REL: November 15, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1170988

Ex parte Kristi Kelley

PETITION FOR WRIT OF MANDAMUS

(In re: Arnold Curry, as administrator of the Estate of A.C., a deceased minor

v.

Kristi Kelley et al.)

1170995

Ex parte Becky Van Gilder

PETITION FOR WRIT OF MANDAMUS

(In re: Arnold Curry, as administrator of the Estate of A.C., a deceased minor

v.

Kristi Kelley et al.)

(Montgomery Circuit Court, CV-15-900134)

PER CURIAM.

This case addresses whether a foster-care provider and a caseworker for the Department of Human Resources ("DHR") are immune from liability. Arnold Curry filed this wrongful-death action against Becky Van Gilder, a licensed foster-care provider, and Kristi Kelley,[1] a caseworker with the Montgomery County DHR office, seeking damages for the death of his nine-year-old son A.C., who died of complications related to sickle-cell anemia after DHR removed him from Curry's home. Curry alleged that Van Gilder had acted negligently and wantonly in caring for A.C. and that Kelley had acted negligently and wantonly in managing A.C.'s case. Van Gilder and Kelley separately asked the Montgomery Circuit Court to

[1]In the materials before this Court, Kelley's first name is spelled various ways, including "Kristi," "Kristie," "Christy," and "Christie." Her last name is also sometimes spelled "Kelly." In this opinion, we use the spelling used by Kelley in an affidavit she submitted to the trial court.

enter summary judgments in their favor, denying liability and arguing that they were protected by immunity based on their respective roles as a foster parent and a DHR caseworker. The trial court denied their motions. They have separately petitioned this Court for writs of mandamus directing the trial court to vacate its previous order denying their summary-judgment motions and to enter a new order granting those motions. We have consolidated the petitions for the purpose of issuing one opinion. We grant the petitions in part and deny them in part.

Facts and Procedural History

On February 25, 2013, DHR removed A.C. and his two siblings from their home after receiving reports from officials at the children's school and a neighbor of the family indicating that Curry was physically abusing the children. DHR placed the children with Van Gilder and, after conducting an investigation and substantiating the allegations of abuse, DHR obtained legal custody of the children. Kelley was assigned to be the caseworker for the children and, in accordance with DHR policy, drafted the initial Individualized

Service Plan ("ISP"), setting forth DHR's plans and goals for the family.

Van Gilder was told at placement that A.C. suffered from sickle-cell anemia, and she subsequently took him to appointments with his primary-care physician and received instruction from the Sickle Cell Center associated with the University of Alabama at Birmingham Hospital. Van Gilder states that she was told it was important for A.C. to stay hydrated and to rest when he was tired but that he could otherwise engage in any activities that interested him. She also states that she was told to give him ibuprofen or acetaminophen if he complained of pain but that, if that medication did not alleviate his pain, if he complained of chest pain, or if he had a body temperature of over 101 degrees, she should seek emergency medical treatment. Kelley also attended at least some of A.C.'s medical appointments and visited the children on at least a monthly basis over the next several months.

On May 18, 2013, Van Gilder's grandmother died, and she made plans to attend the funeral, which was out of state. Van Gilder arranged for Susan Moss, a friend and another licensed

foster parent, to care for A.C. and his siblings while she was away.[2] Van Gilder states that she told Moss about A.C.'s condition and care and that, when she left the children with Moss on May 24, 2013, she also left pain medication for A.C. in case it was needed. That evening, A.C. told Moss that he had a stomachache; he subsequently felt better and no medication was administered. On May 25, 2013, A.C. again reported that he had a stomachache. Moss gave him acetaminophen and, after taking a nap, A.C. said he felt better. Van Gilder states that she communicated with Moss and A.C. later that day and that they both told her he was feeling better.

A.C. did not complain of any discomfort over the next two days. On May 28, 2013, he woke up with a sore throat and asked for a Sprite soft drink. Shortly afterward, Van Gilder retrieved him and his siblings from Moss's home; A.C. apparently made no further complaints before going to bed that night. After A.C. went to bed, one of his siblings alerted Van Gilder that A.C. was in pain and was crying. Van Gilder

[2]Van Gilder states that she told Kelley of the substitute-care arrangements, but Kelley states that she was not made aware of the arrangements.

checked on him, and, when he complained of chest pain, she took him to the emergency room. A.C. was admitted to the hospital. Van Gilder notified Kelley of his hospitalization the next morning, and Kelley went to the hospital and visited him.

A.C. initially appeared to be in stable condition, but on May 30, 2013, his condition deteriorated, and the decision was made to transfer him to a hospital in Birmingham because he was showing symptoms of acute chest syndrome and hypoxia, which are complications of sickle-cell anemia. Van Gilder accompanied A.C. in the ambulance to Birmingham, but before A.C. could be given a needed blood transfusion, he suffered respiratory failure and died.

