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# SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

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**Ex parte Tim Tucker**

**PETITION FOR WRIT OF MANDAMUS**

**(In re: Mary Young**

**v.**

**City of Orange Beach and Tim Tucker)**

**(Baldwin Circuit Court, CV-16-900795)**

MENDHEIM, Justice.

Tim Tucker petitions this Court for a writ of mandamus directing the Baldwin Circuit Court to vacate its order

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denying his summary-judgment motion in which he contends that he is entitled to State-agent immunity for all claims asserted against him by Mary Young in an action stemming from injuries Young sustained when she tripped and fell on a residential street in the City of Orange Beach ("the City") and to enter a summary judgment in his favor. We grant the petition and issue the writ.

#### Facts

Tucker is the public-works director for the City. In that capacity, he oversees the Street, Refuse, Maintenance, Custodial, Landscape, Battlefield/Golf Course, and Beach Departments for the City. Tucker reports to Ken Grimes, the city administrator. Tucker is responsible for initiating, monitoring, and supervising maintenance and repair work performed by each of the above-listed departments, including maintenance and repair work on the roads in the City. Thus, Tucker is charged with supervising the Street Department's maintenance of 34 miles of roads within the City's jurisdiction and its mowing of property abutting 17 miles of state roads.

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Tucker's duties include implementation of the City's annual resurfacing project. The list of streets to be resurfaced is generated based on relative wear and tear. The assistant public-works director, Rick White, submits recommendations to Tucker of roads and streets that should be included in the resurfacing project, and Tucker, in turn, reviews the list and provides that list to Grimes. The mayor and the city council have an opportunity to provide input and to make additions to and/or deletions from the list before a final determination is made as to which streets will be resurfaced. Tucker testified that the Street Department's goal is to repave every road and street in the City once every 10 to 12 years.

Tucker testified by affidavit that, aside from resurfacing, work on the shoulder of the roads is performed on an "as noted and needed" basis. It is undisputed that the City has no written policies or procedures with regard to how often or in what manner repairs are to be made to the shoulders of roads within the City. Repairs are performed when a problem is brought to the City's attention by an employee or by a complaint from a member of the public. In

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his capacity as public-works director, Tucker prioritizes repairs and maintenance based on such factors as the severity of the condition or defect, the availability of labor and materials, and budgetary constraints. There is no written policy concerning the prioritization of repairs; instead, Tucker uses his judgment to make the decisions as to whether and when repair work is performed.

In 2012, Young was living in the Bear Point Community on Dowdy Lane, two streets over from Louisiana Avenue. Young testified that she had lived in the community for several years, that she had lived on Dowdy Lane for approximately 7 years, and that before that she had lived on Louisiana Avenue. The Bear Point Community is a single-family residential neighborhood with no sidewalks in which homes are close to the streets and front yards extend all the way to the street, including on Louisiana Avenue. Young submitted Google Earth mapping-service photographs from April 2011 indicating that at that time the surface of Louisiana Avenue was flush with the shoulder of the street and accompanying lawns.

In October 2012, Mobile Asphalt Company, LLC ("Mobile Asphalt"), contracted with the City to perform its annual

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resurfacing project, which had been voted on and approved by the city council ("the 2012 repavement project"). The project included resurfacing Louisiana Avenue in the Bear Point Community. Mobile Asphalt's contract with the City specified that it was to pave a 1.5-inch overlay on the streets to be resurfaced. It is undisputed that, at that time, "dressing" of the edge of roadways was the City's responsibility, not the contractor's. Kenny White, the City's street superintendent, served as the foreman on the shoulder work after Mobile Asphalt had repaved Louisiana Avenue.<sup>1</sup> Rick White testified that the shoulder work involved "putting dirt down [and] raking it to elevation," followed by seeding the ground with grass to help hold the dirt in place. White testified that the goal is to "keep dirt ... about an inch, inch and a half below surface [of the road] for when the grass grows and easy shed for water." White stated that this standard was just something "we've always done" and that it was not contained in a written City policy.<sup>2</sup> Tucker confirmed in his affidavit that this is the usual guideline used and that "there is no

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<sup>1</sup>Rick White and Kenny White are not related.

<sup>2</sup>At the time of his testimony, Rick White had worked for the City for over 23 years.

