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COURT OF APPEALS

STATE OF NEW YORK

RHONDA WILLIAMS,

Respondent,

-against-

SHARON T. WEATHERSTONE,
Defendant,

No. 68
(Papers sealed)

JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT,

Appellant.

20 Eagle Street
Albany, New York 12207
March 25, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 today with number 68, Williams v. Weatherstone.

3 Counselor?

4 MS. GASSER: Good afternoon. May it please
5 the court. Christine Gasser for the defendant-
6 appellant, Jordan-Elbridge School District.

7 Your Honor, may I reserve one minute for
8 rebuttal?

9 CHIEF JUDGE LIPPMAN: One minute for
10 rebuttal, sure.

11 MS. GASSER: Thank you.

12 CHIEF JUDGE LIPPMAN: Go ahead, counselor.
13 You're on.

14 MS. GASSER: I'm appearing for one school
15 district today, but in a real sense, I feel that I
16 speak for all of the districts in the State. The
17 primary issue that's presented on this appeal
18 involves the legal duty owed to students as they
19 travel back and forth to school.

20 CHIEF JUDGE LIPPMAN: Counsel, in this
21 particular case, could you argue that the - - - the -
22 - - I know you're not going to argue this, but that
23 the - - - the driver put the - - - the student in a -
24 - - in a zone of danger and - - - and looking at
25 busing, in the broadest strokes, that - - - that sort

1 of created this - - - this dangerous, whatever you
2 want to call it, you know, almost like in the old
3 case about attractive nuisance, that the bus turns
4 around, pulls over, you have a kid who's not used to
5 this route and goes there. Can you fit that within a
6 possible duty that - - - that you might have or you
7 don't have control, you don't have the - - - the
8 duty. What's your - - - what's your view of that?

9 MS. GASSER: I think that if I were the
10 plaintiff I would argue as you've just suggested.

11 CHIEF JUDGE LIPPMAN: Why isn't it a valid
12 argument? In this particular case, you had a special
13 needs kid, isn't notified, the mother is not notified
14 of a new route and a new bus. The driver doesn't go
15 around the block, but instead, you know, makes a - -
16 - turns around and comes back. Why isn't this an
17 unusual case where at least there's an issue as to
18 whether there's a duty? Why not?

19 MS. GASSER: Because I think, as a first
20 matter, the duty would be for the court to determine.
21 And I do not believe there's a question of fact in
22 that regard.

23 JUDGE PIGOTT: If you assume the duty as a
24 matter of law, and I think you're probably right - -
25 - the courts seemed to split, before you got here, as

1 to the importance of the IEP. Do you have a thought
2 on that?

3 MS. GASSER: I don't believe that the IEP
4 comes into play here at all. And I think, first of
5 all, the IEP provided for one simple thing, for
6 special ed student mandated transportation. It only
7 mandated the delivery of the child, really, to the
8 driveway where she was waiting.

9 CHIEF JUDGE LIPPMAN: But does it mandate
10 anything else for you, that let the - - - let the
11 mother know there's a new route, let the - - - let
12 the driver know that the kid has an IEP? It has no
13 relevance to this situation?

14 MS. GASSER: Well, I don't believe so, and
15 I think the reason that I feel that that's the case
16 is that the mom helped shape that IEP. She herself
17 states that she would - - - that she assisted in its
18 preparation. She was content with the transportation
19 that was provided, which was a bus that would pick
20 the child up at the - - - at the bottom of the
21 driveway every day. Really, Justice - - - Judge
22 Lippman, there is no difference the day of the
23 accident. There's a bus coming to get her at almost
24 exactly the same time, and it will pick her up at the
25 bottom of that driveway, the way it had done for the

1 entire school year before. So there's really no
2 rerouting of the student.

3 JUDGE GRAFFEO: Is it your - - -

4 JUDGE SMITH: But he was - - -

5 JUDGE GRAFFEO: Is it your posture that
6 there can never be a duty by the school when it
7 involves picking up students? I know most of the
8 cases deal with when students are disembarking the
9 bus or when they're being discharged from school and
10 looking for their school bus. But what - - - this is
11 a slightly different situation where they're being
12 picked up. Is there any scenario under which the
13 school would have a duty?

14 MS. GASSER: I think that one scenario
15 would be this. If the - - - if the school bus
16 arrives, and if the school bus is in the active
17 process of boarding that student - - -

18 JUDGE READ: Then there'd be care and
19 custody?

20 MS. GASSER: Then - - -

21 JUDGE READ: Then the student would be in
22 care and custody? And when you - - - you started out
23 by saying that you thought you were - - - you were
24 arguing for all school districts. Is that what
25 you're worried about, is it the - - - the extending

1 of the care and custody beyond - - - you know,
2 pushing it back, I guess; is that - - -

3 MS. GASSER: Yes.

4 JUDGE READ: That's what you're worried
5 about?

6 MS. GASSER: Absolutely, Your Honor.

7 That's - - -

8 CHIEF JUDGE LIPPMAN: You would agree that
9 if the driver had motioned - - - or would you? If
10 the driver had motioned to the student to - - - to
11 come over, then your care and custody?

