

Rel: May 22, 2020

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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Rita Marie Edwards, as mother of Raven June Edwards, a
deceased minor

v.

Penny Pearson

Appeal from Elmore Circuit Court
(CV-15-900369)

STEWART, Justice.

Rita Marie Edwards, as mother of Raven June Edwards, a deceased minor, appeals from a summary judgment entered in favor of Penny Pearson on the ground of State-agent immunity.

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For the reasons discussed below, we affirm the judgment.

Procedural History

On November 5, 2014, Raven Edwards, an eight-year-old student at Airport Road Elementary School, attempted to cross the Deatsville Highway ("the highway") to board a school bus being driven by Pearson, an employee of the Elmore County Board of Education. As she did so, Raven was struck by an automobile, and she ultimately died as a result of her injuries.

On December 21, 2015, Rita Marie Edwards ("Edwards"), Raven's mother, sued Pearson and fictitiously named defendants A, B, and C, asserting claims of wrongful death and negligent infliction of emotional distress. Edwards alleged that Pearson negligently had instructed and/or invited Raven to cross the highway to board the school bus. Pearson filed an answer denying the allegations in the complaint and asserting various affirmative defenses, including, among others, State-agent immunity.

On August 25, 2016, Pearson filed a motion for a summary judgment. In support of her motion, Pearson submitted, among other evidence, affidavits, excerpts from deposition

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testimony, photographic exhibits, and video footage from a camera on the school bus. On November 4, 2016, Edwards filed an amended complaint asserting only a claim of wrongful death. The parties thereafter engaged in further discovery.

On November 16, 2018, Pearson filed another motion for a summary judgment grounded on State-agent immunity. Pearson attached to her motion excerpts of deposition testimony of Pearson, Edwards, and J. Robert Berkstresser and Sandra Thomas, expert witnesses retained by Edwards. Pearson also attached a map of the area where the accident occurred, a copy of Ex parte Mason, 146 So. 3d 9, 14 (Ala. 2013), and a letter to "Parents" from Ray Mullino, the Transportation Coordinator for the Elmore County Board of Education ("the Mullino letter").

On February 16, 2019, Edwards filed a response in opposition to Pearson's summary-judgment motion. To her response, Edwards attached an affidavit from Cody Rauschenberger, an eyewitness to the accident; the accident report; excerpts from the Alabama School Bus Driver Handbook ("the State handbook"), published by the Alabama Department of Education, the Elmore County Public Schools Department of

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Transportation School Bus Driver Handbook ("the Elmore County handbook"), and the Alabama Commercial Driver License Manual published by the Alabama Department of Public Safety ("the CDL manual"); the Mullino letter; deposition excerpts from Pearson, Berkstresser, and Dr. Lila Laux, an expert in human-factors engineering; and photographs of the scene of the accident.

The trial court held a hearing on the summary-judgment motion on February 20, 2019. On June 5, 2019, the trial court entered a summary judgment in favor of Pearson on the basis of State-agent immunity. Edwards appealed.

Facts

The facts are largely undisputed, but a review of the evidence submitted in support of and in opposition to the summary-judgment motion is necessary to determine whether Pearson is entitled to State-agent immunity.

Pearson had been driving a school bus since 2008. On November 5, 2014, she drove by Raven's house, which was located on the highway. Raven was not in front of her house, which, Pearson said, was unusual. Pearson continued her route, turning left onto Sunset Drive in a subdivision across the street from Raven's house. After she picked up the students

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from that subdivision, her route returned her to the stop sign on Sunset Drive across from Raven's house at the intersection of Sunset Drive and the highway. Pearson saw Raven coming out of the front door to her house and running across the front yard, heading toward the highway. Pearson testified:

"So I immediately turned on all my lights, put my brake on, opened the door. I was coming down the steps because her mama wasn't with her. So I was going to go get her. And then -- I mean, I never got off the steps, and then I just heard a noise and then seen -- you know, I never saw the truck hit her, but I -- I could just -- I mean, you just heard it. And then -- and then she was just there in the road.

"And so then I ran to her. And then her mama ran out then and was coming up to her. So as soon as her mom got there, I immediately went, you know, back to the bus and called 911 and then called my -- you know, called my boss."

Pearson testified that she thought it was best for her to stop the bus where she did. Pearson acknowledged that, based on the position of the bus, oncoming traffic on the highway could not see the warning lights on the bus. Pearson also acknowledged that she could have turned left onto the highway as she was planning to do, and then she could have stopped the bus on the highway to pick up Raven. She testified, however,

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that she was not sure that that would have been a better decision because Raven was already running toward the bus.

