Rel: September 30, 2021

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1200215

Steven C. Smith, as conservator of the Estate of B.J., a minor

v.

Elizabeth Alexander, Amanda Buchanan, and Michael Key

Appeal from Cullman Circuit Court
(CV-15-900394)

BOLIN, Justice.

Steven C. Smith, as conservator of the estate of B.J., a minor, appeals from the Cullman Circuit Court's summary judgment in favor of Elizabeth Alexander, Amanda Buchanan, and Michael Key ("the

defendants"), who are employees of the Cullman County Department of Human Resources ("the Cullman County DHR"), on Smith's claims alleging violations of policies promulgated by the State Department of Human Resources ("the State DHR"), negligence, wantonness, and the tort of outrage.[1]

I. Facts and Procedural History

In May 2015, Key was employed by the Cullman County DHR as a foster-care supervisor, and he was responsible for supervising Cullman County DHR caseworkers. Key reported to Buchanan, who oversaw the Child Family Services Program, the Child Protective Services Program, and the Foster Care Program for the Cullman County DHR. Buchanan in turn reported to Alexander, the director of the Cullman County DHR.

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[1] "The county departments of human resources serve as agents of the State Department of Human Resources; the State Department is empowered to designate the county [department] as its agent and to assist the count[y departments] in their various duties when necessary. See §38-6-2, Ala. Code 1975; Admin. Rules 660-1-2.01(g) and 660-1-2-.02."

State Dep't of Hum. Res. v. Estate of Harris, 857 So. 2d 818, 819 n. 1 (Ala. Civ. App. 2002).

B.J. was placed in the custody of the Cullman County DHR when he was three years old after having suffered physical abuse, sexual abuse, and neglect at the hands of family members. On July 9, 2002, the trial court awarded the Cullman County DHR legal guardianship and permanent custody of B.J. While in the custody of the Cullman County DHR, B.J. was placed in a number of foster homes, group homes, residential facilities, hospitals, and psychiatric institutions. In July 2014, B.J. was placed by the Cullman County DHR at the Altapointe Group Home ("Altapointe"), a therapeutic foster-care facility located in Mobile County.

In April 2015, while B.J. was residing at Altapointe, a multidimensional assessment tool was used to assess B.J.[2] The assessment indicated, among other things, that, while in the custody of the Cullman County DHR, B.J. had regularly exhibited violent outbursts and physically aggressive behavior toward others; that B.J. had fought on

[2]According to the record, a multidimensional assessment tool is used to determine whether a child should be placed in a moderate, a therapeutic, or an intensive residential setting.

a regular basis; that B.J. had a history of depression, suicide attempts, and delusional thinking; and that B.J. had engaged in impulsive and delinquent behavior, including pathologically lying, theft and destruction of property, fire setting, running away, inciting a riot at a treatment facility, and attempting to poison previous foster parents. B.J. admitted that fighting was a "way of life" for him. The assessment also indicated that B.J. attended a local high school but did not go to class and was failing his course work. B.J. had recently returned to school after being suspended for delusional thinking, refusing to follow the rules of a school setting, threatening school personnel, and engaging in inappropriate behavior with his girlfriend while at school. The assessment further indicated that B.J. had had virtually no contact with his family.

The assessment also indicated that B.J. had been diagnosed with a number of mental and emotional disorders during his lifetime, including intermittent explosive disorder, mood disorder, and attention-deficit/hyperactivity disorder ("ADHD"). B.J.'s diagnosed conditions were managed with medications, therapy, and counseling. B.J. required constant monitoring due to his mental-health issues and aggressive

behavior. While residing at Altapointe, B.J. was prescribed trazodone to help him sleep and Straterra and Tenex for treatment of his ADHD. Dr. Ashley Dumas, B.J.'s treating psychiatrist at Altapointe, discontinued the use of Tenex on April 3, 2015. Dr. Dumas explained that Tenex was not significantly improving B.J.'s ADHD symptoms and that he was not exhibiting any hyperactivity symptoms at the time. Dr. Dumas explained that those medications were not used to treat B.J.'s intermittent explosive disorder. Rather, B.J. received multiple psychotherapy and counseling sessions per week to help manage his verbally and physically aggressive behavior resulting from his intermittent explosive disorder.[3] B.J.'s behavior regressed without therapy to help manage his aggressive outbursts.

On April 1, 2015, B.J. demanded that another Altapointe resident relinquish control of a video-gaming system. The other resident complied, but B.J. nevertheless struck the other resident in the back of the head

[3]According to the record, the symptoms of intermittent explosive disorder include irritability, the probability of being "set off" by a minor event, impulsiveness, and aggressive behavior.

because B.J. deemed that the other resident was not moving fast enough in giving up control of the system. As a result, officers of the local sheriff's department were called to the scene, and the investigating officer completed a report. On April 2, 2015, Brandon Swaim, B.J.'s therapist at Altapointe, notified Kristen Edge, B.J.'s caseworker for the Cullman County DHR, that B.J. had assaulted another resident and that a police report had been filed. Swaim informed Edge that B.J. had a history of bullying the particular resident. Both Key and Buchanan were also notified of the incident at that time. On April 3, 2015, the other resident filed a criminal complaint against B.J., and an arrest warrant was issued for B.J. on the charge of third-degree assault. The arrest warrant was not served on B.J. at that time. On April 7, 2015, Swaim informed Edge that criminal charges had been filed against B.J. by the other resident and that B.J. was still at Altapointe. Edge notified Key and Buchanan that criminal charges had been filed against B.J. On April 7, 2015, Buchanan instructed Key and Edge by e-mail to "make sure" a plan was developed for B.J. in case he was asked to leave Altapointe. Both Key and Edge

started making inquiries as to possible placements for B.J. if he was asked to leave Altapointe.

On April 24, 2015, Swaim informed Edge and Key that B.J. had been found to be in possession of a pellet gun while at school and that B.J. was most likely going to be suspended or expelled from school for bringing the pellet gun onto campus. Key directed Edge at that time to update B.J.'s guardian ad litem regarding the situation and to inquire about openings at other facilities because, Key noted, B.J. "may have to move sooner." On April 27, 2015, Swaim notified Edge that B.J. had demonstrated a "consistent and increasing pattern of defiance and verbal aggression towards staff." On May 1, 2015, Swaim notified Edge and Key that a meeting had taken place between himself, B.J., and the principal and the special-education teacher at B.J.'s school. B.J. was informed at the meeting that he would be suspended from school for the remaining 21 days of the school year for the pellet-gun incident and that the principal was recommending B.J.'s expulsion from school. During that meeting, B.J. became aggressive toward the principal and the special-education teacher, to the point that law-enforcement officers were nearly called in.

Swaim further informed Edge and Key that B.J. had a history of sexual contact with his girlfriend at school, of skipping classes, and of verbal aggression and that B.J. was failing all of his classes and would receive no school credit for the year.

On May 1, 2015, Edge completed a report indicating that she had traveled to Altapointe on April 29, 2015, to conduct a targeted case management ("TCM") meeting with B.J. The purpose of the TCM meeting had been to observe and monitor B.J. Edge noted in her report that B.J. had related to her that he liked his placement at Altapointe, that he did not want to leave Altapointe, and that he did not want to return to north Alabama. Edge further noted in the report that B.J. had been suspended from school with a recommendation for expulsion because of the pellet-gun incident at school, that he had become aggressive with the principal and the special-education teacher during the meeting relating to the pellet-gun incident, and that he was failing all of his classes. Edge also indicated in the report that she had discussed and reviewed B.J.'s individualized

service plan ("ISP")[4] during a meeting with Swaim and the staff at Altapointe. Edge noted that the staff had informed her that they would allow B.J. to remain at Altapointe but that, if his behavior did not improve, he would have to be placed at a lockdown facility.

