REL: 01/14/2011

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2010-2011

1091055

Patricia Working, Rick Erdemir, and Floyd McGinnis

v.

Jefferson County Election Commission

Appeal from Jefferson Circuit Court
(CV-08-900316)

SMITH, Justice.

Patricia Working, Rick Erdemir, and Floyd McGinnis appeal from an order of the Jefferson Circuit Court denying their motion seeking an award of attorney fees and expenses following the conclusion of their legal action against the Jefferson County Election Commission ("the JCEC"). For the reasons explained below, we reverse in part, dismiss the appeal in part, and remand the case with directions.

I. Facts and Procedural History

These parties have previously been before this Court. See Working v. Jefferson County Election Comm'n, 2 So. 3d 827 (Ala. 2008) ("Working I"). Because a knowledge of the facts and procedural history of Working I is necessary for a complete understanding of the issues presented by this appeal, a detailed statement of the facts and procedural history in Working I is set forth below:

> "On October 9, 2007, Larry Langford, the member of the Jefferson County Commission representing district 1, was elected mayor of the City of Birmingham. He thereafter resigned his seat on the Jefferson County Commission. On October 29, 2007, the [JCEC], pursuant to Act No. 784, Ala. Acts 1977,[1] adopted a resolution calling for a special election to fill the seat vacated by Langford. The resolution set the special election for February 5, 2008 -- the date of Alabama's presidential-preference primaries. Fred L. Plump, George F. Bowman, and William A. Bell, Sr., were among those who qualified to run for the district 1 seat on the county commission.
>
> "On November 21, 2007, Governor Bob Riley appointed George F. Bowman to fill the vacant district 1 seat on the Jefferson County Commission. The Governor's appointment was made pursuant to a general law, § 11-3-1(b), Ala. Code 1975.[2]
>
> "On January 31, 2008, Patricia Working and Rick Erdemir filed a complaint for declaratory relief in the Jefferson Circuit Court, naming as defendants the [JCEC] and its individual members, namely Jefferson County Probate Judge Alan King, Jefferson County Sheriff Mike Hale, and Jefferson County

> Circuit Clerk Anne-Marie Adams.[1] Among other things, they alleged that they were residents and taxpayers in Jefferson County and that the special election was unauthorized and unconstitutional because, they said, Act No. 784, Ala. Acts 1977, violated § 105 of the Alabama Constitution of 1901,[3] and that, even if Act No. 784 was not unconstitutional and authorized the special election, the date set by the [JCEC] for the special election was incorrect. Accompanying the complaint were an application for a temporary restraining order and a motion for a preliminary injunction.
>
> "On February 1, 2008, the Jefferson Circuit Court conducted an expedited hearing in which it noted the absence of potentially interested parties and issued an order holding that it would not have subject-matter jurisdiction until the attorney general was served with a copy of the complaint pursuant to Ala. Code 1975, § 6-6-227. It further stated that the matter would be held under submission until the plaintiffs had complied with § 6-6-227. Subsequent to the entry of that order, the attorney general was served with a copy of the complaint and filed an answer stating that he was entitled to be heard on the issue of the constitutionality of Act No. 784, and that because Act No. 784 is unconstitutional, the circuit court should enjoin the [JCEC] from canvassing the votes and certifying the results of the special election. In addition, on February 6, 2008, Plump filed a motion to intervene as a defendant, which the court later granted.
>
> "The special election was held on February 5, 2008. On February 12, Floyd McGinnis filed a 'Joinder of Verified Complaint' and, with Working

---

[1]In the complaint, Working and Erdemir stated that they had named King, Hale, and Adams "as individual defendants solely for the purpose of securing any needed relief in the nature of a writ of mandamus."

and Erdemir, amended the complaint to add Bell as a defendant. McGinnis, Working, and Erdemir (collectively referred to as 'the Working plaintiffs') each filed a verification in support of the amended complaint.

"On February 13, 2008, the Working plaintiffs filed a notice of appeal to this Court from the trial court's February 1, 2008, order and, specifically, its effective denial of a temporary restraining order and a preliminary injunction by holding the case 'under submission.' On February 14, 2008, this Court granted an emergency motion filed by the Working plaintiffs, enjoining the [JCEC] from certifying the results of the special election until further order of this Court. On February 20, 2008, this Court issued an order noting that it appeared the statutory notice requirements pertaining to the attorney general had been met, remanding the cause to the trial court for a ruling on the merits of the Working plaintiffs' claims, and maintaining in place the injunction prohibiting the certification of the results of the February 5 special election pending further order of this Court. (Case no. 1070693.)

