[Cite as *Grace v. Pecorelli*, 2020-Ohio-4820.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

CHRISTINE GRACE,

Plaintiff-Appellant,

v.

HEIDI PECORELLI,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0028

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2018 CV 181

BEFORE:
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Jeffrey Jakmides and *Atty. Julie Jakmides Mack*, 325 East Main Street, Alliance, Ohio 44601, for Plaintiff-Appellant

Atty. Josh L. Schoenberger and *Atty. Susan S. R. Petro*, 338 S. High Street, 2nd Floor, Columbus, Ohio 43215, for Defendant-Appellee.

Dated: September 28, 2020

WAITE, P.J.

{¶1} Appellant Christine Grace appeals a July 26, 2019 Columbiana County Common Pleas Court judgment entry granting summary judgment in favor of Appellee Heidi Pecorelli. Appellant argues that the trial court erroneously determined Appellee was entitled to immunity in regard to several tort claims Appellant raised against her in both her official and individual capacities. Appellant also argues that the trial court erroneously held that Appellee did not violate the Fourth Amendment when she entered Appellant's house with her husband's permission but over her objection. Finally, Appellant requests an order from this Court directing the trial court to enter default judgment against Appellee in a separate mandamus action filed under the same case number. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellee is the Dog Warden for Columbiana County. Appellant and her husband are residents of Columbiana County. Appellant's husband is not a party to this appeal nor was he a party in the proceedings below. Appellant and her husband were living in a house in the town of Rogers. On April 18, 2017, Appellee visited Appellant's property after receiving an anonymous complaint pertaining to the living conditions at the house and the number of dogs Appellant and her husband possessed. Appellant and her husband were not at home, so Appellee placed a door hanger with instructions to contact her office.

{¶3} On April 19, 2017, Appellant contacted Appellee, who informed Appellant that she would be visiting the house to conduct a welfare check on the dogs. Appellant placed her twelve dogs in the backyard, which was surrounded by a fence, before Appellee and Deputy Dog Warden Amy Dowd (who is also not a party to this appeal) arrived. The dogs included ten Chihuahuas, one Jack Russell Terrier, and one mixed breed dog.

{¶4} When Appellee arrived at the house, she noticed flies "swarming" the carport area and she could detect a strong odor of urine and feces inside of the house while standing outside. (6/14/19 Pecorelli Aff., paragraph 5.) Appellee observed the dogs in the fenced in area and then requested of Appellant and her husband that she be allowed to inspect the inside of the home. Appellant declined, saying that "it's not going to pass your standards." (6/4/19 Christine Grace Depo., p. 58.) Appellant then walked away and sat on a tire in the yard. Appellee asked the husband for his consent to enter the house. He initially declined. Appellee informed him that if he did not allow the two dog wardens to inspect the interior of the house, the matter would proceed before a judge and that it was likely not to "end well." The husband shouted to Appellant that they should let Appellee inside. Appellant again declined, but her husband opened the door and allowed Appellee and Dowd to enter the house.

{¶5} When Appellee entered the house, the smell of urine and feces was "nearly overwhelming." (6/14/19 Pecorelli Aff., paragraph 8.) She observed stacks and piles of boxes, clothing, dishes, and what appeared to be shredded paper on the floor. She also observed empty containers, cans, plastic bags, and piles of feces on the floor. She found feces on a couch. Areas of the flooring and furniture upholstery were decayed and rotting.

She described the interior of the house to contain “general filth.” (6/14/19 Pecorelli Aff., paragraph 9.) Areas of the ceiling had been either torn out or had fallen down, exposing blackened areas of wood and insulation. Mold and water damage were also visible.

{¶6} Appellant’s husband told Appellee that occasionally he did not fill his prescriptions because of the expenses related to the dogs. He also informed Appellee that his wife has a history of mental illness, but later denied making this statement. However, Appellant admitted to a history of mental illness, including the diagnosis of depression and bi-polar I, for which she takes medication.