On May 4, 2015, B.J. "blew up and threw some things" at Altapointe staff when they asked him to bathe. Law-enforcement officers were

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[4]According to the record, an ISP serves as a child's service plan and is used to document information about the planning and delivery of services for children and families who are receiving ongoing child-welfare services from a department of human resources. The child and family planning team, also known as the ISP team, works in partnership to develop, review, and revise an ISP. The ISP team is responsible for identifying a child's strengths and needs; establishing goals; matching steps and services to a child's needs; monitoring service delivery; and evaluating the ISPs effectiveness. The ISP team is composed of an age-appropriate child, the child's parents, a department of human resources employee, the child's primary caregiver or foster-care provider, and any other individuals that might be requested or needed. On May 5, 2015, Katherine Rouse, Altapointe's coordinator of Transitional Age Residential Services, e-mailed Key and Edge informing them that the Altapointe staff was not aware that the meeting with Edge had been a formal ISP meeting. Rouse explained that, during ISP meetings, notes were typically taken and then reviewed by all involved in the meeting for approval and that all ISP team members present at the meeting would sign the ISP form. Rouse informed Edge and Key that none of the Altapointe staff had read or signed anything during the meeting. Finally, Rouse requested that the Cullman County DHR provide Altapointe staff with a copy of the ISP materials if it was going to treat the meeting as an official ISP meeting.

summoned, and B.J. was arrested pursuant to the outstanding warrant that had been issued following the incident with the other resident on April 1, 2015. B.J., who was 18 years old at the time, was transported to the Mobile County Metro Jail. B.J.'s medications were sent with him to the jail. Upon arrival at the jail, B.J. received a medical check from the jail nurse, and B.J. informed her that he had been prescribed Straterra and trazodone. However, B.J. refused at that time to continue to take his medications. Subsequently, B.J.'s bond was set at $1,000 and a court date was scheduled for June 15, 2015. After B.J. was arrested, Edge contacted the jail to inquire about visiting hours for B.J. and was told by jail officials that B.J. could not have any visitors for at least 15 days after being incarcerated. Edge was also told that B.J. would have to add approved visitors to his visitation list.

On May 5, 2015, Edge notified Alexander, Buchanan, Key, and B.J.'s guardian ad litem that B.J. had been arrested. Edge further informed them that efforts were being made to locate an intensive residential placement for B.J. and to have B.J. evaluated to determine if acute care was needed. Edge stated that BayPointe Hospital ("BayPointe") and a

facility operated by an entity referred to as Gateway ("the Gateway facility") were being looked at as possible placements for B.J. BayPointe is a locked psychiatric facility affiliated with Altapointe and is located in Mobile County. Gateway is a nonlocked facility located in Birmingham that offers, among other things, therapeutic foster care and counseling. Subsequently, the Cullman County DHR also looked at Mountain View Hospital ("Mountain View"), an intensive inpatient psychiatric-treatment facility located in Gadsden, as a possible placement for B.J.

On May 5, 2015, B.J. was discharged from Altapointe. Swaim completed the discharge summary noting that B.J. had been arrested and taken to jail after throwing things, punching walls, and becoming verbally aggressive with the staff when he was asked to take a shower. Swaim noted that B.J. was in need of a locked psychiatric facility and that Rouse had contacted the coordinator of the Altapointe Jail Diversion Team to refer B.J. to BayPointe for stabilization and additional services. Swaim further noted that Key and Edge had been notified of B.J.'s discharge from Altapointe. Dr. Dumas also opined that B.J. was in need of a locked psychiatric facility.

On May 5, 2015, Key notified Buchanan, Alexander, and Edge that B.J. had been accepted for placement in the residential psychiatric program at the Gateway facility. Buchanan expressed her concern at that time that a "more structured and secure placement would be needed" than the program offered at the Gateway facility. On May 8, 2015, Carla Ladnier, BayPointe's assistant director of Children's Residential Services, informed Edge that BayPointe could not accept B.J. because he needed to be hospitalized for stabilization of his medications before entering a residential program and that she could not "hold a bed" for him.[5]

On May 7, 2015, Buchanan and Key were informed by the State DHR that B.J.'s own personal funds could be used to pay his $1,000 bond. Bond could be posted either by B.J. -- or by someone on his behalf -- paying $1,000 into the court or, alternatively, by paying a percentage of the $1,000 bond to a bail-bonding company, with the bail-bonding

[5]The record indicates that applications for placement of B.J. were made by the Cullman County DHR to a number of facilities and that those applications were rejected for various reasons, including B.J.'s age, his aggressive behavior, his prior bad behavior at a particular facility, his having left other treatment facilities, and his particular needs.

company then becoming the surety for the bond. The Cullman County DHR was required to obtain B.J.'s written permission to use his personal funds to pay the bond. Sherri Smelley, B.J.'s court-appointed attorney, contacted Gregory Wood, a bail bondsmen, to assist in arranging for B.J.'s bond to be paid through Wood's bail-bonding company. Wood informed Smelley that a $1,000 bond would require a $100 payment and an additional bond fee of $35 for a total payment of $135. Because B.J. was a minor, he was precluded from signing his own bond and entering into the surety agreement with the bail-bonding company. Wood informed Smelley that B.J. would need a local cosigner. The record reflects that department of human resources personnel are not required to cosign as a surety for a criminal bond and, in most cases, are not allowed to cosign as a surety on such a bond.

On May 11, 2015, Alexander informed Buchanan, Key, and Edge that a certificate of need would be required to place B.J. at a residential treatment facility.[6] On May 12, 2015, Key informed Alexander and

[6]The record reflects that a certificate of need for services is required to admit a child in the custody of a department of human resources to a

Buchanan that Swaim would assist in obtaining a certificate of need for B.J. On May 13, 2015, in an e-mail to Key and Edge, Buchanan again expressed her reservations about B.J.'s being placed at the Gateway facility, stating her opinion that the Gateway facility "cannot handle him and it would not be safe for him to go there." On May 14, 2015, Swaim faxed a letter to the Cullman County DHR in support of the certificate of need for B.J., stating that "it is my recommendation that [B.J.] be referred to a locked acute psychiatric unit for intensive supervision, medication administration, and psychiatric observation if/when, he is bonded out of the Mobile Metro Jail."

Additionally on May 14, 2015, Smelley met with B.J. at the jail to discuss the charges against him, the range of potential punishments, and the amount of the bond and how it could be paid. There was no discussion regarding B.J.'s medications at that meeting.

On May 18, 2015, as soon as it was permitted by the visitation policy of the jail, Key met with B.J. at the jail to conduct a TCM meeting. Key

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residential treatment facility providing intensive services and psychiatric care.

testified that the primary purpose of that meeting with B.J. was to convince him to accept placement at a facility and to obtain permission to allow the Cullman County DHR to use his personal funds to post bail. B.J. was being housed in the "barracks" section of the jail at the time of that meeting. The "barracks" was a less restrictive area of the jail in which certain inmates, referred to as "trustees," were housed. Trustees housed in the "barracks" are allowed to join work crews and can work outside the premises of the jail. B.J. reported to Key that he was "happy" in the barracks and that he was working in the community picking up trash.

Key noted in his narrative summary of the May 18 meeting that B.J. was continuing to refuse to take his medications and that he had observed B.J. becoming easily agitated during the meeting. Key noted that B.J. had stated that he had noticed his temper and agitation getting worse two months earlier and that "he would do things without thinking." Key further noted that B.J. had informed him that "he [could not] leave Mobile because he [could not] leave his girlfriend" and that B.J. had started crying because he wanted contact with his girlfriend. Key further noted that B.J. had told him that "no one would keep him from talking with his

girlfriend." Despite B.J.'s saying that he could not leave Mobile because of his girlfriend, Key noted in his narrative summary that B.J. had also requested to go to the Gateway facility or Mountain View. Key specifically noted that B.J. had not mentioned his girlfriend at that point during the meeting. Key noted later in the narrative summary that B.J. again had said that "he wants to go to Gateway if it will result in him living on his own" but "then got upset over the fact that he may have to leave Mobile." Despite Key noting in his narrative summary that B.J. had informed him at times in the meeting that he wished to be placed at the Gateway facility or Mountain View, Key testified in his deposition that B.J. had refused placement at both the Gateway facility and Mountain View and that B.J. had threatened to run away if he were placed in a facility that was too far from his girlfriend. B.J. had a history of leaving other treatment facilities, and that was a reason why his applications for placement at certain facilities were being rejected during that time. See note 5, supra.

Key did not provide B.J. with the necessary paperwork at the May 18 meeting to authorize the use of his personal funds to post bond. However, Key noted in his narrative summary of the meeting that "B.J.

said he would approve to use his funds to post bail and go where he needs to go." Key testified that B.J. had orally authorized the use of $140 to $150 of his own funds to post bond but would not authorize the use of $1,000 of his own funds to post bond.