"On February 21, 2008, the defendants moved to dismiss the action on the bases, among others, that the Working plaintiffs lacked standing to pursue their claims because, as was undisputed, Working and Erdemir did not actually reside in district 1 of Jefferson County and McGinnis had not suffered a sufficient, particularized injury. On February 27, 2008, Plump filed an answer to the complaint and a third-party complaint asserting a quo warranto action as a relator for the State against Bowman. See Ala. Code 1975, § 6-6-597.

"On February 28, 2008, Governor Riley filed a motion, which was later granted, to intervene as a plaintiff. Also on February 28, the Working plaintiffs filed a second amended complaint, among other things, adding a claim that the [JCEC] was

required by Act No. 2007-488 to hold an election at the November 2008 general election to fill the district 1 vacancy and that its refusal to do so was a violation of plaintiff McGinnis's right to vote in such an election.[2]

"On March 6, 2008, Bell filed, and on March 9, 2008, the trial court granted, a motion to join and to amend Plump's third-party quo warranto complaint against Bowman. The amended third-party complaint alleged that Bell was entitled to hold the office of County Commissioner for district 1 based on the result of the special election and that Bowman was unlawfully holding that office. Specifically, Bell and Plump alleged:

> "'Governor Riley did not have the authority to appoint George Bowman to the District 1 seat because it is clear that a general state statute, Act 2007-488 codified at § 11-3-1(b), that begins "Unless a local law authorizes a special election," allows local laws on the same subject to coexist without violating § 105 of the Alabama Constitution. Baldwin County v. Jenkins, 494 So. 2d 584 (Ala. 1986).'

"After conducting a hearing, the trial court issued a final judgment. In its judgment, the trial court held that the Working plaintiffs lacked standing to pursue their claims. As to the merits of the litigation, the trial court determined that the local law on which the special election was based, Act No. 784, Ala. Acts 1977, did not conflict with the general law, § 11-3-1(b), and therefore did not violate § 105 of the Alabama Constitution of 1901,

---

[2]In the second amended complaint, Working, Erdemir, and McGinnis stated that they had named King, Hale, and Adams "as individual defendants solely for the purpose of securing any needed relief in the nature of a writ of mandamus." See supra note 1.

because of the proviso at the beginning of § 11-3-1(b) allowing local laws to authorize special elections to fill vacancies on county commissions. Finally, the trial court held that the [JCEC] had set the special election for the correct day.

"Consistent with the foregoing determinations, the trial court specifically ruled that Governor Riley's appointment of Bowman to the district 1 seat for the Jefferson County Commission was unauthorized and that, when the final results of the election of February 5, 2008, are certified by the [JCEC], the winner of the election will be entitled to hold the office of Jefferson County commissioner for district 1.

"[1]The Alabama Legislature enacted Act No. 784 effective May 25, 1977, as a local law that purported to authorize a special election to fill a vacancy on the Jefferson County Commission caused by 'death, resignation, impeachment, or any cause except normal expiration of terms.' § 1, Act No. 784.

"[2]Section 11-3-1(b) now provides:

"'Unless a local law authorizes a special election, any vacancy on the county commission shall be filled by appointment by the Governor. If the appointment occurs at least 30 days before the closing of party qualifying as provided in Section 17-13-5, the person appointed to the vacated office shall only serve until seven days after the next general election following the appointment as provided herein. The person so appointed to fill the vacancy shall meet the residency requirements in subsection (a), and shall hold office from the date of appointment until the eighth day following the next

> general election. If the original term in which the vacancy occurred would not have expired on the eighth day following the next general election after the appointment, the person elected at the election required by operation of this subsection shall serve for a period of time equal to the remainder of the term in which the vacancy was created. Thereafter, election for the county commission seat shall be as otherwise provided by law.'

"The emphasized language, however, was first included in this statutory scheme effective in 2004. See Act No. 2004-455, Ala. Acts 2004. The substance of the first sentence, without the emphasized language, was part of the Alabama Code prior to the enactment of Act No. 784 in 1977. Until September 1, 2007, it was codified as § 11-3-6, Ala. Code 1975. Effective September 1, 2007, the entire provision, including the emphasized language and additional language, was renumbered by Act No. 2007-488 as § 11-3-1(b).

"[3]Section 105 provides:

> "'No special, private, or local law, except a law fixing the time of holding courts, shall be enacted in any case which is provided for by a general law, or when the relief sought can be given by any court of this state; and the courts, and not the legislature, shall judge as to whether the matter of said law is provided for by a general law, and as to whether the relief sought can be given by any court; nor shall the legislature indirectly enact any such special, private, or local law by the partial repeal of a general law.'"

Working I, 2 So. 3d at 828-31 (footnote omitted).