{¶7} Appellee informed Appellant that she was going to impound the dogs. Appellant handed her each dog and they were placed inside Appellee’s van, but Appellee allowed Appellant to retain two of the twelve dogs. Before leaving, Appellee asked Appellant and her husband to sign a voluntary relinquishment form. Both Appellant and Appellant’s husband initially declined to sign the form. Appellee again informed the husband that if he did not sign the form, the matter would proceed to court and that he would not be allowed to own dogs in the future. The husband reluctantly signed the form, and then also convinced Appellant to sign.

{¶8} Appellee noticed that Appellant was emotional, upset, sobbing, and made several outbursts. She also heard a statement that she construed as a possible threat from Appellant that Appellant might harm herself. Based on this, Appellee called the sheriff’s office and at least two sheriff deputies were dispatched to the house. According to Appellant’s husband, he spoke with the deputies when they arrived and he told them that Appellant was fine and that if she needed medical attention, he would take her to receive treatment. According to the deputies’ reports, he also stated that Appellant has

a history of mental illness, a claim he later denied. Approximately one week later, the local newspaper published a story about Appellant's alleged suicide threat.

{¶9} On April 17, 2018, Appellant filed a complaint against Appellee, raising allegations against Appellee both as a private individual and in her official capacity. The complaint included allegations that the trial court construed to include violations of Appellant's civil rights and claims of conversion, intentional infliction of emotional distress, and vicarious liability (which was construed as a slander claim). On the same date, Appellant also filed a separate writ of mandamus against Appellant that was inexplicably filed under the same case number. In the writ Appellant alleged that Appellee failed to provide her with documents requested through a public records request. The writ sought an order broadly directing Appellee to operate her office in accordance with the law, obtain training, and additionally sought monetary damages.

{¶10} Appellee filed an answer to the complaint but not to the writ. Among the defenses raised was a claim of sovereign immunity pursuant to R.C. 2744.02. On April 2, 2019, Appellant voluntarily dismissed the intentional infliction of emotional distress claim. On June 4, 2019, Appellee filed a motion for summary judgment. Appellant filed a brief in opposition but did not file a competing motion for summary judgment. On July 26, 2019, the trial court granted Appellee's motion. It is from this entry that Appellant appeals.

{¶11} On September 3, 2019, while this appeal was pending, Appellant filed a motion for default judgment in the trial court pertaining to the writ of mandamus, based on Appellee's failure to file an answer. On October 3, 2019, Appellee filed a response opposing default judgment and arguing failure of service. On November 14, 2019, the

trial court acknowledged that Appellant had filed an appeal of the summary judgment action and stayed a ruling on the motion for default judgment until the conclusion of the appeal.

{¶12} On December 12, 2019, Appellee filed a motion to dismiss the appeal in this Court based on the lack of a final appealable order. We denied the motion.

Summary Judgment

{¶13} An appellate court conducts a *de novo* review of a trial court's decision to grant summary judgment, using the same standards as the trial court set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶14} Before summary judgment can be granted, the trial court must determine 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, (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). Whether a fact is "material" depends on the substantive law of the claim being litigated. *Hoyt, Inc. v. Gordon & Assoc., Inc.*, 104 Ohio App.3d 598, 603, 662 N.E.2d 1088 (8th Dist.1995).

{¶15} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." (Emphasis deleted.) *Dresher v. Burt*, 75 Ohio St.3d 280, 296, 662 N.E.2d 264 (1996). If the moving party carries its burden, the nonmoving party has a reciprocal

burden of setting forth specific facts showing that there is a genuine issue for trial. *Id.* at 293, 662 N.E.2d 264. In other words, when presented with a properly supported motion for summary judgment, the nonmoving party must produce some evidence to suggest that a reasonable factfinder could rule in that party's favor. *Brewer v. Cleveland Bd. of Edn.*, 122 Ohio App.3d 378, 386, 701 N.E.2d 1023 (8th Dist.1997).

