[Cite as *Mathews v. Waverly*, 2010-Ohio-347.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PIKE COUNTY

GRETA MAE MATHEWS, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 08CA787
vs.	:	
CITY OF WAVERLY, OHIO,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

COUNSEL FOR APPELLANT: Edward J. Dowd and Brendan D. Healy, 1 Prestige Place, Suite 700, Miamisburg, Ohio 45342

COUNSEL FOR APPELLEES: Thomas M. Spetnagel and Paige J. McMahon, 42 East Fifth Street, Chillicothe, Ohio 45601

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 1-26-10

PER CURIAM.

{¶ 1} This is an appeal from a Pike County Common Pleas Court judgment that denied the City of Waverly, defendant below and appellant herein, the benefit of an alleged immunity under R.C. Chapter 2744.

{¶ 2} Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT IMMUNITY PURSUANT TO R.C.

2744.01 WITH RESPECT TO PLAINTIFFS-APPELLEES' NEGLIGENCE AND NUISANCE CLAIMS. THERE IS NO EXCEPTION UNDER R.C. 2744.02(B) THAT WOULD ABROGATE DEFENDANT-APPELLANT'S GENERAL GRANT OF IMMUNITY."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT IMMUNITY PURSUANT TO R.C. 2744.03(A)(5) WITH RESPECT TO PLAINTIFFS-APPELLEES' NEGLIGENCE AND NUISANCE CLAIMS. THE DEFENDANT-APPELLATE [SIC] CANNOT BE HELD LIABLE FOR DISCRETIONARY DECISIONS AS TO ITS ALLOCATION OF PERSONNEL AND RESOURCES TOWARD THE IMPLEMENTATION AND EXECUTION OF ITS TREE INSPECTION PROGRAM."

{¶ 3} On September 4, 2004, 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. Ms. Mathews and her husband filed a complaint and alleged that appellant negligently maintained the park premises and that appellant allowed a nuisance to exist. Mr. Mathews also asserted a loss of consortium claim. Appellant denied liability and asserted the defense of statutory immunity under R.C. Chapter 2744.

{¶ 4} Appellant subsequently filed a summary judgment motion and asserted that no genuine issues of material fact remained as to whether it is immune from liability for appellant's injuries under R.C. Chapter 2744.[1] Appellant argued that Ms. Mathews' injury did not occur within or on the grounds of buildings used in connection with the

[1] Appellant further argued that no genuine issues of material fact remained regarding the merits of appellees' claims. Neither party has raised any argument regarding the propriety of the trial court's decision to deny summary judgment on the merits of the claims. Furthermore, this aspect of the trial court's decision is not presently subject to appellate review. See Essman v. Portsmouth, Scioto App. No. 08CA3244, at ¶10.

performance of a governmental function, within the meaning of R.C. 2744.02(B)(4), so as to except appellant from the general grant of immunity under R.C. 2744.02(A)(1). Appellant claimed that appellees cannot show that any building within the park was used in connection with the performance of a government function.

{¶ 5} The trial court considered and denied appellant's summary judgment motion and this appeal followed.

{¶ 6} In its two assignments of error, appellant asserts that the trial court erroneously denied its summary judgment motion on the basis of R.C. Chapter 2744 immunity. Appellant contends that: (1) none of the R.C. 2744.02(B) exceptions apply so as to remove the R.C. 2744.02(A)(1) general grant of immunity; and (2) even if an R.C. 2744.02(B) exception applies, R.C. 2744.03(A)(5) re-instates its immunity. Because these issues are interrelated, we combine our analysis of appellant's assignments of error.

{¶ 7} A

{¶ 8} SUMMARY JUDGMENT STANDARD

{¶ 9} Initially, we note that appellate courts conduct a de novo review of trial court summary judgment decisions. See, e.g., Grafton v. Ohio Edison Co. (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. See Brown v. Scioto Bd. of Commrs. (1993), 87 Ohio App.3d 704, 711, 622 N.E.2d 1153; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411-12, 599 N.E.2d 786. Thus, to determine whether a trial court properly granted a

summary judgment motion, an appellate court must review the Civ.R. 56 summary judgment standard, as well as the applicable law.

