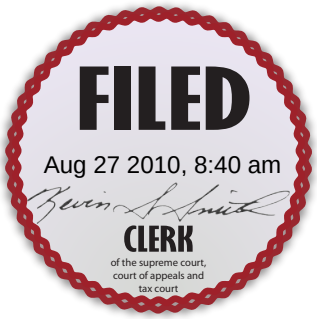

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IN THE
COURT OF APPEALS OF INDIANA

SHAWN DAVIS b/n/f MISTY DAVIS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 82A01-0911-CV-527
	)	
ANIMAL CONTROL – CITY OF EVANSVILLE,	)	
EVANSVILLE HOUSING AUTHORITY, and	)	
CITY OF EVANSVILLE,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
Cause No. 82C01-0702-CT-75

August 27, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Shawn Davis, by his next friend, Misty Davis, appeals the trial court's entry of summary judgment against him in his action against Animal Control-City of Evansville ("Animal Control") and the City of Evansville (collectively, the "City Defendants") for injuries he sustained from a dog bite. Shawn raises one issue for our review, which we restate as: whether the City Defendants have immunity from Shawn's claim.[1] Concluding there is neither statutory nor common law immunity for Shawn's claim, we reverse the trial court's grant of summary judgment to the City Defendants and remand for further proceedings.

Facts and Procedural History

Shawn lives with his mother, Misty, her boyfriend, Bill Kesler, and his siblings in Evansville, Indiana. On February 18, 2005, Kesler took six-year-old Shawn with him to his friend Chad Owens's house to work on a car. Shawn was outside playing with a neighbor, Jessica Bays, and her small dog. While Kesler was briefly in Owens's house and Bays was in her house answering the phone, Bays's dog ran down the street and Shawn ran after him. When Bays came back outside, she saw Shawn and her dog running down the sidewalk toward her and then she saw a large dog with no leash run out of a house on the corner of the street. Bays recognized the dog as one that had been dropped off and picked up from the corner house repeatedly over the past few weeks. The dog attacked Shawn from behind.

[1] The City Defendants include a paragraph in their brief alleging Animal Control "may not be sued because it has no separate corporate existence." Brief of Appellees at 21. They do not allege therein that they made a motion to dismiss to the trial court that was erroneously denied, and they do not ask for any specific relief from this court. We therefore do not address the allegation herein.

Bays kicked the dog away from Shawn and carried Shawn to the house where Kesler was. The dog ran back to the corner house from which it had come. Bays testified in a deposition that there were two people standing outside the house calling the dog. One of the people she recognized as someone she had seen dropping the dog off at the house. Bays returned to her house and called Animal Control to report the dog attack. Before Animal Control officers arrived, two men in a pickup truck picked up the dog and left the area.

The dog that attacked Shawn was identified as a sixty-pound Rottweiler named "Romeo" belonging to Thomas Minor, residing on East Sycamore Street in Evansville.[2] Approximately six months prior to the attack on Shawn, Animal Control had received a report of a Rottweiler named "Romeo" biting a child. The owner and address of the dog involved in that incident were different, however. That dog was held by Animal Control for ten days after the biting incident as required by law and then released to its owner. Animal Control was not aware of ownership of that dog being transferred and was not aware that a Rottweiler was owned by Thomas Minor or that one was kept at East Sycamore Street. Bays also testified she had called Animal Control several times within the week prior to the attack on Shawn to report the aggressive dog running loose in the neighborhood. She saw Animal Control drive through the neighborhood once after she first called to report the dog. Shawn suffered serious injuries to his arm and back from the attack which required hospitalization and follow-up therapy. He still bears scars from the attack.