{¶16} The evidentiary materials to support a motion for summary judgment are listed in Civ.R. 56(C) and include the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact that have been filed in the case. In resolving the motion, the court views the evidence in a light most favorable to the nonmoving party. *Temple*, 50 Ohio St.2d at 327, 364 N.E.2d 267.

Sovereign Immunity

{¶17} In determining whether a political subdivision is entitled to immunity, a three-tiered analysis is employed. *Bowman v. Canfield*, 7th Dist. Mahoning No. 13 MA 144, 2015-Ohio-1323, ¶ 6, citing *Ziegler v. Mahoning County Sheriff's Department*, 137 Ohio App.3d 831, 835, 739 N.E.2d 1237 (7th Dist.2000); *Abdalla v. Olexia*, 7th Dist. Jefferson No. 97-JE-43, 1999 WL 803592 (Oct. 6, 1999). The analysis begins with the presumption, “pursuant to R.C. 2744.02(A)(1), that a political subdivision is generally immune from liability for its acts and the acts and actions of its employees unless one of the exceptions enumerated within R.C. 2744.02(B) apply.” *Bowman* at ¶ 6.

{¶18} The exceptions under the second tier include: (1) negligent operation of a motor vehicle by an employee who is acting within the subdivision's scope of employment and authority; (2) an employee's negligent performance of acts with respect to the

subdivision's proprietary functions; (3) negligent failure to repair public roads and negligent failure to remove obstructions from public roads; (4) negligence of employees that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings used in connection with the performance of a governmental function; and, (5) when a section of the revised code expressly imposes civil liability on the subdivision. *Id.* at ¶ 7. If any of the five exceptions applies, the political subdivision is stripped of its immunity. *Id.*

{¶19} The third and final tier sets out seven defenses that revive a political subdivision's immunity in the event that one of the above exceptions applies. The defenses that restore immunity are: (1) when the political subdivision or an employee of the subdivision is engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function at the time of the alleged injury; (2) when the injury is caused by non-negligent conduct that was required or authorized by law, or by conduct that was necessary or essential to the exercise of the subdivision's powers; (3) when the action that caused the alleged injury was within the employee's discretion by virtue of the office or position held within the political subdivision; (4) when the person whose action caused the injury was serving any portion of a sentence stemming from a criminal conviction by performing community service work within the subdivision; (5) when the injury 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." R.C. 2744.03(A)(5).

<u>ASSIGNMENT OF ERROR NO. 1</u>

> The trial court erred in granting summary judgment in favor of Defendant-Appellee Heidi Pecorelli based on an immunity defense and the inapplicability of the exceptions to the immunity defense under R.C. Chapter 2744.

{¶20} In her complaint, Appellant asserted claims of conversion and slander/vicarious liability against Appellee in both her official and individual capacities. We note at the outset that Appellant did not sue the political subdivision that employs Appellee. For ease of understanding, Appellant's arguments will be separately addressed.

Individual Capacity

{¶21} While Appellee, in her position as the appointed Dog Warden, is an employee of a political subdivision, and thus may not be sued for performing her duties within the scope of employment for her governmental employer, Appellant argues that Appellee's actions were manifestly outside of the scope of her legitimate job duties. Thus, Appellee should be subject to legal redress because immunity applies only so long as she performs her job in the scope of employment.

{¶22} Appellant argues that the trial court erroneously determined that Appellee was entitled to immunity on the conversion and slander/vicarious liability claims. As to conversion, Appellant argues that Appellee obtained possession of the dogs through coercion and deception and she no longer possesses the animals. Appellant argues that the acts of coercion and deception strips Appellee of the protection of immunity pursuant to R.C. 2744.03(A)(6)(b).

{¶23} R.C. 2744.03(A)(6)(b) provides that an employee is not entitled to immunity where "[t]he employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner."

