

ORIGINAL

No. 2011-1588

IN THE SUPREME COURT OF OHIO

Discretionary 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.

CITY OF CUYAHOGA FALLS, ET. AL.,

Defendants-Appellants

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DEFENDANTS/APPELLANTS, CITY OF CUYAHOGA FALLS'
MERIT BRIEF

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I. STATEMENT OF THE FACTS

A. Facts of the Case

Plaintiff, Michael L. Hawsman, a minor, (“Plaintiffs” or “Hawsmans”) claims that on May 12, 2006, he visited the Defendant, City of Cuyahoga Falls’ (“City”) 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 alleged injury to their son. See, Complaint at ¶9.

The Natatorium is owned by the City of Cuyahoga Falls and is a community recreation center that includes an indoor swimming pool equipped with a diving board (Lohan Affidavit at ¶¶ 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. Statement of the Case

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 trial court based its decision on the Ninth District Court of Appeals’ ruling in *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517 (9th Dist) and this Court’s ruling in *Cater v. Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 60 (1998), 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, supra*, and disregarded the Supreme Court's precedent in *Cater, supra*.

This Appeal followed.

II. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law I: Under the Political Subdivision Tort Liability Act, 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 contained in R.C. 2744.02(B)(4) does not apply.

Plaintiff, Michael L. Hawsman visited the City's Natatorium and allegedly injured his knee while using the swimming pool's diving board. In reversing the trial court's grant of summary judgment to the City, the court of appeals abrogated and effectively overruled this Court's decision in *Cater*. The court of appeals erred by disregarding valid case law handed down by the highest Court in this State.

Pursuant to the Political Subdivision Tort Liability Act("Act"), 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.*

In *Cater, supra*, a young boy died as a result of complications from nearly drowning in an indoor swimming pool owned and operated by the City of Cleveland. This Court was asked to determine whether an indoor swimming pool operated by a political subdivision is subject to the exceptions to immunity pursuant to R.C. 2744.02(B). This Court held in *Cater, supra*, that while 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)¹. *Cater*, 82 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. 3d at 31. In drawing the distinction, the *Cater* decision implicated the theory of similar classification or *ejusdem generis* (literally meaning, “the same kind”).

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 functions not of this type will not fall under (B)(4). 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. Droste*, 83 Ohio St 3d 36, 39, 697 N.E.2d 620 (1998). Had the General Assembly intended that the (B)(4)

¹ R.C. 2744.02(B)(4) has been amended since the Supreme Court’s ruling in *Cater*. The amendment added the words “due to physical defects” within or on the grounds of the building.

exception 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”. R.C. 2744.02(B)(4)

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 , on the other hand, based its finding on *Cater*, 83 Ohio St.3d 24, and on a unanimous Ninth District decision *Hopper*, 182 Ohio App.3d 521, 2009-Ohio-2517 that followed *Cater*. The court of appeals decided *Hopper*, *supra* just over two years before it unanimously overruled *Hopper* in the case *sub judice*. In so doing, the Ninth District implicitly overruled this Court and violated the doctrine of *stare decisis*. *Cater* remains the Supreme Court of Ohio's definitive statement of the relevant law.

If *Cater*, 83 Ohio St.3d 24, 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 Act. Users of recreational facilities, where swimming, exercising and competitive sports are the norm have a greater expectation of injury than a citizen visiting City Hall or a courthouse. There exist inherent risks in voluntarily engaging in exercise, recreation and fitness training that are not associated with attending jury duty, obtaining a building permit or filing a police report.

A. Plurality Opinion and Stare Decisis.

The Plaintiffs argue that because of its plurality opinion, *Cater*, 83 Ohio St.3d 24, is at best, a judgment only. In their brief to the Ninth District, Plaintiffs admitted that all seven justices joined the in *Cater* judgment. However, both the Plaintiffs and the court of appeals

chose to ignore the fact 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 court of appeals.

In its decision, the Ninth District agreed with the Plaintiffs' argument and adopted the reasoning of a dissenting opinion rendered in the Ohio Court of Appeals for the Sixth District in *O'Connor*, 6th Dist. No. S-10-008, 2010-Ohio-4159. In doing so, the Ninth District blatantly ignored *stare decisis*. In *Johnson v. Microsoft Corp.*, 156 Ohio App.3d 761, 2004-Ohio-761 (1st Dist), the court 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*

Plaintiffs assert that *Cater* deserves to be ignored as unreliable because of its plurality status; yet, this Court, appellate courts, the Sixth Circuit Federal Court of Appeals and the Federal District Court use *Cater* as the hallmark authority for the three tier review of immunity under R.C. Chapter 2744. See, *Rankin v. Cuyahoga County Dept. of Children's and Family Services*, 118 Ohio St. 3d 392, 2008-Ohio-2567, 889 N.E.2d 521 (this Court quoted from *Cater* as authoritative.), *Howard v. City of Girard*, 11th Dist. No. 2010-T-96, 2011-Ohio-2331, *French v. Vill. of New Paris*, 12th Dist. No. CA2010-05-008, 2011-Ohio-1309, *Scott v. Dennis*, 8th Dist. No. 94685, 2011-Ohio-12, *Krantz v. City of Toledo Police Dep't.*, , 2006 FED App. 692N (6th Cir. 2006), *Beckett v. Ford*, 613 F.Supp. 2d 970 (N.D. Ohio 2009).

The City recognizes that *Cater* was a plurality decision, but this fact does not minimize the persuasive significance of the decision that is directly on point with the case at

bar. The Supreme Court is the ultimate authority of law in the State of Ohio. *Hayes v. State Med. Bd. of Ohio*, 138 Ohio App. 3d 762, 769 (2001). Even if *Cater's* precedential "value is limited" as Plaintiff suggests, than its value surely has importance in a case with substantially similar fact as the case before this Court.

In its decision, the court of appeals provided no compelling reason to depart from *stare decisis* or its own decision in *Hopper*, 182 Ohio App.3d 521, 2009-Ohio-2517 (9th Dist). Certainly, the court of appeals failed to analyze *Hopper, supra*, against the test promulgated by this Court in *Westfield Ins. Co. v. Galatis* 100 Ohio St3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. *Westfield* sets forth the definitive test for whether a court should depart from *stare decisis*.

