[Cite as *Estate of Cook v. Montville Twp.*, 2023-Ohio-3002.]

STATE OF OHIO))ss: COUNTY OF MEDINA)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
THE ESTATE OF DEVON R. COOK Appellee v. MONTVILLE TOWNSHIP, et al. Appellants	C.A. No. 22CA0046-M APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 19CIV0760

DECISION AND JOURNAL ENTRY

Dated: August 28, 2023

CARR, Judge.

{¶1} Defendants-Appellants Montville Township, Montville Township Board of Trustees, and Montville Service Department (collectively "Montville") appeal the judgment of the Medina County Court of Common Pleas. This Court affirms.

I.

{¶2} On August 4, 2017, Devon Cook was driving on River Styx Road, also known as County Highway 49, during a storm. Ms. Cook's young child was in the backseat. A large tree fell across the roadway and onto the driver's side roof of the vehicle driven by Ms. Cook, gravely injuring Ms. Cook. The vehicle veered off the road and came to rest in a treed area. Ms. Cook succumbed to her injuries, but her young child was unharmed physically in the accident.

{¶3} In August 2019, the Estate of Devon R. Cook, deceased ("the Estate") filed a complaint against Montville and John Does 1-20. The Estate alleged that the tree that fell was a dead tree originally located on the property of Austin Badger Park, which was owned, operated,

and maintained by Montville. The Estate also asserted that Ms. Cook's vehicle came to rest in a wooded area of Austin Badger Park, and that was where Ms. Cook passed away. The Estate's complaint contained two claims: one alleging negligence and one for wrongful death. Montville filed an answer and raised the affirmative defense of political subdivision immunity.

{¶4} In March 2021, Montville and the John Doe Defendants filed a motion for summary judgment. Therein, Montville alleged that it was a political subdivision engaged in a governmental function and therefore entitled to immunity. Montville maintained that the elements of the R.C. 2744.02(B)(4) exception to immunity asserted by the Estate were not satisfied. The Estate opposed the motion. A reply and surreply were also filed. Ultimately, the trial court denied the motion concluding that "[t]here are genuine issues of material fact concerning Defendants' responsibility for the tree falling on Plaintiff's decedent's car which caused her death. There are genuine issues of material fact concerning whether sovereign immunity prevents Defendants from having liability in this matter."

{¶5} Montville has appealed, raising a single assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED WHEN IT DENIED THE APPELLANTS THE BENEFIT OF IMMUNITY UNDER CHAPTER 2744 OF THE OHIO REVISED CODE[.]

{¶6} Montville argues that the trial court erred in denying it the benefit of immunity.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any

doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (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) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶9} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id*. Once a moving party satisfies its burden of supporting its motion for summary judgment with acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. *Id*. at 293. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated at trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶10} "We begin our discussion by underscoring that the scope of the [] appeal is limited to the immunity issue. Though a trial court's order denying a motion for summary judgment is generally not a final, appealable order, R.C. 2744.02(C) permits [an] [] appeal to the extent that the trial court's order denies a political subdivision the benefit of an alleged immunity from liability." *Thomas v. Lorain Metro. Hous. Auth.*, 9th Dist. Lorain No. 17CA011177, 2018-Ohio-2997, ¶ 12, quoting *Calet v. E. Ohio Gas Co.*, 9th Dist. Summit No. 28036, 2017-Ohio-348, ¶ 13.

{¶11} Determining whether a political subdivision qualifies for immunity pursuant to R.C. 2744 et seq. involves a three-tiered analysis. *Lambert v. Clancy*, 125 Ohio St.3d 231, 2010-Ohio-1483, ¶ 8. R.C. 2744.02(A) provides, in relevant part, that "a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function." "When it has been determined that a party generally qualifies for immunity due to its status as a political subdivision, the second tier of the analysis is to determine whether one of the exceptions to immunity set forth in R.C. 2744.02(B) is applicable." *Thomas* at ¶ 13. "Under circumstances where an exception to immunity applies, the third tier of the analysis involves a determination of whether immunity may be restored under R.C. 2744.03(A)." *Id.*

{¶12} The issue before this Court is whether there remains a genuine issue of material fact as to whether the exception in R.C. 2744.02(B)(4) applies to the facts of this matter. R.C. 2744.02(B)(4) provides that:

> 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.

