ATTORNEY FOR APPELLANTS

Amy M. Davis
Law Office of Amy M. Davis, LLC
Indianapolis, Indiana

ATTORNEY FOR AMICUS CURIAE
INDIANA TRIAL LAWYERS
ASSOCIATION
Amy Van Ostrand-Fakehany
Rowe & Hamilton
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

Caren L. Pollack
Pollack Law Firm, P.C.
Carmel, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Casey Hopkins and Terry Yarbrough, As Parents and Next Friends of DeShawn Yarbrough,

Appellants-Plaintiffs,

v.

Indianapolis Public Schools d/b/a Ralph Waldo Emerson School 58,

Appellee-Defendant

January 31, 2022

Court of Appeals Case No. 21A-CT-1709

Appeal from the Marion Superior Court

The Honorable Jason G. Reyome, Magistrate

Trial Court Cause No. 49D13-1912-CT-50743

Crone, Judge.

Case Summary

[1] The parents of a seven-year-old filed a negligence claim against his public elementary school seeking tort damages for their son's mental anguish after he was mistakenly instructed and released to walk home from school rather than being placed on the school bus that he was designated to ride pursuant to the school's beginning of the year dismissal procedures. The trial court granted summary judgment in favor of the elementary school, concluding that the school was immune from liability under the Indiana Tort Claims Act (ITCA). Casey Hopkins and Terry Yarbrough, as parents and next friends of DeShawn Yarbrough (the Parents), appeal the trial court's order granting summary judgment in favor of Indianapolis Public Schools d/b/a Ralph Waldo Emerson School 58 (the School) on their negligence claim. We reverse and remand.

Facts and Procedural History

[2] The designated material facts most favorable to the Parents as the parties opposing summary judgment indicate that on August 7, 2018, seven-year-old DeShawn Yarbrough attended his second day of first grade at the School. DeShawn had ridden the school bus to the School that morning, and at the end of the school day, he got in line to go home on the bus just as he had done the previous day. As he was waiting in line to get on the bus, a teacher[1] removed

[1] The evidence is conflicting as to who exactly (a teacher, substitute teacher, or other staff member) was responsible for the misdirection. Although it appears that a substitute teacher named Louella Mann removed DeShawn from the bus line, the designated evidence indicates that she may have done so based upon misinformation given to her, as "[d]ocumentation" gathered "did clearly show that DeShawn's status [as] a bus rider was changed by an unknown person[.]" Appellants' App. Vol. 2 at 147.

DeShawn from the line and informed him that he was designated as a walker and that he should not ride the bus home. Pursuant to the School's beginning of the year dismissal procedures, DeShawn had a blue tag attached to his book bag to identify him as a bus rider. Despite DeShawn showing the teacher his blue tag, he was mistakenly directed to leave the bus line and go to the area where designated walkers congregated before walking home.

[3] DeShawn believed that his parents would be waiting for him near the congregation area, and he was scared when they were not. DeShawn had never walked to or from the School, and he did not know how to get home. DeShawn's home was approximately 1.2 miles away from the School, with many busy streets in between. The young boy walked over a mile in the wrong direction, was approached by a homeless man in an alley, was chased by dogs which caused him to fall,[2] and crossed a major thoroughfare alone at rush hour. Eventually, a stranger found DeShawn, called the School and the police to inform them of his whereabouts, and took him to her home. The stranger then messaged DeShawn's mother on Facebook to tell her that she had found him.

[4] The Parents filed a complaint against the School alleging that the School breached its "duty of reasonable ca[r]e and supervision" owed to Deshawn by wrongfully releasing him from School to walk home alone. Appellants' App.

---

[2] Although the Parents claim on appeal that, in addition to damages for mental anguish, they are also seeking compensation for physical injury sustained by DeShawn, presumably when he fell, we find no evidence or allegation in the record below that DeShawn sustained any physical injury. Indeed, the citations to the appendices provided by the Parents in their appellate briefs do not support that any such claim has ever been (or ever could be) made based upon the designated evidence.

