ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2011-1588

MICHAEL L. HAWSMAN, *et al.*
Plaintiff-Appellees,

-vs-

CITY OF CUYAHOGA FALLS
Defendant-Appellant.

ON APPEAL FROM THE NINTH DISTRICT COURT OF APPEALS
CASE NO. 25582

BRIEF OF *AMICUS CURIAE*, OHIO ASSOCIATION FOR JUSTICE, IN SUPPORT OF PLAINTIFF-APPELLEES, MICHAEL L. HAWSMAN, *et al.*

Kimberly C. Young, Esq. (#0085794)
ELK & ELK CO., LTD.
Landerhaven Corporate Center
6105 Parkland Boulevard
Mayfield Hts., Ohio 44124
(440) 442-6677
FAX: (440) 442-7944
kyoung@elkandelk.com
Attorney for Plaintiff-Appellees, Michael L. Hawsman, et al.

Paul W. Flowers, Esq. (#0046625)
[COUNSEL OF RECORD]
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
FAX: (216) 344-9395
pwf@pwfco.com
Attorney for Amicus Curiae, Ohio Association for Justice

Paul A. Janis, Esq. (#00347201)
City of Cuyahoga Falls
2310 Second Street
Cuyahoga Falls, Ohio 44221
Attorney for Defendant-Appellant, City of Cuyahoga Falls

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

TABLE OF CONTENTS

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

INTRODUCTION OF *AMICUS CURIAE*

The *Amicus Curiae* now appearing before this Court is the Ohio Association for Justice ("OAJ"). The OAJ is comprised of over a thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

As was tacitly acknowledged when this Court accepted jurisdiction over this appeal, an issue of substantial public important lies at the heart of this personal injury action. The time has come for this Court to set aside the plurality opinion that appears in *Cater v. Cleveland*, 83 Ohio St. 3d 24, 1998-Ohio-421, 697 N.E. 2d 610, which has generated substantial confusion throughout the Ohio judicial system over the last fourteen years. In accordance with the consensus of appellate courts that have grappled with the frustrating incongruity between the *Cater* lead opinion, syllabus, and concurring opinions, the Ninth District adopted a workable and eminently sensible interpretation of the exception to political subdivision immunities provided by R.C. §2744.02(B)(4). The unerring holding closely tracks the late Chief Justice Moyer's concurring opinion, thereby striking an appropriate balance between the competing needs to hold governmental entities responsible for their negligence in specified instances and the public's interest in maintaining suitable limits upon municipal liability. The OAJ therefore urges this Court to affirm the Ninth District and afford clarity to this unsettled issue of law.

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

ARGUMENT

Even though only one Proposition of Law had been accepted for review by this Court, two were furnished in Defendant/Appellant's, City of Cuyahoga Falls' Merit Brief dated March 9, 2012 ("Defendant's Brief"). The second was then stricken in an Entry dated April 6, 2012. The OAJ will therefore address only the first Proposition of Law.

> **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 CONTAINED IN R.C. 2744.02(B)(4) DOES NOT APPLY.**

The OAJ does not deny that the first sentence of the Proposition of Law is accurate. The second sentence, however, seeks to impose an artificial construction upon R.C. §2744.02(B)(4) that is contrary to the plain and ordinary meaning of the statute. The General Assembly had merely included "office buildings and courthouse" as examples of "buildings that are used in connection with the performance of a governmental function[.]" *Moore v. Lorain Metro. Hous. Auth.*, 121 Ohio St. 3d 455, 2009-Ohio-1250, 905 N.E. 2d 606, 611, ¶24. The readily apparent purpose of this exception is to promote public safety by subjecting governmental entities to the same duties of care that all private property owners and occupiers are required to fulfill, including the State of Ohio.[1] The subsection plainly is not confined to just office buildings and courthouses. *Mathews v. Waverly*, 4th Dist. No. 08CA787, 2010-Ohio-

[1] The State of Ohio has waived sovereign immunity for most common law theories of recovery, including premises liability actions. *R.C. §2743.02(A)(1).*

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

347, 2010 W.L. 364455; *Ganzhorn v. R & T Fence Co.*, 11th Dist. No. 2010-P-0059, 2011-Ohio-6851, 2011 W.L. 6938590; *Thompson v. Bagley*, 3rd Dist. No. 11-04-12, 2005-Ohio-1921, 2005 W.L. 940872, ¶32; *O'Connor v. Freemont*, 6th Dist. No. S-10-008, 2010-Ohio-4159, 2010 W.L. 3449258, ¶17-33 (Cosme, J., dissenting).

