[Cite as *O'Connor v. Fremont*, 2010-Ohio-4159.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Daniel R. O'Connor, et al.	Court of Appeals No. S-10-008
Appellants	Trial Court No. 09-CV-582
v.	
City of Fremont	**DECISION AND JUDGMENT**
Appellee	Decided: September 3, 2010

* * * * *

Donald J. Rasmussen, for appellants.

Larry P. Meyer, for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas which granted appellee's motion for summary judgment. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants, Daniel O'Connor and his parents ("The O'Connors"), set forth the following sole assignment of error:

{¶ 3} "Assignment of Error No. 1: THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT, AS A MATTER OF LAW, IN FAVOR OF THE CITY OF FREMONT ON THE BASIS THAT THE SPECIFIC IMMUNITY EXCEPTION TO POLITICAL SUBDIVISION OF IMMUNITY FOUND IN R.C. 2744.02 (B)(4) DID NOT APPLY."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. On June 23, 2005, Daniel O'Connor, a minor, was engaged in recreational swimming at the Fremont Community Recreation Complex Swimming Pool. In the course of enjoying the municipal swimming pool, O'Connor utilized the swimming pool diving board. O'Connor successfully jumped from the diving board without incident. Subsequently, on a second trip to the diving board, approximately 20 minutes following the first successful dive, O'Connor slipped and fell from the diving board sustaining injury.

{¶ 5} The O'Connors filed suit against appellee alleging negligence in connection to the swimming pool diving board. On May 16, 2008, the O'Connors voluntarily dismissed their initial action against appellee. Appellee's motion for summary judgment was pending at the time of the voluntary dismissal. On May 13, 2009, the O'Connors refiled the matter. In the refiling, appellants again alleged negligence in the design, operation, supervision, and maintenance of the swimming pool and its diving board.

{¶ 6} On May 28, 2009, on the proffered basis of efficiency and judicial economy, appellee filed a motion to carry forward all prior discovery and pleadings, including the motion for summary judgment. The motion was granted. The previously pending motion for summary judgment became active again before the trial court.

{¶ 7} In support of its summary judgment filing, appellee asserted that sovereign immunity precluded any claimed liability in negligence. In addition, appellee contended that contributory negligence and assumption of the risk by O'Connor proximately caused his injuries.

{¶ 8} Following extensive opposing summary judgment briefing by the parties, the matter became decisional. On January 14, 2010, the trial court granted summary judgment to appellee affirming its sovereign immunity. The merits of the alleged negligence and the affirmative defenses asserted in rebuttal were moot and not incorporated in the ruling given the threshold determination that sovereign immunity applied to appellee thus precluding the claimed negligence as a matter of law.

{¶ 9} In support of its summary judgment determination, the trial court found in relevant part, "Defendant City of Fremont enjoys a general grant of immunity under R.C. 2744.02(A)(1), and the specific immunity exception of R.C. 2744.02(B)(4) does not apply." Timely notice of appeal was filed.

{¶ 10} In their sole assignment of error, appellants assert that the trial court erred in granting summary judgment to appellee. It is well-established that appellate review of summary judgment determinations is conducted on a de novo basis, applying the same

standard utilized by the trial court. *Lorain Natl. Bank v. Saratoga Apts*. (1989), 61 Ohio App.3d 127, 129; *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Summary judgment shall be granted when there remains no genuine issue of material fact and, when considering the evidence most strongly in favor of the non-moving party, reasonable minds can only conclude that the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶ 11} In support of their contention that the trial court erred in finding appellee protected by a sovereign immunity and not subject to the relevant exception to immunity set forth in R.C. 2744.02(B)(4), appellants assert that the seminal Ohio Supreme Court case of *Cater v. Cleveland* (1998), 83 Ohio St. 3d 28 rendering the sovereign immunity exception inapplicable to municipal swimming pools is not controlling in this matter. In conjunction with this, appellants further bolster their argument by contending that the R.C. 2744.02(B)(4) immunity exception applying in this case is supported by the Third District's holding in *Thompson v. Bagley*, 3d Dist. No. 11-04-12, 2005-Ohio-1921. *Thompson* found liability in connection to a drowning at a public elementary school pool occurring in the course of a general education class taking place at the school.