Working, Erdemir, and McGinnis (hereinafter referred to as "the Working plaintiffs"), the Governor, and Bowman each appealed; we consolidated the appeals. This Court reversed the trial court's judgment and remanded the cause to that court, holding, in relevant part, that the Working plaintiffs had standing to bring their claims, Working I, 2 So. 3d at 836, and that Act No. 784, Ala. Acts 1977, was repealed by the legislature's adoption of § 11-3-1(b), Ala. Code 1975. 2 So. 3d at 841. Consequently, we concluded:

> "[T]he judgment of the trial court upholding the validity of the February 5 special election on the basis of its conclusion that Act No. 784 authorized that election was in error. The Governor's appointment of George F. Bowman to fill the vacant district 1 seat on the Jefferson County Commission was in accordance with § 11-3-1(b) and was lawful. An election for that seat is to be held as part of the November 2008 general election. Accordingly, we reverse the trial court's judgment and remand the cause before us to the trial court for the entry of a judgment consistent with this opinion."[3]

2 So. 3d at 841-42. Based on our disposition of the appeals in Working I, we pretermitted as unnecessary any discussion of the Working plaintiffs' state and federal constitutional claims. See 2 So. 3d at 841 n.11.

---

[3]On remand, the trial court entered an order in accordance with this Court's directions.

On July 22, 2008, the Working plaintiffs moved this Court for an award of attorney fees and expenses against the JCEC.[4] In the motion, the Working plaintiffs contended, in sum, that they were entitled to an award of attorney fees and expenses under (1) 42 U.S.C. § 1988; (2) Rule 35, Ala. R. App. P.; and (3) the "common-benefit" theory. See Ex parte Horn, 718 So. 2d 694, 702 (Ala. 1998) (stating that attorney fees are recoverable, among other situations, "when justified by special equity," such as "when the efforts of the plaintiff's attorneys render a public service or result in a benefit to the general public").

This Court denied the Working plaintiffs' motion "without prejudice to the trial court's considering the questions raised by this motion"; thereafter, the Working plaintiffs filed their motion for attorney fees and expenses in the trial court.[5] In October 2009, the Working plaintiffs filed a

---

[4]The Working plaintiffs also requested that this Court remand the cause to the trial court for, among other things, "a determination of ... any apportionment of the award among the officials who serve ex officio as the [JCEC]."

[5]Between December 2008 and January 2010, the Working plaintiffs presented to the trial court numerous supplemental filings in support of their motion; those filings included, among other things, two affidavits from their counsel, Albert L. Jordan, and an affidavit from attorney Algert S. Agricola,

"motion for an order directing the parties to engage in mediation" of the Working plaintiffs' motion for attorney fees and expenses, contending that "Ala. Code [1975, §] 6-6-20[,] directs the [trial] Court to enter an order for mediation when one of the parties requests it." The trial court, however, did not order mediation.

After a hearing, the trial court entered an order on March 30, 2010, denying the Working plaintiffs' motion for an award of attorney fees and expenses and taxing costs as paid. In the order, the trial court concluded, in pertinent part, that "[42 U.S.C. § 1988] does not entitle the [Working] plaintiffs to an award of plaintiffs' attorney fees under the particular facts of this case" and that, although "the [Working] plaintiffs prevailed [in the underlying declaratory-judgment action], ... the victory resulted in no real benefit to the public." The Working plaintiffs appeal.

II. Discussion

A. Subject-Matter Jurisdiction

The Working plaintiffs present several issues for our review; however, before we can address any of those issues, we

---

Jr.

must first address two issues pertaining to subject-matter jurisdiction. Specifically, the JCEC contends that it is immune from an action for money damages, including attorney fees and expenses, under the theories of State immunity and the immunity provided by the Eleventh Amendment to the United States Constitution.

1. State Immunity

> "The long-standing legal principle of state sovereign immunity is written into Alabama's Constitution. 'Article I, § 14, Alabama Constitution of 1901, provides that "the State of Alabama shall never be made a defendant in any court of law or equity." Under this provision, the State and its agencies have absolute immunity from suit in any court.' Ex parte Franklin County Dep't of Human Res., 674 So. 2d 1277, 1279 (Ala. 1996) (citing Barnes v. Dale, 530 So. 2d 770 (Ala. 1988))."

Alabama State Docks Terminal Ry. v. Lyles, 797 So. 2d 432, 434-35 (Ala. 2001).

