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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2019

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Ex parte City of Gadsden

PETITION FOR WRIT OF MANDAMUS

(In re: John Boman et al.

v.

City of Gadsden)

(Etowah Circuit Court, CV-09-669)

PER CURIAM.

PETITION DENIED. NO OPINION.

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

Shaw, J., concurs specially.

Sellers, J., dissents.

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SHAW, Justice (concurring specially).

I concur to deny the petition. I write specially to note the following.

This petition is the most recent action in long-term, ongoing litigation. The facts of this case can be found in numerous decisions of this Court, and I see no need to repeat them all here. See City of Gadsden v. Boman, 104 So. 3d 882 (Ala. 2012); City of Gadsden v. Boman, 143 So. 3d 695 (Ala. 2013); and Boman v. City of Gadsden, 220 So. 3d 298 (Ala. 2016) ("Boman III"). It is sufficient to note that the plaintiffs, who are active or retired police officers and firemen with the City of Gadsden ("the City"), sued the City alleging that they had been erroneously denied certain benefits. Specifically, count I of the complaint alleged, among other things, that all the plaintiffs have or had an employment contract with the City; it appears conceded at this point that the contract was unwritten, but it is argued that some of its terms are found in written materials, such as employee handbooks. The plaintiffs also sought refunds of certain pension payments as well as damages for the City's failure to pay into Social Security on their behalf and to

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provide medical-coverage benefits. They further sought equitable relief in that they be given "continuing medical coverage" and the "full medical care" that was in effect when they retired.

Count II of the complaint related solely to claims asserted by John Boman, one of the plaintiffs. In it, Boman essentially alleged that a contract existed between him and the City providing him lifetime health coverage after retirement. The trial court entered a summary judgment for the City on this count, and Boman's appeal of that decision was the subject of Boman III. Boman argued on appeal that "he entered into an enforceable employment contract with [the City], which, he argues, guaranteed lifetime health-care benefits to retirees such as him." 220 So. 3d at 302. In affirming the summary judgment, this Court focused on whether there was an express contract to provide lifetime health benefits: "[E]ven accepting his contention that the handbook created an employment contract between him and [the City], there is simply no language in any version of the employee handbook that actually relates to retiree health benefits." 220 So. 3d at 302.

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In the instant petition, the City argues that the judgment against Boman on count II and affirmed in Boman III foreclosed count I and, thus, that the trial court should have entered a summary judgment¹ for the City on that count. However, the petition does not convince me that the judgment on count II adjudicated or otherwise foreclosed litigation of count I. It arguably might adjudicate any allegations similar to those by Boman in count II regarding whether post-retirement health benefits were part of an express contract, but it would not seem to foreclose the existence of an implied contract or other equitable relief for such benefits. In fact, equitable remedies often exist only if there is no express contract in the first place. Cf. Kennedy v. Polar-BEK & Baker Wildwood P'ship, 682 So. 2d 443, 447 (Ala. 1996) ("This Court has recognized that where an express contract exists between two parties, the law generally will not recognize an implied contract regarding the same subject matter."). Unless it can be established that Boman III foreclosed all possible contractual relationships--express,

¹The motion for a summary judgment is not included with the materials before us, but the memorandum in support of that motion is found in a supplemental appendix to the petition.

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implied, or otherwise imposed by equity--between all the parties, then it is not clear that the judgment in that case impacts count I. Even if we could hold that Boman III did foreclose all contractual relationships, the petition does not make clear that that conduct forecloses the separate relief sought in count I regarding the pension overpayments and damages. The petition seems to acknowledge this on page 6, stating that only "certain" claims by the plaintiffs in count I "overlap" with count II. It may very well be that there are no equitable doctrines allowing the relief sought in count I, but the petition, in my view, has not demonstrated that.

In any event, the general rule is that this Court will not review by a petition for a writ of mandamus the merits of an order denying a motion for a summary judgment. See Ex parte Mobile Infirmary Ass'n, 74 So. 3d 424, 427 (Ala. 2011), and the numerous cases cited therein. There are many exceptions to this rule for certain categories of cases and issues. Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060, 1064 (Ala. 2014) (listing decisions describing when mandamus is an appropriate means of review). See also Ex parte U.S. Bank, 148 So. 3d at 1073 (Shaw, J., concurring specially) ("[T]here

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are numerous situations in which this Court exercises authority by mandamus to review interlocutory decisions that, if properly set aside, would terminate an action so as to avoid the waste and expense of further litigation." (emphasis added)). None of the exceptions--or situations--seems applicable here.

