[Cite as *In re T.B.Y. v. Martins Ferry*, 2016-Ohio-8482.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

IN THE MATTER OF T.B.Y., a minor, by and through his mother and natural guardian, MORGAN L.YOUNG, PLAINTIFF-APPELLANT, VS. THE CITY OF MARTINS FERRY, OHIO, et al., DEFENDANTS-APPELLEES.	)	CASE NO. 16 BE 0002 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 15 CV 0085

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellant:

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JUDGES:
Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 19, 2016

[Cite as *In re T.B.Y. v. Martins Ferry*, 2016-Ohio-8482.]
ROBB, J.

{¶1} Plaintiff-Appellant Morgan Young appeals the decision of the Belmont County Common Pleas Court granting summary judgment in favor of Defendant-Appellee The City of Martins Ferry due to political subdivision immunity. Appellant's son was bitten by a dog running loose; the dog's owner is unknown. Appellant believes the City caught the dog prior to the biting incident but negligence in securing the dog allowed it to escape. The City emphasizes this factual issue is irrelevant if other elements for exception to immunity do not exist.

{¶2} Appellant contends three exceptions to immunity are applicable to this case. First, she asks this court to apply the immunity exception dealing with negligence by employees in performing proprietary functions of the political subdivision. However, the police officer's securing of a dog running loose was a government function.

{¶3} Appellant alternatively asks this court to apply the immunity exception involving an injury caused by negligence of an employee due to physical defects within or on the ground of buildings used in connection with a government function. However, this exception requires an injury "that occurs within or on the grounds of" the qualifying building. The injury here occurred in a private yard.

{¶4} Finally, Appellant suggests there is an exception to immunity because "civil liability is expressly imposed upon the political subdivision by" the dog bite statute. To the contrary, the dog bite statute does not expressly create liability upon a political subdivision.

{¶5} Appellant's arguments are without merit as these exceptions to immunity are inapplicable. Accordingly, the trial court's judgment is affirmed.

STATEMENT OF THE CASE

{¶6} On August 18, 2013, a four-year old child was attacked by a dog that was running loose. The dog, described as a male Rottweiler mix, entered the backyard of a house located at 611 Hanover Street in Martins Ferry and bit the child's face, near his eye. The child's aunt gave a written statement explaining she saw the dog on top of the child after hearing the child scream. The child was taken to the

hospital, and the hospital called the police. A sergeant from the Martins Ferry Police Department responded and captured the dog with the help of a bystander.

{¶7} On the grounds of the City's water treatment plant, the City maintained a holding pen, which was a cage-like kennel used to keep any dog caught running at large until the dog could be picked up by the Belmont County Dog Warden. As the county's shelter was not open on Sunday, the sergeant transported the dog to this kennel, latched the kennel door, and placed a concrete block in front of the door. (Depo. at 24, 26, 53, 64). Appellant believed there was indication of prior damage to the kennel as added wire ties were observed by the sergeant. (Depo. at 59). The sergeant tried to locate the dog's owner and found the dog had been passed to several different people.

{¶8} After the dog bit the child and was kenneled, the water department called the police to report the dog escaped from the kennel; the dog was captured and retrieved by the county dog warden the next day. (Depo. at 27, 41-42, 48-49). There is evidence indicating the dog may have escaped from the City's kennel prior to the bite as well. For instance, the sergeant's report regarding the dog bite said, "on 8-17-13 the dog was found running loose and was placed in the city kennel. It appears the dog had escaped at an unknown time." (Exhibit 7, original in caps). She learned this from the child's family "when we initially captured the dog after the child was bitten." (Depo. at 43, 68; Exhibit 10). The sergeant testified she checked police records to ascertain whether the dog was in the kennel prior to the bite incident and could find no report of a dog loose or captured on Friday, Saturday, or Sunday prior to her capture of the dog. (Depo. at 32-33, 44).

{¶9} However, a pertinent police dispatcher's log (or carryover log) was subsequently discovered. Under the heading for the day shift on August 18, 2013, the log said, "Rottweiler mix is down at the kennels. Animal Shelter was notified." Later, under the heading for the afternoon shift, which the deposed sergeant worked, the log said, "Rottweiler that was placed in the kennel escaped and was involved in a bite incident. Dog is now back in the kennel. Water dept was advised to contact us if the dog gets loose again so it can be located before it bites anyone else." A

subsequent entry under the afternoon shift stated: "Dog escaped kennel again. Victim's family will call if they see it again."