> "Section 14 has been described as a 'nearly impregnable' and 'almost invincible' 'wall' that provides the State an unwaivable, absolute immunity from suit in any court. Alabama Agric. & Mech. Univ. v. Jones, 895 So. 2d 867 (Ala. 2004); Patterson v. Gladwin Corp., 835 So. 2d 137, 142 (Ala. 2002); and Alabama State Docks v. Saxon, 631 So. 2d 943, 946 (Ala. 1994). When an action is one against the State or a State agency, § 14 wholly removes subject-matter jurisdiction from the courts. Lyons v. River Road Constr., Inc., 858 So. 2d 257, 261 (Ala. 2003). An action is considered to be against the State '"when a favorable result for the

plaintiff would directly affect a contract or property right of the State, or would result in the plaintiff's recovery of money from the [S]tate."' Jones, 895 So. 2d at 873 (quoting Shoals Cmty. College v. Colagross, 674 So. 2d 1311, 1314 (Ala. Civ. App. 1995)) (emphasis added in Jones).

"The appellate courts of this State have generally held that an action may be barred by § 14 if it seeks to recover damages or funds from the State treasury. Ex parte Alabama Dep't of Mental Health & Mental Retardation, 937 So. 2d 1018, 1023 (Ala. 2006) ('Sovereign immunity bars claims against State agencies on the rationale that a damages award against a State agency would result in a monetary loss to the State treasury.'); Lyons, 858 So. 2d at 262 (noting that a party could not bring an action against a State official, because '[s]uch an action impermissibly seeks funds from the State treasury'); Armory Comm'n of Alabama v. Staudt, 388 So. 2d 991, 993-94 (Ala. 1980) (stating that an action against the Armory Commission of Alabama was barred by § 14 because a judgment against it 'would adversely affect the state treasury'); Southall v. Stricos Corp., 275 Ala. 156, 158, 153 So. 2d 234, 235 (1963) (holding that § 14 prevents an action against the State when a result favorable to the plaintiff 'would directly affect a contract or property right of the State'); and Moody v. University of Alabama, 405 So. 2d 714, 717 (Ala. Civ. App. 1981) (noting that an action was barred because a result in the plaintiff's favor 'could ultimately "touch" the state treasury by requiring the disbursement of state funds'). Additionally, a party may not indirectly sue the State by suing its officers or agents '"when a result favorable to plaintiff would be directly to affect the financial status of the state treasury."' Patterson v. Gladwin Corp., 835 So. 2d at 142 (quoting State Docks Comm'n v. Barnes, 225 Ala. 403, 405, 143 So. 581, 582 (1932)) (emphasis added in Patterson)."

Ex parte Town of Lowndesboro, 950 So. 2d 1203, 1206 (Ala. 2006). Also, "it is clear that an award of interim attorney fees and expenses impacts the State treasury and divests it of funds in the very way forbidden by § 14." 950 So. 2d at 1211-12 (citing Haley v. Barbour County, 885 So. 2d 783, 789 (Ala. 2004)).

"This constitutionally guaranteed principle of State immunity acts as a jurisdictional bar to an action against the State by precluding a court from exercising subject-matter jurisdiction." Lyons v. River Road Constr., Inc., 858 So. 2d 257, 261 (citing Lyles, 797 So. 2d at 435). Thus, if the JCEC is protected by State immunity, we must dismiss for lack of subject-matter jurisdiction the Working plaintiffs' action insofar as it seeks an award of attorney fees and expenses against the JCEC based on the Working plaintiffs' state-law claims. See Lyons, 858 So. 2d at 261 (citing Lyles, 797 So. 2d at 435); see also Watkins v. Mitchem, [Ms. 2090005, May 7, 2010] ___ So. 3d ____, ____ (Ala. Civ. App. 2010) ("Sovereign immunity, arising pursuant to the Alabama Constitution of 1901, § 14, provides no protection to the defendants because '[s]ection 14 immunity has no applicability to federal-law

claims.'" (quoting Bedsole v. Clark, 33 So. 3d 9, 13 (Ala. Civ. App. 2009))).

The Alabama Constitution expressly prohibits suits against the State; thus, as a threshold issue, we must determine whether the Working plaintiffs' action seeking an award of attorney fees and expenses against the JCEC is, in effect, a suit against the State within § 14. See Armory Comm'n of Alabama v. Staudt, 388 So. 2d 991, 993 (Ala. 1980).

> "'This Court has held that "the use of the word 'State' in Section 14 was intended to protect from suit only immediate and strictly governmental agencies of the State." Tallaseehatchie Creek Watershed Conservancy Dist. v. Allred, 620 So. 2d 628, 631 (Ala. 1993) (quoting Thomas v. Alabama Mun. Elec. Auth., 432 So. 2d 470, 480 (Ala. 1983)). Thus, we must determine what constitutes an "immediate and strictly governmental agenc[y]." The test for determining whether a legislatively created body is an immediate and strictly governmental agency for purposes of a sovereign-immunity analysis involves an assessment of (1) the character of the power delegated to the body; (2) the relation of the body to the State; and (3) the nature of the function performed by the body [("the Staudt test")]. Armory Comm'n of Alabama v. Staudt, 388 So. 2d 991, 993 (Ala. 1980).'"

Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Bd., Inc., 940 So. 2d 990, 997 (Ala. 2006)

(quoting Rodgers v. Hopper, 768 So. 2d 963, 966 (Ala. 2000)). Also, we note that State immunity "generally does not extend to counties or county agencies," Ex parte Tuscaloosa County, 796 So. 2d 1100, 1103 (Ala. 2000) (citing Wassman v. Mobile County Commc'ns Dist., 665 So. 2d 941, 943 (Ala. 1995)); "[n]evertheless, when a county [or a county agency] acts as an agent of the state, it is entitled to share in the state's absolute immunity." Ex parte Tuscaloosa County, 796 So. 2d at 1103 (citing Town of Loxley v. Coleman, 720 So. 2d 907, 908-09 (Ala. 1998), and Rutledge v. Baldwin County Comm'n, 495 So. 2d 49, 53 (Ala. 1986)). We must apply the Staudt test to determine whether the JCEC is an "immediate and strictly governmental agency" of the State. See Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Bd., 940 So. 2d at 997.[6] First, we must examine the character of the powers delegated to the JCEC by the legislature.

As noted in Working I, the JCEC is composed of the probate judge, the sheriff, and the clerk of the circuit court of Jefferson County. 2 So. 3d at 829; see also Davis v. Reynolds, 592 So. 2d 546, 548 n.2 (Ala. 1991) ("In Jefferson

[6]On appeal, neither the Working plaintiffs nor the JCEC has addressed the Staudt factors.

County, the 'board of supervisors' is commonly known as the Jefferson County Election Commission, and it is composed of the judge of probate, the sheriff, and the clerk of the circuit court.").[7] In 2006, the legislature amended (and renumbered) certain sections of Title 17, Ala. Code 1975, by, among other things, substituting the phrase "canvassing board" for "board of supervisors." See §§ 17-12-9; 17-12-11; 17-12-16; 17-14-33; 17-14-51; and 17-14-72. Section 17-1-2(6) defines "canvassing board," in relevant part, as follows: "In all elections except primary elections, the canvassing board consists of the judge of probate, circuit clerk, and sheriff of the county."

The legislature has authorized the creation of canvassing boards such as the JCEC; this is evident from the numerous mandatory duties prescribed to canvassing boards by statute. See, e.g., § 17-12-9 ("The canvassing board must, as soon as they have ascertained the result of an election, make on forms furnished by the Secretary of State certificates stating the

[7]The Working plaintiffs, citing Davis, state that "the [JCEC] is merely the common name for the statutory duties of the Sheriff, Probate Judge and Circuit Clerk imposed by Ala. Code [1975,] § 17-12-16 (formerly § 17-14-2) for ascertaining and declaring the results of an election." Reply brief, pp. 17-18.

exact number of votes cast in the county by voting place for each person voted for and the office for which such person was voted for, and file the certificates with the judge of probate ...." (emphasis added)); § 17-12-16 ("Immediately after ascertaining the results of an election for county officers, including members of the House of Representatives of the Legislature, the canvassing board must make in writing a public certification of the result, stating the name of each officer elected and the office to which elected." (emphasis added)); § 17-14-33 ("In all elections for electors for President and Vice President, the canvassing board of each county must, within five days after making the statement of the county vote by precincts, return the result of the same to the Secretary of State." (emphasis added)); and § 17-14-72 ("In all elections for representatives in Congress, the canvassing board of each county must, within five days after making the statement of the county vote by precincts, return the result of the same to the Secretary of State." (emphasis added)).[8]

[8]Sections 17-10-2(f), 17-14-51, and 17-16-20(c) and (e) also set forth mandatory duties prescribed to canvassing boards.

Based on our research and the limited information provided by the parties, it appears that the JCEC acts only when authorized by statute and only in the manner authorized by statute.

Second, we must examine the relationship between the JCEC and the State, and, lastly, we must examine the nature of the functions performed by the JCEC. We will review these Staudt factors together.

Our examination of the statutes quoted above shows that the primary duties of canvassing boards like the JCEC are to ascertain the results of elections for county, state, and federal offices and to return those results to the official designated under the applicable statute; this Court has previously stated that those duties are "ministerial" in nature. See Ex parte Krages, 689 So. 2d 799, 805 (Ala. 1997) ("The duty to canvass election returns and certify a winner is ministerial in nature." (citing, among other cases, Sears v. Carson, 551 So. 2d 1054, 1056 (Ala. 1989) ("Canvassing the returns of an election is a ministerial act."))); and Ex parte Pollard, 251 Ala. 309, 313, 37 So. 2d 178, 182 (1948) ("[C]anvassing and tabulating the [election] returns and

declaring the result thereof ... [is] a purely ministerial duty.").

