REL: January 31, 2020

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180741

Roger Wilkinson

v.

Kelly Cochran, individually and in her official capacity as a member of the Gadsden City Board of Education, et al.

Appeal from Etowah Circuit Court
(CV-16-182)

THOMPSON, Presiding Judge.

Roger Wilkinson, a former principal of a Gadsden elementary school, was suspended from his position for 20 days without pay for a certain post he made on Facebook, a social-

media Web site. As a result, Wilkinson filed a civil action against the Gadsden City Board of Education ("the board"); the members of the board, Kelly Cochran, Frank Cylar, Mike Haney, Deborah Howard, Nancy Stewart, Lynn Taylor, and Wayne Watts (hereinafter collectively referred to as "the board members"); and Ed Miller, the Gadsden superintendent of education. The action was against the board members and Miller in both their official and their individual capacities. In the action, Wilkinson sought "appropriate declaratory, mandamus and injunctive relief" ordering that he be "reinstated" and reimbursed $6,897.67, plus interest, for that portion of his salary he did not receive during the suspension. Wilkinson also sought to have the allegations against him removed from his personnel file "or other files existing" regarding him.

The board, the board members, and Miller moved to dismiss Wilkinson's action on the grounds that the complaint failed to state a claim pursuant to which relief could be granted and that Wilkinson's claims were barred by the doctrine of sovereign immunity. After a hearing, on May 19, 2017, the trial court entered an order dismissing the claims against the board and against Miller and the board members in their

official capacities. In the order, the trial court noted that Wilkinson had conceded that the board had immunity.[1] The trial court allowed the claims against Miller and the board members in their individual capacities to go forward and permitted discovery regarding their "rationale and reasoning" in deciding to suspend Wilkinson. After discovery was completed, Miller and the board members moved for a summary judgment. Wilkinson opposed the motion. A hearing was held on the motion, and, on April 12, 2019, the trial court entered a summary judgment as to the claims asserted against Miller and the board members in their individual capacities, stating that it had considered the parties arguments and had concluded that there were no genuine issues of material fact and that the board members and Miller were entitled to a judgment as a matter of law. On April 26, Wilkinson filed a motion to alter, amend, or vacate the summary judgment. That motion was denied on May 3, 2019. Wilkinson timely appealed from both

[1]In his brief opposing the motion to dismiss, Wilkinson wrote that he conceded that the "defendants' arguments regarding 'the Gadsden City Board of Education' as a legal entity are well-taken and claims against the entity itself as a separate defendant itself are due to be dismissed." On appeal, Wilkinson does not argue that the board's dismissal was improper.

the order of dismissal and the summary judgment insofar as they disposed of his claims against Miller and the board members.

The evidence submitted in support of the motion for a summary judgment indicates the following.[2] Wilkinson began working as the principal of R.A. Mitchell Elementary School in February 2014. Wilkinson had a personal page on the Facebook social-media Web site on which he stated that he was the principal of the school. He also posted school announcements such as closings on his personal page. In his affidavit,

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[2]In his brief to the trial court in opposition to the motion for a summary judgment, Wilkinson references a number of exhibits attached to that brief. However, in the record on appeal, Wilkinson's opposition brief has no exhibits. We note that

> "'[i]t is the appellant's duty to check the record and to ensure that a complete record is presented on appeal. Tarver v. State, 940 So. 2d 312, 316 (Ala. Crim. App. 2004).' Alabama Dep't of Pub. Safety v. Barbour, 5 So. 3d 601, 606 n. 1 (Ala. Civ. App. 2008). 'An error asserted on appeal must be affirmatively demonstrated by the record, and if the record does not disclose the facts upon which the asserted error is based, such error may not be considered on appeal.' Martin v. Martin, 656 So. 2d 846, 848 (Ala. Civ. App. 1995)."

Brady v. State Pilotage Comm'n, 208 So. 3d 1136, 1141 (Ala. Civ. App. 2015).

Miller testified that, in January 2016, he received an anonymous complaint about certain posts on Wilkinson's personal Facebook page. The complaint included copies of the posts, several of which included pictures of guns and people holding guns. Miller stated that he asked Wilkinson to meet with the board members during the board's meeting in February 2016. At that meeting, Miller said, the content and nature of the posts were discussed, and Wilkinson "was warned about inappropriate postings which might be misinterpreted to be violent or divisive." Miller also said that he made clear to Wilkinson that "any future issues could result in discipline." In his deposition, Wilkinson said that, at the February 2016 meeting, he assured the board members and Miller that he would use better judgment on future posts and that there would be no more problems with his posts.

Donald J. Trump was elected president of the United States on November 8, 2016. On November 10, 2016, Wilkinson took a picture of the food on his school-lunch tray and, during school hours, posted the picture to his personal Facebook page with the following comment: "All I can say is Trump was elected 2 days ago and we already have actual white

flour American rolls in the lunchroom instead of the Communist wheat bread that's been served for the past few years #MAGA" ("the Facebook post").[3] Miller stated in his affidavit that, the same day, he received several complaints regarding the Facebook post. On the night of November 10, 2016, Miller said, he contacted Wilkinson and told him that he had received "negative feedback" regarding the Facebook post. Miller said that he asked Wilkinson to delete the Facebook post. Wilkinson complied with Miller's request.

At Miller's request, Wilkinson met with Miller and other board officials on November 15, 2016. Miller told Wilkinson that the Facebook post had caused problems and had resulted in negative feedback. Miller then gave Wilkinson a letter explaining that Wilkinson was being placed on administrative leave for four days pending an investigation.