The first Proposition of Law seeks to perpetuate a fallacy that has spawned a number of erroneous decisions, including the Ninth District's short-lived opinion in *Hopper v. Elyria* (9th Dist. 2009), 182 Ohio App. 3d 521, 2009-Ohio-2517, 913 N.E. 2d 997. Undoubtedly at the municipality's considerable urging, the *Hopper* court misconstrued *Cater* as binding precedent. *Id., ¶7-18.* A more careful examination of *Cater* reveals, however, that the lead opinion was approved only by the author, Justice Sweeney. *Id.,* 83 Ohio St. 3d at 27-34. Justice Pfeifer concurred with the explanation (which the OAJ enthusiastically supports) "that Ohio's sovereign immunity statute is unconstitutional." *Id.,* at 34 (citation omitted). Justices Douglas and Resnick concurred in judgment only. *Id.* A majority of the Court did support the syllabus, which provides merely that:

> The operation of a municipal swimming pool, although defined as a governmental function in R.C. 2744.01(C)(2)(u), is subject to the exceptions to immunity set forth in former R.C. 2744.02(B) and to the available defense enumerated in R.C. 2744.03.

The decisions that were rendered below are entirely consistent with this holding, which the OAJ acknowledges is a correct statement of the law.

Confronted with this unavoidable reality, the instant Defendant has grudgingly conceded that "*Cater* was a plurality decision[.]" *Defendant's Merit Brief, p. 5.* The municipality nevertheless proceeds to angrily castigate the Ninth District – over and over – for supposedly having "ignored" rudimentary legal principles, and has even

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

accused the panel of having "blatantly ignored *stare decisis*." *Defendant's Brief, p. 5.* As the well-reasoned appellate court decision attests, these unrelenting criticism are baseless.

By all appearances, Defendant is unaware of the decision that was rendered not long ago in *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250, 268, 2010-Ohio-1027, 927 N.E. 2d 1066, 1084, fn. 14, which specifically cautioned that there is no "holding" in a plurality opinion. And in *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, 125 Ohio St. 3d 280, 285, 2010-Ohio-1029, 927 N.E. 2d 1092, 1100, ¶30, this Court refused to follow a plurality opinion without consulting the test that had been established by *Westfield Ins. Co. v. Galatis*, 100 Ohio St. 3d 216, 2003-Ohio-5849, 797 N.E. 2d 1256. *Stetter*, 125 Ohio St. 3d at 285, ¶30. The notion that the doctrine of *stare decisis* required the Ninth District to slavishly adhere to an oft-criticized opinion of a single Justice has no support in modern Ohio jurisprudence. *Kaminski*, 125 Ohio St. 3d at 271, ¶89.

And as was further recognized in *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 472, 2007-Ohio-6948, 880 N.E. 2d 420, 429, ¶23-24, and *Groch v. General Motors Corp.*, 117 Ohio St. 3d 192, 209, 210 & 218, 2008-Ohio-546, 883 N.E. 2d 377, 396 & 403, ¶101-106 & 147, *stare decisis* is of little utility when the statute at issue has been modified. The *Cater* opinion had analyzed a version of R.C. §2744.02(B)(4) that was later modified by 2002 S.B. 106 (eff. April 9, 2003). *Id.*, 83 Ohio St. 3d at 31-32. That enactment added the requirement for "physical defects within or on the grounds of" the public buildings. The Ninth District was thus fully entitled, if not expected, to take a fresh new look at the exception to immunity.

