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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2012-2013

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)

On Application for Rehearing

MURDOCK, Justice.

This medical-malpractice case is before us on rehearing. This Court previously issued an opinion (1) vacating the

judgment of the Montgomery Circuit Court in favor of Kay E. Davis, as executrix of the estate of Lauree Durden Ellison, deceased, and against the Health Care Authority for Baptist Health, an affiliate of UAB Health System ("the Authority"), and (2) dismissing the Authority's appeal and the case on the ground that the Authority was entitled to State immunity under § 14, Ala. Const. 1901. Davis filed an application for rehearing. We withdraw the January 14, 2011, opinion, and substitute the following opinion.

I. Background Facts and Procedural History

On September 3, 2005, Lauree Durden Ellison visited the emergency room of Baptist Medical Center East (hereinafter "BMCE"), a hospital operated by the Authority and formerly operated by Baptist Health, a private nonprofit corporation. Ellison's visit was for an evaluation after she had fallen at home. At the time of the visit, Ellison was 73 years old, and she suffered from a number of chronic preexisting medical conditions, including respiratory problems, diabetes, hypertension, chronic pain, gastrointestinal bleed, and stroke-related problems.

The initial examination of Ellison did not indicate that she had an infection, and all other tests and X-rays were unremarkable for injuries caused by the fall. While she was in the emergency room, however, Ellison mentioned that she had a sore throat. The emergency-room doctor ordered a test for streptococcus. Thereafter, Ellison was discharged from the emergency room to return home.

After Ellison was discharged, the BMCE laboratory grew the culture taken from the streptococcus test. The culture reflected the presence of methicillin-resistant staphylococcus aureus (hereinafter "MRSA"). Although the BMCE laboratory recorded 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 from providers other than BMCE. She did not complain of a sore throat during that period. On November 3, 2005, however, 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, Davis, as executrix of Ellison's estate, filed a complaint in the trial court, naming as defendants the Authority and two physicians at BMCE.[1] Before trial, the Authority asserted that any damages awarded against it were subject to the $100,000 statutory cap on damages set out in § 11-93-2, Ala. Code 1975, which it argued was applicable to the Authority pursuant to § 22-21-318(a)(2) of the Health Care Authorities Act of 1982, Ala. Code 1975, § 22-21-310 et seq. ("the HCA Act").

At trial, Davis presented the testimony of expert witnesses who opined that BMCE had breached the applicable standard of care by not reporting its finding of MRSA directly to Ellison's attending physician. Davis's expert witnesses opined that Ellison died from MRSA-related pneumonia and that the failure of the BMCE laboratory to report the finding of MRSA to Ellison's doctor caused her death. Conversely, the Authority offered the testimony of several expert witnesses

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[1]In her initial complaint, Davis used an incorrect name for the Authority. She corrected the name in an amended complaint.

Also, each of the two physicians filed a motion for a summary judgment. The trial court granted both motions. Davis has not filed a cross-appeal as to the judgment in favor of the two physicians.

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 finding of MRSA would not have changed Ellison's course of treatment; and that Ellison died of congestive heart failure unrelated to the MRSA, and not of MRSA-related pneumonia.

The jury returned a verdict in favor of Davis and against the Authority in the amount of $3,200,000, and the trial court entered a judgment for Davis in that amount. The Authority filed a postjudgment motion seeking, in part, a remittitur of the judgment from $3,200,000 to $100,000 based on the statutory cap for damages set forth in § 11-93-2. On September 29, 2009, the trial court entered an order denying the Authority's postjudgment motion.

The Authority appealed. On appeal, it argues that it possesses State immunity, also known as sovereign immunity, pursuant to § 14, Ala. Const. 1901, which provides "[t]hat the State of Alabama shall never be made a defendant in any court

of law or equity." Also, the Authority argues that the trial court erred by not remitting the $3,200,000 damages award to $100,000 pursuant to § 11-93-2. In response, Davis contends that the Authority does not qualify for State immunity and, further, does not qualify for the protection of the $100,000 damages cap in § 11-93-2.

II. Discussion

As noted above, Baptist Health at one time operated certain hospitals in Montgomery, including BMCE. When Baptist Health encountered financial problems in conjunction with the operation of those hospitals, it sought the assistance of the University of Alabama Board of Trustees ("the Board").[2] In June 2005, the Board adopted a resolution authorizing the formation of the Authority:

> "WHEREAS, The Board of Trustees of The University of Alabama ('the Board') owns University of Alabama Hospital and related health care facilities located in Birmingham, Alabama ('Hospital'); and
>
> "WHEREAS, the Hospital is managed by the UAB Health System ('UABHS'), pursuant to an Amended and

[2]In Cox v. Board of Trustees of University of Alabama, 161 Ala. 639, 648, 49 So. 814, 817 (1909), this Court held that for purposes of § 14, Ala. Const. 1901, the University of Alabama "is a part of the [S]tate."

Restated Joint Operating Agreement dated effective January 1, 2003 ('JOA'); and

"....

"WHEREAS, after careful consideration, UABHS and Baptist [Health] desire to affiliate for the purpose of improving the overall efficiency of Baptist [Health's] clinical operations and for arranging for Baptist [Health] financial support of the Board's academic and research mission through contributions to UABHS; and

"WHEREAS, by separate resolution on this same date, The Board of Trustees of The University of Alabama approved an Affiliation Agreement between the UA Board, UABHS and Baptist [Health]; and

"WHEREAS, the Affiliation Agreement provides for the establishment of a health care authority by the UA Board, under the terms and conditions set forth in the Affiliation Agreement; ...

"....

"NOW, THEREFORE, BE IT RESOLVED that The Board of Trustees of The University of Alabama hereby declares that it is wise, expedient, and necessary that a health care authority be formed."

After explaining that the purpose of the Authority is "to own and operate one or more hospitals and a health care delivery system," the certificate of incorporation states:

"Pursuant to an Affiliation Agreement dated July 1, 2005 (the 'Affiliation Agreement') by and among the ... Board, Baptist Health, ... and UAB Health System, an Alabama nonprofit corporation ('UABHS'), Baptist Health will transfer its hospitals and related assets to the Authority. The Authority

> shall have full governance powers with respect to its business and affairs, subject to the provisions of the Affiliation Agreement, including without limitation the provisions related to 'Restricted Transactions' contained in the Affiliation Agreement. The Affiliation Agreement, including any amendments made to such Agreement from time to time in accordance with the terms thereof, are hereby incorporated by reference in this certificate of incorporation."

(Emphasis added.) The certificate of incorporation also states:

> "Subject to the provisions of the Affiliation Agreement, the Authority shall have and may exercise all of the powers and authorities set out in the Enabling Law [i.e., the HCA Act], for corporations organized thereunder, together with such additional powers, rights, and prerogatives as are now or may hereafter be provided by law. In addition thereto, the Authority shall have the extraordinary powers set out in Section 22-21-319 of the Enabling Law (eminent domain)."

(Emphasis added.) The certificate further states:

> "Subject to the Authority's obligations under the Affiliation Agreement with respect to reconveyance of assets upon termination of the Affiliation Agreement, upon dissolution of the Authority, the title to all of the assets and property of the Authority at the time of such dissolution shall be transferred to the ... Board."

(Emphasis added.)

The certificate of incorporation provides for an 11-member board of directors. Six directors (and their

respective successors) are chosen by the Board; five directors (and their respective successors) are chosen by Baptist Health. In this respect, the certificate complies with § 22-21-316(a), Ala. Code 1975, which states that "no fewer than a majority of the directors shall be elected by the governing body or bodies of one or more of the authorizing subdivisions." Neither the certificate of incorporation for the Authority nor the HCA Act requires that a director who is chosen by the Board have any other relationship with the Board.

In July 2005, the Board, the University of Alabama at Birmingham Health System, an Alabama nonprofit corporation ("UABHS"), and Baptist Health entered into the aforementioned affiliation agreement ("the affiliation agreement"). The affiliation agreement states:

> "A. The ... Board owns University of Alabama Hospital in Birmingham, Alabama, an operating division of the University of Alabama at Birmingham, and various other entities and assets engaged in the delivery of healthcare services. University of Alabama Health Services Foundation, P.C., an Alabama nonprofit corporation ('UAHSF'), owns the Kirklin Clinic in Birmingham, Alabama and various other entities and assets engaged in the delivery of healthcare services. UAHSF and the ... Board have established UABHS to provide common management of their respective health care delivery operations.

> "B. Baptist Health owns and operates a health care delivery system (the 'Baptist Healthcare System') in the Montgomery, Alabama area that includes three acute care hospitals (the 'Baptist System Hospitals').
>
> "C. The [HCA Act] permits the ... Board to organize a health care authority. Health care authorities are public corporations with authority to operate hospital and health care delivery systems. Pursuant to this Agreement ... [the] Board will organize a health care authority that will own and operate the Baptist Health System assets during the term of this agreement.
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> "D. The parties have determined that the consummation of the transactions contemplated by this Agreement will further their mutual goals 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 the science of medicine."

(Emphasis added.)

A. State Immunity

The Authority is a public corporation. It is an entity separate from the State and from the persons and entities who participated in its creation. See Alabama Hosp. Ass'n v. Dillard, 388 So. 2d 903, 905 (Ala. 1980) ("We simply hold, as we have so often, 'that a public corporation is a separate entity from the state and from any local political

subdivision, including a city or county within which it is organized.'" (citation omitted)).

Nonetheless, the Authority argues that it is immune from liability pursuant to the doctrine of State immunity. Although the Authority raises this argument for the first time on appeal, "[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); see also Ex parte Alabama Dep't of Transp., 978 So. 2d 17, 21 (Ala. 2007). Because this argument, if correct, would preclude our deciding the merits of this appeal, we address this issue first.

Section 14 of the Alabama Constitution of 1901 states that "[t]he State of Alabama shall never be made a defendant in any court of law or equity." It is well established 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)); see also Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Bd., Inc., 940 So. 2d 990, 997 (Ala. 2006) (also quoting Thomas, 432 So. 2d at 480).