{¶ 12} In the highly relevant Ohio Supreme Court case of *Cater*, the Ohio Supreme Court expressly held that the sovereign immunity exception set forth in R.C. 2744.02(B)(4) is inapplicable to municipal pools hosting recreational activities. This is precisely the scenario present in this case. *Cater* remains binding precedent and has not been overturned as applied to this case.

{¶ 13} In the analogous Ninth District case of *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517, the appellant similarly cited *Thompson* in support of the notion both that *Cater* was not controlling and that the sovereign immunity exception could be applied. In rejecting this argument, the court emphasized that *Thompson* is materially distinguishable inasmuch as that incident did not occur at an informal recreational facility but rather involved an official school physical education class taking place at a pool located at a school building. As such, the court held, "the analysis by the *Thompson* court does not implicate the reasoning in *Cater*." On that basis, the *Hopper* court determined that *Thompson* did not negate an application of *Cater*. It concluded that claimed damages in negligence in connection to the municipal, recreational swimming pool did not fall within the R.C. 2744.02(B)(4) sovereign immunity exception so as to enable the imposition of liability in negligence against the sovereign, the city of Elyria.

{¶ 14} Our analysis comports with that which was set forth in *Hopper* and we likewise determine that pursuant to the controlling Ohio Supreme Court *Cater* case, the damages sustained at the Fremont outdoor recreational swimming pool at issue in this case do not fall within the sovereign immunity exception of R.C. 2744.02(B)(4). *Cater* clearly states and stands for the proposition that liability in negligence cannot be imposed upon the sovereign for claimed injuries in connection to an outdoor recreational municipal swimming pool. As the *Hopper* court held, we likewise conclude that *Thompson* is fundamentally distinguishable from, and thus inapplicable to, recreational pool cases given its substantively and materially divergent genesis in a public education

course conducted at a school building so as to be encompassed by the sovereign immunity exception established by R.C. 2744.02(B)(4). Based upon the forgoing, the stare decisis application of *Cater* to the instant case such that appellee's sovereign immunity is intact remains proper.

{¶ 15} Given our determination against the threshold issue of whether the sovereign immunity exception of R.C. 2744.02(B)(4) can be applied to the outdoor recreational municipal pool at issue in this matter, appellants' remaining supporting arguments are moot. Wherefore, we find appellants' sole assignment of error not well-taken.

{¶ 16} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J.
CONCUR. _____
JUDGE

Keila D. Cosme, J.,
DISSENTS.

COSME, J., dissenting.

{¶ 17} I respectfully dissent. Specifically, I disagree with the majority's conclusion that the determinative issue in this appeal is controlled by the Ohio Supreme Court's decision in *Cater v. Cleveland* (1998), 83 Ohio St.3d 24. Twelve years ago, a single member of the Ohio Supreme Court—the author of *Cater*—opined that even though the operation and maintenance of a municipal recreational swimming pool is specifically designated as a governmental function under former R.C. 2744.01(C)(2)(u) for purposes of immunity, it is not a governmental function for purposes of the exception to immunity under former R.C. 2722.02(B)(4). This aspect of *Cater* never attained the status of a plurality opinion, let alone binding legal precedent. However, even if *Cater*

initially constituted controlling legal authority on this issue, it no longer possesses any continuing validity in light of recent case law on the subject that is not included in the majority's analysis.

{¶ 18} Pursuant to R.C. 2744.02(A)(1), political subdivisions are immune from tort liability in connection with a governmental or proprietary function unless one of the five exceptions in subsection (B) applies. 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 * * *." (Emphasis added.)

{¶ 19} R.C. 2744.01(C)(2)(u) defines a "governmental function" to include the "maintenance, and operation of * * * any recreational area or facility, including * * *[a] swimming pool." Inserting this definition into R.C. 2744.02(B)(4) plainly reveals that this exception to immunity applies to injuries that occur within or on the grounds of "buildings that are used in connection with the performance of [the maintenance and operation of any recreational swimming pool]."

