Rel: March 11, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200825

Howard Cole Burton

v.

John Hawkins, Charles Savrda, and Mark Steltenpohl

Appeal from Calhoun Circuit Court
(CV-18-900410)

1200831

Caitlin Elizabeth Hood, as personal representative of the Estate of Nicholas Lawrence Hood, deceased

v.

John Hawkins, Mark Steltenpohl, and Charles Savrda

Appeal from Calhoun Circuit Court
(CV-18-900328)

BOLIN, Justice.

Howard Cole Burton and Caitlin Elizabeth Hood, as the personal representative of the estate of Nicholas Lawrence Hood, deceased ("the plaintiffs"), appeal from summary judgments entered by the Calhoun Circuit Court in favor of John Hawkins, Mark Steltenpohl, and Charles Savrda ("the Auburn defendants"), who are employees of Auburn University, on the plaintiffs' claims alleging negligence, wantonness, and, in one of the cases, wrongful death.

I. Facts and Procedural History

In May 2018, Howard Cole Burton ("Cole") and Nicholas Lawrence Hood ("Nicholas") were Auburn University students enrolled in the field-camp course offered by the Department of Geosciences. As part of that geology course, students participated in a series of field exercises, including traveling to geologically significant sites in Alabama. One of the geologically significant sites in Alabama is known as "the Gadsden site" and is located along a section of U.S. Highway 431 in Calhoun County

near Gadsden. Opportunities to study fresh rock exposures in Alabama are limited to outcrops along stream and river banks, ridge lines, and road cuts. Road cuts are the most accessible for the study of rock exposures. Those outcrops are found along roadways where highway construction has cut through mountainous regions, leaving fresh rock exposed. The Gadsden site provides a world-renowned example of a foreland-fold-and-thrust belt -- a series of mountainous foothills formed by the collision of ancient tectonic plates. It features a ridge line that runs perpendicular to the highway, with rock exposures on each side of the highway. The Gadsden site serves as a better location than other sites containing outcrops because of the availability of off-road parking and a relatively wide space adjacent to the highway. The highway in the area of the Gadsden site is curved and features changes in elevation.

The field exercise conducted at the Gadsden site as part of the field-camp course is known as "the Gadsden exercise." The Gadsden exercise was developed approximately 20 years ago by Auburn defendants Steltenpohl and Savrda, who are geology professors employed by Auburn University. The Gadsden exercise allows students to observe, describe,

identify, and measure the orientation of Paleozoic rocks exposed at the Gadsden site. As part of the Gadsden exercise, students are assigned the task of drawing a detailed field map of the area.

The field-camp course is taught by multiple faculty members who take on various roles in teaching and leading the field exercises. At the time of the events made the basis of these actions, Steltenpohl was the chair of the Department of Geosciences, but he was not involved as part of the teaching team for the field-camp course in 2018. Savrda, a former chair of the department and a former interim dean of the College of Science and Mathematics at Auburn University, served as a co-instructor of the 2018 field-camp course and was specifically in charge of teaching the first week of the course. Hawkins, who was then employed by Auburn University as a lecturer in the Department of Geosciences, was also a co-instructor for the field-camp course. According to Steltenpohl, Savrda and Hawkins shared authority with respect to teaching the field-camp course. Both Savrda and Hawkins answered to Steltenpohl, as the chair of the department. According to Hawkins, Savrda was in charge of formulating the safety plan for the Gadsden exercise. Before the field-

exercise portion of the course began, the faculty conducted an informational meeting to brief the students on safety and the specifics of what they could expect to encounter during the field exercises. At that meeting, the students were told to wear bright colors during field exercises for the purpose of staying visible to drivers when near a roadway and to hunters when in a wooded area. The course syllabus was prepared by Savrda, with input from Hawkins. There was nothing in the course syllabus or in other information provided by the students mandating the wearing of reflective safety vests while on field exercises.

On May 24, 2018, the students and faculty of the field-camp course traveled to the Gadsden site in vans owned by the Department of Geosciences. The group consisted of 18 students; Hawkins, who was in charge of the logistical aspects of the trip and was the faculty member principally in charge of supervising the Gadsden exercise on that particular day; Dr. Chong Ma, a post-doctoral fellow who was there to assist Hawkins in leading the field exercise; and 2 graduate teaching assistants. Steltenpohl and Savrda did not travel to the Gadsden site with the group.

