

IN THE SUPREME COURT OF OHIO

Michael L. Hawsman, minor, et al.,	:	
	:	Case No. 2011-1588
Appellees,	:	
	:	On Appeal from the Summit
	:	County Court of Appeals,
v.	:	Ninth Appellate District
	:	
The City of Cuyahoga Falls, et al.,	:	
	:	
Appellants.	:	

BRIEF OF APPELLEES MICHAEL L. HAWSMAN, MINOR, et al.

Kimberly C. Young (0085794) (COUNSEL OF RECORD)
William J. Price (0071307)
Elk and Elk Co., Ltd.
6105 Parkland Boulevard
Mayfield Heights, Ohio 44124
(440) 442-6677
Fax No. (440) 442-7944
kyoung@elkandelk.com
wprice@elkandelk.com

COUNSEL FOR APPELLEES,
MICHAEL L. HAWSMAN, et al.

Hope L. Jones (0044008) (COUNSEL OF RECORD)
Paul A. Janis (0034201)
City of Cuyahoga Falls
2310 Second Street
Cuyahoga Falls, Ohio 44221
(330) 971-8190
Fax No. (330) 971-8296
joneshl@cityofcf.com
janispa@cityofcf.com

COUNSEL FOR APPELLANTS,
CITY OF CUYAHOGA FALLS, et al.

FILED
APR 27 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
APR 27 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

ARGUMENT 2

Proposition of Law

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

CONCLUSION 13

PROOF OF SERVICE 14

TABLE OF AUTHORITIES

Cases

Cater v. Cleveland, 83 Ohio St.3d 24, 697 N.E.2d 610 (1988)..... 9, 10, 12

Cincinnati v. Roettinger, 105 Ohio St. 145, 137 N.E. 6 (1922)..... 7

Coventry Towers, Inc. v. Strongsville, 18 Ohio St.3d 120, 122, 480 N.E.2d 412 (1985)... 3

Garrett v. Sandusky, 68 Ohio St.3d 139, 624 N.E.2d 704 (1994) 9, 10

Hopper v. Elyria, 182 Ohio App.3d 521, 2009 Ohio 2517; 913 N.E.2d 997 (9th Dist.)1, 11

Hubbard v. Canton City School Board of Education, 97 Ohio St.3d 541, 2002-Ohio-6718, 780 N.E.2d 543 11

In Ohio Dental Hygienists Assn. v. Ohio State Dental Bd., 21 Ohio St.3d 21, 23, 487 N.E.2d 301 (1986) 3

Mathews v. City of Waverly, 4th Dist. No. No. 08CA787, 2010-Ohio-347 11, 12

Maxel v. City of Cleveland Heights, 8th Dist. No. 74851, 1999 Ohio App. LEXIS 4672 (Sept. 30, 1999) 12

Moore v. Lorain Metro. Hous. Auth., 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606 2, 4, 5

Moulton Gas Serv. v. Zaino, 97 Ohio St. 3d 48, 2002-Ohio-5309, 776 N.E.2d 72 5

O'Conner v. City of Fremont, 6th Dist. No. S-10-008, 2010-Ohio-4159..... 10, 12

Portage Cty. Bd. of Commrs v. Akron, 109 Ohio St.3d 78. 2006-Ohio-1926, 846 N.E.2d 16 3

Sears v. Weimer, 143 Ohio St. 312; 55 N.E.2d 413 (1944)..... 3

State ex rel. Rouch v. Eagle Tool & Machine Co., 26 Ohio St.3d 197, 218, 498 N.E.2d 464 (1986)..... 10

State ex. rel Burrows v. Indus. Comm., 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997) 3

State v. Lozano, 90 Ohio St. 3d 560, 740 N.E.2d 273 (2001)..... 6

Thomas v. Freeman, 79 Ohio St. 3d 221, 680 N.E.2d 997 (1997)..... 7

Thompson v. Bagley, 3rd Dist. No. 11-04-12, 2005-Ohio-1921 11, 12

Westfield Ins. v. Galatis, 100 Ohio St. 3d 215, 2003-Ohio-5849, 797 N.E.2d 1256..... 11