On January 26, 2015, Curry, initiated this wrongful-death action against Van Gilder and Kelley, alleging that their negligence and wantonness caused A.C.'s death.[3] The essence

[3]The trial court was aware of the fact that A.C. had been removed from Curry's custody before the events leading to this petition because of alleged physical abuse. In its order denying the petitioners' motions for summary judgment, the trial court indicated that it would consider at a later time whether, "as a matter of equity or law," Curry may be entitled to receive any settlement proceeds or to be awarded any portion of any damages. Those issues are not before this Court on these mandamus petitions and remain outstanding below.

of Curry's complaint was that Van Gilder and Kelley failed to act in accordance with DHR policies and guidelines and that their failure to do so proximately caused A.C.'s death. Curry alleged that Van Gilder had been provided guidelines for caring for a child with sickle-cell anemia and that she violated those guidelines by not telling Moss to take A.C. to the hospital after being apprised that he had complained of stomach pain on consecutive days. Curry alleged that Kelley failed to properly manage A.C.'s case by not educating herself about A.C.'s condition and by failing to ensure that necessary information regarding his care was shared with all interested parties, including the different divisions of DHR, Van Gilder, and Moss. Curry further alleged that, if Kelley had acted properly, A.C. would have been classified as "medically fragile" and, under DHR policy, his caretakers would have been subject to additional training and oversight.

On November 17, 2017, Van Gilder and Kelley filed separate motions for a summary judgment. Van Gilder argued in her motion that the doctrine of parental immunity barred any claim against her based on negligence and that Curry had identified no evidence indicating that she had acted wantonly

in caring for A.C. In her summary-judgment motion, Kelley argued that she was entitled to parental immunity as well as State-agent immunity. Kelley further argued that Curry had identified no act or omission on her part that had proximately caused A.C.'s death. On February 1, 2018, the trial court conducted a hearing on the motions for summary judgment. Several months later, the trial court denied both motions without stating its rationale for doing so. Van Gilder and Kelley subsequently filed separate petitions for the writ of mandamus with this Court.

Standard of Review

> "A writ of mandamus is a
>
> > "'drastic and extraordinary writ that will be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.'
>
> "Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993)."

Ex parte Wood, 852 So. 2d 705, 708 (Ala. 2002). This Court generally will not entertain a mandamus challenge to a trial court's denial of a summary-judgment motion, but we make an

exception to this rule when a trial court has denied a summary-judgment motion that is "grounded on a claim of immunity." Id. See also Ex parte Spurgeon, 82 So. 3d 663, 665 (Ala. 2011) (considering a petition for a writ of mandamus filed by foster parents arguing that they were entitled to a summary judgment on the basis of the doctrines of parental immunity, State immunity, and State-agent immunity); Ex parte Sumerlin, 26 So. 3d 1178, 1183 (Ala. 2009) (considering a petition for a writ of mandamus filed by a DHR employee arguing that a summary judgment should have been entered in her favor based on the doctrine of State-agent immunity). Because one of the purposes of immunity is to spare a defendant from the demands associated with defending a drawn-out lawsuit, a defendant wrongfully denied immunity protection has no adequate remedy if the case is erroneously permitted to go to trial. Ryan v. Hayes, 831 So. 2d 21, 31-32 (Ala. 2002).

We emphasize, however, that this Court will consider such petitions only to the extent they challenge the trial court's determination of immunity issues. This Court will not consider secondary arguments about the appropriateness of summary judgment on other grounds or review the trial court's

conclusions on other issues decided at the same time as the immunity issue. See Spurgeon, 82 So. 3d at 670 (stating that this Court would not consider the trial court's rulings on matters not "relevant to the resolution of the issues of the applicability of parental, State, or State-agent immunity" because those rulings were "beyond the proper scope of mandamus review"); Ex parte Hudson, 866 So. 2d 1115, 1120 (Ala. 2003) (explaining that on mandamus review of a denial of a summary-judgment motion grounded on immunity "[w]e confine our interlocutory review to matters germane to the issue of immunity," and that "[m]atters relevant to the merits of the underlying tort claim, such as issues of duty or causation, are best left to the trial court").

As further explained in Wood, the standard of review we apply on a petition for a writ of mandamus to a trial court's denial of a motion seeking a summary judgment on immunity grounds is the same standard of review we would apply in any appeal reviewing a trial court's ruling on a motion for a summary judgment:

> "If there is a genuine issue as to any material fact on the question whether the movant is entitled to immunity, then the moving party is not entitled to a summary judgment. Rule 56, Ala. R. Civ. P. In determining whether there is [an issue of] material

> fact on the question whether the movant is entitled to immunity, courts, both trial and appellate, must view the record in the light most favorable to the nonmoving party, accord the nonmoving party all reasonable favorable inferences from the evidence, and resolve all reasonable doubts against the moving party, considering only the evidence before the trial court at the time it denied the motion for a summary judgment. Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000)."

852 So. 2d at 708.

Van Gilder's Petition (no. 1170995)

Van Gilder argues first that the trial court erred by not entering a summary judgment in her favor on Curry's wrongful-death claim to the extent that claim is premised on alleged negligence. She bases her argument on the doctrine of parental immunity, which she says bars negligence-based claims against a foster parent. In support of her argument, Van Gilder cites multiple cases decided by this Court, including Spurgeon, in which we stated the rule that "in Alabama the parental-immunity doctrine extends to foster parents with regard to simple negligence claims." 82 So. 3d at 668. Curry concedes that Van Gilder's argument is meritorious, and he does not oppose this Court's granting her petition with regard to the negligence allegations in his complaint.

Curry argues, however, that to the extent his wrongful-death claim is based on wantonness, it is not barred by the doctrine of parental immunity. Van Gilder agrees. The parties' view of the scope of parental immunity is in accord with the applicable law, which we explained in Spurgeon:

> "The [foster parents] do not argue that they are entitled to parental immunity on the wantonness claims, and, indeed, our decision in Mitchell [v. Davis, 598 So. 2d 801 (Ala. 1992)], makes it clear that such claims against foster parents are not barred by the parental-immunity doctrine. Mitchell, 598 So. 2d at 805–06 ('[T]he trial court must determine whether the acts by the defendants alleged to give rise to liability would amount only to simple negligence or would rise to the level of wantonness.... If the alleged acts amounted to wantonness ..., then the wantonness claim by the foster children would not be barred by the parental immunity doctrine.')."

