Rel: June 10, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200775

Ex parte Wilcox County Board of Education; Donald McLeod; Lester Turk; Darryl Perryman; Joseph Pettway, Jr.; and Bernard Martin, Jr.

PETITION FOR WRIT OF MANDAMUS

(In re: Jane Doe

v.

Wilcox County Board of Education et al.)

(Wilcox Circuit Court, CV-12-900055)

PER CURIAM.

The Wilcox County Board of Education ("the Board") and individual Board members Donald McLeod, Lester Turk, Darryl Perryman, Joseph Pettway, Jr., and Bernard Martin, Jr. ("the Board members"), who are defendants in a lawsuit filed by Jane Doe,[1] petition this Court for a writ of mandamus directing the Wilcox Circuit Court ("the trial court") to grant their motion for a summary judgment on the ground that they are entitled to immunity. We grant the petition in part and deny it in part.

Facts and Procedural History

On November 11, 2010, Doe, who, at that time, was a 12th-grade student at Wilcox County Central High School ("the school"), was sexually assaulted by the principal of the school, James Thomas. According to Doe, Thomas made inappropriate comments of a sexual nature to her while she was serving as an aide in the school office and later called her into his private office, closed the door, and began kissing

[1]"Jane Doe" is an alias used by the parties for the purpose of protecting the identity of the plaintiff, who was the victim of a sexual offense committed while she was a minor.

her and touching her. Doe reported the incident, and, as a result, Thomas was arrested the following day by the Wilcox County Sheriff's Department. After his arrest, Thomas was suspended from his duties as school principal and placed on administrative leave. He was ultimately convicted of having sexual contact with a student under the age of 19 years, a violation of § 13A-6-82, Ala. Code 1975, see Thomas v. State, 142 So. 3d 1264 (Ala. Crim. App. 2013), and, upon the recommendation of Rosa Ashmon, the superintendent of the Wilcox County school system, the Board voted to terminate Thomas's employment.

On October 16, 2012, Doe initiated an action against Thomas,[2] the Board, the individual members of the Board,[3] Ashmon, and 11 individuals identified as former Wilcox County school-system

[2]Thomas died on August 29, 2020.

[3]The members of the Board sued by Doe were Donald McLeod, Lester Turk, Darryl Perryman, Joseph Pettway, Jr., Clifford Twilley, and Bernard Martin, Jr. Twilley died in 2017 and was ultimately dismissed from the lawsuit. When we refer to "the Board members" in reference to events occurring before 2017, Twilley is included in that phrase.

superintendents.[4] With regard to the Board members, Doe's complaint stated that each Board member was being "sued in his individual capacity, and any other capacity allowed by law." In her complaint, Doe asserted negligence and wantonness claims against the Board and the Board members, contending that those defendants had had knowledge of previous instances of similar misconduct by Thomas that they had allegedly failed to properly investigate or report. Doe also asserted claims of negligent or wanton hiring, training, and/or retention of Thomas against the Board and the Board members.

In 2014, the Board and the Board members moved for a summary judgment as to the claims asserted against them. The Board contended that it was protected from Doe's claims by the doctrine of State or sovereign immunity under Art. I, § 14, Ala. Const. 1901 (Off. Recomp.). The Board members asserted that, to the extent that they had been sued in their official capacities, they were likewise entitled to the protection of State or sovereign immunity under § 14. As to the claims against them

[4]Ashmon and all the individual defendants identified as former superintendents have been dismissed from the action.

in their individual capacities, the Board members argued that they were entitled to State-agent immunity. In support of the summary-judgment motion, the Board members submitted similarly worded affidavits in which they each attested that, before the November 2010 incident involving Doe, they had received no information regarding any similar accusation against Thomas and had had no personal knowledge regarding any other incident or allegation of sexual harassment or abuse by Thomas. Each Board member also attested that the Board had, at all relevant times, maintained a policy requiring that all personnel actions made by the Board be based upon a recommendation from the superintendent and that, in acting upon such recommendations, each Board member had always used his own judgment and discretion in determining the appropriate course of action.