Pearson agreed in her deposition that establishing designated bus stops is the responsibility of the local board of education and the local transportation supervisor. Pearson acknowledged having seen the Mullino letter, but she testified that Mullino had never told her not to make an unscheduled stop. Pearson also agreed that the State handbook applies to school-bus drivers in Alabama.

Edwards's deposition testimony indicated that Raven was not ready for school when the bus first drove by the designated stop in front of her house and that Edwards had waved at Pearson to let her know Raven would be riding the bus. Edwards testified that she did not intend to walk Raven to the bus stop; it was cold and she had her two other small children she was caring for that morning. After Raven left the house, Edwards heard the impact and ran outside.

Rauschenberger stated in his affidavit that he was traveling north on the highway and that, as he approached the intersection of the highway and Sunset Drive, he noticed a young girl standing to his left at the end of her driveway. He

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testified that a school bus was just stopping on Sunset Drive. According to Rauschenberger, the girl "appeared to be anxious to cross the road." After he passed, in his rearview mirror he saw the young girl run into the highway and get hit by an automobile.

The State handbook excerpt submitted by Edwards provides that "the exact location of each stop [is] the responsibility of the local board of education and the transportation supervisor." The State handbook lists "several things [a bus driver] should keep in mind in making stops," including, among others:

"Students who must cross the road should do so under the watchful eye of the school bus driver and the protection of the school bus warning system.

". . . .

"School bus stops should not be located at street intersections. . . .

"It is recommended that the warning system always be used when loading or unloading students."

On another page, under the heading "RULES TO LOAD AND UNLOAD STUDENTS," the State handbook reads:

"1. The driver should NEVER change stops. Unsafe situations should be reported to the supervisor.

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"2. Students should load or unload ONLY at their school or designated stop.

". . . .

"4. Stops should be at least 100 feet from railroad tracks and intersections.

"5. Stops on interstate highways are prohibited."

(Capitalization in original.) Edwards also submitted an excerpt from the Elmore County handbook, which includes a section that mirrors the language in the State handbook, with the exception that the Elmore County handbook does not include non-standard capitalization or emphasis.¹

In addition, Edwards submitted an excerpt from the CDL manual. The CDL manual states: "Each school district establishes official routes and official school bus stops. All stops should be approved by the school district prior to making the stop. You should never change the location of a bus stop without written approval from the appropriate school district official."

¹The excerpt from the Elmore County handbook Edwards submitted with her response in opposition to Pearson's summary-judgment motion indicates it was revised August 1, 2016. The accident occurred November 5, 2014. Neither party addresses whether the submitted version of the handbook was in effect at the time of the accident.

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Both parties submitted the Mullino letter, which is undated and addressed to "Parents." It states, in pertinent part:

"The purpose of this letter is to request that your child(ren) arrive at the designated stop at least 5 minutes prior to the bus arrival. Your child(ren)'s bus driver has reported a concern that the child(ren) is not present at the stop prior to the bus's arrival. ... Please note that the bus driver is directed to stop only ONCE at the designated stop. Often drivers travel through a street, and must return by passing the designated stop again. I HAVE DIRECTED THE BUS DRIVER TO MAKE ONLY ONE STOP."

(Emphasis and capitalization in original.)

Thomas, who had been a school-bus driver for 23 years, testified in her deposition that she disagreed with the actions Pearson took on the morning of November 4, 2015.² Thomas opined that the only options Pearson had when confronted with the situation were either to turn left and leave Raven behind, or to turn right, circle around, and then pick up Raven. Thomas agreed that Pearson was in a bad position and that, no matter what choice Pearson made, there was a risk Raven would be injured. Thomas acknowledged that

²Although Thomas had been hired by Edwards, Pearson, rather than Edwards, submitted excerpts from her deposition testimony.

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Raven could have attempted to cross the highway while the bus sat at the stop sign waiting to make a left turn. Thomas testified that there was nothing in the State handbook or the Elmore County handbook to address the specific situation Pearson was faced with and that Pearson had to make split-second decision and a judgment call.