Vol. 2 at 156. In response, the School raised governmental immunity as an affirmative defense. Thereafter, in November 2020, the School filed a motion for summary judgment asserting that the School, as a governmental entity, was immune from liability pursuant to various provisions of the ITCA. The trial court held a hearing on the School's motion and, by order dated July 13, 2021, ruled in favor of the School. Specifically, the trial court found that because the Parents' alleged loss arose from the School's failure to properly adopt or enforce a school policy (regarding dismissal of students), the School was entitled to immunity pursuant to Indiana Code Section 34-13-3-3(8)(B). The Parents now appeal.

Discussion and Decision

[5] The Parents appeal the trial court's entry of summary judgment in favor of the School. This Court recently explained our summary judgment standard of review as follows:

> We review a summary judgment ruling de novo, applying the same standard as the trial court. The moving party bears the initial burden of making a prima facie showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. We construe all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. Our review is limited to those facts designated to the trial court. Issues of statutory construction present questions of law, which we review de novo. We are not bound by the trial court's

> findings of fact and conclusions thereon, which merely aid our review by providing us with a statement of reasons for the trial court's actions.

Ind. Univ. v. Thomas, 167 N.E.3d 724, 731 (Ind. Ct. App. 2021) (alterations, citations, and quotation marks omitted).

Section 1 – The School is not immune from liability pursuant to Indiana Code Section 34-13-3-3(8).

[6] The Parents argue that summary judgment is improper because the trial court erred in concluding that their alleged loss arose from the School's failure to properly enforce a school policy (regarding dismissal of students) and therefore the School was entitled to immunity pursuant to the ITCA. In addressing this argument, we are mindful of our well-established rules of statutory interpretation:

> The first step in interpreting a statute is to determine whether the Legislature has spoken clearly and unambiguously on the point in question. When a statute is clear and unambiguous, we need not apply any rules of construction other than to require that words and phrases be taken in their plain, ordinary, and usual sense. Clear and unambiguous statutes leave no room for judicial construction. However[,] when a statute is susceptible to more than one interpretation it is deemed ambiguous and thus open to judicial construction.
>
> And when faced with an ambiguous statute, other well-established rules of statutory construction are applicable. One such rule is that our primary goal of statutory construction is to determine, give effect to, and implement the intent of the Legislature. .... And we do not presume that the Legislature

> intended language used in a statute to be applied illogically or to bring about an unjust or absurd result.

Schon v. Frantz, 156 N.E.3d 692, 698-99 (Ind. Ct. App. 2020) (quoting *City of N. Vernon v. Jennings Nw. Reg'l Utils.*, 829 N.E.2d 1, 4-5 (Ind. 2005)).

[7] Governmental immunity from suit is governed by the ITCA. *Bartholomew Cnty. v. Johnson*, 995 N.E.2d 666, 671-72 (Ind. Ct. App. 2013) (quoting *E. Chicago Police Dep't v. Bynum*, 826 N.E.2d 22, 26 (Ind. Ct. App. 2005), *trans. denied* (2006)). It is undisputed that the School is considered a governmental entity for the purposes of the ITCA. Ind. Code § 34-6-2-110(9). Governmental entities and their employees are subject to liability for torts committed by them unless they can prove that one of the immunity provisions of the ITCA applies. *Johnson*, 995 N.E.2d 672. "The purpose of [such] immunity is to ensure that public employees can exercise their independent judgment necessary to carry out their duties without threat of harassment by litigation or threats of litigation over decisions made within the scope of their employment." *Id.* (quoting *Bushong v. Williamson*, 790 N.E.2d 467, 472 (Ind. 2003)).

[8] "Whether the ITCA imparts immunity to a governmental entity is a question of law for the court to decide." *Schon*, 156 N.E.3d at 699 (quoting *Lee v. Bartholomew Consol. Sch. Corp.*, 75 N.E.3d 518, 525 (Ind. Ct. App. 2017)). "The party seeking immunity bears the burden of proving that its conduct falls within the provisions of the ITCA." *Id.* Because the ITCA is in derogation of the

common law, it must be strictly construed against limitations on a claimant's right to bring suit. *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). Indeed, our supreme court continues to emphasize the principle that "governmental *liability* for tortious conduct is the rule while immunity is the exception." *Ladra v. State*, 177 N.E.3d 412, 418 (Ind. 2021).