When the group arrived at the Gadsden site, the vans were parked facing north and adjacent to Highway 431, a four-lane highway that runs north and south. After the group arrived, Hawkins gave a safety briefing, which included providing information about the boundaries of the work area, educational information, instructions for the students to work in pairs, and instructions on how to cross the highway safely when the students reached the boundary of the northbound mapping section of the area. After that briefing, one of the graduate teaching assistants informed Hawkins that she had found some reflective safety vests in one of the vans being used by the group. That was the first time Hawkins had ever seen the vests; in his several previous trips to the Gadsden site as a student and as an instructor of the field-camp course -- including when conducting the Gadsden exercise -- no reflective safety vests had ever been on site or utilized. Hawkins testified that he did not know where the vests had come from, but he offered the vests to the students and encouraged them to wear the vests. After the vests were handed out, several of the students complained that the vests were soiled and damp. Ultimately, neither Hawkins nor any of the students wore the reflective safety vests during

the field exercise. Hawkins did not require the students to wear the vests because there was nothing in the course syllabus requiring the use of reflective safety vests and because it had never been a practice or rule of the Department of Geosciences to require students to wear a reflective safety vest during the Gadsden exercise. Additionally, no safety cones, signs, or flags were placed along the section of the highway where the group was conducting the field exercise to alert oncoming traffic as to the presence of the group. Hawkins testified that if the department had provided cones, signs, or flags he would have placed them along the highway where the group was working.

After Hawkins gave the safety briefing, the students began working in pairs, headed in a northerly direction, collecting data along the road-cut outcrop, with Hawkins and other faculty supervising. That process continued for approximately two hours. Once the group reached the boundary of the northbound mapping section of the area, Hawkins again informed the group on how to safely cross the highway to get to the southbound mapping section of the area. The group crossed the highway in a controlled manner, with Hawkins crossing first and then waiting at

the crossing point until all the students were safely across. Once everyone was safely across the highway and ready to start on the southbound mapping section, the group separated into two subgroups, based upon the speed at which they were completing the exercise. The students began working on the field exercise approximately 12 to 15 feet from the edge of the highway. Around 3:30 p.m., Hawkins briefed the slower group about the planned departure time and about making sure the students had all the required data. Hawkins was standing on the highway at the time he was relating the information to that group.[1] Hawkins then turned to make his way southward to give the other group the same information.

At the same time Hawkins was standing on the edge of the highway, Jennifer Fulkerson was driving southbound on Highway 431 in an impaired state and under the influence of several prescription

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[1]Investigative notes summarizing the incident made the basis of these actions noted that Hawkins had stood in the "pullover area" of the highway watching for traffic to ensure that the students, who were working approximately 12-15 feet from the highway, did not come too close to the highway. Hawkins testified that he had expected the students to be paying attention to the work they were doing and that, if the students were focused on the rock outcrop, they would have their backs to the highway and traffic.

medications. Fulkerson's vehicle was initially traveling in the outside lane (the lane closest to where the students were working on the rock outcrop) and then merged into the inside lane (the lane closest to the median) as she approached the students. Fulkerson's driver's side tires ran off the highway into the median, causing Fulkerson to react and overcorrect. Fulkerson's vehicle then crossed both southbound lanes of the highway and struck Cole and Nicholas, who were studying the rock outcrop along the southbound side of the highway. Hawkins and others present called emergency-911 and attended to Cole and Nicholas at the scene. Both students were airlifted from the scene. Cole suffered severe injuries, and Nicholas died approximately one month after the accident from the injuries he had sustained.

In December 2018, a Calhoun County grand jury returned an indictment against Fulkerson for recklessly causing the death of Nicholas, for recklessly causing injury to Cole, and for recklessly endangering a passenger in her vehicle. The criminal case against Fulkerson was originally set for trial on March 3, 2020, but it was continued to a later date. The criminal case against Fulkerson appears to still be pending.

Chris O'Gwynn, the executive director of risk management for Auburn University, testified that the reflective safety vests found in the van had been made available to the students to mitigate the hazard of working along the highway by alerting traffic to their presence. O'Gwynn further testified that safety cones, flags, and lights would have mitigated the hazard to the students of working by the highway. Steltenpohl testified that he had always recommended that the students wear bright-colored clothing when they were working on the rock outcrop near the highway so that they would be visible to oncoming traffic.[2] However, Steltenpohl stated that he had never had the students wear reflective safety vests while working on the rock outcrop.

On June 18, 2018, Caitlin Hood, as the personal representative of Nicholas's estate, sued Fulkerson, among others, asserting various claims arising out of the accident. On July 25, 2018, Cole sued Fulkerson, also asserting claims arising out of the accident. On May 17, 2019, Cole

[2]Photographs taken of Cole and Nicholas at the Gadsden site on the day of the accident show that Cole was dressed in an orange long-sleeved shirt and was carrying an orange backpack and that Nicholas was dressed in a red sleeveless shirt and was carrying a dark-colored backpack.

amended his complaint to add Hawkins as a defendant, asserting claims of negligence and wantonness against him. On September 6, 2019, Hood amended her complaint to add Hawkins as a defendant, asserting claims of claims of negligence, wantonness, and wrongful death against him.