82 So. 3d at 669. Thus, there is no question that the doctrine of parental immunity bars Curry's wrongful-death claim against Van Gilder to the extent that claim is based on alleged negligence, but not to the extent it is based on alleged wantonness.

Despite the fact that the parental-immunity doctrine is inapplicable to wantonness, Van Gilder argues that a summary judgment should have been entered in her favor on Curry's entire claim, because, she says, Curry has not put forth

substantial evidence to support his wantonness allegation. Van Gilder's argument, however, is not appropriate for mandamus review. As we explained when discussing the standard of review, our mandamus review in cases such as this is limited to determining only whether immunity applies. The law is clear that foster parents are entitled to parental immunity with regard to negligence-based claims but not with regard to wantonness-based claims, and we decline to look beyond that principle in this case. Whether there is substantial evidence to support Curry's allegation of wantonness is a decision for the trial court to make, and its decision is not reviewable at this stage of the litigation by mandamus petition. See Ex parte Hudson, 866 So. 2d at 1120 ("Matters relevant to the merits of the underlying tort claim ... are best left to the trial court ...."); Mitchell v. Davis, 598 So. 2d 801, 805-06 (Ala. 1992) (explaining that in determining the applicability of the doctrine of parental immunity the trial court must determine whether the acts of the defendant foster parents constitute negligence or rise to the level of wantonness).

In summary, Van Gilder has established that Curry's wrongful-death claim is barred by the doctrine of parental

immunity to the extent the claim is based on her alleged negligence. The doctrine of parental immunity, however, does not shield Van Gilder from suit to the extent the wrongful-death claim is based on alleged wantonness. Her petition for the writ of mandamus is therefore granted in part and denied in part.

Kelley's Petition (no. 1170988)

Kelley first argues that, as a DHR caseworker, she too has parental immunity. In support of her argument, she cites Mitchell, in which this Court, after extending the doctrine of parental immunity to foster parents, explained:

> "The parental immunity doctrine should also be available, in a qualified form, to the commissioner [of DHR], the [Barbour County DHR], the [Barbour County DHR] director, and the case supervisor charged with the care and custody of foster children. That is, they also should be able to assert the parental immunity doctrine as a defense to claims of simple negligence by foster children. Alabama has already concluded that DHR stands in loco parentis to children of unfit parents. [Citations omitted]. As DHR stands in loco parentis, so does the commissioner [of DHR], the [Barbour County DHR], the [Barbour County DHR] director, and the case supervisor."

598 So. 2d at 805. It is undisputed that DHR had legal custody of A.C. at the time of his death. As A.C.'s caseworker, Kelley states that she arranged and attended his

medical appointments and helped determine what activities were appropriate for him based on his health -- tasks that would traditionally be performed by parents. Kelley argues that the logic of the Mitchell Court's decision to extend parental immunity to DHR employees remains applicable, that this Court has not abrogated that holding, and that parental immunity therefore bars the claim against her.

In response, Curry argues that Mitchell's holding extending parental immunity to DHR employees is obsolete. He notes that Kelley has not cited a single post-Mitchell case in which this Court has held that a DHR employee was entitled to parental immunity, even though this Court has regularly decided appeals involving DHR employees who have been sued in their individual capacities. See, e.g., Ex parte Watson, 37 So. 3d 752, 757-65 (Ala. 2009); Sumerlin, 26 So. 3d at 1183-91; Gowens v. Tys. S., 948 So. 2d 513, 522-27 (Ala. 2006). Curry observes that those cases have instead focused exclusively on State-agent immunity when considering the liability of DHR employees, and he urges us to decide whether Kelley is entitled to immunity solely under the State-agent

immunity doctrine set forth in Ex parte Cranman, 792 So. 2d 392, 405 (Ala. 2000).[4] We disagree.

The absence of post-Cranman caselaw applying the Mitchell parental-immunity shield to DHR employees does not mean that Mitchell has been silently overruled. Curry is correct that, since Cranman, this Court's opinions analyze the immunity afforded DHR employees sued in their individual capacities exclusively by reference to the test restated in Cranman. But the doctrine of parental immunity undisputedly did not apply in most of those cases. Mitchell stated that, because DHR stands in loco parentis to foster children, DHR employees "should be able to assert the parental immunity doctrine as a defense to claims of simple negligence by foster children." 598 So. 2d at 805 (emphasis added). None of the cases Curry cites featured claims filed on behalf of foster children in DHR custody. Rather, the factual underpinning of the claims in Watson, Sumerlin, and Gowens was that DHR employees should have removed children from their parents and placed them in

[4]"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 Rizk, 791 So. 2d 911 (Ala. 2000), and Ex parte Butts, 775 So. 2d 173 (Ala. 2000)." Ex parte Yancey, 8 So. 3d 299, 305 (Ala. 2008).

DHR custody before they suffered their injuries. Because those cases did not concern foster children who were injured while in the custody of DHR, Mitchell did not apply. Therefore, the failure of the DHR employees in Watson, Sumerlin, and Gowens to assert parental immunity, and the corresponding absence of any discussion of Mitchell in those cases, cannot be read as an implicit recognition that the doctrine of parental immunity no longer applies to DHR employees.