12 MS. GASSER: If the driver is in the - - -
13 the act of boarding that student and had done it - -
14 -

15 CHIEF JUDGE LIPPMAN: But let's say - - -

16 MS. GASSER: - - - with a gesture - - -

17 CHIEF JUDGE LIPPMAN: - - - the student was
18 still in the driveway but the - - - the bus turns
19 around, like this bus did - - -

20 MS. GASSER: Um-hum.

21 CHIEF JUDGE LIPPMAN: - - - and then, as
22 they're pulling up, he's motioning to the kid. Then
23 it's you, right?

24 MS. GASSER: Absolutely.

25 JUDGE SMITH: Suppose he doesn't - - -

1 MS. GASSER: And I think that's - - -

2 JUDGE SMITH: Suppose he doesn't make - - -
3 take Judge Lippman's hypothetical and change it a
4 little. Suppose he doesn't make the hand motion, but
5 he parks across the street?

6 MS. GASSER: If he parks across the street,
7 and doing so to stop to get the student, what he has
8 to be doing, under the statute, under the Vehicle and
9 Traffic Law, is having lights flashing, and usually
10 there's a little stop sign that comes out.

11 JUDGE SMITH: Well, suppose, yeah - - -
12 yeah - - -

13 MS. GASSER: So with all of that, that's
14 the act of busing. And - - - and I would agree - - -

15 JUDGE GRAFFEO: It would increase the
16 danger to the student, though, to have to cross a
17 highway.

18 MS. GASSER: It would, except that it's not
19 unusual that - - -

20 JUDGE SMITH: Okay. So if he had, in fact,
21 done what the child thought he was doing, which is
22 turn around to pick her up across the street, that
23 would be - - - then there would be a duty?

24 MS. GASSER: If he had gotten to where the
25 ch - - -

1 JUDGE SMITH: But if he negligently created
2 the impression that that was what he was doing,
3 there's no duty?

4 MS. GASSER: No duty, and for this reason,
5 because he had still not arrived to the area where he
6 would have begun to board her.

7 CHIEF JUDGE LIPPMAN: You mean, if he's - -
8 - if he's pulling up but hasn't quite stopped,
9 there's a distinction between that? Are you saying
10 that if he did stop, with the expectation that the
11 student would go across the street, may be in your
12 control, but the difference is that he was just
13 pulling up and didn't quite stop? Could that really
14 be a meaningful distinction, or is that - - -

15 MS. GASSER: Well, I think it's an incred -
16 - - I think it's a very significant distinction.

17 CHIEF JUDGE LIPPMAN: Why? Why isn't it
18 almost the same thing that - - -

19 MS. GASSER: Well - - -

20 CHIEF JUDGE LIPPMAN: - - - he's pulling up
21 and the driver has, in effect, obviously come to get
22 the kid, and the kid starts crossing the street.

23 MS. GASSER: The reason it's a significant
24 distinction is because once he actually does pull up
25 and gets to that area or is actually starting - - -

1 I'd even give you maybe ten feet from when he
2 actually stops; he's got lights flashing. He's - - -

3 CHIEF JUDGE LIPPMAN: So you're saying he's
4 in the process of boarding as opposed to - - -

5 MS. GASSER: Yes.

6 CHIEF JUDGE LIPPMAN: - - - pulling up, but
7 it's - - - it's really a fine distinction, though,
8 isn't it?

9 MS. GASSER: It's not so fine in this case,
10 Your Honor, and here's why, because he's still quite
11 a distance from where the student is. The car that
12 hit the student preceded him down the road by quite a
13 few feet. In fact, he had waited for that car to
14 pass before he got into the lane and headed in the
15 direction of the student.

16 JUDGE GRAFFEO: What was his intention
17 here? Was he going to stop across the street from
18 the student, or was he just going to go by the
19 student, turn around again, and then come and get her
20 on her - - -

21 MS. GASSER: Yes.

22 JUDGE GRAFFEO: - - - on her driveway side?
23 Is that what the record shows?

24 MS. GASSER: That - - - that's what the
25 record shows, that the driver was going to make two

1 turns.

