

Rel: October 6, 2023

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2022-1004

**Ex parte Dr. William Morgan, Dr. Carol Zippert,
Morris Hardy, Leo Branch, Sr., and Carrie Dancy,
in their individual capacities**

PETITION FOR WRIT OF MANDAMUS

(In re: Rhinnie B. Scott, Ph.D.)

v.

**Dr. William Morgan, Dr. Carol Zippert, Morris Hardy,
Leo Branch, Sr., and Carrie Dancy, in their individual
capacities and in their official capacities as members
of the Greene County Board of Education)**

(Greene Circuit Court: CV-16-900003)

MENDHEIM, Justice.

Dr. William Morgan, Dr. Carol Zippert, Morris Hardy, Leo Branch, Sr., and Carrie Dancy, each of whom is or was a member of the Greene County Board of Education ("the Board"), petition this Court for a writ of mandamus directing the Greene Circuit Court to enter a summary judgment in their favor on the individual-capacity claims asserted against them by Dr. Rhinnie B. Scott. We grant the petition.

I. Facts

Morgan served as a member of the Board from November 2014 until 2020, and he was president of the Board at the time Scott commenced the action that precipitated this petition. Zippert is a current member of the Board who has served since November 2014, and she was the vice president of the Board at the time Scott commenced this action. Hardy served as a member of the Board for many years, including during the 2010-2011 school year, before retiring in 2016. Branch has served as a member of the Board for many years, including during the 2010-2011 school year. Dancy is a current member of the Board who has served since November 2014.

Scott has been an employee of the Board for over two decades. For most of that time, she has served as "Vocational Director," or as it is now termed, "Career Technical Director," at Greene County High School ("GCHS"). During the 2007-2008 school year, Scott was asked by the president of the Board at that time, Elzora Fluker, to serve as "Acting Principal" at GCHS. The Board voted to approve Scott to serve as acting principal at GCHS for that school year, Scott performed the duties of acting principal in addition to her duties as vocational director, and Scott was paid for her service as acting principal during the 2007-2008 school year. In her deposition, Scott testified that she was "familiar" with the Alabama policy that the hiring of "educational personnel" requires the recommendation of the superintendent of the school system and the approval of the school board.

In her operative complaint, Scott alleges, in pertinent part:

"16. At the beginning of the 2010 to 2011 school year, the Board and then-Superintendent Isaac Atkins were in the middle of the process of selection of a new principal for [GCHS]. There were some ongoing disagreements regarding that selection and the process was moving slowly.

"17. Then-Superintendent Atkins and Dr. Scott were in Agreement that the Assistant Principal was not up to the task of providing the leadership needed for the principal function. Thus, Dr. Scott was tagged by then-Superintendent Isaac

Atkins to act as Instructional Leader for [GCHS] in addition to her regular function of Vocational Director. The purpose of such designation was for Dr. Scott to serve as the leader of the school until a principal was selected.

"18. At the time of that decision, the period of time of the designation was thought to be only a few weeks at most. Problems arose, however, with the selection, and Dr. Scott ended up having to serve in the position for the entire 2010-2011 school year. The Board was aware of this situation and approved it at the time. ...

"19. Dr. Scott worked many extra hours in her de facto acting Principal role covering the football and basketball season home games. In addition, during her regular schedule she performed not only her own regular job functions as Vocational Director but also those of acting Principal. After the end of the school year, she sought compensation for those functions, and she presented her claim to the Board. As a result she was invited to attend an executive session, during which she was questioned about her claim and, at the end of the session, Defendant then-[President] of the Board, Leo Branch, advised her that the Board would 'take care of' her claim. Accordingly, by virtue of [President] Branch's representation, this claim is undisputed.

"20. When she continued to not be reimbursed on her claim, Dr. Scott continued to seek the compensation that was due her, repeatedly seeking a response from the new Superintendent, Dr. Emma Louie, and then writing a letter to the Board in 2012. In response, she was advised that her claim would have to await the conclusion of an existing lawsuit against the Board.