On April 7, 2020, the Board and the Board members filed a renewed motion for a summary judgment in which they reasserted the arguments they had made in their 2014 summary-judgment motion, and they attached additional evidentiary submissions in support of their renewed motion, including the deposition testimony of the Board members,

Ashmon, and some former superintendents. On August 14, 2020, Doe filed a response in opposition to the renewed motion for a summary judgment. In her response, Doe conceded that the Board was entitled to sovereign immunity under § 14, and that, likewise, the doctrine of sovereign immunity barred any claims against the Board members in their official capacities. Nevertheless, Doe argued that the Board members, in their individual capacities, were not immune from suit. Specifically, Doe contended that the Board members were not entitled to State-agent immunity because, she claimed, they knew or should have known of other alleged incidents of sexual misconduct involving Thomas. In support of her response, Doe attached deposition testimony from other witnesses indicating that rumors had circulated in the community regarding Thomas's purported inappropriate conduct toward female students and teachers at the school; documents indicating that Thomas had been accused of sexual harassment by a school employee in 1992 and that, based on that allegation, the then-acting superintendent had recommended that Thomas's employment be terminated; and an affidavit of Eli Mack, a former vice-president of the school's parent-teacher

association, who purported to have knowledge of four additional incidents of alleged sexual misconduct by Thomas involving school employees and a student at the school. Doe further alleged that Thomas, an elected member of the Alabama House of Representatives, and the Board members had engaged in certain corrupt or unethical conduct that, Doe suggested, had caused the Board members to protect Thomas's employment as the principal of the school.

A hearing on the renewed motion for a summary judgment was conducted on September 1, 2020.[5] On February 19, 2021, the Board and the Board members moved the trial court to enter a ruling on the renewed motion for a summary judgment. On July 19, 2021, the trial court entered an order denying the renewed motion for a summary judgment in its entirety. The Board and the Board members then timely filed their mandamus petition.

Standard of Review

"'"While the general rule is that the denial of a motion for summary judgment is not

[5]No transcript of the hearing is included in the materials submitted to this Court.

> reviewable, the exception is that the denial of a motion for summary judgment grounded on a claim of immunity is reviewable by petition for writ of mandamus." Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000). A writ of mandamus is an extraordinary remedy available only when there is: "(1) a clear legal right 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) the properly invoked jurisdiction of the court." Ex parte BOC Group, Inc., 823 So. 2d 1270, 1272 (Ala. 2001).'

"Ex parte Nall, 879 So. 2d 541, 543 (Ala. 2003). Also,

> "'whether review of the denial of a summary-judgment motion is by a petition for a writ of mandamus or by permissive appeal, the appellate court's standard of review remains the same. If there is a genuine issue as to any material fact on the question whether the movant is entitled to immunity, then the moving party is not entitled to a summary judgment. Rule 56, Ala. R. Civ. P. In determining whether there is a [genuine issue of] material fact on the question whether the movant is entitled to immunity, courts, both trial and appellate, must view the record in the light most favorable to the nonmoving party, accord the nonmoving party all reasonable favorable inferences from the evidence, and resolve all reasonable doubts against the moving party, considering only the evidence before the trial court at the time it denied the motion for a summary

> judgment. Ex parte Rizk, 791 So. 2d 911, 912 (Ala. 2000).'
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> "Ex parte Wood, 852 So. 2d 705, 708 (Ala. 2002)."

Ex parte City of Montgomery, 272 So. 3d 155, 159 (Ala. 2018).

> "'"Once the [summary-judgment] movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989); Ala. Code 1975, § 12-21-12. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' West v. Founders Life Assur. Co. of Fla., 547 So. 2d 870, 871 (Ala. 1989)."'
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> "Prince v. Poole, 935 So. 2d 431, 442 (Ala. 2006) (quoting Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004))."

Brown v. W.P. Media, Inc., 17 So. 3d 1167, 1169 (Ala. 2009).

Analysis

First, we agree with the parties that the Board is immune from Doe's claims against it under Art. I, § 14, Ala. Const. 1901 (Off. Recomp.). This court has long recognized that county boards of education are

