REL:01/14/2011

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2010-2011

1090084

Health Care Authority for Baptist Health, an affiliate of UAB Health System, d/b/a Baptist Medical Center East

v.

Kay E. Davis, as executrix of the estate of Lauree Durden Ellison, deceased

Appeal from Montgomery Circuit Court
(CV-06-1475)

BOLIN, Justice.

The Health Care Authority for Baptist Health, an affiliate of UAB (University of Alabama at Birmingham) Health System, d/b/a Baptist Medical Center East, appeals from the

trial court's denial of its postjudgment motion seeking a new trial or, in the alternative, a remittitur of the judgment against it based on the statutory cap contained in § 11-93-2, Ala. Code 1975. Because we hold that the Health Care Authority for Baptist Health is entitled to State immunity, we do not discuss the other issues raised by this appeal.

Facts and Procedural History

Baptist Health, a private nonprofit corporation, operated several hospitals in Montgomery, Alabama, for many years. When Baptist Health began experiencing financial difficulties, the University of Alabama Board of Trustees (hereinafter "the Board") and its affiliate, the University of Alabama at Birmingham Health System (hereinafter "UABHS"), agreed to assist Baptist Health by managing its hospitals. On March 11, 2004, Baptist Health entered into a management agreement whereby UABHS would manage the operations of Baptist Health's three acute-care facilities in Montgomery and the ancillary health-care services.

In June 2005, the Board determined that it would organize a health-care authority pursuant to § 22-21-310 et seq., Ala. Code 1975, the Health Care Authorities Act (hereinafter "the

HCA Act"). The purpose of establishing the Health Care Authority for Baptist Health (hereinafter "the Authority") was to improve the overall efficiency of the clinical operations of the facilities that would be owned by the Authority and arrange for financial support of the Board's academic and research mission from those operations.

On June 28, 2005, the Board adopted a resolution approving the incorporation of the Authority. That same day, the Board approved an affiliation agreement, dated July 1, 2005, between the Board, UABHS, and Baptist Health, which set forth the goals in support of creating the Authority. On July 1, 2005, the certificate of incorporation was filed in the Tuscaloosa County Probate Court. On August 1, 2005, Baptist Health transferred its title and interest in its medical facilities and other assets to the Authority.

On September 3, 2005, Lauree Durden Ellison was treated at the emergency room of Baptist Medical Center East (hereinafter "BMCE"), formerly one part of Baptist Health and at the time of her treatment a part of the Authority. She was 73 years old and suffered from a number of chronic preexisting medical conditions (e.g., respiratory failure, diabetes,

hypertension, chronic pain, gastrointestinal bleed, and stroke). The visit was for evaluation after Ellison had fallen at home, but, while she was in the emergency room, Ellison mentioned that she had a sore throat. The emergency-room doctor ordered a quick streptococcus test, which was negative. The exam and lab results indicated that Ellison did not have an infection, and all other tests and X-rays were unremarkable for injuries caused by the fall, so Ellison was discharged from the emergency room to return home.

After Ellison was released, the lab at BMCE grew the culture taken from the quick streptococcus test and detected the presence of methicillin-resistant staphylococcus aureus (hereinafter "MRSA"). Although the lab reported the results in its electronic medical-records system, the results were not reported directly to Ellison's treating physician.

Over the next two months, Ellison received medical treatment for other medical conditions, away from BMCE, but did not complain of a sore throat during that time. Then on November 3, 2005, she returned to BMCE's emergency room complaining of a cough and moderate to severe respiratory distress. Ellison died on November 8, 2005.

On May 25, 2006, Kay E. Davis, as the executrix of Ellison's estate, filed a complaint in Montgomery County, naming as a defendant "Baptist Health d/b/a Baptist Medical Center East." Davis later amended her original complaint to correct the name of the defendant as follows: "Healthcare Authority for Baptist Health d/b/a Baptist Medical Center East," also known as "The Healthcare Authority for Baptist Health, an Affiliate of UAB Health System d/b/a Baptist Medical Center East." Before trial, the Authority asserted that it was subject to the $100,000 statutory cap on damages against governmental entities set out in § 11-93-2, Ala. Code 1975.

At trial, Davis presented the testimony of expert witnesses who claimed that BMCE had breached the standard of care by not reporting its finding of MRSA directly to Ellison's doctor and that BMCE's failure to report was the proximate cause of Ellison's death, which they opined was caused by MRSA pneumonia. The Authority offered the testimony of several expert witnesses who testified that MRSA does not cause a sore throat; that, because Ellison was not suffering from a throat infection when the streptococcus culture was

taken, the standard of care did not require that anyone be notified of the presence of MRSA, which is present in a large part of the population without symptoms or consequences; that notifying Ellison's doctor of the MRSA would not have changed Ellison's course of treatment; and that, in any event, Ellison died of congestive heart failure unrelated to the MRSA, and not of MRSA pneumonia.

The jury returned a verdict for Davis in the amount of $3,200,000. A judgment was rendered for Davis and against the Authority for that amount.

The Authority filed a postjudgment motion seeking a new trial or, in the alternative, a remittitur of the judgment from $3,200,000 to $100,000, the statutory cap for damages recoverable against governmental entities contained in § 11-93-2, which it argued was applicable to the Authority under § 22-21-318(a)(2), a part of the HCA Act. On September 29, 2009, the trial court denied the Authority's postjudgment motion, expressly holding that the Authority is not entitled to have its damages capped at $100,000 pursuant to the statute, and it entered a final judgment against the Authority for $3,200,000. Specifically, the trial court stated:

"[Davis] presented legally-sufficient evidence as to each element of the cause of action for medical malpractice, so there is no merit to the defendant's renewed motion for judgment as a matter of law.

"The defendant offered no evidence in support of any ground for its motion for new trial. This Court finds that there is no merit in the contentions that the jury's verdict was the product of bias, passion, or prejudice, or that it was in any way tainted by irrelevant or inflammatory evidence or argument. Because there was no error in this trial, there is, of course, also no merit to the defendant's argument of cumulative error as a ground for new trial.

"The defendant pleads the $100,000 cap enacted in 1987 and codified at Ala. Code [1975,] § 6-5-547. That statute has been declared unconstitutional, and this Court is bound by the precedents of the Alabama Supreme Court. Similarly, this Court is bound by the appellate decisions that have rejected the defendant's constitutional attacks on Alabama's current system of assessing damages in wrongful death cases. Furthermore, there are no other valid grounds for remittitur in this case, or for altering, amending, or vacating the judgment. The amount of the verdict does not shock the conscience of the Court.