A ministerial duty is defined as follows:

> "'The duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain and specific duty arising from fixed and designated facts, is a ministerial act.'"

Lucas v. Belcher, 20 Ala. App. 507, 508, 103 So. 909, 911 (1925) (quoting Grider v. Tally, 77 Ala. 422 (1884)).

The duties performed by canvassing boards like the JCEC are statutorily mandated and ministerial in nature, i.e., the legislature has not made provision for canvassing boards to exercise any judgment or discretion in the performance of their duties. After examining, as we must, all the factors in the relationship between the JCEC and the State, see Staudt, 388 So. 2d at 993 ("All factors in the relationship must be examined to determine whether the suit is against an arm of the state ...."), we conclude that the JCEC's powers, its function, and its relationship to the State identify the JCEC as an "immediate and strictly governmental agency" of the State for purposes of § 14. See Ex parte Greater

Mobile-Washington County Mental Health-Mental Retardation Bd., 940 So. 2d at 997.

Because the JCEC is a State agency, the trial court was without subject-matter jurisdiction to entertain the Working plaintiffs' action insofar as it sought an award of attorney fees and expenses against the JCEC based on the Working plaintiffs' state-law claims. See Lyles, 797 So. 2d at 435 ("'We have held that the circuit court is without jurisdiction to entertain a suit against the State because of Sec. 14 of the Constitution.'" (quoting Aland v. Graham, 287 Ala. 226, 229, 250 So. 2d 677, 678 (1971), citing in turn J.R. Raible Co. v. State Tax Comm'n, 239 Ala. 41, 194 So. 560 (1939))). "'Action taken by a trial court lacking subject-matter jurisdiction is void.'" Miller v. Riley, 37 So. 3d 768, 772 (Ala. 2009) (quoting Riley v. Pate, 3 So. 3d 835, 838 (Ala. 2008), citing in turn State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1029 (Ala. 1999)). "'[A] void order or judgment will not support an appeal.'" Wehle v. Bradley, [Ms. 1081433, April 16, 2010] ___ So. 3d ____, ____ (Ala. 2010) (quoting Gallagher Bassett Servs., Inc. v. Phillips, 991 So. 2d 697, 701 (Ala. 2008)). Accordingly, we must dismiss the

Working plaintiffs' appeal insofar as it seeks payment of attorney fees and expenses from JCEC on the Working plaintiffs' state-law claims. See Phillips, 991 So. 2d at 701.

2. Eleventh Amendment Immunity

The JCEC contends that "[t]he Eleventh Amendment prohibits § 1983 claims against agencies of the State of Alabama," the JCEC's brief, p. 24 (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100 (1984)), and, thus, the JCEC says, "[it] is immune from the [Working plaintiffs'] federal claim." The JCEC's brief, p. 25. The Working plaintiffs contend, however, that the JCEC has waived its right to assert Eleventh Amendment immunity, correctly noting that the JCEC raises this issue for the first time on appeal. Reply brief, p. 21. In support of this argument, the Working plaintiffs cite Wisconsin Department of Corrections v. Schacht, 524 U.S. 381 (1998), which states, in relevant part:

> "[T]he Eleventh Amendment grants the State a legal power to assert a sovereign immunity defense should it choose to do so. The State can waive the defense. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985); Clark v. Barnard, 108 U.S. 436, 447 (1883). Nor need a court raise the defect on its own. Unless the State raises the matter, a

> court can ignore it. See Patsy v. Board of Regents of Fla., 457 U.S. 496, 515, n. 19 (1982)."

524 U.S. at 389.

The Working plaintiffs' reliance on Schacht is misplaced. Although it is true that the State can waive the defense of Eleventh Amendment immunity, the State does not waive its Eleventh Amendment immunity by raising the defense for the first time on appeal. The United States Supreme Court has stated that "'the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar' that it may be raised by the State for the first time on appeal." Patsy v. Board of Regents of State of Florida, 457 U.S. 496, 515 n.19 (1982) (quoting Edelman v. Jordan, 415 U.S. 651, 678 (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.")). Thus, the JCEC has not waived the defense of Eleventh Amendment immunity by failing to raise the issue in the trial court.[9]

---

[9]As part of this argument, the Working plaintiffs contend that "[t]he Governor filed a pleading which asserted that the [JCEC] had violated the State Constitution by scheduling the primary election to displace his appointee [to the Jefferson County Commission]"; thus, they say, "[t]hat filing, alone, should have been bar [sic] an assertion of sovereign immunity by the [JCEC]." Reply brief, p. 21. The only authority