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written standard dictating the amount of fill that is required to be placed." Rick White testified that he visited the worksite daily to ensure that the work was being performed correctly. Kenny White kept a daily log of the work his crew performed. Tucker testified that those records indicated that dirt was added alongside the asphalt on Louisiana Avenue on December 10, 17, 18, 20, 21, 26, and 27, 2012. At the conclusion of the resurfacing project, Rick White inspected the work that had been performed by Mobile Asphalt and the City. White told Tucker that the work had been performed satisfactorily. Tucker then approved Mobile Asphalt's invoice for payment on the project. Tucker testified that to his knowledge the City never received any complaints about the shoulder along Louisiana Avenue from the time the street was resurfaced until the date of Young's accident.

On January 16, 2015, at approximately 9:30 p.m., Young was walking her dog along Louisiana Avenue. Young testified that it was dark and that there were no street lights. Young attempted to get her dog back on the street after it had veered off the asphalt, and she then tried to step onto the street as well from the shoulder. Young's foot caught on the

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edge of the asphalt of the street, and she tripped and fell to the ground. Young testified that she broke her shoulder as a result of the fall and that she had to have immediate surgery. Young estimated that where she tripped and fell there was a six-inch differential between the shoulder of the road and the asphalt roadway. Her son later measured Louisiana Avenue drop-off ranges from the roadway to the shoulder from between three inches to nine inches.

On July 22, 2016, Young filed a complaint in the Baldwin Circuit Court asserting claims of negligence and wantonness against the City, Tucker in his individual capacity, and Mobile Asphalt. Young alleged that the defendants had "breached their duty by not inspecting and correcting the significant shoulder drop offs at various locations within the City of Orange Beach, including Louisiana Avenue, at any point during or after the repaving process ...." The City and Tucker filed a joint answer to the complaint on September 2, 2016.

On May 6, 2019, the City and Tucker filed a summary-judgment motion, an accompanying brief, and supporting evidentiary materials with respect to the claims Young

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asserted against Tucker. In their brief, the City and Tucker contended that Tucker is entitled to State-agent immunity from the claims Young asserted against him. Specifically, they conceded that Tucker's responsibilities as public-works director for the City included "initiating, monitoring and supervising maintenance and repair work" for the City's streets, but they argued that "when and where that work is performed is wholly discretionary." They contended that this discretion entitles Tucker to State-agent immunity from Young's claims.

On May 17, 2019, Young filed a response in opposition to the City and Tucker's summary-judgment motion. In her response, Young argued that Tucker had violated specific standards applicable to the Louisiana Avenue repavement project and that, therefore, he was not entitled to State-agent immunity. Specifically, Young contended that the Alabama Department of Transportation's Standard Specifications for Highway Construction ("the ALDOT Specifications") provided "clear and detailed regulations for shoulder/roadside repair work" that Tucker had violated during the repavement of Louisiana Avenue. She also argued that the City of Orange



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Beach Construction Standards for Miscellaneous Construction, Utility Excavation, and Right-of-Way and Pavement Restoration ("the City Construction Standards") "required that all lawn areas affected by a construction project be replaced with materials that were existing prior to the project" and that Tucker had violated this standard as well.

On May 21, 2019, the circuit court held a hearing on the City and Tucker's summary-judgment motion. On the same date, the circuit court entered an order denying their summary-judgment motion.

Tucker timely petitioned this Court for a writ of mandamus. We ordered answers and briefs and granted a motion filed by the City to stay the proceedings below.

#### Standard of Review

"While the general rule is that the denial of a motion for summary judgment is not reviewable, the exception is that the denial of a motion grounded on a claim of immunity is reviewable by petition for writ of mandamus. Ex parte Purvis, 689 So. 2d 794 (Ala. 1996) ....

"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." Rule 56(c)(3), Ala. R. Civ. P., Young v. La Quinta Inns, Inc., 682 So. 2d 402 (Ala.

1996). A court considering a motion for summary judgment will view the record in the light most favorable to the nonmoving party, Hurst v. Alabama Power Co., 675 So. 2d 397 (Ala. 1996), Fuqua v. Ingersoll-Rand Co., 591 So. 2d 486 (Ala. 1991); will accord the nonmoving party all reasonable favorable inferences from the evidence, Fuqua, supra, Aldridge v. Valley Steel Constr., Inc., 603 So. 2d 981 (Ala. 1992); and will resolve all reasonable doubts against the moving party, Hurst, supra, Ex parte Brislin, 719 So. 2d 185 (Ala. 1998).