"The only serious issue presented by the defendant's consolidated post-judgment motion is its contention that the $100,000 cap on damages established by Ala. Code [1975,] § 11-93-2[,] ought to apply to this case. This Court rejects that argument on the ground that this defendant, The Health Care Authority for Baptist Health, an Affiliate of UAB Health System, d/b/a Baptist Medical Center East, is not a 'governmental entity,' within the meaning of Ala. Code [1975,] § 11-93-1(1). This Court interprets the $100,000 cap to apply only to 'governmental entities.' Section 11-

93-2 provides that '[t]he recovery of damages under any judgment against a governmental entity shall be limited to $100,000.00 ....' .... Section 11-93-1(1) defines 'governmental entity,' as follows ...:

> "'Any incorporated municipality, any county, and any department, agency, board, or commission of any municipality or county, municipal or county public corporations, and any such instrumentality or instrumentalities acting jointly. "Governmental entity" shall also include county public school boards, municipal public school boards and city-county school boards when such boards do not operate as functions of the State of Alabama. "Governmental entity" shall also mean county or city hospital boards when such boards are instrumentalities of the municipality or county or organized pursuant to authority from a municipality or county.'

"The parties agree about this historical background: The Health Care Authorities Act of 1982 is codified at Ala. Code [1975,] §§ 22-21-310 [through] -344. For over 20 years, these entities could be formed only by counties or cities. Thus, there was never much doubt about them being 'governmental entities.' The possibility for Baptist Health to claim the status of 'governmental entity,' and the protection of the $100,000 cap, was created by a 2003 amendment to the [HCA] Act. Ala. Act 2003-249, p. 606, § I, added the phrase 'educational institution,' in addition to counties and municipalities, to Ala. Code [1975,] §§ 22-21-311(a)(1), (4), (10), (13) and 313(a), (a)(1), (a)(3)b. The 2003 amendments permitted an 'educational institution' [defined as an Alabama public college or university 'that operates a school of medicine'] to form a 'health care authority,' in addition to counties and municipalities. Then, in

July 2005, Baptist Health, a nonprofit, private, non-governmental corporation, entered into an 'Affiliation Agreement' with The Board of Trustees of the University of Alabama (an educational institution that operates a medical school, commonly known as 'UAB').

"[Davis] denies that the defendant was ever legally and properly converted into a 'health care authority.' It is unnecessary for this Court to reach that issue, however, because, even if this defendant is a 'health care authority,' it is not a 'governmental entity' for purposes of the $100,000 cap. That is, not every 'public corporation' or every 'health care authority' is necessarily a 'governmental entity,' within the meaning of Ala. Code [1975,] §§ 11-93-1 and -2. Only 'governmental entities' are given the benefit of the $100,000 cap.

"Defendant's sole argument for application of the $100,000 cap to it is based on Ala. Code [1975,] § 22-21-318(a)(2), which gives the authority the power:

> "'To sue and be sued in its own name in civil suits and actions, and to defend suits and actions against it, including suits and actions ex delicto and ex contractu, subject, however, to the provisions of Chapter 93 of Title 11, which chapter is hereby made applicable to the authority.' ....

"This Court rejects the defendant's interpretation of this statute. In interpreting § 22-21-318(a)(2), it is important to note that this provision dates to the original [HCA] Act, when only counties or municipalities could form such authorities and counties and cities were clearly 'governmental entities' otherwise subject to the $100,000 cap.

> "This Court finds that [Davis's] interpretation of this statute is the more logical and persuasive. [Davis] contends that all this provision means is that the $100,000 cap may apply to health care authorities, if the cap could otherwise apply. That is, counties and cities, who are 'governmental entities' subject to the $100,000 cap, do not lose that protection by forming a health care authority. Therefore, the intent and meaning of Ala. Code [1975,] § 22-21-318(a)(2)[,] was to preserve the benefit of the cap, where it otherwise would apply. The legislature, through § 22-21-318(a)(2), did not purport to extend the application of the $100,000 cap to private, non-governmental entities, entities that otherwise have no claim to the protection of the cap statute. This Court holds that the legislature did not intend that every 'health care authority' would automatically be deemed to be a 'governmental entity,' within the meaning of Ala. Code [1975,] §§ 11-93-1 and -2.
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> "The $100,000 cap was enacted in 1977 and codified at Ala. Code [1975,] §§ 11-93-1 and -2. It is very important to note that §§ 11-93-1 and -2 were not amended in 1982, or in 2003, when the [HCA] Act of 1982 was amended to add 'educational institutions.' Thus, even if the cap statute is 'incorporated' into the [HCA] Act [via § 22-21-318(a)(2)], the cap statute itself still must provide the substantive limitation on damages in favor of the particular defendant in question. The Health Care Authority for Baptist Health, an Affiliate of UAB Health System, is not a 'governmental entity,' as defined in Ala. Code [1975,] § 11-93-1(1), e.g., because it was not 'organized pursuant to authority from a municipality or county.' The plain meaning of § 11-93-1(1) excludes this defendant from the definition of 'governmental entity.' There is nothing to indicate that the legislature intended the $100,000 cap to apply to every 'health care authority,' even those who are not themselves 'governmental entities.'

> "As noted above, this Court's resolution of this issue does not require the Court to address or rule on [Davis's] alternative contention -- the contention that The Health Care Authority for Baptist Health, an Affiliate of UAB Health System, is not a valid 'health care authority.' However, in case this judgment is appealed and if the appellate court should disagree with this Court's holding, stated above, that not every 'health care authority' is necessarily a 'governmental entity,' this Court, for the possible benefit of the reviewing appellate court, will state its conditional ruling on [Davis's] alternative argument.
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> "If it were necessary for this Court to decide the issue, this Court would agree with [Davis] and find that The Health Care Authority for Baptist Health, an Affiliate of UAB Health System, is not a valid 'health care authority,' within the meaning of the [HCA] Act, at least not for the purpose of enforcing the $100,000 cap intended for governmental entities. As one example, [Davis] points out that Ala. Code [1975,] § 22-21-339[,] appears to require that, when The Health Care Authority for Baptist Health, an Affiliate of UAB Health System, ultimately dissolves, its assets 'shall' revert to a local governmental entity (city or county) or to an educational institution. But, in apparent contradiction, the July 2005 Affiliation Agreement, at § 3.3, on page 8, states that: 'Upon termination, all assets of the Authority will be transferred to Baptist Health or to its designee....' This Court is persuaded by [Davis's] contention that, if the defendant in this case were truly a 'governmental entity,' then its assets would obviously be arranged to revert back to the government, not to some private enterprise (even if that private enterprise is categorized for some purposes as nonprofit).
>
> "Further, [Davis] appears to this Court to have the better side of the argument when [Davis]