There are other reasons why this Court has not discussed, post-Cranman, how parental immunity applies to DHR employees. First, it is well settled that this Court will not reverse a trial court's judgment based on arguments not made to this Court. Maloof v. John Hancock Life Ins. Co., 60 So. 3d 263, 268 (Ala. 2010). Thus, if a DHR employee seeks this Court's review of a trial court's decision denying him or her immunity -- but argues only that he or she was entitled to State-agent immunity -- this Court will not go out of its way to analyze whether parental immunity might also have applied. For example, in Watson, this Court exclusively applied the Cranman test for State-agent immunity because that was the only basis

upon which the defendant DHR employees had sought immunity. 37 So. 3d at 757.

Second, this Court will not address every applicable issue in a case if the resolution of another issue makes doing so unnecessary. Ex parte McClintock, 255 So. 3d 180 (Ala. 2017), for example, is similar to this case; it involved claims against DHR employees alleging that the negligence and wantonness of those employees caused the death of a child who had been removed from his parent's custody and placed in foster care. The DHR employees moved for a summary judgment, arguing "that they were entitled to immunity on several bases." 255 So. 3d at 182. After the trial court denied their summary-judgment motion, the DHR employees petitioned this Court for mandamus relief. This Court granted their petition and issued the requested writ, holding that the DHR employees had established that they were entitled to "a summary judgment in their favor based on State-agent immunity under Ex parte Cranman." McClintock, 255 So. 3d at 186. Because State-agent immunity was appropriate, it was unnecessary for this Court to discuss any other basis upon which the DHR employees might have been entitled to immunity.

In sum, the fact that this Court has not cited Mitchell in the post-Cranman era for the proposition that DHR employees are entitled to parental immunity should not be taken to mean that this Court has retreated from that aspect of Mitchell. See Ex parte James, 836 So. 2d 813, 818 (Ala. 2002) ("Arguments based on what courts do not say, logically speaking, are generally unreliable and should not be favored by the judiciary ...."). To the contrary, Mitchell continues to apply, and Curry's wrongful-death claim against Kelley is barred by the doctrine of parental immunity to the extent the claim is based on allegations of negligence.[5] The doctrine of parental immunity does not, however, bar Curry's claim based on wantonness. See Spurgeon, 82 So. 3d at 669 ("If the alleged acts amounted to wantonness ..., then the wantonness claim by the foster children would not be barred by the parental immunity doctrine."). Consequently, we next consider Kelley's argument that she is entitled to State-agent

[5]We further note that Curry has not asked us to overrule Mitchell, nor has he offered any reasons why it should be overruled. Instead, he operates as if it has already been overruled. As we have previously stated: "[T]his Court has long recognized a disinclination to overrule existing caselaw in the absence of either a specific request to do so or an adequate argument asking that we do so." Ex parte McKinney, 87 So. 3d 502, 509 n. 7 (Ala. 2011).

immunity. See McClintock, 255 So. 3d at 182 (holding that State-agent immunity barred "claims of wrongful death of a minor, negligence, wantonness, and negligent/wanton training and supervision" asserted against DHR employees).

Kelley contends that she has established a claim to State-agent immunity under the third ground of the test set forth in Cranman:

> "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
>
> "....
>
> "(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 ...."

792 So. 2d at 405. She asserts that all the actions she took with respect to A.C. were performed in accordance with DHR rules and regulations and that Curry should be prevented from second-guessing the discretionary decisions that she made. She further asserts that she was highly involved in A.C.'s case, visiting him and his siblings on at least a monthly basis, and that there is no evidence that A.C.'s death was caused by any act or omission on her part. Thus, she argues,

the trial court erred by not entering a summary judgment in her favor on the basis of State-agent immunity, and this Court should now issue a writ directing the trial court to do so.

We agree that, under Cranman, Kelley has a presumptive claim to State-agent immunity. See Ex parte Terry, 239 So. 3d 1125, 1130-31 (Ala. 2017) (agreeing that "as a social worker with DHR, [the petitioner] is entitled to State-agent immunity under category (3) of the Cranman restatement because ... the actions for which she is being sued involve her discharging duties pursuant to DHR policy and procedures"). Our inquiry is not complete, however, because Cranman also provides that, despite the general availability of State-agent immunity, "a State agent shall not be immune from civil liability in his or her personal capacity ... 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. In Ex parte Estate of Reynolds, 946 So. 2d 450, 452 (Ala. 2006), this Court explained the burden-shifting analysis that courts must apply:

> "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 [v.

> Douglas], 874 So. 2d [1046,] 1052 [(Ala. 2003)]; 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))."

Curry does not dispute that Kelley met her initial burden, but he argues that State-agent immunity is not available to her because, he says, she acted beyond the scope of her authority. Curry contends that Kelley generally failed to learn about A.C.'s condition and failed to properly share information about his case with all the DHR employees and caretakers involved in A.C.'s case. He also contends that Kelley failed to follow specific, detailed rules set forth in the DHR manual concerning ISPs. Curry argues that those failures make State-agent immunity inappropriate. See Gowens, 948 So. 2d at 527 (stating that the rules in the DHR manual "are precisely the sort of 'detailed rules or regulations' that State agents cannot ignore, except at their peril"); Giambrone v. Douglas, 874 So. 2d 1046, 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 ....'" (quoting Ex parte Butts, 775 So. 2d 173, 178 (Ala. 2000))). But see Watson, 37 So. 3d at 766 (Murdock, J., concurring in part and dissenting in part) (expressing concern that "we are moving to a place in our law in which we consider any violation of any regulation and any violation of a memorandum of instruction (or for that matter even an oral instruction) from a supervisor to deprive an employee of otherwise applicable State-agent immunity on the ground that he or she is acting 'beyond his or her authority'"). Therefore, it is necessary to review DHR's rules regarding ISPs to determine if Kelley was in compliance.