Key testified in his deposition that the Gateway facility "would not have been safe" for B.J. and that, following the May 18 meeting, he informed Buchanan and Alexander of B.J.'s threats to run away from the facility if it was too far away from his girlfriend. On May 22, 2015, Buchanan again expressed her concern regarding B.J.'s possible placement at the Gateway facility. In an e-mail addressed to Alexander and other officials with the State DHR, Buchanan explained that, although B.J.'s placement at the Gateway facility would qualify as a placement in an "intensive" setting, see note 2, supra, the Gateway facility is not a locked facility and its close proximity to an interstate and a housing complex caused her concern. Because of B.J.'s history of leaving treatment facilities and his threats to run away, the Gateway facility was determined by the defendants to be an inappropriate placement for B.J.

On May 22, 2015, Buchanan informed Alexander and the State DHR officials that Mountain View had agreed to accept B.J. "if an [emergency-room] contract slot bed [could] be used." Buchanan was then directed by the State DHR to submit a request to the State DHR's Resource Management Division for emergency intensive placement of B.J. at Mountain View. On May 22, 2015, the State DHR's Resource Management Division approved Buchanan's request for emergency placement of B.J. at Mountain View.

Once B.J. had been accepted and approved for placement at Mountain View, the defendants began working to post bond for B.J. and to arrange transportation for him from Mobile to Gadsden. By that time, B.J. had been off his medications for several weeks and had not had any psychiatric counseling while in jail. Those factors, along with B.J.'s history of aggressive behavior and of lashing out at Cullman County DHR staff, led to the determination by the defendants that B.J. would need to be transported by a law-enforcement officer from the jail in Mobile to Mountain View in Gadsden. It was feared that attempting to transport B.J. without law-enforcement assistance was likely to result in his

running away, hurting himself, and/or hurting the person transporting him.

On May 28, 2015, Edge contacted the Mobile County Criminal Court Division by e-mail to inform the court that she was arranging for a Cullman County law-enforcement officer to travel to Mobile County with a money order to post bond for B.J. and then to transport him to Mountain View in Gadsden. Edge asked the court whom the money order should be made payable to, where it should be presented, and if there was anything that could be done to avoid the officer's having to wait an extended amount of time for B.J. to be released once the bond was posted. The court responded that same day, stating: "Yes, if you make it to Mobile before 4:30. Payable to District Court." On that same day, Edge completed a payment-voucher disbursement request in the amount of $1,001.50, seeking to use B.J.'s personal funds to pay his bond.[7] Key and Buchanan were kept informed of the ongoing efforts to post B.J.'s bond and to

[7]That funds request was for the payment of the full amount of B.J.'s bond using B.J.'s personal funds, despite the fact that B.J. had previously informed Key that he would authorize the use of only $140 to $150 of his personal funds toward payment of the bond.

arrange transportation for him by a law-enforcement officer from the jail to Mountain View.

On June 2, 2015, Christina Russo, the director of mental health at the jail, informed Key that B.J. had agreed to a placement at Mountain View. Russo also informed Key that B.J. was still refusing to take his medications.

B.J. would have been immediately free to leave the jail on his own once the bond was posted. Because B.J. had threatened to run away in the past and because Alexander felt that it would be unsafe for B.J. to be left unattended should he be released before the law-enforcement officer arrived to transport him to Mountain View, the defendants sought to have a "hold" order placed on B.J. so that he would remain in jail until the law-enforcement officer arrived to transport him to Mountain View. Key requested that Smelley seek to obtain a "hold" order for B.J. Smelley requested a "hold" order from the Mobile District Court, but that request was denied.

On June 3, 2015, Key sent an e-mail to Alexander and Buchanan informing them of his conversation with Smelley regarding B.J.'s bonding

out of jail. Smelley had informed Key that, if B.J. bonded out of jail, the Cullman County DHR had to ensure that B.J. would be back in Mobile for his June 15 court date and that if B.J. was not back in Mobile for court on June 15, "it ruins his case."

On June 3, 2015, Key informed Alexander that Edge would be in the Mobile area on June 5, 2015, for vacation and was going to pick up B.J.'s belongings from Altapointe while there. Alexander responded that same day by asking Key if they could send the money order for B.J.'s bond with Edge so that the "move [could] happen early next week." On June 4, 2015, Key informed Alexander and Buchanan by e-mail that Edge would be picking up B.J.'s belongings at Altapointe on Tuesday June 9, 2015. He further stated that "[w]ithout a hold I do not recommend her paying the bail that day, but once released ... his attorney pointed out that [B.J.] will have to be brought back the following Monday for his trial on the 15th at 8:30 am. She had suggested he stay where he is to reduce risk." Shortly after receiving Key's e-mail, Alexander responded by e-mail to Key and Buchanan by stating: "[H]e needs to stay."

On June 10, 2015, B.J. was involved in an altercation with another trustee in the "barracks" at the jail. B.J. stole some personal property from the other trustee with the intent of instigating a fight with that trustee, which resulted in B.J.'s "being transferred from the barracks to the general-population section of the jail. The Cullman County DHR was not notified that B.J. had been transferred to the general-population section.

On June 11, 2015, B.J. initiated a confrontation with jail correctional officers. B.J. dumped his belongings on the floor and wrapped his laundry bag around his hand and assumed a fighting position. B.J. yelled and screamed at the correctional officers and also made the "throat slashing" gesture at the correctional officers. The jail was placed on "lock down," which requires the inmates to return to their cells. B.J. refused orders to "lock down" and return to his cell. A violent confrontation occurred when the jail correctional officers attempted to subdue B.J. B.J. suffered a permanent spinal-cord injury during the confrontation with the jail correctional officers and was left a functional quadriplegic.

On October 30, 2015, Smith, as conservator of B.J.'s estate, sued Alexander and Key, alleging, among other things, that they had negligently and wantonly failed to provide B.J. with an appropriate placement and had failed to provide him with his prescribed medications. Smith also asserted a tort-of-outrage claim, alleging that Alexander and Key knew, or should have known, that B.J. was likely to suffer emotional distress as the result of their failing to provide a placement for him other than jail.[8]

On May 3, 2017, Smith amended his complaint to add Buchanan as a defendant. Smith also added a claim alleging that, "[a]s part of the Defendants' mandatory duties, they were obligated to insure the Cullman County DHR and State DHR and the employees of the said organization or entities followed the laws, regulations and rules of the State of Alabama[,] as well as the regulations and policies of Cullman County DHR

[8]Smith also brought an action in the United States District Court for the Southern District of Alabama against certain jail personnel and NaphCare, Inc., the company that contracted to provide medical treatment for inmates housed in the Mobile County Metro Jail. On August 8, 2018, the parties to that case entered into an agreement to settle the claims asserted in that case.

and the State DHR," and that the defendants had negligently and/or wantonly performed those mandatory duties. Smith further asserted claims of negligent and wanton hiring and training against Alexander and Buchanan.

On November 8, 2017, Smith filed a second amended complaint, adding Smelley as a defendant and asserting a legal-malpractice claim against her. The second amended complaint is the operative complaint in this case and alleges, in relevant part, the following:

> "On or about May 18, 2015, Amanda Buchanan was aware of an appropriate and less restrictive placement for B.J., but neglected to bond B.J. out of jail prior to June 11, 2015, to enter said placement in violation of existing Alabama state law or regulations or Cullman DHR and/or State DHR rules, policies, procedures and/or regulations.
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> "On or about May 18, 2015, Mrs. Buchanan communicated the alternative placement option to the other defendants, but no action was taken by the other defendants herein.
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> "On or about May 18, 2015, Amanda Buchanan became aware that B.J. was not receiving his medications at the [jail] as medically directed, but failed to act to correct that issue in violation of existing state law or regulations or Cullman DHR and/or State DHR rules, policies, procedures and/or regulations.

> "Defendants Key, Alexander and Buchanan willfully and intentionally caused B.J. to remain in [jail] from May 4, 2015, until June 11, 2015, by willfully and intentionally refusing to post bond for his release, notwithstanding defendants' knowledge that such placement in the [jail] was not in the best interest of B.J.
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> "Defendants Key, Alexander and Buchanan failed to adhere to regulations, rules, and/or policies regarding change in placement and failed to adhere to regulations, rules and/or policies regarding conducting Individual Service Plan meetings upon the change in placement. Such failure to adhere to regulations and policies caused B.J. to be deprived of the care, treatment, and services set forth in his Individualized Service Plan.
>
> "....
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> "That the DHR defendants, as described herein, acted willfully, maliciously, fraudulently, in bad faith, beyond their authority or under a mistaken interpretation of law in their acts and conduct."