Allred and Greater Mobile-Washington County Mental Health Board relied on Armory Commission of Alabama v. Staudt, 388 So. 2d 991 (Ala. 1980), in which this Court identified three factors that determine whether an action against a body created by legislative enactment is an action against the State for purposes of the doctrine of State immunity:

> "Whether a lawsuit against a body created by legislative enactment is a suit against the state depends on [1] the character of 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. All factors in the relationship must be examined to determine whether the suit is against an arm of the state or merely against a franchisee licensed for some beneficial purpose."

388 So. 2d at 993 (emphasis added).

In Ex parte Department of Human Resources, 999 So. 2d 891, 897 (Ala. 2008), this Court stated "that the same factors ('the Staudt factors') are informative in determining whether an entity established by a State agency at the direction of the legislature is part of that agency for purposes of sovereign immunity." Likewise, in Vandenberg v. Aramark

Educational Services, Inc., 81 So. 3d 326, 339 (Ala. 2011), this Court explained:

> "The immunity that comes from § 14 and that is associated with being part of the State ... does not automatically attach to all public corporations; some public corporations are entitled to it while others are not. In Armory Commission of Alabama v. Staudt, 388 So. 2d 991, 993 (Ala.1980), we explained what more is required before a public corporation may claim that immunity ...."

When applying the three Staudt factors, this Court "emphasizes substance over form."[3] Tallaseehatchie Creek, 620 at 630. As this Court noted in Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 583, 42 So. 114, 115 (1904):

> "If the suit instituted against it is practically and really against the State -- if the judgment and decree obtained against it must be satisfied, if at all, out of the property held by it, and this property belongs to the State, though the title is eo nomine in the [defendant] as an agent of the State -- then clearly to permit an action or suit against it would be doing by indirection that which cannot be done directly. In other words, if the [defendant] is a mere State agency -- a representative of the State, instituted and maintained by the sovereignty for the exercise of a

[3]Accordingly, after examining the Staudt factors, the Court in Greater Mobile-Washington County Mental Health Board concluded that the public corporation at issue there was not an "immediate and strictly governmental agency of the State," 940 So. 2d at 997, and therefore was not entitled to immunity. The Court reached the same conclusion as to the State agency at issue claiming immunity in the Allred case.

> governmental function -- a suit against it is a suit against the State ...."

(Emphasis added.)

1. The Character of Power Delegated to, and the Nature of the Function Performed by, the Authority[4]

In adopting the HCA Act, the legislature stated:

> "[P]ublicly-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 ...."

Ala. Code 1975, § 22-21-312(1). The legislature also concluded 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 ... publicly-owned hospitals and other health care facilities adequately and efficiently ...."

Ala. Code 1975, § 22-21-312(2). Accordingly, "to enable such publicly-owned hospitals and other health care facilities to continue to operate adequately and efficiently," the

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[4]Given the similarity and overlap of these two Staudt factors, the following discussion serves to address both of them.

legislature enacted the HCA Act "to provide a corporate structure somewhat more flexible than those ... provided for in existing laws relating to the public hospital and health-care authorities" and to give "the entities and agencies operating [public hospitals and health-care authorities] ... significantly greater powers with respect to health care facilities than now vested in various public hospital or health-care authorities." Ala. Code 1975, § 22-21-312(3).

Although the powers to arrange for the provision of health-care services to the indigent and to promote public health are legitimate ends of government, they certainly are not functions unique to government. Thus, the power granted authorities under the HCA Act in this regard, and in particular by the Board to the Authority, is not of the same character, for example, as the power granted an entity that is charged with a strictly governmental function, e.g., law enforcement. Compare, e.g., Ex parte Board of Dental Exam'rs of Alabama, 102 So. 3d 368 (Ala. 2012) (citing and quoting Ala. Code 1975, §§ 34-9-40(a), 34-9-43, 34-9-46, and 34-9-5), with Ala. Code 1975, § 22-21-318. Clearly, the nature of the

authority to operate a public hospital is not such as to dictate an affirmative answer to the question whether the entity who holds that authority is entitled to immunity.[5]

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[5]In a number of cases this Court has held that a State university is entitled to immunity in relation to a public hospital that is part of a college of medicine within the university. The hospitals in those cases, however, were owned and operated directly by the universities as part of their operations. See, e.g., Sarradett v. University of South Alabama Med. Ctr., 484 So. 2d 426, 427 (Ala. 1986) (holding that sovereign immunity protected an existing public hospital that was acquired by the University of South Alabama and thereafter "owned and operated by the University of South Alabama in conjunction with its college of medicine" (emphasis added)). Irrespective of the function in which they were engaged, those universities were "part of the [S]tate." See, e.g., Cox v. Board of Trs. of Univ. of Alabama, 161 Ala. 639, 648, 496 So. 814, 817 (1909). The hospitals, in turn, were simply a component part of these universities. See, e.g., Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1027 (Ala. 2003) (quoting with approval the explanation in the complaint that "UAB Hospital is 'a division (and/or component) of the University of Alabama at Birmingham'"); Hutchinson v. Board of Trs. of Univ. of Alabama, 288 Ala. 20, 24, 256 So. 2d 281, 284 (1971) (plurality opinion). See also Recital "A" of the affiliation agreement, explaining that "the University of Alabama Hospital in Birmingham, Alabama, [is] an operating division of the University of Alabama at Birmingham."

Thus, the immunity of the universities in these hospital cases was not determined by the nature of the activity in which they were engaged. The ownership and operation of a public hospital, including those run for the benefit of the indigent and to promote public health, are by no means functions unique to government. Compare University of Alabama Health Servs. Found., 881 So. 2d at 1028 (holding that the University of Alabama at Birmingham Health Services Foundation, "a nonprofit, independent professional corporation

Also, a review of the powers that may be granted a health-care authority under the HCA Act reflects, with a few exceptions, powers that legally may be exercised by any number of private or for profit business entities. Compare Ala. Code 1975, § 22-21-318, with, e.g., Ala. Code 1975, § 10-2B-3.02 (general powers of corporations), and Ala. Code 1975, § 10-3A-20 (general powers of nonprofit corporations).

Beyond the general power to operate a public hospital, we note that a health-care authority created under the HCA Act may, if so provided in the authority's certificate of incorporation, exercise a right of eminent domain, namely,

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that, in part, attends to the billing for UAB Hospital," and UABHS, an Alabama nonprofit corporation, as "entities separate and distinct from UAB Hospital," were "not ... shown to qualify for" immunity pursuant to § 14); Ex parte Cranman, 792 So. 2d 392, 406 (Ala. 2000) (plurality opinion) (concluding that services rendered by a hospital in the treatment of patients was "too remote from governmental policy" to warrant the provision of immunity to a University employee providing that treatment). Instead, the dispositive factor in these cases was the character of the universities themselves as "part of the [S]tate":

> "'Our cases are clear that the operation of a hospital is a "governmental function," but even if we should classify the operation of University Hospital as being a "business function," nevertheless, the State could not be sued.'"

Sarradett, 484 So. 2d at 427 (quoting Hutchinson, 288 Ala. at 24, 256 So. 2d at 284).

> "the same power of eminent domain as is vested by law in any authorizing subdivision, in the same manner and under the same conditions as are provided by law for the exercise of the power of eminent domain by such authorizing subdivision; provided however, that under no circumstances may an authority exercise the power of eminent domain for the purposes of providing office facilities for any physician, dentist or other health care professional primarily for use in his private practice."

See Ala. Code 1975, § 22-21-319. The Authority's certificate of incorporation provides it with the power of eminent domain. Although that power is among powers that belong to the State, this Court has not found the possession of the power of eminent domain to be determinative, in and of itself, of the issue whether a particular entity is entitled to State immunity. Clearly, the power of eminent domain is a power enjoyed by entities such as municipalities and counties, public corporations, and other agencies that are not part of the State and that do not enjoy State immunity. See, e.g., Greater Mobile-Washington Cnty. Mental Health Board, 940 So. 2d at 994; Tallaseehatchie Creek, 620 So. 2d at 630; and Thomas v. Alabama Mun. Elec. Auth., 432 So. 2d at 481 (see Ala. Code 1975, § 11-50A-8(4)).

The Authority also possesses certain powers under the HCA Act that pose difficulty in reaching a conclusion that the

Authority has State immunity. In particular, it is especially hard for this Court to overlook the fact that the legislature, which is responsible for the creation of health-care authorities, expressly contemplated that such authorities would be entities subject to suit:

> "(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:
>
> "....
>
> "(2) <u>To sue and be sued in its own name in civil suits and actions</u>, and to defend suits and actions against it, <u>including suits and actions ex delicto and ex contractu,</u> subject, however, to the provisions of Chapter 93 of Title 11, which chapter is hereby made applicable to the authority."

Ala. Code 1975, § 22-21-318. This language is plain. "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 an arm of the state." <u>Stallings & Sons, Inc. v. Alabama Bldg. Renovation Fin. Auth.</u>, 689 So. 2d 790, 792 (Ala. 1996). See also <u>Wassman v. Mobile Cnty. Commc'ns Dist.</u>, 665 So. 2d 941, 943 (Ala.

1995) (applying Staudt and concluding that the Communications District did not possess State immunity; "the 'power to sue and to be sued' language in the empowering statute is incompatible with the constitutional immunity with which state agencies are cloaked").[6]

In addition, Ala. Code 1975, § 22-21-318(a)(5), provides that a health-care authority has the power

> "[t]o 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 ...."

(Emphasis added.) If a health-care authority created under the HCA Act is a State agency, the legislature, by this

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[6]Also, a health-care authority has the power under the HCA Act

> "[t]o 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."

Ala. Code 1975, § 22-21-318(a)(23). This provision is at least consistent with the notion that an obligation owed a tort creditor who has filed a judgment lien against property that is transferred to an authority is to be enforceable against the authority.

provision, has authorized a State agency to own a health-care facility located in another state, a state in which the Authority would not possess State immunity like it has in Alabama. Under such a scenario the legislature would have, in effect, preferred the claims of injured patients who are citizens of other states to those of Alabama citizens.