{¶10} Appellant, who is the child's mother, filed suit against the City on behalf of the child and individually.[1] The City filed a motion for summary judgment. In arguing immunity, the City urged the exceptions were inapplicable as: protecting the community from a dog running at large was a government function rather than a proprietary function; the injury did not occur "on or within the grounds" of a government-related building, which is required by the current version of the statute; and the dog bite statute did not expressly impose liability on a political subdivision.

{¶11} Appellant responded that three different exceptions to immunity in R.C. 2744.02(B) were applicable, divisions (B)(2), (B)(4), and (B)(5). The application of any of these three exceptions would defeat the motion for summary judgment. Appellant argued: rescuing and kenneling animals is a proprietary function, which was performed negligently; the kennel was on the grounds of a government building, and the injury was caused by the negligence of a City employee and a physical defect in the kennel; and the City was strictly liable as the keeper of a dog under R.C. 955.28, which was said to implicate the immunity exception where civil liability is expressly imposed upon the political subdivision by law.

{¶12} The City pointed out the factual question of whether the City possessed the dog prior to the bite and/or was negligent in confining the dog was irrelevant as other mandatory elements of the immunity exceptions did not exist in this case. The City also pointed to the Martins Ferry Ordinances on dogs. For instance, an owner or person having charge of a dog shall not permit the dog to run at large upon any public place or upon the premises of another. Section 505.01(b). The violation of the ordinance is a minor misdemeanor. Section 505.01(d). Moreover: "A police officer or animal warden may impound every animal or dog found in violation of Section 505.01." Section 505.02(a) (and the dog may be sold or destroyed after notice).

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[1] Appellant originally sued the Belmont County Commissioners as well. The County filed a motion for summary judgment stating the City's holding pen was not owned or controlled by Belmont County. The affidavit of an assistant Belmont County Dog Warden was submitted explaining the difference between the animal control facility operated by the County and the holding pen used by the City. Thereafter, Appellant dismissed the County from the suit.

{¶13} The trial court held a hearing. Oral arguments were presented on the summary judgment motion. On January 27, 2016, the trial court granted summary judgment in favor of the City. (We address findings made within that judgment in a separate section below, after addressing the first immunity exception raised.)

GENERAL LAW: SUMMARY JUDGMENT & IMMUNITY

{¶14} We consider the propriety of granting summary judgment under a de novo standard of review. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Summary judgment can be granted when there remains no genuine issue of material fact and when reasonable minds can only conclude the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶15} In determining whether there exists a genuine issue of material fact to be resolved at trial, the court is to consider the evidence and all reasonable inferences to be drawn from the evidence in the light most favorable to the non-movant. *See, e.g.*, *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 11; *Leibreich v. A.J. Refrig., Inc.*, 67 Ohio St.3d 266, 269, 617 N.E.2d 1068 (1993) (doubts are to be resolved in favor of the non-movant). A court "may not weigh the proof or choose among reasonable inferences." *Dupler v. Mansfield Journal Co.*, 64 Ohio St.2d 116, 121, 413 N.E.2d 1187 (1980).

{¶16} Nevertheless, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 12, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). As the City points out, the factual question of whether the City possessed the dog prior to the bite and/or was negligent in confining the dog is irrelevant if other mandatory elements of the immunity exceptions did not exist in this case.

{¶17} "The material issues of each case are identified by substantive law," which in this case is the law on political subdivision immunity. *Id.* Political subdivision immunity involves a three-tiered statutory analysis evaluating: (1) the general grant of immunity in division (A) of R.C. 2744.02; (2) the exceptions in division (B) of R.C. 2744.02, which strip the political subdivision of immunity; and (3)

the defenses to liability, such as those in R.C. 2744.02(B) and 2744.03, which reinstate stripped immunity. *Elston v. Howland Local Schools*, 113 Ohio St.3d 314, 2007-Ohio-2070, 865 N.E.2d 845, ¶ 10-13.

{¶18} The general grant of immunity in R.C. 2744.02(A)(1) provides: "Except as provided in division (B) of this section, 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." Division (B) then lists five exceptions: (1) negligent operation of a motor vehicle by an employee in the scope of employment and authority; (2) negligent performance of an act by an employee with respect to proprietary functions of the political subdivisions; (3) negligent failure to keep public roads in repair or to remove obstructions from public roads; (4) negligence of an employee causing injury 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 civil liability is expressly imposed upon the political subdivision by another statute. R.C. 2744.02(B)(1)-(5).