A written copy of DHR's ISP policy was submitted to the trial court and has been submitted to this Court. That document describes its purpose as follows:

> "This policy provides guidelines and procedures related to the individualized service planning process which results in the development of an individualized service plan (ISP). The ISP, developed in partnership with the child and family planning team, is the actual case plan that is designed to achieve the desired case outcome. It also serves as an organizer of case activity and a tool for communicating with the individuals involved with the children and family."

The ISP policy provides that "[i]nitial ISPs must be completed within 30 days of when the determination is made that the case will be opened for on-going child welfare services." It is undisputed that Kelley completed an initial ISP for A.C.; that ISP has been submitted to this Court.

The ISP policy also states in bold print that "[i]nitial ISPs will be reviewed at a meeting of the child and family planning team that is held within thirty (30) days of the date of the initial ISP." The ISP policy explains the twofold purpose of this review:

> "(1) to determine if implementation is occurring as planned, and if not, what revisions need to be made; and
>
> "(2) to complete a more thorough ISP addressing additional needs which have been identified and prioritized during the assessment process following the initial ISP."

The ISP policy provides that "[a] more thorough ISP includes, at a minimum, addressing strengths and needs for the children and family in the physical/medical, behavioral, emotional, educational, and social (for children in out-of-home care) areas of family functioning." Curry argued in his response to Kelley's motion for a summary judgment that Kelley never performed this required, more thorough 30-day ISP review and,

in fact, never updated A.C.'s initial ISP to include information about his sickle-cell-anemia care and treatment. For that reason, Curry argues, the details of A.C.'s care and treatment were not available to other interested parties and could not be evaluated by Kelley's supervisor. Curry further argues that, if Kelley had been properly involved and had completed these tasks, she would have ensured that A.C. was designated a "medically fragile" child.

Kelley refutes Curry's assertion that she never performed the required 30-day ISP review. In a November 2017 affidavit, Kelley states that she performed "a segmented ISP review" at a doctor's appointment for A.C. on March 21, 2013.[6] She states that Van Gilder, Curry, and A.C.'s primary-care physician were present at the review, that she concluded at that time that the initial ISP was thorough, and that no goals in that ISP needed to be changed. Kelley had previously stated in an October 2016 deposition that she was not required to document the 30-day ISP review. Thus, Kelley argues, she complied with DHR's ISP policy, and any concerns Curry has

[6]The ISP policy explains that segmenting "means bringing some of the team members together for a meeting, rather than assembling the entire team."

raised about decisions that she made regarding A.C.'s ISP are impermissible attempts to second-guess those decisions.

Curry maintains that Kelley did not abide by DHR's rules regarding the 30-day ISP review and argues that she is now attempting to retroactively label A.C.'s March 21, 2013, doctor's appointment as an ISP review. He further argues that Kelley's position that the initial ISP only has to be "reviewed" by the 30-day mark, and not updated and documented, is contrary to the written guidelines in DHR's ISP policy, which indicate that one of the purposes of the 30-day ISP review is "to complete a more thorough ISP." In support of his argument, Curry notes that the ISP policy provides that all interested parties, or "team members," are to be given "[s]ufficient advance notice ... of each ISP meeting ... to allow them to prepare for and participate in the meetings." Moreover, the method of notification is to be documented "on the ISP form," and all revisions and updates to the initial ISP are to be completed within 10 days of the ISP meeting so that the ISP can be distributed to appropriate team members within that same time frame. Finally, the DHR policy specifically provides that supervisory review and approval, as

evidenced by a signature, are required after "the 30-day review following an initial ISP's development." In this case, Kelley acknowledged during her October 2016 deposition that no one at A.C.'s March 21, 2013, doctor's appointment knew they were attending an ISP meeting, and it is undisputed that an updated ISP was not prepared, submitted for supervisor review, or distributed to any team members following that alleged ISP meeting.

When reviewing a trial court's decision on a summary-judgment motion, our standard of review requires us to consider the evidence in the light most favorable to the nonmovant -- in this case, Curry. Curry has established that there is at least a question of material fact about whether Kelley failed to discharge her duties in accordance with DHR's rules. Specifically, he has identified evidence indicating that Kelley violated DHR's ISP policy by failing to conduct the required 30-day ISP review and by failing to complete a more thorough ISP in conjunction with that review. Thus, under our caselaw, Kelley did not establish that she was entitled to a summary judgment in her favor on the basis of State-agent immunity. See, e.g., Ex parte Jones, 52 So. 3d

475, 484 (Ala. 2010) (holding that DHR employee was not entitled to a summary judgment on the basis of State-agent immunity where there was a genuine issue of material fact about whether she had acted beyond her authority by failing to turn in a required report); Watson, 37 So. 3d at 760-61 (holding that DHR employee did not establish that she was entitled to a summary judgment based on State-agent immunity where there was substantial evidence indicating that she had not complied with a DHR regulation requiring her to conduct a home visit); Gowens, 948 So. 2d at 527 (holding that DHR employee was not entitled to a summary judgment on the basis of State-agent immunity where employee failed to comply with a DHR requirement that he verify, from an outside source, the number of children in a household under investigation).