Finally, any discussion of the first Staudt factor -- "the character of power delegated to the body" -- in the present case must consider the control retained by Baptist Health in relation to the operation of the Authority and the reservation by Baptist Health of an interest in the Authority's assets. As to the former, the affiliation agreement, which is incorporated by reference in the Authority's certificate of incorporation, reserves to Baptist Health the right to approve certain significant transactions and operational changes.[7]

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[7]Section 1.2 of the affiliation agreement states:

> "(a) The Authority may not engage in any Restricted Transaction without the prior written consent of ... [the] Board and Baptist Health.
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> "(b) Each of the following shall be deemed to be a 'Restricted Transaction':
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> "(I) any capital expenditure in

excess of $10,000,000, either with respect to a single project or in the aggregate with respect to a related group of projects;

"(ii) elimination of any services that, as of the Closing, are provided at the Baptist System Hospitals;

"(iii) any transaction involving the transfer, sale or other disposition of assets of the Authority to any person or entity (including without limitation [the Board and UABHS] or an affiliate of [the Board and UABHS]) other than in the ordinary course of business or as otherwise expressly permitted by this Agreement;

"(iv) the incurring of new debt in excess of $10,000,000, either in a single transaction or in the aggregate with respect to a related series of transactions;

"(v) the appointment or removal of the chief executive officer of the Authority;

"(vi) the amendment of the mission statement for the Authority, as set forth in this Agreement;

"(vii) any amendment to the certificate of incorporation or bylaws of the Authority; and

"(viii) any transfer of funds from the Authority to [the Board and UABHS] or an affiliate of [the Board and UABHS] through contribution, grant, dividend or otherwise, except such transfers as are

Additionally, § 1.3 of the affiliation agreement provides for Baptist Health to transfer to the Authority all its assets and all interest in any subsidiaries or other affiliates; the affiliation agreement does not appear to require any payment by the Authority in return for those assets and affiliates. Although § 1.4 of the affiliation agreement states that "[e]ffective as of the Closing Date, the Authority will assume all debts, liabilities and other obligations of Baptist Health," it continues by stating:

> "Baptist Health shall not be released from any of such debts, liabilities and other obligations. Neither UABHS nor its sponsors ([University of Alabama Health Services Foundation, P.C.,] and the ... Board) will assume or be required to guarantee any debts, liabilities, or other obligations of Baptist Health or the Authority."

(Emphasis added.)

The affiliation agreement further provides in § 3.3 that, upon the termination of the affiliation agreement or the dissolution of the Authority, the Authority is to transfer its

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> specifically authorized by this Agreement or transactions in the ordinary course of business of the Authority."

(Emphasis added.)

assets back to Baptist Health, either entirely or in substantial part (after a payment to UABHS) depending upon the circumstances.[8]

2. The Relation of the Authority to the State

According to the Authority's brief, "the legislature has determined that the Authority 'acts as an agency or instrumentality of its authorizing subdivisions and as a political subdivision of the state.' Ala. Code [1975,] § 22-21-318(c)." Thus, the Authority contends, it shares the immunity of its "authorizing subdivision," the Board. See Cox v. Board of Trs. of Univ. of Alabama, 161 Ala. 639, 648, 49 So. 814, 817 (1909) (University's board of trustees "are but agents appointed by the state to manage the affairs of the University," which possesses immunity under § 14).

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[8]Termination of the affiliation agreement for this purpose includes termination by Baptist Health or any other party, either with or without cause. Section 3.4 provides that "cause" includes conduct of the business of the Authority "in a manner contrary to the mission of Baptist Health." If Baptist Health terminates the affiliation agreement other than for cause, § 3.4 provides that Baptist Health must pay as "compensation" to UABHS an amount equal to a percentage of between 33% and 50% of any increase in the value of those assets during the term of the affiliation agreement, plus an additional amount in the event Baptist Health were to then sell or otherwise dispose of those assets within three years of the termination of the affiliation agreement.

The specific context of the above-quoted language from Ala. Code 1975, § 22-21-318(c), however, is as follows:

> "(c) As a basis for the power granted in subdivision (31) of the preceding subsection (a), the Legislature hereby:
>
> > "(1) Recognizes and contemplates that the nature and scope of the powers conferred on authorities hereunder are such as may compel each authority, in the course of exercising its other powers or by virtue of such exercise of such powers, to engage in activities that may be characterized as 'anticompetitive' within the contemplation of the antitrust laws of the state or of the United States; and
> >
> > "(2) Determines, as an expression of the public policy of the state with respect to the displacement of competition in the field of health care, that each authority, when exercising its powers hereunder with respect to the operation and management of health care facilities, acts as an agency or instrumentality of its authorizing subdivisions and as a political subdivision of the state."

(Emphasis added.) Section 22-21-318(a)(31), Ala. Code 1975, provides that a health-care authority created under the HCA Act can

> "exercise all powers granted hereunder in such manner as it may determine to be consistent with the purposes of this article, notwithstanding that as a consequence of such exercise of such powers it engages in activities that may be deemed 'anticompetitive' within the contemplation of the

> antitrust laws of the state or of the United States."

Based on the foregoing, it is apparent that the legislature has stated that a health-care authority acts as an agency or instrumentality of its authorizing subdivision and as a political subdivision of the State only in connection with its engagement in anticompetitive conduct. What the Authority's argument glosses over is that the issues of immunity from antitrust laws and of State immunity are two different things. The former is a legislatively controlled immunity related to a particular activity; the latter is a blanket immunity provided by the Alabama Constitution of 1901. An entity may be authorized by the State to engage in anticompetitive activity and be immune from suit for doing so but still not possess State immunity. This is evident from considering the antitrust precedents themselves.

To the extent the Authority argues that the legislature's articulation of a policy that it should have antitrust immunity is an "indication" that supports the conclusion that it should be viewed as the State for purposes of § 14 immunity, it is a very weak "indication." It is well settled that even "<u>local</u> governmental entities" may "'engage[] in

anticompetitive conduct pursuant to a 'clearly expressed state policy.'" Todorov v. DCH Healthcare Auth., 921 F.2d 1438, 1460 (11th Cir. 1991) (quoting Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985)) (emphasis added). As the United States Supreme Court has stated:

> "Municipalities ... are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'"

Town of Hallie, 471 U.S. at 38-39 (citations omitted); see also Mobile Cnty. Water, Sewer & Fire Prot. Auth., Inc. v. Mobile Area Water & Sewer Sys., Inc., 567 F. Supp. 2d 1342, 1349 (S.D. Ala. 2008) (noting that immunity from prosecution under federal antitrust law "is not confined to states, but has been extended to municipalities and instrumentalities of states, albeit under a different legal test. ... '[P]olitical subdivisions such as municipalities are immune from antitrust liability if their anticompetitive acts follow a clearly articulated and affirmatively expressed state policy.'" (quoting Bankers Ins. Co. v. Florida Residential Prop. & Cas. Joint Underwriting Ass'n, 37 F.3d 1293, 1296 (11th Cir.

1998))). Even a private entity may engage in certain anticompetitive conduct when the restraint on trade is "'clearly articulated and affirmatively expressed as state policy'" and "the policy [is] 'actively supervised' by the State itself." California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

Despite the potential availability to them of immunity as to certain anticompetitive conduct, however, neither counties nor municipalities nor private entities are part of the State or enjoy State immunity. See, e.g, Parker v. Jefferson Cnty., 796 So. 2d 1071, 1072 n.2 (Ala. 2000); Knight v. West Alabama Envtl. Imp. Auth., 287 Ala. 15, 20, 246 So. 2d 903, 906 (1971); Ex parte Tuscaloosa Cnty., 796 So. 2d 1100, 1103 (Ala. 2000); and Ex parte Hale Cnty. Bd. of Educ., 14 So. 3d 844 (Ala. 2009).[9]

Pursuant to Ala. Code 1975, § 22-21-318(a)(7), a health-care authority created under the HCA Act has the power to sell and otherwise to dispose of personal and real property without the permission of the "authorizing subdivision" that sponsored its formation. The only caveat prescribed by § 22-21-

[9]It is unnecessary to cite authority for the proposition that a private entity does not possess State immunity.

318(a)(7) is that the health-care authority may not exercise this power in a manner that would materially impair its ability to provide the health-care services for which it was created.

Further, the legislature has provided that certain laws that normally apply to the State or its agencies are not to be applied to a health-care authority created under the HCA Act. See Tennessee Valley Printing Co. v. Health Care Auth. of Lauderdale Cnty., 61 So. 3d 1027, 1033 (Ala. 2010) (noting that "health-care authorities are exempt from certain laws applicable to governmental entities"). Thus, unlike certain entities that have been held to possess State immunity, a health-care authority created under the HCA Act is not subject to State ethics laws. Compare Ex parte Board of Dental Exam'rs, 102 So. 3d at 376 ("'The board [of dental examiners] ... shall adhere to guidelines and proceedings of the State Ethics Commission as provided in Chapter 25 of Title 36.'" (quoting Ala. Code 1975, § 34-9-43(b))), with Ala. Code 1975, § 22-21-334 ("The provisions of Chapter 25 of Title 36 shall ... not apply to any authority, the members of its board or

any of its officers or employees."[10]). Likewise, the legislature provided that the board of directors' meetings of a health-care authority formed pursuant to the HCA Act are not subject to the provisions of the Alabama Open Meetings Act, Ala. Code 1975, § 36-25A-1 et seq. See Ala. Code 1975, § 22-21-316(c).[11] Further, the legislature provided that the

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[10]Section 36-25-1(16), Ala. Code 1975, defines "governmental corporations and authorities" as

> "[p]ublic or private corporations and authorities, including but not limited to, hospitals or other health care corporations, established pursuant to state law by state, county or municipal governments for the purpose of carrying out a specific governmental function. Notwithstanding the foregoing, all employees, including contract employees, of hospitals or other health care corporations and authorities are exempt from the provisions of this chapter."

[11]The Open Meetings Act provides:

> "It is the policy of this state that the deliberative process of <u>governmental bodies</u> shall be open to the public during meetings as defined in Section 36-25A-2(6). Except for executive sessions permitted in Section 36-25A-7(a) or as otherwise expressly provided by other federal or state statutes, all meetings of a <u>governmental body</u> shall be open to the public and no meetings of a governmental body may be held without providing notice pursuant to the requirements of Section 36-25A-3."