On January 24, 2020, Cole filed a second amended complaint to add Steltenpohl and Savrda as defendants, asserting claims of negligence and wantonness against them. On February 27, 2020, Hood filed a second amended complaint, also adding Steltenpohl and Savrda as defendants and asserting claims of negligence, wantonness, and wrongful death against them.[3]

On March 18, 2020, the circuit court entered an order consolidating the cases for the purpose of addressing the Auburn defendants' affirmative defense of State-agent immunity. On May 14, 2021, the Auburn defendants moved the circuit court for a summary judgment, arguing that they were entitled to State-agent immunity as to all claims asserted

[3]The plaintiffs filed additional amended complaints, asserting claims against various other defendants, including treating physicians, their medical practices, and pharmacies.

against them by the plaintiffs because, they asserted, they were acting in the course of their employment with the Department of Geosciences of Auburn University in educating and supervising students at the time of the accident. The circuit court set the hearing on the Auburn defendants' motion for a summary judgment for July 9, 2021.

On June 14, 2021, the plaintiffs moved the circuit court, pursuant to Rule 56(f), Ala. R. Civ. P., to defer ruling on the Auburn defendants' motion for a summary judgment until Fulkerson's criminal proceedings had concluded. The plaintiffs argued that they had requested Fulkerson's criminal file from the Calhoun County District Attorney's Office and had been informed that the file could not be turned over until the conclusion of the criminal prosecution. The plaintiffs also stated that they had been unable to take Fulkerson's deposition and that they would be able to only at the conclusion of the criminal proceedings. The circuit court reset the summary-judgment hearing for July 23, 2021.

On July 20, 2021, the plaintiffs each filed a response in opposition to the Auburn defendants' motion for a summary judgment, arguing that the Auburn defendants had acted beyond the scope of their authority and

were not entitled to State-agent immunity because (1) the Auburn defendants had not required the students, including Cole and Nicholas, to wear high-visibility safety apparel on the day of the accident, as required by § 6D.03 of the Manual on Uniform Traffic Control Devices ("the MUTCD"), a comprehensive document issued by the Federal Highway Administration ("the FHWA")[4] setting forth standards and guidelines for traffic-control devices that has been adopted by this state, and (2) the evidence showed that Hawkins had been standing on the paved shoulder at the edge of the southbound lanes of the highway at the time of the accident, in violation § 32-5A-215(b), Ala. Code 1975, which requires pedestrians to walk as far as practicable from the edge of the roadway.

Following a hearing, the circuit court, on July 30, 2021, entered in each case a summary judgment in favor of the Auburn defendants on the basis that they are entitled to State-agent immunity. On August 12, 2021,

[4]The FHWA supervises and oversees the construction and maintenance of this country's highways. The FHWA also provides research and technical assistance to state and local agencies for the improvement of highway safety.

the circuit court certified its judgments as final pursuant to Rule 54(b), Ala. R. Civ. P. The plaintiffs appeal.

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).
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> > " '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).'
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> "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. State-agent Immunity

In Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000), a plurality of this Court restated the law governing State-agent immunity. Although Cranman was a plurality decision, the restatement of the law governing State-agent immunity set forth in Cranman was subsequently adopted by a majority of this Court in Ex parte Butts, 775 So. 2d 173, 178 (Ala. 2000). In 2006, this Court, in Hollis v. City of Brighton, 950 So. 2d 300, 309 (Ala. 2006), modified category (4) of the Cranman restatement. Accordingly, the full Cranman restatement of the law governing State-agent immunity, as modified by Hollis, supra, is as follows:

> "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
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> "(1) formulating plans, policies, or designs; or
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> "(2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:
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> "(a) making administrative adjudications;
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> "(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, 950 So. 2d at 309).

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 Auburn Defendants' Initial Burden

The plaintiffs argue that the Auburn defendants failed to establish that the plaintiffs' claims arose from a function that would entitle the

Auburn defendants to State-agent immunity because, they say, the Auburn defendants never established what duties were imposed upon them by "statute, rule, or regulation" as required by category (5) of the Cranman restatement.