It is important to note that the judge who authored the opinion in the court of appeals issued the decision without a mention of the *Westfield, supra*, three pronged test. Yet, we know that the judge understands its mandates. In *Moody v. Coshocton County*, 9th Dist. No. 05CS0059, 2006-Ohio-3751, the judge who authored the opinion below was profoundly aware of *Westfield's* command and utilized it when she argued for the court to overrule a prior decision in her dissent. *Id. at* ¶s 30-31.

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.*

According to *Westfield*, a prior decision may be overruled only 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.* syllabus ¶1. The court of appeals in this case did not engage in any analysis whatsoever based on this Court's ruling in *Westfield*. Yet the facts of *Cater*, *Hopper* and this case are significantly the same. No appeals court should be permitted to depart from *stare decisis* simply because the panel of judges of the district changes from one case to the next. *Westfield* requires more. *Westfield* represents the hallmark test which a court must use before overturning its own precedent. Unfortunately, the court of appeals did not even mention *Westfield* in its decision before summarily overruling *Hopper*, 182 Ohio App.3d 521, 2009-Ohio-2517. *Stare decisis* was all but forgotten.

In *State v. Kalish*, 120 OhioSt.3d 23, 2008-Ohio-4912, this Court was faced with the argument that Eleventh District Court of Appeals had ignored *stare decisis* and overruled itself for no other reason than the appellate panel had changed. This Court would not decide the question because the appellant did not point to a specific case that the panel had overruled. This Court may decide the issue in this case because it is ripe.

When applying the above three pronged test to the *Hopper* case, it is clear *stare decisis* should not have been ignored by the court of appeals. All three prongs of the *Westfield* test must apply in order for a court to depart from *stare decisis*. None of the prongs applied to *Hopper* in the case below. First, *Hopper* was not wrongly decided because it relied upon this Court's judgment in *Cater*, 83 Ohio St.3d 24, 697 N.E.2d 60. Second, *Hopper* was not unworkable at all. *Hopper* stands for this very simple principle: pursuant to *Cater* injuries that occur at a swimming pool owned by a political subdivision are not subject to the exception to immunity provided in R.C. 2744.02(B)(4). Finally, abandoning *Hopper* will create an undue hardship upon the political subdivisions that enjoy immunity and have relied upon it

and *Cater*. Immunity provides the political subdivisions with the ability to provide various recreational opportunities - ones that present a potential risk of injury - to citizens without the concomitant risk of costly judgments or costly insurance premiums.

As this Court held in *Rocky River v. SERB*, 43 Ohio St.3d 1, 539 N.E.2d 103 (1989),

‘[s]tare decisis’ is, of course, shorthand for *stare decisis et non quieta movere*—“stand by the past decisions and do not disturb settled things.” See Black’s Law Dictionary (5 Ed. Rev. 1979) 1261. The heritage of the law is built like a wall-brick by brick. The spirit of the Anglo-Saxon law is, in part, the impact of the cases as they come down through the years. Each case as it is decided supplies another brick for the wall and gives us the taught tradition of the law. This tends to provide the stability necessary for an organized society to deal with its everyday affairs.

Uniformity and continuity in law are necessary for us to deal with our daily pursuits. We need to preserve the integrity of contractual agreements, wills, conveyances of property and our dealings in the commercial market-place. The applications of the principles of tort cannot be an ever-changing concept. What is negligence in the morning must also be negligence in the afternoon. To permit such standards to be in a continual state of flux would invite havoc.

The doctrine of *stare decisis* provides solid rocks upon which men and women can build and arrange their affairs with confidence. The doctrine serves to remove the capricious element from the law and lends stability to society. *Stare decisis* is a strong tie which our future has with our past. *Id.* at 4-5

This Court went on:

[t]he doctrine of *stare decisis* is a doctrine applying to future cases where the facts of the subsequent case are substantially the same as the former case. (emphasis added) *Id.* at 6.

Cater remains precedent in this state and the Ninth District erred in not following it as it did in *Hopper, supra*.

The Ninth District Court of Appeals had before it case facts that were substantially the same as those presented in *Cater*. The court had but one choice - and that was to adhere to the doctrine of *stare decisis* and affirm the decision of the trial court. As it was succinctly stated in *Ash v. Tyson* 664 F.3d 883, 907 (11th Cir. 2011), “Supreme Court precedent is not like an ash on a cigarette to be flicked off whenever convenient.”

B. *Cater, Hubbard and Moore*

The three cases that are consistently relied upon by appellate courts in the analysis of the issue before this Court are *Cater*, 83 Ohio St.3d 24, 697 N.E.2d 60, *Hubbard v. Canton City School B.O.E.*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543 and *Moore v. Lorain County Metropolitan Housing Authority*, 123 Ohio St.3d 471, 2009-Ohio-5934, 918 N.E.2d 135.

Courts of Appeals that have criticized *Cater, supra*, have used both *Hubbard, supra*, and *Moore, supra*, to insist that *Cater* is obsolete, when, in fact, those cases have not affected *Cater's* value as precedent in the least when similarity of facts is considered.² Neither *Hubbard, supra*, nor *Moore, supra*, involved a municipal swimming pool or dealt with the distinction between a governmental use and a recreational use.

In *Hubbard* Chief Justice Moyer wrote for the majority. He also wrote a concurring opinion in *Cater*. *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*

² See, *Mathews v. City of Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-347; *Thompson v. Bagley*, 3rd Dist. No. 11-4-12, 2005-Ohio-1921.

however, was left untouched by *Hubbard* and remains binding precedent. In fact, the Ninth District specifically held in *Hopper*, 182 Ohio App.3d 521, 2009-Ohio-2517 (9th Dist) that “[t]he *Hubbard* court did not revisit the distinction between buildings used for governmental purposes and recreational facilities. Accordingly, this Court is not persuaded that *Hubbard* has diminished the authority of *Cater* in regard to the circumstances of the instant case.” *Id.* at ¶16. Further, the court of appeals stated “[n]evertheless, the *Hubbard* court did not overrule *Cater* or make any attempt to discuss or distinguish its reasoning.” *Id.* at ¶15

The court below relied upon this Court’s reasoning in *Moore*, 123 Ohio St.3d 471, 2009-Ohio-5934, 918 N.E.2d 135 and held that in *Moore* this Court had abandoned the Court’s government versus recreational use distinction set forth in *Cater*. *Hawsman v. City of Cuyahoga Falls*, 9th Dist. No. 25582, 2011-Ohio-3795 at ¶15. The Plaintiffs make the identical argument. Of course, this Court did no such thing, as the Ninth District was obliged to point out in its opinion. *Id.* *Moore* did not involve a swimming pool or the recreational/governmental use distinction set forth in *Cater*, 83 Ohio St.3d 24, 697 N.E.2d 60. The position that the *Moore* court abandoned the “government versus recreational use” distinction is flawed and misleading. *Moore* involved the death of two children in an apartment fire. The Lorain County Metropolitan Housing Authority owned the apartment complex where the children died. Apartment buildings are not devoted to recreational uses; therefore, the Supreme Court would have had no reason in its opinion to make a distinction based on “governmental versus recreational use”. Since the Supreme Court did not mention this distinction, appellate courts and the plaintiffs have inaccurately hailed *Moore* as abandoning the distinction utilized in *Cater*. It is erroneous for courts to draw such sweeping conclusions. *Moore* did not implicate the distinction whatsoever.