Berkstresser, who was retained by Edwards, had 41 years of experience in the school-bus-transportation field as a bus driver, supervisor of operations, and safety and training manager. Berkstresser testified that he had reviewed the State handbook, Pearson's deposition testimony, a summary of Edwards's deposition testimony, and the accident report. Berkstresser had not reviewed the statements of any other witnesses. Berkstresser was asked:

"Q. Okay. What is a bus driver supposed to do when a child is sitting there across a dangerous road and, through no fault of the bus driver's, him- or herself, they approach the child across a busy road? What are they supposed to do? What should Penny have done at that point?"

Berkstresser replied:

"A. At that point she should have had her left-turn indicator on to make a left turn onto Deatsville Highway. If she felt compelled to then slow the bus down and pull over and activate her lights, that would have been -- that would have been

acceptable; however, again, not according to policy had she would have been following the procedure [sic].

"However, what is missed here is the golden opportunity: When this first happened^[3] and Raven's mother was in -- was present, at that point Penny Pearson should have again turned her left-turn indicator on, made the left turn onto Deatsville Highway, come to a stop, and addressed that with the -- with the parent or, better yet, made the left-hand turn onto Deatsville Highway and continued on to school and then report that to her supervisor."

Berkstresser testified that Pearson's actions in attempting to pick up Raven at an undesignated stop and having Raven cross the highway without the protection of the stop arm and red light on the bus violated industry safe-loading standards and the Elmore County School District's policy.

Edwards also submitted excerpts of deposition testimony from Dr. Laux, a proffered expert in human-factors

³Berkstresser testified that he recalled Edwards's deposition testimony indicating that, on another occasion, Edwards walked Raven to the bus stop after she had missed the bus and Pearson stopped across the highway, walked across to retrieve Raven, and held Raven's hand while they crossed the highway to board the bus. Berkstresser testified that that indicated that Pearson did not appreciate the danger that her actions had put Raven in. Edwards's deposition excerpt attached to Pearson's first summary-judgment motion includes testimony regarding that scenario having occurred previously. Neither party emphasizes it, however, so we have included it only for contextual purposes.

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engineering. Dr. Laux testified that she determines how people respond to various circumstances and that she considers all the cognitive, perceptual, and learning capabilities of a person in determining how that person would respond to experiences. Dr. Laux testified that, when Pearson "pulled as far forward as she did at the intersection and put her -- and stopped and put her warning lights and all that on and started to get out, that's when I think she did something wrong." Dr. Laux further testified: "Well, basically, I think that [Pearson] should not have stopped there. And when she did stop and then open the door and came out, I think that was an invitation to Raven to come across the road. So, I mean, I think that was the precipitating factor for Raven's behavior." Dr. Laux also testified that if the bus had stopped at the stop sign long enough, Raven could have viewed that as an invitation to run across the highway to board the bus.

Standard of Review

"We review a summary judgment de novo." Potter v. First Real Estate Co., 844 So. 2d 540, 545 (Ala. 2002) (citation omitted). "Summary judgment is appropriate only when 'there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.'" Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000) (citations omitted)."

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Hollis v. City of Brighton, 950 So. 2d 300, 303-04 (Ala. 2006) (quoting Hollis v. City of Brighton, 885 So. 2d 135, 140 (Ala. 2004)).

Discussion

This Court has explained that "'[a] State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based upon the agent's ... exercising judgment in the discharge of duties imposed by statute, rule, or regulation in ... educating students.'" Ex parte Butts, 775 So. 2d 173, 177-78 (Ala. 2000) (quoting Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000), and adopting the Cranman test for determining State-agent immunity). We have also explained that "educating students" encompasses "not only classroom teaching, but also supervising and educating students in all aspects of the educational process." Ex parte Trotman, 965 So. 2d 780, 783 (Ala. 2007). Exercising judgment in supervising students extends to bus drivers performing official duties and exercising discretion in supervising students. Ex parte Mason, 146 So. 3d 9, 14 (Ala. 2013).

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Once a State agent meets his or her initial burden of "demonstrating that the plaintiff's claims arise from a function that would entitle the State agent to immunity" "the burden then shifts to the plaintiff to show that the State agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority." Ex parte Estate of Reynolds, 946 So. 2d 450, 452 (Ala. 2006) (citing Giambrone v. Douglas, 874 So. 2d 1046, 1052 (Ala. 2003), and Ex parte Wood, 852 So. 2d 705, 709 (Ala. 2002)). "'A State agent acts beyond authority and is therefore not immune when he or she "fail[s] to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist.'" Reynolds, 946 So. 2d at 452 (quoting Giambrone, 874 So. 2d at 1052, quoting in turn Ex parte Butts, 775 So. 2d at 178).