2 JUDGE GRAFFEO: So he didn't make the
3 second turn - - -

4 MS. GASSER: Never got there.

5 JUDGE SMITH: - - - by the time she was hit
6 by the car?

7 MS. GASSER: Car was hit before he even
8 returned to where she had been - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but the student
10 - - -

11 JUDGE RIVERA: Is your point - - -

12 CHIEF JUDGE LIPPMAN: The student might
13 assume, though, that that's where he was going to
14 pick her up. Is that - - -

15 MS. GASSER: Well, a student might assume
16 that, but I think the part of the equation that's
17 missing here is that that student happened to be
18 unsupervised in this case, but did not have to be
19 unsupervised.

20 CHIEF JUDGE LIPPMAN: Well, it wasn't
21 supervised, to some degree - - -

22 MS. GASSER: Wasn't super - - -

23 CHIEF JUDGE LIPPMAN: - - - that the mother
24 wasn't notified that a different bus picking a
25 special needs student up.

1 MS. GASSER: Mother knew that the student
2 was a special needs student; it's her daughter. What
3 the mother - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but you're
5 ignoring a key fact. Isn't for - - - particularly
6 for a special needs student, that - - - that this was
7 a new, different bus. And the mother says,
8 obviously, that if she had known, she would have been
9 out there with the - - - with the student.

10 MS. GASSER: Well, I think you have to take
11 that comment of the mom somewhat with a grain of
12 salt. That mother knew, for the entire school year,
13 which was coming to a conclusion, that the student
14 was a special needs student.

15 JUDGE RIVERA: So in part - - - if I'm
16 trying to understand what your point is here about
17 the lights and the - - - and the signal, that once
18 the driver does that, that is now not only to make it
19 safe for the child to cross, but also to notify the
20 child that now is the moment to cross, now is the
21 moment when the boarding process has begun?

22 MS. GASSER: It notifies the student of
23 that. It gives the student the direction of the
24 driver and the assistance of the lights. It should
25 stop the cars, and - - -

1 JUDGE RIVERA: Okay. So then let's go back
2 to, I think what, in part, the Chief Judge is asking;
3 how - - - how is that an appropriate understanding
4 for a child with an IEP, or any, perhaps, young
5 child, who's on these buses?

6 MS. GASSER: Well, the fact of the matter
7 is the child, in many instances, is accompanied by a
8 parent who knows what the child - - - who - - - who
9 can be seeing the bus coming, who sees the lights,
10 and realizes that - - -

11 JUDGE RIVERA: Yes, but your district knew
12 that wasn't the case here.

13 MS. GASSER: Well, that was the case - - -

14 JUDGE RIVERA: That's - - -

15 MS. GASSER: - - - by the mom's choice.

16 JUDGE SMITH: Why shouldn't it be the rule
17 that if - - - if the - - - I mean, I guess, are you
18 really saying that even on the assumption that your
19 driver was negligent - - - I could see an argument
20 that he wasn't - - - that he was negligent and that
21 it caused the accident, that even that he negligently
22 misled her into thinking that he was picking her up,
23 how can there not be a duty to refrain from doing
24 that?

25 MS. GASSER: The duty exists whether you -

1 - - the question is whether you have a duty, in the
2 first instance, to the person who's ultimately
3 injured.

4 JUDGE SMITH: Yeah, but don't you - - - but
5 don't - - - but this is not - - - yeah, here this is
6 a - - - on the - - - on the plaintiff's theory, the -
7 - - the school district created the hazard here.
8 Don't you have a duty not to create a hazard?

9 MS. GASSER: You know what? With all due
10 respect, Your Honor, the hazard does exist to a
11 student who's standing alongside the road and waiting
12 for a bus unaccompanied, regardless of whether it's a
13 mainstream student or a special ed student.

14 JUDGE SMITH: Why - - -

15 MS. GASSER: I do - - -

16 JUDGE SMITH: Why - - - I guess what I'm
17 having trouble with is why, in principle, is what the
18 plaintiff says happened here, which is you
19 negligently put the bus in a place where the student
20 believed she was going to be picked up, why is that
21 different, in principle, from the wave that you admit
22 would do it?

23 MS. GASSER: Oh, I think - - - well,
24 because I think that's, number one, what the statute
25 says. I think VTL 1174 explains what the act of

1 boarding is and explains that it's when the - - - the
2 student is coming on or getting off the bus, with the
3 use of the lights, and the dr - - - the driver's
4 directions. So I think it's very different.

5 But I think this case isn't really all that
6 different from one that came out of the Fourth
7 Department as well, which is Norton v. Canandaigua.
8 And basically, Norton said that if the student
9 decides to cross the street well before the bus
10 arrives, that's the student or the parent's choice,
11 and that there's no duty then.

