

IN THE SUPREME COURT OF OHIO

<b>The Estate of Devon Cook,</b>	)	
	)	
Appellee,	)	
	)	
vs.	)	
	)	
<b>Montville Township, et al.,</b>	)	<b>On Appeal from the Medina County</b>
	)	<b>Court of Appeals, Ninth District</b>
	)	<b>Court of Appeals</b>
Appellants.	)	<b>Case No. 22CA0046-M</b>

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS,  
MONTVILLE TOWNSHIP, MONTVILLE TOWNSHIP BOARD OF TRUSTEES,  
AND MONTVILLE SERVICE DEPARTMENT**

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Gregory A. Beck (18260)  
James F. Mathews (0040206)  
Tonya J. Rogers (90439)  
Brittany A. Bowland (100126)  
BAKER | DUBLIKAR  
400 South Main Street  
North Canton, Ohio 44720  
Phone: (330)499-6000  
Fax: (330)499-6423  
Email: [beck@bakerfirm.com](mailto:beck@bakerfirm.com)  
[mathews@bakerfirm.com](mailto:mathews@bakerfirm.com)  
[tonya@bakerfirm.com](mailto:tonya@bakerfirm.com)  
[bbowland@bakerfirm.com](mailto:bbowland@bakerfirm.com)

*Counsel for Appellants*

Steven M. Goldberg, Esq.  
Goldberg Legal Co., LPA  
Solon Business Campus  
31300 Solon Road - Suite 12  
Solon, Ohio 44316  
[steven@goldberglpa.com](mailto:steven@goldberglpa.com)

James A. Amodio, Esq.  
Brown, Amodio & Chandler  
109 W. Liberty Street  
Medina, Ohio 44256  
[jamodio@medina-legal.com](mailto:jamodio@medina-legal.com)

Scott L. Melton, Esq.  
300 Ninth Street  
Conway, Pennsylvania 15027  
[smeltonlawfirm@gmail.com](mailto:smeltonlawfirm@gmail.com)

*Counsel for Appellee*

**TABLE OF CONTENTS**

**EXPLANATION WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1**

**STATEMENT OF THE CASE AND FACTS .....3**

**ARGUMENTS IN SUPPORT OF THE PROPOSITIONS OF LAW.....4**

**Proposition of Law No. 1:**

**Because R.C. 2744.02(B)(4) is a narrow exception from governmental immunity triggered only by injury, death or loss caused by a physical defect and employee negligence within or on the grounds of a governmental building, this exception is not applicable when the occurrence that proximately caused the injury, death or loss occurred on property owned by another person or entity. ....4**

**Proposition of Law No. 2:**

**As used in R.C. 2744.02(B)(4), the phrase “within or on the grounds of, buildings that are used in connection with the performance of a governmental function,” requires an analysis akin to examining the curtilage of a structure such that the exception is triggered only by physical defects on the grounds immediately adjacent to or necessarily supportive of the use of the subject building and shall not extend to property beyond that limit. ....9**

**Proposition of Law No. 3:**

**A “building” “used in connection with performance of a governmental function” for purposes of determining the immunity exception in R.C. 2744.02(B)(4) is limited to a building owned or expressly controlled by the political subdivision. ....13**

**CONCLUSION .....15**

**PROOF OF SERVICE .....16**

**APPENDIX**

**Journal Entry of the Medina County Common Pleas Court  
(July 20, 2022) .....A-1**

**Decision and Journal Entry of the Ninth District Court of Appeals  
(August 28, 2023) .....A-5**

**EXPLANATION WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Over the course of the past decade, the Court has conclusively addressed a series of issues presented under the Political Subdivision Tort Liability Act (the “Act”), as codified in Chapter 2744 of the Revised Code. This case calls upon the Court to examine three features of the exception stated in R.C. 2744.02(B)(4) which have, thus far, evaded review. By way of the 2003 amendment to the Act, the General Assembly emphasized that the purpose of the Act is to confine the exceptions from immunity to narrow sets of facts. The Court has then duly recognized the limitations of the exceptions. In this case, the Ninth District Court of Appeals has fashioned a broad reach of the exception which is not sustainable under the wording of the statute itself and which exposes political subdivisions to liability not contemplated by the General Assembly.