[9] It is well established that "[w]ith respect to negligence, a public elementary school has only one duty at common law—the duty to exercise ordinary and reasonable care." *LaPorte Cmty. Sch. Corp. v. Rosales*, 963 N.E.2d 520, 524 (Ind. 2012). This includes the duty to exercise reasonable care and supervision for the safety of the children under its control. *King v. Ne. Sec., Inc.*, 790 N.E.2d 474, 484 (Ind. 2003). However, the School directs us to a provision of the ITCA that expressly provides that "[a] governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from… [t]he adoption and enforcement of or failure to adopt or enforce ... in the case of a public school … a policy[.]" Ind. Code § 34-13-3-3(8)(B). Immunity under the

ITCA assumes negligence but denies liability. *Putnam Cnty. Sheriff v. Price*, 954 N.E.2d 451, 453 (Ind. 2011).[3]

[10] We begin by noting that much of the dispute here revolves around the fact that the term "policy" is not defined by the ITCA. Rather than having us necessarily find that term ambiguous, the School urges that it would be appropriate to look to the School's statutorily derived powers under Indiana Code Section 20-26-3-3. Specifically, our legislature has determined that a school corporation possesses all powers "necessary or desirable in the conduct of the school corporation's affairs[.]" Ind. Code § 20-26-3-3(b)(2). In exercising its powers, if "there is not a constitutional or statutory provision requiring a specific manner for exercising a power, a school corporation that exercises the power shall: (1) adopt a written policy prescribing a specific manner for exercising the power[.]" Ind. Code § 20-26-3-5. The School contends that the implementation and regulation of its students' dismissal at the end of each school day is necessary in the conduct of its affairs, and therefore the adoption of general written procedures, or in this case what could be more accurately referred to as simply

---

[3] The Parents' argument that the ITCA does not apply to their negligence claim against the School clearly misses this point. "In general, it is only after a determination is made that a governmental defendant is not immune under the ITCA that a court undertakes the analysis of whether a common law duty exists under the circumstances." *Putnam Cnty. Sheriff*, 954 N.E.2d at 453-54 (citation omitted). "And this is generally so because immunity trumps [a claim of negligence] and bars recovery even where ordinary tort principles would impose liability." *Id*. (citation and quotation marks omitted). "Thus, the issues of duty, breach and causation are not before the court in deciding whether the government entity is immune." *Peavler v. Bd. of Comm'rs of Monroe Cnty.*, 528 N.E.2d 40, 46-47 (Ind. 1988). Indeed, if the court finds that the governmental entity is not immune, the case may yet be decided on the basis of failure of any element of negligence. *Id*. "This should not be confused with the threshold determination of immunity." *Id*.

an internal document created by the School that prescribes the manner for doing so, would be included in the legislature's use of the term "policy" when discussing public schools' immunity under the ITCA.

[11] Assuming, without deciding, that the School's general dismissal procedures here would satisfy the meaning of a policy as contemplated by Indiana Code Section 34-13-3-3(8)(B), we cannot agree with the School that the Parents' negligence claim is predicated upon the School's failure to "enforce" those dismissal procedures against DeShawn. Indeed, while the parties concede that there are no published Indiana cases specifically construing subsection 3(8)(B), Indiana courts have already determined what "enforcement" means in this context. Both the Parents and the amicus curiae appearing on their behalf, the Indiana Trial Lawyers Association (ITLA), direct us to *Moore v. Hamilton Southeastern School District*, No. 1:11-CV-01548-SEB, 2013 WL 4607228 (S.D. Ind. Aug. 29, 2013), as persuasive support for their claim that subsection 3(8)(B) is inapplicable to the School's failure to properly follow its own dismissal procedures, even assuming that those procedures can be considered a school policy.

[12] In *Moore*, the mother of a student in the Hamilton Southeastern School District filed suit after her son died by suicide outside of school hours and off school property following prior disciplinary problems and expulsion from school. Among other things, the mother alleged that the school district was negligent in failing to take appropriate steps to prevent his suicide, to protect him from bullying, and to arrange an alternative learning environment for him. *Id.* at *9.