> contends that the plain language of the [HCA] Act of 1982 (even as amended in 2003) does not appear to permit private entities to become 'health care authorities.' For example, Ala. Code [1975,] § 22-21-311(a)(2)[,] defines an 'authority' as a 'public corporation,' and Baptist Health, in June 2005, was not a public corporation. Also, Ala. Code [1975,] § 22-21-311(a)(14)[,] defines 'health care facilities' as being 'public hospitals,' but Baptist Health's facilities do not appear to be 'public hospitals,' e.g., they are not owned by a federal, state, or local government. Additionally, the [HCA] Act appears to have no room for Baptist Health because Baptist is not a 'public hospital corporation,' as defined by Ala. Code [1975,] § 22-21-311(a)(21), e.g., Baptist Health, and the purported Health Care Authority for Baptist Health, [was] not organized by any county or municipality.
>
> "Finally, Ala. Code [1975,] § 22-21-312[,] declares the legislative findings and intent of the [HCA] Act. This Court finds that these legislative statements clearly exclude any intent to ever include any nongovernmental entity like Baptist Health. First, the Legislature 'distinguished' away community-nonprofit hospitals from the intent of the [HCA] Act, which describes Baptist Health. Second, Baptist Health was not funded from taxes. Third, Baptist Health already had a 'corporate structure,' and, as noted above, Baptist does not fit the definition of 'publically-owned hospitals' or 'health care facilities.' Lastly, the purpose of the [HCA] Act is to facilitate owning and operating 'health care facilities,' which Baptist is not, e.g., because it is not a 'public hospital.' All this is further proof that the Affiliation Agreement of July 2005 meets neither the letter nor the spirit of the [HCA] Act. If this issue were necessary to be decided, this Court would hold that the defendant in this case cannot be deemed to be a 'health care authority.' Thus, there is no foundation for the defendant to assert that the $100,000 cap applies to

> it. Whatever legal effect, if any, the July 2005 Affiliation Agreement might have [e.g., vis-à-vis the parties to the agreement], it cannot be effective or enforced by this defendant against [Davis] to cap this judgment at $100,000.
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> "[Davis's] third and final argument is a constitutional argument. [The attorney general was served with a copy of Davis's brief that included this issue.] This constitutional question need not be addressed at this time in this case because this Court has resolved the defendant's consolidated post-judgment motion on other, non-constitutional grounds. Just for informational purposes (e.g., for a reviewing appellate court), this Court notes for the record that [Davis's] constitutional argument is that Ala. Code [1975,] § 22-21-318(a)(2)[,] would have to be declared unconstitutional (at least in part, as applied to this plaintiff by this defendant in this case) if this Court were to adopt the defendant's construction of Ala. Code [1975,] § 22-21-318(a)(2). That is, if the Alabama Legislature really did intend for all 'health care authorities' to automatically become 'governmental entities,' for purposes of the $100,000 cap [assuming this defendant is a valid 'health care authority'], then that intent would have to be declared unconstitutional as applied to 'health care authorities' that are not truly 'governmental entities.' According to [Davis] the Legislature can only constitutionally cap damages for State and local governmental entities, and [Davis] argues that this defendant, an otherwise private, non-governmental entity, cannot utilize the organizational structure of a statutory 'health care authority,' to convert itself into a 'governmental entity' that has the benefit of the $100,000 cap. [Davis] argued, in part, that: 'Prior to 2005, Baptist Health was not an arm of the State or a "local governmental entity." It was not entitled to any kind of immunity or cap on damages. By entering into an "affiliation" with UAB, Baptist Health did

> not transform itself into a "governmental entity." That is, not every "public corporation" in Alabama is a "governmental entity" subject to the $100,000 cap.' This Court determines to deny each post-judgment motion on non-constitutional grounds, but, for the record, this Court notes that this alternative constitutional argument was presented by [Davis]. To reiterate, IT IS HEREBY ORDERED THAT each one of the defendant's post-judgment motions is herein DENIED."

(Emphasis omitted.)

The Authority timely appealed.

Discussion

At the outset, we note that the Authority argues on appeal that State immunity under § 14, Ala. Const. 1901, also known as sovereign immunity, acts as a jurisdictional bar in this case. The Authority raises this argument for the first time on appeal. Typically, an appellate court cannot consider arguments raised for the first time on appeal. CSX Transp., Inc. v. Day, 613 So. 2d 883, 884 (Ala. 1993). However, "[t]he assertion of State immunity challenges the subject-matter jurisdiction of the court; therefore, it may be raised at any time by the parties or by a court ex mero motu." Atkinson v. State, 986 So. 2d 408, 411 (Ala. 2007). "'[A]n action contrary to the State's immunity is an action over which the courts of this State lack subject-matter jurisdiction.'" Ex

ex parte Alabama Dep't of Transp., 978 So. 2d 17, 21 (Ala. 2007)(quoting Larkins v. Department of Mental Health & Mental Retardation, 806 So. 2d 358, 363 (Ala. 2001)). Therefore, we will address whether the Authority is entitled to State immunity.

A brief history of the statutes allowing for the creation of health-care authorities is necessary. In 1945, the legislature authorized the creation of public hospital associations by local governing bodies. Title 22, Art. 3 (now § 22-21-50 et seq., Ala. Code 1975). In 1949, the legislature provided for the creation of county hospital associations. Title 22, Art. 4 (now § 22-21-70 et seq., Ala. Code 1975). In 1961, the legislature enacted Title 22, Art. 5 (now § 22-21-130 et seq., Ala. Code 1975), to allow the creation of municipal hospital-building authorities. In 1975, the legislature enacted Title 22, Art. 6 (now § 22-21-170 et seq., Ala. Code 1975), to authorize the creation of county and municipal hospital authorities.

In 1982, the legislature enacted the HCA Act. Section 22-21-312 of the HCA Act provides for the creation of health-

care authorities as public corporations in order to effectuate its intent:

> "The Legislature hereby finds and declares:
>
> "(1) That publicly-owned (as distinguished from investor-owned and community-nonprofit) hospitals and other health care facilities furnish a substantial part of the indigent and reduced-rate care and other health care services furnished to residents of the state by hospitals and other health care facilities generally;
>
> "(2) That as a result of current significant fiscal and budgetary limitations or restrictions, the state and the various counties, municipalities, and educational institutions therein are no longer able to provide, from taxes and other general fund moneys, all the revenues and funds necessary to operate such publicly-owned hospitals and other health care facilities adequately and efficiently; and
>
> "(3) That to enable such publicly-owned hospitals and other health care facilities to continue to operate adequately and efficiently, it is necessary that the entities and agencies operating them have significantly greater powers with respect to health care facilities than now vested in various public hospital or health-care authorities and corporations and the ability to provide a corporate structure somewhat more flexible than those now provided for in existing laws relating to the public hospital and health-care authorities.

> "It is therefore the intent of the Legislature by the passage of this article to promote the public health of the people of the state (1) by authorizing the several counties, municipalities, and educational institutions in the state effectively to form public corporations whose corporate purpose shall be to acquire, own and operate health care facilities, and (2) by permitting, with the consent of the counties or municipalities (or both) authorizing their formation, existing public hospital corporations to reincorporate hereunder. To that end, this article invests each public corporation so organized or reincorporated hereunder with all powers that may be necessary to enable it to accomplish its corporate purposes and shall be liberally construed in conformity with said intent."

A 2003 amendment to the HCA Act added the language "educational institutions" to allow a public college or university established under the Alabama Constitution that operates a school of medicine to establish a health-care authority.