Prior to 2003, the (B)(4) exception stated, in part, “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 buildings that are used in connection with the performance of a governmental function.” *See Hubbard v. Canton City Sch. Bd. of Educ.*, 97 Ohio St. 3d 451, 2002-Ohio-6718, ¶6. In 2003, R.C. 2744.02(B)(4) was amended to add the provision of “and is due to a physical defect within or on the grounds of.” Notably, the amended did not alter the pre-existing requirement that such injury, loss or death must occur “within or on the grounds of” buildings used in connection with a governmental function.

Despite the R.C. 2744.02(B)(4) exception being in place for decades, this Court has not addressed the correct reading of the phrase on the “grounds of” such governmental buildings. As a result, Ohio courts, including the lower court in this instance, have interpreted the (B)(4) exception broadly and have essentially denied immunity in all situations where an injury, loss or death occurs on any government property which happens to have a building somewhere in the

general vicinity – regardless of whether the injury, death, or loss occurred on grounds directly tied to the government buildings itself. Such interpretation is not consistent with the express language of the statute. This case directly presents this issue for the Court to settle the proper interpretation of the phrase “grounds of” governmental buildings, as set forth in the (B)(4) exception.

This case is not, however, limited to solely interpreting the phrase “grounds of,” as used in R.C. 2744.02(B)(4). Rather, this case also presents the issue of whether such injury, loss, or death must occur within or on the grounds of such building, and that the proximate cause of such injury, loss or death similarly occur within or on the grounds of such governmental building. Here, the fatal injury to the decedent occurred on adjacent property not owned or controlled by the Township, rather, the decedent’s vehicle happened to veer onto the Township property. Thus, the issue of whether the event that proximately caused the injury, loss or death must occur “within or on the grounds of” governmental buildings is already directly before the Court in this case.

Finally, the (B)(4) exception is limited to instances that occur within or on the grounds of buildings used in connection with a governmental function, “including, but not limited to, office buildings and court houses.” There remains no clarity on what is meant by “buildings” in this statute, and lower courts have expanded such phrase to include quite literally any structure that has a roof, such as storm shelters or picnic pavilions. Therefore, guidance is required as to what constitutes a “building” within the meaning of this statute, as all such questions have been routinely issued to juries, which are not the appropriate entity to determine such questions of law.

This case illustrates just how broad the R.C. 2744.02(B)(4) exception has been interpreted, in direct contradiction to the express purpose of Act. The Decedent in this case sustained her fatal injury on county-owned property, yet the county was never named a defendant. It is further undisputed that the decedent was not using the park at the time of the injury. Rather, the court of

appeals suggests the narrow exception to immunity can be triggered because there was a covered shelter hundreds of yards away for park users, a small portion of the base of the tree which struck the decedent was located on Township property, and the decedent's vehicle came to rest on Township property – despite such property being entirely inaccessible from park users. It is therefore necessary for the Court to provide guidance on the phrases and terms used in this statute in order to provide clarity to political subdivisions as to what liability exposure they may face.

### **STATEMENT OF THE CASE AND THE FACTS**

On August 4, 2017, Devon Cook (Decedent), was traveling southbound on County Road 49 (“CR 49”) during a thunderstorm. Tragically, a tree trunk, located on the east side of CR 49 fell and struck the car compartment directly above the Decedent. A subsequent coroner's report determined the blunt force trauma from the tree trunk striking the Decedent was the cause of death. After being struck, the Decedent lost control of her vehicle and veered to the east side on CR 149 and came to rest on Township property. The property to the west was private, residential property.

The Township park, Austin Badger Park, is located along the eastern side of CR 149 where the accident occurred. The tree trunk that struck the decedent was part a cluster of three trees. The trunk that struck the decedent was entirely on County property. As confirmed by a surveyor and arborist, approximately 2 inches of the tree-cluster base extended onto Township property.