Ala. Code 1975, § 36-25A-1(a)(emphasis added). Section 36-25A-2(4), Ala. Code 1975, defines "governmental body" as

competitive-bid laws set forth in Ala. Code 1975, § 41-16-20 through § 41-16-63, which are applicable to public contracts, do not apply to a health-care authority created under the HCA Act. See Ala. Code 1975, § 22-21-335; Rodgers v. Hopper, 768 So. 2d 963 (Ala. 2000) (holding that leases entered into by the Alabama Corrections Institute Finance Authority, which was held not to have State immunity, are exempt from the competitive-bid law, see Ala. Code 1975, § 14-2-36); Thomas, supra (holding that contracts of the Alabama Municipal Electric Authority, which was held not to have State immunity, are not subject to the public-contract statutes, see Ala. Code

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> "All boards, bodies, and commissions of the executive and legislative departments of the state or its political subdivisions or municipalities which expend or appropriate public funds; all multimember governing bodies of departments, agencies, institutions, and instrumentalities of the executive and legislative departments of the state or its political subdivisions or municipalities, including, without limitation, all corporations and other instrumentalities whose governing boards are comprised of a majority of members who are appointed or elected by the state or its political subdivisions, counties, or municipalities; and all quasi-judicial bodies of the executive and legislative departments of the state and all standing, special, or advisory committees or subcommittees of, or appointed by, the body."

(Emphasis added.)

1975, § 41-16-1 et seq., which include the competitive-bid statutes, see Ala. Code 1975, § 11-50A-29).

In regard to other provisions of the HCA Act, we note that the legislature provided limited guidance as to who may serve as members of the board of directors of a health-care authority. Section 22-21-316(a) provides that "no fewer than a majority of the directors shall be elected by the governing body or bodies of one or more of the authorizing subdivisions."[12] Provisions regarding the composition of a board of directors have not precluded us from determining that an entity was not entitled to State immunity. See Stallings & Sons, 689 So. 2d at 793 ("We have found no precedent holding that membership on an authority's board of directors of the governor, the finance director, the state treasurer, or, for that matter, any state officer is determinative of whether an authority is an entity that could be sued or one that is immune from suit."); see also Thomas, supra, and the relevant statutory provision governing the Alabama Municipal Electric Authority, Ala. Code 1975, § 11-50A-6. Also, we note that the

[12]In this case, the certificate of incorporation of the Authority does provide, in accordance with the statute, that six directors are to be chosen by the Board. The remaining five directors are to be chosen by Baptist Health.

HCA Act does not require that any director be employed by or otherwise associated with the governing body of the authorizing subdivision. Thus, the legislature did not require that the board of directors of a health-care authority be composed entirely of individuals, or indeed of any individuals, who are subject to the daily control of the authorizing subdivision that created it.[13]

Significantly, there is no indication that the Authority receives appropriations from the State or from the Board. Compare Sarradett v. University of South Alabama Med. Ctr., 484 So. 2d 426, 427 (Ala. 1986) ("[Counterclaim defendant] has cited us to numerous acts of the legislature appropriating money to the University of South Alabama for operation of the medical center [it owned and operated]. Therefore, and notwithstanding the ad valorem tax and any other sources of income for [counterclaim defendant], it appears to us that a judgment against [counterclaim defendant] in this case would directly affect the financial status of the State treasury.");

[13]The legislature did provide that members of the board of directors of the Authority could be "impeached and removed from office in the same manner and on the same grounds" as certain public officials. Ala. Code 1975, § 22-21-316(d) (citing Ala. Const. 1901, § 175). That, however, is simply one factor in the equation before us.

Staudt, 388 So. 2d at 993 ("Substantial appropriations for the Armory Commission are made through the Military Department and are payable from funds in the state treasury to the credit of the Armory Commission. See, e.g., 1979 Ala. Acts, No. 79-124, p. 192. Additionally, the governor is authorized to use any appropriation for military purposes to pay expenses or obligations of the Commission. Code 1975, § 31-4-6."). In addition to the significance of this factor in its own right, it supports the conclusion that a judgment against the Authority would not directly affect the State treasury.

A health-care authority created under the HCA Act has no authority or power to levy any taxes. Ala. Code 1975, § 22-21-318(d). Nor has the legislature provided that the State, or the Board, must make any provision for a health-care authority out of tax revenues (except under circumstances that are not before us, see Ala. Code 1975, § 22-21-330). See Ala. Code 1975, § 22-21-344 ("Nothing in this article shall be construed to permit the use, by or for the benefit of any authority, of the proceeds of any hospital tax for any purpose, at any place, or in connection with any health care facilities, not permitted or described in the constitutional,

statutory or other provision of law authorizing the imposition, levy and collection of such hospital tax or the use of the proceeds therefrom."). We also note that the legislature has not required that a health-care authority deliver any specific level of medical services to the public, particularly to the indigent.

A health-care authority created pursuant to the HCA Act is a tax-exempt entity. See Ala. Code 1975, § 22-21-333. Although this Court has recognized that an entity's exemption from state and local taxation might suggest that the entity is an agency of the State, we have not found that factor determinative for purposes of our State-immunity analysis. See, e.g., Greater Mobile-Washington Cnty. Mental Health Bd., 940 So. 2d at 994; Tallaseehatchie Creek, 620 So. 2d at 630.[14]

As previously referenced, and as is discussed in more detail below, we note that, subject to compensation to be paid

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[14]Section 22-21-337, Ala. Code 1975, provides that "[a]n authority shall be a public corporation or authority and no part of its net earnings remaining after payment of its expenses shall inure to the benefit of any individual, firm or corporation." The restriction as to the inurement of net earnings, however, is also part of what distinguishes a public corporation from a private corporation and is consistent with the fact that a health-care authority created pursuant to the HCA Act is a tax-exempt entity.

to UABHS under limited circumstances of an amount equal to only a portion of those assets, the Authority must return all the assets of the Authority, including any transferred to it by Baptist Health, to Baptist Health upon the termination of the affiliation agreement. The same return of assets to Baptist Health is prescribed in the event of a dissolution of the Authority. In the latter regard, although the certificate of incorporation provides for the transfer of assets to the Board in the event of a dissolution of the Authority, it also specifically states that this transfer is "subject to the Authority's obligations under the Affiliation Agreement with respect to reconveyance of assets upon termination of the Affiliation Agreement."

During oral argument, the Authority correctly noted that, although it was required to make a contribution to UABHS each year in an amount generally equal to 25% of the Authority's net operating income, no part of its net earnings could be distributed as such to Baptist Health. Section 22-21-337, Ala. Code 1975, provides:

> "An authority shall be a public corporation or authority and no part of its net earnings remaining after payment of its expenses shall inure to the benefit of any individual, firm or corporation,

> except in the event the board shall determine that sufficient provision has been made for the full payment of the expenses, securities and other obligations of the authority, then any portion, as determined by the board, of the net earnings of the authority thereafter accruing may, in the discretion of the board, be paid to one or more of its authorizing subdivisions."

Nonetheless, because all or a substantial part of the assets held by the Authority at the time of the termination of the affiliation agreement are to be transferred to Baptist Health, to the extent that the operation of the health-care facility results in any growth in the value of the assets during the term of the affiliation agreement, that growth will inure to the benefit of Baptist Health upon the termination of the affiliation agreement.[15]

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[15]Nor does the fact that the Authority is to make a "contribution" to UABHS in most years, or that a payment representing part of the value of the assets of the Authority may, under limited circumstances, be due to UABHS upon termination of the affiliation agreement or dissolution of the Authority, support the extension of § 14 immunity to the Authority. Even in cases in which all the assets of a public corporation must, upon dissolution of the corporation, be transferred back to the State itself, our cases do not consider the diminution in income or assets of the corporation to be an invasion of the State treasury in the sense necessary to deem that corporation a part of the State and trigger § 14 immunity. See Greater Mobile-Washington Cnty. Mental Health Bd., 940 So. 2d at 996 (holding that board was not entitled to State immunity even though upon dissolution its assets vested in the Department of Mental Health); see also Rodgers, supra (noting that, upon dissolution, the assets of the

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Alabama Corrections Institute Finance Authority revert to the State, see Ala. Code 1975, § 14-2-25); Stallings & Sons, 689 So. 2d at 793 ("[T]he Authority holds title to the property it is charged with maintaining and, in effect, has rights separate from the state, affecting that property and those rights are subject only to the dissolution of the Authority. The conveyance in Section 41-10-470, Ala. Code 1975, provides that the Authority 'shall be invested with all rights and title that the State of Alabama had in the property conveyed ... thereby, subject to the right of reverter to the state upon dissolution of the authority.' Moreover, a separate account in the state treasury was created for all proceeds derived from the sale of any bonds issued by the Authority and it is 'subject to be drawn on by the authority' for the purposes described therein. § 41-10-468, Ala. Code 1975. Based on the foregoing, we believe that it is clear that the Authority was created as a separate entity, that it is not an arm of the state, and that it is not, therefore, immune from suit under § 14." (emphasis omitted)); Thomas, supra (involving the Alabama Municipal Electric Authority, whose governing statute, Ala. Code 1975, § 11-50A-1 et seq., provides that, upon dissolution, "all the projects, buildings, properties and other assets then owned by the [AMEA]" are to "be conveyed to the municipalities at that time represented on the election committee." Ala. Code 1975, § 11-50A-27.).

Moreover, in this case, the aforementioned payments due upon the termination of the affiliation agreement or the dissolution of the Authority are payments to be made only to UABHS, not the Board. UABHS is a separate corporation formed by the Board and University of Alabama Health Services Foundation, P.C. ("UAHSF") (itself a separate corporation). UABHS is not the Board. As this Court specifically has held, UABHS is not part of the State so as to qualify for immunity under § 14. See note 5, supra (also noting our holding that UAHSF is not part of the State so as to qualify for § 14 immunity). The fact that some amount might be paid to UABHS by the Authority under limited circumstances surrounding the termination of the affiliation agreement or the dissolution of the Authority simply holds no import for whether the Authority itself is part of the State for purposes of § 14 immunity.

In addition, we note that, unlike certain entities that have been held to possess State immunity, a health-care authority created under the HCA Act is not required to file with the State an audit or report of the authority's income and expenditures. Compare Ex parte Board of Dental Exam'rs, 102 So. 3d at 383 (citing Ala. Code 1975, § 34-9-42). Likewise, the legislature has not restricted a health-care authority created under the HCA Act to hiring only attorneys who are approved by the attorney general. Compare id. (citing Ala. Code 1975, § 34-9-43(a)(8)b.), with Ala. Code 1975, § 22-21-318(a)(25).

