

No. 2011-1588

IN THE SUPREME COURT OF OHIO

Discretionary Appeal from the Court of Appeals, Ninth Appellate District
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'
REPLY BRIEF**

PAUL A. JANIS (#0034201)
HOPE L. JONES (#0044008)
[COUNSEL OF RECORD]
CITY OF CUYAHOGA FALLS, OHIO
2310 Second Street
Cuyahoga Falls, Ohio 44221
(330) 971-8190
(330) 971-8296-Fax
joneshl@cityofcf.com
janispa@cityofcf.com

Counsel for Defendants/Appellants
City of Cuyahoga Falls, *et. al.*

KIMBERLY YOUNG (#0085794)
[COUNSEL OF RECORD]
ELK & ELK, CO., LTD
Landerhaven Corporate Center
6105 Parkland Boulevard
Mayfield Hts., Ohio 44124
(440) 442-6677
(440) 442-7944-Fax
kyoung@elkandelk.com

Counsel for Plaintiffs/Appellees,
Michael L. Hawsman, *et. al.*

PAUL W. FLOWERS (#0046625)
[COUNSEL OF RECORD]
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
(216) 344-9395-Fax
pwf@pwfco.com

Attorney for Amicus Curiae
Ohio Association for Justice

FILED
MAY 21 2012
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
MAY 21 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

I. ARGUMENT..... 1

 A. *Cater* 1

 B. *Stare Decisis* 2

 C. *Negligence and Physical Defects* 3

II. CONCLUSION..... 4

CERTIFICATE OF SERVICE 5

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Cater v. Cleveland</i> , 83 Ohio St.3d 24, 697 N.E.2d 60 (1998).....	1, 2
<i>Hayes v. State Med. Bd. of Ohio</i> , 138 Ohio App.3d. 762, 769.....	2
<i>Hopper v. Elyria</i> , 182 Ohio App.3d 521, 2009-Ohio-2517 (9 th Dist).....	2
<i>Hubbard v. United States</i> , 514 U.S. 695, 718-719, 115 S. Ct. 1754 (1995).....	3
<i>Mattox v. Village of Bradner</i> , 6th Dist. No. WD-96-038 (1997).....	1
<i>O'Connor v. Fremont</i> , 6 th Dist. No. S-10-008, 2010-Ohio-4159.....	2
<i>Westfield Ins. Co. v. Galatis</i> 100 Ohio St3d 216, 2003-Ohio-5849, 797 N.E.2d 1256.....	2, 3
 <u>Statutes</u>	
R.C. Chapter 2744 (Political Subdivision Tort Liability Act).....	2
R.C. 2744.02(B).....	1-3

I. ARGUMENT

A. *Cater*

There can be no dispute that this lawsuit was filed as a result of a serious injury that the Plaintiff, Michael L. Hawsman allegedly sustained. However, notwithstanding the assertions of both Plaintiffs and the Ohio Association for Justice (“OAJ”), the City is not liable for it.

This Court has held that the R.C. 2744.02(B)(4) exception does not apply to municipal pools hosting recreational activities. *Cater v. Cleveland*, 83 Ohio St.3d 24, 1998-Ohio-421, 697 N.E.2d 610. Indeed, in applying *Cater* to swimming facilities, intermediate appellate courts across Ohio have held that the physical-defect exception does not apply at all, even if the injury was proximately caused by the negligence of an employee and due to a physical defect on governmental property. See *Cater v. Cleveland*, *supra*; *O'Connor v. City of Fremont*, 6th Dist. No. S-10-008, 2010-Ohio-4159; *Mattox v. Village of Bradner*, 6th Dist. No. WD-96-038 (1997). That's because buildings housing municipal swimming facilities 1) do not fall within the scope of buildings similar to "office buildings and courthouses"; and 2) the purpose of buildings located on the grounds of a municipal swimming pool are used to further recreational purposes rather than to conduct governmental business. *Id.* In the instant case, the City's Natatorium where the Plaintiff was injured is a building containing a swimming pool, locker rooms, equipment storage areas, basketball court, racquetball courts, weight areas and other recreation and fitness rooms. Under *Cater*, R.C. 2744.02(B)(4) cannot apply here.