Generally, "'the Eleventh Amendment [to the United States Constitution] prohibits actions seeking a monetary award from a state, state agency or state employee sued in his or her official capacity.'" Ex parte Mobile County Dep't of Human Res., 815 So. 2d 527, 530 (Ala. 2001) (quoting Ross v. State, 893 F. Supp. 1545, 1549 (M.D. Ala. 1995)); see also Ex parte Madison County Bd. of Educ., 1 So. 3d 980, 987 (Ala. 2008) ("[I]t is well established that if a local government body is acting as an 'arm of the State,' which includes agents or instrumentalities of the State, then Eleventh Amendment immunity bars [a suit under § 1983]." (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977), and Regents of the Univ. of California v. Doe, 519 U.S. 425, 429-30 (1997))). The Working plaintiffs, however, citing

---

presented in support of this rather muzzy argument is a general citation to Riley v. Cornerstone Community Outreach, Inc., [Ms. 1090808, May 21, 2010] ___ So. 3d ____, ____ (Ala. 2010). However, the sparse argument and sole citation to legal authority presented by the Working plaintiffs provide this Court no basis for determining whether the Governor's "pleading" bars the JCEC's assertion of State immunity. See Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994) ("We have unequivocally stated that it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument.").

Missouri v. Jenkins, 491 U.S. 274 (1989), contend that, in a § 1983 action, an award of attorney fees under 42 U.S.C. § 1988 constitutes "part of the costs" rather than relief in the form of damages and, thus, they say, "'is not subject to the strictures of the Eleventh Amendment.'" The Working plaintiffs' brief, p. 15 (quoting Missouri, 491 U.S. at 278-79). We agree.

> Section 1988(b) provides, in pertinent part:
>
> "In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs ...."

(Emphasis added.)

In Hutto v. Finney, 437 U.S. 678 (1978), the United States Supreme Court held that the Eleventh Amendment does not bar an award of attorney fees incurred in litigation seeking prospective relief, even though the fees would be paid from the State's treasury. 437 U.S. at 693-98. Specifically, the Court stated:

> "[Section 1988] imposes attorney's fees 'as part of the costs.' Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court. See Missouri v. Iowa, 7 How. 660, 681 [(1849)]; North Dakota v. Minnesota, 263 U.S. 583 [(1924)] (collecting cases). The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants."

Hutto, 437 U.S. at 695.

Similarly, in Missouri, the United States Supreme Court noted that "[§] 1988 ... fit easily into the longstanding practice of awarding 'costs' against States, for the statute imposed the award of attorney's fees 'as part of the costs.'" 491 U.S. at 278-79 (quoting Hutto, 437 U.S. at 695-96, citing in turn Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927)). Accordingly, the Court concluded, "it must be accepted as settled that an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment." Missouri, 491 U.S. at 279.

The foregoing authorities establish that the Eleventh Amendment will not shield a State agency from an award of attorney fees and expenses. Accordingly, we conclude that the trial court had subject-matter jurisdiction over the Working plaintiffs' action insofar as it sought an award of attorney

fees and expenses against the JCEC based on the Working plaintiffs' federal-law claims.[10]

B. The Trial Court's Failure to Order Mediation

Among the issues presented in their appellate brief, the Working plaintiffs argue that the trial court committed reversible error by failing to grant their motion requesting mediation of their request for attorney fees and expenses. The JCEC contends that the Working plaintiffs have waived this issue on appeal because they allegedly did not raise this issue in their notice of appeal. Furthermore, the JCEC says, even if the Working plaintiffs had properly preserved this issue for appellate review, "the trial court's failure to force the parties to mediation would be at best harmless error." The JCEC's brief, p. 43.

Initially, we conclude that the JCEC's contention that the Working plaintiffs' have waived this issue is without merit. Our examination of the Working plaintiffs' notice of

[10]This Court notes the rather peculiar nature of Eleventh Amendment immunity; specifically, we note that, although "[a]n assertion of Eleventh Amendment immunity essentially challenges a court's subject matter jurisdiction," Seaborn v. State of Florida, Dep't of Corr., 143 F.3d 1405, 1407 (11th Cir. 1998), Eleventh Amendment immunity is also an affirmative defense that may be waived unless it is raised by the State. See Schacht, 524 U.S. at 389.

appeal and the associated docketing statement reveals that they raised, among others, the following issue: "Did the circuit court fail to order mediation as required by Ala. Code [1975,] § 6-6-20, where a motion was made?" This statement was sufficiently specific to preserve this issue for appellate review. See Rule 3(c), Ala. R. App. P. ("The notice of appeal ... shall designate the judgment, order or part thereof appealed from .... Such designation of judgment or order shall not, however, limit the scope of appellate review.").