Counts I and II of the complaint alleged that the defendants had negligently and wantonly failed to provide an appropriate placement for B.J. and to provide B.J. with his prescribed medications. Count III of the complaint asserted a tort-of-outrage claim and alleged that the defendants, individually and/or jointly, knew, or should have known, that B.J. was likely to suffer emotional distress as the result of their failure to

provide a placement for B.J. other than jail. Count IV of the complaint asserted a claim alleging that the defendants had negligently and/or wantonly performed, and/or failed to perform, their mandatory duties under the rules and regulations of the State of Alabama, as well as the rules, regulations, and policies applicable to the State DHR and the various county departments of human resources (collectively referred to as "DHR"). See note 1, supra. Counts V and VI of the complaint asserted claims against Alexander and Buchanan for negligently and/or wantonly hiring, training, and supervising employees of the Cullman County DHR. Count VII of the complaint asserted a claim against the defendants alleging that they had allowed B.J. to be institutionalized when an alternative placement was available, in violation of state law and rules, regulations, and policies applicable to DHR. Count VIII of the complaint asserted a claim against the defendants alleging that they knew, or should have known, that Cullman County DHR employees were not following state law or DHR policies in the protection or placement of B.J., that they had negligently and/or wantonly failed to correct the problem, and that

they knew that the failure to take corrective measures would likely result in harm or injury to B.J.

On June 7, 2019, Smelley moved the trial court for a summary judgment on the legal-malpractice claim asserted against her. On December 2, 2019, the trial court entered an order granting Smelley's motion for a summary judgment and certified that order as a final judgment pursuant to Rule 54(b), Ala. R. Civ. P.[9]

On March 10, 2020, Alexander and Key moved the trial court for a summary judgment. On March 11, 2020, Buchanan moved the trial court for a summary judgment. The defendants argued, among other things, that they were entitled to State-agent immunity with respect to the claims asserted against them by Smith. The defendants argued that the claims asserted against them arose out of the exercise of their respective duties as employees of the Cullman County DHR and that they were exercising their judgment and discretion in the exercise of those duties. Additionally, the defendants argued that the record lacked substantial

[9]Smith has not appealed from that order.

evidence demonstrating that they had acted "willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law" so as to remove them from the protection offered by the doctrine of State-agent immunity. See Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000).

On July 2, 2020, Smith filed a consolidated response in opposition to the defendants' motions for a summary judgment. Smith argued that the defendants had failed to establish that they had been engaged in a function that would entitle them to State-agent immunity. Smith further argued that, even if the defendants had established that they had been engaged in a function that entitled them to State-agent immunity, the defendants had acted willfully and beyond their authority and, therefore, had lost the protection afforded them by State-agent immunity. Smith argued that the defendants had willfully injured B.J. by keeping him confined to jail where he was denied his rights (1) to the least restrictive environment and appropriate placement, (2) to receive services under his ISP, (3) to his prescribed medications, (4) to monitoring by a medical doctor or a psychiatrist, (5) to participate in placement decisions, (6) to

post bond, and (7) to an education. Smith argued that the defendants had acted beyond their authority (1) by making placement decisions without holding an ISP meeting and (2) by unilaterally blocking B.J.'s transfer to a less restrictive placement.

Following a hearing, the trial court, on December 8, 2020, entered an order granting the defendants' motions for a summary judgment, finding that "there is no genuine issue as to any material fact that would preclude judgment in favor of the Defendants. The Plaintiff has not presented substantial evidence of such weight and quality that fair-minded persons in the exercise of impartial judgement could reasonably infer the existence of the facts necessary to establish the Plaintiff's claims." The trial court also found that the defendants were entitled to State-agent immunity. Smith appealed.

II. Standard of Review

"The standard of review applicable to a summary judgment is the same as the standard for granting the motion ...." McClendon v. Mountain Top Indoor Flea Market, Inc., 601 So. 2d 957, 958 (Ala. 1992).

> " 'A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c)(3), Ala. R. Civ. P. The burden is on the moving party to make a prima facie showing that there is no genuine issue of material fact and that it is entitled to a judgment as a matter of law. In determining whether the movant has carried that burden, the court is to view the evidence in a light most favorable to the nonmoving party and to draw all reasonable inferences in favor of that party. To defeat a properly supported summary judgment motion, the nonmoving party must present "substantial evidence" creating a genuine issue of material fact -- "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved." Ala. Code 1975, § 12-21-12; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989).'
>
> "Capital Alliance Ins. Co. v. Thorough-Clean, Inc., 639 So. 2d 1349, 1350 (Ala. 1994)."

Pritchett v. ICN Med. All., Inc., 938 So. 2d 933, 935 (Ala. 2006).

III. Discussion -- State-agent Immunity

In Ex parte Cranman, 792 So. 2d 392 (Ala. 2000), a plurality of this Court restated the law governing State-agent immunity:

> "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

"(1) formulating plans, policies, or designs; or

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

"(a) making administrative adjudications;

"(b) allocating resources;

"(c) negotiating contracts;

"(d) hiring, firing, transferring, assigning, or supervising personnel; or

"(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; or

"(4) exercising judgment in the enforcement of the criminal laws of the State, including, but not limited to, law-enforcement officers' arresting or attempting to arrest persons[, or serving as peace officers under circumstances entitling such officers to immunity pursuant to §6-5-338(a), Ala. Code 1975]; or

"(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in

> releasing prisoners, counseling or releasing persons of unsound mind, or educating students.
>
> "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
>
> > "(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of this State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or
> >
> > "(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."

792 So. 2d at 405 (bracketed modification added by Hollis v. City of Brighton, 950 So. 2d 300, 309 (Ala. 2006)). 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 this Court in Ex parte Butts, 775 So. 2d 173 (Ala. 2000).

Additionally,

> "[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 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).

A. The Defendants' Initial Burden Under Cranman

1. Alexander

Smith argues that Alexander has failed to meet her initial burden under Cranman because, he says, she has failed to establish the existence of any relevant statute, rule, or regulation that she was acting in accordance with, when dealing with B.J., that would entitle her to State-agent immunity under Cranman. Specifically, Smith contends that there is no DHR policy that authorizes a county department of human resources director to unilaterally make a placement decision regarding a child and that such a placement decision must be determined by the child's ISP

team. Smith argues that Alexander made such a unilateral placement decision when she stated in her June 4, 2015, e-mail that B.J. "needs to stay" in jail.

Alexander argues that she met her initial burden under Cranman and that she is entitled to State-agent immunity under categories 2 and 3 of Cranman. Category 2 of Cranman provides that a State agent will be immune from civil liability when the conduct made the basis of the claim against the agent is based upon the agent's "exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, ... supervising personnel." Alexander was the director of the Cullman County DHR at all times relevant to the events made the basis of this action. As the director of the Cullman County DHR, Alexander had supervisory authority over Buchanan, Key, and Edge. The evidence contained in the record suggests that Alexander coordinated and supervised the efforts of Buchanan, Key, and Edge in locating a satisfactory placement for B.J., in posting bond for B.J., in arranging a secure transport for B.J. to his new placement, and in ensuring that B.J. was present for his court date. Alexander regularly

received information and recommendations from Buchanan, Key, and Edge regarding the ongoing efforts to locate potential placements for B.J. and to post bond for B.J. On June 4, 2015, Key informed Alexander that Edge would be in the Mobile area on June 9, 2015, and would retrieve B.J.'s belongings from Altapointe, but Key recommended to Alexander that Edge not pay B.J.'s bond at that time without a hold order in place. Key further informed Alexander that if B.J. was released from jail on June 9, he would have to be brought back to Mobile the following Monday for his trial on June 15, and that Smelly, B.J.'s attorney, had suggested that "he stay where he is to reduce risk." Alexander responded to Key and Buchanan by stating in an e-mail that "he needs to stay." In making the decision that B.J. should stay in jail, Alexander simply assessed all the relevant factors, information, and recommendations provided to her by her subordinates and made the decision that it was in B.J.'s best interests to remain in jail until after his court date. In an attempt to serve B.J.'s best interests, Alexander directed and assisted her subordinates in locating a satisfactory placement for B.J., in posting bond for B.J., in arranging a secure transport for B.J. to his new placement, and in

ensuring that B.J. was present for his court date. We conclude that such actions fall within category 2 of Cranman -- "exercising ... judgment in the administration of a department or agency of government, including ... supervising personnel" -- and is the type of supervisory action that is protected by Cranman.