Auburn University is a public university and "an instrumentality of the state." Rigby v. Auburn Univ., 448 So. 2d 345, 347 (Ala. 1984). The Auburn University Board of Trustees has been organized to carry out the educational mission of the university. See Ala. Const. 1901 (Off. Recomp.), Art. XIV, § 266. Among other things, the board of trustees has been empowered "to organize [Auburn University] by appointing a corps of instructors, who shall be styled the faculty of the university and such other instructors and officers as the interest of the university may require; ... to prescribe courses of instruction ...; ... and to do whatever else it may deem best for promoting the interest of the university." § 16-48-4, Ala. Code 1975. This Court has repeatedly held that public educators are agents of the State and are entitled to State-agent immunity when the conduct made the basis of a claim asserted against an educator is based upon the educator's exercise of judgment in the "discharge of duties

imposed by statute, rule, or regulation in ... educating students." Ex parte Cranman, 792 So. 2d at 405. See also Moore v. Tyson, [Ms. 1190547, Feb. 19, 2021] __ So. 3d __ (Ala. 2021); Ex parte Blunt, 303 So. 3d 125 (Ala. 2020); Ex parte Trottman, 965 So. 2d 780 (Ala. 2007); and Ex parte Blankenship, 806 So. 2d 1186 (Ala. 2000). "Educating students includes not only classroom teaching, but also supervising and educating students in all aspects of the educational process." Ex parte Trottman, 965 So. 2d at 783.

It is undisputed that the Auburn defendants were acting in their official capacities as educators employed by Auburn University and were furthering the educational purpose of the university at the time of the accident made the basis of these actions. The field-camp course was a for-credit course offered by Auburn University for the express purpose of educating students. Steltenpohl was the chair of the Department of Geosciences and oversaw the overall administration of the department, including the field-camp course. Savrda and Hawkins served as co-instructors of the course at the time of the accident, and both contributed to formulating the course syllabus. Savrda formulated the

safety plan for the Gadsden exercise, and Hawkins led and supervised the field exercise on the day of the accident. Because the Auburn defendants have demonstrated that they were acting in their official capacities as educators employed by Auburn University and were engaging in administering, planning, executing, and supervising the field-camp course and the Gadsden exercise, we conclude that they met their initial burden of demonstrating that their conduct fell within category (5) of the Cranman restatement -- "exercising judgment in the discharge of duties imposed by statute, rule, or regulation in ... educating students."

B. The Plaintiffs' Burden

Once the Auburn defendants met their initial burden of showing that the plaintiffs' claims arose from functions that entitled the Auburn defendants to State-agent immunity, the burden shifted to the plaintiffs to show that the Auburn defendants "acted willfully, maliciously, fraudulently, in bad faith, or beyond their authority." Giambrone v. Douglas, 874 So. 2d 1047, 1052 (Ala. 2003). "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 at 178). The rules and/or regulations must be sufficiently detailed so as to " 'remove a State agent's judgment in the performance of required acts.' " Giambrone, 874 So. 2d at 1055 (quoting Ex parte Spivey, 846 So. 2d 322, 333 (Ala. 2002)).

The plaintiffs argue that the Auburn defendants acted beyond their authority in failing to require the students to wear high-visibility safety apparel during the Gadsden exercise in accordance with provisions contained in the MUTCD. The Auburn defendants argue that the MUTCD did not apply to their planning and overseeing the Gadsden exercise; therefore, the Auburn defendants contend that the plaintiffs cannot demonstrate that the Auburn defendants acted beyond their authority in failing to require the students to wear high-visibility safety apparel during the Gadsden exercise.

The FHWA has recognized that high visibility is one of the most important needs for workers who must perform tasks near moving vehicles or equipment. The need to be seen by those who drive or operate vehicles or equipment is recognized as a critical issue for a worker's safety

when that worker has to perform his or her duties in close proximity to moving vehicles and equipment. The sooner a worker in or near the path of travel is seen, the more time the operator of the vehicle or equipment has to avoid an accident. The FHWA recognized this fact and included language in the 2000 edition of the MUTCD to address this issue. The inclusion of the language in the 2000 edition of the MUTCD to address the issue led some agencies to adopt policies requiring workers to wear high-visibility vests or shirts on highway projects. The FHWA recognized the need for a more specific policy and included language to that effect in the 2003 edition of the MUTCD. In response to the language the FHWA included in the 2003 edition of the MUTCD, many agencies revised their policies to require their employees to wear high-visibility safety apparel at all times while working in close proximity to moving vehicles and equipment. Although the language included in the 2003 edition of the MUTCD was more specific than the language addressing this issue that had been included in the 2000 edition of the MUTCD, it nevertheless amounted to only a recommendation and not a requirement. Therefore,

some agencies did not incorporate the use of high-visibility safety apparel into their policies.

In November 2006, the FHWA issued a "final rule" on "worker visibility," which established a "policy for the use of high-visibility safety apparel" and which was to be codified at 23 C.F.R. Part 634. Worker Visibility, 71 Fed. Reg. 67,792, 67,792 (Nov. 24, 2006). In April 2006, the FHWA had initially proposed the following definition of "worker" under its proposed rule on worker visibility:

> "Workers means people on foot whose duties place them within the right-of-way of a Federal-aid highway, including highway construction and maintenance forces, survey crews, utility crews, responders to incidents within the highway right-of-way, law enforcement personnel and <u>any other personnel whose duties put them on the Federal-aid highway right-of-way</u>."