"21. Dr. Scott was patient and due to the instruction of Dr. Louie, she waited until early 2014 to follow up, again meeting with Dr. Louie to discuss the status of getting paid, since the existing lawsuit had by then been resolved. Much to

Dr. Scott's dismay, Dr. Louie then advised Dr. Scott that she could file a grievance if she wanted it heard by the Board."

It is undisputed that Scott filed a grievance with the Board in 2014 concerning her claim that she had not been compensated for her service as "Instructional Leader," which she deemed to be service as the de facto acting principal, at GCHS during the 2010-2011 school year. Additionally, Scott presented a claim that she had been "underpaid by approximately \$1,664.00" each year since 2007 because, she asserted, the Board had "inadvertently reduc[ed] the annual pay for the Vocational Director." On December 15, 2014, the Board denied Scott's grievance claims.

On January 7, 2016, Scott commenced the underlying action by filing a complaint against the Board and against Morgan, Zippert, Hardy, Branch, and Dancy ("the Board members"), in their official and individual capacities. In addition to Scott's claims of lack of payment or underpayment that she had asserted in her grievance claims, Scott also asserted that her "supplemental salary schedule" had been inadvertently reduced on an annual basis since 2007 and that her salary for serving as instructional leader during the 2010-2011 school year should be higher than the amount that Gary Rice -- the person who was subsequently

appointed as principal at GCHS -- received "because [Scott] holds an earned doctorate and Mr. Rice possesses only a master's degree, [so Scott] should have been paid the credential differential of an additional \$5,107.00 as well."

On February 10, 2016, the defendants filed a joint answer to the complaint in which they denied the material allegations and asserted the defenses of State immunity based on Ala. Const. 1901, Art. I, § 14 (Off. Recomp.), regarding Scott's claims against the Board and the Board members in their official capacities, and State-agent immunity regarding Scott's claims asserted against the Board members in their individual capacities. On July 20, 2016, the defendants filed a motion to dismiss the complaint against the Board and to dismiss Scott's claims against the Board members in their official capacities on the basis of State immunity. On August 10, 2016, Scott filed a response in opposition to the motion to dismiss, arguing that she was not seeking monetary damages against the State; instead, she contended, she was seeking to require the Board and the Board members to perform a legal or ministerial duty.

On September 28, 2016, before the circuit court had ruled on the motion to dismiss, Scott filed a "First Amended Complaint" that named

only the Board members in their official and individual capacities as defendants. In other words, Scott abandoned her claims against the Board. Scott's amended complaint contained a more detailed rendition of facts, and it asserted two counts against the Board members. Count one, captioned "Failure to Perform Ministerial Duties" and asserted against Board members in their official capacities, alleged

"[t]he failure to pay [Scott] in accord with the salary schedules previously adopted by the Board as well as the failure to pay her for the time that she had spent performing principal duties per previous policy and practice of the Board and in contravention of the representation of Board members, as well as the failure to pay [Scott] the amount that is due a principal with a doctorate as reflected in Board salary schedules, pursuant to the salary schedules adopted by the Board."

Count two was captioned "Breach of Contract and Failure to Perform Legal and Ministerial Duties" and was asserted against the Board members in their official and individual capacities. With respect to the Board members in their individual capacities, Scott alleged that the Board members' "breach of their compensation agreements with [Scott] was willful, fraudulent, in bad faith, beyond the individual Board members' respective authority, or under a mistaken interpretation of law" and that their "breach of contract consist[ed] of their failure to

comply with the set salary schedules and failure to pay [Scott] in accord with Board policies pertaining to the wages to which she is due."

On January 9, 2017, the Board members filed a motion to dismiss the first amended complaint with respect to the official-capacity claims asserted against them on the basis of State immunity. On January 23, 2017, Scott filed a response in opposition to that motion to dismiss. On February 3, 2018, the circuit court entered an order denying the Board members' motion to dismiss. That order also formally dismissed the Board from the action.