Wilkinson testified in his deposition that, on November 28, 2016, he received a second letter from Miller. In the second letter, Miller advised Wilkinson that Miller was recommending to the board that Wilkinson be suspended for 20

[3]"MAGA" was the acronym for President Trump's campaign slogan, "Make America Great Again."

days without pay. According to the letter, the recommendation was based on an inappropriate Facebook post made during school hours and "[n]egligence of prior warnings on inappropriate activity on social media." Wilkinson was further advised that the board would consider the recommendation at its December 6, 2016, meeting and that Wilkinson had a right to attend the meeting and be heard. In his deposition, Wilkinson said that, at the meeting, he apologized and acknowledged that the Facebook post was a mistake, telling the board he should have used better judgment and saying he would remove his Facebook page. Wilkinson also told the board that the Facebook post "was taken by individuals in a way that was not meant." There was evidence indicating that some people who complained about the Facebook post believed that the references to white bread and wheat bread were racial in nature. Wilkinson said that he told the board that the post was not meant to be "accusatory of any individual or any group of people. It was not racially motivated nor meant to be racially offensive in any way."

Wilkinson acknowledged to the board that there should be consequences for the Facebook post, but he disagreed that a 20-day suspension was warranted. Instead, Wilkinson said that

he believed that the four-day suspension was adequate discipline.

On December 8, 2016, Miller sent Wilkinson a letter informing him that the board had approved Miller's recommendation that Wilkinson be suspended for 20 work days without pay. The suspension was to run from November 15, 2016, and conclude on January 3, 2017. Wilkinson was to return to work on January 4, 2017.

In his deposition, Wilkinson was asked whether he was aware that the Facebook post had "caused problems and a disruption for the Gadsden City Board of Education" and whether he was aware that the Facebook post had "caused a negative reflection upon" his school. Wilkinson responded "[m]ost definitely" to both questions. He also said that he had no evidence indicating that Miller or any of the board members had acted out of any ill will or malice in imposing the suspension, although he had alleged that in his complaint.

On December 27, 2016, Wilkinson filed the instant action, which resulted in the dismissal order and the summary judgment, discussed above, from which he has appealed.

Although the parties did not raise the issue of this court's jurisdiction over this appeal, because "'jurisdictional matters are of such magnitude that we take notice of them at any time and do so even ex mero motu.' Nunn v. Baker, 518 So. 2d 711, 712 (Ala. 1987)." Bryant v. Flagstar Enters., Inc., 717 So. 2d 400, 401 (Ala. Civ. App. 1998).

The trial court stated in its May 19, 2017, order dismissing the action in part that Wilkinson had been disciplined pursuant to the Students First Act ("the SFA"), § 16-24C-1 et seq., Ala. Code 1975. At no point, either before the trial court or before this court, has Wilkinson challenged the applicability of the SFA. We recognize that the SFA applies to principals only under certain circumstances. Under § 16-24C-3(8), Ala. Code 1975, a part of the SFA, the definition of "teacher" includes

> "principals who had attained tenure under prior law, but who have not elected to become contract principals under subsection (h) of Section 16-24B-3[, Ala. Code 1975]. The term does not include ... a principal who is employed as or who has elected to become a contract principal under subsection (h) of Section 16-24B-3, whether or not certification is required for [that] position[] by law or policy ...."

From the record before us, we cannot determine whether Wilkinson falls within that definition. However, Wilkinson has never asserted that he is not subject to the SFA, and we are are not called upon to decide the issue of the applicability of the SFA in this case. Therefore, we, too, will review this case under the SFA.

Under the SFA, a superintendent of a city board of education is included within the definition of "chief executive officer." § 16-24C-3(1). The "governing board" is defined as "[t]he body of elected or appointed officials that is granted authority by law, regulation, or policy to make employment decisions on behalf of the employer." § 16-24C-3(5). The "employer" is "[t]he entity, institution, agency, or political subdivision of the state by which an employee who is subject to [the SFA] is employed." § 16-24C-(4).

Section 16-24C-6(I), Ala. Code 1975, provides, in pertinent part:

> "(I) An employee may be suspended for cause with or without pay on the written recommendation of ... the chief executive officer[, i.e., the superintendent] and the approval of the governing board[, i.e., the school board members]. <u>The suspension of a tenured teacher or a nonprobationary employee for no more than 20 work days without pay</u>

> is not a termination of employment that is subject to review under [the SFA]. ..."

(Emphasis added.)

Because Wilkinson's suspension was for 20 days, the board members' decision was not subject to review under the SFA. "'We recognize that the legislature may properly limit the right to appeal. Ex parte Smith, 394 So. 2d 45[, 47-48] (Ala. Civ. App. 1981).'" South Alabama Skills Training Consortium v. Ford, 997 So. 2d 309, 331 (Ala. Civ. App. 2008)(quoting Fields v. State ex rel. Jones, 534 So. 2d 615, 616 (Ala. Civ. App. 1981)). However, the

> "'prohibition of appeal by the legislature does not affect the authority of the court to review the proceedings below by granting certiorari. See, Ex parte Bracken, 263 Ala. 402, [406,] 82 So. 2d 629[, 631] (1955). Because the Enabling Act [at issue in Ex parte Smith] provides no right of appeal or statutory certiorari, the common law writ of certiorari is the only available means of review. Phelps v. Public Service Comm'n, 46 Ala. App. 13, [17,] 237 So. 2d 499[, 501] (1970).'
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> "[Ex parte] Smith, 394 So. 2d [45] at 47-48 [(Ala. Civ. App. 1981)]."

Ford, 997 So. 2d at 331.