Statutes

R.C. 2744.01(C)(2)(u)..... 2, 4, 9, 12
R.C. 2744.02(A)(1)..... 1
R.C. 2744.02(B)(4) passim

Other Authorities

Black's Law Dictionary (8 Ed.2004) 1125..... 10

STATEMENT OF FACTS

Appellee Michael L. Hawsman is a minor child who suffered a severe injury to his knee on May 12, 2006 while attempting to use a diving board at the Natatorium and Wellness Center owned, operated and maintained by the City of Cuyahoga Falls and its Parks and Recreation Department (collectively, “Appellants”) (Complaint, ¶15). The unrefuted expert opinion in the record of the trial court is that Michael’s injuries were the direct result of the unsafe condition of the diving board surface. Appellees’ expert further identified improper maintenance of the diving board by the City and its employee’s as the cause of the unsafe condition. (Affidavit of David Morrill, attached to Plaintiff’s opposition to the City’s Motion for Summary Judgment.) Whether the surface condition of the diving board constitutes a “physical defect” as required in order to impose liability on a political subdivision under R.C. 2744.02(B)(4) was neither raised in, nor determined by, the lower courts in this matter.

This appeal arises from the Ninth District Court of Appeal’s reversal of the trial court’s August 17, 2010 grant of summary judgment in favor of Defendants/Appellants. The trial court held that it was bound by the precedent of the Ninth District Court of Appeals in *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517, 913 N.E.2d 997 (9th Dist.) and held that Appellant was entitled to political subdivision immunity under R.C. 2744.02(A)(1) in connection with the operation of the facility and that the indoor swimming pools are not within the exception to political subdivision immunity set forth in R.C. 2744.02(B)(4).

ARGUMENT

Proposition of Law

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 pursuant to R.C. 2744.02(B)(4) does not apply

The proposition of law put forth by the Appellant is flawed in two fatal ways. The Appellant asks this Court to abandon both well-settled principals of statutory interpretation as well as the historical application of the doctrine of *stare decisis*. As discussed fully below, neither the statutory language at issue, nor this Court's prior holdings support the proposition of law as posited. The decision of the Ninth District Court of Appeals under review, however, embodies a well-reasoned interpretation of statute and is consistent with this Court's holding in *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606.

- A. **Ohio Revised Code 2744.01 unambiguously defines the operation of a recreational swimming pool as a governmental function for purposes of the application of Ohio Revised Code 2744.02(B)(4).**

R.C. 2477.01(C)(2)(u) defines "governmental function" as including:

***design, construction, reconstruction, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or **any recreational area or facility**, including, but not limited to *** (iv) a bath, **swimming pool**, pond, water park, wading pool, waters slide, or other type of aquatic facility [emphasis added].

It is undisputed that the operation of the natatorium at issue in the case at bar falls within the governmental function contained in R.C. 2744.01(C)(2)(u).

It is further clear and undisputed that R.C. 2477.04(B) sets forth the specific exceptions to the grant of general immunity enjoyed by political subdivisions. At issue here, is the specific application of R.C. 2744.02(B)(4), which creates liability on the part of the political subdivision for injury or loss caused by negligence of the political subdivision or its employees:

***that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings used in connection with the performance of a governmental function, including but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses or other detention facilities as defined in *section 2921.01 of the Revised Code* [emphasis in the original].

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

Ohio law is well-settled that where statutory language is unambiguous and definite, it should be applied as written *Coventry Towers, Inc. v. Strongsville*, 18 Ohio St.3d 120, 122, 480 N.E.2d 412 (1985); *Portage Cty. Bd. of Commrs v. Akron*, 109 Ohio St.3d 78, 2006-Ohio-1926, 846 N.E.2d 16; *State ex. rel Burrows v. Indus. Comm.*, 78 Ohio St.3d 78, 81, 676 N.E.2d 519 (1997).

In *Ohio Dental Hygienists Assn. v. Ohio State Dental Bd.*, 21 Ohio St.3d 21, 23, 487 N.E.2d 301 (1986), the Ohio Supreme Court held that:

Absent ambiguity, a statute is to be construed without resort to a process of statutory construction. *** [Further] “where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.”