12 CHIEF JUDGE LIPPMAN: No, but this is a
13 different situation that the - - - the theory is that
14 the driver created this danger by, instead of going
15 around the block, instead of calling his own base and
16 waiting for instructions or whatever, that they came
17 around. And it's different than - - - than the
18 normal situa - - - where you have a route, we
19 understand that you go and pick up the child, if, in
20 the normal course, till the child gets in your
21 custody, you're not responsible, but I think what
22 Judge Smith is driving at, isn't it - - - isn't it
23 theoretically possible, in this kind of situation,
24 assuming your driver is negligent, that - - - that
25 they could be responsible for the injuries to the - -

1 - to the child?

2 MS. GASSER: I don't think without a duty -

3 - -

4 CHIEF JUDGE LIPPMAN: You're saying even
5 with negligence, no duty?

6 MS. GASSER: Correct, Your Honor.

7 CHIEF JUDGE LIPPMAN: Okay. Let's wait til
8 rebuttal and then you'll have more time. Let's see
9 what your adversary has to say.

10 Counselor?

11 MR. BUZARD: May it please the court.

12 CHIEF JUDGE LIPPMAN: Counselor - - -

13 MS. GASSER: This district - - -

14 CHIEF JUDGE LIPPMAN: - - - what is exactly
15 your theory? Is it that they created the danger? Is
16 that the heart of your theory?

17 MR. BUZARD: Two theories; actually three,
18 but two that we've been talking about.

19 CHIEF JUDGE LIPPMAN: Right.

20 MR. BUZARD: First, that clearly this
21 involves an act of busing. In Pratt, even though it
22 was broadly - - -

23 CHIEF JUDGE LIPPMAN: Broader, yeah.

24 MR. BUZARD: - - - it definitely says that
25 there's an exception if - - - if there's busing

1 involved, broadly construed. Well, the district
2 wants to read out "broadly construed" and say if the
3 lights are flashing and the kid's in custody, then we
4 have a duty. Well, of course you do.

5 JUDGE ABDUS-SALAAM: Well, counsel - - -
6 counsel - - -

7 MR. BUZARD: Broadly construed doesn't
8 include - - -

9 JUDGE ABDUS-SALAAM: Counsel - - -

10 MR. BUZARD: - - - the lights.

11 JUDGE ABDUS-SALAAM: Counsel, if the bus
12 had gone around the corner, and the child saw the bus
13 leaving and followed it and tried to board and was
14 hit as she was trying to follow the bus going around
15 the corner, would your argument be the same?

16 MR. BUZARD: No, Your Honor, because, as
17 Judge Smith was pointing out and other - - - others
18 of you were talking about, there was an act of
19 confusion way beyond just passing.

20 JUDGE PIGOTT: Well, in Pratt, they talked
21 about a case where a parent has been deprived of the
22 opportunity of control. And I don't know; how do you
23 - - - how do you think the corporation counsel
24 handled this case, generally?

25 MR. BUZARD: You're talking about - - -

1 JUDGE PIGOTT: In Pratt.

2 MR. BUZARD: Pardon?

3 JUDGE PIGOTT: In Pratt.

4 MR. BUZARD: How'd they get the corporation
5 counsel?

6 JUDGE PIGOTT: How did the corporation
7 counsel handle it, in your view?

8 MR. BUZARD: You mean because it was me?
9 Well, that was a long time ago. And I think even
10 then, in my wildest dreams, if - - - if somebody had
11 said that - - - given me these facts - - - we're not
12 talking about this. Pratt involved - - - and - - -
13 and the - - - this court, in Ernest, quickly
14 dismissed it, saying it was involved with a negligent
15 bus stop, the kid had gone two blocks from the bus
16 stop, the bus was long gone. Here's a bus at the
17 scene.

18 CHIEF JUDGE LIPPMAN: Counselor - - -

19 MR. BUZARD: It was less than 250 feet - -
20 -

21 CHIEF JUDGE LIPPMAN: What's your - - -

22 MR. BUZARD: - - - from the child.

23 CHIEF JUDGE LIPPMAN: What's your second?
24 Your first theory is broadly busing - - -

25 MR. BUZARD: Yes - - -

1 CHIEF JUDGE LIPPMAN: - - - and we
2 understand.

3 MR. BUZARD: - - - the kid - - - the bus
4 passed her. It turned around - - -

5 CHIEF JUDGE LIPPMAN: What's the second
6 theory?

7 MR. BUZARD: The second theory is, which is
8 an independent theory, but when combined with the
9 first - - -

10 CHIEF JUDGE LIPPMAN: Go ahead.

11 MR. BUZARD: - - - is the creation of the
12 hazard, the crea - - - which, under Ernest, is a very
13 clear exception to Pratt.