On February 15, 2007, Misty filed, as next friend on Shawn's behalf, a complaint

[2] The house at which Bays had seen the dog dropped off and picked up and from which the dog came prior to attacking Shawn was at the corner of Sycamore and Harlan Streets.

against the City Defendants[3] alleging Animal Control was "well aware of this dog's violent propensities based upon numerous prior attacks by this dog" and the City Defendants failed to protect Shawn from the dog's attack. Appellant's Appendix at 14. The City Defendants filed a motion for summary judgment, alleging Shawn's claim was barred by the immunity provisions of the Indiana Tort Claims Act. The City Defendants also filed a motion to publish the depositions of Misty, Kesler, and Bays "for evidentiary purposes at the trial of this and all other purposes permitted by law." Id. at 192. Shawn responded to the motion for summary judgment. The City Defendants then filed a reply and a motion to strike certain statements in Shawn's response for not being made from personal knowledge.[4] After a hearing, the trial court granted the City Defendants' motion for summary judgment, and ordered entry of final judgment thereon. Shawn now appeals.

Discussion and Decision

I. Standard of Review

Summary judgment should be granted only if the properly designated evidence "shows 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." Ind. Trial Rule 56(C); Freidline v. Shelby Ins. Co., 774 N.E.2d

[3] Shawn's complaint also named the Evansville Housing Authority as a defendant. Evansville Housing Authority proceeded separately from the City Defendants and was not part of the proceedings relevant to this appeal and we have therefore omitted mention of it herein for the sake of clarity.

[4] There is no indication in the record the trial court ever ruled on the motion to strike. The City Defendants renew their motion to strike on appeal to the extent Shawn's brief includes statements to which they previously objected. However, the City Defendants do so by referring to the Motion to Strike filed with the trial court rather than by making a specific argument within their appellate brief. We decline to consider arguments outside the brief. See T-3 Martinsville, LLC v. US Holding, LLC, 911 N.E.2d 100, 104 n.3 (Ind. Ct. App. 2009) (noting Appellate Rule 46 requires the argument to contain the contentions of the party supported by cogent reasoning and considering argument incorporated by reference to argument made to the

37, 39 (Ind. 2002). We review the grant of a motion for summary judgment de novo. Univ. of S. Ind. Found. v. Baker, 843 N.E.2d 528, 531 (Ind. 2006). All factual inferences must be construed in favor of the non-moving party, and all doubts as to the existence of a material issue must be resolved against the moving party. Kovach v. Caligor Midwest, 913 N.E.2d 193, 197 (Ind. 2009). The party appealing the grant of summary judgment has the burden of persuading this court that the trial court's decision was improper. First Farmers Bank & Trust Co. v. Whorley, 891 N.E.2d 604, 607 (Ind. Ct. App. 2008), trans. denied. If the trial court's grant of summary judgment can be sustained on any theory or basis in the record, we will affirm. Beck v. City of Evansville, 842 N.E.2d 856, 860 (Ind. Ct. App. 2006), trans. denied.

II. Governmental Immunity

A. Statutory Immunity

The Indiana Tort Claims Act ("ITCA") provides, in relevant part:

> A governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from the following:
> * * *
> (8) The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or imprisonment.

Ind. Code § 34-13-3-3(8). The ITCA is in derogation of the common law and we therefore construe it narrowly against the grant of immunity. Mullin v. Municipal City of South Bend, 639 N.E.2d 278, 281 (Ind. 1994). The party seeking immunity has the burden of establishing its conduct comes with the provisions of the ITCA. Id. "Whether a particular governmental

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trial court to be waived), trans. denied.

act is immune is a question of law for the court to decide, although the question may require extensive factual development." Barnes v. Antich, 700 N.E.2d 262, 265 (Ind. Ct. App. 1998), trans. denied.