Montville Township acquired 252-acres from a golf course in 2015. The 252 acres were transformed into three connected parks, including Austin Badger Park. At the time of acquisition, property three buildings, although the record below shows that the Township did not utilize any of the buildings until well after the tragic accident at issue in this case.

The Austin Badger Park is comprised of three parcels: (1) Parcel No. 031-11B-20-036 (“Parcel A”), (2) Parcel No. 030-11B-26-054 (“Parcel B”), and (3) Parcel No. 030-11B-26-055

(“Parcel C”). The Decedent’s car came to rest on Parcel C, which is separated from the two northern parcels (A and B) by the Lake Erie Railway, which owns the property and has an overpass railroad track. Park users traverse below the overhead railroad track through paths that pre-existed the Township’s acquisition. Testimony from the Township Service Director indicated that prior to the accident, the Township had not performed any maintenance or work on the shelters.

Although CR 49 is adjacent to Parcel C, any park patrons who are on the Parcel C portion of the park are separated from the roadway by West Branch Rocky River, which runs parallel to CR 49 and renders the roadway inaccessible from the Township park. Thus, aside from wading through a river, users of the Park can only gain access to CR 49, as well as the property containing the subject tree, by walking under the railroad, out through the park entrance, onto County-owned property, and up along the CR right-of-way. In short, the location of the tree was not in any way connected to or accessible from any structures located on the newly acquired property.

The Ninth District Court of Appeals upheld the trial court’s denial of summary judgment, determining factual questions existed as to whether the shelters were “buildings” and whether the subject tree was on the “grounds of” such shelters. Further, the Court of Appeals determined that because the Decedent may have taken her last breaths on Township property after the blunt force trauma which occurred on County property, the R.C. 2744.02(B)(4) exception was triggered.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

#### **Proposition of Law No. 1:**

**Because R.C. 2744.02(B)(4) is a narrow exception from governmental immunity triggered only by injury, death or loss caused by a physical defect and employee negligence within or on the grounds of a governmental building, this exception is not applicable when the occurrence that proximately caused the injury, death or loss occurred on property owned by another person or entity.**

The appellate court ruling would permit appellee’s alleged claims to proceed to trial solely because the appellee’s vehicle ultimately came to a stop on Township-owned property, despite the undisputed fact that the injury that proximately caused the decedent’s death occurred entirely on the county-owned roadway. The appellate court’s determination that because there was a question of fact as to whether the decedent actually died on the Township property – regardless of the fact that the blunt-force trauma which caused her death occurred on County property – results in a political subdivision at risk of losing immunity by mere chance as to where a vehicle came to a stop after a tragic accident. This result is not contemplated by the immunity statutes. As R.C. 2744.02 is intended to remove liability only in five narrow circumstances, allowing mere chance to remove immunity defies the express purpose of the statute.

The Ohio Political Subdivision Tort Liability Act, as codified in Chapter 2744 of the Revised Code, was “the General Assembly’s response to the judicial abrogation of common—law sovereign immunity. Its manifest purpose is the preservation of the fiscal integrity of political subdivisions.” *Wilson v. Stark Cty. Dept. of Human Servs.*, 70 Ohio St.3d 450, 453, 639 N.E.2d 105 (1994). “Consistent with that purpose, early resolution of the immunity issue may save the parties the time, effort, and expense of a trial and appeal.” *Supportive Solutions, L.L.C. v. Elec. Classroom of Tomorrow*, 137 Ohio St. 3d 23, 2013-Ohio-2410, ¶11, citing *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶25, quoting *Burger v. Cleveland Hts.*, 87 Ohio St.3d 188 (1999) (Lundberg Stratton, J., dissenting). Under the general rule, political subdivisions enjoy immunity in civil tort claims involving property and personal injury. There are only five exceptions to this immunity, as set forth in R.C. 2744.02(B).