{¶ 20} Nevertheless, the lead opinion in *Cater* reasoned:

{¶ 21} "Unlike a courthouse or office building where government business is conducted, a city recreation center houses recreational activities. Furthermore, 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. We do not believe that the General Assembly intended to insulate political subdivisions from liability based on this distinction. Therefore, we reject appellants' contention that former R.C. 2744.02(B)(4) applies to an indoor municipal swimming pool." Id., 83 Ohio St.3d at 31.

{¶ 22} It is well-established that plurality opinions are not binding authority. See *State ex rel. Rouch v. Eagle Tool & Machine Co.* (1986), 26 Ohio St.3d 197, 218, fn. 7 (Celebrezze, C.J., concurring in part and dissenting in part); *Hedrick v. Motorists Mut. Ins. Co*. (1986), 22 Ohio St.3d 42, 44*; State v. Preztak*, 181 Ohio App.3d 106, 2009-Ohio-621, ¶ 41, fn. 2; *State v. Harris*, 8th Dist. No. 90699, 2008-Ohio-5873, ¶ 99, fn. 1; *Reasoner v. Bill Woeste Chevrolet, Inc*. (1999), 134 Ohio App.3d 196, 201; *Progressive Cas. Ins. Co. v. Oakford* (1992), 79 Ohio App.3d 97, 98; *McIntosh v. Stanley-Bostitch, Inc*. (S.D.Ohio 2000), 82 F.Supp.2d 775, 786. The opinion in *Cater* as to the inapplicability of R.C. 2744.02(B)(4) to municipal swimming pools was not even a plurality opinion. 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. The lead opinion in *Cater* did not receive more votes than any other opinion on that issue. To the contrary, no other member of the court joined the lead opinion on the issue of R.C 2744.02(B)(4)'s applicability and three members of the

court joined in specifically rejecting the lead opinion's analysis and conclusion on that issue.

{¶ 23} Thus, in a concurring opinion joined by two other justices, Chief Justice Moyer wrote:

{¶ 24} "As the lead opinion acknowledges, operation of a swimming pool has been expressly designated 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 the 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 pool. Indoor pools clearly are '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) to this case would result in our creation of an artificial distinction between indoor and outdoor swimming pools in applying the relevant immunity statutes." Id., 83 Ohio St.3d at 35 (Moyer, C.J., concurring in syllabus and judgment).

{¶ 25} Not since *Cater* was decided has the Ohio Supreme Court or any of its members relied upon, endorsed, or even cited to its "government business" analysis in determining the application of R.C. 2744.02(B)(4). Thus, *Cater* ultimately represents the

reasoning of but a single Ohio Supreme Court justice with regard to the pivotal issue in this case.

{¶ 26} In any event, even if *Cater* initially enjoyed the force of law in regard to a municipality's liability for injuries sustained in connection with the operation of a recreational swimming pool, it can no longer be said to have any continuing validity in that regard. *Cater's* continuing viability was first questioned by the Third District Court of Appeals in *Thompson v. Bagley*, 3d Dist. No. 11-04-12, 2005-Ohio-1921, ¶ 34:

{¶ 27} "Initially, we note that this Court has serious doubts regarding the continuing validity of *Cater* in light of the Supreme Court's more recent ruling in *Hubbard* [*v. Canton Cty. School Bd. of Edn.*, 97 Ohio St.3d 451, 2002-Ohio-6718]. In *Cater* the Supreme Court found that municipal swimming pools were not subject to the R.C. 2744.02(B)(4) exception based on the fact that the governmental function being performed by municipal pools was recreational in nature and not the kind of 'government business' being conducted in a courthouse or government office building. Id. at 31-32, 697 N.E.2d 610. The Court made this finding despite having recognized in the same opinion that 'the General Assembly has already classified the operation of a municipal swimming pool as a governmental function under R.C. 2744.01(C)(2)(u).' Id. at 28, 697 N.E.2d 610. No such distinction has been made by the Court since *Cater*. In fact, in *Hubbard* the Court stressed that the only relevant inquiry in such a case is whether 'the injuries claimed by plaintiffs were caused by negligence occurring on the grounds of a building used in connection with a government[al] function * * *.' *Hubbard* at ¶ 18.