The trial court's order on summary judgment explained its reasoning for granting summary judgment to the City Defendants:

> Said defendants claim that they are immune from liability herein because of I.C. 34-13-3-3(8) . . . . The law which the defendants claim that they were enforcing was the City of Evansville's Municipal Code § 9.90.30, relating to the "Regulation of Dangerous Animals".
>
> The plaintiff states that his complaint is not based upon any allegation that the defendants failed to enforce a law, but rather that the defendants failed to follow the regulations which are set forth in the subject ordinance. However, the Court finds that all of the regulations and procedural steps contained in the subject ordinance were designed to enforce § 9.90.30(G) which states that "no person shall own, keep, or harbor a dangerous animal within the city; except for dangerous animals in compliance with the orders of the Commission as provided above." According to Mullin v. Municipal City of South Bend, 639 N.E.2d 278, 283 (Ind. 1994), the statutory immunity provision at issue is "limited to those activities in which a governmental entity or its employees compel or attempt to compel the obedience of another to laws, rules or regulations, or sanction or attempt to sanction a violation thereof." In the instant case, the Court finds that in all of its activities herein, the defendants were charged with compelling or attempting to compel the obedience of another to the above cited subsection (G). Consequently, the defendants are immune from the claims of the plaintiff.

Appellant's App. at 339-40. Special findings are not required in the summary judgment context and are not binding on appeal. AutoXchange.com, Inc. v. Dreyer & Reinbold, Inc., 816 N.E.2d 40, 48 (Ind. Ct. App. 2004). However, such findings offer this court valuable insight into the trial court's rationale and facilitate appellate review. Id.

Shawn contends his complaint did not allege the City Defendants failed to enforce a law, but rather that they failed to follow their own procedures as set forth in the Evansville

Animal Control Ordinance (the "Ordinance"), and therefore, the immunity provision is not applicable. The Ordinance defines a "dangerous animal" as:

> any animal which presents a substantial threat of bodily harm to any person or pet in its vicinity or if it was to escape its primary enclosure or escape from the control of its owner or custodian. Such determination is to be made from past acts of aggressive behavior justifying the determination that it is a dangerous animal. A dog's breed shall not be considered in determining whether or not it is "dangerous."

Appellant's App. at 261 (Ordinance Section 9.90.02). It is prohibited for any person to "[b]e a custodian of a dangerous animal." Id. at 280 (Ordinance Section 9.90.04(A)(3)). The Ordinance also states that "[n]o person shall own, keep, or harbor a dangerous animal within the city; except for dangerous animals in compliance with the orders" of the Animal Control and Education Commission (the "Commission"). Id. at 295 (Ordinance Section 9.90.30(G)). Dangerous animals are regulated by section 9.90.30 of the Ordinance, which provides that any person may make a complaint regarding a dangerous animal to either an Animal Control Officer ("ACO") or the Commission. The Commission immediately determines if there is probable cause to believe the animal is a dangerous animal, and if so issues an order to an ACO to seize the animal pending a hearing. Where the Commission determines by a preponderance of the evidence following a hearing that the animal is dangerous, the Commission shall require the owner to register the animal and provide notice of any changes in ownership, health status, further instances of attack, claims made or lawsuits brought as a result of attack, or the death of the animal. In addition, the Commission may impose any of a number of restrictions upon the keeping of the animal, such as how the animal is confined and supervised or that warning signs be placed on the property, and, if none of the

restrictions are deemed sufficient to prevent the risk of injury to any person, the Commission may order the animal destroyed. Failure to comply with the restrictions ordered by the Commission subjects the owner to a fine of not more than $2,500. Moreover, the general failure to comply with the Ordinance subjects a person to a fine, court order to comply, and revocation or denial of licenses or permits.

As cited by the trial court below, our supreme court has defined the scope of "enforcement" as "limited to those activities in which a governmental entity or its employees compel or attempt to compel the obedience of another to its laws, rules or regulations, or sanction or attempt to sanction a violation thereof." Mullin, 639 N.E.2d at 283. In Mullin, the plaintiff sued South Bend when an emergency dispatcher failed to send an ambulance to a house fire despite a department policy stating that medics would be dispatched to all fire calls where someone is thought to be inside. South Bend claimed statutory immunity under the law enforcement provision, claiming the policy of sending ambulances only to occupied house fires is a rule or regulation within the meaning of the statute and therefore, if the dispatcher failed to follow the policy, that was a failure to enforce a rule or regulation. Our supreme court noted that "following governmental policy is not the same as enforcing it, as least in the context of the Tort Claims Act." Id. Because South Bend "was neither compelling nor attempting to compel obedience of another to its rule or regulation nor sanctioning or attempting to sanction a violation thereof," it was not engaged in enforcement within the meaning of the statute and had no statutory immunity. Id. In St. Joseph County Police Dep't v. Shumaker, 812 N.E.2d 1143 (Ind. Ct. App. 2004), trans. denied, this court

traced the evolution of the law enforcement immunity provision and determined that "enforcement":

> means compelling or attempting to compel the obedience of another to laws, rules, or regulations, and the sanctioning or attempt to sanction a violation thereof. It would also, by the plain meaning of the statute, include the failure to do such. However, it does not include compliance with or following of laws, rules, or regulations by a governmental unit or its employees. Neither does it include failure to comply with such laws, rules, or regulations.

Id. at 1150 (emphasis in original).

Construing the factual inferences in Shawn's favor at this stage of the proceedings, we assume the Rottweiler named "Romeo" that was involved in the earlier biting incident was the same Rottweiler named "Romeo" that attacked Shawn, and that Animal Control had notice of this dog and its history. There is no indication in the record that after the first biting incident, the dog was declared dangerous and subject to any restrictions pursuant to the Ordinance. There is no indication the issue of whether the dog was dangerous was even taken before the Commission at all. Pursuant to the Ordinance, unless and until a dog is declared dangerous, there is nothing to enforce against another. The failure Shawn alleges led to his injury is that the City Defendants failed to follow their own rules regarding declaring an animal to be dangerous and therefore, even though the Ordinance states "no person shall . . . harbor a dangerous animal in the City," the City Defendants could not compel action on the part of the dog's owner. The City Defendants' failure to follow its own rules does not fall within the definition of "enforcement" for purposes of statutory immunity. Cf. City of Valparaiso v. Defler, 694 N.E.2d 1177, 1183 (Ind. Ct. App. 1998) (holding city was not immune under the enforcement provision of ITCA because in building a sewer lift

station alleged to have caused subsidence damage to neighboring land, it was not seeking to compel the obedience of another to the law but was forced to comply with a mandate by other governmental entities to correct a sewer discharge problem), trans. denied.

B. Common Law Immunity

The City Defendants also claim common law immunity from Shawn's claims. Shawn contends this issue is waived for failure to raise it in the trial court. Although it is often said that a party may not raise an issue for the first time on appeal, see Troxel v. Troxel, 737 N.E.2d 745, 752 (Ind. 2000), we can affirm a grant of summary judgment on any ground supported by the designated materials, Catt v. Bd. of Comm'rs of Knox County, 779 N.E.2d 1, 3 (Ind. 2002). Therefore, the appellee is not subject to this rule of issue preservation/waiver on our review of summary judgment proceedings.[5] Because the City Defendants advanced common law immunity as an affirmative defense in their answer, we consider whether the trial court's grant of summary judgment can be sustained on this basis.

The ITCA is not the final word on whether a governmental entity may be liable for its negligence. Harrison v. Veolia Water Indianapolis, LLC, 929 N.E.2d 247, 252 n.5 (Ind. Ct. App. 2010). Only after a determination is made that a governmental entity is not immune

[5] The summary judgment hearing was not recorded. Shawn therefore provided a verified statement of the evidence pursuant to Appellate Rule 31. The City Defendants did not file a timely response. According to that certified statement, both parties advanced only those arguments made in their summary judgment briefs. The City Defendants' summary judgment brief discusses only statutory immunity. The trial court certified Shawn's statement of the evidence. More than two months after Shawn's statement was certified by the trial court, the City Defendants filed their own verified statement of the evidence alleging they had advanced a common law immunity argument at the hearing. The trial court also certified this statement. Because the City Defendants could not waive the common law immunity issue given our standard of review regardless of whether the argument was advanced at the summary judgment hearing, we do not address Shawn's arguments regarding whether the City Defendants' motion to certify its verified statement of the evidence and the trial court's subsequent certification of the statement were proper.

under the ITCA, however, do we undertake an analysis of whether common law immunity exists. Id. Under the common law, all governmental units are bound by the common law duty to use ordinary and reasonable care under the circumstances except for claims such as failure to provide adequate police protection to prevent crime, appointment of an incompetent official, or an incorrect judicial decision, or claims closely akin to one of those limited exceptions. Benton v. City of Oakland City, 721 N.E.2d 224, 227, 230 (Ind. 1999). Benton declined to articulate a "one-size-fits-all test for determining when a duty is so closely akin to one of the limited exceptions that it should be treated as one as well," but noted the "duty of care is so pervasive, any additional exceptions will be rare and identified on a case-by-case basis." Id.

The City Defendants contend Shawn's claim is closely akin to either failure to prevent crime or negligence in appointing an official who failed to adequately enforce the Ordinance. Considering the City Defendants' argument in light of the Benton court's statements regarding the "rare" circumstances in which we will find an exception to the common law duty, we disagree. The decision which first abrogated the doctrine of sovereign immunity stated the exceptions to the general common law duty as:

> one may not claim a recovery because a city or state failed to provide adequate police protection to prevent crime. . . . Nor may one recover damages because a state official made an appointment of an individual whose incompetent performance gives rise to a suit alleging negligence on the part of the state official for making such an appointment.

Campbell v. State, 259 Ind. 55, 62-63, 284 N.E.2d 733, 737 (1972). Animal Control is not closely akin to the police, and failing to declare a dog to be a dangerous animal and impose

precautionary restrictions upon its keeping is not closely akin to failing to prevent a crime. Even if Animal Control could be considered akin to the police, Shawn's claim is not that the Ordinance does not provide adequate safeguards, it is that the City Defendants did not follow the Ordinance in the first place. As to the negligent appointment of an official argument, Campbell stated the exception would apply to a suit against a state official for making an appointment of an individual who negligently performed his or her duties. That is not the situation we are presented with here. Thus, we conclude there is no common law immunity under these circumstances.

Conclusion

The trial court's grant of summary judgment to the City Defendants cannot be supported by any basis apparent from the record, as Shawn's claim does not fall under either an immunity provision of the ITCA or an exception to the common law duty. The trial court's grant of summary judgment is therefore reversed and this cause remanded for further proceedings.

Reversed and remanded.

FRIEDLANDER, J. concurs.

KIRSCH, J., dissents with separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

SHAWN DAVIS, b/n/f MISTY DAVIS,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 82A01-0911-CV-527
	)	
ANIMAL CONTROL - CITY OF EVANSVILLE,	)	
EVANSVILLE HOUSING AUTHORITY, and	)	
CITY OF EVANSVILLE,	)	
	)	
Appellees-Defendants.	)	

KIRSCH, Judge, *dissenting*.

I respectfully dissent. To me, the underlying action is one for the failure to enforce the section of the Evansville Municipal Code relating to the regulation of dangerous animals and falls squarely within the immunity set forth at Ind. Code § 34-13-3-3(8).

The plaintiff contends that his complaint did not allege that the City failed to enforce a law, but rather alleged that the City failed to follow its own procedures set forth in the Animal Control Ordinance. Those procedures, however, are the enforcement provisions of the ordinance. They provide the procedures for determining if an animal is dangerous and for seizing such an animal. Had the City followed such procedures, it would have been enforcing a law, and its failure to follow such procedures is a failure to enforce a law, a failure that is immune under the Indiana Tort Claims Act.

To me, there is not a meaningful difference between failing to enforce a law and

failing to follow the enforcement provisions of a law. I would affirm the trial court's decision in all respects.