Neither *Cater* nor this case can be compared to *Moore*. While children may play and frolic at their homes, an apartment building devoted to housing families is not a recreation center. Recreation centers are the kinds of places where people jump, run, lift, swim, dive, slide, play contact sports and are active. Courthouses and office buildings are typically more subdued places where jumping, running, diving, sliding and playing sports do not occur. Citizens and patrons have different expectations when entering a courthouse or office building than they do when they enter a recreation center to exercise, swim or play a game of racquetball.

All seven justices in *Cater* agreed that the judgment of the Court was correct. *Cater*, 83 Ohio St.3d 24, 697 N.E.2d 60, has not been affected by either the *Hubbard*, 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543 or the *Moore* case and remains good law and binding as a precedent because it involves the same or similar facts as presented in this case.

Proposition of Law II: Where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the General Assembly, the reason and purpose of the statute shall control. An interpretation of a statute that allows an exception to a rule to completely negate the rule to which it refers, contrary to demonstrable legislative intent, is absurd and shall be avoided.

The Political Subdivision Tort Liability Act divides all functions of political subdivisions into categories of “governmental” and “proprietary,” and in the first tier of analysis provides a general rule of immunity from tort liability for negligent acts or omissions arising out of *both* governmental and proprietary functions. R.C. 2744.01(C)(1), (G)(1), and 2744.02(A)(1). (“Tier One Immunity Rule”). In the second tier, five exceptions to the rule of immunity are provided in R.C. 2744.02(B). These exceptions can be fairly paraphrased as follows:

- (B)(1). Negligent operation of a motor vehicle,
- (B)(2). Negligent performance of acts with respect to “proprietary” functions,
- (B)(3). Negligent failure to remove obstructions from public roads (roadway nuisances),
- (B)(4). Negligent maintenance of public buildings (premises liability), and
- (B)(5). Civil liability expressly imposed by another section of the Revised Code. (“Tier Two Exceptions”)

The structure of the statute makes clear that there is an important distinction between governmental and proprietary functions. R.C. 2744.01 carefully sets out all functions of local government as “governmental” and “proprietary” primarily for the purpose of the later exemption of “proprietary” functions from the general rule of immunity. There would be no need for the statute’s painstaking definitions if these definitions were not of major importance to how the statute works: “governmental” functions are generally immune and “proprietary” functions are generally not immune. Any exception to immunity that has the result of excluding most or all of the defined “governmental” functions from the rule of immunity would be an exception that swallows the rule. An interpretation of the statute which would cause wholesale transfer of governmental functions from the “immune” category to the “non-immune” category is contrary to the plain meaning of the statute.

Thus, the Act’s enumeration of “governmental” functions is clearly meant to be an enumeration of *immune* functions, subject to the exceptions. R.C. 2744.01(C)(2) sets forth the following as an immune governmental function:

- (g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the

performance of a governmental function, including, but not limited to, office buildings and courthouses;

R.C. 2744.01(C)(2) also sets for the following as an immune governmental function:

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities. *Id.*

As stated above, R.C. 2744.02(B)(4) sets forth the exception to the general rule of immunity that is the subject of this case:

...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.

In the case below the Plaintiff claims he was injured at a municipal swimming pool, specifically on a diving board located at that pool. The construction of the statute plainly shows that immunity from tort claims arising in swimming pools and other recreational facilities is distinct from the immunity that is set forth for premises liability. The Act clearly provides immunity for “maintenance” of buildings like office buildings and courthouses in R.C. 2744.01(C)(2)(g), and provides for an exception to that immunity in R.C. 2744.02(B)(4) when a physical defect is present, i.e., “premises liability.” There is no corollary exception for swimming pools. If the General Assembly had intended that swimming pools be considered simply another category of “buildings” subject to these provisions, there would be no need to recite “swimming pools” separately as a one of the immune governmental functions. But instead, there is in fact Tier One immunity for “maintenance” of “buildings” used in a governmental function *and* for swimming pools. This is evidence, on the face of the statute itself, that the General Assembly intended these to be considered as separate functions when analyzing for applicable exceptions.

The use of the term “swimming pools” obviously connotes a function more specific than the “maintenance” of “buildings.” The City submits that special inclusion of the term “swimming pool” alongside the list of other immune governmental functions (including “maintenance” of “buildings”) does not give rise to any ambiguity. It is altogether clear that a swimming pool is not in a class of buildings similar to “office buildings and courthouses.” In *Hackathorn v. Springfield Local S.D.*, 94 Ohio App. 3d 319 (1994), the Court of Appeals stated:

R.C. §2744.02(B)(4) includes a general description, “buildings that are used in connection with the performance of a governmental

function,” as well as two specific examples, office buildings and courthouses.” [cite omitted] The specific inclusion must be contrasted with the statute’s specific exclusion of “jails, places of juvenile detention, workhouses, or any other detention facility.” Construing the inclusion and exclusion together, we find that the statute’s general classification is limited to the class which is similar to office buildings and courthouses. *Id.* at 325.

Thus, if a swimming pool is like an office building or a courthouse, the exception to immunity applies. If it is not like an office building or a courthouse, the exception does not apply. Perhaps more importantly to this case, if a *diving board* is like an office building or a courthouse, the exception to immunity applies. If a diving board is not like an office building or a courthouse, the exception does not apply.

In *Mattox v. Village of Bradner*, 6th Dist. No. WD-96-038 (March 21, 1997), the plaintiff was injured by falling off a diving board at a municipal swimming pool. The Sixth District Court of Appeals applied the same rule that was applied in *Hackathorn*, although a bit more prosaically:

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. [cite omitted] 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. *Id.* at p. 7, citing *McCloud v. Nimmer* 72 Ohio App. 3d 533, 539 (1991).