"An appellate court reviewing a ruling on a motion for summary judgment will, de novo, apply these same standards applicable in the trial court. Fuqua, supra, Brislin, supra. Likewise, the appellate court will consider only that factual material available of record to the trial court for its consideration in deciding the motion. Dynasty Corp. v. Alpha Resins Corp., 577 So. 2d 1278 (Ala. 1991), Boland v. Fort Rucker Nat'l Bank, 599 So. 2d 595 (Ala. 1992), Rowe v. Isbell, 599 So. 2d 35 (Ala. 1992)."

Ex parte Turner, 840 So. 2d 132, 135 (Ala. 2002) (quoting Ex parte Rizk, 791 So. 2d 911, 912-13 (Ala. 2000)). A writ of mandamus is an extraordinary remedy available only when the petitioner can demonstrate: "(1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked

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jurisdiction of the court.'" Ex parte Nall, 879 So. 2d 541, 543 (Ala. 2003) (quoting Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001)).

### Analysis

As we noted in the rendition of the facts, Tucker contends that he is entitled to State-agent immunity for the claims asserted against him by Young and that, therefore, those negligence and wantonness claims should be dismissed.

"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

"....

"(2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:

"....

"(b) allocating resources;

"....

"(3) discharging duties imposed on a department or agency by statute, rule, or regulation, insofar as the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner ....

"....

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"Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity

". . . .

"(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law."

Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000) (plurality opinion).<sup>3</sup>

We note that "[i]mmunity applies to employees of municipalities in the same manner that immunity applies to employees of the State. See Ex parte City of Birmingham, 624 So. 2d 1018 (Ala. 1993). Ex parte Cranman, [792 So. 2d 392 (Ala. 2000),] did nothing to alter this application." City of Birmingham v. Brown, 969 So. 2d 910, 916 (Ala. 2007).  
Furthermore,

"[t]his Court has established a 'burden-shifting' process when a party raises the defense of State-agent immunity. Giambrone v. Douglas, 874 So. 2d 1046, 1052 (Ala. 2003). In

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<sup>3</sup>"Although Cranman was a plurality decision, the restatement of law as it pertains to State-agent immunity set forth in Cranman was subsequently adopted by the Court in Ex parte Rizk, 791 So. 2d 911 (Ala. 2000), and Ex parte Butts, 775 So. 2d 173 (Ala. 2000)." Ex parte Yancey, 8 So. 3d 299, 305 (Ala. 2008).

order to claim State-agent immunity, a State agent bears the burden of demonstrating that the plaintiff's claims arise from a function that would entitle the State agent to immunity. Giambrone, 874 So. 2d at 1052; Ex parte Wood, 852 So. 2d 705, 709 (Ala. 2002). If the State agent makes such a showing, 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. Giambrone, 874 So. 2d at 1052; Wood, 852 So. 2d at 709; Ex parte Davis, 721 So. 2d 685, 689 (Ala. 1998). '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.'" Giambrone, 874 So. 2d at 1052 (quoting Ex parte Butts, 775 So. 2d 173, 178 (Ala. 2000))."

Ex parte Estate of Reynolds, 946 So. 2d 450, 452 (Ala. 2006).

Young concedes that Tucker met his prima facie burden of demonstrating that her claims arise from a function that would entitle Tucker to State-agent immunity. However, Young contends that she then met her burden of showing that Tucker acted beyond his authority by violating specific regulations applicable to him in the performance of his duties as public-works director for the City. Specifically, Young notes that § 410.05(b) of the ALDOT Specifications addresses "Edge Requirements" for paving roads, and it provides:

"These edges shall be neatly shaped to line behind the breakdown roller and shall be trimmed as necessary after final rolling, to an accurately

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lined string or wire providing a maximum tolerance of 2 inches {50 mm} outside the theoretical edge of pavement, with a maximum variation from a true line of  $\frac{1}{2}$  of an inch {12 mm} in 10 feet {3 m} and a slope not flatter than 1:1. Edges that are distorted by rolling shall be corrected promptly."

(Emphasis added.) Young also observes that Tucker testified in his deposition that, although bid-contracting documents for City repaving work before 2014 did not specify whether the ALDOT Specifications applied to such work, it was Tucker's understanding that the ALDOT Specifications did apply "regardless of whether or not they're specifically called out in the bid documents." Thus, Young argues that Tucker violated § 410.05(b) of the ALDOT Specifications by approving the completed repavement of Louisiana Avenue, which clearly had a shoulder drop-off larger than two inches, and by failing to rectify the "dangerous edges" present on that street before Young's accident occurred.