Finally, Kelley argues that, regardless of whether she is entitled to immunity, there is no connection between her alleged violations of DHR's ISP policy and A.C.'s death. As she states, the "alleged lack of documentation did not cause the child's death" nor did the lack of "a 'more thorough' ISP." Petition at p. 29. Such an argument, however, is unrelated to Kelley's claim of immunity and thus is not an

issue we can consider on mandamus review. See Hudson, 866 So. 2d at 1120 (explaining that on mandamus "[w]e confine our interlocutory review to matters germane to the issue of immunity" and that "[m]atters relevant to the merits of the underlying tort claim, such as issues of duty or causation, are best left to the trial court" (emphasis added)). Moreover, in a previous appeal in which a government employee's claim of State-agent immunity was rejected because the employee failed to follow specific guidelines outlining the manner in which she should perform her job, this Court explained:

> "The extent to which there is a causal relation between the matters made the basis of the complaint and the deviation from the guideline is an issue we do not decide. When entertaining interlocutory review of the denial of a summary judgment in the context of immunity we do not address other matters dealing with the merits of tort liability."

Ex parte Monroe Cty. Bd. of Educ., 48 So. 3d 621, 628 n.2 (Ala. 2010). Therefore, because Curry has provided substantial evidence that Kelley did not comply with the DHR ISP policy, this Court may deny her petition for the writ of mandamus without a consideration of proximate cause. Of course, Curry will be required to produce substantial evidence

of causation at trial in order to submit his claims to the jury for its consideration. But to the extent Curry's wrongful-death claim against Kelley is premised on allegations of wantonness, Kelley has not established that she was entitled to a summary judgment on the basis of State-agent immunity, and her petition in that respect is denied.

Conclusion

Curry sued Van Gilder and Kelley following the death of his son A.C., alleging that their negligent and wanton actions wrongfully caused his death. Van Gilder and Kelley argued that they were immune from liability based on their respective statuses as a foster parent and a DHR caseworker, and they moved the trial court to enter summary judgments in their favor on those bases. After the trial court denied their motions, Van Gilder and Kelley petitioned this Court for mandamus relief, seeking writs directing the trial court to enter summary judgments in their favor on the basis of immunity.

For the reasons explained above, we grant Van Gilder and Kelley's petitions in part. To the extent Curry's wrongful-death claims against Van Gilder and Kelley are based on

allegations of negligence, those claims are barred by the doctrine of parental immunity. Parental immunity, however, does not bar wantonness-based claims, and Kelley has not established that she is entitled to State-agent immunity as to the wantonness claim against her. Therefore, Curry's wrongful-death claims against Van Gilder and Kelley may proceed to the extent those claims are based on allegations of wantonness.

1170988 -- PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

1170995 -- PETITION GRANTED IN PART AND DENIED IN PART; WRIT ISSUED.

Bolin, Shaw, Bryan, Sellers, Mendheim, and Stewart, JJ., concur.

Parker, C.J., and Wise and Mitchell, JJ., concur specially.

PARKER, Chief Justice (concurring specially).

In Mitchell v. Davis, 598 So. 2d 801 (Ala. 1992), this Court extended parental immunity to the Department of Human Resources and its employees (hereinafter referred to collectively as "DHR"). The respondent, Arnold Curry, has not asked us to overrule Mitchell, so I concur with the main opinion. However, I write to explain why Mitchell's grant of parental immunity to DHR is both an anomaly in American jurisprudence and contrary to the historical foundations of parental immunity in Alabama.

First, Mitchell's extension of parental immunity to DHR is an extreme outlier in the United States. National treatises suggest that Alabama is the only state to have granted such immunity to a child-protection agency. See Marjorie A. Shields, Liability of Parents or Person in Loco Parentis for Personal Tort Against Minor Child -- Willful or Malicious Act, 118 A.L.R.5th 513, § 6 (2004); 43 Causes of Action 2d 1, § 25 (2019); see also Grant Hayes Frazier, Defusing a Ticking Time Bomb: The Complicated Considerations Underlying Compulsory Human Genetic Testing, 10 Hastings Sci. & Tech. L.J. 39, 73 n. 153 (2019). I have found no other

American case granting such immunity. Indeed, other courts that have considered this or similar claims of immunity have expressly rejected them. See, e.g., Bartels v. Westchester Cty., 76 A.D.2d 517, 520, 522, 429 N.Y.S.2d 906, 908, 909 (N.Y. App. Div. 1980); Wallace v. Smyth, 203 Ill. 2d 441, 443, 448, 451-52, 786 N.E.2d 980, 982, 985, 987, 272 Ill. Dec. 146, 148, 151, 153 (2002).

Second and more importantly, Mitchell's extension of parental immunity to DHR runs counter to the historical foundations of this type of immunity. The doctrine of parental immunity stems from a trio of American cases decided in the late 19th and early 20th centuries: Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); and Roller v. Roller, 37 Wash. 242, 79 P. 788 (1905). Widespread adoption of the doctrine quickly followed. Martin J. Rooney & Colleen M. Rooney, Parental Tort Immunity: Spare the Liability, Spoil the Parent, 25 New Eng. L. Rev. 1161, 1163 (1991).