While Defendant has not been shy about lambasting respected jurists who do

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

not share its contrived and outdated interpretation of R.C. §2744.02(B)(4), no meaningful criticism has been offered of Chief Justice Moyer's concurring opinion in *Cater*, 83 Ohio St. 3d at 34-36. His analysis was approved by Justice Lundberg Stratton and Judge Hadley (who was sitting for Justice Cook) and, it would seem, should have served as the court's lead opinion. He had wisely concluded that "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." *Id.*, at 35 (Moyer, C. J. concurring). He thus agreed that the appellate court had erred in affirming the entry of the directed verdict upon the immunity defense. *Id.*, at 36. This sensible analysis of the plain and ordinary meaning of the statute is fatal to the instant Defendant's attempt to avoid a trial upon the merits of Plaintiffs' negligence claim. As was recognized by the Ninth District, Chief Justice Moyer's concurring opinion reflects the most pragmatic and logical interpretation of R.C. §2744.02(B)(4), which remains unaffected by the subsequent legislative modifications.

Defendant appears to be under the impression that Chief Justice Moyer opted to abandon his prior views, and embrace Judge Sweeney's lead opinion, when he cited *Cater* in *Hubbard v. Canton City Sch. Bd. of Edn.*, 97 Ohio St. 3d 451, 2002-Ohio-6718, 780 N.E. 2d 543. *Defendant's Brief, pp. 9-10.* The *Cater* decision was referenced only in connection with the Court's recognition of the three-tiered analysis that is required in political subdivision immunity disputes. *Hubbard*, 97 Ohio St. 3d at 453, ¶10 & 12. In the ensuing discussion of the exception afforded by R.C. §2744.02(B)(4), Chief Justice Moyer never suggested that he had any reason to "correct" the sensible interpretation that had been afforded to the "within or on the grounds of buildings" provision in his concurring opinion four years earlier in *Cater*, 83 Ohio St. 3d at 34-36.

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

Defendant's unabashed efforts to rewrite R.C. §2744.02(B)(4) cannot be reconciled with R.C. §1.42, which requires statutes to be construed "according to the rules of grammar and common usage." Courts may not judicially rewrite legislation under the guise of "statutory construction." *State ex rel. Myers v. Chiaramonte* (1976), 46 Ohio St.2d 230, 238, 348 N.E.2d 323. Regardless of the policy implications, plain and unambiguous language may not be ignored. *Board of Edn. v. Fulton County Budget Comm.* (1975), 41 Ohio St.2d 147, 156, 324 N.E.2d 566; *Guear v. Stechschulte* (1928), 119 Ohio St. 1, 7, 162 N.E. 46. Unless a constitutional due process argument is raised, the judiciary may not speculate as to the wisdom of a legislative enactment. *Lorain Cty. Bd. of Commrs. v. United States Fire Ins. Co.* (9th Dist. 1992), 81 Ohio App. 3d 263, 268, 610 N.E.2d 1061, 1064-1065.

As was his custom, Chief Justice Moyer's concurring opinion faithfully adhered to time-tested principles of statutory construction and judicial restraint. Defendant's pleas for an expansion of the scope of immunity beyond that which has been provided through the plain and ordinary terms set forth in R.C. §2744.02(B)(4) should be directed (if at all) to the General Assembly. This Proposition of Law lacks merit, and should be rejected.

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

CONCLUSION

Consistent with Chief Justice Moyer's concurring opinion in *Cater*, 83 Ohio St. 3d at 35-36, this Court should overrule Defendant's ill-conceived Proposition of Law and affirm the Ninth District's unanimous opinion in all respects.

Respectfully Submitted,

Paul W. Flowers, Esq., (#0046625)
[Counsel of Record]
PAUL W. FLOWERS CO., L.P.A.
Attorney for Amicus Curiae, Ohio Association for Justice

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Brief** has been sent by regular U.S. Mail, on this 30th day of April, 2012 to:

Paul A. Janis, Esq.
City of Cuyahoga Falls
2310 Second Street
Cuyahoga Falls, Ohio 44221
Attorney for Defendant-Appellant, City of Cuyahoga Falls

Kimberly Young, Esq.
ELK & ELK CO., LTD.
Landerhaven Corporate Center
6105 Parkland Boulevard
Mayfield Hts., Ohio 44124
Attorney for Plaintiff-Appellees, Michael L. Hawsman, et al.

Paul W. Flowers, Esq., (#0046625)
PAUL W. FLOWERS CO., L.P.A.
Attorney for Amicus Curiae, Ohio Association for Justice

PAUL W. FLOWERS CO.,
50 Public Sq., Ste 3500
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395