposition of Law No. 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.

Defendants-Appellants’ single proposition of law was addressed and rejected by this court in *Moore, supra*, as well as by implication in the General Assembly’s most recent iteration of the statute. In *Moore*, two children died as a result of a fire in a residential apartment, owned

by the housing authority, from which a housing authority employee had removed the only functioning smoke detector. The housing authority presented this Court with the identical argument as the Appellants here: that because units of public housing were not similar to offices and courthouses, R.C. §2744.02(B)(4) did not apply. *Id.* at 23. This Court, however, found that the statutory language at issue (specifically, the phrase "including, but not limited to"), "denote[d] a nonexclusive list of buildings to which the exception may apply" *Id.* at 24 and held that units of public housing are used in connection with the performance of a governmental function, making R.C. §2744.02(B)(4) applicable. The issue presented by the case *sub judice*, does not present any new issue meriting review by this court. Notably, the Appellants seem to completely overlook the conclusion reached by this Court in *Moore* that the statute does not require any similarity to office buildings or courthouses, as proposed by Appellants. Appellants contend that merely because *Moore* did not specifically address a swimming pool or recreational facility, the reasoning is not applicable here. This argument is insufficient to justify review by this Court. Despite the slight factual variation, it is clear that holding of *Moore* abandoned the "like an office or courthouse" analysis that the *Cater* lead opinion embraced.

Furthermore, the General Assembly undertook amending the statute after this Court's decision in *Cater*. The most recent version of the statute did not: 1) adopt the *Cater* Court's recreation/business function distinction; 2) remove the operation of recreation pools as an enumerated governmental function; nor 3) add indoor or outdoor swimming facilities to buildings specifically excluded from the exemptions of R.C. §2744.02(B)(4). Given the unambiguous language of the statute it must be concluded that it was their intent that the exemption of R.C. §2744.02(B)(4), read in *pari materia*, with the definitions contained in R.C. §2744.01, accurately reflected their legislative intent.

The specific exemption to immunity contained in R.C. §2477.04(B)(4) provides that political subdivisions are liable for:

[I]njuries or loss caused by negligence of the political subdivision or its employee * * * that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings used in connection with the performance of a governmental function¹, including but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses or other detention facilities as defined in section 2921.01 of the Revised Code.

Ohio law is well-settled that where statutory language is unambiguous and definite, it should be applied as written *Coventry Towers, Inc. v. Strongsville* (1985), 18 Ohio St.3d 120, 122; 480 N.E.2d 412; *Portage Cty. Bd. of Commrs v. Akron* (2006), 109 Ohio St. 3d 106, 846 N.E.2d 478; *State ex. rel Burrows v. Indus. Comm.* (1997), 78 Ohio St. 78, 81, 676 N.E.2d 519. To this end, this Court has recognized the judiciary's duty is to "give effect to the words used in the statute, not to delete words or insert words not used." *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441. Here, the lower court has fulfilled this duty. Appellants' proposition of law, however, asks this court to effectively add the words "**similar to an office building or courthouse**" to the language of the statute.

Employing well-settled principles of statutory construction, the lower court correctly determined that that the injuries complained of by Appellees met the statutory requirements of R.C.2744.02(B)(4), by having taken place within a building used in connection with a governmental function.

Finally, Appellants' plea to this Court that *stare decisis* mandates review and reversal of the lower court's decision is also insufficient. As set forth clearly in the Ninth District's opinion

¹ It is undisputed by the parties to this action that the operation of the natatorium in question is a governmental function as defined by R.C. §2477.01(C)(2)(u).

below, the lead opinion in *Cater*, lacks any binding effect. Only that lead opinion concluded, in part, that despite being a governmental function, as defined by R.C. §2477.01, the operation of a swimming pool was not a governmental function for the purposes of the exception to immunity to immunity set forth in R.C. §2477.02(B)(4). However, inasmuch as that portion of the opinion was not joined by sufficient number of justices to even reach the status of a plurality, it does not constitute binding precedent on this Court or any others in the state.

Even assuming, *arguendo*, the lead opinion in *Cater* were determined to have binding effect on the courts of Ohio, that standing alone is not sufficient to entitle Appellants' to the relief they seek. This Court has recognized that a court "not only has the right, but is entrusted with the duty to examine its former decisions and, when reconciliation is impossible, to discard its former errors. *Westfield Ins. Co. v. Galatis, supra*, quoting *State v. Jenkins* (2000), 93 Hawaii 87, 112, 997 P.2d 13. This is precisely what the appellate court below correctly done by overturning its ruling in *Hopper*, and what this court has done by implicitly abandoning the business use analysis in *Moore*.

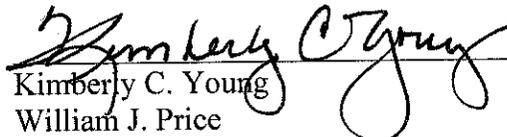
In the case *sub judice*, this Court must recognized that the lead opinion in *Cater* represents a misapplication of the principles of statutory construction to the plain language of R.C. §2744.02(B)(4) and hold, as it has in the past that "[i]t does no violence to the legal doctrine of *stare decisis* to right that which is clearly wrong. It serves no valid public purpose to allow incorrect opinions to remain in the body of our law." *State ex rel. Bd. of Cty. Comm. Lake Cty. v. Zupancic* (1991), 62 Ohio St.3d 297, 300, 581 N.E.2d 1086.

CONCLUSION

For the foregoing reasons, Appellees' urge this court to find that this case presents no issues of public or great general interest that its review.

Respectfully submitted,

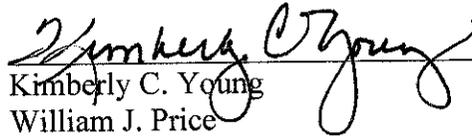
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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Opposition of Jurisdiction was sent by ordinary U.S. Mail to counsel for Appellants, Hope L. Jones and Paul A. Janis, City of Cuyahoga Falls 2310 Second Street Cuyahoga Falls, Ohio 44221 on October 14th, 2011.



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