It has long been the law that, in the absence of the right to appeal or other adequate remedy, a petition for the

common-law writ of certiorari lies to review the rulings of an administrative board or commission. Fox v. City of Huntsville, 9 So. 3d 1229, 1232 (Ala. 2008); State Pers. Bd. v. State Dep't of Mental Health & Retardation, 694 So. 2d 1367, 1371 (Ala. Civ. App. 1997); Hardy v. Birmingham Bd. of Educ., 634 So. 2d 574, 576 (Ala. Civ. App. 1994); Ex parte Alabama Textile Prods. Corp., 242 Ala. 609, 7 So.2d 303 (1942); Fowler v. Fowler, 219 Ala. 457, 122 So. 444 (1929); and Ferguson v. Jackson Cty. Comm'n, 187 Ala. 645, 65 So. 1028 (1914). When a public-school employee has no statutory right to appeal an employment decision, the employee seeking review of such a decision of a board of education may petition the circuit court for a common-law writ of certiorari. Alexander v. Dothan City Bd. of Educ., 891 So. 2d 323, 326 (Ala. Civ. App. 2004)(citing Williams v. Board of Educ. of Lamar Cty., 263 Ala. 372, 374, 82 So. 2d 549, 551 (1955)); Hardy v. Birmingham Bd. of Educ., supra.

The dissenting opinions both reject the availability of the remedy of the common-law writ of certiorari in this case. To support that contention, the dissenting opinions rely on the following language from Nashville, Chattanooga & St. Louis

Ry. Co. v. Town of Boaz, 226 Ala. 441, 443, 147 So. 195, 196 (1933):

> "The remedy by common-law certiorari only extends to courts or boards required by law to keep a record or quasi record of their proceedings, and the only proper return to the writ is such record or a transcript thereof duly authenticated by the legal custodian, as it exists at the time of the issuance of the writ. Commissioners' Court of Lowndes County v. Hearne, 59 Ala. 371 [(1877)]; Town of Camden v. Bloch, 65 Ala. 236 [(1880)]; City of Decatur v. Brock, 170 Ala. 149, 54 So. 209 [(1910])]; 11 C.J. 175, §§ 265-270."

They argue that because a school board is not required to make a record of its "proceedings" under the SFA, a petition for the common-law writ of certiorari is not available to review the board members' decision to suspend Wilkinson for 20 days.

The dissenting opinions read the language of Town of Boaz too narrowly, and they too easily dismiss years of caselaw holding that boards of education are "quasi judicial," enabling judicial review of their decisions by a petition for the common-law writ of certiorari. See, e.g., Williams v. Board of Educ. of Lamar Cty., 263 Ala. at 374, 82 So. 2d at 551 (stating that the board of education was a "quasi judicial board"); Alexander, 891 So. 2d at 326 ("It is well settled that decisions of governmental boards, such as a local board

of education, are subject to judicial review by a petition for a writ of certiorari."); see also § 16-8-4, Ala. Code 1975 ("The county board of education shall hold an annual meeting each year in November. At this meeting the board shall elect each year one of its members to serve as president and one to serve as vice-president. Each board shall hold at least five additional regular meetings during the school year, and such special meetings may be held, at such place as the duties and the business of the board may require. Public notice shall be given of regular meetings. The rules generally adopted by deliberative bodies for their government shall be observed by the county board of education. No motion or resolution shall be declared adopted without the concurrence of the majority of the whole board.").

In Alexander, a former public-school teacher, Pattie Alexander, filed a declaratory-judgment action against her former employer, the Dothan City Board of Education ("the Dothan school board"), as well as the Retirement Systems of Alabama ("the RSA") and the State Board of Adjustment ("the board of adjustment"), regarding the calculation of her retirement benefits. Specifically, Alexander sought a

judgment declaring that she was entitled to have her retirement benefits calculated at a higher salary than was being used. 891 So. 2d at 324. To her complaint, Alexander attached letters from the superintendent of the Dothan school board informing her that she was being denied credit on the Dothan school board's salary schedule for work she had done as an adult-education instructor. Alexander made three requests to the Dothan school board regarding the three years of credit she believed she was not receiving toward her retirement benefits. 891 So. 2d at 325-26. This court pointed out that the Dothan school board and its superintendent were "'vested with all the powers necessary or proper for the administration and management'" of the public schools in its district and that, pursuant to those powers, they had determined on three separate occasions that Alexander was not entitled to credit for her three years of employment as an adult-education instructor. Id. at 326 (quoting § 16-11-9, Ala. Code 1975).

The Dothan school board, the RSA, and the board of adjustment filed motions to dismiss Alexander's complaint. The parties filed briefs in support of their positions, and the trial court in that case dismissed the action, concluding

that the complaint did not state a justiciable controversy for which the trial court could grant relief. Id. at 325.

This court determined that, because Alexander was actually disputing the correctness of the Dothan school board's determination, "her remedy for correcting that determination, if erroneous, was to timely seek judicial review of that determination via a petition for a writ of certiorari." 891 So. 2d at 326. Significantly, there is no indication of the existence of a "record" of the type that appears to be contemplated in the dissenting opinions, i.e., a transcript of what occurred during the meetings during which the Dothan school board denied Alexander's requests for credit for three additional years of employment. Instead, the "record" appears to be the documents the Dothan school board reviewed and the letters from the superintendent to Alexander advising her of the Dothan school board's decisions.