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SELLERS, Justice (dissenting).

I respectfully dissent. I would grant the petition and issue the writ ordering the Etowah Circuit Court to enter a summary judgment in favor of the City of Gadsden ("the City") on count I of the 14th amended complaint.

I. Facts and Procedural History

This is the fourth time in seven years this case has been before us. See City of Gadsden v. Boman, 104 So. 3d 882 (Ala. 2012) ("Boman I"); City of Gadsden v. Boman, 143 So. 3d 695 (Ala. 2013) ("Boman II"); and Boman v. City of Gadsden, 220 So. 3d 298 (Ala. 2016) ("Boman III"). As background, count I of the 14th amended complaint, which is the subject of this mandamus petition, was severed from count II of the complaint, in which John Boman asserted an individual breach-of-contract claim against the City. In Boman III, this Court affirmed a summary judgment in favor of the City on count II of the complaint, concluding that no contract existed between the City and Boman to provide Boman with lifetime health-care benefits upon his retirement. Based on that ruling, the City moved the trial court to enter a summary judgment on count I of the complaint, in which the plaintiffs, active and retired

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police officers and firemen with the City, as discussed infra, seek equitable relief for an alleged breach of contract. The trial court denied the City's motion for a summary judgment on count I; that denial is the subject of this mandamus petition.

Boman worked for the City as a police officer from 1965 until he retired in 1991; it is undisputed that he did not have a written employment contract with the City. Following his retirement, Boman elected to pay for retiree health coverage through a group plan offered by the City and administered by Blue Cross and Blue Shield of Alabama ("Blue Cross"). In 2000, however, the City elected to join the "Local Government Health Insurance Plan" ("the State plan") administered by the State Employees' Insurance Board ("the Board"); the claims administrator for the State plan was Blue Cross. The State plan provided, in relevant part, that, when a retiree becomes "entitled" to Medicare, Medicare becomes the primary payer of medical benefits; the State plan becomes the secondary payer; and a participant must have both Parts A and B of Medicare to have adequate coverage under the State plan.

When Boman turned 65 in 2011, Blue Cross began denying his medical claims based on his failure to provide Blue Cross

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with a "record of the Medicare payment" associated with his claims. During his employment with the City, however, Boman had been exempted from paying Medicare taxes; thus, he had no Medicare credits.² Boman requested from the Board that the State plan remain his primary coverage. The Board denied that request, taking the position that, when Boman became entitled to Medicare upon turning 65, the State plan became secondary to Medicare. Boman sued the City, alleging, among other things, that he had entered into an employment contract with the City requiring the City to provide him lifetime health-care benefits upon his retirement, that those benefits had vested when he reached 20 years of service as a police officer for the City, and that the City had breached that agreement when he turned 65 and the State plan was deemed secondary to Medicare.³ Boman asserted that that agreement was

²When Boman was hired in 1965, he was required to participate in the Policemen's and Firemen's Retirement Fund of the City of Gadsden ("PFRF"), established by act of the Alabama Legislature, Act No. 80-442, Ala. Acts 1980. Because Boman participated in the PFRF, he was exempt from paying Medicare taxes. See Boman I for a detailed discussion concerning Medicare coverage for groups of employees working in positions covered by a public-retirement system.

³Boman also sued the State plan, the Board, and the Board members in their official capacities. However, the City is the only remaining defendant in this litigation.

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memorialized in various versions of the employee handbook the City distributed to its police officers. Boman further relied on the deposition testimony of former mayor of the City, Steve Means, who stated that the employee handbook was the written understanding of the agreement between the City and the police department. The trial court entered a summary judgment in favor of Boman, concluding that the State plan remained his primary coverage because he was not Medicare eligible.

In Boman II, this Court reversed the summary judgment in favor of Boman, concluding that Boman was "entitled" to Medicare, as that term was used in the State plan. This Court determined that, even though Boman was not entitled to participate in "premium-free" Medicare coverage, he was nevertheless entitled to participate in Medicare simply by enrolling and paying the applicable premium once he turned 65 years old. On remand, the trial court entered a summary judgment in favor of the City, concluding that there was no contract requiring the City to provide Boman with lifetime health-care benefits. Boman appealed.