Applying the rule of *ejusdem generis*, the *Mattox* court found that the plaintiff’s fall off the diving board did not trigger the exception to immunity found in R.C. 2744.02(B)(4). This Court in *Cater*, 83 Ohio St.3d 24, 697 N.E.2d 60, cited the *Mattox* decision with approval, and indeed, this Court in *Cater* stated that there is no conflict between the statute’s enumeration of swimming pools as a governmental function and the exception contained in

R.C. 2744.02(B)(4) that sets forth an exception for *some* governmental functions. *Cater*, *supra* at 29. To get there, of course, this Court needed to engage in the *Hackathorn/Mattox* analysis, and it did so. It is this analysis that is under attack in the opinion below. Ironically, the abandonment of *Hackathorn*, *Mattox*, *Cater* and the line of other cases using this analysis³ would create the very conflict of laws that this Court avoided in adopting the *Mattox* reasoning in the first place. The court below provided no remedy for this problem.

At issue in the case *sub judice* is whether the Tier Two Exception for negligence that occurs in or on the grounds of building used in a government function applies to a municipal swimming pool. The discussion in *Cater* concerning how to analyze the (B)(4) exception using the *Hackathorn/Mattox* analysis is admittedly not a part of the *Cater* syllabus. Some of the most recent cases suggest that this analysis be abandoned in favor of a hyperliteral reading of R.C. 2744.02(B)(4) that ignores its place in the statutory scheme. Read literally and in a vacuum, R.C. 2744.02(B)(4) appears to provide an exception to immunity for negligence occurring in any building used in the performance of a governmental function. Literally, a swimming pool is a building used in the performance of a governmental function. Literal application of R.C. 2744.02(B)(4) produces the conclusion that an exception to immunity applies for all governmental functions. This turns the entire statutory scheme on its head.

Garrett v. City of Sandusky, 68 Ohio St. 3d 139 (1994), and the legislative response thereto demonstrates conclusively that the intent of the General Assembly is to continue the *Hackathorn/Mattox* analysis, not to apply the (B)(4) exception in a manner that swallows the

³ *Siebenaler v. Village of Montpelier*, 113 Ohio App. 3d 120, 124 (1996); *Thompson v. Bagley*, 2005-Ohio 1921, P36.

rule. In *Garrett* this Court found that a wave pool owned by a municipality was materially different from a swimming pool and more akin to an amusement ride, because of the wave activation device. *Garrett, supra* at 140. Thus, the wave pool could not be an immune governmental function as the same is defined as a “swimming pool” in R.C. 2744.01(C)(2)(u). Importantly, this Court recognized in *Garret* that the inclusion of “swimming pool” in the definitional section setting forth “governmental functions” was by itself evidence of the General Assembly’s intent to immunize that function. This Court found that the municipality was not immune from suit because “a wave pool is not a “swimming pool” pursuant to R.C. 2744.01(C)(2)(u).” *Id.* The section cited is the definition; not the rule or its exception.

In *Garrett*, this Court did not need to refer to the Tier Two Exceptions because there was no immunity at the Tier One Immunity level. However, in the process this Court recognized that the General Assembly intended that a swimming pool should be an immune governmental function, *because of the definition.*

The General Assembly reacted to *Garrett* and amended R.C. 2744.01(C)(2)(u) to include “wave pools” in the same section of the law that defines swimming pools as “governmental functions.” 1999 H.B. 205. Again, the General Assembly’s unmistakable intent was to immunize “wave pools” in the same manner as they believed swimming pools had been immunized. See, 1999 H.B. 205, uncodified Section 3. They effected this simply by adding to the definitional section of the statute, not by amending the immunity rules themselves, and under the scheme of the statute reflected in the *Garrett* case, this was all they had to do. The General Assembly, like this Court in *Garret* and *Cater*, recognized that the definitional sections, the immunity rule, and the exceptions all must be read *in pari*

materia. Given the General Assembly's response to *Garrett*, no serious argument can be made that the General Assembly did not intend wave pools, swimming pools, and every other recreational function listed in that section to be *immune* governmental functions. *Id.*

The court below abandons this logic and instead considers the (B)(4) exception to immunity in a vacuum. The court of appeals below found that the distinction between “governmental/business” uses and “recreational” uses is no longer viable. Indeed, the court below adopted an observation that “the 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.” *Hawsman*, 2011-Ohio-3795, ¶ 9, citing *Mathews v. City of Waverly*, 2010-Ohio-347, ¶30. This analysis is erroneous because “inserting this latter definition into R.C. 2744.02(B)(4)” literally rewrites the exception to consume the basic rule entirely. The General Assembly could not have intended that terms in the definitions and rules would be shifted around like Scrabble tiles to achieve a desired end. Indeed, this interpretation sets up “swimming pools” as an immune governmental function and then entirely removes that immunity based on the same definition. The statute cannot have been intended to work in such a manner, and after 1999 H.B. 205 no one can seriously suggest that this is what the General Assembly intended.

The rules of statutory construction employed by this Court were succinctly set forth in *Lesnau v. Andante Enterprises*, 93 Ohio St. 3d 467 (2001):

When called upon to construe a statute, we rely on well-established rules of statutory construction to determine legislative intent. To do so, we first look to the language of the statute and its purpose. We must give effect to the words used in the statute, not delete any words or insert words not used. In addition, R.C. 1.49 sets forth factors for

statutory construction that include the object sought to be obtained, the circumstances under which the statute was enacted, the common law, and the consequences of a particular construction. *Id.* 93 Ohio St. 3d 467, 471 (2001) (cites omitted)

The essential goal of statutory construction is to give effect to the intent of the General Assembly. *Carter v. City of Youngstown* 146 Ohio St. 203 (1946), syllabus ¶1. The intent may be inferred from the particular wording the General Assembly has chosen to set forth the substantive terms of the statute. See, *Wachendorf v. Shaver*, 149 Ohio St. 231 (1948), syllabus ¶5. Intent may also be revealed in the procedural passage of the legislative act under consideration, when that body passes legislation that enacts, amends, or repeals a statute. See, *State v. Wilson*, 77 Ohio St. 3d 334, 336-337 (1997). In other words, the intent of the legislature may be determined by considering the way the statute at issue was amended.