{¶19} In laying out the issues for review, Appellant essentially sets forth two assignments of error: one pertaining to the second exception, and one pertaining to the fourth exception. Appellant's brief also touches upon the fifth exception.

GOVERNMENT OR PROPRIETARY FUNCTION

{¶20} The first issue presented by Appellant states:

"The Trial Court erred in granting immunity to the defendants because a municipality is not immune when injuries are caused by the negligent performance of acts by their employees with respect to proprietary function."

{¶21} The second statutory exception to political subdivision immunity provides: "[P]olitical subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions. R.C. 2744.02(B)(2) ("Except as otherwise provided in [statutes unrelated to this case]"). Appellant emphasizes the policy behind this exception: once the political subdivision enters the

domain of private enterprise, the justifications for immunity are diminished. *See Greene Cty. Agricultural Soc. v. Liming*, 89 Ohio St.3d 551, 559, 733 N.E.2d 1141 (2000).

{¶22} Appellant argues the apprehension and detention of a dog running loose constitutes a proprietary function. Appellant characterizes the activity as "rescuing" stray dogs and says this activity is customarily engaged in by nongovernmental actors, such as humane societies. Appellant claims the City had no obligation to perform this service but elects to do so merely "for the comfort and convenience of its citizens" or as a favor to the county dog warden, citing *City of Wooster v. Arbenz*, 116 Ohio St. 281, 156 N.E. 210 (1927).

{¶23} However, *Arbenz* predates the immunity statutes at issue and did not involve law enforcement responsibilities. Regardless, the *Arbenz* Court specifically recognized "it is settled that the function is governmental" where a municipality acts to preserve the peace and protect the well-being, health, and property of citizens, whether the municipality undertakes these functions voluntarily or by legislative enactment. *Id.* at 284-285.

{¶24} The City cites a Fifth District case where it was undisputed the political subdivision's act of operating a dog pound was a government function. *See Jamison v. Stark Cty. Bd. of Commrs.*, 5th Dist. No. 2014CA00044, 2014-Ohio-4906, ¶ 14 (and holding the dog bite statute did not expressly impose liability upon the political subdivision). The City points out the function of the police was to protect society from a dog running loose, not to merely rescue the dog. We also note a dog can be protected as the property of a citizen.

{¶25} Pursuant to R.C. 2744.01(C)(1), a government function is one specified in division (C)(2) or a function that: (a) is imposed on the state as an obligation of sovereignty and performed by a political subdivision voluntarily or pursuant to legislative requirement; or (b) is for the common good of all citizens of the state; or (c) promotes or preserves the public peace, health, safety, or welfare, and involves activities not customarily engaged in by nongovernmental persons, and is not specified in division (G)(2) as a proprietary function.

{¶26} *If a function is specified in the list of government functions in division (C)(2), it is not a proprietary function even if it involves activities customarily engaged in by nongovernmental persons*. *See id.*; R.C. 2744.01(G)(1)(a)-(b) (both must be satisfied if the function is not a specifically listed proprietary function). The enforcement of any law by a political subdivision is specifically defined as a government function. R.C. 2744.01(C)(2)(i). This is true even if the political subdivision is not mandated to perform the function. *Compare id. with* R.C. 2744.01(C)(2)(x). A "law" as used in this statute includes an ordinance of a political subdivision. *See* R.C. 2744.01(D).

{¶27} As the City points out, Martins Ferry Ordinance Section 505.01 makes it a crime for an owner or person having charge of a dog to let it run at large upon any public place or the premises of another. *See also* R.C. 955.22(C); R.C. 955.99(E)(1)-(2). The next ordinance provides: "A police officer or animal warden may impound every animal or dog found in violation of Section 505.01." Section 505.02(a) (and the dog may then be sold or destroyed after notice and a certain time period passes). Likewise, the police department had a long-standing policy of requiring officers to pick up a dog running loose; the officer indicated she would not have performed the service in the absence of the policy.

{¶28} Furthermore, division (C)(2) specifically declares that the provision or non-provision of police or rescue services or protection is a government function. R.C. 2744.01(C)(2)(a). The power to preserve the peace and to protect persons and property is also a specifically listed government function. R.C. 2744.01(C)(2)(b). The Eighth District found it was a government function of providing police services where a police officer used a shotgun to shoot a dog that was attacking another dog and a person was shot as well. *Maclin v. Cleveland*, 8th Dist. No. 102417, 2015-Ohio-2956, ¶ 14 (the city was thus immune from the claim that it failed to provide rules on the permissible use of police firearms).