The exception at issue in this case is set forth in R.C. 2744.02(B)(4), which states political subdivision immunity will be removed “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, . . .” 2744.02(B)(4). As this statute removes immunity only in narrow circumstances where negligence has been shown, it is axiomatic that the plaintiff must first prove all the elements of a negligence claim: duty, breach, proximate cause, and damages. *See e.g. Mencini v. Greater Cleveland Reg'l Transit Auth.*, 8<sup>th</sup> Dist. 2023-Ohio-2299, ¶23, *citing Pierce v. City of Gallipolis*, 4<sup>th</sup> Dist. 2015-Ohio-2995, ¶20 and *Gabel v. Miami E. School Bd.*, 2<sup>nd</sup> Dist. 2006-Ohio-5963, ¶¶39-40 (“We recognize that before [a 2744.02(B) exception] removes a political subdivision's immunity, the plaintiff must establish the elements required to sustain a negligence action: duty, breach, proximate cause, and damages.”).

“As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy.” *Johnson v. Univ. Hosps. of Cleveland*, 44 Ohio St. 3d 49, 57 *citing* Prosser & Keeton, *Law of Torts* (5 Ed. 1984) 264, Section 41. The narrow purpose for which R.C. 2744.02(B) exceptions are triggered, together with the express language of the (B)(4) exception, demonstrates that the exception is triggered only when the injury or loss actually occurs within or on the grounds of the government building and is the direct result of a physical defect on said grounds due to employee negligence. To suggest that this exception to immunity can be triggered by an injury that occurs on separate grounds, but where the injured party subsequently succumbs to injuries on government property by mere chance, contravenes the basic principles of negligence and proximate cause analysis established throughout Ohio precedent.

As noted above, R.C. 2744.02(B)(4) was amended in response to *Hubbard v. Canton City Sch Bd. of Edu*, 84 Ohio St.3d 1486 (Feb 3, 1999), in which it was certified as a conflict. The General Assembly sought to amend R.C. 2744.02(B)(4) to its current version in 2000, but its initial effort was struck down by way of *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451 (1999). Therefore, this Court issued its decision in *Hubbard*, 97 Ohio St. 3d 451, 2002-Ohio-6718. The current version of R.C. 2744.02(B)(4) went into effect on March 9, 2003 and was intended to limit the reach of this exception. *Fry v. City of Cincinnati*, 1<sup>st</sup> Dist. 2022-Ohio-1248, ¶9, citing *Dornal v. Cincinnati Metro. Hous. Auth.*, 1st Dist., 2010-Ohio-6236, ¶14 (The amendment "reflects a legislative intent to restrict a political subdivision's liability to losses or injuries that occur in government buildings or on their grounds.").

Following the 2003 amendments, Ohio courts have differed in their application of the statute, as some have adopted a two-prong test analysis, while others have adopted a three-prong test analysis. The plain and unambiguous language of the statute necessitates the three-prong test requiring a showing the injury, loss or death is: 1) caused by employee negligence, 2) on the grounds or in buildings used in connection with governmental activity, and 3) due to physical defects on or within those grounds or buildings. All of these characteristics must be present.

Several districts have adopted this three-prong approach, finding the exception is triggered “only if an injury is: 1) caused by employee negligence, 2) on the grounds or in buildings used in connection with governmental activity, and 3) due to physical defects on or within those grounds or buildings. All of these characteristics must be present.” *R.K. v. Little Miami Golf Ctr.*, 1<sup>st</sup> Dist. 2013-Ohio-4939, ¶15, citing *Leasure v. Adena Local School Dist.*, 4<sup>th</sup> Dist. 2012-Ohio-3071 and *Hamrick v. Bryan City Sch. Dist.*, 6<sup>th</sup> Dist. 2011-Ohio-2572, ¶25; *Shaw v. Wash. Court House City Schs. Bd. of Educ.*, 12<sup>th</sup> Dist. 2022-Ohio-4226, ¶18; *O.G. v. City of Middleburg Heights*, 8<sup>th</sup> Dist.