Category 3 of Cranman extends immunity to a State agent when that agent is "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." Ex parte Cranman, 792 So. 2d at 405.

Section 38-2-6, Ala. Code 1975, imposes certain "duties, powers, and responsibilities" upon the State DHR, specifically including the duty to

> "receive and care for dependent or neglected minor children committed to its care, make a careful physical examination and, if possible, a mental examination of every such child, investigate in detail the personal and family history of the child and its environment, and place such children in family homes or in approved suitable institutions operating in accordance with the provisions of [Title 38, Ala. Code 1975,] and supervise such children however placed."

§38-2-6(14). Section 38-2-8(b), Ala. Code 1975, imposes upon the directors of county departments of human resources certain general duties and responsibilities. Section 38-2-8(b) provides, in part:

> "All administrative and executive duties and responsibilities of the county department shall be performed by the county director and must be in accordance with the rules and regulations of the state department, subject to the approval of the state board. These duties and responsibilities shall include relief to persons in need of assistance; the performance of family welfare services; the care of children who are dependent, neglected, under insufficient guardianship or otherwise handicapped, and such other child-care activities as shall be directed to it by the State Department of Human Resources."

The State DHR has promulgated regulations and formulated policies to facilitate the performance of the duties imposed upon DHR by statute.

Smith has stated in his brief that this action is premised primarily on each defendant's violation of certain DHR policies in their dealings with B.J. As discussed above, Smith specifically claims that Alexander violated DHR policies pertaining to ISPs and placement decisions when she made the decision that B.J. needed to stay in jail until after his court date. We conclude that Alexander is also entitled to State-agent immunity pursuant to category 3, because it is clear that Alexander was

discharging certain duties imposed upon her, as the director of the Cullman County DHR, by statute in her dealings with B.J. and that the very premise of this action is that she violated certain DHR policies in the discharge of those duties.

Smith argues that Cranman makes clear that State-agent immunity attaches only if "the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner." 792 So. 2d at 405. In other words, Smith contends that, although a statute, rule, or regulation imposing a duty upon a State department or agency might exist, not every act in furtherance of the performance of that duty by a State agent will be cloaked in State-agent immunity. Smith asserts that State-agent immunity would attach only if the statute, rule, or regulation instructed the State agent as to the manner of exercising the authority granted and the State agent exercised the authority granted in the manner prescribed. Smith contends that Alexander violated DHR policies pertaining to ISPs and placement decisions and therefore failed to perform her duties in the manner prescribed by DHR policies.

In support of her motion for a summary judgment, Alexander presented the affidavit and deposition testimony of Debbie Green.[10] From June 2002 through February 2017, Green was employed as a program specialist in the State DHR's Office of Child Welfare Policy. Green's duties in that capacity included developing, writing, and revising child-welfare policies for Alabama; researching federal and state laws and regulations for developing DHR policies; and conducting policy review and analysis, including interpreting existing DHR policies. In March 2017, Green was promoted to the position of program manager in the Office of Child Welfare Policy. Green testified that she had reviewed State DHR

[10]During the litigation of this matter, Smith sought to take the deposition of Nancy Buckner, the commissioner of the State DHR. On October 10, 2018, the trial court entered an order conditionally granting a motion to quash the deposition subpoena for Buckner on the condition that Buckner "make available another person knowledgeable and authorized to provide information sought by Plaintiffs." Smith moved the trial court to reconsider its order, alleging that Buckner "is the final decision-maker regarding DHR policy, she, and only she, can provide authoritative pre-trial testimony whether the acts of the defendants complied with DHR regulations or policy." That motion to reconsider was denied. Green was ultimately appointed by Buckner to be the State DHR's representative on the interpretation of DHR policies. That appointment was ratified by the trial court.

and Cullman County DHR records pertaining to B.J., as well as the depositions of the defendants, of the medical professionals that had treated B.J., and of B.J.'s attorney Smelley. Based on that information, Green concluded that Alexander had discharged the duties imposed upon her by DHR policies in dealing with B.J. and that she had followed all applicable DHR policies in doing so. Green further stated that Alexander had performed her duties in the manner prescribed by DHR policies and had not exceeded the scope of her authority or acted in violation of DHR policies.

Based on the foregoing, we conclude that Alexander met her initial burden of demonstrating that Smith's claims arose from functions that entitled Alexander to State-agent immunity. Giambrone v. Douglas, 874 So. 2d 1047, 1052 (Ala. 2003); Ex parte Wood, 852 So. 2d 705, 709 (Ala. 2002).

2. Buchanan

Smith argues that Buchanan has failed to meet her initial burden under Cranman because, he says, she has failed to establish the existence of any relevant statute, rule, or regulation that she was acting in

accordance with, when dealing with B.J., that would entitle her to State-agent immunity under Cranman. Specifically, Smith contends that there is no DHR policy that authorizes Buchanan, as a county department of human resources program supervisor, to unilaterally make a placement decision regarding a child and that such a placement decision must be determined by the child's ISP team. Smith argues that Buchanan made a unilateral decision regarding B.J.'s placement when she determined that the Gateway facility was not a proper placement for B.J. and the decision was made not to place him there.

Buchanan argues that she met her initial burden under Cranman and that she is entitled to State-agent immunity under categories 2 and 3 of Cranman. Buchanan was the program director for the Cullman County DHR at all times relevant to the events made the basis of this action. As the program director, Buchanan had supervisory authority over Key and Edge. The evidence indicates that Buchanan was presented with information regarding B.J.'s arrest, his removal from Altapointe, and his need for a more intensive placement. Buchanan coordinated and supervised the efforts of Key and Edge in making applications to various

facilities in order to locate an available and appropriate placement for B.J. Key and Edge notified Buchanan that the Gateway facility had accepted B.J.'s application for placement. However, as stated above, the Gateway facility is not a locked facility. Both B.J.'s treating psychiatrist and his therapist had recommended that B.J. be placed in a locked facility. B.J. had a history of leaving placement facilities and had threatened to run away if he was not placed near his girlfriend in Mobile. Based on those relevant factors, Buchanan suggested to Alexander and certain State DHR officials that the Gateway facility was not an appropriate placement for B.J., and the search for an appropriate facility continued. In making the determination that the Gateway facility was not an appropriate placement for B.J., Buchanan assessed all the relevant factors, information, and recommendations provided to her by her subordinates and made the determination that the Gateway facility was not an appropriate placement for B.J. In an attempt to serve B.J.'s best interests, Buchanan directed and assisted her subordinates in locating and securing an appropriate placement for B.J. We conclude that such actions fall within category 2 of Cranman -- "exercising ... judgment in the administration of a department

or agency of government, including ... supervising personnel" -- and is the type of supervisory action that is protected by Cranman.

As discussed above, § 38-2-6 imposes certain duties and responsibilities upon the State DHR, and the State DHR has promulgated regulations and formulated certain policies to facilitate the performance of the duties imposed upon DHR by statute. Smith's action is premised primarily on each defendant's violation of certain DHR policies in their dealings with B.J. Smith claims that Buchanan violated DHR policies pertaining to ISPs and placement decisions when she determined that the Gateway facility was not an appropriate placement for B.J. As with Alexander, we conclude that Buchanan was discharging the duties imposed upon her by statute in accordance with category 3 of Cranman as the Cullman County DHR program director in her dealings with B.J. and that the alleged wrongful discharge of those duties is the premise of Smith's action.

Smith again argues that State-agent immunity under Cranman attaches only if "the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that

manner." 792 So. 2d at 405. Smith argues that Buchanan is not entitled to State-agent immunity because, he says, she violated DHR policies relating to ISPs and placement decisions and therefore failed to perform her duties in the manner prescribed by DHR policies.

As Alexander did, Buchanan presented the affidavit and deposition testimony of Green. Green testified that she had reviewed the evidentiary materials in this case and concluded that Buchanan had discharged the duties imposed upon her in dealing with B.J. and had followed all applicable DHR policies in the process. Green further testified that Buchanan had performed her duties in the manner prescribed by DHR policies and had not exceeded the scope of her authority or acted in violation of DHR policies.