Similarly, in this case, there is a record for the trial court and this court to review. The record consists of, at the very least, the Facebook post at issue; documentation of complaints regarding that Facebook post; letters from Miller to Wilkinson advising Wilkinson of his initial suspension; the

recommendation to the board regarding the subsequent, 20-day suspension; and the notifications to Wilkinson of his right to be present and to be heard at the meeting when the board would consider Miller's recommendation, of the date, time, and place of that meeting, of the board's decision to accept Miller's recommendation and suspend Wilkinson without pay for 20 days, and of the details of that suspension. Merely because there is no transcript of that meeting does not mean there is no record to review in this matter.

In Alexander, this court wrote:

> "In cases where an applicable statute, such as § 16-11-9 and § 16-11-17, [Ala. Code 1975,] provides no right of appeal and no statutory right to certiorari review, 'the only available means of review is the common law writ of certiorari.' Hardy v. Birmingham Bd. of Educ., 634 So. 2d 574, 576 (Ala. Civ. App. 1994) (citing Fields v. State ex rel. Jones, 534 So. 2d 615 (Ala. Civ. App. 1987)) (emphasis added). Specifically, it is well settled under Alabama law that a declaratory-judgment action may not 'be substituted for the remedy of appeal, certiorari or mandamus as the method of direct review of the judgments, decrees or orders of a judicial nature, respectively, of lower courts, bureaus, departments, or the directors or administrators thereof.' Mitchell v. Hammond, 252 Ala. 81, 83, 39 So. 2d 582, 583 (1949); accord Personnel Bd. of Jefferson County v. Bailey, 475 So. 2d 863, 867 (Ala. Civ. App. 1985) (declaratory-judgment action 'may not be substituted for the remedy of appeal, certiorari, or mandamus as

> the method of direct review of an agency's or lower tribunal's orders')."

891 So. 2d at 326. For purposes of determining that Wilkinson's remedy was to seek a common-law writ of certiorari, we find no meaningful distinction between the circumstances present in Alexander and the circumstances present in this case.

Admittedly, this court's review of the instant case has been complicated by the manner in which Wilkinson's complaint is written. Wilkinson did not set out specific claims or causes of action against the board, the board members, or Miller. In the first section of the complaint, Wilkinson sets forth the "nature of action," stating that the action is one for a declaratory judgment, an alternative writ of mandamus, and a preliminary and permanent injunction. He then goes on to list the parties. The third section of the complaint is a recitation of facts. The complaint does not include specifically delineated claims for relief. The defendants, the trial court, and this court were left to glean from the factual allegations which claims Wilkinson appeared to be asserting. After the recitation of facts, Wilkinson makes his prayer for relief, asking the trial court to "enter

appropriate declaratory, mandamus and injunctive relief" requiring that he be reinstated and be repaid his "lost salary" and asking that the allegations against him be removed from personnel files or "other files existing on" him.[4]

The substance of a plaintiff's complaint controls in determining the claims alleged therein. Assurant, Inc. v. Mitchell, 26 So. 3d 1171, 1175 (Ala. 2009). "'[I]t has long been the law that substance, not nomenclature, is "the determining factor regarding the nature of a party's pleadings or motions."'" Ex parte Alabama Dep't of Mental Health, 207 So. 3d 743, 755 (Ala. Civ. App. 2016) (quoting Chamblee v. Duncan, 188 So. 3d 682, 691 (Ala. Civ. App. 2015), quoting in turn Eddins v. State, 160 So. 3d 18, 20 (Ala. Civ. App. 2014)). The substance of Wilkinson's complaint is that he disputed the board members' determination, and he sought to have that determination set aside and the discipline imposed somehow expunged. In other words, Wilkinson was seeking judicial review of the board members' decision to suspend him. As this court explained in Alexander, his "remedy for

[4]The request to be "reinstated" is puzzling. Wilkinson was suspended for 20 working days; his employment was not terminated.

correcting that determination, if erroneous, was to timely seek judicial review of that determination via a petition for a writ of certiorari." 891 So. 2d at 326. The civil action he filed was an improper substitute for a petition for the common-law writ of certiorari. See id.

In Hicks v. Jackson County Commission, 990 So. 2d 904, 910 (Ala. Civ. App. 2008), this court discussed the standard a circuit court is to apply in reviewing a petition for a common-law writ of certiorari, writing:

> "On a petition for a common-law writ of certiorari, the circuit court's 'scope of review was limited to determining if the decision to terminate [an employee's employment] was supported by legal evidence and if the law had been correctly applied to the facts.' Evans v. City of Huntsville, 580 So. 2d [1323,] 1325 [(Ala. 1991)]. 'In addition, the court was responsible for reviewing the record to ensure that the fundamental rights of the parties, including the right to due process, had not been violated.' Id. 'Questions of fact or weight or sufficiency of the evidence will not be reviewed on certiorari.' Personnel Bd. of Jefferson County v. Bailey, 475 So. 2d 863, 868 (Ala. Civ. App. 1985).
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> > "'"'[A] common-law writ of certiorari extends only to questions touching the jurisdiction of the subordinate tribunal and the legality of its proceedings. The appropriate office of the writ is to correct errors of law apparent on the face of the record. Conclusions of fact cannot be reviewed, unless specially authorized by statute. The trial is not de novo but on

> the record; and the only matter to be determined is the quashing or the affirmation of the proceedings brought up for review.'"'
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> "G.W. v. Dale County Dep't of Human Res., 939 So. 2d 931, 934 n. 4 (Ala. Civ. App. 2006) (quoting City of Birmingham v. Southern Bell Tel. & Tel. Co., 203 Ala. 251, 252, 82 So. 519, 520 (1919)). 'This court's scope of appellate review is the same as that of the circuit court.' Colbert County Bd. of Educ. v. Johnson, 652 So. 2d 274, 276 (Ala. Civ. App. 1994)."