Id. at 24, quoting *Sears v. Weimer*, 143 Ohio St. 312; 55 N.E.2d 413 (1944).

In the unambiguous language of the statute at issue here, the General Assembly has included the operation of a recreational facility, including swimming pools, as a governmental function for purposes of R.C. 2744. See R.C. 2744.01(C)(2)(u). Despite this clarity, Appellant asks this court to redraft the statute to substitute the language of the General Assembly with the language of Appellants' proposition of law. Specifically, Appellants' would have the Court delete the words "including, but not limited to" and substitute the words "similar to." As stated above, there is no dispute that the Michael's claimed injuries occurred within a building used in connection with a governmental function. This is the only issue that this Court deemed relevant to the determination of whether or not the provisions of R.C. 2744.02(B)(4) are applicable to impose liability. In 2009 this Court rejected an argument identical to that of the Appellants here. In *Moore v. Lorain Metropolitan Housing Authority*, 121 Ohio St.3d 445, 2009-Ohio-1250, 905 N.E.2d. 606, the Housing Authority asserted that the exception provided by R.C.2744.02(B)(4) only applied to buildings similar to office buildings and courthouses. The court rejected that proposition and concluded:

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

The Moore court did not, as Appellants are asking today, engage in any analysis of what type of governmental function was being performed, or look outside the text of the statute

in for clues to reveal the intent of the General Assembly. Rather, it relied on the plain language of the statute, read along with the definitions of governmental function, and applied the law as written. Likewise, the Ninth District Court of Appeals, following holding of *Moore*, correctly concluded the same below.

B. Statutory Interpretation

- i. The interpretive maxim of 'ejusdem generis' does not apply to the language of the statute at issue.

Assuming, *arguendo*, this court finds some measure of ambiguity in the language of the statute, the Appellants' proposed application of the maximum of *ejusdem generis* is incorrect and misplaced. In *Moulton Gas Serv. v. Zaino*, 97 Ohio St. 3d 48, 2002-Ohio-5309, 776 N.E.2d 72, this Court explained its appropriate application clearly, as follows:

When there is a listing of specific terms followed by a catchall word or phrase which is linked to the specific terms by the word "other," and the statute is to be strictly construed, we apply the doctrine of *ejusdem generis*. In *State v. Aspell* (1967), 10 Ohio St. 2d 1, 39 Ohio Op. 2d 1, 225 N.E.2d 226, paragraph two of the syllabus we held: "Under the rule of *ejusdem generis*, where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term having perhaps a broader signification is conjoined, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms."

Id. at 50. This principal was again restated more recently in *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 309, 2009-Ohio-4872, 916 N.E.2d 446. The statutory language at issue before the court does not contain specific terms, followed by a broader term such as "other." To the contrary the statutory language the Appellants are asking the court to examine precedes the exemplars of "office buildings and courthouses." The language

also lacks the requisite general term (i.e., "other") to which the Court would apply the maxim. In other words, there is no general term for the Court to interpret by employing the maxim *ejusdem generis*. It is not correct, as the Appellants assert that the preceding, "including, but **not limited to**" language requires this Court to in fact "limit" the statute's application to office buildings and courthouses.

In *State v. Lozano*, 90 Ohio St. 3d 560, 740 N.E.2d 273 (2001), this Court was asked to interpret very similar statutory language in response to an identical assertion by a Defendant. The Court concluded:

"Public official" is defined as "any elected or appointed officer, or employee, or agent of the state or any political subdivision, whether in a temporary or permanent capacity, and includes, but is not limited to, legislators, judges, and law enforcement officers." R.C. 2921.01(A).

Defendant asserts that R.C. 2921.01(A) is ambiguous. He contends that if the General Assembly had intended the term "public official" to include all public employees, it could have simply defined the term as "any employee of the state or any political subdivision." By providing examples of public employees who are included in the class "public official," i.e., legislators, judges, and law enforcement officers, defendant maintains, the General Assembly intended the statute to apply only to public employees who share the same characteristics as legislators, judges, and law enforcement. We disagree.