Worker Visibility, 71 Fed. Reg. 20,925, 20,930 (proposed April 24, 2006). During the notice and comment period preceding adoption of the final rule, the FHWA received comments from various agencies offering input as to the definition of "worker" under the rule. The Virginia Department of Transportation opposed the definition of "worker" encompassing both personnel being paid for duties and personnel volunteering for duties

along a highway, such as Adopt-A-Highway volunteers picking up litter. The FHWA responded by reiterating "that the rule applies to all workers, whether paid or volunteer, who are within the rights-of-way of Federal-aid highways." 71 Fed. Reg. at 67,796. The FHWA reasoned that "[t]he Adopt-A-Highway volunteers are exposed to traffic while doing the cleanup duties within the right-of-way and should be afforded the same measure of safety as other workers." Id.

The National Traffic Incident Management Coalition opposed the proposed definition of "worker," pointing out that the definition of "worker" in the proposed rule had the "unintended consequence of applying the rule to persons who [were] not intended to be covered, such as postal letter carriers, delivery truck drivers, etc.," and recommended specific language to redefine the term "worker," "including deleting the last phrase of the [proposed] definition, 'any other personnel whose duties put them on the Federal-aid highway right-of-way,' and substituting 'such as' for 'including.' " 71 Fed. Reg. at 67,796. The FHWA agreed to the suggested change and revised the definition. When the FHWA issued its

final rule on November 24, 2006, the definition of "worker," which was to be codified at 23 C.F.R. § 634.2, was as follows:

> "Workers means people on foot whose duties place them within the right-of-way of a Federal-aid highway, such as highway construction and maintenance forces, survey crews, utility crews, responders to incidents within the highway right-of-way, and law enforcement personnel when directing traffic, investigating crashes, and handling lane closures, obstructed roadways, and disasters within the right-of-way of a Federal-aid highway."

71 Fed. Reg. 67,800. The FHWA stated the worker-visibility rule, which was to be codified at 23 C.F.R. § 634.3, as follows:

> "All workers within the right-of-way of a Federal-aid highway who are exposed either to traffic (vehicles using the highway for purposes of travel) or to construction equipment within the work area shall wear high-visibility safety apparel."

71 Fed. Reg. at 67,800.

In December 2009, the FHWA issued another "final rule," revising the standards relating to traffic-control devices contained in all parts of the MUTCD for the stated purpose of expediting traffic, promoting uniformity, improving safety, and incorporating technology advances in traffic-control devices. See National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and

Highways; Revision, 74 Fed. Reg. 66,730 (Dec. 16, 2009)(to be codified at 23 C.F.R. Part 655). As part of that final rule, the FHWA revised the Code of Federal Regulations to delete Title 23, Part 634, relating to worker visibility, because those regulations had been incorporated into the MUTCD, which is applicable to all public roads. The FHWA explained that 23 C.F.R. Part 634 was no longer needed because its requirements for use of high-visibility safety apparel had been incorporated into the MUTCD in §§ 6D.03 and 6E.02, which are applicable to all roads open to public travel and not just "Federal-aid highways." See 74 Fed. Reg. at 66,830. Section 6D.03 of the MUTCD provides:

> "All workers, including emergency responders, within the right-of-way who are exposed either to traffic (vehicles using the highway for purposes of travel) or to work vehicles and construction equipment within the [temporary traffic-control] zone shall wear high-visibility safety apparel that meets the Performance Class 2 or 3 requirements of the [American National Standards Institute ('ANSI')/International Safety Equipment Association] 107-2004 publication entitled 'American National Standard for High-Visibility Safety Apparel and Headwear' ..., or equivalent revisions, and labeled as meeting the ANSI 107-2004 standard-performance for Class 2 or 3 risk exposure, except as provided in Paragraph 5. A person designated by the employer to be responsible for worker safety shall make the selection of the appropriate class of garment."

Section 1A.13 of the MUTCD defines a "worker" as

> "a person on foot whose duties place him or her within the right-of-way of a street, highway, or pathway, such as street, highway, or pathway construction and maintenance forces, survey crews, utility crews, responders to incidents within the street, highway, or pathway right-of-way, and law enforcement personnel when directing traffic, investigating crashes, and handling lane closures, obstructed roadways, and disasters within the right-of-way of a street, highway, or pathway."

Currently, 23 C.F.R. § 655.603 specifically recognizes the rules promulgated in the MUTCD as the national standards for all traffic-control devices on any road or highway open to public travel.