{¶29} It is also noted, the function promotes or serves the public health, peace, safety, or welfare, and it is not specified as a proprietary function. *See* R.C. 2744.01(C)(1)(c). A nongovernmental person can also capture a roaming Rottweiler; however, the corralling of such an animal and transporting of the animal (by police) to

a city kennel to await the dog warden is not an activity customarily engaged in by nongovernmental persons. *See* R.C. 2744.01(C)(1)(c). *See also* R.C. 2744.01 (G)(1)(b). Although Appellant provided a list of humane societies incorporated in the state, this case involves a city police kennel used to hold a dog pending the arrival of the county dog warden. The Tenth District found an entry onto land to rescue dogs was a government function even though a statute allowed any person to do so as the function was not normally carried out by a private person. *Zageris v. City of Whitehall*, 10th Dist. No. 92AP-388 (Dec. 29, 1992).

{¶30} In any case, whether an activity is customarily engaged in by nongovernmental persons need not be addressed if the function is specifically listed in R.C. 2744.02(C) as a government function. R.C. 2744.01(C)(1) (nor must it be addressed if the function is imposed on the state as an obligation of sovereignty and performed by a political subdivision voluntarily or pursuant to legislative requirement or is for the common good of all citizens of the state).

{¶31} This court concludes the City's activity in capturing and penning a dog running loose is a government function, especially when performed by an on-duty law enforcement officer pursuant to department policy and city ordinance. Therefore, the proprietary function immunity exception in R.C. 2744.02(B)(2) is inapplicable. In accordance, Appellant's first argument is overruled.

TRIAL COURT'S FINDINGS

{¶32} Before proceeding to the next exception to immunity raised by Appellant on appeal, we stop to recognize that after granting summary judgment, the trial court made specific findings relevant to the immunity exception in (B)(2). Although the trial court focused only on finding inapplicable the exception for negligence with respect to proprietary functions, we find the trial court necessarily disagreed with Appellant's arguments as to the other two immunity exceptions raised. In other words, the City was required to show it was entitled to a judgment as a matter of law on each exception, and Appellant could only avoid summary judgment if all three raised exceptions to immunity were inapplicable. By granting summary judgment, immunity was granted to the City, and no exception was applied.

{¶33} Our review is de novo, and the trial court is not required to make findings in support of summary judgment. Furthermore, we note that where a trial court's ultimate judgment is correct, it can be upheld even if the appellate court disagrees with all of the reasons expressed. *See, e.g., Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, 994 N.E.2d 408, ¶ 50 (where two of three of trial court's findings were erroneous, court of appeals should not have reversed trial court's rejection of certified class where this ultimate decision was correct), citing *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990). "If the defendant was entitled to judgment at the conclusion of the plaintiff's case, the fact that the trial court based its conclusion upon an erroneous reason is unimportant." *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 284, 58 N.E.2d 658 (1944).

{¶34} We note this is not a case where multiple alternative arguments are set forth below in support of summary judgment, but the court only grants summary judgment on one ground.[2] Instead, this is a case where summary judgment could only be granted in favor of the City if no exception to immunity applied. Summary judgment was granted for the City, and thus, no exception to immunity was applied. We also note that the trial court held an oral hearing on summary judgment; there is a possibility arguments were narrowed or concessions were made at the hearing. The transcript is not before this court, and no party suggests the trial court's decision is insufficient for this court to conduct our de novo review.

{¶35} We therefore do not believe remand (for specific findings as to the other two exceptions) is necessarily *required* merely because the trial court made specific findings as to one of the raised exceptions. Rather, this court is permitted to proceed with a complete review of Appellant's arguments regarding immunity.

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[2] For instance, this court has observed: "In other words, if a party raises ten arguments in a summary judgment motion, the trial court adopts the first one, and the appellant assigns that position as error, the appellee cannot require this court to address the nine other arguments by arguing that the judgment can be affirmed on other grounds that the trial court never reached." *Yoskey v. Eric Petroleum*, 7th Dist. No. 13CO42, 2014-Ohio-3790, 2014 WL 4291629, ¶ 41. Although we could use our discretion to affirm on other grounds, we are not precluded from remanding instead.