{¶ 10} Civ. R. 56(C) provides, in relevant part, as follows:

> * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶ 11} Thus, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (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) reasonable minds can come to but one conclusion, and after viewing such evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made. See, e.g., Vahila v. Hall (1997), 77 Ohio St.3d 421, 429-30, 674 N.E.2d 1164.

{¶ 12} B

{¶ 13} GENERAL IMMUNITY PRINCIPLES

{¶ 14} R.C. Chapter 2744 establishes a three-step analysis to determine whether a political subdivision is immune from liability. See, e.g., Cramer v. Auglaize Acres, 113 Ohio St.3d 266, 270, 2007-Ohio-1946, 865 N.E.2d 9, at ¶14. First, 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. See, e.g., Cramer; Colbert v. Cleveland, 99 Ohio St.3d 215, 2003-Ohio-3319, 790 N.E.2d 781, at ¶7; Harp v. Cleveland Hts. (2000), 87 Ohio St.3d 506, 509, 721 N.E.2d 1020. Second, R.C. 2744.02(B) lists five exceptions to the general immunity granted to political subdivisions under R.C. 2744.02(A)(1). See, e.g., Cramer; Ryll v. Columbus Fireworks Display Co., 95 Ohio St.3d 467, 470, 2002-Ohio-2584, 769 N.E.2d 372, at ¶25. Finally, R.C. 2744.03(A) sets forth several defenses that a political subdivision may assert if R.C. 2744.02(B) imposes liability. See Cramer; Colbert at ¶9. These defenses then re-instate immunity. Whether a political subdivision is entitled to statutory immunity under Chapter 2744 presents a question of law. See, e.g., Conley v. Shearer (1992), 64 Ohio St.3d 284, 292, 595 N.E.2d 862; Murray v. Chillicothe, Ross App. No. 05CA2819, 2005-Ohio-5864, at ¶11.

{¶ 15} In the case at bar, the parties do not dispute that appellant is entitled to the general grant of immunity under R.C. 2744.02(A)(1). Instead, the dispute focuses on whether an R.C. 2744.02(B) exception applies, and, if so, whether R.C. 2744.03(A)(5) re-instates immunity.

{¶ 16} C

{¶ 17} R.C. 2744.02(B)(4)

{¶ 18} Appellant first contends that none of the exceptions to immunity contained within R.C. 2744.02(B) apply, but further argues that if any of the exceptions do apply, R.C. 2744.02(B)(4) contains the only possible exception. Moreover, appellees do not argue that any other R.C. 2744.02(B) exception applies. We therefore limit our review

of the R.C. 2744.02(B) exceptions to paragraph (4).

{¶ 19} R.C. 2744.02(B)(4) provides:

> (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:
> * * *
> (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.

(Emphasis added).

{¶ 20} Appellant contends that this exception does not apply because the injury did not occur "within or on the grounds of * * * buildings that are used in connection with the performance of a governmental function." Appellant advances two arguments in support of this contention. First,[2] appellant argues that the immediate grounds of Canal Park do not include any buildings that are used in connection with the performance of a governmental function. Appellant argues that the shelter houses, roofed pagodas, playground structures and bathrooms located in Canal Park do not constitute "buildings used in connection with the performance of a governmental function." Second, appellant asserts that the nearby grounds of the municipal building, which is located upon a separate parcel of property and is divided from Canal Park by

[2] Appellant actually raises this argument second, but we choose to consider it first.

two other parcels of property, do not constitute the same grounds of Canal Park where Ms. Mathews suffered her injury. In support of this second assertion, appellant contends that even if the municipal building is within what is commonly referred to as "Canal Park," the term "grounds" as used in R.C. 2744.02(B)(4) does not include property beyond the legal boundaries of the property upon which the government building sits. Both of these arguments require us to interpret R.C. 2744.02(B)(4).

{¶ 21} D

STATUTORY INTERPRETATION

{¶ 22} The interpretation of a statute is a question of law that we review de novo. Washington Cty. Home v. Ohio Dept. of Health, 178 Ohio App.3d 78, 2008-Ohio-4342, at ¶27. "The primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute. Brooks v. Ohio State Univ. (1996), 111 Ohio App.3d 342, 349, 676 N.E.2d 162. The court must first look to the plain language of the statute itself to determine the legislative intent. State ex rel. Burrows v. Indus. Comm. (1997), 78 Ohio St.3d 78, 81, 676 N.E.2d 519. We apply a statute as it is written when its meaning is unambiguous and definite. Portage Cty. Bd. of Commrs. v. Akron, 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶52, citing State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn. (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language. State ex rel. Burrows, 78 Ohio St.3d at 81, 676 N.E.2d 519." State v. Lowe, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, at ¶9.