The plain language of R.C. 2921.01(A) includes "any elected or appointed officer, or employee, or agent of the state or any political subdivision." The statute could not be clearer. **The fact that the statute mentions a specific class of employees does not definitively indicate an intent on the part of the General Assembly to limit the definition to employees with those characteristics. Rather, the language "including but * * * not limited to" indicates that what follows is a nonexhaustive list of examples.** *Henley v. Youngstown Bd. of Zoning Appeals* (2000), 90 Ohio St. 3d 142, 156, 735 N.E.2d 433, 444 (Lundberg Stratton, J., dissenting). In fact, **the General Assembly**

might have added those particular employees to make clear that legislators, judges, and law enforcement are to be included. Regardless of the legislative intent regarding those particular employees, the statute, by its plain language, clearly includes all employees of political subdivisions. (Emphasis added.)

Id. at 562. It is clear that R.C. 2744.02(B)(4)'s language expresses a non-exhaustive list of buildings where governmental functions are performed. As such the application of principal of *ejusdem generis* is unnecessary and inappropriate where there is no generalized term to interpret following the specific list.

- ii. The interpretive maxim of 'expressio unius est exclusio alterius' is more appropriately applied to the excluded types of buildings specified in the statute.

Appellants assert that the maxim of statutory construction *expressio unius est exclusio alterius* should be applied to the statutory language in question to limit the the types of 'buildings used for the performance of a governmental function' to courthouses and office buildings. Here again, Appellants are asking the court to misapply this interpretative rule. This court has held:

Expressio unius est exclusio alterius means that "the expression of one thing is the exclusion of the other." Under this maxim, "if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." Black's Law Dictionary (6 Ed.1990) 581.

Thomas v. Freeman, 79 Ohio St. 3d 221, 224-225, 680 N.E.2d 997 (1997) quoting *Cincinnati v. Roettinger*, 105 Ohio St. 145, 152, 137 N.E. 6 (1922). However, Appellants overlook that this interpretive maxim is not applied to situations where the statutory language is "including, but not limited to." If applied to any portion of the language of R.C. 2744.02(B)(4), it should be applied to the exhaustive list of exceptions, to wit: "****

but not including jails, places of juvenile detention, workhouses or other detention facilities ***” R.C. 2744.02(B)(4). By this language the General Assembly clearly set forth that the only **exceptions** to the premises liability were detention facilities. Had the legislature intended to grant immunity for recreational facilities, including indoor swimming pools, those could easily have been included in that list of exceptions. Appellants are not only asking this Court to ignore the fact that the statute contains a non-exhaustive list of included buildings and but also that it specifies an exhaustive list of excluded buildings in order to conclude that summary judgment was appropriate.

iii. The holding of the Ninth District Court of Appeals is consistent with legislative intent.

Appellants’ assertion that upholding the lower court here would be expose political subdivisions to liability for “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,”¹ overlooks the plain language of the statute. Contrary to Appellants’ argument, political subdivisions would not lose the general grant of immunity and face liability for the inherent risks of the activities being undertaken at recreation facilities. Rather, as set forth in the statute they would be liable for only those injuries caused by **physical defects on the premises** – the precise type of risk that the recreational participant should **not** expect to encounter.

This is consistent with the General Assembly’s intent to shield political subdivisions from liability except for situations, like here, where a premises defect was the cause of an injury.

¹ Defendants/Appellants, City of Cuyahoga Falls’ Merit Brief, p. 4.

B. *Cater v. Cleveland* is not binding legal precedent on the issue of whether or not an indoor swimming pool operated by a political subdivision is covered by Ohio Revised Code §2744.

Appellants' second argument in favor of their proposition of law is premised on their assertion that the Ninth District should be compelled, by the doctrine of *stare decises*, to follow the lead opinion as set forth in *Cater v. Cleveland*, 83 Ohio St.3d 24, 697 N.E.2d 610 (1988). However, as correctly held by the Ninth District below, that decision lacked a sufficient consensus of the members of this Court to create binding legal precedent on the question of whether, despite being a governmental function, as defined by R.C. 2477.01, the operation of a swimming pool was subject to the exception to immunity set forth in R.C. 2477.02(B)(4).