In exploring and ultimately deciding the question of immunity, it is apparent that the trial court did not limit its role to deciding questions touching on the board's jurisdiction, which was not disputed, or the legality of its proceedings. Accordingly, we reverse the judgment and remand the cause to the trial court for it to determine the extent, if any, that Wilkinson's complaint raised matters that can be properly be considered appropriate for certiorari review and to proceed accordingly.

REVERSED AND REMANDED.

Donaldson and Hanson, JJ., concur.

Moore, J., dissents, with writing, which Edwards, J., joins.

Edwards, J., dissents, with writing, which Moore, J., joins.

MOORE, Judge, dissenting.

I respectfully dissent.

Background

On November 10, 2016, Roger Wilkinson, while employed as the principal of a Gadsden elementary school, posted on his private Facebook social-media account a photograph of his school lunch, along with a message ("the post"), stating:

> "All I can say is Trump was elected 2 days ago and we already have actual white flour American rolls in the lunchroom instead of the Communist wheat bread that's been served for the past few years #MAGA"

On November 14, 2016, Ed Miller, the superintendent of the Gadsden City Schools, met with Wilkinson regarding the post. On November 28, 2016, Miller sent a letter to Wilkinson, notifying him that Miller was recommending to the Gadsden City Board of Education ("the board") that Wilkinson's employment be suspended without pay for 20 days for "[i]nappropriate [F]acebook posting during school hours" and "[n]egligence of prior warnings of inappropriate activity on social media." Wilkinson informed Miller that he contested the suspension and requested that he be allowed to present his contest to the board. On December 6, 2016, the board heard from Wilkinson, his counsel, and his witnesses, and, after an executive

session, the board voted to approve the suspension. Miller notified Wilkinson of the suspension by letter dated December 8, 2016. As a result of his suspension, Wilkinson lost $6,897.67 in salary.

On December 27, 2016, while serving his suspension, Wilkinson filed a complaint in the Etowah Circuit Court ("the trial court"). Wilkinson named as defendants the board, Miller, and the members of the board at the time of his suspension -- Kelly Cochran, Frank Cylar, Mike Haney, Deborah Howard, Nancy Stewart, Lynn Taylor, and Wayne Watts (hereinafter referred to collectively as "the board members"). Wilkinson asserted that he had been suspended maliciously without cause, without due process, and in violation of his constitutional rights to equal protection of the law and freedom of speech. Wilkinson also asserted that, although his employment had been suspended, he was still performing "required work" at home. Wilkinson requested the following relief:

> "A. Enter appropriate declaratory, mandamus and injunctive relief ordering and requiring that [Wilkinson] be reinstated and receive repayment/reimbursement of his lost salary in the amount of $6,897.67 with interest;

> "B. Enter appropriate declaratory, mandamus and injunctive relief ordering and requiring that the allegations be removed from any personnel files or other files existing on [Wilkinson];
>
> "C. Enter such other and further relief appropriate in these factual and legal premises [to] which [Wilkinson] may be entitled."

The defendants filed a joint motion to dismiss the complaint. In that motion, the defendants argued, among other things, that the board was immune from suit under Art. I, § 14, Ala. Const. of 1901 (Off. Recomp.), which provides "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity," and that the claims against Miller and the board members, in their personal capacities, were barred by state-agent immunity. See Ex parte Cranman, 792 So. 2d 392 (Ala. 2000) (a plurality opinion subsequently adopted by a majority of the supreme court in Ex parte Butts, 775 So. 2d 173 (Ala. 2000)). The defendants further argued that the complaint was due to be dismissed as moot because, they said, by the time of the filing of the motion to dismiss, Wilkinson had already served his suspension. Lastly, the defendants argued that Wilkinson had failed to state a claim for which relief could be granted because Wilkinson's employment had

been properly suspended pursuant to the Students First Act ("the SFA"), Ala. Code 1975, § 16-24C-1 et seq.

Wilkinson filed a response to the motion to dismiss conceding that the board was immune from suit and should be dismissed. Wilkinson argued, however, that Miller and the board members were not entitled to sovereign immunity under § 14 and that the personal-capacity claims against Miller and the board members could be maintained under certain exceptions to state-agent immunity. Wilkinson acknowledged that his employment had been suspended pursuant to the SFA, but, he contended, he had nevertheless stated a valid claim that he had been suspended without sufficient cause in violation of his rights to due process, equal protection, and freedom of speech. Wilkinson concluded as follows:

> "[Wilkinson] has correctly invoked this court's jurisdiction through his petition for a common law Writ of Certiorari to assert a violation of his right to due process, including a total lack of legal evidence to support the [b]oard members' decision. Thus, [Wilkinson] has clearly stated a claim for which relief can be granted, meaning that [Miller's and the board members'] motions to dismiss should be denied."

The trial court determined that Wilkinson was seeking a judgment declaring that his employment had been wrongfully suspended, an award of backpay, and the removal of the

sanction from his personnel records. The trial court dismissed the board as a defendant on the basis of sovereign immunity. The trial court also dismissed the claims against Miller and the board members in their official capacities on the basis of sovereign immunity. The trial court denied the motion to dismiss the claims made against Miller and the board members in their personal capacities.