Further, fundamental rules of statutory construction require that statutes are to be interpreted as a whole, and harmoniously, so as to give effect to all sections of the statute. See, *General Motors Corp. v. McAvoy*, 63 Ohio St. 2d 232, 235 (1980); *State v. Parks*, 13 Ohio App. 3d 85 (1983). Sections and acts *in pari materia* – that is, in relation to the same matter or object, should be construed together. *State ex rel. Hyter v. Teater*, 52 Ohio App. 2d 150, 158 (1977).

It was apparent when the Act was first passed in 1985 that the exception to immunity in R.C. 2744.02(B)(4) was inserted to preserve a “premises liability” exception to immunity in buildings where one would expect the unanticipating public to be present. Perhaps inartfully drafted, the intent of General Assembly is plainly apparent. Obviously, if the premises liability exception is applied to swimming pools simply because a swimming pool is a governmental function, then the rest of the language in the exception, which limits the

exception to office buildings and courthouses and the like, is rendered mere surplusage. This violates the rule of statutory construction that all words in the statute should be given effect, and harmoniously. More importantly, the interpretation of the (B)(4) exception proffered in the opinion below results in an absurdity. Clearly, the General Assembly intended that functions defined as “governmental” to be presumptively immune. Yet, given the opinion below, any governmental function loses its immune status simply by having the term lifted and dropped into what was formerly a narrow exception for “premises liability.” Under the opinion below, it is now a gaping maw that literally swallows the Tier One rule of immunity. This cannot be what was intended by the General Assembly.

1999 H.B. 205 demonstrates beyond all doubt that the General Assembly intended that functions defined as “governmental” be presumptively immune functions. In restoring immunity to wave pools, the General Assembly did not amend the (B)(4) exception, although it could have. The General Assembly could have amended the last clause of R.C. 2744.02(B)(4) to read: “...but not including jails, places of juvenile detention, workhouses, or any other detention facility, *or wave pools.*” If the General Assembly understood the operation of R.C. 2744.02(B)(4) the way the court below does, i.e., that the “office building and courthouse” phrase is not limiting, they would have been required to make such an amendment. But they did not. They did not need to. Consistent with this Court’s view in *Garrett*, the General Assembly amended only the definitional section. We know as a matter of certainty that the General Assembly intended to immunize wave pools. We know as a matter of certainty that the General Assembly believed then that swimming pools were already immune. We also know as a matter of certainty that to accomplish immunization of wave pools, they amended only the definition section that contains, among other things,

swimming pools. This is indisputable evidence that the General Assembly does not subscribe to the view that any defined governmental function can be dropped into the (B)(4) exception to eliminate immunity. Clearly, the General Assembly relied on the “office buildings and courthouses” language to limit the exception to genuine “premises liability” situations. Any other view results in the inevitable conclusion that what the General Assembly did in 1999 H.B. 205 was futile. A court should not choose to interpret a statute in a manner that renders a legislative enactment entirely futile. If the opinion below stands, wave pools are still exempt from immunity notwithstanding 1999 H.B. 205, simply because they are defined as governmental functions. This is an absurd result, and completely contrary to demonstrable legislative intent.

It is apparent that R.C. 2744.02(B)(4) is an exception for premises liability meant to protect members of the public who might happen upon a negligently created defect in a place where no one would be called upon to anticipate it. Under the plain terms of the Act, this does not apply to a swimming pool. Users of a swimming pool are held to a higher degree of alertness, and this interpretation is mandated by the inclusion of the phraseology relating to “office buildings and courthouses” in the exception itself. Clearly, the *eiusdem generis* analysis set forth in *Hackathorn* and *Mattox* cases, and adopted by this Court in *Cater*, is mandated by the logic of the Act. Without the *Hackathorn/Mattox* analysis, the exception swallows the rule. An exception should never swallow the rule. This Court should once again affirm the *Hackathorn/Mattox* analysis as it did in *Cater*. For the reasons stated above, the Ninth District court of appeals should have affirmed the trial court’s grant of summary judgment.

III. CONCLUSION

Based on the foregoing, the City respectfully requests that this Court to overrule the Ninth District Court of Appeals and reinstate the trial Court's order granting summary judgment on behalf of the City.

In the alternative, if this Court affirms the court of appeals, the City asks that this Court remand the case for further determination regarding whether an employee was negligent and whether there existed a physical defect in or upon the grounds of the building as required by R. C. 2744.02(B)(4).

Respectfully submitted,



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APPENDIX

Notice of Appeal to the Supreme Court (September 19, 2011)

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'
NOTICE OF APPEAL**

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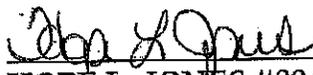
SEP 19 2011

CLERK OF COURT
SUPREME COURT OF OHIO

Notice of Appeal of Appellant, City of Cuyahoga Falls

Appellant, City of Cuyahoga Falls, hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth District, entered in Court of Appeals case No. 25582 on August 3, 2011.

Respectfully submitted,



HOPE L. JONES #0044008

Counsel for Defendant/Appellant
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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal has been sent by regular U.S. Mail, postage prepaid, September 10th, 2011 to the following:

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Journal Entry and Opinion of the Summit County Court of Appeals (August 3, 2011)

STATE OF OHIO) COURT OF APPEALS
) DANIEL M. HORRIGAN
) ss: IN THE COURT OF APPEALS
 COUNTY OF SUMMIT) 7:11 AUG -3 AM 7:52 NINTH JUDICIAL DISTRICT

MICHAEL L. HAWSMAN, minor, et al.) SUMMIT COUNTY A. No. 25582
) CLERK OF COURTS

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. *Viock 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).¹ *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

¹ 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.

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:

PETER D. TRASKA and WILLIAM J. PRICE, Attorneys at Law, for Appellant.

PAUL A. JANIS, Law Director, and HOPE L. JONES, Deputy Law Director, for Appellee.

Decision and Judgment of the Summit County Court of Common Pleas (August 17, 2010)

DANIEL M. HORRIGAN
IN THE COURT OF COMMON PLEAS
2010 AUG 17 PM 3:28
COUNTY OF SUMMIT

SUMMIT COUNTY
CLERK OF COURTS

Michael L. Hawsman, minor,)
Et al.)
Plaintiffs)
vs)
City of Cuyahoga Falls, et al.)
Defendants)

CASE NO. CV 2009 07 5156

JUDGE HUNTER

ORDER

44

This matter is before the Court upon Defendant City of Cuyahoga Falls' ("the City") motion for summary judgment, filed May 26, 2010. Plaintiff Michael L. Hawsman ("Hawsman"), a minor, by and through his mother, files a brief in opposition. The City files a reply brief and a Notice of Supplemental Authority.