Based on the foregoing, we conclude that Buchanan, like Alexander, met her initial burden of demonstrating that Smith's claims arose from functions that entitled her to State-agent immunity. Giambrone, 874 So. 2d at 1052; Ex parte Wood, 852 So. 2d at 709.

3. Key

Smith argues that Key has failed to meet his initial burden under Cranman because, he says, Key has failed to establish the existence of any relevant statute, rule, or regulation that he was acting in accordance with, when dealing with B.J., that would entitle him to State-agent immunity under Cranman. Specifically, Smith contends that Key violated DHR policies on providing the least restrictive residential-placement setting, by failing to take the necessary actions to post B.J.'s bond, and by effectively deciding that B.J. should remain in jail when other less restrictive settings were available to B.J.

Key argues that he met his initial burden under Cranman and that he is entitled to State-agent immunity under category 3 of Cranman. The record indicates, that in his capacity as a foster-care supervisor with the Cullman County DHR, Key worked with the other defendants and Edge to post B.J.'s bond and to locate a suitable placement for B.J. Key met with B.J. while B.J. was in jail to discuss placement possibilities and to obtain B.J.'s authorization to use his personal funds to pay the bond. Key also made the recommendation to Alexander that Edge not pay B.J.'s bond on the day Edge was going to pick up his belongings from Altapointe

without a "hold" order in place. Key also informed Alexander of Smelley's suggestion that B.J. remain in jail to reduce any risk that he would not be in court on his hearing date. Smith claims that Key violated DHR policies pertaining to least restrictive placement settings by not bailing B.J. out of jail and placing him at Mountain View. Again, as with Alexander and Buchanan, it is clear that, as required by category 3 of Cranman, Key, in dealing with B.J., was discharging duties imposed upon him by statute as the Cullman County DHR foster-care supervisor and that the very premise of this action is that he violated DHR policies in the discharge of those duties.

As Smith did with Alexander and Buchanan, he argues that State-agent immunity under Cranman attaches only if "the statute, rule, or regulation prescribes the manner for performing the duties and the State agent performs the duties in that manner." 792 So. 2d at 405. Smith argues that Key is not entitled to State-agent immunity because, he says, Key violated DHR policies relating to placement decisions and therefore failed to perform his duties in the manner prescribed by DHR policies. Key also relied on the testimony of Green, who testified that Key was

discharging the duties imposed upon him in dealing with B.J. and that he had followed all applicable DHR policies in the process. Green further testified that Key had performed his duties in the manner prescribed by DHR policies and had not exceeded the scope of his authority or acted in violation of DHR policies. Thus, Key, like Alexander and Buchanan, met his initial burden of demonstrating that Smith's claims arose from a function that entitled him to State-agent immunity. Giambrone, 874 So. 2d at 1052; Ex parte Wood, 852 So. 2d at 709.

B. Smith's Burden Under Cranman

1. Beyond the Scope of Authority

a. Alexander

Once Alexander met her initial burden of showing that Smith's claims arose from functions that entitled her to State-agent immunity, the burden shifted to Smith to show that Alexander "acted willfully, maliciously, fraudulently, in bad faith, or beyond [his or her] authority." Giambrone, 874 So. 2d at 1052. Smith argues that Alexander acted beyond her authority in dealing with B.J. (1) by making a placement

decision without holding an ISP meeting and (2) by unilaterally blocking B.J.'s transfer to a less restrictive placement.

DHR policies provide the following regarding ISPs:

> "ISPs shall be developed, reviewed, and revised in partnership with the age-appropriate children, their parents, service providers, and other members of the child and family planning team. A discussion of strengths, needs, and potential steps and services to address family members' needs shall be held with all team members prior to ISP meetings. Decisions made during the ISP process will reflect the age-appropriate children's and family members' agreement unless the children's immediate safety needs cannot be met through mutual agreement of those involved.
>
> "ISPs shall also be developed and revised within specific timeframes and based on underlying conditions related to identified safety threats and risks. Actions taken and the intensity of service delivery are directly related to these conditions and the information derived during the assessment process. Regardless of whether an ISP has been developed, child welfare staff shall initially respond to safety threats through the development and implementation of a safety plan. In many cases, this will mean that a safety plan is in place and functioning as a result of the first contact with the family. Safety plans are intended to control symptoms, and ISPs are intended to address underlying conditions.
>
> "....
>
> "... Interim Reviews.

> "ISP meetings shall be held to review an ISP and make needed revisions when the following situations, at a minimum, occur:
>
> > "....
> >
> > "after an emergency change in a child's out-of-home care placement;
> >
> > "when a change in a child's out-of-home care placement is anticipated;
> >
> > "when the ISP is not adequately managing the risks or new risks are identified;
> >
> > "....
>
> "....
>
> "In situations where families have an ISP that is not adequately managing the identified risks, safety threats emerge, and the children's removal is imminent, a safety plan must be developed and implemented or revised if one has already been implemented. It is essential that child welfare staff engage the family to develop or revise the safety plan, and conduct a pre-removal ISP meeting as soon as possible. The ISP team is responsible for working in partnership with the age-appropriate children and family to evaluate the identified risks and revise ISP accordingly. This ISP will address, at a minimum, the same areas as required for an initial ISP .... If the team is unable to revise the ISP prior to the children's removal, it

> must be revised within 72 hours of when the removal occurs."

DHR policies provide the following regarding selecting an out-of-home placement for a child:

> "The selection of a placement will be made in partnership with the family, age appropriate child, and the child and family planning team as part of the development or revision of a strengths and needs based ISP.
>
> "In an emergency situation (e.g., when a child is at imminent risk of serious harm and a placement must be made to protect the child before a child and family planning team can be convened), placement decisions will be made as part of the child's safety plan which will be developed by the DHR worker in partnership with the family and age appropriate child when possible. The child and family planning team will review placement decisions within 72 hours of placement (an ISP must be developed by a child and family planning team within 72 hours of placement). A child must be placed in close proximity to his or her home during the 72-hour period unless the child's need for safety cannot feasibly be met by such a placement.
>
> "....
>
> "When out-of-home care becomes necessary, children should be placed in the least restrictive setting possible. ...

> "....
>
> "... Therapeutic Foster Care.
>
> > "Therapeutic Foster Care (TFC) exists to serve children and youth whose special emotional needs lead to behaviors, that in the absence of such programs, they would be at risk of placement into restrictive settings, e.g., hospitals, psychiatric centers, correctional facilities or residential treatment programs."

Smith argues that the above-quoted DHR policies specifically contemplate that children with behavioral issues like B.J.'s are at risk of being placed in correctional facilities and that those DHR policies are precisely the type of rules that must be followed for State-agent immunity to be applicable. Smith contends that, because those DHR policies grant authority to make placement decisions only to the ISP team and because the ISP team's placement decision must adhere to DHR's least-restrictive-placement-possible requirement in those policies, Alexander acted beyond her authority in making the decision, without seeking input from B.J.'s ISP team, that, until his court date, B.J. should remain in jail rather than at Mountain View.

Smith presented the expert testimony of Janet Justice. Justice testified in her affidavit that "[a] detention center or jail such as Mobile County Metro Jail is a placement for purposes of DHR policy, procedure, and regulations" and that, pursuant to "DHR policy, it is anticipated that children with special emotional needs such as [B.J.] are at risk of being put into a placement such as a correctional facility which is the most restrictive placement." Justice stated that Alexander had a mandatory duty to follow DHR policies. Justice further testified that Alexander acted beyond her authority by failing to discharge the duties imposed on her by DHR policies relating to least restrictive placements and the convening of ISP meetings when Alexander made the determination that B.J. should stay in jail pending his court date.

Alexander argues that B.J.'s incarceration presented a unique set of circumstances as to which DHR policies provided no clear directive on how to proceed. Alexander contends that, because there were no clear DHR policies governing how to deal with the circumstances presented by B.J.'s incarceration, she did not act beyond her authority in dealing with his situation. Alexander relies on the testimony of Green, the State DHR

commissioner's appointed representative on the interpretation of DHR policies, see note 10, supra, in support of her argument. Green testified in her deposition that although B.J.'s removal from Altapointe by law-enforcement officers and his incarceration in the jail constituted an emergency change for B.J., it did not constitute a placement made by the Cullman County DHR. Green stated in her affidavit that incarceration in a jail is not a placement option within the scope of the authority of DHR. Green further testified that Alexander did not exceed the scope of her authority or act in violation of any DHR policies.