{¶ 23} Courts must give effect to the words used in a statute and must not delete

words used or insert words not used. Erb v. Erb (2001), 91 Ohio St.3d 503, 507, 747 N.E.2d 230, citing Cleveland Elec. Illuminating Co. v. Cleveland (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus. If the meaning of a statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary. State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn. (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463.

E

"BUILDINGS THAT ARE USED IN CONNECTION WITH THE PERFORMANCE OF A GOVERNMENTAL FUNCTION"

{¶ 24} In determining whether the shelter houses, roofed pagodas, etc., located in Canal Park constitute "buildings that are used in connection with the performance of a governmental function," we first look to the statutory definition of "governmental function." A "governmental function" includes "[t]he design, construction, reconstruction, renovation, repair, maintenance, and operation of * * * any recreational area or facility, including, but not limited to, any of the following: (i) A park, playground, or playfield * * *." R.C. 2744.02(C)(2)(u)(i).

{¶ 25} A straight-forward application of the principles of statutory interpretation would appear to indicate that the structures present in Canal Park constitute "buildings that are used in connection with the performance of a governmental function" and thus, within the R.C. 2744.02(B)(4) exception. However, a review of the cases interpreting this provision reveals that the issue is more complicated.

{¶ 26} In Cater v. Cleveland (1998), 83 Ohio St.3d 24, 697 N.E.2d 610, the court construed a former but similar version of R.C. 2744.02(C)(2)(u) and concluded that the

operation of an indoor municipal swimming pool constituted a governmental function. The court concluded, however, that even though the operation of an indoor municipal swimming pool constituted a governmental function, it did not fall within the exception to immunity contained in R.C. 2744.02(B)(4). The court explained:

> "Although former R.C. 2744.02(B)(4) may be applicable to other governmental functions, not specifically listed in the statute, we believe that it does not apply to an indoor swimming pool. (See, also, Mattox v. Bradner [Mar. 21, 1997], Wood App. No. WD-96-038, unreported, 1997 WL 133330, which held that the exception enumerated in R.C. 2744.02[B][4] is inapplicable to injuries sustained in a municipal swimming pool.) 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."[3]

{¶ 27} Id. at 31-32.

{¶ 28} Therefore, under Cater a building that a political subdivision owns that does not house the activities of a governmental body does not meet the definition of a

[3] Although we generally disagree with Cater, we do find the indoor/outdoor distinction interesting as applied to the case at bar. For example, if liability may be imposed in the case sub judice, it is because the tree limb fell on Ms. Mathews while she stood upon a political subdivision's property that also contained a building. If, however, the same injury occurred upon a political subdivision's property that did not contain a building, then under R.C. 2744.02(B)(4) there would be no liability. According to Cater, the General Assembly could not have intended this result. We agree that R.C. 2744.02(B)(4) can produce this incongruous result. As we explain further in this opinion, however, we believe that the General Assembly certainly has the option to clarify R.C. 2744.02(B)(4)'s application.

"building used in connection with the performance of a governmental function." Cater excepts from this definition buildings that are used for recreational governmental functions.

{¶ 29} Chief Justice Moyer criticized this aspect of the majority's holding and stated his belief that R.C. 2744.02(B)(4) excepted the city from the general grant of immunity. The Chief Justice wrote:

> "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 pools in applying the relevant immunity statutes."
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> Id. at 619.

{¶ 30} In addition to the Chief Justice's concerns, we note that Cater seems to ignore principles of statutory interpretation. The plain meaning of R.C. 2744.02(B)(4) is that it applies to "buildings used in connection with the performance of a governmental function." 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." The facts in Cater demonstrate that the injury occurred in a building used in connection with the performance of the operation of a swimming

pool, yet the court concluded that the General Assembly did not intend to include such buildings within the R.C. 2744.02(B)(4) because the building houses a recreational function. The Cater court failed to explain it how it could avoid a seemingly plain application of the statute to conclude 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). If the General Assembly did not intend to include buildings that are used in connection with the performance of a recreational governmental function, it could have said so.