The question before the court in *Cater* was whether governmental functions were the subject to the exceptions to immunity set forth in R.C.2744.02(B), or whether those exceptions were only available when political subdivisions were engaged in proprietary functions. A majority of the court concurred that the exceptions set forth in R.C. 2744.02(B)(4) applied to both governmental and proprietary functions. In addition, a majority of the court concurred with the judgment of reversing the trial court's grant of summary judgment and remanding the matter for trial on the merits. *Id.*

However, the lead opinion authored by Justice Sweeney, was not joined in its entirety by another single member of the court. As such it did not even reach the status of a plurality opinion. Specifically, the lead opinion was authored by Justice Sweeney alone. Justice Pfeifer concurred separately noting that his concurrence was premised on his belief that the sovereign immunity statute was unconstitutional as explained by *Garrett v. Sandusky*, 68 Ohio St.3d 139, 141, 624 N.E.2d 704 (1994).

Chief Justice Moyer, joined by Justices Hadley and Lundberg-Stratton, concurred in the **judgment only** and authored a separate opinion noting:

As the lead opinion acknowledges, operation of a swimming pool has been expressly designated as a governmental function. R.C. 2744.01(C)(2)(u). It follows that liability potentially exists where death is caused by the negligence of city employees on swimming pool property. **Although I acknowledge existence of case law from the courts of appeals to the contrary, in my view both indoor and outdoor pools exist “within or on the grounds” of buildings used in connection with the performance of the governmental function of operating a pools.** Indoor pools are clearly “within” buildings. Outdoor pools, while not located within buildings themselves, invariably are located on land that includes buildings, such as bathhouses, shelters, restrooms, storage areas, and offices. I therefore do not accept the conclusion of the majority that application of (B)(4) would result in our creation of artificial distinction between indoor and outdoor pools in applying the relevant immunity statutes.

Id. at 26-27. This concurrence, representing the opinion of three members of the Court, reached the plurality status that the lead opinion lacked. A plurality opinion is “[a]n opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion.” Black's Law Dictionary (8 Ed.2004) 1125.

Ohio law is well-settled, however, that even plurality opinions are not binding authority in Ohio. *State ex rel. Rouch v. Eagle Tool & Machine Co.*, 26 Ohio St.3d 197, 218, 498 N.E.2d 464 (1986). As recently noted in the dissenting opinion in *O'Connor v. City of Fremont*, 6th Dist. No. S-10-008, 2010-Ohio-4159, “inasmuch as much as the lead opinion in *Cater* did not reach even a plurality on the issue of whether or not the operation of a recreational swimming pool was within the exception set forth in R.C. 2744.02(B)(4), it cannot be considered binding authority on this issue.”

Cater's lead opinion is confusing at best. It is clear that appellate and trial courts are struggling to harmonize the plain language of the statute and the clearly inconsistent rationale in the lead opinion. Several appellate courts have criticized or questioned the incongruous conclusion that recognized the operation of a municipal swimming pool as a governmental function under the statute, but still failed to recognize that function as triggering the R.C. 2477.02(B)(4) exception to immunity. See, e.g., *Mathews v. City of Waverly*, 4th Dist. No. No. 08CA787, 2010-Ohio-347. *Thompson v. Bagley*, 3rd Dist. No. 11-04-12, 2005-Ohio-1921, appeal accepted for review by 2005-Ohio-5343 (noting the court's "serious doubts regarding the continued validity of *Cater* in light of the Supreme Court's more recent ruling in *Hubbard*").

In *Hubbard v. Canton City School Board of Education*, 97 Ohio St.3d 541, 2002-Ohio-6718, 780 N.E.2d 543, this Court again addressed the issue of statutory immunity and exception available in R.C. 2744.02(B)(4) and concluded, "that the exception to political-subdivision immunity in R.C. 2744.02(B)(4) applies to all cases where an injury resulting from the negligence of an employee of a political subdivision occurs within or on the grounds of buildings that are used in connection with the performance of a governmental function." *Id.* at 547. Notably, the court declined to query the type of governmental function, i.e., the recreational and non-recreational, as the lead opinion had done in *Cater*. In fact, Appellees' research has uncovered no other cases where this Court has drawn such a distinction to attempt to determine whether or not the exception applied.