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 Political Subdivision Tort Liability Act, this does not apply to a swimming pool, or more specifically to a diving board. Users of a swimming pool and diving board 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.

Cater remains this Court’s definitive statement of the relevant law. 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. This 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. The R.C. 2744.02(B)(4) exception does not apply to municipal swimming areas hosting recreational activities.

Cater, *O'Connor*, and *Mattox* properly interpreted the language of R.C. 2744.02(B)(4) to conclude that buildings located at municipal swimming facility 1) do not fall within the scope of buildings similar to courthouses and office buildings; and 2) the purpose of buildings located on the grounds of a municipal swimming pool are used to further recreational purposes rather than to conduct government business.

B. Stare Decisis

Both Plaintiffs and OAJ miss the City’s point that the Ninth District failed to follow the mandates of *stare decisis* not only with *Cater* but also with its own decision in *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517 (9th Dist). *Hopper* represented a majority opinion of the Ninth District Court of Appeals that adopted Judge Sweeney’s opinion in *Cater*. The Ninth District was required to follow the precepts of *Westfield Ins. Co. v. Galatis* 100 Ohio St3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. Plaintiffs’ argument in support of

the court's failure to follow *Westfield* is essentially that the court arrived at the right decision; therefore, *Westfield* can be ignored. That is simply not the rule in this state.

Plaintiffs and OAJ would have decisions of "courts of appeals that cannot be reconciled with earlier [Supreme Court] precedent treated as a basis for disavowing, not the aberrant court of appeals decisions, but, *miribile dictu* [the Supreme Court] decision! This novel corollary to the principle of *stare decisis* subverts the very principle on which a hierarchical court system is built." *Hubbard v. United States*, 514 U.S. 695, 718-719, 115 S. Ct. 1754 (1995) (Rehnquist, C.J., dissenting).

C. Negligence and Physical Defects

Although Plaintiff's admit that the lower courts did not proceed to judgment regarding the R.C. 2744.02(B)(4) requirements of employee negligence and physical defects, the Plaintiffs argue, again and again, the physical defect issue in their brief to this Court

Therefore, the City submits that assuming Plaintiffs can prevail in overcoming the City's immunity they must then establish that the injury was "caused by" the City's negligence and "due to" physical defects. R.C. 2744.02(B)(4) While Plaintiffs make many claims about City employees who failed to inspect the diving board, they don't connect the next dot – how any such inspection would have made a difference, because Plaintiff failed to present any evidence whatsoever that the diving board constituted a "physical defect." R.C. 2744.02(B)(4) Without evidence of a physical defect in the board, it is immaterial whether the City inspected the board. Failure to inspect is only relevant or material if such inspection would have disclosed the existence of a defect. However, if there was no defect to discover, any failure to inspect is a non-issue. Plaintiffs have presented no evidence of any defect; therefore the alleged negligent inspection is immaterial.

II. 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.

Respectfully submitted,



HOPE L. JONES 0044008

Counsel for Defendant/Appellant
City of Cuyahoga Falls

CERTIFICATE OF SERVICE

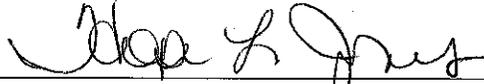
A copy of the foregoing Merit Brief has been sent by regular U.S. Mail, postage prepaid, May 18th, 2012 to the following:

KIMBERLY YOUNG
WILLIAM J. PRICE
ELK & ELK, CO., LTD
Landerhaven Corporate Center
6105 Parkland Boulevard
Mayfield Hts., Ohio 44124

PAUL W. FLOWERS (#0046625)
Paul W. Flowers Co., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113

Attorney for Plaintiffs/Appellees
Michael L. Hawsman, *et. al.*

Attorney for Amicus Curiae
Ohio Association for Justice



HOPE L. JONES 0044008

Counsel for Defendants/Appellants
City of Cuyahoga Falls, *et. al.*