{¶13} Thus, the exception applies upon proof that injury, death, or loss was "(1) caused by employee negligence; (2) on the grounds or buildings used in connection with the performance of that governmental function; and (3) due to a physical defect on or within those grounds or buildings." (Internal quotations and citations omitted.) *Cuyahoga Falls v. Gaglione*, 9th Dist. Summit No. 28513, 2017-Ohio-6974, ¶ 11. "This Court has recognized that a physical defect is

an imperfection that possesses some materiality that diminishes the worth or utility of the object at issue." (Internal quotations and citations omitted.) *Id.* at ¶ 24. Governmental functions include "[t]he design, construction, reconstruction, renovation, repair, maintenance, and operation of any school athletic facility, school auditorium, or gymnasium or any recreational area or facility, including, but not limited to, * * * [a] park, playground, or playfield[.]" R.C. 2744.01(C)(2)(u)(i).

{¶14} Ms. Cook's vehicle was on a county road, River Styx Road, when her vehicle was struck by the tree. Alongside the road is a right of way, also owned by the county. Adjacent to the right of way is land owned by Montville. That land is part of a park known as Austin Badger Park. In 2015, Montville acquired a 252-acre property that had been used as a golf course. The area was developed by Montville into three parks: Austin Badger Park, Aaron Smith Nature Preserve, and Thomas Currier Nature Preserve. The three parks are composed of several parcels but are interconnected by paved walkways allowing visitors to traverse through all three. A portion of the West Branch of the Rocky River cuts through Austin Badger Park between River Styx Road and the Austin Badger Park walking paths. An active railroad crosses overhead some of the paths in Austin Badger Park. Two shelters cover the paths where the railroad tracks proceed overhead.

{¶15} The Estate presented evidence from a professional forensic arborist indicating that the tree at issue was a white ash tree composed of three trunks which were fused and that the tree was on property owned by Montville. Specifically, the arborist found that "[t]he subject tree, including section T-1[] [the trunk that failed], was located on the property owned and managed by Montville Township since its purchase of the property." That T-1 portion was described as dead, decaying, and bug-infested. It was approximately 84 feet tall, weighed over 10,000 pounds, was leaning towards the road, and was 28 feet from the road. The arborist did not believe that the tree was struck by lightning. The arborist believed it was in an obvious and unreasonably dangerous

condition since 2009 and that a structurally sound tree would not have failed under the weather conditions present that day. Photographic evidence of the tree over the years from Google was also presented. Other evidence demonstrates that the base of the tree and its three trunks was on the boundary line between county owned land and the Montville Austin Badger Park land. A surveyor averred that it was his opinion that "the tree was a boundary tree which was astride the property line between the 40 foot right [of] way for the eastern side of River Styx Road and Montville Township park property[.]" In other words, portions of the base of the tree were on county owned land and portions were on Montville owned land.

{¶16} The two structures within the borders of Austin Badger Park that cover the portions of a path that cross under the railroad track are referred to on a park map as covered shelters. They are covered but the sides are open to the elements. There was testimony by Montville's service director that the covered shelters were present when the land was acquired by Montville and that the structures were required by the railroad. The service director testified that it was his understanding that the covered shelters were there to keep people from being struck by debris falling from the railroad tracks. Thus, the purpose of the structures was to provide safety to people using the park. In addition, the covered shelters could also be used for cover in the case of a storm. The service director indicated that since the land was acquired, annual inspections were done as well as any repairs that were needed. The service director did not recall doing any major maintenance on the covered shelters. The service director testified to, every three to four months, going through the entire park to inspect it. That inspection would include the covered shelters to ensure that they are safely maintained for the public using the park. The covered shelters are shown within the park boundary on the park map.

{¶17} The three parks contain additional structures and buildings; some of which were not present at the time of the events at issue. Montville maintains that it did not use these other structures and buildings that were on the property of the three parks at the time of the accident.

{¶18} On appeal, Montville argues that R.C. 2744.02(B)(4) is not satisfied. Montville asserts that the part of the tree trunk that fell was not on Montville property and only a portion of the base of the tree, which remained intact, was on Montville property. However, we note the statement of the arborist that "[t]he subject tree, including section T-1[] [the trunk that failed], was located on the property owned and managed by Montville Township since its purchase of the property[,]" as well as the statements from the surveyor and the diagrams of the tree in relation to the right of way, taken together and viewed in a light most favorable to the Estate, at the very least create a genuine issue of material fact as to the issue.