2017-Ohio-7604, ¶11, citing *Duncan v. Cuyahoga Community College*, 8<sup>th</sup> Dist. 2012-Ohio-1949, ¶ 26 (noting that all three elements “must” be present.”); *Conley v. Wapakoneta City Sch. Dist. Bd. of Educ.*, 3<sup>rd</sup> Dist. 2022-Ohio-2915, ¶36.

Further, several Ohio courts have determined that the express language removes immunity only where a showing is made that the loss or injury occurred on the subject property. *Doe v. Massillon City Sch. Dist.*, 5<sup>th</sup> Dist. 2007-Ohio-2801, ¶34 (“we hold the exception to general immunity under former R.C. 2744.02(B)(4) is limited to situations where the injury or loss occurred on the property of the political subdivision.”); *Keller v. Foster Wheel Energy Corp.*, 10<sup>th</sup> Dist. 2005-Ohio-4821, ¶14 (“our own review of R.C. 2744.02(B)(4) reveals that it requires the injury, not the negligent act or omission, to occur on public grounds.”)

This is demonstrated most clearly in the recent opinion *Fry v. City of Cincinnati*, 1<sup>st</sup> Dist. 2022-Ohio-1248, which has nearly identical facts and was issued a year prior to the lower court’s opinion in this case. In *Fry*, the appellant was traveling down a City street and was injured when a tree branch fell from an adjacent City park and struck her vehicle. *Id.* at ¶1. The trial court denied the City’s motion to dismiss, and the City appealed. On appeal, the City argued that for the (B)(4) exception to be triggered, the Court must look to the three-prong test and argued that the appellant failed to meet the second prong – her injury did not occur within or on the grounds of a governmental building. *Fry*, ¶¶ 6-7. The court of appeal agreed, finding:

In holding that the R.C. 2744.02(B)(4) physical-defect exception applied to defeat the city's immunity, the trial court ignored the second requirement of the exception and concluded that it was enough that Fry's allegations met the exception's first and third requirements: negligence by a city employee and a physical defect occurring on city property. . . . Because Fry did not allege that her injury occurred within or on the grounds of a building used in connection with a governmental function, sufficient to establish the second requirement of the physical-defect exception, the exception did not apply to remove the city's general grant of immunity.

*Fry*, ¶10.

Here, it is undisputed that the decedent in this case was traveling on a county road when she was struck by the tree. It is further undisputed that the blunt force trauma which proximately caused the decedent's death was the result of the tree striking her while she was on the county road. Where the decedent's vehicle came to rest had no bearing whatsoever on the decedent's injuries and did not in any way contribute to her death. If the decedent's vehicle had veered to the west and ended up in the yard of a residential home, the outcome would have been the same. The appellate court's determination that the exception was triggered merely due to the fact that the decedent's last breaths may have occurred on Township property – despite the fact that the injury that proximately caused the decedent's death did not occur on Township property – flies in the face of the express language of the statute and traditional proximate-cause analysis. Taken to an extreme, the decision of the appellate court could open up liability for any person to stumble onto political-subdivision property and succumb to injuries sustained elsewhere, and thus trigger the (B)(4) exception. As the statute calls for the injury, loss or death to occur within or on the grounds of the government building, as well as requires that the cause of such injury, loss or death be the result of employee negligence and a physical defect within or on the grounds of the government building, the appellate court's holding fails to meet the plain language of the statute.

It is necessary for this Court to address that the R.C. 2744.02(B)(4) exception to immunity applies only when the occurrence that proximately causes the injury, loss, or death actually occurs within or on the grounds of a building used in connection with a governmental function, and that such occurrence must be the result of a physical defect resulting from employee negligence.