Briefly, this matter arises out of Hawsman's allegation that he injured his knee on May 12, 2006 while using the swimming pool diving board at the Natatorium and Wellness Center, owned and maintained by the City and its Parks and Recreation Department. Plaintiffs, Angela and Michael J. Hawsman bring claims for loss of consortium as a result of Hawsman's injuries. Plaintiffs claim that Hawsman's injury was due to the City's negligence.

The City moves for summary judgment, arguing that it is immune in connection with the operation of the pool. Hawsman argues that the instant action falls squarely within the exception to immunity pursuant to R.C. 2744.02(B)(4).

Summary Judgment Standard

Summary judgment proceedings are governed by Civ.R. 56. Pursuant to Civ.R. 56(C), summary judgment should be granted where (1) there is no genuine issue of material fact, and (2) viewing the evidence most strongly in favor of the party opposing the motion, the moving party is entitled to judgment as a matter of law. *Turner v. Turner* (1993), 67 Ohio St.3d 337. The burden is on the moving party to show that there is an absence of genuine issues of material fact. *Mitseff v. Wheeler* (1988), 39 Ohio St.3d 112. The non-moving party then must produce evidence on any issue for which that party bears the burden at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the syllabus, approving and following *Celotex v. Catrett* (1986), 477 U.S. 317. The non-moving party may not rest upon the mere allegations or denials in the pleadings, but must point to or submit some evidence that shows the existence of a genuine dispute over the material facts. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

Immunity

In determining whether a political subdivision such as the City is immune from liability, the Court must engage in a three-tier analysis pursuant to R.C. Chapter 2744. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007 Ohio 2070. The first tier provides a general grant of immunity, stating that a "political subdivision is not liable in damages in a civil action for injury to persons allegedly caused by "any act or omission of the political subdivision or any employee of the political subdivision in connection with a governmental or proprietary function." R.C. 2744.01(A)(1). *Elston*

at p. 11. In this matter, the parties do not dispute that Hawsman's claimed injury was a governmental function as it occurred in connection with the operation of a swimming pool pursuant to R.C. 2744.1(C)(2)(u).

The second tier centers on the exceptions to immunity outlined in R.C. 2744.02(B). Hawsman argues that the allegations in the complaint fall squarely within the exception set forth in R.C. 2744.02(B)(4), which sets forth an exception to immunity for injury, death or loss to person or property caused by "negligent acts of employees that occur within or on the grounds of, and due to physical defects within or on the grounds of, buildings used in connections with a governmental function." Hawsman argues that the diving board was defective because employees of the City failed to follow the diving board's manufacturer's instructions to test the surface safety of the diving board.

The City cites to the Ohio Supreme Court case of *Cater v. Cleveland* (1998), 83 Ohio St.3d 24, holding that indoor swimming pools are not subject to the exception to immunity. Hawsman argues that many appellate Courts have criticized and questioned the *Cater* decision. The City also cites to the Ninth District case of *Hopper v. Elyria* (2009), 182 Ohio App. 3d 521, 200- Ohio 2517, finding that R.C. 2744.02(B)(4) not applicable to either indoor or outdoor pools. Hawsman argues that *Hopper* dealt with an injury at an outdoor pool and any language dealing with indoor pools is therefore dicta.

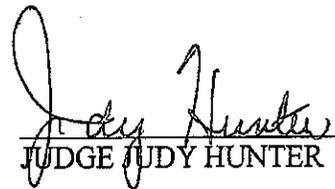
Having reviewed the applicable case law, the Court finds that *Cater's* finding that indoor pools are not subject to immunity, while questioned by some appellate courts, has been followed by the Ninth District in *Hopper*, which interpreted the same

statute at issue herein. As such, the Court finds that the exception to immunity sought by Hawsman in R.C. 2744.02(B)(4) is inapplicable in this matter.¹ Thus, the City is entitled to the general grant of immunity set forth in R.C. 2744.02(A)(1).

The City's motion for summary judgment is thus granted as against all claims asserted by Plaintiffs. John Doe Defendants are hereby dismissed.

This is a final, appealable Order. Costs to Plaintiffs.

IT IS ORDERED.


JUDGE JUDY HUNTER

Hope L. Jones
William J. Price

¹ Finding that the exception to immunity not applicable, consideration of the third tier is unnecessary.

R.C. 2744.01

2744.01. Definitions

As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision. "Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 [3319.30.1] of the Revised Code. "Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2152.19 or 2152.20 of the Revised Code to perform community service or community work in a political subdivision.

(C) (1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

- (c) The provision of a system of public education;
- (d) The provision of a free public library system;
- (e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;
- (f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;
- (g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;
- (h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;
- (i) The enforcement or nonperformance of any law;
- (j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;
- (k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.
- (l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;
- (m) The operation of a job and family services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;
- (n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;

(o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;

(p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;

(q) Urban renewal projects and the elimination of slum conditions;

(r) Flood control measures;

(s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;

(t) The issuance of revenue obligations under section 140.06 of the Revised Code;

(u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, any of the following:

(i) A park, playground, or playfield;

(ii) An indoor recreational facility;

(iii) A zoo or zoological park;

(iv) A bath, swimming pool, pond, water park, wading pool, wave pool, water slide, or other type of aquatic facility;

(v) A golf course;

(vi) A bicycle motocross facility or other type of recreational area or facility in which bicycling, skating, skate boarding, or scooter riding is engaged;

(vii) A rope course or climbing walls;

(viii) An all-purpose vehicle facility in which all-purpose vehicles, as defined in section 4519.01 of the Revised Code, are contained, maintained, or operated for recreational activities.

(v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;

(w) (i) At any time before regulations prescribed pursuant to 49 U.S.C.A 20153 become effective, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in a zone within a municipal corporation in which, by ordinance, the legislative authority of the municipal corporation regulates the sounding of locomotive horns, whistles, or bells;

(ii) On and after the effective date of regulations prescribed pursuant to 49 U.S.C.A. 20153, the designation, establishment, design, construction, implementation, operation, repair, or maintenance of a public road rail crossing in such a zone or of a supplementary safety measure, as defined in 49 U.S.C.A 20153, at or for a public road rail crossing, if and to the extent that the public road rail crossing is excepted, pursuant to subsection (c) of that section, from the requirement of the regulations prescribed under subsection (b) of that section.

(x) A function that the general assembly mandates a political subdivision to perform.