The holding of the Ninth District Court of Appeals in *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009 Ohio 2517; 913 N.E.2d 997 (9th Dist.), incorrectly relied on the lead

opinion of *Cater*, as binding authority. As such court here determined that *Hopper* was wrongly decided and overruled same. Appellants assert that in so doing the Appellate Court acted improperly by not explicitly addressing the three-prong test set forth in *Westfield Ins. v. Galatis*, 100 Ohio St. 3d 215, 2003-Ohio-5849, 797 N.E.2d 1256. However, regardless of whether the court specifically addressed the issues raised by *Westfield*, the conclusion reached is consistent with the principals contained therein. The Court affirmatively stated its belief that *Hopper* was wrongly decided, satisfying the first requirement of *Westfield*. Secondly, as set forth by Appellant's in their Memorandum in Support of Jurisdiction, Ohio's appellate courts are reaching inconsistent conclusions regarding the applicability of R.C. 2744.02(B)(4). See, e.g. *Thompson v. Bagley*, (3rd Dist. No. 11-04-12, 2005-Ohio-1921, *Matthews v. City of Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-347 (holding that recreational facilities are buildings used in connection with a governmental function for purposes of R.C. 2744.02(B)(4). But, see, *Maxel v. City of Cleveland Heights*, 8th Dist. No. 74851, 1999 Ohio App. LEXIS 4672 (Sept. 30, 1999) and *O'Conner v. Fremont*, 6th Dist. No. S-10-001, 2010-Ohio-4159 (holding that the exception in R.C. 2744.02(B)(4) is not available to recreational facilities or swimming pools pursuant to *Cater*, supra.).

Finally, as to the reliance prong of the *Westfield* test, it is difficult to imagine that the General Assembly intended political subdivisions freedom to permit dangerous premises defects to exist only in recreational facilities across the state. If political subdivisions have relied on *Cater* in order to avoid liability for injury-causing premises defects, they should not be allowed to continue with such a course of conduct.

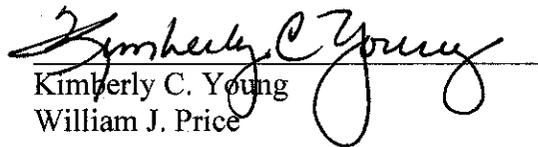
CONCLUSION

The record is clear that Michael Hawsman was injured within a building used in connection with a governmental function, due to a physical defect on those premises. R.C. 2477.01(C)(2)(u) defines “governmental function” to include: “The design, construction, reconstruction, repair, maintenance, and operation of any * * * recreational area or facility, including, but not limited to * * * a swimming pool” (Emphasis added.) Employing well-settled principals of statutory construction, this court can only conclude that injuries complained of fall within the exception to immunity set forth in R.C. 2477.02(B)(4).

The sound and well-reasoned decision of the Ninth District Court of Appeals embodies a correct application of R.C. 2744.02(B)(4) and is consistent with this Court’s holding in *Moore*, supra. Therefore, the Appellees respectfully request this Court affirm that holding, and find that injury suffered by Michael Hawsman falls within the exception to immunity provided in R.C. 2744.02(B)(4) and, as such, he should be permitted to proceed to trial on the merits of his liability claim.

Respectfully submitted,

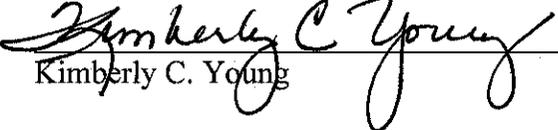
Kimberly C. Young, Counsel of Record


Kimberly C. Young
William J. Price

COUNSEL FOR APPELLEES
MICHAEL L. HAWSMAN,
MINOR, ET AL.

PROOF OF SERVICE

I certify that a copy of this Brief of Appellees was sent by ordinary U.S. mail to counsel of record for the Appellant, Hope L. Jones and Paul A. Janis, Director of Law, City of Cuyahoga Falls, 2310 Second Street, Cuyahoga Falls, Ohio 44221 on this 26th day of April, 2012.


Kimberly C. Young

COUNSEL FOR APPELLEES
MICHAEL L. HAWSMAN,
MINOR, ET AL.