{¶24} Willful and wanton misconduct has been defined as:

> conduct that is a degree greater than negligence. *Rankin v. Cuyahoga Cty. Dept. of Children and Family Servs.*, 118 Ohio St.3d 392, 2008-Ohio-2567, 889 N.E.2d 521, ¶37; *Wagner v. Heavlin* (2000), 136 Ohio App.3d 719, 730-731, 737 N.E.2d 989. Specifically, wanton misconduct is "the failure to exercise any care toward one to whom a duty of care is owed when the failure occurs under circumstances for which the probability of harm is great and when the probability of harm is known to the tortfeasor." *Id.* Willful conduct involves a more positive mental state than wanton misconduct and implies intent. *Id.* at 731 [737 N.E.2d 989]. That intention relates to the conduct, not the result. *Id.* It is an intentional deviation from a clear duty or purposely doing wrongful acts with knowledge or appreciation of the likelihood of resulting injury. Reckless conduct is conduct that was committed knowing the facts or having reason to know the facts and which leads a reasonable person to know that his conduct will in all probability result in injury. *Rankin* at ¶ 37.

DeMartino v. Poland Local School Dist., 7th Dist. Mahoning No. 10 MA 19, 2011-Ohio-1466, ¶ 48.

{¶25} Generally, issues regarding wanton and willful acts are questions for the jury. *Adams v. Ward*, 7th Dist. Mahoning No. 09 MA 25, 2010-Ohio-4851, ¶ 27. However,

the standard of proof for such conduct is high. *Id.* When reasonable minds cannot conclude that the conduct at issue meets that high standard, a court may determine that such conduct is not willful or wanton as a matter of law. *Id.*

{¶26} "Reckless conduct is characterized by the conscious disregard of or indifference to a known or obvious risk of harm to another that is unreasonable under the circumstances and is substantially greater than negligent conduct. (2 Restatement of the Law 2d, Torts, Section 500 (1965), adopted.)" *Anderson v. Massillon*, 134 Ohio St.3d 380, 2012-Ohio-5711, 983 N.E.2d 266, paragraph four of the syllabus. These are rigorous standards that will in most circumstances be difficult to establish." *Argabrite v. Neer*, 149 Ohio St.3d 349, 2016-Ohio-8374, ¶ 8 (2016).

{¶27} The conduct at issue allegedly occurred when Appellee attempted to gain entrance into the house and when she obtained Appellant's signature on the relinquishment form. Appellee requested to inspect the inside of the house. Appellant declined Appellee's request and told her that it was "because it's not going to pass your standards." (6/4/19 Christine Grace Depo, p. 58.) Appellee reiterated her need to observe the condition of the interior of the house. Appellant again declined and walked approximately twenty feet away and sat on a tire. Appellee then asked Appellant's husband for his consent to enter the house and he similarly declined the request. Appellee informed him that if he did not allow her in the house, "things would not go well for [him]." (6/4/19 Jimmy Grace Depo., p. 10.) He called out to Appellant and told her that they should let Appellee inside and she again declined. As Appellee had told him that they may face further judicial or legal proceedings, he opened the door and allowed Appellee and Dowd inside the house.

{¶28} Based on the disrepair and filthy conditions in the premises, Appellee informed Appellant and her husband that she was impounding the dogs. At first, Appellant cooperated and handed Appellee each dog as they were placed inside Appellee's van. Appellee allowed Appellant and her husband to choose two dogs would not be subject to impoundment. Appellee asked Appellant's husband to sign a form of voluntary relinquishment, which he declined to sign at first. Once Appellee explained to him that if he did not sign the form, the matter would proceed before a judge and he probably would not be allowed to own dogs in the future, he then signed the form and persuaded Appellant to reluctantly signed.

{¶29} Both sides agree that the Fourth Amendment applies to dog wardens. The inspection of the physical condition of private property implicates the Fourth Amendment. *Camara v. Municipal Court,* 387 U.S. 523, 534, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). However, the issue in this context is not whether Appellee's search violated Appellant's Fourth Amendment rights. The narrow issue is whether Appellee's conduct in obtaining consent to enter the house and in obtaining the signatures on the relinquishment form was in bad faith, with a malicious purpose, or in a wanton or reckless manner.