**Proposition of Law No. 2:**

**As used in R.C. 2744.02(B)(4), the phrase “within or on the grounds of, buildings that are used in connection with the performance of a governmental function,” requires an analysis akin to examining the curtilage of a structure such that the exception is triggered only by physical defects on the grounds**

**immediately adjacent to or necessarily supportive of the use of the subject building and shall not extend to property beyond that limit.**

The phrase “grounds of,” as used in R.C. 2744.02(B)(4) has not been defined in the statute or by this Court. It is well-established that “when a term is undefined, we give the term its ‘plain and ordinary meaning.’” *State ex rel. Int’l Ass’n of Fire Fighters v. Sakacs*, 2023-Ohio-2976, ¶17 (OSC Aug 29, 2023), citing *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St.3d 199, 2018-Ohio-5207, ¶8, and *Rhodes v. City of New Phila.*, 129 Ohio St.3d 304, 2011-Ohio-3279, ¶17. “In doing so, we keep in mind that ‘[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage.’” *Sakacs*, at ¶17, quoting R.C. 1.42.

In the context of R.C. 2744.02(B)(4), the term “grounds” is not used in isolation; it is used in the phrase “grounds of” certain government buildings. One of the common usage definitions of the word “of,” as used in the preposition context, is “used as a function word to indicate the component material, parts, or elements or the contents.” Merriam-Webster Diction. Here, the General Assembly decision to indicate the exception is triggered only when the injury, loss or death occurs “within or on the grounds of” governmental buildings indicates a direct relationship between the building and the grounds. As noted by the Eleventh District, Chapter 2744 references “buildings” and “office buildings,” “public grounds” and “the grounds of buildings.” *Alcus v. Bainbridge*, 11<sup>th</sup> Dist. 2020-Ohio-543, ¶92-93, referencing R.C. 2744.01(C)(2)(e) and (g) and 2744.02(B)(4). “Since the terms ‘public grounds,’ ‘grounds,’ and ‘buildings’ are used separately in the immunity statute, they are intended to have different meanings.” *Alcus*, at ¶93, citing *State ex rel. Ross v. Crawford Cty. Bd. of Elections*, 125 Ohio St.3d 438, 2010-Ohio-2167, ¶23.

Ohio case law reveals very little analysis or guidance on the term “grounds of.” One of the few cases to address this issue determined it was a jury question. *Mathews v. City of Waverly*, 4<sup>th</sup> Dist. 2010-Ohio-347. ¶39-40. In *Mathews*, the City was argued the building had to be on the same

parcel for (B)(4) to apply. The *Mathews* court looked to the dictionary definition, and rejected the parcel argument, noting that the focus is the purpose for which the grounds are “devoted” rather than mere parcel distinction. *Mathews*, ¶39. However, that is where the analysis stopped, and the Court offered no further guidance on how “grounds” were to be evaluated.

Thereafter, opinions have given little notice to the analysis and thus such issues are routinely remanded as matters for the jury. Such approach was taken here by the Ninth District Court of Appeals, which found it was irrelevant that the subject tree was not accessible from the park. Rather, the Court found that because trees can be visually appreciated from anywhere in the park, the jury needed to decide whether the tree was on the “grounds of” a governmental building.

As such, in the absence of a clear definition, the issue of whether an injury or loss was “on the grounds of” will always result in a trial, which contravenes the express purpose of the immunity statute, as recognized by this Court in *Wilson*. If Courts defer to a jury on the issue of whether a proximate-cause event occurred “on the grounds of” a governmental building, then any case to which this exception applies loses the ability to have cases dismissed by way of summary judgment, thus entirely undermining the immunity principles articulated by this Court in *Wilson*.

In addition, some Ohio courts have imputed the phrase “in connection with” to refer to grounds used in connection with a governmental building. See *Nicholson v. Loanmax, LLC*, 7<sup>th</sup> Dist. 2018-Ohio-375, ¶21, quoting *Aratari v. Leetonia Exempt Vill Sch Dist.*, 7<sup>th</sup> Dist., 2007-Ohio-1567, ¶30 and *Roberts v. Switzerland of Ohio Sch Dist.*, 7<sup>th</sup> Dist. 2014-Ohio-78, ¶20. This common misinterpretation of the statutory language demonstrates the necessity of establishing clear guidelines on how to determine whether government owned or controlled property qualifies as on “the grounds of” a governmental building.