It should be noted that until 1975 city and county hospitals, as well as the city or county that established them, enjoyed almost absolute governmental immunity from civil liability. See Thompson v. Druid City Hosp. Bd., 279 Ala. 314, 184 So. 2d 825 (1966)(holding that a hospital board, created by local law as an agency of the county and city to construct and operate a public hospital mainly for charity, was a public agency immune from liability for the negligence

of its officers and employees and that the procurement of liability-insurance coverage by the board did not affect such immunity); Clark v. Mobile County Hosp. Bd., 275 Ala. 26, 151 So. 2d 750 (1963)(holding that the county hospital board was a public agency performing governmental function and was immune from suit by paying patient for injuries allegedly suffered by him as a result of the negligence of agents, servants, or employees of the board); Laney v. Jefferson County, 249 Ala. 612, 32 So. 2d 542 (1947)(holding that the general provision that a county is a corporate body with power to sue and be sued does not deprive a county of the immunity from suit based on negligence so long it is engaged in governmental functions); Moore v. Walker County, 236 Ala. 688, 185 So. 175 (1938)(holding that the act authorizing and empowering a county to equip, own, and operate a hospital nowhere makes the county subject to suit for any injuries patients suffer by reason of the negligence of the officers, agents, or servants entrusted with the operation and management of the hospital).

In 1975, this Court issued two opinions that abolished the doctrine of governmental immunity for municipalities and

counties, including immunity for the public hospitals they operate: Jackson v. City of Florence, 294 Ala, 592, 320 So. 2d 68 (1975), and Lorence v. Hospital Bd. of Morgan County, 294 Ala. 614, 320 So. 2d 631 (1975). In Jackson, Jackson sued the City of Florence and several of its police officers for damages based on injuries he alleged the city's officers had negligently inflicted on him during and after his arrest. Jackson asked this Court to review its previous interpretation of the statute now codified § 11-47-190, Ala. Code 1975. This Court acknowledged that, based on the plain language of the statute, the legislature had abrogated tort immunity for municipalities to the extent that the alleged wrongful acts occurred "through the neglect, carelessness, or unskillfulness of ... some agent, officer or employee of the municipality engaged in work therefor and while acting in the line of his or her duty ...." § 11-47-190. The Jackson Court "recognize[d] the authority of the legislature to enter the entire field, and further recognize[d] its superior position to provide with proper legislation any limitations or protections it deem[ed] necessary." 294 Ala. at 600, 320 So. 2d at 75.

In Lorence, the issue of governmental immunity in the context of a county hospital was presented. The Court discussed not only Tit. 22, § 204(24), Code of Ala. 1940 (Recomp. 1958)(now § 22-21-77, Ala. Code 1975), that allowed a county hospital board "to sue and be sued and to defend suits against it," but also Tit. 12, §§ 3 and 115, and Tit. 7, § 96, Code of Ala. 1940 (Recomp. 1958)(now § 11-1-2, § 11-12-5, and § 6-5-20, respectively), permitting the county "to sue or be sued" and providing for the claim procedure before bringing suit. The Court stated, however, that the issue of a county's general liability was not before the Court and that what was before it was the immunity of a county hospital board, and it held that because the statute authorizing the creation of the boards expressly provided for suits against them, county hospital boards no longer had immunity from tort actions. In Cook v. County of St. Clair, 384 So. 2d 1 (Ala. 1980), the Court clarified the implication in its holding in Lorence, holding that counties and county commissioners are subject to suit in tort under § 11-1-2.

It is clear that health-care authorities created by a county or city no longer have State immunity and are subject

to the $100,000 statutory cap of § 11-93-2. However, whether a health-care authority created by a state educational institution is entitled to State immunity is a question of first impression.

In the present case, the Board created a health-care authority. In accordance with the 2003 amendment to the HCA Act, the Board adopted a resolution organizing a health-care authority. Section 22-21-312, setting out the legislature's intentions in creating the HCA Act, provides that the HCA Act is to "promote the public health of the people of the state (1) by authorizing ... educational institutions in the state effectively to form public corporations whose corporate purpose shall be to acquire, own and operate health care facilities."

The HCA Act defines an "authority" as a "public corporation organized, and any public hospital corporation reincorporated, pursuant to the provisions hereof." § 22-21-311(a)(2). The Board also entered into an affiliation agreement with Baptist Health, pursuant to which Baptist Health's assets would be transferred to the Authority. The certificate of incorporation for the Authority was filed in

the Tuscaloosa County Probate Court and provided, among other things, that subject to the affiliation agreement, the Authority shall have and may exercise all the powers and authority set out in the HCA Act.

Davis argues that the Authority is not a validly created health-care authority because, she argues, the HCA Act does not authorize the Authority to acquire private hospitals and the affiliation agreement between the Authority and Baptist Health violates the HCA Act.

Section 22-21-312, Ala. Code 1975, authorizes certain educational institutions "to form public corporations whose corporate purpose shall be to acquire, own and operate health care facilities." Section 22-21-311(a)(14), Ala. Code 1975, defines "health care facility" as:

> "Health care facilities. Generally, any one or more buildings or facilities which serve to promote the public health, either by providing places or facilities for the diagnosis, treatment, care, cure or convalescence of sick, injured, physically disabled or handicapped, mentally ill, retarded or disturbed persons, or for the prevention of sickness and disease, or for the care, treatment and rehabilitation of alcoholics, or for the care of elderly persons, or for research with respect to any of the foregoing, including, without limiting the generality of the foregoing:

"a. Public hospitals of all types, public clinics, sanitoria, public health centers and related public health facilities, such as medical or dental facilities, laboratories, out-patient departments, educational facilities, nurses' homes and nurses' training facilities, dormitories or residences for hospital personnel or students, other employee-related facilities, and central service facilities operated in connection with public hospitals and other facilities (such as, for example, gift and flower shops, cafe and cafeteria facilities and the like) ancillary to public hospitals;

"b. Retirement homes, nursing homes, convalescent homes, apartment buildings, dormitory or domiciliary facilities, residences or special care facilities for the housing and care of elderly persons or other persons requiring special care;

"c. Appurtenant buildings and other facilities:

"1. To provide offices for persons engaged in the diagnosis, treatment, care, or cure of diseased, sick, or injured persons, or in preventive medicine, or in the practice of dentistry; or

"2. To house or service equipment used for the diagnosis, treatment, care or cure of diseased, sick, or injured persons, or in preventive medicine, or in the practice of dentistry, or the records of such diagnosis, treatment, care, cure

> or practice or research with respect to any of the foregoing;
>
> "d. Parking areas, parking decks, facilities, buildings and structures appurtenant to any of the foregoing;
>
> "e. Ambulance, helicopter, and other similar facilities and services for the transportation of sick or injured persons; and
>
> "f. Machinery, equipment, furniture, and fixtures useful or desirable in the operation of any of the foregoing."