Section 32-5A-30, Ala. Code 1975, mandates that the Alabama Department of Transportation ("ALDOT") "adopt a manual and specifications for a uniform system of traffic-control devices" and that such system "shall correlate with and so far as possible conform to the system set forth in the most recent edition of the [MUTCD] and other standards issued or endorsed by the federal highway administrator." On April 10, 2018, ALDOT approved the following definition of "workers" in the context of requiring "workers" to wear high-visibility safety apparel:

> "[P]eople on foot whose duties place them within the right-of-way of a highway. Examples of 'Workers' include the following:
>
> > "Highway pre-construction, construction, and maintenance forces[;]
> >
> > "Survey and utility crews[;]
> >
> > "Non-Departmental responders to emergencies/incidents within the highway right-of-way[; and]
> >
> > "Law enforcement personnel when directing traffic, investigating crashes, and handling lane closures, obstructed roadways, or disasters within the right-of-way."

ALDOT, Guidelines for Operation: High Visibility Safety Apparel § 1-5.

In support of their position that the Auburn defendants acted beyond their authority in failing to require the use of high-visibility safety apparel during the field exercise, as the plaintiffs assert is required by the MUTCD, the plaintiffs presented the affidavit testimony of Tate Geren and Rowland Lamb. Geren is a licensed professional engineer with experience in the application and interpretation of the MUTCD. Geren testified that "every individual in this geological survey group, and specifically Professor John Hawkins, [was] a 'worker' as defined by

MUTCD Section 1A.13 'Definitions of Headings, Words, and Phrases in this Manual' and therefore should have been wearing 'high-visibility safety apparel' as required by MUTCD Section 6D.03 'Worker Safety Considerations.' " Geren further testified that the failure of Hawkins to wear high-visibility safety apparel was a clear violation of the MUTCD, which he was subject to as a worker, i.e., as "a person on foot whose duties place[d] him ... within the right-of-way" of the highway at the time of the accident. MUTCD, § 1A.13.

Lamb, is a licensed professional engineer who formerly worked as the Statewide Work Zone Traffic Control Engineer for the Florida Department of Transportation. Lamb testified that the MUTCD was "applicable to the work that was being conducted in the right-of-way by [the] individual workers" at the time of the accident. Lamb further testified that the MUTCD requires "any worker within the highway right of way to wear high visibility safety apparel" such as "an orange or fluorescent yellow/green vest," and that "John Hawkins and the individuals that were involved in the survey at the time of the subject incident were workers and were required to be wearing high visibility

safety apparel." Lamb also stated that the "lack of wearing high visibility safety apparel, such as a safety vest ..., was a complete breach of the rules and standards set forth in the MUTCD."

1. Applicability of the MUTCD to the Students

To determine whether the Auburn defendants acted beyond their authority by failing to require the students, including Cole and Nicholas, to wear high-visibility safety apparel during the Gadsden exercise in accordance with the MUTCD, this Court must determine whether the MUTCD was applicable to the students. The MUTCD is applicable to the students only if the students fall within the definition of "worker" as that term is defined in the MUTCD.[5]

In construing an administrative regulation, an appellate court must give the language used in the regulation its "natural, plain, ordinary, and commonly understood meaning, just as language in a statute. ... In

[5]The definitions of the term "worker" contained in the MUTCD and in the ALDOT Guidelines for Operation are essentially, although not exactly, identical. Because the definition of the term "worker" contained in the MUTCD was the one presented to, and relied upon by, the circuit court in the summary-judgment proceedings, that is the definition that this Court will reference in addressing this issue.

addition, however, one should construe such language by looking at the entire regulation, rather than at just an isolated clause or paragraph." Alabama Medicaid Agency v. Beverly Enters., 521 So. 2d 1329, 1332 (Ala. Civ. App. 1987).

The plaintiffs argue that the students were "workers" under the MUTCD on the day of the accident because, they say, the Gadsden exercise required the students to be on foot within the right-of-way of the highway while observing and mapping the rock outcrop. The plaintiffs contend that the students were, in "essence, part of a geological 'survey crew' " and were therefore required by the MUTCD to wear high-visibility safety apparel.

Alabama has long recognized the doctrine noscitur a sociis, which provides:

> " ' "[W]here general and specific words which are capable of analogous meaning are associated one with the other, they take color from each other, so that the general words are restricted to a sense analogous to that of the less general." ' Ex parte Emerald Mountain Expressway Bridge, L.L.C., 856 So. 2d 834, 842-43 (Ala. 2003) (quoting Winner v. Marion Cty. Comm'n, 415 So. 2d 1061, 1064 (Ala. 1982), and citing State v. Western Union Tel. Co., 196 Ala. 570, 72 So. 99 (1916)). The [doctrine] has been summarized this way: 'When several

> [words] ... are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar.' [Antonin] Scalia & [Bryan A.] Garner, [Reading Law: The Interpretation of Legal Texts] 195 [(Thomson/West 2012)]."