The considerations are distinct in immunity cases. Notably, the denial of a political subdivision's summary judgment motion requesting immunity is immediately appealable under R.C. 2744.02(C); whereas in the standard case, the denial of summary judgment is not subject to appeal. *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 9, syllabus.

INJURY ON GROUNDS OF GOVERNMENT BUILDING

{¶36} As an alternative to the proprietary function exception, the second issue presented by Appellant is as follows:

"The Trial Court erred in granting immunity to the defendants because municipalities are not immune when injuries arise from defects to a government building or its grounds."

{¶37} Appellant urges the kennel was defective, stating: it was previously mended, the dog escaped multiple times, and the sergeant felt the need to put a cement block in front of the door instead of relying on the latch. Appellant states it was negligent to place a large dog in this mended kennel with insufficient security. Appellant points to the lack of training on securing a dog, including the failure to implement an observation period after placing the animal in the kennel.

{¶38} The City responds with legal arguments, reiterating that any factual issues are not material if other statutory elements are lacking. For instance, the City contends that the condition of the kennel would not be considered a "physical defect" "within or on the grounds" of a building used in connection with a government function. In evaluating the applicability of prior cases, the City notes the "physical defect" element was added in April 2003 and suggests a faulty latch on a cage in a yard would not qualify.

{¶39} Besides the "physical defect" argument, the City also refers to the element of whether the building was "used in connection with the performance of a governmental function." It is noted that a prior version of the statute contained an exception involving a nuisance on public grounds. *See* Former R.C. 2744.02(B)(3) ("political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep * * * public grounds within the political subdivision open, in repair, and free from nuisance."). This is no longer an existing exception.

{¶40} As to the kennel being on the grounds of a building, the kennel was outside of a building housing the City Water Department's pumping facility. Pursuant to R.C. 2744.01(G)(2)(c), a proprietary function includes the "maintenance, and operation of a utility, including * * * a municipal corporation water supply system." The City notes the kennel was not a building. Appellant points out that if the

proprietary function exception was found inapplicable supra, then the kenneling was a government function. Appellant suggests the building with a yard containing the kennel would be sufficiently associated with this function.

{¶41} In any event, as the City points out*, it is undisputed the injury took place in the yard of a private residence, not on the grounds of the building where the kennel is located*. Appellant frames the immunity exception in R.C. 2744.02(B)(4) as making a political subdivision liable for an injury caused by the negligence of an employee that occurs within or on the grounds of a building used in connection with a government function and is due to a physical defect within or on the grounds of such a building.

{¶42} However, this is not an accurate or complete recitation of the injury portion of the statute. R.C. 2744.02(B)(4) provides:

> 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.

The injury must be caused by the negligence of an employee, be due to a physical defect within or on the grounds of a building used in connection with a government function, and occur within or on the grounds of such a building. R.C. 2744.02(B)(4).

{¶43} In other words, the provision does not refer merely to an injury *that* is caused by employee negligence *that* occurs on the grounds of the government building; rather, the two instances of the word “that” in the pertinent portion of the provision are separated with the word “and” meaning both clauses modify the injury. The injury must be one “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." (Emphasis added). R.C. 2744.02(B)(4).

{¶44} If the injury to the plaintiff did not occur within or on the grounds of a building used in connection with the performance of a government function, the exception is inapplicable. *Vento v. Strongsville Bd. of Edn.*, 8th Dist. No. 88789, 2007-Ohio-4172, ¶ 9 ("The injury to plaintiff-appellant's property did not occur 'within or on the grounds of' school property, but on adjacent property. Therefore, this exception does not apply to allow appellant to pursue his claim."); *Keller v. Foster Wheel Energy Corp.*, 163 Ohio App.3d 325, 2005-Ohio-4821, 837 N.E.2d 859, ¶ 14 (10th Dist.) (analyzing the grammar of the provision), ¶ 16-17 (no exception to immunity where injury occurred in plaintiff's home); *Kennerly v. Montgomery Cty. Bd. of Commrs.*, 158 Ohio App.3d 271, 2004-Ohio-4258, 814 N.E.2d 1252, ¶ 19-20 (2d Dist.) (exception does not apply to an injury "that occurs anywhere other than within or on the grounds of a building where a governmental function from which the harm proximately resulted is performed"). *See also Slane v. Hilliard*, 10th Dist. No. 15AP-493, 2016-Ohio-306, ¶ 43 ("there is no dispute in the evidence that appellant sustained her injury on a public roadway and not within or on the grounds of a school * * *").