We initially note that Justice's testimony that jail is a placement under DHR policies and Smith's argument, based on Justice's testimony, that DHR policies anticipate that children like B.J. are at risk of being placed in a correctional facility rely solely on the reference to "correctional facilities" contained in the provision of the DHR policies quoted above relating to therapeutic foster care. That provision provides that "Therapeutic Foster Care (TFC) exists to serve children and youth whose special emotional needs lead to behaviors, that in the absence of such programs, they would be at risk of placement into restrictive settings, e.g.,

hospitals, psychiatric centers, correctional facilities or residential treatment programs." It cannot reasonably be inferred that the reference to "correctional facilities" in that provision supports the conclusion that jail is a placement within the scope of DHR policies or that DHR policies govern or control a situation in which a child in the legal custody of DHR has been incarcerated and taken into physical custody by a law-enforcement agency. The term "correctional facilities" merely refers to one of several restrictive settings where a child with special emotional needs might end up without the benefit of therapeutic foster care. Smith has not identified any other DHR policies supporting the notion that jail is a DHR placement option.

We further note that Green's testimony interpreting DHR policies -- specifically, her testimony that DHR policies do not provide that incarceration in jail constitute a placements made by DHR and that such a placement is not a placement within the scope of the authority of DHR -- is controlling unless its plainly erroneous. This Court has stated:

> " 'This court and the trial court must give substantial deference to an agency's interpretation of its rules and regulations. Personnel Bd. of Jefferson County v. Bailey, 475

> So. 2d 863 (Ala. Civ. App. 1985).' Mobile County Pers. Bd. v. Tillman, 751 So. 2d 517, 518 (Ala. Civ. App. 1999). 'It is well settled that "an agency's interpretation of its own regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation." Ferlisi v. Alabama Medicaid Agency, 481 So. 2d 400, 403 (Ala. Civ. App. 1985).' State Pers. Bd. v. Wallace, 682 So. 2d 1357, 1359 (Ala. Civ. App. 1996). An agency's interpretation of its own policy is controlling unless it is plainly erroneous. Brunson Constr. & Envtl. Servs., Inc. v. City of Prichard, 664 So. 2d 885, 890 (Ala.1995). See also Peacock v. Houston County Bd. of Educ., 653 So. 2d 308, 309 (Ala. Civ. App. 1994)."

Ex parte Board of Sch. Comm'rs of Mobile Cnty., 824 So. 2d 759, 761 (Ala. 2001).

The reasonableness of Green's interpretation of DHR policies and, thus, the basis for the deference given to her interpretation of those policies is illustrated by the circumstances presented by B.J.'s incarceration in the jail. Once B.J. was arrested, he was no longer in the physical custody of the Cullman County DHR but, rather, was in the physical custody of the Mobile County sheriff and subject to the sheriff's authority, policies, and regulations pertaining to custody and confinement. DHR policies require that an ISP meeting be convened before the selection of a new placement for a child and, if that is not possible, no later than 72

hours after the child's placement in the new facility. However, in this case, the policies of the jail prohibited B.J. from having any visitors for two weeks after his arrival and required that any visitors that he wished to have be approved and added to a visitation list. DHR policies also provide that ISP "[m]eetings will be conducted at any mutually agreeable and accessible location which maximizes the family's opportunity for participation. Regardless of the location, seating should be arranged so that all participants are able to see and interact with each other." To serve their purpose, jails by nature are not easily accessible facilities and are designed to restrict the movement of inmates and visitors alike. A jail setting would not be conducive for conducting an ISP meeting, as required by DHR policies.

DHR policies provide that, "[w]hen out-of-home care becomes necessary, children should be placed in the least restrictive setting possible." B.J. was in the physical custody of the sheriff and subject to the jurisdiction of the court system. Obviously, B.J. could not have been summarily removed from the custody of the sheriff and placed in a less restrictive setting by Alexander or the other defendants. However,

because he had a bond amount set, B.J. had the opportunity to post bond and leave jail for his new placement at Mountain View in Gadsden on the condition that he return to Mobile for his court date. Key had recommended that B.J.'s bail not be paid without a "hold" order on him -- which the Cullman County DHR was unable to obtain -- because, otherwise, B.J. would have been free to simply leave the jail on his own if his transportation was not there to meet him. Smelley had stated that the Cullman County DHR had to ensure that B.J. would be returned to Mobile for his court date or that his case would be "ruined." Smelley recommended that B.J. remain in jail until after his court date to reduce the "risk" that he would not be returned to Mobile from Gadsden. DHR policies do not address, and offer no guidance on, the conflict presented in this case between the requirement that B.J. be placed in the least restrictive setting possible and the requirement that he be present in court on his court date. DHR policies offer no guidance on prioritizing those dueling interests. The record indicates that, when Alexander was faced with the dilemma of leaving B.J. in jail until after his court date or posting his bond and transporting him to Mountain View, she considered

all the relevant factors and made the purely discretionary decision to leave B.J. in jail until after the court date.

Because we have determined that incarceration in jail is not a placement made pursuant to DHR policies and because those policies fail to address the circumstances presented when a minor in the custody of DHR is incarcerated and in the physical custody of a law-enforcement agency, we conclude that Smith has failed to provide substantial evidence demonstrating that Alexander acted beyond her authority by failing to discharge her duties pursuant to a detailed set of rules or regulations because no DHR policies existed addressing the circumstances with which Alexander and the other defendants were faced in this case. Giambrone, 874 So. 2d at 1052.

b. Buchanan

As discussed above, once Buchanan met her initial burden of showing that Smith's claims arose from functions that entitled her to State-agent immunity, the burden shifted to Smith to show that Buchanan "acted willfully, maliciously, fraudulently, in bad faith, or beyond [his or her] authority." Giambrone, 874 So. 2d at 1052. Smith

contends that Buchanan acted beyond her authority in dealing with B.J. (1) by making a placement decision without holding an ISP meeting and (2) by unilaterally blocking B.J.'s transfer to a less restrictive placement. A detailed discussion of this issue in not necessary because we have already concluded that incarceration in jail is not a placement made pursuant to DHR policies and that DHR policies fail to address the circumstances presented when a minor in the custody of DHR is incarcerated and in the physical custody of a law-enforcement agency. As with Alexander, Smith has failed to provide substantial evidence demonstrating that Buchanan acted beyond her authority by failing to discharge her duties pursuant to a detailed set of rules or regulations because no DHR policies existed addressing the circumstances with which Buchanan and the other defendants were faced in this case. Giambrone, 874 So. 2d at 1052.

c. Key

Because Key met his initial burden under Cranman of demonstrating that Smith's claims arose from a function that entitled him to State-agent immunity, the burden shifted to Smith to show that

Key "acted willfully, maliciously, fraudulently, in bad faith, or beyond [his or her] authority." Giambrone, 874 So. 2d at 1052. As discussed in detail above, Smith contends that Key and the other defendants acted beyond their authority in their dealings with B.J. Because we have thoroughly addressed those arguments above, we will not revisit them here. Suffice it to say that Smith has failed to provide substantial evidence demonstrating that Key acted beyond his authority by failing to discharge his duties pursuant to a detailed set of rules or regulations because no DHR policies existed addressing the circumstances with which Key and the other defendants were faced in this case. Giambrone, 874 So. 2d at 1052.

2. Willful Behavior

Smith argues that the defendants lost the protection afforded them by State-agent immunity because, he says, they acted willfully to injure B.J. by keeping him confined to jail where they knew he was being denied his rights (1) to the least restrictive placement possible, (2) to receive services under his ISP, (3) to his prescribed medications, (4) to treatment

from his physicians, (5) to participate in placement decisions, (6) to post bond, and (7) to an education.

Smith argues that the defendants were aware that B.J. was lacking the services required by his ISP while he was in jail, including receiving his medications, his therapy, and an education. Smith further contends that, by ignoring DHR policies on ISP meetings and least restrictive placements, each of the defendants made the decision to continue to deny B.J. the right to those services until such time as it was easier and more convenient for them to transfer him to a new placement. Smith further argues that, by not posting B.J.'s bond, by failing or refusing to hold an ISP meeting as required by DHR policies, and by failing to take actions to transfer B.J. to the Gateway facility or Mountain View, the defendants also denied B.J. his rights to participate in placement decisions, to post bond, and to be placed in the least restrictive placement possible. Smith concludes by arguing that, because the defendants had knowledge of B.J.'s situation in jail, every day that they delayed in posting his bond after other placements became available amounted to an injury that they willfully inflicted upon B.J.