Ex parte City of Millbrook, 304 So. 3d 202, 205-06 (Ala. 2020)(plurality opinion). The FHWA's definition of "worker" contained in § 1A.13 of the MUTCD surrounds the phrase "survey crew" with the phrases "highway ... construction and maintenance forces," "responders to incidents within the ... highway ... right-of-way," and "law enforcement personnel when directing traffic, investigating crashes, and handling lane closures, obstructed roadways, and disasters within the right-of-way of a ... highway," all of which directly relate to the mission of the FHWA, i.e., the construction, maintenance, and safe operation of vehicles on this country's highways. Assigning similar meaning to the term "survey crew," this Court concludes that "survey crew" under the definition of "worker" in the MUTCD means a survey crew working within the scope of highway construction, highway maintenance, or improving the safe operation of vehicles on highways.

It is undisputed that the students were observing and mapping the rock outcrop as part of their course requirements for the field-camp course and that they were not working within the scope of highway construction, highway maintenance, or improving highway safety. Accordingly, the students do not fall with the definition of the term "worker" as that term is defined by the FHWA in the MUTCD. Because the students do not fall within the term "worker" under the MUTCD, the provisions of the MUTCD, including the requirement that "workers" wear high-visibility safety apparel, was not applicable to them at the time of the accident.

This Court's interpretation of the term "worker" is bolstered by the FHWA's deletion of the catchall phrase from an earlier proposed definition of the term "worker." On April 24, 2006, the FHWA proposed a definition of "worker" that contained the catchall phrase "any other personnel whose duties put them on the Federal-aid highway right-of-way." However, during the notice and comment period preceding final adoption of the definition, the FHWA received input from other agencies indicating that the inclusion of the catchall phrase would have the unintended consequence of applying to persons who were not intended to be covered

by the rule, such as postal workers and delivery drivers. The FHWA agreed to the change and deleted the catchall phrase from the definition of "worker" in its "final rule" issued on November 24, 2006. By removing the catchall phrase from the definition, the FHWA removed from the scope of the MUTCD those persons whose duties might place them within a highway right-of-way for reasons not related to highway construction, highway maintenance, or the safe operation of vehicles on highways. The removal of the catchall phrase from the definition of "worker" evidences the FHWA's intent to limit the scope of that term to cover only those persons engaged in activities with respect to highway construction, highway maintenance, or the safe operation of vehicles on highways.

The plaintiffs also rely upon the affidavits of Geren and Lamb to support their position that the MUTCD was applicable to the students and that the Auburn defendants acted beyond their authority in failing to require the students to wear high-visibility safety apparel during the Gadsden exercise. Geren and Lamb testified that the students fell within the definition of the term "worker" under the MUTCD and that, as

"workers," the students were required to wear high-visibility safety apparel while in the right-of-way of the highway.

> " 'Generally, a witness, whether expert or lay, cannot give an opinion that constitutes a legal conclusion or amounts to the application of a legal definition.' Hannah [v. Gregg, Bland & Berry, Inc.], 840 So. 2d [839,] 852 [(Ala. 2002)](citing Phillips v. Harris, 643 So. 2d 974, 976 (Ala. 1994), and C. Gamble, McElroy's Alabama Evidence § 128.07 (5th ed. 1996))."

DISA Indus., Inc. v. Bell, 272 So. 3d 142, 153 (Ala. 2018). Because the interpretation of the MUTCD -- specifically, the interpretation of the definition of the term "worker" -- is strictly a legal question for the courts, Geren's and Lamb's affidavits cannot be relied upon for the purpose of determining the scope or definition of the term.

Based on the foregoing, this Court concludes that the MUTCD was not applicable to the students and that the Auburn defendants did not act beyond their authority so as to remove them from the protection of State-agent immunity by failing to require the students wear high-visibility safety apparel during the Gadsden exercise.

2. Applicability of § 32-5A-215(b), Ala. Code 1975

The plaintiffs also argue that Hawkins acted beyond his authority by standing too close to the highway in violation of § 32-5A-215(b). Section 32-5A-215(b) provides: "Where a sidewalk is not available, any pedestrian walking along and upon a highway shall walk only on a shoulder, as far as practicable from the edge of the roadway." Hawkins testified that he was standing on the paved shoulder of the highway at the time of the accident. The plaintiffs contend that a question exists from which a jury could conclude that Hawkins was standing in close proximity to the highway and contributed to Fulkerson's being startled and losing control of her vehicle as she approached the group.

> "To invoke the beyond-the-scope-of-authority exception, a rule 'must be so specific that it removes the [S]tate agent's discretion and puts him on notice that certain, specific acts are unacceptable.' King v. Archer (No. 2:17-CV-174-KOB, Sept. 6, 2018) (N.D. Ala. 2018) (not reported in F. Supp. 3d)."