{¶19} Additionally, Montville argues that the injury occurred on the county road and not on Montville property and that case law requires that the injury occur on Montville's property. However, the plain language of the statute provides otherwise. R.C. 2744.02(B)(4) provides in relevant part 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[.]" While it is undisputed that Ms. Cook's initial injury occurred on the county road, there was also evidence that Ms. Cook's death did not occur on that road. There was evidence that Ms. Cook was still alive when her car came to rest in Austin Badger Park, owned by Montville. There was testimony that Ms. Cook passed away while trapped in her vehicle on park property. Under the plain language of the statute, it is not only the location of the injury that is considered, it is also the location of the death or loss. *See* R.C. 2744.02(B)(4).

{¶20} Montville also asserts that the allegedly defective tree was not on the grounds of a building used in connection with the performance of a governmental function. While there are several structures that the Estate points to in order to satisfy the statute, we will focus on the covered shelters that are located under the railroad tracks and cover a portion of paths in Austin Badger Park as we conclude that, at the very least, a genuine issue of fact exists with respect to whether they satisfy the statute. It is thus unnecessary to address whether other structures on the three parks might also satisfy the statute.

{¶21} While Montville maintains that the covered shelters are on property owned by the railroad, we cannot say that the evidence presented by Montville establishes the same as a matter of law. First, Montville initially raised this argument in its reply brief. In so doing, it pointed to no testimony in support of its claim; instead, it directed the trial court to three map pages accompanying Montville's motion for summary judgment. Not only are the documents difficult to locate within the exhibits, Montville has not indicated that the maps depict the covered shelters at all. Thus, absent testimony, we fail to see how the pages demonstrate that the covered shelters are on property owned by the railroad or that the railroad owns the covered shelters. Instead, there are park maps in the record that would tend to support that the covered shelters are on Montville park's property. In addition, a lengthy grant application related to the purchase of the parkland submitted by the Estate states that the "project area includes 12 bridges, 1 tunnel, and 2 covered walkway that cross under a rail road trestle." Nonetheless, a purchase agreement related to the parkland, included with the grant application, indicates that the sale also involved the transfer of "easements with Wheeling & Lake Erie Company Railway for passage under its railroad right of way." Thus, at a minimum, there is a genuine dispute of material fact as to whether the covered shelters are owned by Montville and/or on property owned by Montville. Irrespective, we are not

convinced that, in order to satisfy the statute, the covered shelters must be owned by Montville or on property owned by Montville. The statue indicates Montville is liable for death "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[.]" R.C. 2744.02(B)(4). It would seem that irrespective of ownership, there is evidence that Montville utilized the covered shelters in connection with the performance of a governmental function. The covered shelters covered a path within the park that the public used in accessing the park. There was evidence presented that the covered shelters were there to keep people using the park from being struck by debris falling from the railroad tracks and could also be used for cover in the case of a storm. Moreover, there was testimony that the covered shelters were inspected by Montville to ensure that they are safely maintained for the public using the park.

{¶22} Montville also contends that the allegedly defective tree was not in an area accessible to the public due to its location near the river and along the road. Thus, Montville asserts that the tree was not on the grounds of a building used in connection with the performance of a governmental function. Essentially, Montville maintains that because the public could not easily access the tree from the covered shelters, the tree cannot be on the grounds of the covered shelters. Montville also challenges whether the covered shelters are buildings and the extent of what the grounds would be if they are in fact buildings.

{¶23} While the term building is not defined in the portion of the Revised Code related to political subdivision immunity, it has been defined in various portions of the Revised Code. For example, in the chapter of the Revised Code addressing building standards, R.C. 3781.06(C)(2) defines a building as "any structure consisting of foundations, walls, columns, girders, beams,

floors, and roof, or a combination of any number of these parts, with or without other parts or appurtenances." A similar definition is found in the chapter addressing radon. *See* R.C. 3723.01(B). Whereas R.C. 5701.02(B)(1) indicates that a building is "a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of these elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal property, and that has structural integrity independent of the tangible personal property, if any, it is designed to shelter." While obviously none of these definitions strictly apply to R.C. 2744.02 and are by their own terms limited to the specific sections detailed within the statutes, they are nonetheless instructive. Given the evidence in the record, we conclude that a genuine issue of material fact exists as to whether the covered shelters are buildings as contemplated by R.C. 2744.02(B)(4).