14 JUDGE READ: Well, is this like - - -

15 CHIEF JUDGE LIPPMAN: What about this - - -
16 I'm sorry; go ahead.

17 JUDGE READ: Is this like the notion that
18 it's kind of comparable to a wave?

19 MR. BUZARD: Pardon?

20 JUDGE READ: Is this the notion that it's
21 kind of comparable to a wave?

22 MR. BUZARD: Well, it is comparable to a
23 wave. It was a - - - I - - - I couldn't tell from
24 the question and answering before whether or not the
25 district counsel kept voting in the lights, but if

1 you take out the lights, and she conceded - - - and
2 if she conceded the way I heard, to Judge Smith's
3 question, that if - - - if the driver had said I'm
4 going around - - - or you know, not like this - - -
5 that was easy - - - that'd be easy if he went like
6 this, but it went like this, that - - -

7 JUDGE GRAFFEO: Can I - - -

8 MR. BUZARD: - - - that would be
9 sufficient, well, that's what - - - exactly what he
10 did with the bus.

11 JUDGE GRAFFEO: Can I ask you what you
12 think the bus driver should have done here, because
13 this wasn't a city block that he could just go around
14 the block.

15 MR. BUZARD: Well - - -

16 JUDGE GRAFFEO: At least from what I saw in
17 the record - - -

18 MR. BUZARD: Yes, the - - -

19 JUDGE GRAFFEO: - - - he would have had to
20 go - - - it's a rural area; he'd have to go miles
21 away. So what should he have done once he realized
22 he had passed the student?

23 MR. BUZARD: The acts of negligence, we've
24 been focusing on the bus, but we have to look at the
25 rest, and that is that the supervisor of buses said

1 that had he known that this child was a special needs
2 kid being bused for safety, had - - - had he been
3 given that, which he wasn't - - -

4 JUDGE SMITH: And is your - - -

5 JUDGE GRAFFEO: Well, I understand that,
6 but what - - -

7 MR. BUZARD: - - - which was an act of
8 neglig - - -

9 JUDGE GRAFFEO: - - - but what should the
10 bus driver have done to avoid this - - - what you're
11 - - -

12 MR. BUZARD: First thing - - -

13 JUDGE GRAFFEO: - - - proposing was an
14 assumption of duty?

15 MR. BUZARD: First thing he should have
16 done was call the dispatcher and find out what to do.
17 And the supervisor - - - and this is more acts of
18 negligence, creating the hazard and busing - - - the
19 supervisor, unequivocally said that had I known that
20 - - - had - - - had I been given the plan, as I was
21 supposed to, and had he called, I would have said go
22 on down the road; I'll send another bus. That's
23 clearly in the record; there's no question about, and
24 that contributes to the creation of the hazard - - -

25 CHIEF JUDGE LIPPMAN: What about this - - -

1 MR. BUZARD: - - - and the acts of - - -

2 CHIEF JUDGE LIPPMAN: What about the
3 distinction that your adversary talked about that - -
4 - does it matter that he hadn't stopped yet?

5 MR. BUZARD: No, not under busing, broadly
6 concern (sic) - - - you mean, under - - - this is not
7 so much the hazard creation as - - -

8 CHIEF JUDGE LIPPMAN: But if he had
9 stopped, then, in your view, it - - - clearly it was
10 almost like beckoning him - - - beckoning her. But
11 assuming he hadn't stopped, that he's just kind of
12 going along the street and the - - - the kid does
13 what the kid did, which is go out and - - -

14 MR. BUZARD: Yes, no, I - - - I think - - -
15 I think - - -

16 CHIEF JUDGE LIPPMAN: You don't think it
17 matters? That's not a distinction that matters.

18 MR. BUZARD: That's - - - that's - - -
19 that's too attenuated. And I don't - - - this case
20 does not require some broad pronouncement setting
21 aside a big part of Pratt. These are very specific -
22 - -

23 JUDGE RIVERA: So what - - -

24 MR. BUZARD: - - - unusual circumstances.

25 JUDGE RIVERA: What if the bus had, as

1 you're saying, gone around, not - - - instead of
2 making a U-turn, said let me go ahead, come around,
3 or let me continue this route; they're going to send
4 another bus. And another bus was coming on the other
5 side. And the child - - - it's a new bus, right?
6 This is a different bus; it had a different logo on
7 it. Would - - - would the school district be liable,
8 in that case, if she runs out and sees the other bus
9 coming on the other side?