In Bowman III, this Court affirmed the summary judgment in favor of the City, explaining:

"First, Boman argues that the summary judgment on his breach-of-contract claim is due to be reversed. Specifically, he contends that he entered into an enforceable employment contract with [the City], which, he argues, guaranteed lifetime health-care benefits to retirees such as him. He contends that this agreement is memorialized in the various versions of the employee handbook distributed by [the City] to the city's police officers during his employment. In support of this argument, Boman cites Hoffman-La Roche, Inc. v. Campbell, 512 So. 2d 725 (Ala. 1987), for the proposition that an employee handbook may form the basis of an employment contract. Boman also cites the testimony of a former mayor of [the City] who testified that the employee handbook was the written understanding of the agreement between [the City] and the police department. Boman alleges that the [State] plan became 'worthless' once it became secondary to Medicare. Thus, he argues that [the City] breached the employment agreement purporting to provide him lifetime health benefits.

"The fundamental problem with Boman's argument, however, is that, even accepting his contention that the handbook created an employment contract between him and [the City], there is simply no language in any version of the employee handbook that actually relates to retiree health benefits. An essential element of a breach-of-contract claim is '"the existence of a valid contract binding the parties.'" City of Gadsden v. Harbin, 148 So. 3d 690, 696 (Ala. 2013) (quoting Ex parte Alfa Mut. Ins. Co., 799 So. 2d 957, 962 (Ala. 2001)). Here, Boman has not directed this Court to any provision of the handbook addressing retiree health benefits. It is true that some versions of the employee handbook summarized the health benefits for active uniformed employees of the police department, but nothing in the handbook can be construed as promising health benefits to retirees, much less definite, vested lifetime benefits. The provisions of the handbook

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that do mention retirement benefits specifically address those benefits provided through the Policemen's and Firemen's Retirement Fund of the City of Gadsden [('the PFRF')], established by act of the Alabama Legislature. Act No. 80-442, Ala. Acts 1980. The retirement benefits provided by [the PFRF], however, are pension benefits, not health-care benefits. In short, the handbook evidences no agreement on the part of [the City] to provide Boman with vested lifetime health benefits.

"Boman alternatively contends that the doctrine of promissory estoppel entitles him to relief on his breach-of-contract claim. Again, however, Boman has not directed this Court to any actual evidence of a promise by [the City] to provide him with vested lifetime health benefits. In short, Boman has not produced substantial evidence of the existence of a contract providing him with such benefits. Accordingly, the trial court correctly entered a summary judgment in favor of [the City] on Boman's breach-of-contract claim."

Boman III, 220 So. 3d at 302-03 (footnote omitted).

After the trial court entered a summary judgment in favor of the City on count II of the complaint, the City moved for a summary judgment on count I, in which the plaintiffs seek equitable relief based on an alleged breach of contract. In opposition to the City's summary-judgment motion, the plaintiffs attached the previously submitted deposition of former Mayor Steve Means; various versions of the employee handbook; and several affidavits of retired police officers and firemen, all of whom state that the City had assured them

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that their retirement packages included lifetime health-care benefits. Inexplicably and seemingly disregarding the law of the case, the trial court entered an order denying the City's motion for a summary judgment, concluding that the City had not met its burden of proof that no contract existed between the City and the plaintiffs.⁴ The City petitioned this Court for a writ of mandamus.

II. Standard of Review

"A writ of mandamus is an extraordinary remedy available only when the petitioner can demonstrate: "(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 Nall, 879 So. 2d 541, 543 (Ala. 2003) (quoting Ex parte BOC Grp., Inc., 823 So. 2d 1270, 1272 (Ala. 2001))."

Ex parte Alabama Dep't of Corr., 252 So. 3d 635, 636 (Ala. 2017).

III. Discussion

In their response, the plaintiffs specifically state that they are seeking "equitable reformation of the contract with

⁴This position is hard to reconcile, given that this Court had previously determined that there was no written contract that could afford any relief to the plaintiffs.

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the City" pursuant to § 8-1-2, Ala. Code 1975,⁵ because, they say:

"The combination of the City not paying Medicare taxes for at least ten years on the employees, the insertion of Medicare language, and the resulting denial of coverage by [the Board], has gutted the contract plaintiffs entered into with the City to the point of nullity. The City, which had a duty to be aware of the coverage being offered by joining [the State plan] cannot claim surprise at the language. The City's knowledge and failure to inform plaintiffs, along with plaintiffs not being independently aware of the problem until seeking health care after age 65, demonstrate[] inequitable conduct on behalf of the City, allowing reformation of the contract to its original terms[,] i.e., lifetime health benefits."