Edwards first argues that Pearson did not meet her burden of demonstrating that Edwards's claims arose from a function that would entitle Pearson to immunity. Edwards, relying on Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1265 (11th Cir. 2004), asserts that this Court must first consider the general nature of Pearson's action to determine whether she was performing a legitimate job-related function that fell

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within her job description. In Holloman, the United States Court of Appeals for the 11th Circuit explained: "We ask whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize." 370 F.3d at 1265.

Edwards argues that, at the time the accident occurred, Pearson was not performing a "legitimate job-related function" because, by making an unscheduled and unapproved bus stop to pick up Raven, Pearson, in effect, created a new bus stop and, in doing so, Edwards contends, exceeded her discretion and authority. Edwards asserts that it is undisputed that Pearson's job function does not involve establishing bus stops. Edwards points to deposition testimony from Pearson in which she acknowledged that the bus-stop locations are the responsibility of the local board of education and the transportation supervisor. Edwards further asserts that Pearson had been instructed (via the Mullino letter) that, if a student was not at his or her scheduled stop on time, she was to continue the route, leaving the student behind.

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As Pearson points out, however, Holloman involves an analysis of qualified immunity under federal law; it does not involve an analysis of State-agent immunity under Cranman or Alabama law. This Court follows the analysis detailed in Cranman and subsequently adopted in Ex parte Butts. In Ex parte Mason, a similar case involving a bus driver, we explained:

"The determination as to whether a bus driver is entitled to State-agent immunity rests upon whether the claims against the bus driver are based on acts arising from the performance of official duties and the exercise of discretion in the supervision of students. ... [I]n this case, the claims arise from Mason's conduct in supervising a student's getting off the school bus. Because the conduct at issue in this case involves the exercise of discretion in supervising students, Mason has satisfied his burden of demonstrating that [the plaintiff's] claims arise from his exercise of discretion while performing his duties as a bus driver in supervising students and that he is entitled to State-agent immunity."

146 So. 3d at 14.

The evidence indicated that Pearson, after turning the bus around in a cul-de-sac, was traveling to a stop sign on Sunset Drive at the intersection of Sunset Drive and the highway across the street from Raven's house with the intention of making a left turn. Pearson saw Raven running across her yard toward the highway. Pearson made the quick

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decision to activate the warning lights on the bus, and she began to exit the bus with the intention of escorting Raven across the highway. Before Pearson was able to exit the bus, Raven attempted to cross the highway and was struck by an automobile. Pearson's actions were taken in contemplation of supervising (and assisting) a student in boarding the school bus. Based on this factual scenario, there can be no question but that Pearson was performing her duties as a bus driver in supervising students when she stopped the school bus and exited the bus. Accordingly, Pearson met her burden of demonstrating that Edwards's claims arose from Pearson's exercise of discretion while performing her official duties and that she thus is entitled to State-agent immunity.

After Pearson met her burden of demonstrating she was entitled to State-agent immunity, the burden shifted to Edwards to demonstrate that Pearson "act[ed] willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law." Cranman, 792 So. 2d at 405. Edwards's argument in the trial court and on appeal is that Pearson acted beyond her authority. Edwards asserts that Pearson's responsibilities

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regarding bus stops were nondiscretionary and that, by creating an unauthorized and unscheduled bus stop, Pearson violated rules in the State handbook, the Elmore County handbook, and the CDL manual.

Pearson asserts that, in Ex parte Mason, this Court was confronted with the argument that a bus driver did not follow certain rules and procedures and held that the bus driver was entitled to State-agent immunity. In Ex parte Mason, a fifth-grade student was riding a school bus being driven by Mason. The student exited the school bus at a stop across a highway from his house that was a designated stop but that was not his designated stop. The student was struck by an automobile and injured when crossing that highway. The student's grandfather sued Mason and others, alleging that Mason failed to properly supervise the student and failed to ensure that the student exited the bus at the appropriate bus stop. The grandfather alleged that Mason acted beyond his authority and violated, among other rules, the following rules and regulations in the State handbook and the CDL manual:

"- The driver should never change stops;

"- Students should load or unload only at their school or designated stop;

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"- Students should not cross a median or divided highway;

"- Students should wait on the side of the road on which they live"

Ex parte Mason, 146 So. 3d at 14. It was apparent in Ex parte Mason that the above rules were not followed. We explained, however, that the evidence indicated that Mason did not know that the student exited the bus at the incorrect stop or that he lived across the highway from the stop and would have to cross a busy highway. Further, there was no evidence indicating that Mason "suggested, forced, or otherwise caused" the student to exit the bus at the incorrect location. Id. at 15. Based on the evidence, this Court concluded that the plaintiff in that case "did not satisfy his burden of establishing that Mason acted beyond the scope of his authority in supervising" the student. Id.