(D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.

(E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.

(F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, board of hospital commissioners appointed for a municipal hospital under section 749.04 of the Revised Code, board of hospital trustees appointed for a municipal hospital under section 749.22 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 [713.23.1] of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 [307.05.2] of the Revised Code, fire and ambulance district created pursuant to section 505.375 [505.37.5] of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district

established under section 343.01 or 343.012 [343.01.2] of the Revised Code, community school established under Chapter 3314. of the Revised Code, the county or counties served by a community-based correctional facility and program or district community-based correctional facility and program established and operated under sections 2301.51 to 2301.58 of the Revised Code, a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated, and the facility governing board of a community-based correctional facility and program or district community-based correctional facility and program that is so established and operated.

(G) (1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:

(a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

(a) The operation of a hospital by one or more political subdivisions;

(b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;

(c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;

(d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

History:

141 v H 176 (Eff 11-20-85); 141 v H 205, § 1 (Eff 6-7-86); 141 v H 205, § 3 (Eff 1-1-87); 142 v H 295 (Eff 6-10-87); 142 v H 815 (Eff 12-12-88); 142 v S 367 (Eff 12-14-88); 143 v H 656 (Eff 4-18-90); 144 v H 210 (Eff 5-1-92); 144 v H 723 (Eff 4-16-93); 145 v H 152 (Eff 7-1-93); 145 v H 384 (Eff 11-11-94); 146 v H 192 (Eff 11-21-95); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 148 v H 205 (Eff 9-24-99); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 24, § 1 (Eff 10-26-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v S 108, § 2.03 (Eff 1-1-2002); 149 v S 24, § 3 (Eff 1-1-2002); 149 v S 106. Eff 4-9-2003; 150 v S 222, § 1, eff. 4-27-05; 151 v H 162, § 1, eff. 10-12-06.

§ 2744.02. Classification of functions of political subdivisions; liability; exceptions

(A) (1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except 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.

(2) The defenses and immunities conferred under this chapter apply in connection with all governmental and proprietary functions performed by a political subdivision and its employees, whether performed on behalf of that political subdivision or on behalf of another political subdivision.

(3) Subject to statutory limitations upon their monetary jurisdiction, the courts of common pleas, the municipal courts, and the county courts have jurisdiction to hear and determine civil actions governed by or brought pursuant to this chapter.

(B) Subject to sections 2744.03 and 2744.05 of the Revised Code, a political subdivision is liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by an act or omission of the political subdivision or of any of its employees in connection with a governmental or proprietary function, as follows:

(1) Except as otherwise provided in this division, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority. The following are full defenses to that liability:

(a) A member of a municipal corporation police department or any other police agency was operating a motor vehicle while responding to an emergency call and the operation of the vehicle did not constitute willful or wanton misconduct;

(b) A member of a municipal corporation fire department or any other firefighting agency was operating a motor vehicle while engaged in duty at a fire, proceeding toward a place where a fire is in progress or is believed to be in progress, or answering any other emergency alarm and the operation of the vehicle did not constitute willful or wanton misconduct;

(c) A member of an emergency medical service owned or operated by a political subdivision was operating a motor vehicle while responding to or completing a call for emergency medical care or treatment, the member was holding a valid commercial driver's license issued pursuant to Chapter 4506. or a driver's license issued pursuant to Chapter

4507. of the Revised Code, the operation of the vehicle did not constitute willful or wanton misconduct, and the operation complies with the precautions of section 4511.03 of the Revised Code.

(2) Except as otherwise provided in sections 3314.07 and 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) 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 caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility for maintaining or inspecting the bridge.

(4) 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.

(5) In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

(C) An order that denies a political subdivision or an employee of a political subdivision the benefit of an alleged immunity from liability as provided in this chapter or any other provision of the law is a final order.

□History:

141 v H 176 (Eff 11-20-85); 143 v H 381 (Eff 7-1-89); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 149 v S 106. Eff 4-9-2003; 152 v H 119, § 101.01, eff. 9-29-07.

R.C. 2744.03

§ 2744.03. Defenses or immunities of subdivision and employee

(A) In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to person or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

(1) The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.

(2) The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.

(3) The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

(4) The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision in accordance with the order of a juvenile court entered pursuant to section 2152.19 or 2152.20 of the Revised Code, and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123. of the Revised Code in connection with the community service or community work for or in the political subdivision.

(5) The political subdivision is immune from liability if the injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other

resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

(6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:

(a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

(b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;

(c) Civil liability is expressly imposed upon the employee by a section of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon an employee, because that section provides for a criminal penalty, because of a general authorization in that section that an employee may sue and be sued, or because the section uses the term "shall" in a provision pertaining to an employee.

(7) The political subdivision, and an employee who is a county prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a political subdivision, an assistant of any such person, or a judge of a court of this state is entitled to any defense or immunity available at common law or established by the Revised Code.

(B) Any immunity or defense conferred upon, or referred to in connection with, an employee by division (A)(6) or (7) of this section does not affect or limit any liability of a political subdivision for an act or omission of the employee as provided in section 2744.02 of the Revised Code.

□History:

141 v H 176 (Eff 11-20-85); 141 v S 297 (Eff 4-30-86); 145 v S 221 (Eff 9-28-94); 146 v H 350 (Eff 1-27-97); 147 v H 215 (Eff 6-30-97); 149 v S 108, § 2.01 (Eff 7-6-2001); 148 v S 179, § 3 (Eff 1-1-2002); 149 v S 108, § 2.03 (Eff 1-1-2002); 149 v S 106. Eff 4-9-2003.

AN ACT

To amend section 2744.01 of the Revised Code to amend the definition of "governmental function" in the political subdivision tort immunity law to include the operation of all types of aquatic facilities.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1 . That section 2744.01 of the Revised Code be amended to read as follows:

Sec. 2744.01. As used in this chapter:

(A) "Emergency call" means a call to duty, including, but not limited to, communications from citizens, police dispatches, and personal observations by peace officers of inherently dangerous situations that demand an immediate response on the part of a peace officer.

(B) "Employee" means an officer, agent, employee, or servant, whether or not compensated or full-time or part-time, who is authorized to act and is acting within the scope of the officer's, agent's, employee's, or servant's employment for a political subdivision.

"Employee" does not include an independent contractor and does not include any individual engaged by a school district pursuant to section 3319.301 of the Revised Code.