The placement of the words within the immunity exception becomes critical to its proper interpretation and application. The General Assembly did not use “grounds” in isolation. In other words, the exception does not apply merely when an injury occurs on “grounds” of the political subdivision. Rather, the General Assembly placed “grounds” before the word “buildings,” to limit the scope. Only when an injury occurs *on the grounds of buildings* may the exception apply.

The “grounds of” a building does not translate to all land used in connection with a governmental function which may be near a building. To the contrary, the “grounds of buildings” are only those immediately adjacent lands directly supportive of the building and its governmental purpose. If the General Assembly intended the exception to be all encompassing of a government’s land, it could have easily stated such. Instead, it chose to limit the application of the exception to only grounds “of” governmental buildings. Thus, rules of statutory interpretation and grammar dictate that due to the language used by the General Assembly, the “grounds” must be directly and necessarily related to the subject building and the building’s use.

It is common for the law to examine a distinction on the legal import of land immediately adjacent to buildings rather than land that shares a common owner with a building. One example is in curtilage jurisprudence. The “curtilage” of a building is general recognized as “the land immediately surrounding it, including any closely associated buildings and structures, but excluding any associated ‘open fields beyond.’” These identical parameters are applicable to the correct and universal application of R.C. 2744.02(B)(4) and therefore this exception should be triggered only in situations where the injury, loss or death occurs due to a physical defect caused by employee negligence on grounds that are immediately adjacent to or materially support the function of the government building, such as sidewalks, steps, or entrances. To allow the (B)(4) exception to be expanded to include any lands that are also owned by the same political subdivision

that owns a structure in the general vicinity improperly expands the express language of the statute and the intended purpose of the Political Subdivision Tort Liability Act.

**Proposition of Law No. 3:**

**A “building” “used in connection with performance of a governmental function” for purposes of determining the immunity exception in R.C. 2744.02(B)(4) is limited to a building that have a material relationship to the subject governmental function which are owned or expressly controlled by the political subdivision.**

As noted, the Austin Badger Park is comprised the three parcels: Parcels A, B, and C. The parcel adjacent to where the accident occurred in Parcel C, which is separated from Parcels A and B by an overhead railroad track, which also owns the property dividing the parcels. Park patrons who wish to walk from Parcels A and B to Parcel C must traverse under the railroad track to access Parcel C. When Montville Township purchased the property, there were pre-existing shelters located under the overhead railroad tracks. The Court of Appeals suggests that these shelters – posts and a roof that the Township did not construct, own, or control – was sufficient to trigger liability. However, such conclusion undermines the express language of the statute and its express purpose. First, it is axiomatic that the Township must own and control any “building” for the R.C. 2744.02(B)(4) to be triggered. Further, the railroad shelters are merely incidental to use of the park. The park can be fully operational and functional in the absence of such shelters. Thus the shelter (even if owned by the Township) are not material to the Township’s operation of the park and are not sufficient to serve as “buildings” as contemplated in R.C. 2744.02(B)(4).

Some Ohio courts have already recognized that privately-owned structures cannot trigger the R.C. 2744.02(B)(4) immunity exception merely because such privately-owned structures are incidentally related to a government function. In *Dornal v. Cincinnati Metro. Hous. Auth.*, 1<sup>st</sup> Dist. 2010-Ohio-6236, which involved a private residence funded through the metropolitan housing

authority, the court of appeals found: “The performance of a governmental function at a privately owned facility does not transform that building into one that is ‘used in connection with the performance of a governmental function.’” *Dornal*, at ¶13. *See also, Holimon v. Sharma*, 1<sup>st</sup> Dist. 2021-Ohio-3840, ¶16 (“R.C. 2744.02(B)(4) reflects a legislative intent to restrict a political subdivision’s liability to losses or injuries that occur in government buildings or on their grounds,” as opposed to any privately-owned structure incidentally related to a government function).

Here, the subject shelters under the overhead railroad are located on land owned by the railroad company, pre-existed the Township’s acquisition of the property, and were not otherwise maintained or controlled by the Township. For that reason alone, the court of appeals erred in determining that such shelter were “buildings used in connection with a governmental function.” As such, it is necessary for this Court to provide clarity that privately-owned buildings which are not owned or controlled by a political subdivision cannot trigger the R.C. 2744.02(B)(4) exception.