Significantly, although a health-care authority created under the HCA Act may issue bonds and incur indebtedness, the legislature specifically has provided that a health-care authority's debts and obligations are not debts and obligations of the State or of an authorizing subdivision. Section 22-21-325, Ala. Code 1975, states:

> "All agreements and obligations undertaken, and all securities issued, by an authority shall be solely and exclusively an obligation of the authority and shall not create an obligation or debt of the state, any authorizing subdivision or any other county or municipality within the meaning of any constitutional or statutory provision. The faith and credit of the state, any authorizing

> subdivision or any other county or municipality shall never be pledged for the payment of any securities issued by an authority; nor shall the state, any authorizing subdivision or any other county or municipality be liable in any manner for the payment of the principal of or interest on any securities of an authority or for the performance of any pledge, mortgage, obligation or agreement of any kind whatsoever that may be undertaken by an authority."

Compare Ex parte Board of Dental Exam'rs, supra, with Ala. Code 1975, §§ 22-21-318(a)(9) and 22-21-325. See also Rodgers, supra (citing Ala. Code 1975, § 14-2-24, which states: "No obligation incurred by the [Alabama Corrections Institute Finance Authority] ... shall create an obligation or debt of the state."); Tallaseehatchie Creek, 620 So. 2d at 630 (obligations of Watershed Conservancy District are not obligations of the State, county, or municipality, see Ala. Code 1975, § 9-8-61(3)); Stallings & Sons, 689 So. 2d at 792 ("Stallings argues that, in light of the inclusion of this language in the enabling 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.' We agree." (footnote omitted)); and Thomas, 432 So. 2d at 481

("[T]he Authority exists as a public corporation separate and apart from the State. Any liabilities the Authority might incur would never be payable out of the State Treasury.").

3. Weighing the Staudt Factors Against Each Other

In Rodgers, supra, this Court concluded that the Alabama Corrections Institute Finance Authority ("the ACIFA"), a public corporation formed pursuant to Ala. Code 1975, § 14-2-1 et seq., was not entitled to immunity under § 14, Ala. Const. 1901. Discussing Tallaseehatchie Creek, the Rodgers Court stated:

> "As a [watershed conservancy district ('WCD')], [Tallaseehatchie] Creek was authorized to act as an agent of the State. It enjoyed the customary governmental power of eminent domain; it was exempt from State and local taxation; and it benefited from legislative appropriations. See §§ 9-8-61(1), 9-8-61(7), and 9-8-67. Despite these decidedly governmental characteristics, we held that Tallaseehatchie Creek, as a WCD, was an independent entity, and, thus, was not entitled to sovereign immunity. Tallaseehatchie Creek, 620 So. 2d at 631.
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> "This Court based its holding in that case on several key characteristics that distinguished WCDs 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. Id. at 630 (citing [Ala. Code 1975,] §§ 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 WCD were not the State's debts

and obligations. Id. (citing [Ala. Code 1975,] § 9-8-61(3)). We found this final characteristic to be dispositive, stating:

> "'This last provision clearly contemplates that WCD 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 WCD.'

"Tallaseehatchie Creek, 620 So. 2d at 630.

"In the present case, ACIFA has these same qualities, qualities suggesting that it is an entity independent of the State. These qualities include: (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 Tallaseehatchie Creek). See [Ala. Code 1975,] §§ 14-2-8(2), 14-2-8(5) through (7), 14-2-12, and 14-2-24.

"ACIFA argues 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. This oversight power, however, is not different from the power to direct operations that is commonly exercised by the owner of any ordinary business. In this case, the State's power to direct operations includes the power to approve prison-construction plans and the use of prison labor. ACIFA's relationship with the State does not persuade us to accept its argument."

768 So. 2d at 967.

Consistent with the approach taken by the Court in Rodgers and Tallaseehatchie Creek, we take stock of some of the more noteworthy factors weighing for and against treatment of the Authority as an arm of the State. Those that support that treatment include: (1) its purposes of promoting public health and arranging for the provision of health-care services to the indigent, (2) the ability to exercise the right of eminent domain in furtherance of its corporate purposes, (3) the articulation by the legislature of a policy choice that the Authority be permitted to engage in anticompetitive conduct, (4) the Authority's tax-exempt status, and (5) the appointment of a majority of the directors of the Authority by the Board. Among the factors that support the treatment of a health-care authority formed under the HCA Act as simply a franchisee of the State are: (1) the fact that operating a hospital is not a uniquely governmental function, (2) the power to sell and dispose of property, (3) the fact that the State assumes no responsibility for any debt issued by a health-care authority, (4) the fact that no tax dollars are used in the operation of a health-care authority, (5) the power of a health-care authority to make contracts and to do

so without being required to solicit bids or to participate in the State contract-review process, (6) the fact that the legislature specifically prescribed to health-care authorities an amenability to suit, and, perhaps most significantly, (7) the fact that money judgments and other losses or obligations incurred by a health-care authority are not payable from the State treasury and therefore do not "directly affect the financial status of the State treasury."

After examining and weighing the significance of these factors, we conclude that the factors that support treatment of the Authority as a franchisee of the State rather than as an "arm of the State" predominate. The impact of many of the factors supporting treatment as the State is diluted in some manner as discussed in the analysis above. Among other things, the power to operate a public hospital, including providing indigent health care, the power to exercise eminent domain, the legislature's expression of intent that the Authority be permitted to engage in anticompetitive conduct, and the Authority's tax-exempt status are all powers or privileges that may be held by entities such as cities, counties, public corporations, and/or nonprofit corporations

that are not entitled to State immunity. Furthermore, we consider the import of these factors to be well outweighed by the same five factors found to be dispositive in Tallaseehatchie Creek and Rodgers, i.e., the power to sell and dispose of property, the legislature's prescription to the Authority of amenability to suit, the power to make contracts without being subject to the State's competitive-bid laws or the contract-review process, the power to issue debt for which the State assumes no responsibility, and, most significantly, the fact that any judgments or other losses incurred by the Authority are not payable from the State treasury. In addition, a health-care authority has no power to levy any taxes and, except in certain limited circumstances, no taxes are used to maintain or operate a health-care authority. Finally, in the present case there is the additional fact that Baptist Health has retained control of certain significant operational decisions and has reserved an interest in the assets of the Authority.

4. Conclusion as to State Immunity

The function performed by the Authority is, in the main, providing the same health services as were provided, prior to

the formation of the Authority, by a private entity. Moreover, the intrinsic character of a health-care authority formed under the HCA Act is distinguishable from that of the health-care-service providers that have been held to possess State immunity. Compare, e.g, Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013 (Ala. 2003); Sarradett, supra; and Hutchinson v. Board of Trs. of Univ. of Alabama, 288 Ala. 20, 256 So. 2d 281 (1971). See also White v. Alabama Insane Hosp., 138 Ala. 479, 35 So. 454 (1903) (involving a hospital for the "insane" and noting, among other things, that the State supplied the means by which the hospital was maintained and operated).

Based on our weighing of the Staudt factors, we must conclude that a health-care authority organized and operating under the HCA Act is not an "'immediate and strictly governmental agenc[y] of the State.'" See, e.g. Allred, 620 So. 2d at 631 (quoting Thomas, 432 So. 2d at 480). The Authority does not serve as "an arm of the State." Instead, it is a "franchisee licensed for some beneficial purpose," Staudt, 388 So. 2d at 993, namely to participate with other health-care providers in this State, both public and private,

in rendering health-care services to citizens of this State. The Authority therefore is not entitled to State immunity under § 14 of the Alabama Constitution.

B. Damages Cap of § 11-93-2

We turn now to the applicability of the $100,000 damages cap in § 11-93-2.

As already discussed, § 22-21-318(a)(2) of the HCA Act provides that health-care authorities shall be amenable to suit in both tort and contract actions. It continues, however, by stating that this amenability to suit is "subject ... to the provisions of Chapter 93 of Title 11, which chapter is hereby made applicable to the authority." (Emphasis added.)

The Authority argues that this latter language, or at least the "hereby made applicable" language, evidences an intent by the legislature to make the $100,000 damages cap that is applicable to county and municipal agencies and instrumentalities under Chapter 93 applicable to all health-care authorities formed under the HCA Act, regardless of whether the Authority constitutes an agency or instrumentality of a county or municipality.

Consistent with the position taken by the trial court, Davis responds by arguing that the above-emphasized portions of § 22-21-318(a)(2) plainly provide for the application of the "chapter" -- i.e., the entire "chapter" and all "the provisions" found therein. Davis points out that among "the provisions" of Chapter 93 "hereby made applicable" are the provisions in Ala. Code 1975, § 11-93-2 and § 11-93-1(1), defining the partial immunity granted by Chapter 93 as a partial immunity for counties and municipalities and their agencies.[16]

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[16]Section 11-93-2 provides, in pertinent part, that "[t]he recovery of damages under any judgment against a governmental entity shall be limited to $100,000.00 for bodily injury or death ...." Section 11-93-1(1) defines "governmental entity" as follows:

> "Governmental entity. 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."

Davis notes that in § 22-21-318(a)(2) the legislature did not simply borrow by reference the monetary amount of the damages cap prescribed in § 11-93-2 for counties and municipalities and then create a damages cap for all health-care authorities in this same amount. Instead, Davis argues, it reaffirmed the applicability of Chapter 93, such as it is, to health-care authorities. Davis reasons that the effect of the above-quoted passage is simply to make clear that, despite the fact that § 22-21-318(a)(2) was enacted after Chapter 93 of Title 11, the express grant in the first sentence therein to health-care authorities of the power to "be sued" in the later enacted § 22-21-318(a)(2) is not to be construed as overriding the grant of partial immunity in § 11-93-2 to an "authority" that would otherwise fall within "the provisions" of Chapter 93.

Alternatively, Davis argues that the particular attributes of the Authority in this case, as embodied in its certificate of incorporation and in the affiliation agreement, prevent the Authority from qualifying as a health-care authority under the HCA Act, or at least would deprive it of

the partial immunity, if any, otherwise granted under § 22-21-318(a)(2).

We pretermit discussion of the foregoing arguments in light of our conclusion as to the merits of one additional argument made by Davis, namely, that, to the extent the HCA Act was intended to extend the $100,000 damages cap of § 11-93-2 to all health-care authorities organized under the HCA Act, i.e., not just those that constitute agencies or instrumentalities of a county or municipality, it is unconstitutional.

Under Alabama law, there are only two categories of governmental immunity within which the Authority possibly could fall, and the Authority falls within neither.

The first category of immunity extends to the State, which enjoys sovereign immunity. As discussed in Part II.A., the Authority is not an "arm of the State" and does not qualify for State immunity.[17]

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[17]The immunity of certain State officials and of State employees performing certain governmental functions also is a function of the immunity afforded to the State. See Ex parte Cranman, 792 So. 2d 392 (Ala. 2000) (plurality opinion); Ex parte Butts, 775 So. 2d 173 (Ala. 2000).

The second category applies to local governmental entities, i.e., counties and municipalities. As discussed below, unlike State immunity, this second category finds no expression in the Alabama Constitution; it exists in some measure today only because of the unique, historical treatment afforded counties and municipalities under Alabama law: common-law immunity predating and surviving the adoption of the 1901 Constitution.

As reflected in our cases, the common-law immunity for counties and municipalities, and presumably their agencies, is indeed unique because (a) it was <u>not created</u> by the 1901 Constitution but (b) it <u>did survive</u> the adoption of the 1901 Constitution. The fact that this immunity was a function of common law and not the constitution means that it can and has been restricted or modified by legislative enactments (see, e.g., § 11-47-190, Ala. Code 1975, and Title 11, Chapter 93, Ala. Code 1975, and their predecessors) without violating any constitutional provision restricting the power of the legislature (e.g., § 14, Ala. Const. 1901). Conversely, the fact that this common-law immunity was not abrogated by the 1901 Constitution itself means that the continued existence of

this immunity in some measure today (i.e., to the extent the legislature has chosen in provisions like § 11-47-190 and § 11-93-2, to allow it) does not offend the 1901 Constitution and its assurances under §§ 11 and 13, Ala. Const. 1901, of trial by jury and remedies for injuries. To the contrary, the reach of these provisions has been assessed in the context of the county and municipal immunity that was accepted at the time of their adoption.

It is because of the unique source and nature of county and municipal immunity, and the resulting ability of the legislature thus to limit or modify it, that a statute such as § 11-93-2 can, on the one hand, acknowledge and reaffirm this immunity in some measure and yet simultaneously impose a restriction on that immunity, something the legislature has no power to do with respect to State immunity.[18] The Authority, however, is not a county or municipality, or an agency

[18]That the legislature contemplated that some health-care authorities might qualify under Chapter 93 of Title 11 for a type of immunity that the legislature could restrict or waive is further corroboration of the conclusion reached in Part II.A. that the legislature did not consider health-care authorities to be part of the State for purposes of immunity. Dunn Constr. Co. v. State Bd. of Adjustment, 234 Ala. 372, 376, 175 So. 383, 386 (1937) ("[Section 14] wholly withdraws from the Legislature, or any other state authority, the power to give consent to a suit against the state.").

thereof. This, taken in combination with the fact that it is not the State, means there is no basis upon which the legislature could extend local governmental immunity to it.[19]

In Home Indemnity Co. v. Anders, 459 So. 2d 836 (Ala. 1984), this Court rejected a constitutional challenge to § 11-93-2 based on § 13 of the 1901 Constitution (providing for a remedy for every injury). Importantly, in doing so, we specifically acknowledged that counties and municipalities enjoyed an "immunity recognized at common law," i.e., an immunity that predated the adoption of the Alabama Constitution of 1901. 459 So. 2d at 840. On the basis of this "background" this Court upheld the partial immunity afforded by § 11-93-2 as one subject to regulation by the legislature. 459 So. 2d at 840-41.

Similarly, in Garner v. Covington County, 624 So. 2d 1346 (Ala. 1993), this Court rejected the argument that § 11-93-2 violates § 11 of the 1901 Constitution (providing for a right to trial by jury). We began by noting that, in Anders, the

[19]Compare, e.g., Hutchinson, 288 Ala. at 24, 256 So. 2d at 283 (noting that the claim in that case was not against an agency of a county and must be assessed as one against an agency of the State for purposes of determining whether the entity is entitled to immunity).

Court had rejected the argument "that § 11-93-2 'violates the remedy provisions of Article I, § 13.'" 624 So. 2d at 1351. Consistent with Anders, we explained that § 11-93-2 "must be addressed in the context of the unique status of counties and cities as governmental entities." Id. We explained that, because of the unique role of counties and municipalities as local governmental entities, actions against counties and municipalities "have always been subject to reasonable regulation by the legislature on a basis not applicable to actions against individuals and other entities." Id. In Garner, we specifically discussed the rejection at the 1901 Constitutional Convention of a provision that would have provided for the right to sue a municipality and quoted portions of the Convention's debate indicating that, in rejecting the provision, the members understood that, in its absence, counties and municipalities would continue to enjoy an immunity from suit, albeit one subject to "regulation" by the legislature. 624 So. 2d at 1351-54. We ended our analysis as follows:

> "Because cities and counties are exercising governmental functions, however, and because judgments against them must be paid out of public moneys derived from taxation, the reasonable

> limitation of § 11-93-2 on awards against them must be sustained. If the Constitutional Convention had adopted the proposed limitation on the legislative power to regulate actions against municipalities, we would probably reach a different result. Given this constitutional history, however, we cannot say that § 11-93-2 violates the constitution."

Id. at 1354-55.

In Smith v. Schulte, 671 So. 2d 1334 (Ala. 1995), this Court specifically explained that § 11, Ala. Const. 1901, must be read in the context of the causes of action available at common law and that the immunity of counties and municipalities under the common law was the reason limitations on their liability, as reflected in statutes such as § 11-93-2, were constitutional:

> "It is well settled in Alabama that § 11 governs (1) those causes of action arising under the common law, and (2) those causes of action afforded by pre-1901 statutes. This principle was never more forcefully stated than in Gilbreath v. Wallace, 292 Ala. 267, 270, 292 So. 2d 651, 653 (1974), where the Court declared: 'Alabama's Constitution effected a "freezing" of the right to jury trial as of 1901.' 292 Ala. at 269, 292 So. 2d at 652. See also Alford v. State ex rel. Attorney General, 170 Ala. 178, 188-89, 54 So. 213, 215-16 (1910) (Mayfield, J., dissenting); Tims v. State, 26 Ala. 165 (1855)."

671 So. 2d at 1342 (emphasis omitted). As we further explained:

> "The distinction between the [county and municipal] entities subject to § 11-93-2 and [the medical providers] subject to § 6-5-547[, Ala. Code 1975,] renders these respective statutes so fundamentally distinguishable as to eliminate the need for further elaboration. Suffice it to say, as did the trial judge: 'The defendants in the case at bar do not enjoy the unique status of counties or cities; and, therefore, no such status, crucial to the rationale of Garner, supports the constitutionality of the § 6-5-547 cap on any wrongful death judgment against medical providers.'"

671 So. 2d at 1343-44 (emphasis added).

It is with equal certitude that we can and must conclude in the present case that the Authority "do[es] not enjoy the unique status of counties or cities; and, therefore, no such status, crucial to the rationale of Garner [and Schulte and the constitutionality of the application of § 11-93-2 in those cases], supports the constitutionality of the [§ 11-93-2] cap on any ... judgment against [the Authority]." That is, to the extent § 22-21-318(a)(2) may be construed as an attempt to extend the partial immunity for counties and municipalities recognized in § 11-93-2 to an entity that is neither of those, that attempt is unconstitutional.

III. Conclusion

For the foregoing reasons, we must reject the Authority's argument that it is entitled to the protection afforded

counties and municipalities in § 11-93-2. The only other form of governmental immunity that it can and does seek is the sovereign immunity of the State. State immunity would apply only if the Authority were an "immediate and strictly governmental agency of the State." It is not. It therefore is not entitled to either form of governmental immunity it requests, and the judgment of the trial court therefore is due to be affirmed.

APPLICATION GRANTED; OPINION OF JANUARY 14, 2011, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Parker, Main, and Wise, JJ., concur.

Bryan, J., concurs in part and concurs in the result in part.

Moore, C.J., concurs in the result.

Stuart, Bolin, and Shaw, JJ., dissent.

BRYAN, Justice (concurring in part and concurring in the result in part).

I concur in Part II.A. of the main opinion. However, I do not believe this Court needs to address the argument by Kay E. Davis, the plaintiff below, that interpreting the Health Care Authorities Act, § 22-21-310 et seq., Ala. Code 1975 ("the Act"), so as to apply the damages cap set forth in § 11-93-2, Ala. Code 1975, to all health-care authorities formed pursuant to the Act is unconstitutional. Therefore, as to Part II.B. of the main opinion, I concur only in the result. See Lowe v. Fulford, 442 So. 2d 29, 33 (Ala. 1983) ("'Generally courts are reluctant to reach constitutional questions, and should not do so, if the merits of the case can be settled on non-constitutional grounds.'" (quoting the trial court's order)); see also Working v. Jefferson Cnty. Election Comm'n, 2 So. 3d 827, 838 (Ala. 2008) ("We first turn our attention to the latter issue because an affirmative response to it will make it unnecessary for us to address the constitutionality of a legislative enactment." (citing Lowe)).

The Act 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 ...:
>
> "....
>
> "(2) To sue or be sued in its own name in civil suits and actions, and to defend suits and actions against it ..., subject, however, to the provisions of Chapter 93 of Title 11, which chapter is hereby made applicable to the authority."

§ 22-21-318(a)(2), Ala. Code 1975.

As noted in the main opinion, the Health Care Authority for Baptist Health ("the Authority) argues that the language of § 22-21-318(a)(2), Ala. Code 1975, making "Chapter 93 of Title 11 ... applicable to the authority," indicates that the legislature intended for the $100,000 damages cap set forth in § 11-93-2 for governmental entities, including county and municipal agencies, to apply to <u>all</u> authorities formed under the Act, regardless of the status of the creating entity.

> "'The fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the statute. Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.'"

Bandy v. City of Birmingham, 73 So. 3d 1233, 1246 (Ala. 2011) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)).

Section 11-93-2 provides, in pertinent part, that "[t]he recovery of damages under any judgment against a governmental entity shall be limited to $100,000 for bodily injury or death for one person in any single occurrence." Section 11-93-1(1), Ala. Code 1975, defines a "governmental entity" as:

> "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."

As Davis points out, the legislature did not expressly state that the damages cap in § 11-93-2 applies to all authorities but, instead, that Chapter 93 in its entirety "is made applicable" to health-care authorities under the Act. Giving the terms their plain meaning and interpreting the language of the Act to mean what it says, I do not read § 22-

21-318(a)(2) of the Act as subjecting all authorities to the statutory damages cap in § 11-93-2, but, instead, as ensuring that a health-care authority created under the Act that also satisfies the definition of a "governmental entity" in § 11-93-1(1) receives the protections afforded such entities by § 11-93-2.

The Authority concedes that it "is not a 'governmental entity,' as defined in § 11-93-1[(1)]." The Authority's brief, at 52. Therefore, the statutory damages cap set forth in § 11-93-2 does not apply to the judgment entered against the Authority in this case. For this reason, I concur in the result reached in Part II.B. of the main opinion.

MOORE, Chief Justice (concurring in the result).

I concur in the result reached by the main opinion. I agree that the Health Care Authority for Baptist Health ("the Authority") is not entitled to sovereign immunity (now referred to as "State immunity") under Article I, § 14, of the Alabama Constitution of 1901 for reasons set out below. I further agree that extending the $100,000 damages cap of § 11-93-2, Ala. Code 1975, to health-care authorities organized under the Health Care Authorities Act of 1982, § 22-21-310 et seq., Ala. Code 1975, that are not agencies or instrumentalities of a county or a municipality is unconstitutional.

I write to state that weighing various factors such as tax-exempt status, anticompetitive conduct, eminent-domain powers, ownership and disposal of property, makeup of the board of directors will not necessarily lead to the proper determination of a sovereign-immunity issue in every case. Different courts and different judges will at different times weigh and prioritize such factors differently. The determination of whether sovereign immunity exists is not arrived at by balancing various factors relating to powers

generally exercised by government but, rather, is dependent upon whether the activity involved is a proper function of government according to the Constitution ratified by the people.

Whether the Authority enjoys sovereign immunity under Article I, § 14, must be examined under the provisions of the Constitution of Alabama. I would hold that sovereign immunity from civil actions under Article I, § 14, can exist only when that immunity does not violate the rights retained by the people under the Constitution of Alabama unless that immunity is specifically granted an entity by the people of Alabama in an amendment to the 1901 Constitution.

A historical overview of the origins of state sovereignty in our country is helpful to a proper understanding of sovereign immunity in its most recent forms. One of the first Associate Justices of the United States Supreme Court, Justice James Wilson, who not only signed the Declaration of Independence but who also helped draft the Constitution of the United States, attributed "sovereignty" to the feudal system. In Chisholm v. Georgia, 2 U.S. 419 (1793), Justice Wilson wrote:

> "[S]overeignty is derived from a feudal source; and like many other parts of that system so degrading to man, still retains its influence over our sentiments and conduct, though the cause, by which that influence was produced never extended to the American States."

2 U.S. at 457. In the earliest stages of our Republic, the term "sovereign" was not readily applied to our federal government, as Justice Wilson explained:

> "To the Constitution of the United States the term SOVEREIGN, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves 'SOVEREIGN' people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration."

Id. at 454 (capitalization in original). Nor did Alabama's original Constitution of 1819 ascribe to State government the term "sovereign," and it gave State government no immunity under the law for wrongs it had committed. Article 6, § 9, Ala. Const. 1819. Even after the War Between the States, the Constitution of Alabama of 1865 continued to protect citizens in their right to bring suits against the State. Article 1, § 15, Ala. Const. 1865.

Both the federal government as well as our State government recognized, according to Justice Wilson, that the

State was an "inferior contrivance" to human authority. "When I speak of a State as an inferior contrivance, I mean that it is a contrivance inferior only to that, which is divine: Of all human contrivances, it is certainly most transcendently excellent." Chisholm, 2 U.S. at 455.

However, in 1875 a new Constitution was ratified. It included the provision that the State of Alabama "shall never be made to be a defendant in any court of law or equity." Article 1, § 15, Ala. Const. 1875. (This bar to suit was retained as Article 1, § 14, in the Alabama Constitution of 1901.) The same year the 1875 Constitution was ratified, the Supreme Court of Alabama began to define the bounds of State sovereignty:

> "[I]t is not congruous with the ideas of order and duty, that the State, the August sovereign body whose servants they are, from which proceed all civil laws, and to which we owe unstinted respect and honor, should be held capable of doing wrongs, for which she should be made answerable as for tortious injuries, in her own courts to her own children or subjects."

State v. Hill, 54 Ala. 67, 68 (1875) (emphasis added). Hill starkly described perhaps the essence of Alabama State sovereignty: immunity from suit for "tortious injuries" in "her own courts to her own children or subjects."

This Court later stated simply: "The state can do no wrong. Neither can her servants do a wrong for it or in its name, so as to make it a party to a suit against them." Elmore v. Fields, 153 Ala. 345, 351, 45 So. 66, 67 (1907).[20] "This Court, construing Section 14, has held almost every conceivable type of suit to be within the constitutional prohibition." Hutchinson v. Board of Trs. of Univ. of Alabama, 288 Ala. 20, 23, 256 So. 2d 281, 283 (1971). With that, Alabama "closed the door to litigants who had claims against the State, and the door has remained closed continuously." Id.[21]

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[20]The similar maxim "the king can do no wrong" rests on a legal misconception. Joe McElwain, State Immunity from Tort Liability, 8 Mont. L. Rev. 45, 45 (1947)(citing Bouchard, Government Liability in Tort, 34 Yale L. J. 1 n.2 (1924)). Originally, the maxim did not mean "that the king could not do wrong in the sense that he was incapable of doing a wrong, but that he was not privileged to do wrong. The king was obligated to right any wrongs which he had done." Id. (footnote omitted). Sir William Blackstone likewise limited the maxim so: "[I]t means that the prerogative of the crown extends not to do any injury." 1 William Blackstone, Commentaries *239 (emphasis added).

[21]One exception is actions arising from the State's legal contractual obligations. See, e.g., State of Alabama Highway Dep't v. Milton Constr. Co., 586 So. 2d 872, 875 (Ala. 1991)("Once the Highway Department has legally contracted under state law for goods or services and accepts such goods or services, the Highway Department also becomes legally obligated to pay for the goods or services accepted in

Nevertheless, other provisions of the Declaration of Rights in the 1901 Constitution present a seeming inconsistency with the State's immunity from suit in § 14. Specifically, Article I, § 11, guarantees the right of trial by jury, and Article I, § 13, provides "[t]hat all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law."

That inconsistency, however, must first be examined under Article I, § 36, of the Declaration of Rights, which protects "against any encroachments on the rights herein retained" by declaring "that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate." Each of Alabama's Constitutions from 1819 to 1901 "has excepted out of the general powers of government, the power to violate the right of trial by jury." Clark v. Container Corp. of America, Inc., 589 So. 2d 184, 196 (Ala. 1991). In fact, Article I, § 36, prohibits "the Legislature, the executive, or judicial branch, one or all,

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accordance with the terms of the contract. It follows that this obligation is not subject to the doctrine of sovereign immunity and is enforceable in the courts.").

from destroying or impairing such reserved rights of the people" and "from ever burdening, disturbing, qualifying, or tampering with, these rights, to the prejudice of the people." Alford v. State, 170 Ala. 178, 213, 54 So. 213, 223 (1910). Because the entire Declaration of Rights is excepted out of the general powers of government, neither the judiciary nor the legislature may extend § 14 sovereign immunity so as to destroy the inalienable rights of the people contained in §§ 11 and 13.

Although the rights contained in the Declaration of Rights are made secure, this Court has also held:

> "The presence of these guarantees, we respectfully submit, does not repudiate other provisions of our state's organic law which the people themselves have established, however inconsistent to some they may appear to be. By adopting § 14, our people have placed a limitation upon their own ability to make their state a 'defendant in any court.' It would be incongruous for this court to hold that this particular section [Art. 1, § 14] of the Constitution of Alabama 1901 may not be enforced because it might appear to be in conflict with another. This follows from the requirement that constitutional provisions should be construed as a whole and in light of the entire instrument and to harmonize with its other provisions."

Deal v. Tannehill Furnace & Foundry Comm'n, 443 So. 2d 1213, 1218-19 (Ala. 1983). As stated in Deal, there is an apparent

conflict between § 14 (sovereign immunity) and §§ 11 and 13 (trial by jury and open courts). The question then becomes -- when does § 14 restrict the rights to trial by jury and access to an open court system?

Whether the Authority is entitled to sovereign immunity depends on whether they are "arm[s] of the state" and whether they perform a function of State government. Armory Comm'n of Alabama v. Staudt, 388 So. 2d 991, 993 (Ala. 1980). In Staudt, three elements were discussed:

1. The character of power delegated to the entity;

2. The relation of the entity to the State; and

3. The nature of the function performed by the entity.

388 So. 2d at 993.

The main opinion sufficiently examines the first two elements, i.e., the "character of power delegated" to the Authority and the Authority's "relation" to the State of Alabama. I concentrate here on the third element -- the nature of the "function performed by the entity." Article 1, § 35, of the Alabama Constitution of 1901 declares that "the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property,"

because "when the government assumes other functions it is usurpation and oppression." Therefore, sovereign immunity under § 14 can never be said to exist for any entity that violates the "sole object and only legitimate end of government" and "assumes other functions." Because the Declaration of Rights is excepted out of the general powers of government, only the people of Alabama may enlarge the "legitimate end of government" to encompass functions such as health care. Thus sovereign immunity exists only when a government entity functions within its legitimate constitutional sphere.