The definition of health-care facility in the HCA Act specifically includes public hospitals and then lists several types of public hospitals "without limiting the generality" of the preceding definition of health-care facility. The omission of "private" hospital from the definition does not mean that the legislature intended that health-care authorities could purchase only public hospitals. We agree with the reasoning of the United States Court of Appeals for the Eleventh Circuit in Askew v. DCH Regional Health Care Authority, 995 F.2d 1033 (11th Cir. 1993), regarding the health-care authority's purchase of a private hospital. In Askew, the plaintiffs brought an antitrust action against a health-care authority to prevent the authority from

completing its acquisition of a private hospital in the same region. The Eleventh Circuit held that the health-care authority qualified as a "political subdivision of the state" for the purposes of antitrust immunity. The court went on to address the plaintiffs' argument that a health-care authority could not acquire a private hospital because, they argued, a health-care facility under the definition in § 22-21-311 of the HCA Act means a "publicly owned" hospital as opposed to a "privately owned" hospital:

> "Plaintiffs' argument is inconsistent with a common sense reading of the statute. The legislature clearly stated that, in its view, publicly-owned hospitals played a very significant role in providing health care to the poor. By establishing public health care authorities, it sought to enhance the amount and quality of service for Alabama's poor. If DCH could only purchase other publicly-owned hospitals, the overall number of publicly-owned facilities would not increase and service to the disadvantaged would remain the same. To the contrary, by purchasing [a privately owned hospital], DCH has increased the number of publicly-owned hospitals in the Tuscaloosa area, has expanded its ability to serve indigent care needs in the region, and has enhanced its ability to provide indigent and reduced-rate care at its existing facilities. This is entirely consistent with what the Alabama legislature authorized DCH to do."

995 F.2d at 1040.

Davis asserts that the affiliation agreement between the Board and Baptist Health provides that upon termination of the agreement the assets of the Authority will be transferred to Baptist Health or its designee. Davis argues that this provision of the affiliation agreement conflicts with § 22-21-339, Ala. Code 1975, which provides that upon dissolution of a health-care authority formed pursuant to the HCA Act the assets revert to the local governmental entity or the educational institution that created the authority. Davis also contends that the specific provision in the Authority's articles of incorporation that provides that the Authority is obligated under the affiliation agreement to reconvey assets to Baptist Health likewise violates § 22-21-339.

Section 22-21-339 prescribes the manner in which a health-care authority formed under the HCA Act is dissolved. Section 22-21-339 provides:

> "At any time when the authority does not have any securities outstanding and when there shall be no other obligations assumed by the authority that are then outstanding, the board may adopt a resolution ... declaring that the authority shall be dissolved. ... [I]n the event that it owns any assets or property at the time of the dissolution, the title to its assets and property ... shall ... vest in one or more counties, municipalities, or educational institutions in such manner and

> interests as may be provided in the ... certificate of incorporation."

The affiliation agreement between the Board and Baptist Health accomplishes the purpose of the management agreement between Baptist Health and UABHS, with the stated goal of "(i) providing community-based health care in the Montgomery area; (ii) promoting efficiency and quality in the delivery of health care services to the people of the state of Alabama; and (iii) supporting the academic and research mission of the [Board and UABHS] with respect to health care services and science of medicine." In the affiliation agreement, the parties expressly recognize that the Board has the power under the HCA Act to organize a health-care authority and that such an authority would be created to take possession of and to operate Baptist Health's assets during the term of the affiliation agreement.

By the separate act of creating a health-care authority, the Board formed a public corporation under the HCA Act, providing financial benefits and other powers, such as eminent domain and an exemption from certain taxation. Section 22-21-318 provides, in pertinent part:

"(a) In addition to all other powers granted elsewhere in this article, and subject to the express provisions of its certificate of incorporation, an authority shall have the following powers, together with all powers incidental thereto or necessary to the discharge thereof in corporate form:

"....

"(5) To acquire, construct, reconstruct, equip, enlarge, expand, alter, repair, improve, maintain, equip, furnish and operate health care facilities at such place or places, within and without the boundaries of its authorizing subdivisions and within and without the state, as it considers necessary or advisable;

"....

"(7) To receive, acquire, take and hold (whether by purchase, gift, transfer, foreclosure, lease, devise, option or otherwise) real and personal property of every description, or any interest therein, and to manage, improve and dispose of the same by any form of legal conveyance or transfer; provided however, that the authority shall not, without the prior approval of the governing body of each authorizing subdivision, have the power to dispose of (i) substantially all its assets, or (ii) any health care facilities the disposition of which would materially and significantly reduce or impair the level of hospital or health care services rendered by the authority; and provided further, that the foregoing proviso shall not be construed to require the prior approval of any such governing body for the mortgage or pledge of all or substantially

> all its assets or of any of its health care facilities, for the foreclosure of any such mortgage or pledge or for any sale or other disposition thereunder;
>
> "....
>
> "(18) To receive and accept from any source aid or contributions in the form of money, property, labor or other things of value, to be held, used and applied to carry out the purposes of this article, subject to any lawful condition upon which any such aid or contributions may be given or made;
>
> "....
>
> "(23) To assume any obligations of any entity that conveys and transfers to the authority any health care facilities or other property, or interest therein, provided that such obligations appertain to the health care facilities, property or interest so conveyed and transferred to the authority."

The terms of the affiliation agreement between Baptist Health and the Board comply with the powers granted an authority to transfer property as contemplated by § 22-21-318. If the Authority has no outstanding securities or obligations and the Authority's board elects to dissolve the Authority, under § 22-21-339 the Authority's assets, <u>if any</u>, will be transferred to the Board. In contrast to a dissolution, the affiliation agreement between Baptist Health and the Board

addresses the transfer of property in the event of the termination of the affiliation agreement. It does not address the dissolution of the Authority, and thus nothing in the affiliation agreement contradicts the provisions of § 22-21-339. Section 22-21-339 contemplates that the Authority might not own assets at the time of dissolution, and nothing in the HCA Act requires that the Authority own assets before it can be dissolved.[1]

Davis also argues that the Authority does not meet this Court's test for determining whether an entity is entitled to sovereign immunity. In Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Board, 940 So. 2d 990 (Ala. 2006), a resident at a group home was killed in an accident involving a van operated by the county mental-health board. The parents of the resident sued the board and the manager of the group home. The defendants moved for a summary judgment on the basis of various types of immunity, the board

[1]The Chief Justice's dissent clearly confuses the distinction between the disposition of assets upon a dissolution of the Authority under § 22-21-339 and a termination of the affiliation agreement between Baptist Health and the Board, where the affiliation agreement states that the Board must return assets to Baptist Health upon the termination of the agreement.

principally relying on its claim that it was entitled to sovereign immunity as an agency of the State. This Court reviewed caselaw relating to the criteria for determining whether a particular entity qualifies as a State agency for purposes of § 14, Ala. Const. 1901, and concluded that the board had not shown that it was qualified as a State agency. Specifically, this Court analyzed the three-factor test set out in Armory Commission of Alabama v. Staudt, 388 So. 2d 991 (Ala. 1980): (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 body's function. Some attributes of the board and some aspects of its relation with the State suggested that the board was a State agency. For example, caring for citizens suffering from mental illness is a governmental function, citing White v. Alabama Insane Hosp., 138 Ala. 479, 35 So. 454 (1903). Further, this Court recognized that the board had the power of eminent domain and that its property, income, and activities were exempt from taxation. However, certain elements favored characterizing the board as an entity separate from the State. Although the State exercised a certain amount of oversight over the board, the oversight was

minimal. The board's regulations provided that the "facilities and programs" of the board were not under the direction or control of any person other than its directors so long as those facilities and programs complied with the minimum standards adopted by the Board of Health and the Department of Mental Health as set out in § 22-51-12, Ala. Code 1975. Also, the board was authorized to own all of its property in its own name and to sell or to otherwise dispose of it. Ownership of the property in the name of the entity has been considered indicative of its independent status, particularly when the entity was authorized to sell or dispose of the property independent of the State. Also, the board was authorized to borrow money by issuing bonds and notes and to secure that indebtedness by a pledge of its revenues, so that its indebtedness was not an obligation of the State. Ultimately, this Court concluded that the board was not entitled to sovereign immunity.