{¶ 31} Although we may not fully agree with Cater, it is obviously a pronouncement from a superior court, thus, controlling authority. We note, however, that a more recent Ohio Supreme Court decision appears to diverge from Cater. In Moore v. Lorain Metropolitan Hous. Auth., 121 Ohio St.3d 455, 2009-Ohio-1250, 905 N.E.2d 606,[4] the court held "that the operation of a public housing authority is a governmental function under R.C. 2744.01(C)(2) rather than a proprietary function" and remanded the case to determine whether the R.C. 2744.02(B)(4) exception applies. In Moore, two individuals died when a fire started in an apartment owned by the Lorain Metropolitan Housing Authority (LMHA). The plaintiff filed a wrongful death complaint against LMHA and other defendants. The trial court ultimately granted LMHA summary judgment and concluded that it was entitled to immunity under R.C. Chapter 2744 because R.C. 2744.02(B)(4) did not except LMHA from immunity. The appellate

[4]At least one other Ohio appellate court has questioned Cater's continued validity. See Thompson v. Bagley, Paulding App. No. 11-04-12, 2005-Ohio-5343, discretionary appeal disallowed, 106 Ohio St.3d 1544, 2005-Ohio-5343, 835 N.E.2d 726.

court determined that the trial court wrongly classified the operation of a public housing authority as a governmental function. On appeal to the Ohio Supreme Court, the court disagreed with the appellate court's determination that the operation of a public housing authority is not a governmental function. In discussing the applicability of R.C. 2744.02(B)(4), the court disagreed with LMHA's argument that "the legislature intended to apply this exception 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. The court explained: "[T]he phrase 'including, but not limited to' denotes a nonexclusive list of buildings to which the exception may apply. The phrase 'buildings that are 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.'" Id. at ¶24.

{¶ 32} Thus, Moore stands in contrast to Cater. Moore does not interpret R.C. 2744.02(B)(4) so as to require that the building house the actual, physical operations, maintenance, etc., of a governmental body performing a governmental function. For example, in Moore the political subdivision did not literally "operate" or "maintain" the public housing from the building where the injury occurred–a requirement that Cater seems to imply. The political subdivision's base of operations or maintenance was not physically located in the public housing, yet Moore did not find this absence to remove the building from the definition of a building used in connection with the performance of a governmental function. Instead, Moore applies a plain, common sense definition–one that asks whether the building is logically, not literally, connected to the

performance of a governmental function. Thus, it appears that Moore has limited Cater.

{¶ 33} Once again, we note that at least one other Ohio appellate court has questioned Cater's continued validity. The Thompson court wrote:

> "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. 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 earlier 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 function * * *.' Hubbard at ¶18. There was no discussion regarding whether the governmental function in the building involved was recreational in nature."
>
> Id. at ¶34.

{¶ 34} A more recent Ohio appellate decision finds Cater to be of continuing validity. In Hopper v. Elyria, 182 Ohio App.3d 521, 2009-Ohio-2517, 913 N.E.2d 2517, the city claimed that it was immune from liability for the wrongful death action that the plaintiff brought as a result of his son's drowning at the city's pool. On appeal, the court first concluded that the city's operation of a municipal pool constituted a governmental function for which it is entitled to R.C. 2744.02(A)(1) immunity. The court then examined whether the R.C. 2744.02(B)(4) exception to immunity applied and determined that it did not. In reaching its decision, the court relied upon Cater:

> "The Ohio Supreme Court held that although the operation of an indoor 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). Cater, 83 Ohio St.3d at 28, 697 N.E.2d 610. The high 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 recreational activities. Cater, 83 Ohio St.3d at 31, 697 N.E.2d 610.
>
> Hopper at ¶11.

{¶ 35} 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.[5] 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.

[5] Moore was decided three months before Hopper.

{¶ 36} In the case at bar, we believe that the buildings[6] in Canal Park bear a logical connection to the performance of the operation or maintenance of the park. Community members apparently use the shelter houses for various events. They are part and parcel of the park. The city obviously holds them out as available for public use. Although 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. The city maintains those structures as part of its governmental function of operating the park. Consequently, R.C. 2744.02(B)(4) applies to the facts of the case at bar to except appellant from R.C. 2744.02(A)(1)'s general grant of immunity.