In Ex parte Morgan County Commission, 6 So. 3d 1145 (Ala. 2008), this Court addressed the issue whether the circuit court exceeded the scope of its authority in denying the Morgan County Commission's request for mediation:

> "Section 6-6-20, Ala. Code 1975, provides:
>
> > "'(a) For purposes of this section, "mediation" means a process in which a neutral third party assists the parties to a civil action in reaching their own settlement but does not have the authority to force the parties to accept a binding decision.
> >
> > "'(b) Mediation is mandatory for all parties in the following instances:
> >
> > "'....

> "'(2) Upon motion by any party. The party asking for mediation shall pay the costs of mediation, except attorney fees, unless otherwise agreed.
>
> "'(3) In the event no party requests mediation, the trial court may, on its own motion, order mediation. The trial court may allocate the costs of mediation, except attorney fees, among the parties.
>
> "'....'

"(Emphasis added.) See also Mackey v. Mackey, 799 So. 2d 203 (Ala. Civ. App. 2001) (recognizing that if a party moves for mediation pursuant to § 6-6-20(b)(2), Ala. Code 1975, a trial court is required to order mediation).

"Rule 2 of the Alabama Civil Court Mediation Rules also recognizes that a court is required to order mediation if one party so requests, stating:

> "'Parties to a civil action may engage in mediation by mutual consent at any time. The court in which an action is pending shall order mediation when one or more parties request mediation or it may order mediation on its own motion. In all instances except where the request for mediation is made by only one party, the court may allocate the costs of mediation, except attorney fees, among the parties. In cases in which only one party requests mediation, the party requesting mediation shall pay the costs of mediation, except attorney fees, unless the parties agree otherwise.

> "'Upon entry of an order for mediation, the proceedings as to the dispute in mediation may be stayed for such time as set by the court in its order of mediation. Upon motion by any concerned party, the court may, for good cause shown, extend the time of the stay for such length of time as the court may deem appropriate.'

"(Emphasis added.)

"Although a trial court has discretion as to whether to stay the proceedings during the mediation, the trial court has to order mediation upon request of a party. See Comment to Amendment to Rule 2 Effective June 26, 2002, which states:

> "'Section 6-6-20, Ala. Code 1975, allows one party to require a court to order mediation of a dispute, irrespective of the position of any other party to the dispute. ...
>
> "'....
>
> "'Rule 2 as originally adopted provided in the last paragraph that the underlying proceedings "shall be stayed"; the change to "may be stayed" provides greater flexibility to courts and disputants in staying all or part of a dispute during the course of mediation.'

"Here, the circuit court exceeded the scope of its discretion in denying the Commission's request for mediation. Although the circuit court has discretion to determine whether to stay any or all of the proceedings during mediation, it does not have the discretion to deny the Commission's motion for mediation."

6 So. 3d at 1146-47 (some emphasis added). Accordingly, this Court granted the Morgan County Commission's petition for the writ of mandamus and "direct[ed] the Morgan Circuit Court to vacate its order denying mediation and to enter an order ordering mediation, pursuant to § 6-6-20(b), Ala. Code 1975." 6 So. 3d at 1148.

As noted, under § 6-6-20(b), a trial court is required to order mediation of a dispute upon the motion of any party. Thus, in this case, the trial court committed reversible error in failing to grant the Working plaintiffs' request for mediation.

III. Conclusion

For the reasons stated above, we dismiss for lack of subject-matter jurisdiction the Working plaintiffs' appeal insofar as it contests the trial court's denial of their motion for an award of attorney fees against the JCEC based on their state-law claims. We reverse the trial court's judgment denying the Working plaintiffs' motion for an award of attorney fees against the JCEC insofar as the motion seeks attorney fees based on their federal-law claims. We remand the cause to the trial court with directions to enter an order

ordering mediation of the Working plaintiffs' claim for attorney fees based on their federal-law claims, pursuant to § 6-6-20(b), Ala. Code 1975. We pretermit as unnecessary any discussion of the other issues raised by this appeal.

REVERSED IN PART; APPEAL DISMISSED IN PART; AND CASE REMANDED WITH DIRECTIONS.

Cobb, C.J., and Lyons, Woodall, and Parker, JJ., concur.

Stuart, Murdock, and Shaw, JJ., concur in the result.

MURDOCK, Justice (concurring in the result).

I concur in the result reached by the main opinion but decline to join in all the analysis offered therein. Among other things, I find it unnecessary to decide whether to address the issue of so-called "Eleventh Amendment immunity"[1] as an issue of subject-matter jurisdiction.

[1]See generally Alden v. Maine, 527 U.S. 706, 712-14, 732-33 (1999) (discussing the meaning of "Eleventh Amendment immunity" and noting, among other things, that "[t]he phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment").