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Health Care Case Law Update

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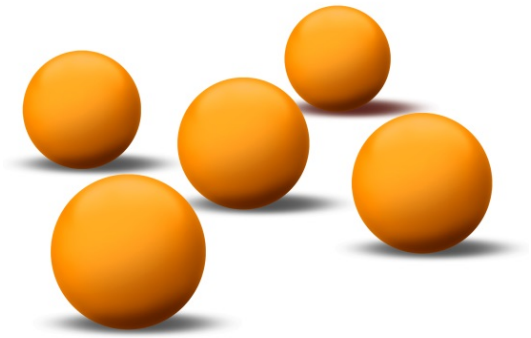

Health Care Authority for Baptist Health v. Davis, --- So. 3d. ----, 2013 WL 2149493 (Ala. Feb. 28, 2014).

The Supreme Court of Alabama reversed itself on re-hearing of its May 2013 opinion to affirm a judgment for a plaintiff in a medical malpractice case. The University of Alabama Board of Trustees formed the Health Care Authority for Baptist Health (the "Authority") as a public corporation created by the Health Care Authorities Act ("HCA") for UAB Health System to operate facilities owned by Baptist Health under an affiliation agreement. The plaintiff sued the Authority and two physicians for medical malpractice. Summary judgment for the physicians was unopposed, granted, and not appealed. The jury returned a $3,200,000 verdict against the Authority. The trial court denied the Authority's request for application of a $100,000 statutory damages cap based on Ala. Code § 11-93-2 and entered the judgment, and the Authority appealed, raising State immunity under Section 14 of the Alabama Constitution and the HCA's cap on damages. While the case has interesting facts on which malpractice was found, the legal questions of immunity are central to the opinion. In this case of first impression, the Court held that the "Authority" did not enjoy sovereign immunity under Section 14 of the Alabama Constitution, and further held as unconstitutional any attempt by the legislature to apply a $100,000 damages cap for health care authorities enabled by the HCA, as denying constitutional rights to a jury trial.

Following the established premise that Section 14 was only intended to protect immediate or strictly governmental agencies of the State from lawsuit, the Court applied the HCA and the unique facts of this case to the *Staudt* factors used to determine whether a public corporation is entitled to State immunity: (1) the character of the power delegated to the body, (2) its relation to the state; and (3) the nature of the function performed. As to the nature of such a Health Care Authority's function, the Court observed that providing healthcare is not unique to government, as is law enforcement (for example). The Court acknowledged that the same Board established UAB Health System to do the same function, and it was noted in dissent that the Authority was created to further the medical and academic missions of UAB Health System, which enjoys sovereign immunity along with the Board. The Court also acknowledged the powers of imminent domain and immunity for anti-competitive conduct but noted those protections are granted without Section 14 immunity, and can be granted to any entity. These factors were outweighed, however, by certain provisions of the enabling legislation, the HCA.

The Court just could not get beyond the fact that the HCA allows a Health Care Authority to issue bonds and borrow money but that these debts are not guaranteed by the State. In cited prior precedent, the Court has found this factor dispositive. The Court also observed that the HCA allows a Health Care Authority to sue or be sued and that a Health Care Authority is not subject to some state laws applicable to the state, such as ethics laws and competitive bid laws. Based on these factors, the Court concluded that a Health Care Authority created under the HCA cannot be immune from suit under Section 14. Based further on the fact that the Authority does not receive appropriations and specific rights and powers retained by Baptist Health, namely the right to control certain transactions and operational changes, including any change in the CEO, and its retention of all of the Authority's assets upon termination of the Affiliation Agreement or dissolution of the Authority, so that all improvements inure to the benefit of Baptist Health, the Court held that this Authority does not enjoy State immunity under Section 14 of the Constitution.

The dissents distinguishes *Ex parte Greater Mobile–Washington County Mental Health–Mental Retardation Board*, 940 So.2d 990 (Ala. 2006), by the enabling legislations. In the prior case, a Mental Health Board was created by legislation enabling three or more people to form a public corporation and contract with the State's Board of Health, rather than providing that the public corporation would be an arm or instrumentality of the Department of Health, as in the HCA, which created the Authority to "act as an agency or instrumentality of its authorizing subdivisions and as a political subdivision of the state." The same distinction is not attempted with regard to *Tallaseehatchie Creek Watershed Conservancy Dist. v. Allred,* 620 So.2d 628, 631 (Ala. 1993), in which the Court found no immunity for a Watershed Conservancy District enabled by statute that said it "shall constitute a governmental subdivision of this state and a public body, corporate and politic, exercising public powers" and may sue and be sued. Still, the main opinion appears to address this distinction when it says the legislature's observation that the Authority "acts as an agency or instrumentality of the state" applies only to immunity for anti-competitive conduct, which can be given to any entity.

Next the Court summarily rejected the constitutionality of the legislature's granting immunity to health-care authorities. In striking the HCA's cap on damages, the Court simply followed its prior decision in *Smith v. Schulte*, 671 So. 2d 1334 (Ala. 1995). There, the court struck the statutory cap on damages in medical malpractice cases, as a violation the Alabama Constitution's guarantee of the right to a trial by jury in Section 11. While a distinction may be made for statutory protections for counties and cities, the Court explained based on the State's constitutional history of city and county immunity, an HCA is not a city or county and not entitled to State immunity under Section 14, leaving the legislature with no power to impose damage limits. The Court repeated its crucial distinction that cities and counties are fundamentally distinguishable from medical providers, applying the same to the HCA as it did the Medical Liability Act. After reaching these holdings on the constitutional questions and affirming the judgment, the main opinion does not address other questions raised under the HCA, which are addressed by the two dissents.

Justices Bolin and Shaw wrote dissenting opinions, each joined by Justice Stuart. The dissents note that the State's immunity extends to State universities, and specifically hospitals operated by those State universities. Justice Bolin provides a history of the the HCA, including the judicial abrogation of absolute immunity from counties and cities in 1975. He acknowledged 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 damages cap of § 11-93-2," but that this case presented a question of first impression – "whether a health-care authority created by a State educational institution is entitled to State immunity." Justice Shaw concluded that he simply cannot separate the purpose, role, and existence of the Authority from that of its creator, the Board, based on his findings that the Authority was created by the Board of Trustees of the University of Alabama, which is clearly an arm of the state and, therefore, immune from suit, and that the Authority was created to operate health-care facilities to serve the indigent and the public purposes to support the Board's academic and research missions, which allows the Authority to share the same protection from suit as its creator. Neither dissent discussed how an HCA could incur debts that are not guaranteed by the State and still be considered an arm of the State.

Ex parte STV One Nineteen Senior Living, LLC, --- So. 3d ----, 2014 WL 803318 (Ala. Feb. 28, 2014)

The need for additional specialty-care assisted-living-facility beds was apparently justified, and the State Health Plan was adjusted for this addition at the request of a facility. Competing facilities applied for CON approval for the conversion of long-term-care beds to meet this need. At the same time, one of the facilities also applied for an emergency CON, which was approved over objections and, thereby, presented the dispute. The Supreme Court affirmed the Court of Civil Appeals' holding that the emergency CON was not properly considered. The Court acknowledged the apparent *need* but said that an emergency CON is not justified simply because there is a clear need or even an urgent need that has been ignored for some time, as

the standard CON process is designed to address those needs. Instead, an "emergency" CON requires an "unforeseen event," such as a natural or man-made disaster, "that by its very nature could not be planned for and that actually endangers the health or safety of an applicant's *existing patients*, rather than some change or addition to existing plant or services by which a provider could serve new patients or provide new services." The fact that our population is aging and in need of certain care does not create such an "emergency". An application for a true emergency CON under this provision is usually uncontested and would address the need to repair things like water and sewer system or air-conditioning to *existing* facilities for the *existing* patients. "Granting an emergency CON to one facility to meet such a broad medical need undermines the integrity of the review process. The Court refused to allow this kind of "gaming" of the system.

The Court also found the objecting facility timely complied with the procedural steps to for review, rejecting arguments of waiver or that the emergency CON had "vested" under § 22-21-270. While the facility had taken action toward conversion because it had been granted the emergency CON, the Court said those actions do not deprive or "cut off" the objector from administrative and judicial review. To do so would allow "one side to a dispute to 'rush out' and purchase equipment or sign a construction contract to unilaterally thwart the prescribed administrative procedures."

Sacred Heart Health System, Inc. v. Infirmary Health System, --- So. 3d ----, 2014 WL 888531 (Ala. Civ. App. March 7, 2014).

Two hospital systems disagreed whether a CON was necessary for one of them to develop and lease a medical office building in Baldwin County for its physician practice groups that included outpatient diagnostic services and physician offices. At one time an ambulatory surgery center and a rehabilitation facility were envisioned, but those parts were abandoned.

On certiorari review in 2012 the Supreme Court established a modified *Heart-Lung* test for the physician's office exemption ("POE application test"), which if applicable would preclude the need for a CON, reversing and remanding for the trial court to apply this new test. Now on appeal after remand, the Court of Civil Appeals reversed and remanded for entry of judgment in favor of Sacred Heart, finding that "[t]he evidence supports a determination that the . . . leased space, which consists of the family-practice area, the walk-in clinic, and a laboratory and diagnostic center . . . meets the POE application test." The evidence showed that only Sacred Heart physicians could use the laboratory and diagnostic center, the diagnostic equipment used in previous offices would simply be moved to and continued to be used in this new space as their main offices, Sacred Heart would bill for all services, the walk-in clinic would not be a "urgent care" or "emergency department" but a physician clinic that simply took same-day appointments or "walk-ins" as some of the physicians had done in their prior space, and all of the space would be used for out-patient care.

The Court of Appeals rejected the trial court's inclusion of other parts of the building in analyzing the test and its subjective analysis of other observations because the Supreme Court set a specific test for the trial court to apply and said it was "proper to consider only those parts … leased for the … physicians … when applying for the POE." Other parts of the building were either unused or leased for non-medical uses and should not be considered in the analysis, even if envisioned at one time for medical uses.

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