Young argues that, in addition to violating § 410.05(b) of the ALDOT Specifications, Tucker violated § 6.6(A) of the City Construction Standards, which provides, in part: "All established lawn areas affected by the construction project will be replaced with similar type landscape materials which were existing prior to the project." Young contends that

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because some significant variances in shoulder depth on Louisiana Avenue existed at the time of her accident, Tucker did not ensure that lawns adjacent to the street were restored with similar landscape materials after the repavement project. Young contends that Tucker had no discretion to deviate from either § 410.05(b) of the ALDOT Specifications or § 6.6(A) of the City Construction Standards with respect to the repaving of Louisiana Avenue.

Tucker offers two responses to Young's contention that he violated § 410.05(b) of the ALDOT Specifications and § 6.6(A) of the City Construction Standards and that, by doing so, he acted beyond his authority. First, he argues that Young did not demonstrate that either of those standards was applicable to the 2012 repavement project or that either of them applied to Tucker individually. However, as Young observes, Tucker's own testimony appeared to confirm that the ALDOT Specifications applied to the 2012 repavement project, and there is no evidence indicating that City Construction Standards did not apply.

Tucker's contention that the standards did not apply to him individually is more well taken, given that the evidence

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shows that Tucker's responsibility is that of a department supervisor, not streets-project manager. Kenny White was the foreman for the shoulder work in repaving Louisiana Avenue, and Rick White performed the inspections of the 2012 repavement project. However, as Young notes, Tucker did not argue to the circuit court that he was entitled to a summary judgment because Young failed to demonstrate that the standards applied to him individually. Therefore, we cannot issue a writ of mandamus based on this argument. See, e.g., Ex parte Ebbers, 871 So. 2d 776, 786 (Ala. 2003) ("In determining, on mandamus review, whether the trial court exceeded the limits of its discretion, 'the appellate courts will not reverse the trial court on an issue or contention not presented to the trial court for its consideration in making its ruling.'" (quoting Ex parte Wiginton, 743 So. 2d 1071, 1073 (Ala. 1999))).

Tucker's second, and primary, contention is that, because Young's accident occurred more than two years after completion of the 2012 repavement project, the real issue is "continuing maintenance and upkeep of the shoulders," not the initial repaving of Louisiana Avenue. Tucker argues that the



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submitted evidence indicates that the repaving of Louisiana Avenue was performed in accordance with applicable standards. Kenny White's log showed that dirt had been added to the shoulder of the road on several days following Mobile Asphalt's completion of its repaving responsibilities. Rick White inspected the work performed by Mobile Asphalt and by the City and indicated to Tucker that the work had been performed in a satisfactory manner. The City had no record of complaints about the shoulders of Louisiana Avenue in the ensuing two years before Young's accident. Tucker reasons that, because the evidence does not indicate that there were any issues with the initial work performed in repaving Louisiana Avenue in 2012, the issue encountered by Young concerned ongoing maintenance of City roads and streets. It is undisputed that Tucker is responsible for initiating, monitoring, and supervising repairs and maintenance of roads and streets in the City. However, which roads and streets are repaired and when such maintenance occurs is entirely left to Tucker's discretion. The Public Works Department depends upon tips from City employees and citizens to inform the City about issues with City roads and streets. Once Tucker is made aware

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of a problem, he must weigh various factors about how and when to perform any necessary maintenance, including considering the severity of the condition or defect, the availability of labor and materials, and budgetary constraints. Tucker contends that the regulations Young cites do not address his responsibilities with respect to ongoing maintenance and repair of City roads and streets and that, therefore, Young failed to demonstrate that Tucker acted beyond his authority in failing to have maintenance performed along the shoulder of Louisiana Avenue in 2015.

We agree with Tucker. Young contends in her brief that "there is substantial evidence the dangerous pavement edge drop off existed at the time of the project." But other than an assumption that the shoulder could not have degraded from two inches to six inches between 2012 and 2015, Young has not pointed to evidence of the shoulder condition of Louisiana Avenue in 2012 after the completion of the repavement project. Young argues that "[t]he fact that the dangerous and excessive drop off remained after the project was complete, does not allow, by any standard, for an exercise of judgment as to whether the violative drop off could remain unaddressed. The

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duty imposed at the time of construction continues." But Young cites no evidence or authority to support that argument. Section 410.05(b) of the ALDOT Specifications and § 6.6(A) of the City Construction Standards address standards for paving a roadway; they in no way address ongoing maintenance of roads and streets within the City, which is addressed by the process about which Tucker testified and for which Young has cited no specific standard that was violated.