10 MR. BUZARD: Well, the bus - - - the
11 substitute bus should be on the other side of the
12 road, be on the side of the road as the child. The
13 problem here was - - -

14 JUDGE RIVERA: No, no, no, no, I'm sorry.

15 MR. BUZARD: - - - he was going - - -

16 JUDGE RIVERA: I wasn't clear with the
17 hypothetical.

18 MR. BUZARD: I'm sorry.

19 JUDGE RIVERA: Let's say the - - - the bus
20 has - - - has missed the stop, and as you say,
21 continues; another bus is going to come along. But
22 in the interim - - - it's a two-way street - - -
23 there's another school bus, not the one that's coming
24 to pick her up, is on the other side going along its
25 route, for whatever reason. And she runs out

1 because, again, the logo has changed; maybe she
2 thinks that's the same bus.

3 MR. BUZARD: She was looking for a - - - a
4 bus with a monkey.

5 JUDGE RIVERA: I understand. Would the
6 school district be liable in that example?

7 MR. BUZARD: I don't think so, because
8 there's not the act of confusion. Here - - -

9 JUDGE RIVERA: Why - - - no, no, but why
10 not? She sees another bus coming.

11 MR. BUZARD: It doesn't have a monkey on
12 it. I mean, there - - -

13 JUDGE RIVERA: But she can't see the
14 monkey.

15 MR. BUZARD: - - - there wouldn't be an
16 element of confusion.

17 JUDGE RIVERA: Maybe it's on the other
18 side.

19 MR. BUZARD: The key element here is his -
20 - - the acts - - - acts of her bus, with a monkey,
21 recognized as her bus, turns around, and she says
22 it's coming back to pick me up and I'm going to catch
23 it. And with every reasonable inference that we're
24 entitled to on a motion for summary judgment - - -

25 JUDGE RIVERA: Well, how would she know - -

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MR. BUZARD: - - - that should go to a jury.

JUDGE RIVERA: How would she know, under your example - - - they're going to keep going, they're going to send another bus - - - to stand there and wait for another bus? How does she know what to do in that case?

MR. BUZARD: Well, the first thing that should have happened, as pointed out by the Chief Judge, is all of these circumstances have to be taken into account, and the mother should have been called. That child wasn't confused from September till March. So the district tries to argue, well, she just ran out like in - - - in the other case. Well, she didn't. She had successfully stood out there for six months. This bus came by and passed her by and confused her.

Now, it fits squarely within Ernest and the exception in Pratt. But from a duty standpoint, in assessing the duty here, first of all, you do have to look at the wrongfulness of the - - - under Palka, the wrongfulness of the conduct. All kinds of acts of negligence, not just with the bus, but with the district. She entrusts the kid to them, and they

1 don't even tell the Transportation Department that
2 they've got a special needs kid.

3 JUDGE PIGOTT: Mr. Buzard, before you get
4 there, though, you really have to focus on duty,
5 right? I mean, the whole issue here is - - - whether
6 they're negligent or not, if they had no duty,
7 there's no liability. And let me just - - -

8 MR. BUZARD: I'm sorry.

9 JUDGE PIGOTT: - - - make a point. Where
10 in the course of planning out a bus route,
11 particularly in rural areas, there are people - - -
12 there are students that will be standing on the same
13 side as the bus is coming down, and there are others
14 that are going to have to cross the road in order to
15 catch that bus - - - I mean, and they know it. But
16 where does the duty stop for a - - - for any bus, in
17 terms of when kids cross the road? I mean, it - - -
18 it happens all the time. It was conceivable, had
19 this route been driven - - - drawn differently, that
20 she would have had to cross the road every single day
21 to catch the bus, depending on how they decided to
22 draw the route. And where do you draw the line, in
23 terms of the duty of the - - - of the bus and the
24 school, in those instances?

25 MR. BUZARD: If the child - - - and the law

1 is well - - - is very clear on this - - - if - - -
2 and this is why there's not a floodgates problem
3 here. If a child - - - and there are cases involving
4 this - - - a child spontaneously runs out, with the
5 mother there, without the mother there, a child just
6 spontaneously runs out to catch a bus, there's no
7 liability.

8 JUDGE PIGOTT: But isn't that Pratt?
9 Because as I quoted to your opponent, it says in - -
10 - the issue is whether a parent has been deprived of
11 the opportunity to control. And was that - - - was
12 that extant here? Was a parent - - -

13 MR. BUZARD: The parent here was deprived
14 of the very critical piece of information. Unlike in
15 Pratt, the mother here was not told that there was
16 going to be a new bus driver, and that, therefore,
17 with a new bus driver, the mother would naturally be
18 concerned, well, I better get down there. So the
19 mother was - - - unlike Pratt, where they had all
20 this ability to decide whether or not they ought to
21 pick the kid up - - -

22 JUDGE READ: Would that make the case - - -

23 MR. BUZARD: - - - or all the other kinds
24 of things to do - - -

25 JUDGE READ: Would that make the case - - -

1 MR. BUZARD: - - - not present here.

2 JUDGE READ: Would that make the case come
3 out differently, if the mother were told, from your
4 point of view? Would the district then be okay, if
5 the mother were told, even if the same thing had
6 happened?