{¶45} A prior version of the statute contained an exception involving a nuisance on public grounds without regard to where the injury occurred. *See* Former R.C. 2744.02(B)(3) ("political subdivisions are liable for injury, death, or loss to persons or property caused by their failure to keep * * * public grounds within the political subdivision open, in repair, and free from nuisance."). When discussing the nuisance exception in former (B)(3), the Supreme Court used the exception in (B)(4) as an example of the legislative awareness of how to limit the reach of a political subdivision's liability to injuries that occur on particular property. *See Sherwin-Williams*, 112 Ohio St.3d 52, 2006-Ohio-6498, 858 N.E.2d 324, ¶ 16-17, 24 (the former public nuisance exception did not require the injury to occur on the public grounds where the nuisance arose).

{¶46} For these reasons, the second issue presented by Appellant is without merit.

DOG BITE STATUTE DOES NOT EXPRESSLY IMPOSE LIABILITY

{¶47} Although Appellant raised the fifth exception to political subdivision immunity below, Appellant does not set forth an assignment of error on this exception. As Appellant may believe she sufficiently alluded to the subject on appeal,[3] we shall briefly review the exception to immunity in R.C. 2744.02(B)(5), which provides:

> In addition to the circumstances described in divisions (B)(1) to (4) of this section, a political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code, including, but not limited to, sections 2743.02 and 5591.37 of the Revised Code. Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term "shall" in a provision pertaining to a political subdivision.

{¶48} The language in this exception provides a strict standard. To fall under this exception, *the civil liability of the political subdivision* must be expressly stated in the statute claimed to be pertinent. *See Butler v. Jordan*, 92 Ohio St.3d 354, 357, 750 N.E.2d 554 (2001). "Expressly" means "in direct or unmistakable terms: in an express manner: explicitly, definitely, directly." *Id.* Even an express duty imposed upon a political subdivision in a statute is not sufficient to satisfy this exception to immunity; civil liability itself must be explicit. *Id.*; R.C. 2744.02(B)(5).

{¶49} Appellant contends the City became the keeper or harborer of the dog under the dog bite statute, which provides: "The owner, keeper, or harborer of a dog is liable in damages for any injury, death, or loss to person or property that is caused by the dog, unless * * *." R.C. 955.28(B). *See also* R.C. 955.22(C)(1) (no owner,

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[3] In setting forth the general law on immunity, Appellant reviews the second, fourth, *and fifth* exceptions. Appellant also briefly states the City was strictly liable for any damages caused by the dog once it became the keeper or harborer of the dog.

keeper, or harborer of any dog shall fail to keep the dog physically confined or restrained by a leash, tether, adequate fence, supervision, or secure enclosure to prevent escape); R.C. 955.99(E)(1)-(2) (providing penalties).

{¶50} Yet, "R.C. 955.28(B) does not have any language expressly creating liability upon a political subdivision." *Alden v. Dorn*, 9th Dist. No. 27878, 2016-Ohio-554, ¶ 11, quoting *Jamison v. Stark Cty. Bd. of Commrs.*, 5th Dist. No. 2014CA00044, 2014-Ohio-4906, ¶ 18, citing *Perry v. East Cleveland*, 11th Dist. No. 95-L-111 (Feb. 16, 1996). "R.C. 955.28(B) uses the words 'keeper, owner, or harborer' without any reference to political subdivisions or their employees * * *." *Jamison,* 5th Dist. No. 2014CA00044 at ¶ 23. *See also Bundy v. Five Rivers Metroparks*, 152 Ohio App.3d 426, 2003-Ohio-1766, 787 N.E.2d 1279, ¶ 7-22 (2d Dist.) (finding liability is not expressly imposed on a political subdivision by R.C. 951.02, which provides that no person who is the owner or keeper of horses or mules shall permit them to run at large in the public road). Since these statutes do not expressly impose liability on a political subdivision, the fifth exception to immunity is inapplicable here.[4]

{¶51} For the foregoing reasons, the City has demonstrated its immunity as a matter of law, and the trial court's entry of summary judgment is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., dissents in part; see dissenting in part opinion.