considered agencies of the State entitled to § 14 immunity and that they are, therefore, immune from tort claims like the kind asserted against the Board by Doe. See, e.g., Board of Sch. Comm'rs of Mobile Cnty. v. Weaver, 99 So. 3d 1210, 1217 (Ala. 2012), Ex parte Hale Cnty. Bd. of Educ., 14 So. 3d 844, 848 (Ala. 2009), Ex parte Jackson Cnty. Bd. of Educ., 4 So. 3d 1099, 1102 (Ala. 2008), Brown v. Covington Cnty. Bd. of Educ., 524 So. 2d 623, 625 (Ala. 1988); and Hutt ex rel. Hutt v. Etowah Cnty. Bd. of Educ., 454 So. 2d 973, 974 (Ala. 1984). Likewise, the Board members are immune from suit in their official capacities. See Ex parte Wilcox Cnty. Board of Educ., 285 So. 3d 765, 776 (Ala. 2019), and Ex parte Montgomery Cnty. Bd. of Educ., 88 So. 3d 837, 842 (Ala. 2012). Accordingly, as Doe concedes, the Board is entitled to a summary judgment as to Doe's claims against it, and the Board members are entitled to a summary judgment to the extent that Doe has asserted claims against them in their official capacities. Accordingly, we grant the petition in part and direct the trial court to enter a summary judgment in favor of the Board and in favor of the Board members insofar as they were sued in their official capacities.

Turning to the claims asserted against the Board members in their individual capacities, the Board members contend that those claims are barred by the doctrine of State-agent immunity. In Ex parte Cranman, 792 So. 2d 392 (Ala. 2000), this Court restated the doctrine of State-agent immunity,[6] in pertinent part, as follows:

> "A State agent shall be immune from civil liability in his or her personal capacity when the conduct made the basis of the claim against the agent is based up the agent's
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> "....
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> "(2) exercising his or her judgment in the administration of a department or agency of government, including, but not limited to, examples such as:
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> "....
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> "(d) hiring, firing, transferring, assigning, or supervising personnel; or
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> "....
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> "(5) exercising judgment in the discharge of duties imposed by statute, rule, or regulation in ... educating students.

[6]The restatement in Cranman, a plurality decision, was adopted by a majority of this Court in Ex parte Butts, 775 So. 2d 173 (Ala. 2000).

> "Notwithstanding anything to the contrary in the foregoing statement of the rule, a State agent shall not be immune from civil liability in his or her personal capacity
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> "(1) when the Constitution or laws of the United States, or the Constitution of this State, or laws, rules, or regulations of the State enacted or promulgated for the purpose of regulating the activities of a governmental agency require otherwise; or
>
> "(2) when the State agent acts willfully, maliciously, fraudulently, in bad faith, beyond his or her authority, or under a mistaken interpretation of the law."

792 So. 2d at 405; see also § 36-1-12, Ala. Code 1975.

> "This Court has established a 'burden-shifting' process when a party raises the defense of State-agent immunity. Giambrone v. Douglas, 874 So. 2d 1046, 1052 (Ala. 2003). In order to claim State-agent immunity, a State agent bears the burden of demonstrating that the plaintiff's claims arise from a function that would entitle the State agent to immunity. Giambrone, 874 So. 2d at 1052; Ex parte Wood, 852 So. 2d 705, 709 (Ala. 2002). If the State agent makes such a showing, the burden then shifts to the plaintiff to show that the State agent acted willfully, maliciously, fraudulently, in bad faith, or beyond his or her authority. Giambrone, 874 So. 2d at 1052; Wood, 852 So. 2d at 709; Ex parte Davis, 721 So. 2d 685, 689 (Ala. 1998). 'A State agent acts beyond authority and is therefore not immune when he or she "fail[s] to discharge duties pursuant to detailed rules or regulations, such as those stated on a checklist."' Giambrone, 874 So. 2d at 1052 (quoting Ex parte Butts, 775 So. 2d 173, 178 (Ala. 2000))."

Ex parte Estate of Reynolds, 946 So. 2d 450, 452 (Ala. 2006). Furthermore, within the context of State-agent immunity, "malice" has been defined as "'[t]he intent, without justification or excuse, to commit a wrongful act.'" Ex parte Nall, 879 So. 2d 541, 546 (Ala. 2003) (quoting Black's Law Dictionary 968 (7th ed. 1999)).

In this case, the Board members argue that they are entitled to State-agent immunity in their individual capacities because, they contend, Doe's claims against them concern the exercise of their judgment in the performance of their official duties, specifically, the "hiring, firing, transferring, assigning, or supervising" of Thomas. See Cranman, 792 So. 2d at 405 (category (2)(d)); see also § 16-8-23, Ala. Code 1975 (conferring discretion to county boards of education to suspend or dismiss school-system employees). We agree that Doe's claims against the Board members implicate core discretionary functions granted to the Board, and we note that this Court has previously held in analogous situations that school-board members sued in their individual capacities are protected by State-agent immunity. See, e.g., Ex parte Wilcox Cnty. Bd. of Educ., 285 So. 3d at 778-79 (Ala. 2019) (holding that, in a case in