On December 3, 2019, the Board members filed a "Motion to Deem Matters Admitted," in which they alleged that Scott had not answered the Board members' "Requests for Admission" in a timely manner. The Board members argued that, in accordance with Rule 36(a), Ala. R. Civ. P., because Scott had not served a response within 30 days of being served their requests for admission, the matters that were the subject of those requests should be deemed admitted by Scott. On January 24, 2020, the circuit court entered an "Order Deeming Matters Admitted." The relevant matters that were deemed admitted by Scott included:

"D. That the Greene County Board of Education did not vote to approve [Scott] to serve as principal, acting principal,

interim principal or any other administrative position other than her regular position as Vocational Director at Greene County High School for 2010-2011 school year.

"E. That [Scott] was fully and properly paid for her services as Vocational Director at Greene County High School for the 2010-2011 school year.

"....

"J. That [Scott] was never approved by the Greene County Board of Education to work in any capacity beyond her regular position as Vocational Director at Greene County High School Year during the 2010-2111 school year.

"K. That [Scott] is not entitled to payment for any services she claimed to have performed beyond her regular position as Vocational Director at Greene County High School during the 2010-2011 school year.

"L. That the Greene County Board of Education does not have a position within the system known as 'Instructional Leader.'"

Additionally, the order deemed it an admitted fact that Scott "did not have a contract, written or verbal," with any of the Board members, "either individually or in [his or her] capacity as a member of the Greene County Board of Education."

On January 27, 2020, Scott filed a "Motion to Reconsider Defendants' Motion to Deem Matters Admitted." In that motion, Scott argued that the circuit court had the discretion to allow late responses to

requests for admission, and she offered purported reasons why her attorney had not been able to complete responses to the requests for admission within the ordinary time. On February 2, 2020, the Board members filed a response in opposition to Scott's motion to reconsider the circuit court's order deeming certain matters admitted. Based on the submissions provided to this Court, it does not appear that the circuit court ever ruled on Scott's motion to reconsider.

After the completion of discovery, the Board members filed a summary-judgment motion on November 1, 2021, a brief, and evidentiary submissions in support of that motion. With respect to Scott's claims against the Board members in their official capacities, the Board members again contended that Scott was impermissibly seeking damages from the State and, thus, that her official-capacity claims were barred by State immunity under § 14. With respect to Scott's claims against the Board members in their individual capacities, the Board members -- relying upon Ex parte Cooper, 351 So. 3d 501 (Ala. 2021), argued that Scott's claims were, in effect, claims against the State that are barred by § 14 because, they asserted, any alleged duties the Board members breached existed only because of their positions as members of

the Board. As we will discuss in more detail in the "Analysis" portion of this opinion, that is a line of reasoning that we subsequently overruled in Ex parte Pinkard, [Ms. 1200658, May 27, 2022] ___ So. 3d ___ (Ala. 2022).

On November 22, 2021, Scott filed a response in opposition to the Board members' summary-judgment motion. With respect to her official-capacity claims, Scott once again argued that she was not seeking damages against the State but, rather, was seeking to have the Board members perform legal or ministerial duties. With respect to her individual-capacity claims, Scott relied upon her asserted refutation of the Board members' characterization of the official-capacity claims, i.e., she reiterated that actions to compel State officials to perform ministerial acts are not considered to be actions against the State for § 14 purposes, citing Ex parte Moulton, 116 So. 3d 1119, 1131-32 (Ala. 2013).

On December 1, 2021, the Board members filed a reply to Scott's response to their summary-judgment motion. In that reply, the Board members repeated their argument from their initial brief concerning the official-capacity claims. Concerning Scott's individual-capacity claims, the Board members expanded their argument, contending that

"[t]he only possible duty that the [Board members] may have had to [Dr. Scott] arises out of their duties as Members of the Green County Board of Education. As individuals, the [Board members] owed no duty whatsoever to pay [Dr. Scott] out of their own pockets for any service that she may or may not have performed as an employee of the school system."