Pearson argues that the bus driver in Ex parte Mason "arguably could have had some control over" his alleged violation of rules and regulations because he should have known the student's correct bus stop and where the student lived. Pearson's situation, she asserts, is not covered by any rules or regulations and requires the exercise of discretion

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because, she says, she was "faced with an immediate and dangerous situation, which literally required that a split-second decision be made." (Pearson's brief, at 45.)

Edwards argues that Ex parte Mason is distinguishable because, in Ex parte Mason, the bus driver dropped a student off at a designated bus stop, but, in this case, she asserts, Pearson violated rules and regulations by creating a new bus stop to pick up a student at a dangerous location. Edwards also asserts that the bus driver in Ex parte Mason did not encourage the child to cross the road. Edwards asserts that Pearson created the dangerous situation by stopping the bus, activating the warning system on the bus, and opening the door, all of which, she contends, invited Raven to cross the highway.

As explained above, the burden is on Edwards to demonstrate that an exception to State-agent immunity applies. Edwards has not demonstrated that Pearson acted beyond her authority. Pearson did not change the location of a designated bus stop, as Edwards contends. Instead, Pearson was faced with an exigent circumstance that involved a child located across a busy highway from the bus she usually boarded. Pearson and

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Rauschenberger, the only witnesses who observed Raven immediately before the accident, testified that Raven was approaching the highway, and Rauschenberger stated that Raven appeared to be "anxious" to cross the highway. Pearson established that she was justified to stop the school bus at the intersection because she feared that Raven would cross the highway; it is undisputed that this is precisely what happened before Pearson could exit the bus. Nothing in the State handbook or the Elmore County handbook addresses what course of action a school-bus driver must take if the bus driver observes a student approaching a busy highway and the driver believes the student is in imminent danger. This is precisely the type of situation that requires an exercise of discretion, based on the circumstances as they are known to the school-bus driver at that time. As we have previously explained: "State-agent immunity protects agents of the State in their exercise of discretion in educating [and supervising] students. We will not second-guess their decisions." Ex parte Blankenship, 806 So. 2d 1186, 1190 (Ala. 2000).

We note that, in her initial brief on appeal, Edwards does not cite any cases addressing situations in which a State

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agent was held to have acted beyond his or her authority by disregarding rules in a handbook.⁴ In her reply brief, Pearson, for the first time, cites Ex parte Spivey, 846 So. 2d 322 (Ala. 2002), and Giambrone. It is well settled, however, that "'an argument may not be raised, nor may an argument be supported by citations to authority, for the first time in an appellant's reply brief.'" Steele v. Rosenfeld, LLC, 936 So. 2d 488, 493 (Ala. 2005) (quoting Improved Benevolent & Protective Order of Elks v. Moss, 855 So. 2d 1107, 1111 (Ala. Civ. App. 2003)). Even if Edwards had relied on Ex parte Spivey in her principal brief, that case does not support her position. In Ex parte Spivey, a student asserted that a teacher had violated a faculty handbook, OSHA regulations, and an owner's manual for a "shaper tool," which, he asserted, resulted in his injury. This Court explained that the regulations cited by the student were general statements regarding safety that did not prevent the teacher from

⁴In addition, Edwards did not submit with her response to Pearson's summary-judgment motion the full text of the handbooks, which would aid this Court in determining whether the rules in the handbooks were intended to be mandatory and whether they were applicable at the time of the accident.

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exercising his judgment and did not remove the protections of State-agent immunity. 846 So. 2d at 333.

Because Edwards failed to demonstrate that there were detailed rules or regulations that Pearson was required to follow in this circumstance, she failed to demonstrate that Pearson acted beyond her authority; thus, Pearson was entitled to State-agent immunity.

Conclusion

Pearson demonstrated that she was entitled to State-agent immunity, and Edwards failed to demonstrate that an exception to that immunity applied. Accordingly, the trial court properly entered a summary judgment in Pearson's favor, and we affirm the judgment.

AFFIRMED.

Bolin, Wise, and Sellers, JJ., concur.

Parker, C.J., concurs in the result.