which a teacher was alleged to have physically assaulted a student, individual school-board members were entitled to State-agent immunity from tort claims alleging that the school-board members had had knowledge of the teacher's violent propensities yet had negligently failed to supervise, discipline, or remove the teacher); see also C.B. v. Bobo, 659 So. 2d 98, 101 (Ala. 1995) (holding that claims against individual school-board members alleging that they "knew, or should have known," of a teacher's sexual abuse of students were related to the performance of their statutory duties and, thus, were barred by the doctrine of discretionary immunity), and Hill v. Allen, 495 So. 2d 32, 34-35 (Ala. 1986) (holding that claims against individual school-board members alleging that their negligent failure to investigate and/or to act on information that a teacher was sexually abusing students were barred by discretionary-function immunity, a precursor to State-agent immunity). Accordingly, the Board members carried their burden to establish that their alleged actions or omissions fell within a category for which State-agent immunity is available, and the burden, therefore, shifted to Doe to establish that the Board members acted willfully, maliciously,

fraudulently, in bad faith, or beyond their authority -- i.e., that their actions fell within the second exception to State-agent immunity identified in Cranman, the only exception Doe asserts is applicable in this case.

Doe first argues that the Board members acted "beyond their authority" because, she contends, they violated certain rules adopted by the Board intended to prohibit and discourage sexual harassment in the Wilcox County school system. Those rules prohibit school-system employees from engaging in or tolerating sexual harassment, require all school-system employees to promptly report any occurrence of sexual harassment, require that reports of sexual harassment or abuse be promptly and thoroughly investigated, and mandate that school-system employees determined to be guilty of sexual harassment be subject to disciplinary action. There is no evidence, however, that the Board members violated any of the referenced rules, which were expressly applicable to school-system employees, and not the members of the Board itself. Furthermore, the rules cited by Doe place the responsibility for investigating sexual-harassment complaints on the school-system

superintendent, not the Board members.[7] In short, Doe did not establish that the Board members acted beyond their authority by violating any detailed rules or regulations.

Doe further contends that the Board members acted with "malice" or in "bad faith" by continuing to employ Thomas notwithstanding their purported knowledge of his alleged previous instances of inappropriate sexual conduct. Doe charges that the Board members' failure to act was motivated by improper financial ties between Thomas and certain Board members or, even worse, that there was an alleged corrupt scheme, pursuant to which the Board members agreed to turn a blind eye to Thomas's purported persistent sexual misconduct at the school in return for cash payments from Thomas -- money Thomas allegedly misappropriated from the gate receipts of school-sponsored athletic and fundraising events. We recognize that these are serious allegations of corruption and impropriety, which, if proven, would almost certainly fall

[7]The rules implemented by the Board and cited by Doe provide that "[t]he Superintendent or designee has the responsibility of investigating and resolving complaints of sexual harassment."

within the exception to State-agent immunity for conduct committed "willfully, maliciously, fraudulently, in bad faith, [or] beyond [a State agent's] authority." Accordingly, we must determine whether Doe submitted sufficient evidence in support of these allegations.

Here, the parties offered the sworn testimony of 17 witnesses in support of or in opposition to the renewed motion for a summary judgment. Those witnesses included the parties, former Board members, and former administrators and employees of the Board. Many of those witnesses testified as to unspecified and generalized rumors that they had heard suggesting that Thomas had acted inappropriately around female employees and students at the school. Some of the witnesses also testified that they had heard rumors that Thomas was paying members of the Board. We note, however, that nearly all the witnesses disclaimed actual personal knowledge of any specific instance of inappropriate behavior or misconduct by Thomas or the Board members. Moreover, witnesses who testified as to hearing reports or rumors of alleged misconduct confessed that they had not communicated those reports or rumors to the Board or other appropriate officials. Nevertheless, the

evidence could be viewed as indicating that Thomas's reputation for inappropriate sexual behavior was well known in the community, including to some Board members.

There was evidence indicating that, in 1992, the Board voted to terminate Thomas's employment because of a credible allegation that he had sexually harassed a female school employee, but that Thomas had challenged that decision and the Board had ultimately been ordered by a court to reinstate Thomas.[8] Two Board members, Twilley and Turk (see note 3, supra), had served on the Board at the time of the 1992 allegations and, thus, would have been aware of the 1992 allegations against Thomas.