The court of appeals further erred by determining that such shelters amounted to “buildings” as contemplated in R.C. 2744.02(B)(4). Revised Code Chapter 27444 does not define “building” for this purpose. Instead, the General Assembly only provided examples of the types of building that can trigger the R.C. 2744.02(B)(4) exception, “office buildings and courthouses.” While the statute is clear that this list is not exhaustive, “[e]xamples are typically intended to provide *illustrations of a term defined*. . .” *Yoby v. City of Cleveland*, 8<sup>th</sup> Dist. 2020-Ohio-3366, ¶44, *quoting Colbert v. Cleveland*, 99 Ohio St.3d 215, 2003-Ohio-3319. Here, as there has been no consistency among lower courts as to what type of structure constitutes a “building” for purpose of this immunity exception, guidance from the Court is necessary.

In reaching the conclusion that a mere roofed shelter constitutes a “building,” the court of appeals looked to *Mathews v. Waverly*, 4<sup>th</sup> Dist. 2010-Ohio-347, a case relied upon by numerous

other Ohio courts. However, since the issuance of its opinion, *Mathews* has been improperly expanded as the controlling authority that any roofed shelter in a park or on other public ground is a “building” within the meaning of R.C. 2744.02(B)(4), yet the *Mathews* opinion holds no such conclusion. Rather, in *Mathews* at Footnote 6, the Court expressly noted that it was not reaching the issue of whether or not the structures actually constituted buildings, “We note that appellant has not disputed whether the structures constitute ‘buildings’.” “Thus, despite the asserted similarities between the actual structures themselves in *Mathews* and the covered shelters considered herein, *Mathews* must be limited in its interpretation and Courts interpreting said opinion must acknowledge when relying upon it, that it expressly declined to reach the issue of whether the structures were technically “buildings”.

If the General Assembly had intended for the exception to encompass any general structure used on government grounds, it could have said so. Instead, however, R.C. 2744.02(B)(4) exception looks to the examples of administrative offices and courthouses to illustrate the type of government building that can trigger the exception. The decision to include these examples demonstrates an intent to limit the reach of R.C. 2744.02(B)(4) to buildings that are actually used by the political subdivision as an integral part of the government function, as opposed to any structure that is incidental to said governmental function. As Ohio case law shows a variety of determinations by lower courts as to what constitutes a “building” within the meaning of R.C. 2744.02(B)(4), it is necessary for this Court to provide guidance so that lower courts, as well as political subdivisions, may have clarity on this issue.

## **CONCLUSION**

WHEREFORE, the defendant-appellant, Montville Township, respectfully requests that this Court grant jurisdiction for full consideration of the issues outlined above.

Respectfully submitted,

*s/ Tonya J. Rogers*

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Gregory A. Beck (18260)  
Tonya J. Rogers (90439)  
Brittany A. Bowland (100126)  
BAKER | DUBLIKAR  
400 South Main Street  
North Canton, Ohio 44720  
Phone: (330) 499-6000  
Fax: (330) 499-6423  
E-mail: beck@bakerfirm.com  
tonya@bakerfirm.com  
bbowland@bakerfirm.com  
Counsel for Defendants/Appellants

**PROOF OF SERVICE**

A copy of the foregoing was sent via e-mail only this 11<sup>th</sup> day of October, 2023, to:

Steven M. Goldberg, Esq.  
Goldberg Legal Co., LPA  
Solon Business Campus  
Email: steven@goldberglpa.com

James A. Amodio, Esq.  
Brown, Amodio & Chandler  
Email: jamodio@medina-legal.com

Scott L. Melton, Esq.  
Email: smeltonlawfirm@gmail.com

Counsel for Plaintiffs/Appellees

*s/ Tonya J. Rogers*

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Gregory A. Beck (18260)  
Tonya J. Rogers (90439)  
Brittany A. Bowland (100126)  
BAKER | DUBLIKAR