Among other defenses, the school district attempted to invoke the "enforcement" immunity provided by Indiana Code Section 34-13-3-3(8). Judge Barker noted that the school's argument "relie[d] on a misunderstanding of the meaning of the term 'enforcement,' as used by the statute." *Id*. at *21. Relying on language used in *St. Joseph County Police Department v. Shumaker*, 812 N.E.2d 1143 (Ind. Ct. App. 2004), Judge Barker explained,

> [E]nforcement means "compelling or attempting to compel the obedience of *another* to laws, rules, or regulations, and the sanctioning or attempt to sanction a violation thereof." Thus, a school district would be justified in claiming immunity under the ITCA for its decisions to suspend, expel, or otherwise impose discipline on students. A school may *not* claim immunity, however, when sued regarding its compliance, or failure to comply, with laws and regulations. Plaintiff's claims under the common law … allege not that HSE harmed Jamarcus Bell by enforcing laws against him, but rather that it failed to comply with laws that bound *the district* to observe a standard of care for his safety and well-being. As such, "enforcement" immunity does not protect HSE's actions.

Moore, at *21 (citations omitted).[4]

[13] We think that the same reasoning applies here and that a school may not claim immunity when sued regarding its own compliance, or failure to comply, with laws and regulations *or* a school policy. Parents do not allege that the School

[4] Tellingly, the School does not even mention *Moore* or *Shumaker* in its appellee's brief despite the Parents' and the ITLA's reliance on these cases. The School goes so far as to disingenuously state that "[n]either Parents nor their amicus direct this Court to any cases in which the statute has been construed any differently than the manner argued by [the School]…." Appellee's Br. at 17.

harmed DeShawn by failing to compel his obedience to its dismissal procedures, but rather that the School itself failed to properly follow the procedures that were meant to provide for their son's safety and well-being. The School's attempt to recast the Parents' negligence claim as one involving the enforcement of a school policy "as to how to facilitate student transportation upon dismissal" is unpersuasive. Appellee's Br. at 13. Accordingly, we conclude that "enforcement" immunity does not protect the School's actions here and that the trial court erred in entering summary judgment for the School on that basis.[5]

Section 2 – The School is not immune from liability pursuant to Indiana Code Section 34-13-3-3(10).

[14] The School correctly points out that this Court may "affirm the entry of summary judgment on any grounds supported by the designated evidentiary materials." *Hulse v. Ind. State Fair Bd.*, 94 N.E.3d 726, 730 (Ind. Ct. App. 2018). Thus, in the alternative, the School argues that it is entitled to immunity pursuant to another provision of the ITCA which provides that "a governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results" from an "act or omission of anyone other than the governmental entity or the governmental entity's employee."

---

[5] Between its incredibly broad interpretation of the term "policy" and its disregard of the meaning of the term "enforcement," we agree with ITLA that the School's position advocates for a "limitless blanket of immunity" for each and every decision made by our public schools. ITLA Br. at 15. As already noted, we presume that the Legislature did not intend language used in a statute to be applied illogically or to bring about an unjust or absurd result. *See Schon*, 156 N.E.3d at 699.

Ind. Code § 34-13-3-3(10).[6] "This subsection's immunity 'applies in actions seeking to impose vicarious liability by reason of conduct of third parties' other than governmental employees acting within the scope of their employment." *Jacks v. Tipton Cmty. Sch. Corp.*, 94 N.E.3d 712, 717 (Ind. Ct. App. 2018) (quoting *King*, 790 N.E.2d at 481), *trans. denied*. For purposes of the ITCA, an "employee" is "a person presently or formerly acting on behalf of a governmental entity, whether temporarily or permanently or with or without compensation ...." Ind. Code § 34-6-2-38(a). However, the term does not include "an independent contractor[.]" Ind. Code § 34-6-2-38(b)(1).

[15] While the School asserts that the Parents' negligence claim is based solely on the acts or omissions of the teacher who mistakenly removed DeShawn from the bus line and directed him to walk home (who the School claims was a substitute teacher and independent contractor), as we observed in footnote 1, there is conflicting evidence as to which person or persons were ultimately responsible for the misdirection. Because we cannot say in this case that the material facts are undisputed, the School's immunity claim pursuant to Indiana Code Section 34-13-3-3(10) fails.

[16] In sum, we conclude that the trial court erred when it granted summary judgment in favor of the School. Therefore, we reverse and remand for further proceedings.

---

[6] The School raised this alternative provision in its summary judgment motion; however, because the trial court found that the School was immune pursuant to Indiana Code Section 34-13-3-3(8)(B), the trial court did not address this immunity claim.

[17] Reversed and remanded.

Bradford, C.J., and Tavitas, J., concur.