From its inception, the doctrine has been rooted in the nature of the parent-child relationship. Courts reasoned that the state bore a responsibility to protect and preserve the

family unit but that allowing an unemancipated child to sue the parent would promote family turmoil. See, e.g., Hewellette, 68 Miss. at 711, 9 So. at 887; Owens v. Auto Mut. Indem. Co., 235 Ala. 9, 10, 177 So. 133, 134 (1937). Because "the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey," the parent should generally be immune from suit by the child. See Hewellette, 68 Miss. at 711, 9 So. at 887. Although the doctrine has evolved since the early 1900s, this Court has continued to affirm the principle that parental immunity "'exists only where the suit, or the prospect of a suit, might disturb the family relations.'" Owens, 235 Ala. at 10, 11 So. at 134 (quoting Dunlap v. Dunlap, 84 N.H. 352, 372, 150 A. 905, 915 (1930)); see Hurst v. Capitell, 539 So. 2d 264, 266 (Ala. 1989); Mitchell, 598 So. 2d at 804.

As we recognized in Mitchell, this family-relationship rationale naturally extends to foster parents. Like natural parents, "[f]oster parents provide food, shelter, and discipline for children in their homes. Foster parents must also try to meet the emotional needs of the children."

Mitchell, 598 So. 2d at 804. Therefore, foster parents are entitled to parental immunity. Id.

Despite this well established grounding of parental immunity in the family relationship, in Mitchell this Court extended parental immunity to DHR without determining whether the rationale underlying the doctrine supported that extension. See 598 So. 2d at 805. Indeed, we observed that "there is no familial relationship between DHR and foster children that a lawsuit could disturb." Id. That observation remains true today. Unlike foster parents, DHR does not directly provide food and shelter to the children in its care, has no legal authority to discipline them, and cannot meet their emotional needs.

The two state courts that have refused to extend parental immunity to child-protection agencies and similar entities have done so for precisely that reason. A New York Supreme Court Appellate Division considered an agency's argument that it should have parental immunity against a charge of inadequate supervision. Bartels, 76 A.D.2d at 520, 429 N.Y.S.2d at 906. The court held that parental immunity did not extend to the agency because the public-policy

consideration underlying the doctrine -- "the potential strife between parent and child created by litigation" -- did not apply. 76 A.D.2d at 522, 429 N.Y.S.2d at 909.

Similarly, the Illinois Supreme Court considered the issue in the context of a corporately owned children's home that provided care under a contract with a child-protection agency. Wallace, 203 Ill. 2d at 148, 786 N.E.2d at 982, 272 Ill. Dec. at 443. The children's home argued that, because it controlled the daily care of the child, it was entitled to parental immunity. 203 Ill. 2d at 151, 786 N.E.2d at 985, 272 Ill. Dec. at 448. The court disagreed, reasoning that "while the parental immunity doctrine logically reaches foster parents, it cannot stretch to cover a corporate entity and its employees. The employees of a residential child care facility ... exercise their professional duties in handling state wards; they are not parents, however similar their responsibilities." 203 Ill. 2d at 152, 786 N.E.2d at 987, 272 Ill. Dec. at 451-52. The court held that, because of the lack of family relationship, there could be no parental immunity.

Likewise, here in Alabama, the Department of Human Resources and its employees are not parents exercising loving

care and discipline of their children. Rather, the department and its employees perform their professional duties as agents of the State, "which by its nature cannot love," Ex parte G.C., 924 So. 2d 651, 685 (Ala. 2005)(Parker, J., dissenting). See also Parham v. J.R., 442 U.S. 584, 638 (1979) (Brennan, J., concurring in part and dissenting in part) ("The social worker-child relationship is not deserving of the special protection and deference accorded to the parent-child relationship, and state officials ... cannot be equated with parents."). Thus, given the lack of a family relationship between DHR and foster children, the historical rationale for parental immunity cannot justify the application of the doctrine to DHR.

In addition to those problems, the Court in Mitchell relied on a faulty premise, at odds with history, that DHR stands in loco parentis. To the contrary, the origins of that doctrine reveal that it is inextricably tied to the voluntary delegation of authority by parents.

From its oldest recorded reference, the legal concept of in loco parentis entailed a relationship based on consent of a parent. The doctrine first emerged in Roman law under the

term patroni loco. See Kaye Don Moran, An Historical Development in the Doctrine of in Loco Parentis with Court Interpretations in the United States 16, 20-22 (1967) (unpublished Ph.D. dissertation, University of Kansas).[7] According to the Roman jurist Gaius, parents could delegate authority over and custody of their children to a tutor. Id. at 21-22. The tutor became a quasi-legal guardian and therefore stood patroni loco. Id. at 22.

As early as the 13th century, this delegative concept of patroni loco was adopted in England under its current moniker, in loco parentis. See id. at 31 (citing Roscoe Pound, Readings on the History and System of the Common Law 28 (2d ed. 1913)). William Blackstone, the great commentator on the English common law (on which Alabama law is based, see § 1-3-1, Ala. Code 1975), described the doctrine as permitting a parent to

> "delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of

[7]This dissertation is available on the ProQuest Dissertations & Theses Global database, as well as through the Alabama Supreme Court library via an inter-library loan. Copies of the pages referenced in this opinion are also available in the case files of the clerk of the Alabama Supreme Court.

> the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed."