As Tucker observes, the situation presented here is similar to one this Court addressed in Ex parte Estate of Reynolds, 946 So. 2d 450 (Ala. 2006). The Court later summarized its decision in Reynolds as follows:

"In Reynolds, the plaintiff, who was injured in an automobile accident, alleged that the accident resulted when the tires of his vehicle left the roadway and he was unable to steer the vehicle back onto the roadway. The plaintiff alleged that his inability to steer the vehicle back on the roadway was caused by the front right tire of his automobile entering a 'channel' in the paved surface. The plaintiff sued the district engineer of the Alabama Department of Transportation ('ALDOT') as well as ALDOT's district maintenance superintendent, alleging that the two had negligently, wantonly, willfully, maliciously, fraudulently, and in bad faith failed to inspect, maintain, and repair the area of the roadway where the accident occurred. The evidence indicated that both the district engineer and maintenance superintendent inspected highways in the district, determined whether maintenance and

repair were necessary, and supervised the roadwork. Both men would prioritize and rank projects based on the degree of the danger a condition created, the type of work needed, the availability of labor resources, and the particular road. Both men used ALDOT's 'Maintenance Manual' and 'Field Operations Manual' in performing their duties. The maintenance supervisor, however, argued that the manuals often did not provide explicit guidelines for particular situations and that the exercise of judgment was often required. The plaintiff, however, argued that the district engineer and maintenance supervisor were negligent in inspecting the road in question because the former acting district engineer testified via affidavit that he had observed numerous places on the road where the pavement and shoulder had been damaged by large trucks getting too close to the shoulder of the road. He also testified via affidavit that the road contained areas where the shoulder was higher than the roadway as well as areas where the shoulder was lower than the roadway.

"In issuing the writ of mandamus, this Court held that although the ALDOT manuals set forth criteria by which decisions were made and set out duties, the manuals gave the district engineer and district maintenance supervisor a significant degree of discretion in inspecting the highways, formulating plans and policies, and exercising judgment in allocating resources for inspections. Thus, by exercising judgment in actually undertaking to accomplish the necessary maintenance and repairs, the district engineer and district maintenance supervisor were entitled to State-agent immunity."

Slack v. Stream, 988 So. 2d 516, 529 (Ala. 2008) (emphasis added).

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Tucker's responsibilities for maintenance and repair of City streets and roads are similar to those of the defendants in Reynolds in that he must make decisions about prioritizing repairs based on various factors such as the degree of traffic on the particular street, the severity of the damage, the available manpower, and funding. Unlike the defendants in Reynolds, however, Tucker's duties do not include personally inspecting the roads and streets or personally supervising the roadwork. If anything, Tucker's responsibilities fall even more into the category of formulating plans and policies for maintenance and repair work than did the responsibilities of the defendants in Reynolds, and he has more discretion in allocating resources than they did because there is no evidence of any kind of maintenance manual or field-operations manual that directs Tucker with regard to prioritizing repair jobs.

In short, Young's argument glosses over the more than two-year gap between the completion of the 2012 repavement project and her accident in January 2015. Even assuming that § 410.05(b) of the ALDOT Specifications and § 6.6(A) of the City Construction Standards applied to the 2012 repavement

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project and that they applied to Tucker individually, those regulations concern only duties in the performance of paving a roadway; they do not set any standards for repair and maintenance of City roads and streets. Based on the evidence presented, it appears that Young's allegations concern the maintenance and/or repair along the shoulder of Louisiana Avenue. It is undisputed that Tucker exercises judgment in determining how and where to use the limited resources available to the City to repair and maintain its roads and streets. "These decisions are the very sort protected by State-agent immunity as described in Cranman." Reynolds, 946 So. 2d at 456-57. Therefore, the circuit court erred in denying Tucker's summary-judgment motion.

#### Conclusion

Based on the foregoing, Tucker is entitled to State-agent immunity from all claims Young asserted against him. The circuit court is therefore directed to enter a summary judgment in favor of Tucker.

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PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, and  
Stewart, JJ., concur.

Mitchell, J., concurs in the result.