[8]According to the materials before us, when, in 1992, the six-member Board was asked to vote on the recommendation to terminate Thomas's employment, two members of the Board recused themselves from the vote. Three members of the Board voted to terminate Thomas's employment, and one member voted against termination. In subsequent litigation initiated by Thomas to challenge the Board's termination decision, it was determined that, because only three members of the six-member Board had voted to terminate Thomas's employment, a required majority of the Board had not approved that action; therefore, Thomas was reinstated to his position as principal of the school.

Furthermore, Mack testified by way of affidavit that he was a former vice-president of the school's parent-teacher association and a former city councilman for Camden, which is located in Wilcox County, and that he had worked closely with Concerned Parents and Citizens of Wilcox County, a group founded to "address problems with the Wilcox County Board of Education."[9] Mack claimed to have personal knowledge of four other alleged incidents of sexual assault or harassment by Thomas involving female employees and a female student that had occurred after 1992, which incidents, Mack claimed, had been reported to the Board.

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[9]The Board members moved to strike Mack's affidavit on, among other reasons, the grounds that it was not based on Mack's personal knowledge and that it constituted inadmissible hearsay. The trial court, however, did not rule on the motion to strike, and we must, therefore, assume that Mack's testimony was considered by the trial court. See, e.g., Fogarty v. Southworth, 953 So. 2d 1225, 1233 (Ala. 2006). Furthermore, in the petition for a writ of mandamus to this Court, the Board members have not raised the issue of the admissibility of Mack's affidavit testimony. Therefore, we may not consider that issue. Crews v. National Boat Owners Ass'n Marine Ins. Agency, Inc., 46 So. 3d 933, 942 (Ala. 2010). The Board members' attempt to raise this issue in their reply brief comes too late. See Ex parte Riley, 464 So. 2d 92, 94 (Ala. 1985) ("[I]t has long been the law in Alabama that failure to argue an issue in [an initial] brief to an appellate court is tantamount to the waiver of that issue on appeal.").

Mack testified that, despite the Board's knowledge of Thomas's behavior, no action had been taken by the Board to remove Thomas as principal of the school after 1992. Mack posited that the reason the Board had taken no action against Mack was because at least some members of the Board had had a financial interest in Thomas's continued employment.

For instance, Mack testified that in 2002 "tens of thousands of dollars" collected for the school by Thomas at school-sponsored athletic and fundraising events had gone missing. As a result, according to Mack, Thomas's authority to collect such money had been taken away by the superintendent of the school system. Nevertheless, Mack claimed that the Board had voted to restore Thomas's authority to collect money at school-sponsored athletic and fundraising events, and Mack stated that it had been "suspected" that Mack was paying Board members with the funds taken from those events. Indeed, Mack claimed that two Board members, Twilley and Turk, had admitted that they and another Board member had been paid by Thomas to vote against an effort in 2003 to remove Thomas as principal of the school. Furthermore, Mack stated that Twilley had cosigned several bank loans for Thomas, which, Mack

noted, provided Twilley with another financial motive to protect Thomas's employment.

We note that Mack had made the same or similar allegations in a 2003 letter sent by Mack to the Alabama Ethics Commission, indicating that the events described by Mack in his affidavit had all occurred in 2003 or earlier.[10] We recognize that some Board members were not members of the Board until after 2003, and we know of no basis on which to impute the knowledge of one board member or former board member to another. Nevertheless, Mack's affidavit claims that the Board members had, in fact, been made aware of the earlier incidents involving Thomas. Doe also presented evidence indicating that Thomas's pattern of inappropriate behavior had continued beyond 2003 and up until the time of her assault. For instance, Doe testified that Thomas had also made unwanted sexual advances toward one of Doe's classmates while at

[10]The Board members also moved the trial court to strike the 2003 letter from the record. As with the motion to strike Mack's affidavit, however, that motion was not ruled upon by the trial court, and the issue of the admissibility of the letter has not been raised to this Court. See note 9, supra.

school.[11] Moreover, Doe presented evidence that, when viewed in a light most favorable to Doe, suggests that other Board members had financial ties to Thomas. For example, Perryman, who served on the Board from 2005 to 2013, admitted in his deposition that he had also cosigned a loan for Thomas, even though he had not considered Thomas a friend, had never cosigned a loan for anyone else before, and had not known why Thomas needed the loan.