There was no discussion regarding whether the governmental function in the building involved was recreational in nature."

{¶ 28} The majority distinguishes *Thompson*, however, on the basis of the Ninth District Court of Appeals' decision in *Hopper v. Elyria*, 182 Ohio App.3d 521, 2009-Ohio-2517. In *Hopper*, the court found that *Hubbard* did not diminish the authority of *Cater* on the present issue and distinguished *Thompson* as follows:

{¶ 29} "*Thompson* involved a child who drowned in a school pool during a physical education class. However, the *Thompson* court noted that the parties agreed that the child's 'death occurred in connection with a governmental function as provided for in 2744.01(C)(2)(c),' id. at ¶ 28, rather than as provided for in R.C. 2744.01(C)(2)(u), as in *Cater* and the instant case. R.C. 2744.01(C)(2)(c) states that the 'provision of a system of public education' is a governmental function. Accordingly, *Thompson* does not involve a recreation center or recreational activities. Rather, it involves an activity in an office building where government business is conducted, specifically, the business of educating children. Therefore, the analysis by the *Thompson* court does not implicate the reasoning in *Cater*, which distinguished recreational activities from government business and exempted recreational facilities from buildings of the type delineated in R.C. 2744.02(B)(4)." Id. at ¶ 17.

{¶ 30} The majority's analysis inappropriately ends at this point. It does not go on to examine the propriety of *Hopper's* assertions or other relevant case law. In distinguishing *Thompson* and following the lead opinion in *Cater*, the court in *Hopper*

made two key findings. First, it found that the government-business reasoning in *Cater* is still viable because the Ohio Supreme Court in *Hubbard* did not call into question the reasoning in *Cater*. Id. at ¶ 15. However, the Ohio Supreme Court did, in fact, reject the government-business reasoning in another case. In *Moore v. Lorain Metro. Hous. Auth*., 121 Ohio St.3d 455, 2009-Ohio-1250, which was released approximately two months before the Ninth District decided *Hopper*, the Supreme Court of Ohio rejected the political subdivision's argument that R.C. 2744.02(B)(4) applies "only to buildings that are similar to 'office buildings and courthouses' and that the salient characteristics of office buildings and courthouses are that, unlike public housing, the public frequents them and transacts business in them." Id. at ¶ 23.

{¶ 31} Second, the court in *Hopper* distinguished *Thompson* from *Cater* on grounds that the injurious event in *Thompson* did not occur in connection with a governmental function listed in subsection (C)(2)(u) of R.C. 2744.01. Just this year, however, the Fourth District Court of Appeals expressed serious doubts as to the continued validity of *Cater's* government-business analysis and declined to apply it to the operation and maintenance of a city park, which is listed as a governmental function in subsection (C)(2)(u). Thus, in *Mathews v. Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-347, ¶ 35, the court explained:

{¶ 32} "We share the *Thompson* court's reservations regarding *Cater's* continuing validity, especially in light of the more recent *Moore* decision. We observe that *Hopper* did not address the impact of *Moore* upon *Cater*. Due to the apparent conflict between

Moore and *Cater*, we choose to follow the recent *Moore* ruling that more broadly defines 'buildings used in connection with the performance of a governmental function' as used in R.C. 2744.02(B)(4). Under the *Moore* rationale, buildings used in connection with the performance of the operation or maintenance of a park fall within R.C. 2744.02(B)(4), even though those buildings may not house the physical location of the governmental body operating or maintaining the park. Rather, under *Moore*, it is sufficient that the building bears a logical connection to the performance of a governmental function, i.e., the operation or maintenance of a park."

{¶ 33} In light of the decisions in *Moore* and *Mathews*, and considering the initial and ongoing lack of even plurality support for *Cater's* tenuous reasoning in regard to the application of R.C. 2744.02(B)(4), I do not believe that *Cater* should be followed. Summarily disposing of the present matter on grounds that *Cater* has not been formally overruled may be an expedient course of action, but it does not achieve substantial justice.

{¶ 34} I, therefore, respectfully dissent.