{¶30} The specific "threats" on which Appellant bases her arguments include Appellee's statements to the husband that "things would not go well" for him if they did not allow her to enter the house and that he would not be permitted to own dogs in the future if he did not sign the relinquishment form. Neither of these statements were made directly to Appellant, they were directed to her husband, who is not a party to this action. In fact, Appellant conceded in her deposition that she did not learn of these statements until sometime after the incident.

{¶31} Regardless, the trial court was correct that Appellee's conduct did not rise to the level of bad faith, malicious purpose, or wanton or reckless conduct. The first and second statements at issue are related. The first was that things "would not go well" for Appellant's husband if he refused to allow Appellee to inspect the house. The second was that the matter would proceed before a judge if he did not cooperate.

{¶32} Neither of these statements constitute a threat. Instead, both are predictions of how others in the system would view and interpret evidence Appellee would present. This evidence includes Appellant's admission that the condition of the house would not be in accordance with Appellee's standards, the presence of a swarm of flies near the carport, and the intense smell of urine and feces detectable from the outside of the house. We have previously held that the "[p]redictions about how others may interpret the evidence are not threats." *State v. Kinney*, 7th Dist. Belmont No. 18 BE 0011, 2019-Ohio-2704, ¶ 76, appeal allowed on other grounds, 157 Ohio St.3d 1501, 2019-Ohio-4768, 134 N.E.3d 1229, ¶ 76. Because the statements were predictions as to how a judge would interpret evidence, neither statement rises to the level of malicious purpose, bad faith, willful, wanton, or reckless conduct.

{¶33} The third statement was that Appellant and her husband would not be permitted to own a dog in the future if they did not sign the relinquishment form. R.C. 959.132(F)(2) provides:

> If a person is convicted of committing an offense, the court may impose the following additional penalties against the person:
>
> * * *

(2) An order permanently terminating the person's right to possession, title, custody, or care of the companion animal that was involved in the offense. If the court issues such an order, the court shall order the disposition of the companion animal.

{¶34} At the time the statement was made, Appellee believed that Appellant and her husband had committed an offense pursuant to R.C. 959.131(D) which provides that "[n]o person who confines or who is the custodian or caretaker of a companion animal shall negligently do any of the following: (1) Torture, torment, or commit an act of cruelty against the companion animal." Appellee opined that deplorable living conditions rise to the level of an act of cruelty. Again, this statement was based on Appellant's prediction as to how a judge would view and interpret the evidence.

{¶35} None of these statements amount to bad faith, malicious purpose, or were made in a wanton or reckless manner. In her position of Dog Warden and while investigating a complaint, the facts in this record support the determination Appellee acted lawfully throughout her interactions while on Appellant's property. As such, the trial court's decision that Appellee is entitled to immunity because she was acing within the scope of her employment regarding the conversion claim was proper. Thus, these claims filed against Appellee as a private individual must fail.

{¶36} As to the slander/vicarious liability claim, Appellant alleges that Appellee slandered her reputation by calling the sheriff's department to report inaccurate threats of suicide and that Appellee knew that the information would be published in the local newspaper. Appellant argues that these actions were done with a malicious purpose or in bad faith pursuant to R.C. 2744.03(A)(6)(b).

{¶37} In response, Appellee argues that she called the sheriff's office after hearing what she genuinely believed was Appellant's suicide threat. She contends that her motivation was to protect Appellant, not harm her.

{¶38} This record shows that Appellant was emotional and upset during the visit. At some point, Appellant made a comment that Appellee construed as a suicide threat. Appellant asserts that she did not threaten to harm herself, but told Appellee "you are killing me." (6/4/19 Jimmy Grace Depo., p. 26.) The record does not contain the exact statement that precipitated Appellee's call to the sheriff's office.

{¶39} The sole evidence in the record on this issue is that Appellant made a statement that Appellee construed as a possible threat to harm herself. This statement, along with Appellant's emotional state and behavior, led Appellee to believe that it was necessary to call the sheriff's department. There is no evidence that Appellee published Appellant's statement and there is nothing within the record to suggest that Appellee knew Appellant's comments would result in an article being published in the newspaper, nor is there any evidence regarding how the newspaper got the information for the article. Appellant has provided no evidence of slander in this record. Regardless of Appellee's status as an employee of a political subdivision, Appellant's slander claims are unsupported and her assignments of error, as they pertain to Appellee in her individual capacity, have no merit.