On October 16, 2022, the circuit court entered an order granting the Board members' summary-judgment motion with respect to Scott's claims against them in their official capacities but denying their summary-judgment motion with respect to Scott's individual-capacity claims "as it appears to the court that there is a genuine issue as to one or more material facts and that [the Board members] are not entitled to judgment as a matter of law."

On November 22, 2022, the Board members petitioned this Court for a writ of mandamus, requesting that this Court direct the circuit court to enter a summary judgment on Scott's individual-capacity claims against them. On February 15, 2023, this Court entered an order requiring answers and briefs to the Board members' petition. Instead of submitting a respondent's brief, on February 28, 2023, Scott's attorney submitted a letter to this Court that opened by stating: "Please accept this letter as a response of Respondent, Dr. Rhinnie B. Scott, to said Petition for Writ of Mandamus." The letter went on to declare:

"Regarding the merits, Dr. Scott clearly performed duties in addition to her normal duties during the 2010-2011 school year, for which her then-Superintendent promised her she would be paid. As [the Board members] persuasively set forth, however, the Superintendent failed to secure approval of the Board. While the Board may have a moral duty to pay Dr. Scott -- and should -- the undersigned is now persuaded that it has no legal duty to do so, for which reason [the Board members] are entitled to a Writ of Mandamus directing the Circuit Court of Greene County to enter summary judgment in their favor."

II. 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 Wood, 852 So. 2d 705[, 708] (Ala. 2002) (quoting Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993)). A petition for a writ of mandamus 'is an appropriate means for seeking review of an order denying a claim of immunity.' Ex parte Butts, 775 So. 2d 173, 176 (Ala. 2000)."

Ex parte Haralson, 853 So. 2d 928, 931 (Ala. 2003).

III. Analysis

In their mandamus petition to this Court, the Board members have completely altered their arguments for why they are entitled to immunity regarding Scott's individual-capacity claims. Instead of contending, as they did in the circuit court, that Scott's individual-capacity claims are, in reality, official-capacity claims barred by State immunity, the Board members now argue that they are entitled to State-agent immunity because their actions arose from functions that entitle them to State-agent immunity, and further, they insist, Scott has not presented substantial evidence demonstrating that the Board members' actions fall within any of the exceptions to State-agent immunity. As we foreshadowed in the rendition of the facts, the Board members' reason for altering their arguments seems abundantly clear: between the time the Board members submitted their summary-judgment motion and the time they filed their mandamus petition, this Court released Ex parte Pinkard, [Ms. 1200658, May 27, 2022] ___ So. 3d ___ (Ala. 2022). In Pinkard, the Court overruled the line of reasoning that the Board members had presented in their summary-judgment motion as to why

they are entitled to immunity regarding Scott's individual-capacity claims. The Pinkard Court explained:

"[N]othing in the text of [Ala. Const. 1901, Art. I.] § 14 prohibits courts from hearing a claim against an individual State employee if the claim does not name or seek relief from the State. For over a century, our caselaw recognized this. Indeed, this Court has gone out of its way to emphasize that 'any action against a State official that seeks only to recover monetary damages against the official "in [his or her] individual capacity" is, of course, not an action against that person in his or her official capacity' and, therefore, 'would of necessity fail to qualify as "an action against the State" for purposes of § 14.' Ex parte Bronner, 171 So. 3d 614, 622 n.7 (Ala. 2014); see also, e.g., Elmore v. Fields, 153 Ala. 345, 45 So. 66 (1907) (similar). That is, at least, until Barnhart [v. Ingalls], 275 So. 3d 1112 (Ala. 2018)].

"... Barnhart ... [held] for the first time that any 'individual capacity' claims alleging breach of duties that 'existed solely because of [the officers'] official positions' are substantively claims against the State for purposes of § 14. In reaching this result, Barnhart expressly overruled 'any previous decisions' to the contrary. Id. at 1127.