The present case is distinguishable from Greater Mobile because the HCA Act specifically states that a health-care authority established thereunder "acts as an agency or instrumentality of its authorizing subdivisions and as a

political subdivision of the state." § 22-21-318(c)(2). In Greater Mobile, the enabling legislation allowed for three or more persons to form a public corporation to contract with the State Board of Mental Health and Mental Retardation in constructing and operating facilities and in carrying out programs in particular areas of the state. Nothing in that enabling legislation provided that the public corporation would be an arm or instrumentality of the Department of Mental Health.[2]

Conclusion

Section 14 of the Alabama Constitution of 1901 provides "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." The absolute immunity afforded by § 14 extends both to the State and to State agencies. Ex parte Alabama Dep't of Human Res., 999 So. 2d 891, 895 (Ala. 2008); Ex parte Jackson County Bd. of Educ., 4 So. 3d 1099, 1102 (Ala. 2008); and Ex parte Alabama Dep't of

[2]Contrary to the contention in the Chief Justice's dissent that the Authority has been "transformed" by this Court into a governmental entity, it is the clear language of the enabling provisions of the HCA Act that provides that a health-care authority created under the Act acts as an agency or instrumentality of its authorizing subdivision and as a political subdivision of the State.

Transp., 764 So. 2d 1263, 1268 (Ala. 2000). "This immunity extends to the state's institutions of higher learning." Taylor v. Troy State Univ., 437 So. 2d 472, 474 (Ala. 1983).

Pursuant to § 22-21-318(c)(2), the Authority "acts as an agency or instrumentality of its authorizing subdivisions and as a political subdivision of the state." See Staudt, supra, (addressing the factor "the relation of the body to the state"); see also Tennessee Valley Printing Co. v. Health Care Auth. of Lauderdale County, [Ms. 1090945, October 29, 2010] ___ So. 3d ___ (Ala. 2010)(holding that a health-care authority is a local governmental entity for the purposes of the Open Records Act). The incorporating entity for the Authority is the Board, which has State immunity. See Cox v. Board of Trs. of the Univ. of Alabama, 161 Ala. 639, 49 So. 814 (1909)(holding that public institutions created by the State purely for charitable or educational purposes are a part of the State and are not subject to be sued, because § 14 prohibits the State from being a defendant in any court of law or equity).

The HCA Act "shall not be construed as a restriction or limitation upon any power, right or remedy which any county,

municipality, educational institution, or public hospital corporation now in existence or hereafter formed may have in the absence of this article." § 22-21-343, Ala. Code 1975. Article I, § 14, of the Alabama Constitution of 1901, provides "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." We recognize that § 22-21-318(a)(2) provides that an Authority may sue or be sued in its own name. It does not matter that § 22-21-318 allows an Authority created by an educational institution to incorporate and to sue in its corporate name, because the plenary authority of the legislature to enact laws is limited by the provisions of our Constitution. "The legislature may not deny immunity from suit when that immunity is constitutionally granted." Staudt, 388 So. 2d at 992. This Court has held that the "constitutionally guaranteed principle of sovereign immunity, acting as a jurisdictional bar, precludes a court from exercising subject-matter jurisdiction. Without jurisdiction, a court has no power to act and must dismiss the action." Alabama State Docks Terminal Ry. v. Lyles, 797 So. 2d 432, 435 (Ala. 2001). Accordingly, the circuit court did not have subject-matter jurisdiction over this action. Thus,

its judgment is void, and it is hereby vacated, and this action is due to be dismissed. A void judgment will not support an appeal. Alabama Dep't of Corr. v. Montgomery County Comm'n, 11 So. 3d 189 (Ala. 2008). Therefore, this appeal is also dismissed.

JUDGMENT VACATED; APPEAL DISMISSED; AND CASE DISMISSED.

Lyons, Woodall, Stuart, and Shaw, JJ., concur.

Cobb, C.J., and Parker and Murdock, JJ., dissent.

COBB, Chief Justice (dissenting).

I dissent. The doctrine of sovereign immunity is of ancient lineage; it stems from the conception that "the King could do no wrong." Such a concept has found disfavor in a nation that bases its legal theory on ideas of individual rights and due process and equal protection of the law. Jackson v. City of Florence, 294 Ala. 592, 320 So. 2d 68 (1975). Thus, it has been the general rule that neither counties, nor municipalities, nor public corporations in this State enjoy immunity from liability where their negligent acts cause harm to others. Tallaseehatchie Creek Watershed Conservancy Dist. v. Allred, 620 So. 2d 628, 631 (Ala. 1993)(recognizing that a Watershed Conservancy District, a public corporation that could "sue and be sued," was not a State agency entitled to sovereign immunity); Cook v. St. Clair County, 384 So. 2d 1 (Ala. 1980)(suit against St. Clair County and its governing entities was permissible under Code of Ala. 1975, §§ 11-1-2 and 11-93-2, providing that counties are public corporations that may sue or be sued); Lorence v. Hospital Bd. of Morgan County, 294 Ala. 614, 320 So. 2d 631 (1975)(county hospital boards, public corporations with the

power to "sue and be sued," are not entitled to sovereign immunity); and Jackson, supra (abolishing general municipal immunity). As the majority recognizes, "[i]t is clear that health-care authorities created by a county or city no longer have State immunity and are subject to the $100,000 statutory cap of § 11-93-2." ___ So. 3d at ___. Further, under the Health Care Authorities Act of 1982, Ala. Code 1975, §§ 22-21-310 through -344, as presently amended ("the HCA Act"), the Health Care Authority for Baptist Health ("the Authority") is a public corporation, Ala. Code 1975, § 22-21-311(a)(2), which can "sue or be sued," § 22-21-318(a)(2). Indeed, it may be due to the disfavor afforded the doctrine of sovereign immunity by the courts and its general inapplicability to public corporations that the Authority never asserted at trial that it was due the protection of sovereign immunity.[3]

[3]I recognize that the usual concern regarding preservation of error on appeal is not applicable to an argument asserting sovereign immunity because such an argument goes to the jurisdiction of the trial court. Atkinson v. State, 986 So. 2d 408 (Ala. 2007). It is also worth noting that, even on the appeal of this case, the parties spent the great weight of their oral arguments before this Court and in their briefing addressing whether the $100,000 damages cap of Ala. Code 1975, § 11-93-1(1), is applicable to the Authority as a validly created "health-care authority" and "governmental entity" for the purposes of that statute. Although I believe that there are very significant concerns to be raised about the

In spite of the plain language of the applicable statutes and the lack of argument on the issue to the trial court, the majority holds that this Authority, created by the affiliation of Baptist Health, a private corporation, and the University of Alabama Board of Trustees ("the Board")and its affiliate the University of Alabama at Birmingham Health System, is now vested with sovereign immunity. That is, the Authority and Baptist Health, a private corporation that by the affiliation agreement retains an interest in its assets while those assets are managed by the Authority, is no longer legally responsible for the harm that may be caused by its negligence in providing health care to the citizens of this State.