7 MR. BUZARD: Well, it's hard to separate it
8 from the fact also that the - - - that the rest of it
9 wouldn't have happened because the supervisor would
10 never have let him turn around. That's a component.
11 I think - - - they load it all - - - try to load so
12 much onto the mother, but that should go away because
13 she was not - - -

14 JUDGE GRAFFEO: How was he - - -

15 MR. BUZARD: - - - she was not involved.

16 JUDGE GRAFFEO: How was he going to contact
17 the supervisor, once he realized he passed the
18 student? He's going to call the supervisor?

19 MR. BUZARD: Yes, that's part of the rule,
20 Your Honor.

21 JUDGE GRAFFEO: Well, wouldn't he have had
22 to stop the bus? I presume there's other students on
23 this bus; he can't be driving the bus and talking on
24 the cell phone at the same time? So when he stopped
25 the bus to do that, wouldn't that have encouraged the

1 girl to walk down the street?

2 MR. BUZARD: Well, there's a very - - - I
3 don't know - - - I - - - I think the bus - - - like a
4 taxi, the bus just keeps on going. But there's a
5 very - - - so no mistake - - - so that I'm not - - -
6 so that I'm completely clear - - -

7 JUDGE RIVERA: Well, there was someone else
8 on the bus?

9 MR. BUZARD: - - - there's a very clear
10 rule - - -

11 JUDGE RIVERA: Wasn't there someone else on
12 the bus?

13 MR. BUZARD: - - - to call the dispatcher -
14 - - the dispatcher.

15 JUDGE RIVERA: Was there someone else on
16 the bus - - -

17 MR. BUZARD: Pardon?

18 JUDGE RIVERA: - - - with her? Was there
19 some - - - I'm mean, with him.

20 MR. BUZARD: Yes, there was a matron.

21 JUDGE RIVERA: So that person could have
22 called?

23 MR. BUZARD: Yes. There's a very clear
24 rule, and the supervisor said had it been followed we
25 would have done - - - now, I'm out of time and I

1 would like to just point - - -

2 JUDGE SMITH: One more - - -

3 MR. BUZARD: - - - point your direction.

4 JUDGE SMITH: - - - if - - -

5 MR. BUZARD: I'm sorry, Your Honor.

6 JUDGE SMITH: Am I understanding, if the
7 school district had negligently placed the bus stop
8 across the street, where the little girl thought it
9 was, and the accident had been caused by that, then
10 the school district wins because there's no duty,
11 right?

12 MR. BUZARD: That's Pratt.

13 JUDGE SMITH: Yeah, so how - - - is that -
14 - - does that make sense, that if they actually - - -
15 that if they planned it this way they win the case,
16 but if they just - - - if they, arguably negligently,
17 led the child into believing it was this way they
18 lose?

19 MR. BUZARD: Well, I certainly don't think
20 to decide this case that you need to expand Pratt to
21 do away with it. I mean, that's a well-entrenched
22 principle now, and resides, in part, on the fact that
23 the parents can assess how dangerous it is to go to
24 that bus stop. Here we don't have that right.

25 If I could just, thirty seconds on special

1 - - -

2 CHIEF JUDGE LIPPMAN: Thirty seconds,
3 counselor, go ahead.

4 MR. BUZARD: Thirty seconds.

5 CHIEF JUDGE LIPPMAN: Thirty seconds,
6 you've got it.

7 MR. BUZARD: I don't have time to explore
8 it, but there's also a - - - a separate duty here,
9 and that is the special duty. There was an
10 agreement. Part of the agreement surely was to pass
11 that IEP to the Transportation Department, which they
12 didn't do. There was justifiable reliance by the
13 mother. The harm was foreseeable. It fits squarely
14 within the holdings of special duty - - -

15 JUDGE PIGOTT: So you think the Fourth
16 Department was wrong?

17 MR. BUZARD: Pardon?

18 JUDGE PIGOTT: You think the Fourth
19 Department was wrong?

20 MR. BUZARD: On that limited basis, the
21 Fourth Department was wrong, because they were
22 analyzing it that because the agreement didn't say
23 you've got to go up and walk the kid from the house
24 to the bus, therefore, it didn't apply. But there
25 was surely a duty; when they entered into that

1 agreement, there was direct contact that it would end
2 up in the hands of the people who were driving the
3 bus.