"Barnhart's logic may have ultimately led to a correct result (dismissal), but it did so for the wrong reason. Barnhart correctly understood that the employees' individual-capacity claims were nonstarters because the Commission officers obviously owed no duty in their individual capacities to pay the employees. Id. at 1127 n.9. But failure to plead the existence of a legal duty is a merits defect, not a jurisdictional one. Barnhart overlooked that distinction, so it erroneously rejected the employees' individual-capacity claims for lack of subject-matter jurisdiction (under § 14) instead of on the merits (for failure to state a claim)."

___ So. 3d at ___ (footnote omitted).

Pinkard made it clear that individual-capacity claims such as those asserted by Scott are not foreclosed by State immunity, contrary to the Board members' assertion in the circuit court. But, of course, the Board members submitted their summary-judgment motion, as well as their reply to Scott's response to that summary-judgment motion, before we decided Pinkard, so their asserted position before the circuit court is understandable, as is the fact that the Board members present new arguments in their mandamus petition for why they are entitled to State-agent immunity.

Nonetheless,

"[t]his Court will not reverse an order duly entered by a trial court, or issue a writ of mandamus commanding a trial judge to rescind an order, based upon a ground asserted in the petition for the writ of mandamus that was not asserted to the trial judge, regardless of the merits of a petitioner's position in the underlying controversy. Ex parte Ebbers, 871 So. 2d 776, 786 (Ala. 2003) ('In determining, on mandamus review, whether the trial court exceeded the limits of its discretion, "the appellate courts will not reverse the trial court on an issue or contention not presented to the trial court for its consideration in making its ruling." Ex parte Wiginton, 743 So. 2d 1071, 1073 (Ala. 1999).')

State v. Reynolds, 887 So. 2d 848, 851-52 (Ala. 2004) (emphasis added).

Thus, even if the Board members' new arguments for why they are

entitled to State-agent immunity have merit, we cannot entertain those arguments as reasons for granting their petition.

Likewise, even though the above-quoted explanation from Pinkard strongly indicates that Scott's individual-capacity claims against the Board members fail to state a claim for which relief can be granted because the Board members obviously owe no duty in their individual capacities to pay Scott for work she may have performed for the Board, we cannot grant the petition on that basis.

"Mandamus review of the denial of a summary-judgment motion 'grounded on a claim of immunity' is an exception to the general rule against interlocutory review of the denial of summary-judgment motions. Ex parte Auburn Univ., 6 So. 3d 478, 483 (Ala. 2008); Ex parte Hudson, 866 So. 2d 1115, 1120 (Ala. 2003). In those exceptional cases, '[w]e confine our interlocutory review to matters germane to the issue of immunity. Matters relevant to the merits of the underlying tort claim, such as issues of duty or causation, [we leave] to the trial court....' 866 So. 2d at 1120."

Ex parte Simpson, 36 So. 3d 15, 22 (Ala. 2009) (second emphasis added).

In other words, we will entertain a mandamus petition that challenges the denial of a summary-judgment motion when the petition is grounded on a claim of immunity, but we confine our review of such a petition to the issue of immunity. Thus, even though Scott's individual-capacity

claims appear to be unsupported by a legal duty owed by the Board members, and despite the fact that the Board members highlighted that issue in their reply to Scott's response to their summary-judgment motion, we must leave aside examination of that issue because it is a merits issue, not a jurisdictional one.