In this case, Baptist Health and the Board negotiated an affiliation agreement that gives the Authority the ownership and operation of Baptist Health's assets during the term of the affiliation agreement. Thereafter, that ownership and control of those assets revert to Baptist Health. Permitting the affiliation agreement and the Authority to facilitate the

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application of the damages cap to a health-care authority whose assets were generated from a private corporation and whose assets will revert to that corporation upon the dissolution of the authority, the scope of the majority's opinion dispenses with such concerns without further analysis.

removal of legal responsibility for Baptist Health's negligence in this case is particularly troubling in light of the pervasive harm caused by negligence in providing medical care:

> "A 1999 report by the Institute of Medicine estimated that as many as 98,000 people a year died in hospitals from medical errors. Now, 11 years later, a new survey from the inspector general of the Department of Health and Human Services finds that about 1 in every 7 Medicare patients in hospitals suffers a serious medical mishap.
>
> "The report says these adverse events contribute to the deaths of an estimated 180,000 patients a year. Of those, roughly 80,000 are caused by errors that could be caught and prevented, such as letting infections develop, giving the patient the wrong medication or administering an excess dose of the right drug. Aside from the human toll, the extra medical care required to correct for these mistakes costs taxpayers more than $4 billion a year."

"Our View on Your Health: Preventable Medical Mistakes Take an Intolerable Toll," USA Today, Nov. 18, 2010. Medical error is the fifth leading cause of death in the United States; it kills more people than automobile accidents, breast cancer, or AIDS.[4]

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[4]On the date the opinion in this case was released, this statistic could be found at the following Web sites: http://www.medicalnewstoday.com/articles/75042.php and http://www.jatahealth.wordpress.com/2009/03/23/medical-errors-5th-leading-cause-of-death-in-the-united-states/. A copy of these materials printed from the Web sites is in the

The holding that Baptist Health may shroud itself in sovereign immunity by contracting for management of its assets with a public health-care authority seems to me absolutely inconsistent with the existing precedent of this State that authorities generally, and health-care authorities created by a county or city specifically, do not have such immunity. See Jackson, Allred, Cook, and Lorence, supra. The majority reaches its startling holding, essentially that the affiliation between the Board and Baptist Health transformed the formerly private corporation into a governmental agency, based on its interpretation of the HCA Act and Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Board, 940 So. 2d 990 (Ala. 2006). That case held that the Greater Mobile-Washington County Mental Health-Mental Retardation Board ("the board"), a public corporation created pursuant to Ala. Code 1975, § 22-51-1 et seq., and operating under contract with, and according to the rules of, the State Department of Mental Health, a State agency plainly entitled to sovereign immunity, was nonetheless not a governmental agency entitled to sovereign immunity. The majority

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case file of the clerk of the Alabama Supreme Court.

concludes, however, that this case is nevertheless authority for its holding that the Authority here is entitled to State immunity. I disagree.

The analytical framework set out in Greater Mobile-Washington County Mental Health-Mental Retardation Board is perfectly applicable to the instant case:

> "Article I, § 14, of the Constitution of 1901, provides: '[T]he State of Alabama shall never be made a defendant in any court of law or equity.'
>
> > "'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. Armory Comm'n of Alabama v. Staudt, 388 So. 2d 991, 993 (Ala. 1980).'
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> "Rodgers v. Hopper, 768 So. 2d 963, 966 (Ala. 2000)."

940 So. 2d at 997. Thus, the Court must determine whether the Authority is an "immediate and strictly governmental agency" of the State.

The Court in Greater Mobile-Washington County Mental Health-Mental Retardation Board discussed at some length the facts and legal analyses to be applied in determining whether the doctrine of sovereign immunity was applicable to the Watershed Conservancy in Allred, in light of the test articulated in Staudt, supra. More immediately applicable to the instant case is the Court's further discussion of the application of the Staudt test to the entity seeking immunity:

> "In Stallings & Sons, Inc. v. Alabama Building Renovation Finance Authority, 689 So. 2d 790 (Ala. 1997), the Court noted that the Staudt test 'examines the complete relationship between the state and the entity seeking immunity from suit.' 689 So. 2d at 792. Considering first the character of power delegated to the Alabama Building Renovation Finance Authority in the legislation creating the Authority, the Court pointed out that the legislation granted the Authority the right 'to sue and be sued' and that it had accorded similar language in Staudt importance because, inasmuch as the Alabama Constitution prohibits an action against the State, the legislature could not declare an entity vulnerable to suit if it was in fact a State agency. 'Although, such a clause is not determinative of an Authority's status, it does show the intent of the legislature to create a separate entity rather than an agency or arm of the state.' 689 So. 2d at 792. Proceeding to examine the

> relation of the Authority to the State, the second factor of the Staudt test, the Court noted that the legislation creating the Authority provided that all obligations and bonds of the Authority would be its exclusive obligation and could not constitute an obligation or debt of the State. The Court expressed its agreement with the argument of the plaintiff that, by virtue of the inclusion of that language in the legislation, 'the Authority, if it is an arm of the state, cannot perform its necessary functions without violating § 213, Ala. Const. 1901, which provides that "any act creating or incurring any new debt against the state, except as herein provided for, shall be absolutely void."' 689 So. 2d at 792."

940 So. 2d at 1000-01 (emphasis added).

Finally, the Court in Greater Mobile-Washington County Mental Health-Mental Retardation Board discussed Rodgers v. Hopper, 768 So. 2d 963, 966 (Ala. 2000):

> "In Rodgers, the Court was called upon to determine whether the Alabama Correction Institution Finance Authority ('ACIFA') qualified as a State agency. Reiterating the proposition that only 'immediate and strictly governmental agencies of the State,' 768 So. 2d at 966, were protected by sovereign immunity, the Court undertook to apply the Staudt test, beginning with a look back at its application in Allred. The Court noted that in Allred, despite the 'decidedly governmental characteristics' enjoyed by watershed conservancy districts, such as 'the customary governmental power of eminent domain,' exemption from state and local taxation, and legislative appropriations, it had concluded that a watershed conservancy district was an independent agency. 768 So. 2d at 967.
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> "'This Court based its holding in that case on several key characteristics that

> distinguished [watershed conservancy districts] as entities separate from the State. Those characteristics included the ability to: (1) sue and be sued; (2) enter into contracts; (3) sell and dispose of property; and (4) issue bonds. [Allred, 620 So. 2d] at 630 (citing §§ 9-8-25(a)(13), 9-8-61(6), and 9-8-61(4) and (5)). Notably, the Legislature also had expressly provided that debts and obligations of a [watershed conservancy district] were not the State's debts and obligations. Id. (citing § 9-8-61(3)). We found this final characteristic to be dispositive, stating:
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> > "'"'This last provision clearly contemplates that [watershed conservancy districts] are entities separate and apart from the State; the provision also introduces an element of ambiguity into the crucial question of the financial responsibility for any judgment adverse to a [watershed conservancy district].'"
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> "'[Allred], 620 So. 2d at 630.'