F

"GROUNDS"

{¶ 37} Although we believe that the foregoing analysis completely disposes of appellant's argument regarding the R.C. 2744.02(B)(4) exception, we choose to address appellant's second argument–whether the municipal building and Canal Park are located upon the same "grounds." Regarding this argument, appellant does not dispute that the municipal building constitutes a "building used in connection with the performance of a governmental function." Instead, appellant argues that the municipal building and Canal Park are not located on the same "grounds" within the meaning of R.C. 2744.02(B)(4). Appellant contends that because the city building and Canal Park are not located on the same parcel of property, and are not defined by the same legal

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[6] We note that appellant has not disputed whether the structures constitute "buildings."

boundaries, the park is not part of the "grounds" of the city building.

{¶ 38} To determine whether the city building and Canal Park constitute the same "grounds," we again must interpret the statute. In determining the meaning of a word within a statute, we look first to the plain meaning. The ordinary dictionary definition from Webster's Encyclopedic Dictionary of the English Language defines the plural of "ground" as "land, often with lawns, flower gardens etc., attached to a house for ornament and recreation" or as "an area of land devoted to and equipped for some special purpose, camping ground * * *." (1989), 424. Merriam-Webster's Online Dictionary defines "grounds" as "the area around and belonging to a house or other building." http://www.merriam-webster.com/dictionary/grounds, 4.c.

{¶ 39} In the case at bar, we disagree with appellant that the definition of "grounds" is determined by looking to the legal description of the specific parcel of property. The plain meaning of "grounds" includes the area around a building. The land around a building may not always coincide with the legal description of the particular parcel of land upon which the building sits. For example, an individual or entity may own contiguous parcels of land that nonetheless constitute the "grounds" of the building that sits on one of those parcels. The multiple parcels may be grouped together as the "grounds" of a building if they form the portion of land surrounding the building and are devoted to the same purpose as the building. Moreover, if the General Assembly had intended to limit the definition of "grounds" to a particular "parcel" of land, it could have used the word "parcel," instead of "grounds," in the statute.

{¶ 40} We are not convinced, however, that Canal Park and the municipal

building are located upon the same "grounds." Rather, a genuine issue of material fact remains as to whether Canal Park can be considered part of the "grounds" of the municipal building. Appellant, as the party seeking summary judgment, bore the burden to demonstrate the absence of a material fact. We do not believe that appellant presented evidence to show the absence of a material fact as to whether the municipal building and Canal Park sit upon separate and distinct "grounds," such that reasonable minds could conclude only that the municipal building grounds are separate and distinct from the Canal Park grounds.

{¶ 41} Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

G

R.C. 2744.03(A)(5)

{¶ 42} Appellant next argues that even if the R.C. 2744.02(B)(4) exception applies, R.C. 2744.03(A)(5) re-instates its immunity. Appellant contends that whether it should have used a more thorough tree inspection policy is a matter entrusted to the political subdivision's discretion, as the decision regarding the type of tree inspection policy to implement involves a weighing of fiscal resources and personnel allocation.

{¶ 43} Appellees assert, however, that the allegation is not whether appellant should have had a better tree inspection program - but rather, whether appellant negligently administered the program it already had in place. More specifically, they frame the issue as whether appellant negligently maintained the tree.

{¶ 44} R.C. 2744.03(A)(5) states:

> The political subdivision is immune from liability if the injury, death, or loss to persons 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.

{¶ 45} Under R.C. 2744.03(A)(5), political subdivisions are not liable for injuries resulting from the exercise of judgment or discretion in determining how to use personnel and resources. Franks v. Lopez (1994), 69 Ohio St.3d 345, 347-348, 632 N.E.2d 502, 504. The R.C. 2744.03(A)(5) discretionary defense applies only to "the broad type of discretion involving public policy made with 'the creative exercise of political judgment.'" Kenko Corp. v. Cincinnati, Hamilton App. No. C-080246, 2009-Ohio-4189, at ¶35, quoting McVey v. Cincinnati (1995), 109 Ohio App.3d 159, 163, 671 N.E.2d 1288. Thus, the "exercise of judgment and discretion" contemplated by R.C. 2744.03(A)(5) does not apply to every decision that a city makes. Id. at 35. As we explained in Hall v. Fort Frye Loc. Sch. Dist. Bd. Of Educ. (1996), 111 Ohio App.3d 690, 699, 676 N.E.2d 1241:

> "Immunity operates to protect political subdivisions from liability based upon discretionary judgments concerning the allocation of scarce resources; it is not intended to protect conduct which requires very little or independent judgment. The law of immunity is designed to foster freedom and discretion in the development of public policy while still ensuring that implementation of political subdivision responsibilities is conducted in a reasonable manner."