Nonetheless, under the particular circumstances of this case, we deem it appropriate to grant the Board members' mandamus petition because of Scott's admission in her counsel's letter to this Court that she never obtained approval from the Board to receive extra compensation for being an "Instructional Leader" at GCHS during the 2010-2011 school year. Scott further declares that this failure means that the Board members "are entitled to a Writ of Mandamus directing the Circuit Court of Greene County to enter summary judgment in their favor."¹ Because Scott agrees that the Board members are entitled to a summary judgment as to her remaining individual-capacity claims against them, we conclude that there is no genuine issue of material fact concerning those claims. Therefore, we grant the Board members' petition for a writ

¹Scott's letter does not reference her other individual-capacity claims against the Board members for additional compensation, and so we assume that she has abandoned those claims.

of mandamus. See, e.g., Ex parte Utilities Bd. of Foley, 265 So. 3d 1273, 1284-85 (Ala. 2018) (concluding, regarding a mandamus petition challenging the denial of a summary-judgment motion premised on the defense of immunity, that "[b]ecause the [respondents] concede that [some of the defendants] are entitled to a summary judgment as to the wantonness claims asserted against them and that [certain other defendants] are entitled to a summary judgment as to the negligence claims asserted against them, they have established a clear legal right to a summary judgment on those claims").

IV. Conclusion

Because Scott has conceded to this Court that no genuine issues of material fact remain to be decided with respect to her individual-capacity claims against the Board members, the Board members are entitled to a summary judgment concerning those remaining claims. Therefore, we grant the Board members' petition for a writ of mandamus. The circuit court is directed to enter a summary judgment in the Board members' favor as to the remaining individual-capacity claims against them.

PETITION GRANTED; WRIT ISSUED.

Wise, Sellers, Stewart, and Cook, JJ., concur.

Bryan, J., concurs in the result.

Parker, C.J., dissents.

Mitchell, J., dissents, with opinion, which Shaw, J., joins.

MITCHELL, Justice (dissenting).

The current and former members of the Greene County Board of Education who were sued ("the Board members") may eventually be entitled to relief. But they are not entitled to a writ of mandamus here because they have not met the requirements of our mandamus test.

The writ of mandamus is an extraordinary writ, issued only "'when there is 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent [the trial court] 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 Wood, 852 So. 2d 705, 708 (Ala. 2002) (citation omitted). In this case, the Board members have not satisfied two of the elements.

First, as the majority opinion explains, the trial court did not have an "imperative duty" to deny the summary-judgment motion on the issue of State-agent immunity because that issue was not before it. Although the Board members could be entitled to State-agent immunity because of Dr. Rhinnie B. Scott's concession to this Court, the trial court did not hear those arguments. And on the issue that was before the trial court -- State immunity -- the trial court correctly ruled that the Board members, in

their individual capacities, were not entitled to summary judgment. See Ex parte Pinkard, [Ms. 1200658, May 27, 2022] ___ So. 3d ___ (Ala. 2022).

Second, the Board members have an adequate remedy at law -- summary judgment. A defendant "may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor" Rule 56(b), Ala. R. Civ. P. (emphasis added). If there are truly no genuine issues of material fact left in this case because of Dr. Scott's concession, then the Board members may move for summary judgment in the trial court whenever they want. And if our Court denied their petition, the Board members would not then need to go to a jury as they contend. Instead, all they would need to do is file a new motion for summary judgment and support it with evidence of Dr. Scott's concession to this Court.

Granting the Board members' petition for the writ of mandamus puts us in an odd position: correcting a trial court that did nothing wrong. Generally, the writ is appropriate when the trial court has clearly erred. See Ex parte Children's Hosp. of Alabama, 721 So. 2d 184, 186 (Ala. 1998). In fact, "the very purpose of mandamus review is for a petitioner to point out a lower court's error" Ex parte Riverfront, LLC, 196

So. 3d 1167, 1180 (Ala. 2015) (Shaw, J., dissenting). But they cannot point to an error committed by the trial court. And because the Board members did not raise their State-agent immunity arguments below, and the trial court had no evidence of a concession before it when it ruled on their motion, we cannot say that the trial court erred by denying the Board members' summary-judgment motion with respect to Dr. Scott's individual-capacity claims.

For these reasons, I would deny the Board members' petition.

Shaw, J., concurs.