4 Thank you very much.

5 CHIEF JUDGE LIPPMAN: Okay, counselor.
6 Thank you, counselor.

7 Counselor, rebuttal?

8 MS. GASSER: Not enough time, but I'll try
9 to make do. A number of the questions have been
10 asked as to what would have happened if: if the
11 driver had made a call, or if the driver had kept
12 going and a substitute bus. That's the question,
13 indeed, and that's the problem with finding a duty to
14 the student. If something goes wrong with busing - -
15 -

16 CHIEF JUDGE LIPPMAN: Yeah, but the point
17 is the driver didn't do what he was supposed to do.

18 MS. GASSER: Yeah, but Your Honor - - -

19 CHIEF JUDGE LIPPMAN: He was supposed to
20 call and - - - right?

21 MS. GASSER: And what would have happened
22 then in that interim? Let's assume the driver makes
23 that call.

24 CHIEF JUDGE LIPPMAN: Maybe he would have
25 had instructions that said whatever, don't go back -

1 - -

2 MS. GASSER: To do what?

3 CHIEF JUDGE LIPPMAN: - - - we'll send - -
4 - we have another bus right behind; they'll pick the
5 child up in the same place.

6 MS. GASSER: But the problem is the child
7 is still standing at the side of the road. Now maybe
8 - - - maybe - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but their
10 theory is - - -

11 MS. GASSER: - - - there's confusion from
12 that.

13 CHIEF JUDGE LIPPMAN: But their theory is
14 that you created the danger by him not doing what he
15 was supposed to do and - - - and circling back, and
16 where the child may have believed - - - it may have
17 been the equivalent of - - - of waving your hand.

18 MS. GASSER: But - - -

19 CHIEF JUDGE LIPPMAN: That's the theory.

20 MS. GASSER: But that's - - - that's the
21 theory, and with all due respect to that theory, it
22 really has no common sense or logic behind it.

23 JUDGE PIGOTT: Is your point there, let's
24 assume he overshoots the - - - the stop, he goes into
25 that gas station. If he had stopped there, done what

1 is being suggested, made the call, then called the
2 parent and everything, and then continued on his
3 route, he'd have been going right past her again,
4 right, and the same - - -

5 MS. GASSER: I'm not sure where - - -

6 JUDGE PIGOTT: - - - situation could have
7 occurred. In other words, you're saying that this
8 would not - - - that would not have cured the - - -
9 the alleged negligence - - -

10 MS. GASSER: Exactly.

11 JUDGE PIGOTT: - - - and we're still into
12 the duty.

13 MS. GASSER: With all due respect, I think
14 once the first mistake is made, which everybody says
15 don't back the bus up once you make that first
16 mistake, the fixing of it is really - - - is never a
17 good fix to that, because it all would have taken
18 time. And there's a child at the side of the road
19 not supervised - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but he's chosen
21 - - -

22 MS. GASSER: - - - in that time.

23 CHIEF JUDGE LIPPMAN: - - - a particular
24 fix to that.

25 MS. GASSER: But not a fix - - -

1 CHIEF JUDGE LIPPMAN: And that's the - - -
2 the issue is, and I'm not saying how it winds up, but
3 the issue is he chose a certain route to take after
4 that happened. The - - - conceding, if one concedes
5 that that was negligent, and he pulls up on the other
6 side, is it creating a danger for the child that,
7 again, for all the reasons that - - - in addition to
8 the fact that it - - - that it could be argued it's
9 like directing the kid to come over?

10 MS. GASSER: But he never got to the point
11 where he picked the student up or even where he was
12 about to pick the student up. And that's significant
13 because he never takes on that added duty.

14 Mr. Buzard mentioned the special duty - - -

15 CHIEF JUDGE LIPPMAN: Counselor, we'll give
16 you thirty seconds too.

17 MS. GASSER: Okay.

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MS. GASSER: I appreciate it Your Honor,
20 thank you. He mentioned the special duty argument.
21 I've addressed it in my brief, but I'd like to point
22 out that that's not a theory that ever was found in
23 pleadings in this case. And it is a very specific
24 term of art, when you speak about special duty,
25 special relationship. There's no special duty here;

1 it is simply the duty to transport that's given
2 through the IEP to a special education student. That
3 isn't above and beyond. There was nothing promised
4 to the mother above and beyond - - -

5 CHIEF JUDGE LIPPMAN: Okay.

6 MS. GASSER: - - - and they were providing,
7 that day, what they had offered her throughout the
8 school year. It was - - - there was nothing
9 significantly different.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.
11 Thank you. Thank you both. Appreciate it.

12 MR. BUZARD: Thank you, Your Honor.

13 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Williams v. Weatherstone No. 68 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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