On February 20, 2018, Miller and the board members moved for a summary judgment. In that motion, Miller and the board members argued that Wilkinson had acknowledged in his deposition that his employment had been suspended for cause, citing Wilkinson's testimony admitting that he had been previously counseled about the content of his Facebook posts and conceding that he deserved some form of punishment for the post. They also argued that Wilkinson had been afforded due process because, they said, in accordance with § 16-24C-6(I), Ala. Code 1975, a part of the SFA, Wilkinson had received notice of the proposed suspension and a hearing before the board to contest the proposed suspension before it was imposed. Miller and the board members again asserted that they were entitled to state-agent immunity. Wilkinson filed a response to the motion for a summary judgment that included

statements made by Miller and several of the board members regarding the reason for the suspension of Wilkinson's employment. Wilkinson argued that the suspension ostensibly had been based on an alleged violation of the board's social-media-policy guidelines but that the evidence showed that he had not violated those guidelines. Instead, Wilkinson contended, his employment had actually been suspended maliciously in retaliation for disfavored speech contained in the post.

On April 12, 2019, the trial court granted the motion for a summary judgment. Wilkinson timely filed a motion to alter, amend, or vacate the summary judgment, again arguing that his employment had been suspended maliciously and without cause in violation of his freedom of speech. The trial court denied the postjudgment motion. Wilkinson timely appealed to this court.

Discussion

On appeal, Wilkinson argues that the trial court erred in dismissing the claims against Miller and the board members in their official capacities and in entering a summary judgment for Miller and the board members in their personal

capacities.[5] Wilkinson asserts that sovereign immunity does not preclude his claims against Miller and the board members in their official capacities and that state-agent immunity does not preclude his claims against Miller and the board members in their personal capacities. Wilkinson further maintains that genuine issues of material fact exist as to whether good cause existed to support his suspension and whether that suspension violated his right to freedom of speech.[6]

The main opinion does not address the merits of Wilkinson's arguments because it concludes that Wilkinson's complaint should be construed as a petition for a common-law writ of certiorari. The main opinion concludes that, by addressing issues of immunity, the trial court "did not limit its role to deciding questions touching on the board's

[5]Wilkinson has not appealed the order dismissing the board as a party, so any claims he might have had against the board have been waived. See Gary v. Crouch, 923 So. 2d 1130 (Ala. Civ. App. 2005).

[6]In his complaint, Wilkinson also argued that his employment had been suspended in violation of his rights to equal protection and procedural due process, but he has not made any argument as to those claims on appeal, so they are considered waived. See Gary v. Crouch, 923 So. 2d 1130 (Ala. Civ. App. 2005).

jurisdiction, which was not disputed, or the legality of its proceedings," as required by the scope of certiorari review. In essence, the main opinion concludes that the trial court lacked jurisdiction to adjudicate the issue of immunity. I disagree.

Wilkinson acknowledges that his employment was suspended pursuant to § 16-24C-6(I), a part of the SFA, which provides, in pertinent part, that "[a]n employee may be suspended for cause with or without pay on the written recommendation of ... the chief executive officer and the approval of the governing board." Throughout the proceedings below, Wilkinson asserted that his employment had been suspended without cause. Effectively, Wilkinson requested that the trial court enter a judgment declaring that the suspension of his employment, having been made without cause, violated § 16-24C-6(I).

To the extent Wilkinson claims that his employment was suspended unlawfully in violation of § 16-24C-6(I), his claim is, in substance, a petition for judicial review of the decision of the board. However, the SFA does not provide any mechanism for judicial review of a suspension of 20 days or less. Instead, § 16-24C-6(I) provides, in pertinent part: "The suspension of a tenured teacher or a nonprobationary

employee for no more than 20 work days without pay is not a termination of employment that is subject to review under [the SFA]."

Ordinarily, when a statute does not provide a right to appeal an employment decision of a school board, a court may review that decision only by a petition for a common-law writ of certiorari. See Alexander v. Dothan City Bd. of Educ., 891 So. 2d 323, 326 (Ala. Civ. App. 2004) (citing Williams v. Board of Educ. of Lamar Cty., 263 Ala. 372, 374, 82 So. 2d 549, 551 (1955)). However, as Judge Edwards points out in her dissent, that "'remedy ... only extends to courts or boards required by law to keep a record or quasi record of their proceedings, and the only proper return to the writ is such record or a transcript thereof duly authenticated by the legal custodian, as it exists at the time of the issuance of the writ.'" ___ So. 3d at ___ (Edwards, J., dissenting) (quoting Nashville, Chattanooga & St. Louis Ry. Co. v. Town of Boaz, 226 Ala. 441, 443, 147 So. 195, 196 (1933)). The SFA does not require a school board to make and maintain any record of proceedings resulting in a suspension of 20 days or less. See Ala. Code 1975, § 16-24C-6(l) (requiring the compiling of a record only "[i]n any proceeding for which review is provided

hereunder"), and § 16-24C-6(I) (providing that a suspension of 20 days or less is not subject to review under the SFA). As a result, in this case, because there is no record of the December 6, 2016, board meeting, the only "administrative record" of the suspension would consist of the letters from Miller to Wilkinson, notifying Wilkinson of the proposed suspension, and the board's vote approving the suspension.