In the context of State-agent immunity, "willfulness" has been defined as

> " 'the conscious doing of some act or omission of some duty under knowledge of existing conditions accompanied with a design or purpose to inflict injury.' Instruction 29.01, Alabama Pattern Jury Instructions-Civil (2d ed.1993); see also Roe v. Lewis, 416 So. 2d 750, 754 (Ala. 1982) (willfulness 'denotes an intention to cause an injury')."

Ex parte Nall, 879 So. 2d 541, 546 (Ala. 2003).

We initially note that the defendants did not deny B.J. his medications; it is undisputed that B.J.'s medications were sent with him to jail and that he continually refused to take them. Additionally, we note that the defendants did not deny B.J. the right to participate in his placement decision by failing to convene an ISP meeting because, as we have previously determined, DHR policies regarding ISP meetings were not applicable while B.J. was in jail and, if they were, it would have been difficult, if not impossible, to conduct an ISP meeting as prescribed by DHR policies. It is further undisputed that Key met with B.J. in jail on May 18, 2015, to discuss his placement possibilities.

The evidence further suggests that, once B.J. had been expelled from school for the pellet-gun incident and charged with assaulting the other Altapointe resident, but before he was actually arrested and placed in jail, Buchanan directed Key and Edge to make sure a plan was developed for B.J. in case he was asked to leave Altapointe and B.J.'s guardian ad litem was notified of the situation. Key and Edge then started making inquiries as to possible placements for B.J. at other facilities. Once B.J. was arrested pursuant to the outstanding warrant and placed in jail following a confrontation with Altapointe staff, the defendants continued their efforts to locate an appropriate placement for B.J. Once B.J.'s bond was set, the defendants immediately began working to post bond for B.J., enlisted the help of Smelley to contact a bail bondsman on B.J.'s behalf, and sought and obtained authorization from the State DHR to use B.J.'s personal funds to the pay the bond. Key also met with B.J. in jail to discuss placement possibilities and to obtain his approval for the use of his funds to pay the bond.

A number of facilities rejected B.J.'s applications for placement for various reasons, including his aggressive behavior and his prior bad

behavior at a particular facility. See note 5, supra. Both B.J.'s treating psychiatrist and his therapist recommended that B.J. be placed in a locked facility. B.J. was eventually accepted for placement at the Gateway facility; however, the Gateway facility is not a locked facility. Because B.J. had threatened to run away and had a history of leaving facilities, Buchanan suggested that the Gateway facility was not an appropriate facility for B.J.'s placement. B.J. was not placed at the Gateway facility and the search for an appropriate facility continued.

Mountain View ultimately agreed to accept B.J. on an emergency basis. Buchanan then submitted a request to the State DHR's Resource Management Division for emergency intensive placement of B.J. at Mountain View. That request was approved. Once B.J. had been accepted and approved for placement at Mountain View, the defendants began working on the logistics of getting B.J.'s bond paid and arranging transportation for him from Mobile to Gadsden. By that time, B.J. had been off his medications for several weeks and had not had any psychiatric counseling. Those factors, along with B.J.'s history of aggressive behavior and of lashing out at Cullman County DHR staff, led to the determination

by the defendants that B.J. would need to be transported by a law-enforcement officer from the jail in Mobile to Mountain View in Gadsden. The defendants were concerned that attempting to transport B.J. without law-enforcement assistance could result in B.J.'s running away, hurting himself, and/or hurting the person transporting him. Once B.J. posted his bond, he would have been immediately free to leave the jail on his own. Because B.J. had threatened to run away in the past and because Alexander felt that it would be unsafe for him to be left unattended should he be released before the law-enforcement officer arrived to transport him to Mountain View, the defendants sought to have a "hold" order placed on B.J. to ensure that he could not leave the jail without the law-enforcement officer. Key requested that Smelley obtain a "hold" order for B.J., but that request was denied by the court.

While the defendants were contemplating when and how to pay B.J.'s bail, Key recommended to the other defendants that B.J.'s bail not be paid without a hold order in place and further informed the other defendants that Smelley had recommended that B.J. stay in jail to ensure that he would be present for his court date, otherwise his case might be

"ruined." Taking those recommendations and relevant factors into consideration, Alexander made the discretionary decision to leave B.J. in jail until after his court date.

None of the actions taken by the defendants in dealing with B.J. indicate that any defendant made a conscious decision to act " 'with a design or purpose to inflict injury' " upon B.J. Ex parte Nall, 879 So. 2d at 546. The evidence indicates that each crucial decision made by the defendants -- i.e., the decisions not to place B.J. at the Gateway facility and not to post B.J.'s bond before his court date -- were made with B.J.'s best interests in mind after consideration of all the relevant recommendations and factors. Accordingly, Smith failed to provide substantial evidence demonstrating that the defendants acted willfully in dealing with B.J. and that, therefore, they were not entitled to the protection of State-agent immunity.

IV. Conclusion

We conclude that the defendants are entitled to State-agent immunity with respect to the claims asserted against them by Smith. Because we have concluded that the defendants are entitled to State-

agent immunity, we pretermit discussion of the remaining issues raised on appeal. Moreover, Smith asserted in his complaint a number of claims not raised or argued in his brief on appeal; arguments not raised in an appellant's initial brief are deemed waived. See Brown ex rel. Brown v. St. Vincent's Hosp., 899 So. 2d 227 (Ala. 2004).

AFFIRMED.

Shaw, Wise, Mendheim, Stewart, and Mitchell, JJ., concur.

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

Bryan and Sellers, JJ., concur in the result.

PARKER, Chief Justice (concurring in part and concurring in the result).

I concur in all of the main opinion except its holding that Debbie Green's testimony -- that jail was not a "placement" by the Department of Human Resources ("DHR") -- was entitled to agency deference. That testimony was a policy interpretation given in the context of litigation, not a preexisting promulgated interpretation.

Under the doctrine of agency deference, courts interpreting an administrative agency's policies and regulations give substantial deference to the agency's own interpretation if that interpretation is reasonable and not plainly erroneous. Ex parte Board of Sch. Comm'rs of Mobile Cnty., 824 So. 2d 759, 761 (Ala. 2001); cf. Auer v. Robbins, 519 U.S. 452, 461 (1997) (deferring to agency's interpretation of regulation because interpretation was not "plainly erroneous or inconsistent with the regulation"). A legitimate purpose of agency deference is to prevent regulated parties from being surprised by inconsistent interpretations of regulations. See generally Derek A. Woodman, Rethinking Auer Deference: Agency Regulations and Due Process Notice, 82 Geo. Wash. L. Rev. 1721 (2014) (demonstrating that due-process concerns underlie

United States Supreme Court's agency-deference jurisprudence). Thus, courts have refused to apply agency deference when, during litigation, an agency adopts an interpretation that differs from its previous interpretation. For instance, in Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), the United States Supreme Court denied deference to an agency's novel interpretation of a statute because it appeared to be a "convenient litigating position" that was "contrary to [the interpretation] advocated in past cases." Id. at 212-13.

However, this concern over agency litigation positions is not limited to inconsistent interpretations. It also extends to situations in which an agency interprets a regulation for the first time. The Supreme Court noted in Bowen: "We have never applied [deference] to agency litigation positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question." Id. at 212.[11] I

[11]Although Bowen involved an agency's interpretation of a statute, the same principle applies to an agency's interpretation of its own

agree with Bowen on this point. Courts should not defer to an agency's interpretation asserted for the first time during litigation, whether in argument by agency counsel or in testimony by agency representatives. As I have said before, for purposes of deference, "[an agency's] interpretation cannot be established by testimony of an individual staff member without some written pronouncement by the [agency]." Ex parte Hubbard, 321 So. 3d 70, 101 (Ala. 2020) (Parker, C.J., concurring specially).

Here, Green's testimony that jail was not a placement under DHR's policy was not entitled to deference. Although that testimony could properly provide context for understanding the policy, in the absence of a preexisting interpretation by DHR, a court must interpret the policy for itself.

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regulations. See Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 153-59 (2012) (declining to defer to new agency interpretation of a regulation made for first time in amicus briefs in prior cases).