[4] The City concludes by alternatively arguing there would be no liability under the special relationship exception to the public duty doctrine, citing *Sawicki v. Village of Ottawa Hills*, 37 Ohio St.3d 222, 230, 525 N.E.2d 468 (1988). We briefly refer the City to *Estate of Graves v. Circleville*, 124 Ohio St.3d 339, 2010-Ohio-168, 922 N.E.2d 201, ¶ 12-20, which held the rationale behind the Court's adoption of the public-duty rule in *Sawicki* is no longer compelling. *See also Coleman v. Greater Cleveland Regional Transit Auth.*, 174 Ohio App.3d 735, 740, 2008-Ohio-317, 884 N.E.2d 648, 652, ¶ 29 (8th Dist.) (the defense has been abrogated by the immunity statutes in Chapter 2744). In any event, the City's concluding assertion is moot as its statutory immunity remains intact due to the inapplicability of an exception to immunity.

DeGenaro, J. dissenting in part.

{¶52} While I agree with my colleagues that the trial court correctly resolved the governmental function issue, we should remand the case so that the trial court can, in the first instance, resolve the issue regarding the immunity exception in R.C. 2744.02(B)(4) and the issue of strict liability.

{¶53} The trial court granted the City summary judgment solely on the basis that the apprehension and sequestration of dogs is a governmental function. The City asserted two additional grounds in support of its position that it was immune from suit: (1) the injury did not occur on public property—the 2744.02(B)(4) exception to immunity; and (2) that the dog bite statute did not expressly impose liability on a political subdivision. The trial court did not reach the merits of these issues.

{¶54} " '[I]t is well-established that issues raised in summary judgment motions but not considered by the trial court will not be ruled upon by the appellate court.' " *Oxford Oil Co. v. West*, 2016-Ohio-5684, ---- N.E.3d ---, ¶ 24 (7th Dist.), quoting *Conny Farms, Ltd. v. Ball Resources, Inc.,* 7th Dist. No. 09 CO 36, 2011-Ohio-5472, ¶ 15, citing *Mills–Jennings, Inc. v. Dept. of Liquor Control,* 70 Ohio St.2d 95, 99, 435 N.E.2d 407 (1982); *Ochsmann v. Great American Ins. Co.,* 10th Dist. No. 02AP–1265, 2003-Ohio-4679, ¶ 21.

{¶55} For example in *Conny Farms,* the trial court's summary judgment ruling was based upon a lone legal issue: that a judicial ascertainment clause in an oil and gas lease precluded the plaintiffs from bringing suit. *Conny Farms* at ¶ 27–28. The trial court did not review the plaintiff's underlying claims that the leases had been breached or had expired, despite the fact that the merits were raised in summary judgment proceedings. *Id.* On appeal, this court rejected the judicial ascertainment clause argument, finding the clause was unenforceable, and declined to review the substantive arguments raised by the plaintiff because the trial court had not resolved those issues. *Id. See also Fullum v. Columbiana Cty. Coroner,* 2014-Ohio-5512, 25 N.E.3d 463, ¶ 44–46; and *Tree of Life Church v. Agnew,* 7th Dist. No. 12 BE 42, 2014-Ohio-878, ¶ 27–28 (remanding to provide trial court first opportunity to address summary judgment arguments).

{¶56} Similarly, in *Oxford Oil* the trial court granted summary judgment based solely one legal issue raised by the defendant's in their counterclaim. On appeal, this court concluded the trial court's judgment regarding that issue was erroneous and remanded the matter so that the trial court could consider, in the first instance, the other arguments raised by the parties in their motions for summary judgment. *Oxford Oil* at ¶ 23-27.

{¶57} Here, the parties debated the applicability of the R.C. 2744.02(B)(4) and R.C. 2744.02(B)(5) governmental immunity exceptions during summary judgment proceedings in the trial court. Specifically, Appellant argued that the kennel was defective, and as it was on the grounds of a building used in connection with a governmental function and that therefore the R.C. 2744.02(B)(4) exception applied. In seeking summary judgment, the City argued this exception did not apply, and it was still immune. Finally, the City argued in support of summary judgment that strict liability for any damages caused by a dog once the City became a keeper/harborer of a dog was not expressly imposed upon it as contemplated by R.C. 2744.02(B)(5); thus it remained immune. However, the trial court did not consider these issues.

{¶58} Pursuant to *Oxford Oil* and *Conny Farms,* the merits of these two issues should be resolved in the first instance by the trial court on remand, not by this court on appeal. Thus I respectfully dissent in part.