(Emphasis added.)

⁵Section 8-1-2 governs the reformation of contracts and provides that,

"[w]hen, through fraud, a mutual mistake of the parties or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised by a court on the application of the party aggrieved so as to express that intention, so far as it can be done without prejudice to the rights acquired by third persons in good faith and for value."

(Emphasis added.) The plaintiffs' reliance on § 8-1-2 is misplaced because the plain language of the statute requires a written contract, which, in this case, undisputedly does not exist.

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As the City points out, this Court has held that nothing in the employee handbook distributed by the City to its police officers "can be construed as promising health benefits to retirees, much less definite, vested lifetime benefits." Boman III, 220 So. 3d at 303. This Court addressed similar claims in City of Gadsden v. Harbin, 148 So. 3d 690, 693 (Ala. 2013), a case in which Harbin, a retired police officer with the City of Gadsden, asserted

"that the City had assured him and had agreed with him that, if he worked 20 years, he would receive retirement benefits that would include a pension consisting of 50% of his wages, based on a sliding-scale provision that allowed for annual increases, and lifetime family medical benefits. Harbin also asserted that the assurances and agreement were explained and ratified by the chief of police and by the employee handbooks issued by the City."

(Emphasis added.)

This Court held that Harbin had not presented sufficient evidence to establish an essential element of his claim, i.e., that a contract actually existed between him and the City:

"Harbin never articulated, even when specifically asked by the trial court, exactly what contract he contends the City breached. At various times, he appeared to rely on oral representations made by the chief of police when he was hired, on the written provisions in the various employee handbooks for City employees, and on the statutes establishing and modifying the PFRF."

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Harbin, 148 So. 3d at 696. See also, generally, Dye v. City of Gadsden, CV-91-AR-1990-M (N.D. Ala.), in which the United States District Court for the Northern District of Alabama, in an unpublished memorandum opinion, held that the plaintiff class, of whom Boman was a class representative, had not demonstrated a property interest in continued health coverage and therefore had no valid Fourteenth Amendment due-process claim.

Despite the foregoing, the plaintiffs claim that there is presently more evidence of the existence of a contract with the City than there was at the time of Boman's summary-judgment hearing. First, in addition to resubmitting various versions of the employee handbook, the plaintiffs state that they have submitted affidavits of retired police officers and firemen, which, they say, demonstrate that the City "routinely promised life health care to the police and firemen from 1965-1976 if the police and firemen qualified for retirement." The plaintiffs appear to argue that the affidavits demonstrate an oral promise on the part of the City to provide them lifetime health-care benefits upon retirement. However, the plaintiffs offer no discussion of the Statute of Frauds and its

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application to their claim for equitable relief based on an oral promise. It is clear that any alleged oral promise on the part of the City to provide lifetime health-care benefits is not supported by any writing sufficient to satisfy the Statute of Frauds. Section § 8-9-2(1), Ala. Code 1975, specifically states that "[e]very agreement which, by its terms, is not to be performed within one year from the making thereof" is "void unless such agreement or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party to be charged therewith." As explained in Boman III:

"We note that Boman does not contend on appeal that there was an oral promise to pay lifetime health benefits and that those benefits vested after 20 years of service. Had an unwritten agreement existed, however, it appears it would be void under the Statute of Frauds because such an agreement by its terms could not be performed within one year of its making. § 8-9-2, Ala. Code 1975. Nor could the doctrine of promissory estoppel be used to enforce an oral agreement void under the Statute of Frauds. See Branch Banking & Trust Co. v. Nichols, 184 So. 3d 337, 347-48 (Ala. 2015)."

220 So. 3d at 303 n. 3.

The Statute of Frauds therefore precludes examination of the affidavits to establish the existence of a contract providing for lifetime health-care benefits upon retirement. The fact that this Court, in Boman III, has already held that

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no contract exists precludes the examination of the affidavits to resurrect such a claim because a nonexistent contract cannot be resuscitated, much less equitably reformed. Any testimony on the part of the plaintiffs on this issue accomplishes nothing more than explaining each individual's understanding of his or her conversation with City officials and his or her interpretation of the employee handbook. In short, there was no evidence offered to distinguish prior cases directly holding that no written contract existed.