In a similar situation, the Tennessee Court of Appeals has held that a declaratory-judgment action, not a petition for a common-law writ of certiorari, is the appropriate procedural vehicle to obtain judicial review of the employment decision of a state agency. In Bernard v. Metropolitan Government of Nashville & Davidson County, 237 S.W.3d 658, 659 (Tenn. Ct. App. 2007), two police officers filed a declaratory-judgment action after their requests for certain tangible retirement benefits were denied by the deputy chief of police. The trial court in that case dismissed the officers' action on the ground that a petition for a common-law writ of certiorari should have been filed, and, therefore, it concluded, it lacked subject-matter jurisdiction over the declaratory-judgment action. In reversing that judgment, the Tennessee Court of Appeals held that "[t]he sufficiency of the

record is important in determining which procedural avenue is most appropriate." 237 S.W.3d at 662. The only record relating to the decision to deny the officers their retirement benefits consisted of four letters exchanged between the officers and the deputy police chief, none of which contained any evidence to support or oppose the decision denying the officers their retirement benefits because they allegedly lacked "good standing." The court said:

> "The statutory scheme implementing common law certiorari 'plainly presupposes that a judicial or quasi-judicial proceeding is the subject of review and that a "record" of evidence, common in such proceedings, is available for certification to the reviewing court.' Fallin v. Knox County Bd. of Comm'rs, 656 S.W.2d 338, 341 (Tenn. 1983).
>
> "The entire certiorari scheme envisions a 'final order or judgment' before a board, commission, or officer exercising judicial or quasi-judicial authority, with a record of the hearing preserved for judicial review. Stockton v. Morris & Pierce, 172 Tenn. 197, 110 S.W.2d 480, 485-86 (1937)."

237 S.W.3d at 664. The court held that, in the absence of a record of an administrative proceeding setting forth the authority of the deputy police chief over the matter and the evidence supporting the reasons for his denial of the retirement benefits, the officers had properly brought their claims under the Tennessee Declaratory Judgment Act to

"'obtain a declaration of rights, status or other legal relations'" in regard to those benefits. 237 S.W.3d at 665 (quoting Tenn. Code Ann. § 29-14-103).

I recognize that, in response to the motion to dismiss, Wilkinson characterized his claim, at least in part, as a petition for the common-law writ of certiorari. However, because § 16-24C-6(I) does not require a governing board to make a record of the evidence supporting its decision to suspend an employee for 20 days or less, a petition for the common-law writ of certiorari is not an available remedy to obtain judicial review. On the other hand, a declaratory-judgment action may be maintained for that purpose. Alabama's declaratory-judgment act authorizes "[c]ourts of record" to "declare rights, status, and other legal relations whether or not further relief is or could be claimed." Ala. Code 1975, § 6-6-222. In House v. Jefferson State Community College, 907 So. 2d 424, 425 (Ala. 2005), the Alabama Supreme Court held that sovereign immunity did not bar a declaratory-judgment action brought by an employee of a community college against the college, the college president, the chancellor of the Alabama Department of Postsecondary Education, and six members of the State Board of Education alleging that the employee's

employment had been wrongfully terminated without due process. House recognizes the appropriateness of a declaratory-judgment action as a method of judicial review of employment decisions of school boards in some circumstances. Through a declaratory-judgment action, a circuit court can obtain the necessary evidence to conduct a meaningful review of the suspension and the suspension proceedings.[7]

Furthermore, in his complaint, Wilkinson does not seek a judicial review only to determine whether legal evidence supported the suspension of his employment. He also seeks a judgment declaring that the suspension of his employment violated his right to freedom of speech. A declaratory-judgment action may be used as a means to challenge an adverse employment decision of a state agency on that constitutional ground. See, e.g., Long v. Water Works & Sewer Bd. of Gadsden, 487 So. 2d 931 (Ala. Civ. App. 1986).

[7]In this case, the trial court ordered the parties to conduct discovery of "the rationale and reasoning of the [board members]" in order to determine whether there was "a genuine issue of any material fact for trial." It was only through this discovery process that the parties were able to generate any "record" of evidence regarding the suspension for the trial court to consider.

For the foregoing reasons, I believe the complaint states a valid claim under the declaratory-judgment act insofar as Wilkinson seeks a determination that his employment was suspended without cause and in violation of his right to freedom of speech.

To the extent Wilkinson seeks mandamus and injunctive relief, his complaint states claims different from a petition for the common-law writ of certiorari. A common-law writ of certiorari is revisory in nature, see Ex parte Hennies, 33 Ala. App. 229, 234, 34 So. 2d 17, 21 (1947), and serves to correct legal errors on the face of the record with "the only matter to be determined [being] the quashing or the affirmation of the proceedings brought up for review." City of Birmingham v. Southern Bell Tel. & Tel. Co., 203 Ala. 251, 252, 82 So. 519, 520 (1919). In contrast, mandamus and injunction are compulsory remedies. See Ex parte Hennies, supra. A writ of mandamus is a common-law supervisory writ by which a court may compel an administrative board to perform ministerial acts required by law. See Bessemer Bd. of Educ. v. Tucker, 999 So. 2d 957, 963 (Ala. Civ. App. 2008). An injunction is "'[a] court order commanding or preventing an action.'" Dawkins v. Walker, 794 So. 2d 333, 335 (Ala. 2001)

(quoting Black's Law Dictionary 788 (7th ed. 1999)). In his complaint, Wilkinson seeks a judgment declaring that he was wrongfully suspended, but he seeks mandamus and injunctive relief to recover his lost salary and to remove any reference to the sanction from his personnel files. Notably, Wilkinson contends that, even if he is not entitled to a judgment declaring that his employment was unlawfully suspended, he remains entitled to a writ of mandamus directing payment of his lost salary because he was required to work during his suspension and earned that pay. The claims for mandamus and injunctive relief cannot be construed as a petition for the common-law writ of certiorari.