Odom v. Helms, 314 So. 3d 220, 229 (Ala. 2020). The rules and/or regulations must be sufficiently detailed so as to " 'remove a State agent's judgment in the performance of required acts.' " Giambrone, 874 So. 2d at 1055 (quoting Ex parte Spivey, 846 So. 2d at 333).

Section § 32-5A-215(b) directs pedestrians to walk on the shoulder of a road "as far as practicable from the edge of the roadway." That language provides a pedestrian discretion to walk as far as is practicable -- depending on the particular circumstances of the situation -- from the roadway. See Carpenter v. Tillman, 948 So. 2d 536, 539 (Ala. 2006) (holding that language contained in a statute that directed the Alabama Department of Corrections ("the DOC") to inspect jails " 'at least twice each year, if practicable, and as often as it may deem necessary' " required the DOC to exercise judgment as to when and how often it is practicable and necessary to inspect the jails, as required by the statute, and determining that a decision to inspect the jails when practicable would necessarily involve an exercise of judgment by employees of the DOC such that those DOC employees would be immune from suit on claims arising from the manner in which they exercised that judgment).

Hawkins was engaged in observing and instructing two groups of students as they measured and mapped the rock outcrop. Hawkins moved between the two groups of students while observing and instructing the students. Assuming that § 32-5A-215(b) applied to Hawkins, the use of

the term "practicable" in the statute vested Hawkins with the discretion to determine where to stand on the shoulder of the highway as he supervised the students. The decision to stand "as far as practicable from the edge of the roadway" would necessarily involve the exercise of judgment on the part of Hawkins. Accordingly, Hawkins did not act beyond his authority so as to remove him from the protection of State-agent immunity when he stood on the shoulder of the highway while directing the students under his supervision.

IV. Rule 56(f), Ala. R. Civ. P.

The plaintiffs argue that the circuit court erred in denying their motion filed pursuant to Rule 56(f), Ala. R. Civ. P. Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that the party cannot, for reasons stated, present by affidavit facts essential to justify the party's opposition, the court may deny the motion for summary judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

This Court has stated:

> "As we noted in Scrushy v. Tucker, 955 So. 2d 988, 1007 (Ala. 2006), ' "[s]uch an affidavit should state with specificity why the opposing evidence is not presently available and should

> state, as specifically as possible, what future actions are contemplated to discover and present the opposing evidence." ' (Citing Committee Comments to August 1, 1992, Amendment to Rule 56(c) and Rule 56(f).) As the rule indicates, whether to deny a motion for summary judgment or to grant a continuance to allow discovery to proceed is discretionary with the trial court."

Fogarty v. Southworth, 953 So. 2d 1225, 1229 (Ala. 2006).

The plaintiffs argue that they made a showing by affidavit filed pursuant to Rule 56(f) that the deposition of Fulkerson was crucial to their case and that the deposition could not be taken while Fulkerson's criminal case was still pending. The plaintiffs state that they specifically asserted in the affidavit that, "without further discovery and Fulkerson's deposition, [they could not] put forth the facts necessary and essential to opposing [the Auburn] Defendants' motion."

As the plaintiffs explain, they sought a continuance of the summary-judgment hearing on the issue of State-agent immunity until they had access to Fulkerson's criminal file and an opportunity to depose her. Any information that the plaintiffs could have obtained from Fulkerson would have had no bearing on the circuit court's determination of the Auburn defendants' assertion of State-agent immunity -- the sole subject of their

motion for a summary judgment. The only issue before the circuit court was whether the Auburn defendants were entitled to the State-agent immunity. In responding to the Auburn defendants' motion for a summary judgment, the plaintiffs had to show that the Auburn defendants acted beyond their authority in administering, planning, executing, and supervising the Gadsden exercise, an issue that depends solely on whether there was an applicable, detailed rule that removed the Auburn defendants' ability to exercise discretion. Any potential evidence obtained from Fulkerson would not have been "essential" to the determination of whether the Auburn defendants acted beyond their authority by failing to follow the MUTCD or of whether Hawkins acted beyond his authority in failing to comply with § 32-5A-215(b). Accordingly, we cannot say that the circuit court exceeded its discretion in denying the plaintiffs' Rule 56(f) motion.

V. Conclusion

We conclude that the Auburn defendants are entitled to State-agent immunity as to the claims asserted against them by the plaintiffs, and,

thus, we affirm the summary judgments entered by the circuit court in their favor.

1200825 -- AFFIRMED.

1200831 -- AFFIRMED.

Parker, C.J., and Wise, Sellers, and Stewart, JJ., concur.