The plaintiffs also assert that additional evidence of a contract is provided by this Court's decision in Fraternal Order of Police, Lodge No. 64 v. Personnel Board of Jefferson County, 103 So. 3d 17 (Ala. 2012). The plaintiffs assert that this Court, in Fraternal Order of Police, recognized a critical distinction between "entitled to" and "eligible for" and that, based on that distinction, they were not "entitled to" Medicare coverage; rather, they only became "eligible for" Medicare coverage. The plaintiffs state that the former is a bona fide entitlement, while the latter is an illusory entitlement--giving the possessor only the right to ask for a benefit. This argument is without merit. First, Fraternal

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Order of Police involved merit pay raises to sheriff-department employees, and not Medicare coverage. More importantly, in Boman II, this Court found it unnecessary to address whether there was an alleged distinction between the terms "eligible" and "entitled," because the relevant provisions of the State plan did not use the term "eligible" in reference to Medicare; thus, this Court tracked the language of the State plan to address whether Boman was "entitled" to Medicare. Clearly, the plaintiffs have provided no additional admissible evidence of a contract to justify continuing this litigation.

I recognize that as a general rule, subject only to certain narrow exceptions not applicable here, a petition for a writ of mandamus is not a vehicle by which to review the merits of an order denying a motion for a summary judgment; in all but the most extraordinary cases, an appeal is an adequate remedy. See Ex parte U.S. Bank Nat'l Ass'n, 148 So. 3d 1060 (Ala. Ass'n 2014) (discussing narrow exceptions to the general rule that a petition for the writ of mandamus is not a vehicle by which to review the merits of an order denying a summary-judgment motion). In this case, however, a permissive appeal

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under Rule 5, Ala. R. App., is undisputedly not an adequate remedy because the contract question certified by the trial court was previously examined and addressed in Harbin, supra, and Boman III.⁶ And I do not agree that an appeal after a final judgment is an adequate remedy based on this Court's holding in Boman III. Simply put, this Court should not turn a blind eye to a blatant injustice by allowing this litigation to proceed any further, requiring the City to expend a substantial amount of money, time, and effort to relitigate the individual claims of some 49 individuals who are seeking equitable relief based upon the alleged breach of a nonexistent contract. This Court's holding in Boman III establishes the first three components for mandamus relief, i.e., a clear legal right to the order sought, an imperative duty upon the trial court to act and a failure to do so, and the lack of another adequate remedy. The fourth component

⁶Inexplicably, the trial court certified a question under Rule 5, Ala. R. App. P., which this court had previously answered, making Rule 5 inoperable. By certifying as the controlling question of law a question already answered by this Court, the trial court deprived the City of a means to redress error when the motion for a summary judgment was denied and our prior decision that no written contract existed was disregarded. The Court treated the petition for permissive appeal as a petition for a writ of mandamus and ordered answers and briefs.

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necessary for the writ to be issued, namely the properly invoked (mandamus) jurisdiction of the court, is therefore present. I do not believe that issuing the writ in this case would be the equivalent of generally extending mandamus practice to allow for appellate review of the denial of a motion for a summary judgment; rather, in issuing the writ, this Court would merely be extending relief to the City where the City has demonstrated, from this Court's holding in Boman III, a clear legal right to relief in the absence of another adequate remedy. See, generally, Ex parte U.S. Bank National Ass'n, 148 So. 3d at 1073 (Shaw, J., concurring specially) ("It is undisputed that this Court has the authority, based on the Alabama Constitution and statute, to issue any writs necessary to give general superintendence and control of lower courts. Ala. Const. 1901, Art. VI, § 140; Ala. Code 1975, § 12-2-7(3). ... [T]here are numerous situations in which this Court exercises authority by mandamus to review interlocutory decisions that, if properly set aside, would terminate an action so as to avoid the waste and expense of further litigation."); see also, generally, Ex parte Hodge, 153 So. 3d 734 (Ala. 2014).

IV. Conclusion

In Boman III, this Court held that the employee handbook distributed by the City to its police officers did not create a contract providing retired officers with vested lifetime health-care benefits. The plaintiffs have failed to offer any additional evidence providing otherwise, and the evidence they do offer is not sufficient to overcome the Statute of Frauds. Accordingly, I would grant the petition for writ of mandamus and order the trial court to enter a summary judgment in favor of the City on count I of the 14th amended complaint.