Considering the evidence presented to the trial court in support of and in opposition to the renewed motion for a summary judgment, as well as the specific arguments raised (and not raised) by the Board members in the mandamus petition to this Court, we cannot say that the Board members have established a clear legal right to a summary judgment, based on State-agent immunity, on Doe's claims asserted against them in their individual capacities. Accordingly, as to this issue, the petition is denied.

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[11]Doe stated that the classmate, one of Doe's friends, had informed Doe about the incident but that neither Doe nor the classmate had reported the incident to any parent, teacher, or other official.

Conclusion

Based on the above, we conclude that the Board and the Board members, insofar as the Board members were sued in their official capacities, are entitled to § 14 immunity from the claims asserted against them but that the Board members are not entitled to State-agent immunity from the claims asserted against them in their individual capacities.

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

Parker, C.J., and Bolin, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

Shaw, J., concurs in the result in part and dissents in part, with opinion.

SHAW, Justice (concurring in the result in part and dissenting in part).

I disagree that there is substantial evidence indicating that two members of the Wilcox County Board of Education ("the Board") petitioning this Court, Joseph Pettway, Jr., and Donald McLeod, knew of allegations of sexual misconduct against James Thomas or had any financial ties with him and therefore acted with "malice" or "bad faith." The specifically identified instances of misconduct disclosed by the evidence either occurred before they became members of the Board or implicate only other members of the Board. I would thus hold that they are entitled to State-agent immunity and would direct the trial court to grant the renewed summary-judgment motion as to the individual-capacity claims alleged against them. As to the remaining Board members, I agree that the petition should be denied as to the individual-capacity claims asserted against them.

It is alleged that Thomas engaged in misconduct between 1992 and 2010. During that period, the membership of the Board gradually changed as new members were elected. The individual petitioners in this case became members of the Board at different times: Lester Turk in

1986; Bernard Martin, Jr., in 1994; Darryl Perryman in 2005; Pettway in 2006; and McLeod in 2007. Allegations that the Board became aware of an instance of misconduct by Thomas (or engaged in misconduct itself) must indicate when such misconduct occurred in order for this Court to determine which of the individual petitioners were actually members of the Board at the time and thus received the pertinent information.

Much of the testimony related to sexual misconduct and financial impropriety by Thomas does not specify when the misconduct occurred during this 18-year period. Allegations that the Board had knowledge of instances of misconduct during this time refer to the Board as an entity generally and do not specify who was a member of the Board when the misconduct occurred. At the times when the testimony does state when the alleged misconduct happened, it does not appear that either Pettway or McLeod were yet members of the Board. Further, although there is testimony as to financial impropriety against specific individual Board members, there is none as to Pettway or McLeod.

For example, Eli Mack testified in an affidavit that Thomas was "suspected" of taking funds collected at school-sponsored athletic and

fundraising events. He details attempts to remove Thomas's authority to collect such funds and indicates misconduct on the part of certain Board members in that process. All of this appears to have occurred in 2002 through 2003, at least three years before Pettway and McLeod were elected to the Board.

Mack's affidavit goes on to state that, "in the past, the Board of Education has been made aware" of allegations of sexual misconduct by Thomas. The affidavit then lists very specific incidents. However, there is no indication of when those incidents occurred[12] and when the Board was made aware of them; Mack refers to the "Board of Education" as a whole body, but there are no dates from which we could conclude who was a member of the Board during that time "in the past" when it, as a body, was allegedly made aware of the allegations.

The evidence before us alleges that Thomas engaged in misconduct as early as 1992, approximately 14 and 15 years before Pettway and McLeod, respectively, became members of the Board. There are certain

[12]It appears from other evidence in the materials that at least one of the listed incidents occurred in the early 1990s.

allegations of misconduct supported by specific testimony as to when the alleged misconduct occurred and as to which specific Board members were involved. No specific allegation of misconduct, however, is indicated as having occurred after Pettway became a member in 2006 or after McLeod became a member in 2007. Given the long time frame of alleged misconduct, that specific allegations indicate that the alleged misconduct occurred before Pettway and McLeod were members of the Board, and that there is no alleged misconduct identified as having occurred after Pettway and McLeod became members of the Board, I cannot conclude that broad allegations that the Board as a body knew of misconduct generally is substantial evidence that these two defendants, who became members of the Board late in this time frame, individually had knowledge of what had occurred. To the extent that the main opinion denies the petition as to these two members on the individual-capacity claims, I respectfully dissent. As to the remainder of the opinion, I concur in the result.