"768 So. 2d at 967.

"The Rodgers Court was impressed that, like the watershed conservancy districts in Allred, ACIFA had 'qualities suggesting that it is an entity independent of the State,' including '(1) the power to sue and be sued; (2) the power to enter into contracts; (3) the power to sell and dispose of property; (4) the power to issue bonds; and (5) exclusive responsibility for its financial obligations (the same quality that we found dispositive in [Allred]).' 768 So. 2d at 967. The Court dismissed ACIFA's argument that

> 'notwithstanding that it has those qualities, it is organizationally intertwined with the State by virtue of the State's oversight power regarding ACIFA's chief operating activity--prison construction,' observing that the oversight power was 'not different from the power to direct operations that is commonly exercised by the owner of any ordinary business.' 768 So. 2d at 967. The Court stated that '[r]ather than looking to ACIFA's operations, we must look to its organizational and financial structure, as we did with the [watershed conservancy districts] in [Allred],' and concluded that the ACIFA, 'and, derivatively, its officials are not entitled to sovereign immunity.' 768 So.2d at 967."

940 at 1001-02.

The majority cites Greater Mobile-Washington County Mental Health-Mental Retardation Board and then states that because the language in § 22-21-318(c)(2) describes an authority as "a political subdivision of the state," the Authority is now transformed into a State agency complete with full governmental immunity. This conclusion is insupportable. Applying the framework provided in Greater Mobile-Washington County Mental Health-Mental Retardation Board, I note that the board in that case was caring for persons who had been committed to the hospital as mentally incompetent -- "purely a governmental function, wise and beneficial." White v. Alabama Insane Hosp., 138 Ala. 479, 483, 35 So. 454, 454

(1903). In this case, the Authority and Baptist Health were engaged in providing private medical care to private citizens and were not engaged in providing mental-health care to persons who were mentally incompetent as a "purely governmental function." The operation of a general hospital for persons who pay for general medical care of all types cannot be equated to providing mental-health care as a governmental function to patients who have been committed to a treatment facility as a result of mental disease. Under the HCA Act, the Authority is a public corporation, created by the legislature as an entity distinct from the State, an entity that can sue and be sued. Moreover, unlike any other situation addressed in the analysis of Greater Mobile-Washington County Mental Health-Mental Retardation Board, in this case a private corporation, Baptist Health, retains at least a reversionary ownership interest in the assets it conveyed to the Authority to manage.[5] Surely this is a factor

[5]Section 3.3 of the July 1, 2005, affiliation agreement states: "Upon termination, all assets of the Authority will be transferred to Baptist Health or to its designee and Baptist Health shall execute such instruments as shall be necessary to assume, or evidence its responsibility for, all of the outstanding debt, obligations and other liabilities of the Authority. The [Board and UABHS] shall not, in any event, be liable for, or be required to assume, any responsibility for

that argues strongly in favor of the position that the Authority cannot properly be considered an arm of the State. Further, the assets of the Authority are the assets of Baptist Health, assets that were not funded by the taxpayers or the State but, rather, assets that were funded by the operation of a private corporation. Of course, the Authority also has all the powers conferred by Ala. Code 1975, § 22-21-318, e.g., to negotiate contracts and to generate debt in its own name and not on behalf of the State, that were held to be indicia of public corporations and nongovernmental entities not entitled to sovereign immunity under the analysis and precedent set out in Greater Mobile-Washington County Mental Health-Mental Retardation Board.

The Authority also argues that it is entitled to full governmental immunity because a judgment against it would operate to reduce its net operating income and, because the affiliation agreement obligates it to contribute 25 percent of its net operating income to the Board, such a judgment would "adversely affect the state treasury" under Staudt, supra.

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any outstanding debts or other liabilities of the Authority or Baptist Health in connection with the dissolution of the Authority or the reconveyance of assets to Baptist Health."

This argument misreads Staudt, in which the Court considered a plaintiff's claim against the Armory Commission based on the plaintiff's allegation that she had been injured as a result of a fall in a National Guard armory. The Court determined that the Armory Commission was an arm of the State that used State funds to operate and maintain National Guard armories, and, thus, a judgment against it would come from funds already in possession of the State, thereby adversely affecting the State treasury. Properly construed, Staudt stands for the principle that if a judgment against the defendant will cause the State to pay funds from its treasury, that fact is a significant factor supporting a determination that the defendant is entitled to governmental immunity. That is not the situation in this case, where it is undisputed that an adverse judgment against the Authority will not result in any payment of State funds. At most, an adverse judgment against the Authority will result in a reduction of funds that might later be paid to a State agency. If the Authority's argument on this point has merit, then all Alabama taxpayers must surely be entitled to governmental immunity, because an adverse judgment against any one of them would impair his or

her ability to pay taxes and "adversely affect the state treasury." I submit that, under a proper reading of Staudt, a judgment against the Authority can never result in a payment of funds from the State treasury, a factor that further undermines the majority's holding.

Thus, the Authority in this case satisfies none of the criteria set out by this Court in Greater Mobile-Washington County Mental Health-Mental Retardation Board and the cases it relies upon for determining that an entity should be afforded governmental immunity. Moreover, upon its dissolution, the Authority is bound by contract to return the assets it obtained from Baptist Health, and manages for Baptist Health, to Baptist Health. That is, the Authority becomes a device to shield a private corporation from the consequences of its negligent acts. I cannot conclude that because the language in § 22-21-318(c)(2) references an authority as "a political subdivision of the state" that the foregoing precedent and analysis must be disregarded. If this is so, then it would seem plain that other political subdivisions of the State, like counties and municipalities, must be afforded similar treatment. In fact, at least in the context of health care,

corporations like Baptist Health may now insulate themselves from responsibility for their negligence simply by creating a similar "health-care authority" and corresponding affiliation agreement. No county and municipal hospital in this State is comparably insulated. This result is neither good law nor good policy. Rather, in light of the statutory language of the HCA Act and this Court's precedent discussing the intent of that language, I must conclude that the Authority cannot be properly regarded as an "immediate and strictly governmental agency" of the State, and it is not entitled to the sovereign immunity afforded the State by Art. I, § 14, of the Alabama Constitution of 1901. The fact that the majority's holding immunizes the Authority's actions in providing negligent health care to our citizens only worsens the situation. Accordingly, I dissent.

MURDOCK, Justice (dissenting).

I agree with much of the reasoning of the trial court. I do not believe that the Health Care Authority for Baptist Health, an affiliate of the University of Alabama at Birmingham Health System, d/b/a Baptist Medical Center East, given its character and its function, properly may be considered a "governmental entity" within the intendment of the various legislative provisions at issue or, for that matter, within the intendment of §§ 13 and 14 of the Alabama Constitution of 1901. Accordingly, I respectfully dissent.