Official Capacity

{¶40} It is unclear whether Appellant contests the trial court's finding of immunity on the claims asserted against Appellee in her official capacity. Appellee urges that Appellant failed to raise these claims within her response brief to Appellee's motion for

summary judgment and did not file a competing motion for summary judgment. Thus, Appellee's position is that the issues have been waived.

{¶41} As noted by Appellee, Appellant did not address the intentional tort claims within her answer to Appellee's motion for summary judgment and did not file a competing motion for summary judgment. "[I]ssues not raised in the trial court may not be raised for the first time on appeal." *Mobberly v. Wade*, 7th Dist. No. 13 MO 18, 2015-Ohio-5287, 44 N.E.3d 313, ¶ 25, citing *Mauersberger v. Marietta Coal Co*., 7th Dist. No. 12 BE 41, 2014-Ohio-21, ¶ 17; *State v. Abney*, 12th Dist. No. CA2004-02-018, 2005-Ohio-146, ¶ 17.

{¶42} Even if the issue was properly preserved and presented as an assignment of error, the trial court's determination that Appellee cannot be sued in her official capacity for these claims is correct. Again, Appellant did not name Columbiana County as a party. "[T]he sovereign immunity statute expressly protects political subdivisions from suit when that suit involves intentional bad acts by employees." *Cooper v. Youngstown,* 7th Dist. Mahoning No. 15 MA 0029, 2016-Ohio-7184, ¶ 25. If Appellee committed an intentional act, she would not, by definition, be acting within the scope of her governmental employment.

{¶43} As discussed earlier, there is no question of fact in this record that Appellee was acting in her official capacity as the Columbiana County Dog Warden. The trial court found, and the record supports, that Appellee's actions fell within the scope of her official job duties, and so she cannot be sued as an individual for these claims. In so holding, the trial court properly determined that Appellee cannot be sued for the intentional torts of conversion and slander asserted against her in her official capacity. To the extent that

Appellant challenges the court's determination, such argument is without merit and is overruled.

{¶44} Consequently, the trial court's finding that the claims raised against Appellee in the complaint are barred by sovereign immunity was correct. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> The trial court erred in granting summary judgment in favor of Defendant-Appellee Heidi Pecorelli by the incorrect application of the law regarding consent to search a home over the objection of a co-occupant and household member.

{¶45} The trial court's resolution of the Fourth Amendment issue that apparently constitutes the basis for the alleged civil rights claim is unclear, largely due to the lack of clarity in the allegations of the complaint. The complaint begins with a section dedicated to the facts of the case and ends with a discussion about Appellee's entrance into the house. There is no specific recitation of exactly what action constitutes the alleged civil rights violation. The next paragraph is labeled "Count Two" and does address a conversion claim. Although it is not labeled "Count One" and does not specifically refer to a civil rights violation, the court construed the lengthy recitation of the facts as Appellant's attempt to raise a civil rights claim related to Appellee's search of her home.

{¶46} Appellee sought summary judgment on this "claim" based on Appellant's failure to establish the elements. The trial court did not analyze each count of the complaint individually. Rather, it appears that the court granted immunity as to all alleged claims. Appellee concedes that immunity does not apply to a properly filed civil rights

claim. “Ohio's sovereign immunity statute does not bar actions brought under federal civil rights laws such as 42 U.S.C. Section 1983.” *Helfrich v. Branstool*, 5th Dist. Licking No. 08 CA 0072, 2009-Ohio-2865, ¶ 51, citing *Spratt v. Rickey*, Adams App. Nos. 97 CA 639, 97 CA 642, 1998 WL 144432 (Mar. 26, 1998).

{¶47} Pursuant to Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *.

{¶48} Here, Appellant’s claim appears to be based on the Fourth Amendment. The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

{¶49} Consent is a well-recognized exception to the warrant requirement. *State v. Green*, 7th Dist. Columbiana No. 16 CO 0023, 2017-Ohio-7757, ¶ 11, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

{¶50} Appellant concedes that her husband gave consent for Appellee to enter the house. Appellant also concedes that she did not voice an objection when her husband allowed Appellee inside the house. Appellant argues that Appellee obtained consent through coercion and also that a valid consent cannot be given when one homeowner, who is present, objects.

{¶51} As previously discussed, the specific statements that form the basis of Appellant's coercion claims include Appellee's statement to Appellant's husband that the situation would "not go well" if he did not allow her inside the house. This statement was not made to Appellant. Again, Appellant conceded that she first learned of this comment sometime later.

{¶52} Regardless, on the question of whether one occupant can provide consent when another homeowner is present and objects, the law relied on by the trial court is outdated. In more recent caselaw, the United States Supreme Court held that "warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." *Georgia v. Randolph*, 547 U.S. 103, 120, 126 S.Ct. 1515, 1526, 164 L.Ed.2d 208 (2006).

{¶53} Appellee objects to use of *Randolph* as it was not raised to the trial court. While we do not consider arguments raised for the first time on appeal, we do conduct our own independent legal review and frequently rely on cases not considered by the trial court. *U.S. Bank, Natl. Assn. v. Smith*, 7th Dist. Mahoning No. 17 MA 0093, 2018-Ohio-3770, ¶ 6, citing *Blackstone v. Moore*, 7th Dist. Monroe No. 14 MO 0001, 2017-Ohio-8159.

{¶54} Here, although Appellant did not voice an objection when her husband opened the door, she had refused to give consent at least twice before he opened the door. Thus, as Appellant was present at the scene and had voiced an objection, her husband's consent was arguably invalid and another exception to the warrant requirement must apply in order for the search to be deemed lawful.

{¶55} Appellee argues that the instant search falls within an express exception to the warrant requirement. Appellee cites language within *Randolph* that provides an exception where the police are alerted to "a need for protection inside the house that might have justified entry into the portion of the premises." *Randolph, supra,* at 123.

{¶56} Appellee argues she had reason to believe there was a need to protect the dogs from poor living conditions. In support of her argument, Appellee cites to the strong odor of urine and feces that could be detected from outside the house along with a swarm of flies near the carport. Appellant had also conceded that the condition of the home would not meet Appellee's standards.

{¶57} The Sixth Circuit held that the exigent circumstances exception to the warrant requirement applies to animals as well as persons and allows "officers to ensure the safety of animals exposed to dangerous exigent circumstances." *King v. Montgomery Cty., Tennessee*, 2020 WL 41908, *4 (Jan. 3, 2020). In *King,* the appellee could detect a strong odor or urine from outside the appellant's house. In addition, the appellee was told by a person who had been inside the house that the smell of urine made it difficult to breath, some of the dogs did not have food or water, and that the dogs needed medical attention. *Id.*

{¶58} The record contains no specific information regarding the anonymous complaint that led to Appellee's investigation. However, once Appellee arrived at the property she could detect a strong odor of urine and feces from outside the house and observed a swarm of flies near the carport area. Importantly, Appellant admitted to Appellee that the condition of the home would not meet her standards. Similar to *King*, these facts led Appellee to believe that the animals were living in a dangerous environment even before she entered the house.