"Employee" includes any elected or appointed official of a political subdivision. "Employee" also includes a person who has been convicted of or pleaded guilty to a criminal offense and who has been sentenced to perform community service work in a political subdivision whether pursuant to section 2951.02 of the Revised Code or otherwise, and a child who is found to be a delinquent child and who is ordered by a juvenile court pursuant to section 2151.355 of the Revised Code to perform community service or community work in a political subdivision.

(C)(1) "Governmental function" means a function of a political subdivision that is specified in division (C)(2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare; that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons; and that is not specified in division (G)(2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace; to prevent and suppress riots, disturbances, and disorderly assemblages; to prevent, mitigate, and clean up releases of oil and hazardous and extremely hazardous substances as defined in section 3750.01 of the Revised Code; and to protect persons and property;

(c) The provision of a system of public education;

(d) The provision of a free public library system;

- (e) The regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds;
- (f) Judicial, quasi-judicial, prosecutorial, legislative, and quasi-legislative functions;
- (g) The construction, reconstruction, repair, renovation, maintenance, and operation of buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses;
- (h) The design, construction, reconstruction, renovation, repair, maintenance, and operation of jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code;
- (i) The enforcement or nonperformance of any law;
- (j) The regulation of traffic, and the erection or nonerection of traffic signs, signals, or control devices;
- (k) The collection and disposal of solid wastes, as defined in section 3734.01 of the Revised Code, including, but not limited to, the operation of solid waste disposal facilities, as "facilities" is defined in that section, and the collection and management of hazardous waste generated by households. As used in division (C)(2)(k) of this section, "hazardous waste generated by households" means solid waste originally generated by individual households that is listed specifically as hazardous waste in or exhibits one or more characteristics of hazardous waste as defined by rules adopted under section 3734.12 of the Revised Code, but that is excluded from regulation as a hazardous waste by those rules.
- (l) The provision or nonprovision, planning or design, construction, or reconstruction of a public improvement, including, but not limited to, a sewer system;
- (m) The operation of a human services department or agency, including, but not limited to, the provision of assistance to aged and infirm persons and to persons who are indigent;
- (n) The operation of a health board, department, or agency, including, but not limited to, any statutorily required or permissive program for the provision of immunizations or other inoculations to all or some members of the public, provided that a "governmental function" does not include the supply, manufacture, distribution, or development of any drug or vaccine employed in any such immunization or inoculation program by any supplier, manufacturer, distributor, or developer of the drug or vaccine;
- (o) The operation of mental health facilities, mental retardation or developmental disabilities facilities, alcohol treatment and control centers, and children's homes or agencies;
- (p) The provision or nonprovision of inspection services of all types, including, but not limited to, inspections in connection with building, zoning, sanitation, fire, plumbing, and electrical codes, and the taking of actions in connection with those types of codes, including, but not limited to, the approval of plans for the construction of buildings or structures and the issuance or revocation of building permits or stop work orders in connection with buildings or structures;
- (q) Urban renewal projects and the elimination of slum conditions;
- (r) Flood control measures;
- (s) The design, construction, reconstruction, renovation, operation, care, repair, and maintenance of a township cemetery;
- (t) The issuance of revenue obligations under section 140.06 of the Revised Code;

- (u) The design, construction, reconstruction, renovation, repair, maintenance, and operation of any park, playground, playfield, indoor recreational facility, zoo, zoological park, bath, or swimming pool or pond, ~~and the operation and control of any water park, wading pool, wave pool, water slide, and other type of aquatic facility, or golf course;~~
- (v) The provision of public defender services by a county or joint county public defender's office pursuant to Chapter 120. of the Revised Code;
- (w) A function that the general assembly mandates a political subdivision to perform.
- (D) "Law" means any provision of the constitution, statutes, or rules of the United States or of this state; provisions of charters, ordinances, resolutions, and rules of political subdivisions; and written policies adopted by boards of education. When used in connection with the "common law," this definition does not apply.
- (E) "Motor vehicle" has the same meaning as in section 4511.01 of the Revised Code.
- (F) "Political subdivision" or "subdivision" means a municipal corporation, township, county, school district, or other body corporate and politic responsible for governmental activities in a geographic area smaller than that of the state. "Political subdivision" includes, but is not limited to, a county hospital commission appointed under section 339.14 of the Revised Code, regional planning commission created pursuant to section 713.21 of the Revised Code, county planning commission created pursuant to section 713.22 of the Revised Code, joint planning council created pursuant to section 713.231 of the Revised Code, interstate regional planning commission created pursuant to section 713.30 of the Revised Code, port authority created pursuant to section 4582.02 or 4582.26 of the Revised Code or in existence on December 16, 1964, regional council established by political subdivisions pursuant to Chapter 167. of the Revised Code, emergency planning district and joint emergency planning district designated under section 3750.03 of the Revised Code, joint emergency medical services district created pursuant to section 307.052 of the Revised Code, a fire and ambulance district created pursuant to section 505.375 of the Revised Code, joint interstate emergency planning district established by an agreement entered into under that section, county solid waste management district and joint solid waste management district established under section 343.01 or 343.012 of the Revised Code, and a community school established under Chapter 3314. of the Revised Code.
- (G)(1) "Proprietary function" means a function of a political subdivision that is specified in division (G)(2) of this section or that satisfies both of the following:
- (a) The function is not one described in division (C)(1)(a) or (b) of this section and is not one specified in division (C)(2) of this section;
- (b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.
- (2) A "proprietary function" includes, but is not limited to, the following:
- (a) The operation of a hospital by one or more political subdivisions;
- (b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;
- (c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
- (d) The maintenance, destruction, operation, and upkeep of a sewer system;

(e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility.

(H) "Public roads" means public roads, highways, streets, avenues, alleys, and bridges within a political subdivision. "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices, unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices.

(I) "State" means the state of Ohio, including, but not limited to, the general assembly, the supreme court, the offices of all elected state officers, and all departments, boards, offices, commissions, agencies, colleges and universities, institutions, and other instrumentalities of the state of Ohio. "State" does not include political subdivisions.

SECTION 2 . That existing section 2744.01 of the Revised Code is hereby repealed.

SECTION 3 . It is the intent of the General Assembly in amending division (C)(2)(u) of section 2744.01 of the Revised Code in this act, in part, to supersede the effect of the holding of

Garrett v. Sandusky

SECTION , (1994) 68 Ohio St . 3d 139, that a wave pool is not a "swimming pool" within governmental functions for which a city enjoys tort immunity.