I do not necessarily agree with the main opinion that a court cannot consider the issues of sovereign and state-agent immunity in certiorari proceedings, a proposition that is not supported by any direct legal authority in the main opinion, but I find no need to express an opinion on that point because I conclude that this case does not involve certiorari proceedings. Wilkinson has stated claims for declaratory, mandamus, and injunctive relief, distinct from a petition for the common-law writ of certiorari. The trial court adjudicated those claims adversely to Wilkinson on the basis

of the immunity of Miller and the board members. Wilkinson has preserved his argument that the trial court erred in its legal conclusions that immunity barred his claims and, thus, erred in entering the dismissal order and the summary judgment. This court should not reverse the dismissal order and the summary judgment and remand the case for the trial court to reconsider the scope of its review but, rather, should address the merits of Wilkinson's appeal. Because the main opinion concludes otherwise, I respectfully dissent.

Edwards, J., concurs.

EDWARDS, Judge, dissenting.

I respectfully dissent.

Section 16-24C-6(l), Ala. Code 1975, states that "[i]n any proceeding for which review is provided hereunder, the employer shall arrange for a transcript and record of proceedings conducted before ... the governing board to be made and maintained by a qualified court reporter for use in connection with such review." As the main opinion notes, however, "[t]he suspension of a tenured teacher or a nonprobationary employee for no more than 20 work days without pay is not a termination of employment that is subject to review under [the Students First Act]." Ala. Code 1975, § 16-24C-6(I). It is undisputed that no transcript or record was made of the proceedings before the Gadsden City Board of Education in the present case.

This court must follow the decisions of the supreme court, see Ala. Code 1975, § 12-3-16, and the supreme court has held that a fundamental rule regarding the common-law writ of certiorari is that that "remedy ... only extends to courts or boards required by law to keep a record or quasi record of their proceedings, and the only proper return to the writ is such record or a transcript thereof duly authenticated by the

legal custodian, as it exists at the time of the issuance of the writ." Nashville, Chattanooga & St. Louis Ry. Co. v. Town of Boaz, 226 Ala. 441, 443, 147 So. 195, 196 (1933). See Ex parte Hennies, 33 Ala. App. 377, 380, 34 So. 2d 22, 24 (1948) ("[A]ll of the papers filed in this proceeding other than the record of the proceedings in the court below are dehors the record and our consideration of them is therefore precluded."); see also Taylor v. Huntsville City Bd. of Educ., 143 So. 3d 219, 226 (Ala. Civ. App. 2013) ("'"'"The appropriate office of the writ is to correct errors of law apparent on the face of the record."'"'" (quoting South Alabama Skills Training Consortium v. Ford, 997 So. 2d 309, 324 (Ala. Civ. App. 2008), quoting in turn G.W. v. Dale Cty. Dep't of Human Res., 939 So. 2d 931, 934 n.4 (Ala. Civ. App. 2006), quoting in turn City of Birmingham v. Southern Bell Tel. & Tel. Co., 203 Ala. 251, 252, 82 So. 519, 520 (1919), quoting in turn Postal Tel. Co. v. Minderhout, 195 Ala. 420, 71 So. 91 (1916))). See generally 14 C.J.S. Certiorari § 18 (2017) ("Since the scope of the review under common-law certiorari is confined to the record, it follows that the writ does not lie for the purpose of reviewing defects not appearing on the face of the record." (footnotes omitted)).

As noted, no such record exists in the present case. Thus, the main opinion has erred in concluding that the common-law writ of certiorari is available to Wilkinson.

Further the cases on which the main opinion relies regarding the availability of the common-law writ of certiorari -- Williams v. Board of Education of Lamar County, 263 Ala. 372, 82 So. 2d 549 (1955),[8] and Alexander v. Dothan City Board of Education, 891 So. 2d 323, 326 (Ala. Civ. App. 2004), in turn citing Hardy v. Birmingham Board of Education, 634 So. 2d 574 (Ala. Civ. App. 1994), citing Fields v. State ex rel. Jones, 534 So. 2d 615 (Ala. Civ. App. 1987) -- do not discuss the issue of how the lack of an obligation to keep a record affects the availability of the common-law writ of certiorari. Thus, those precedents cannot correctly be read

[8]Williams involved the review of a decision regarding a petition for a writ of mandamus, and the Williams court noted that "[i]t seems to be well established that the finding of a quasi judicial board, such as the Board of Education in this case, '"may be reviewed by certiorari or mandamus (respectively when appropriate),"'" 263 Ala. 374, 82 So. 2d 551 (quoting Board of Educ. of Choctaw Cty. v. Kennedy, 256 Ala. 478, 483, 55 So. 2d 511, 515 (1951)) (emphasis added); that is the only occurrence of the term "certiorari" in Williams. The issue whether review by a petition for the common-law writ of certiorari would have been available in the absence of any record having been made by the school board at issue was not addressed in Williams.

as being in conflict with Town of Boaz, and, to the extent any decision of this court is in conflict with Town of Boaz, our decisions must give way to our statutory obligation under § 12-3-16, Ala. Code 1975.[9]

Moore, J., concurs.

[9]In Alexander this court was focused on the untimeliness of Pattie W. Alexander's 2002 action involving challenges to decisions made by the Dothan City Board of Education in 1988, 1992, and 1998. This court did not address the impact that the lack of a record might have had on our conclusion that a petition for the common-law writ of certiorari purportedly would have been available to Alexander for purposes of seeking a timely review of the decisions at issue. Instead, this court either assumed (perhaps wrongly) that Alexander would have had access to a record for purposes of challenging the Dothan City Board of Education's decisions via a petition for a common-law writ of certiorari or this court overlooked binding precedent from the supreme court, i.e., Town of Boaz. Under either understanding of Alexander, however, that case cannot be read for the proposition that this court decided that the common-law writ of certiorari is available even when a fundamental prerequisite to the availability of the writ is absent. Alexander reflects no binding precedent regarding that issue, and neither Hardy nor Fields reflect such a precedent.