{¶59} Whether a person overestimates the danger an animal faces is immaterial. *Id.,* citing *United States v. Brown*, 449 F.3d 741, 750 (6th Cir. 2006). As such, a recognized warrant exception exists that would negate Appellant's possible Fourth Amendment allegations. Again, it does not appear in looking at the complaint that Appellant has raised any viable claims at all in her opening paragraph. The trial court, giving her the benefit of the doubt, construed this portion of the complaint as a possible civil rights claim. Although the trial court may have been in error when it determined that Appellee was entitled to R.C. 2744 immunity on the civil rights claim, the court's decision is correct for the wrong reason. "[W]hen a trial court has stated an erroneous basis for its judgment, an appellate court must affirm the judgment if it is legally correct on other grounds, if it achieves the right result for the wrong reason, because such an error is not prejudicial." *Mt. Pleasant Volunteer Fire Dept. v. Stuart*, 7th Dist. Jefferson No. 01 JE 11, 2002-Ohio-5227, ¶ 11, citing *Newcomb v. Dredge*, 105 Ohio App. 417, 424, 152 N.E.2d 801 (2d Dist.1957); *State v. Payton*, 124 Ohio App.3d 552, 557, 706 N.E.2d 842 (12th Dist.1997).

{¶60} Accordingly, Appellant’s second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

> The trial erred in granting summary judgment in favor of Defendant-Appellee Heidi Pecorelli as numerous items constituting genuine issues of material fact, which were disputed by the parties, were either left unresolved or construed in favor of the moving party and not the non-moving party, the Plaintiff-Appellant.

{¶61} In Appellant’s third assignment of error she merely repeats arguments posited under the first two assignments of error. For the reasons provided in those assignments, Appellant’s third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

> The trial court erred in refusing to rule on Plaintiff-Appellee Christine Grace's Motion for Default Judgment on her Writ of Mandamus claim following the failure of Defendant-Appellee to answer or otherwise defend.

{¶62} Appellant requests an order from this Court directing the trial court to rule on her motion for default judgment, which pertains to a separate writ of mandamus that was filed under the same case number as the complaint. Appellee responds that the motion for default judgment is not properly before this Court as it has not been decided by the trial court.

{¶63} The record reveals that the complaint and writ of mandamus were filed as separate documents on the same date. It is unclear whether Appellant’s counsel

requested that they be filed under the same case number or the clerk's office, on their own, filed these documents under the same case number. Regardless of who bears responsibility, this filing was improper.

{¶64} The Tenth District has held that a writ of mandamus cannot be filed under the same case number as a pending appeal. *State v. Henry*, 146 Ohio St.3d 10, 2016-Ohio-1525, 50 N.E.3d 555, ¶ 1. In Ohio, a mandamus action may be filed as an original action in either a common pleas court or in an appellate court. The appellant in an action attempted to file a mandamus action in the same case as an appeal, intending that they be determined in the same action. The Supreme Court, in upholding the Tenth District's decision, held that "a mandamus action is a separate civil proceeding," thus is not properly raised in the same proceedings as a pending appeal. While in the instant case the two separate matters were filed in the trial court, the same reasoning applies, here.

{¶65} A writ of mandamus is a wholly separate action from the complaint at issue in this matter. While both actions involve the same parties, and similar facts underly both actions, it is clear that the two filings involve separate and distinct legal matters, require different standards of proof and have entirely different legal standards. As such, they are not "companion cases" but constitute completely separate matters that cannot be filed under the same case number. The complaint involves the determination of whether Appellee committed various torts and involves evidentiary issues. A writ of mandamus is not ordinarily evidence-driven. It is a demand that a governmental entity, owing a clear legal duty to which a petitioner has a clear legal right, comply with that legal duty. In this case, Appellant apparently seeks among other relief, some alleged public records. As

these two matters are wholly separate, they may not be filed under the same case number.

{¶66} Because the writ of mandamus was improperly filed under the same number as the complaint, it was never properly before the trial court pursuant to *Henry*, *supra*. As no relief can granted in the improperly filed writ of mandamus, it is dismissed. Accordingly, Appellant's fourth assignment of error is without merit and is overruled.

Conclusion

{¶67} Appellant argues that the trial court erroneously determined that Appellee was entitled to immunity on the claims asserted against her in both her official and individual capacities. Appellant also argues that the trial court erroneously found that Appellee did not violate the Fourth Amendment when Appellee entered Appellant's house with her husband's permission but over her objection. Appellant's attempt to file a writ of mandamus against this Appellee fails because it was improperly filed. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.