{¶24} In examining whether a building is used in connection with the performance of a governmental function, we are mindful that governmental function includes "[t]he design, construction, reconstruction, renovation, repair, maintenance, and operation" of a park. R.C. 2744.01(C)(2)(u)(i). While Montville did not operate the park from the covered shelters, we conclude that the covered shelters were still logically connected to the performance of the operation or maintenance of the park given that they were available for public use, kept the public safe from falling railroad debris, provided shelter in storms, and were subject to maintenance and inspection by Montville. *See R.K. v. Little Miami Gold Ctr.*, 1st Dist. Hamilton No. C-130087, 2013-Ohio-4939, ¶ 26; *Matthews v. Waverly*, 4th Dist. Pike No. 08CA787, 2010-Ohio-347, ¶ 36.

{¶25} With respect to what constitutes the grounds of the covered shelters, we determine the discussion in *Matthews* is instructive. Therein, the court stated:

> 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.

Matthews at ¶ 39. Thus, we cannot say that Montville's argument that the tree was not accessible from the covered shelters or that potentially different parcels were involved is controlling. There was evidence presented that the covered shelters were on the property of Austin Badger Park as was at least a portion of the tree at issue. Undoubtedly, many of the trees in the park are not easily accessible to the public; that does not inherently make them less a part of the park or grounds, or of less value to the public that visits the park. Trees can be enjoyed whether they are accessible or not. We conclude that a genuine issue of material fact remains with respect to whether the tree at issue was on the grounds of the covered shelters.

{¶26} To the extent that Montville argues that the dead, leaning tree did not constitute a defect, we conclude that an issue of material fact remains. "This Court has recognized that a physical defect is an imperfection that possesses some materiality that diminishes the worth or utility of the object at issue." (Internal quotations and citations omitted.) *Gaglione*, 2017-Ohio-6974, at ¶ 24. Moreover, other districts have concluded that issues of fact exist with respect to whether tree limbs are physical defects. *See R.K.* at ¶ 19-20, citing *Matthews* at ¶ 36. We conclude that the facts here are even more compelling than those in either *R.K.* or *Matthews*. Thus, we likewise conclude an issue of fact exists with respect to whether the tree at issue was a physical defect.

{¶27} Montville also argues that it is entitled to the benefit of immunity and summary judgment because the Estate failed to specifically name the employees that were allegedly

negligent. Under a R.C. 2744.02(B)(4) analysis, it is the political subdivision that is liable, not the employees. *See* R.C. 2744.02(B)(4). Here, it is important to note what Montville is not arguing. Montville is not claiming that its employees were not responsible for the maintenance of the tree at issue; instead, it is asserting only that the Estate failed to expressly name the employee or employees responsible. In its complaint, the Estate asserted that "the Montville Defendants were liable for injury, death, or loss to person or property that is caused by the negligence of their employees * * *." Montville has pointed to nothing in the summary judgment materials that disproves that claim. Neither Montville nor the Estate has asserted that independent contractors were the responsible parties. Thus, we cannot say that the authority Montville has pointed to is dispositive or persuasive to this Court. Montville has not demonstrated on appeal the absence of a genuine issue of material fact and therefore has not shown that the trial court erred in denying its motion for summary judgment with respect to the issue of immunity.

{¶28} Montville's assignment of error is overruled.

III.

{¶29} Montville's assignment of error is overruled. The judgment of the Medina County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

DONNA J. CARR
FOR THE COURT

HENSAL, J.
CONCURS.

SUTTON, P. J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

GREGORY A. BECK, JAMES F. MATHEWS, TONYA J. ROGERS, and BRITTANY A. BOWLAND, Attorneys at Law, for Appellants.

STEVEN M. GOLDBERG, Attorney at Law, for Appellee.

JAMES A. AMODIO, Attorney at Law, for Appellee.

SCOTT L. MELTON, Attorney at Law, for Appellee.