{¶ 46} In Hall, for example, we held that the maintenance of a school's irrigation system does not involve the exercise of judgment or discretion. In that case, the plaintiff, a football player, suffered an injury during football practice when he stepped on an exposed sprinkler head located on the high school's practice field. The trial court

granted summary judgment to the school on the basis of statutory immunity. We reversed and held that the maintenance of the high school practice field does not require the exercise of judgment or discretion as contemplated in R.C. 2744.03(A)(5). We held that the school's "initial decision * * * to purchase and install the irrigation system clearly involved the exercise of protected judgment or discretion, for which [the school] is entitled to immunity * * * ." Id. at 700. We further held, however, that "the maintenance of the school's irrigation system * * * is a totally separate matter that does not involve the exercise of such judgment or discretion. The decision to allocate resources, i.e., 'how to use, equipment * * * facilities,' has been made and is immunized. However, once that policy is put into effect, [the school's] maintenance procedures must be performed in a reasonably safe manner." We held "as a matter of law that the maintenance of a political subdivision's property, as opposed to decisions concerning the acquisition and utilization of such property, do not involve a sufficient amount of budgeting, management, or planning to bring such decisions into the purview of R.C. 2744.03(A)(3) or (5)." Id. at 702; see, also, Perkins v. Norwood City Schools (1999), 85 Ohio St.3d 191, 193, 707 N.E.2d 868 (stating that a school principal's decision regarding whom to employ to repair a leaking drinking fountain does not constitute an exercise of judgment or discretion in determining how to use personnel and resources within the meaning of R.C. 2744.03(A)(5), but instead is a routine maintenance decision requiring little judgment or discretion); Malone v. Chillicothe, Ross App. No. 05CA2869, 2006-Ohio-3258 (R.C. 2744.03(A)(5) does not insulate a political subdivision from liability for damages stemming from the negligent maintenance of its buildings or grounds); Kenko Corp., supra, (a city's establishment of an

infrastructure-improvement program constitutes a discretionary act, but its administration of the program is not a discretionary act).

{¶ 47} In the case at bar, appellees essentially assert that appellant negligently maintained the tree which fell upon Ms. Mathews. This is a question of routine maintenance, not a question of appellant's exercise of discretion in determining how to allocate resources or personnel. The question simply is: was appellant's employee negligent in maintaining the tree?

{¶ 48} Contrary to appellant's suggestion, appellees have not argued that appellant should have adopted a more thorough tree inspection program. Rather, appellees limited their argument to whether appellant's employee was negligent in failing to detect the alleged defect. Appellees' complaint does not contain any allegation that appellant's tree inspection policy was deficient. Rather, the complaint asserts that Ms. Mathews' injury resulted from appellant's negligence in failing "to maintain the premises in a reasonably safe condition." Appellees did not argue during the summary judgment proceedings or on appeal that appellant's inspection program is negligent. The apparent purpose of appellees' expert affidavit is not to show that appellant's tree inspection policy is deficient, but instead, to show that appellant's employee was negligent in failing to recognize the alleged danger that the tree posed. Thus, we do not address whether appellant would be entitled to invoke the R.C. 2744.03(A)(5) discretionary defense on this basis. Consequently, the trial court did not erroneously deny appellant's summary judgment motion on the basis of statutory

immunity.[7]

{¶ 49} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[7] We express no opinion regarding the propriety of the trial court's denial of summary judgment regarding the merits of appellees' negligence claim.

[Cite as *Mathews v. Waverly*, 2010-Ohio-347.]

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

McFarland, P.J.: Dissents
Harsha, J. & Abele, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Matthew W. McFarlalnd
Presiding Judge

BY: _____
William H. Harsha, Judge

BY: _____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *Mathews v. Waverly*, 2010-Ohio-347.]