1 William Blackstone, Commentaries *441.

On this side of the Atlantic, Chancellor James Kent echoed Blackstone's comment: "The power allowed by law to the parent over the person of the child, may be delegated to a tutor or instructor, the better to accomplish the purposes of education." 2 James Kent, Commentaries on American Law 170 (1827). Kent's use of the doctrine of in loco parentis in the context of the delegated authority of educators was later adopted in Alabama. See Boyd v. State, 88 Ala. 169, 171, 7 So. 268, 269 (1890). Shortly thereafter, this Court extended the doctrine to include anyone to whom parents had delegated authority. See Dean v. State, 89 Ala. 46, 49, 8 So. 38, 39 (1890).[8]

[8]This Court also sometimes used the term in loco parentis to refer to the position of a guardian over an orphan. See, e.g., Rittenberry v. Wharton, 182 Ala. 388, 391, 62 So. 672, 673 (1913). Those guardianships similarly involved consent of parents, whether expressed by will or implied by intestacy. Consistent with this Court's historical approach, a Pennsylvania court recently affirmed that "in loco parentis status cannot be achieved without the consent ... of ... a parent." E.W. v. T.S., 916 A.2d 1197, 1205 (Pa. Super. 2007).

In 1939, for the first time, this Court pronounced that the State, in its child-protective role, stood in loco parentis. In deciding a custody dispute between a child's father and stepfather after her mother had died, the Court remarked by way of legal background:

> "In awarding custody of minors modern courts have often said that the welfare of the child is paramount, but this consideration will not suffice to take children from parents who are decent and responsible, if able to furnish the necessities for their children, although the child's welfare and prospects in life might be bettered thereby, but custody may be taken away from parents manifestly unfit by the State standing in loco parentis in equity."

Chandler v. Whatley, 238 Ala. 206, 209, 189 So. 751, 754 (1939) (quoting 1 James Schouler, A Treatise on the Law of Marriage, Divorce, Separation and Domestic Relations § 744 (6th ed. 1921) (emphasis added)). It was on that language in Chandler that Mitchell later relied in extending parental immunity to DHR. Mitchell, 598 So. 2d at 804. However, Chandler's pronouncement that the State stands in loco parentis was made without any consideration of the historical

understanding of that legal status as founded on consensual delegation by parents.[9]

Further, that historical understanding comports with a sound view of the State's role in protecting children. In this role, the State does not derive its authority from being "in the place of a parent." Rather, the State derives its authority from its God-ordained nature as the State. Like the family, the State "is a separate and legitimate human government within its proper sphere." Ex parte E.R.G., 73 So. 3d 634, 650 (Ala. 2011) (Parker, J., concurring specially). "[I]t possesses supreme authority within its own legitimate bounds, with the rights and duties of its members ordained by 'a higher authority.'" Id. at 650-51 (quoting Ex parte Sullivan, 407 So. 2d 559, 563 (Ala. 1981)). See generally id. (explaining divinely designed separate spheres of authority of family and state, with historical references); G.C., 924 So. 2d at 674-77 (same, in greater detail).

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[9]Chandler's pronouncement may have been rooted in the philosophy of national socialism, which regrettably, but briefly, influenced this Court in the early 20th century. See Ex parte E.R.G., 73 So. 3d 634, 656 (Ala. 2011) (Parker, J., concurring specially) (explaining this Court's mercifully short foray into a socialist view of family vis-à-vis state authority).

In Alabama, the State's sphere of authority is defined by its natural purpose, which is recognized in our State constitution: "[T]he sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property ...." Ala. Const. 1901, Art. I, § 35. The "citizen[s]" whom the State is obligated to protect include not only adults, but also their children. "[A]side from being members of families, children are also members of the larger political community. That political community, via the authorities which govern it, has certain responsibilities and related rights with regard to children." Melissa Moschella, To Whom Do Children Belong?: Parental Rights, Civic Education, and Children's Autonomy 151 (Cambridge Univ. Press 2016) (footnote omitted). Thus, "State involvement in [cases of abuse or neglect] is permissible, because in these cases parents have acted improperly outside their jurisdiction and thereby subjected themselves to the state's sword of justice." G.C., 924 So. 2d at 686 (Parker, J., dissenting); cf. Moschella, supra (positing that state may exercise protective authority over children "[o]nly in situations of genuine abuse and neglect" "because in those cases parental authority has

lost its legitimacy"). See generally G.C., 924 So. 2d at 676 (Parker, J., dissenting) (discussing the mutually corrective roles of government spheres, which are "of divine creation rather than human invention").

Because the State's authority over abused or neglected children is inherent, not delegated from parents, the State does not stand in loco parentis. Thus, Chandler's pronouncement and Mitchell's reliance on it to grant parental immunity to DHR were misguided.

In summary, Mitchell's extension of parental immunity to DHR stands as a solitary jurisprudential miscue among American courts. More importantly, it runs counter to the historical foundations of the doctrine of parental immunity. Although the State has an interest in protecting family relationships, DHR has no familial relationship with the children in its care. And although the State has a role in protecting children from abuse and neglect, that role is not in loco parentis. Therefore, although I reluctantly concur because Curry has not asked this Court to abrogate this application of the doctrine, this aspect of Mitchell ought to be overruled upon appropriate request and argument in a future case.

Wise, J., concurs.

MITCHELL, Justice (concurring specially).

I concur because Mitchell v. Davis, 598 So. 2d 801 (Ala. 1992), is controlling precedent. Like Chief Justice Parker and Justice Wise, however, I am uncomfortable with the principle that the State and its agents have parental immunity equivalent to the immunity enjoyed by biological, adoptive, and foster parents. For that reason, I would be open to reconsidering this principle in a future case in which this Court is asked to overrule Mitchell.