At common law, hospitals were not within the sphere of civil government, but were eleemosynary[22] corporations, "constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent." 1 William Blackstone,

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[22]"Of, relating to, or assisted by charity; not-for-profit." Black's Law Dictionary 597 (9th ed. 2004). An "eleemosynaria" was "[t]he place in a religious house or church where the common alms were deposited, to be distributed to the poor." Id.

Commentaries on the Laws of England *459.[23] Our common law inherited much from the canon law of the Christian church, which allowed any group of persons with the proper structure and purpose to form charitable corporations for the purpose of operating hospitals.[24] Harold Berman, Law and Revolution 219 (1983). In accord with English common law, "health care" is not found in the enumerated powers given Congress in Article I, § 8, of the United States Constitution. Nor is such a power to be found under the General Welfare provision as it was understood by our founding fathers. See The Federalist No. 41 at 258-259 (James Madison)(Clinton Rossiter ed., 1961). This legal history demonstrates why hospitals and health care were not considered proper objects and functions of civil

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[23]Eleemosynary corporations were lay corporations, composed of ecclesiastical persons that shared some "of the nature, privileges, and restrictions of ecclesiastical bodies." 1 William Blackstone, Commentaries *459.

[24]Donors would make gifts to God to established ecclesiastical corporations for specific charitable purposes, such as the building and operating of hospitals. Harold Berman, Law and Revolution 238 (1983). However, under Roman law, Emperor Justinian had recognized hospitals as charitable societies, under the supervision of diocesan bishops. Roman law did not grant charitable societies the legal privileges of incorporation, which were reserved for cities, public treasuries, churches, and colleges. Id. at 216, 219. Thus, canon law expanded the legal protections for charitable societies. Id.

government in the United States and in Alabama for many years. Alabama's early hospitals were organized primarily by churches, religious orders, private individuals, and private organizations, and not by the State.[25]

However, in 1946 the people of Alabama ratified Amendment No. 53 to the Alabama Constitution of 1901 to provide for State hospitals and health facilities. Amendment No. 53 (now Article IV, § 93.12, Ala. Const. 1901 (Off. Recomp.)) provides as follows:

> "The state, notwithstanding section 93 of the Constitution as amended and section 94 of the Constitution, may acquire, build, establish, own, operate and maintain hospitals, health centers, sanatoria and other health facilities. The legislature for such purposes may appropriate public funds and may authorize counties, municipalities and other political subdivisions to appropriate their funds, and may designate or create an agency or agencies to accept and administer funds appropriated or donated for such purposes by the United States government to the state upon such terms and conditions as may be imposed by the United States government."

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[25]See Howard Holley, M.D., The History of Medicine in Alabama (1982). Dr. Holley chronicled the development of hospitals in Alabama from colonial times to the 1970s. Holley's survey covers the origins of 27 Alabama hospitals: 21 were organized by religious orders, private individuals, and private corporations; 2 were organized by cities; 2 by federal authority; 1 by a county; and only 1 by the State. Dr. Holley acknowledges he omitted many "privately owned and operated small hospitals." Id. at 45-74.

(Emphasis added.) Section 93.12 clearly defines the limited conditions under which the State of Alabama may constitutionally assume the functions of maintaining hospitals and providing health care to the people of this State. Only under the limited constitutional exception of § 93.12 would a State-run hospital be immune from civil action under the concept of sovereign immunity in § 14.

The evidence in this case does not reflect that the State of Alabama ever acquired, built, established, owned, or operated the Authority's medical facilities. Nor did the Legislature of Alabama appropriate funds or authorize a county, a municipality, or other political subdivision to do so. Because no State entity has availed itself of the provision of § 93.12 in this case, the Authority is not exercising a government function so as to entitle it to sovereign immunity.

The provisions of §§ 22-21-310 through 22-21-359, Ala. Code 1975, the Health Care Authorities Act of 1982, do not, in my opinion, meet the requirements for a State-run hospital under § 93.12 and were never meant to provide for a State-owned and operated hospital. Indeed the Health Care

Authorities Act itself permits a health-care authority to be sued in civil actions:

> "(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:
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> "....
>
> "(2) 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 ...."

§ 22-21-318, Ala. Code 1975 (emphasis added). When the legislature expressly authorized a health-care authority "to sue and be sued in its own name in civil suits and actions," it cannot be said that even the legislature, which could not create sovereign immunity, ever contemplated such a result for any health-care authority.

Therefore, I would hold that, absent a constitutional amendment, sovereign immunity cannot be extended to shield a public authority, agency, or franchisee that works to deprive the people of their rights retained in §§ 11 and 13. The

effect of granting § 14 immunity to the Authority would be to destroy the people's inalienable rights to a jury trial and to take away a remedy in open court in cases involving such an entity, in violation of Article I, §§ 35 and 36. Such an application of sovereign immunity, absent the consent of the people of Alabama by constitutional amendment, is void and unconstitutional under §§ 35 and 36. I agree with the main opinion that under the Alabama Constitution the Authority is not entitled to sovereign immunity.

Furthermore, the $100,000 damages cap of § 11-93-2 is not applicable here because such a cap was never intended under the Health Care Authorities Act to extend to nongovernmental entities. Moreover, the Authority never claimed to be an instrumentality of either a county or a municipal government and is therefore not entitled to the damages limitations that such government entities presently enjoy.

BOLIN, Justice (dissenting).

At the outset, I must express my extreme disappointment in this Court's delay in ruling on this application for rehearing. The original opinion, which I authored, was issued on January 14, 2011, and the application for rehearing was timely filed on January 27, 2011. On July 7, 2011, the case was transferred from my office.

Rule 40(a), Ala. R. App. P., provides that a party who has not prevailed may apply for rehearing.

> "This Court invites applications for rehearing because we are the court of last resort in virtually every case that comes before us. Rule 40(b), Ala. R. App. P., therefore states in relevant part: 'The application for rehearing must state with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended.' The operative words are 'overlooked' and 'misapprehended.' We grant application for a rehearing in a rather narrow range of cases. A rehearing is not an opportunity to raise new issues not addressed on original application. See Town of Pike Road v. City of Montgomery, 57 So. 3d 693, 694 (Ala. 2006)(opinion on application for rehearing)('As a general rule, the Court does not consider matters raised for the first time in an application for rehearing.' (citing Morgan Keegan & Co. v. Cunningham, 918 So. 2d 897, 908 (Ala. 2005))); Riscorp, Inc. v. Norman, 915 So. 2d 1142, 1155 (Ala. 2005)(opinion on application for rehearing)('"The well-settled rule of this Court precludes consideration of arguments made for the first time on rehearing."'(quoting Water Works & Sewer Bd. of Selma v. Randolph, 833 So. 2d 604, 608

> (Ala. 2002))); and Kirkland v. Kirkland, 281 Ala. 42, 49, 198 So. 2d 771, 777 (1967) ('We cannot sanction the practice of bringing up new questions for the first time in application for rehearing.'). Nor is an application for rehearing an invitation to reargue the issues already thoroughly considered on original application. See Willis v. Atlanta Cas. Co., 801 So. 2d 837, 838 (Ala. 2001) (overruling an application for rehearing when it was 'simply an earnest reiteration of the appellant's original brief')(Johnstone, J., concurring specially). Instead, this Court invites an application for a rehearing so that we may be informed of a fact or a point of law that we have 'overlooked' or one that we have 'misapprehended.'"

Chism v. Jefferson Cnty., 954 So. 2d 1058, 1106-07 (Ala. 2006) (See, J., concurring specially on application for rehearing). With the relatively narrow grounds for granting an application for rehearing, there is no justification for the inordinate delay in ruling on this application for rehearing. Not only have the parties been in a state of uncertainty, undoubtedly other patients have been treated at a Baptist Medical Center facility without a final resolution of the issues involved. Furthermore, in the time that has elapsed since our original opinion was issued on January 14, 2011, there have been numerous changes to the membership of this Court, and the delay in ruling on the application could erroneously appear to be outcome driven. Although I am certain that the delay was

not a product of judicial machinations, I must note that such a lengthy delay appears improper and that the mere appearance of impropriety reflects poorly on past and current members of this Court.

That being stated, I now turn to the issue of sovereign immunity. The 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 (hereinafter "the Authority"), argues that State immunity under § 14, Ala. Const. 1901, also known as sovereign immunity, acts as a jurisdictional bar in this case.[26]

Section 14 provides that the State "shall never be made a defendant in any court of law or equity." Neither the

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[26]The Authority raises this argument for the first time on appeal. Generally, 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 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)).

legislature nor this Court has the power to waive the State's immunity from suit. Sovereign immunity provides protection to the State and State-related agencies. The immunity from suit provided by § 14 extends to State universities. Rigby v. Auburn Univ., 448 So. 2d 345, 347 (Ala. 1984)("[W]e conclude that because of the character of the power delegated to it by the state, its relation to the state as an institution of higher learning, and the nature of the function it performs as an institution of higher learning, Auburn University is an instrumentality of the state and therefore immune to suit by the terms of Section 14 of our state constitution."); Taylor v. Troy State Univ., 437 So. 2d 472 (Ala. 1983)(holding that State immunity extends to the State's institutions of higher learning); Harmon v. Alabama Coll., 235 Ala. 148, 177 So. 747 (1937)(holding that the legislature could create a college as a public corporation with the right to sue and to contract, to acquire and to hold real property, that the public corporation so created could incur debt without violating § 213 of the Alabama Constitution, and that the college was immune from suit); Alabama Girls' Indus. Sch. v. Reynolds, 143 Ala. 579, 42 So. 114 (1905)(holding that school was entitled to immunity

from suit under the Alabama Constitution notwithstanding fact that creating statute provided that the school could be sued).

The operation of a hospital by a State university falls within the realm of sovereign immunity. Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013 (Ala. 2003)(holding that sovereign immunity protected State-university hospital from insurer's suit to stop practice of billing more that it would accept as full satisfaction from Medicare or other insurers); Sarradett v. University of South Alabama Med. Ctr., 484 So. 2d 426 (Ala. 1986)(holding that county hospital acquired by university was entitled to sovereign immunity where agreement provided that university desired to operate the hospital as part of its college of medicine and fact that agreement provided that the university would operate the hospital as a public hospital did not deprive the entity of immunity as a subdivision of a State university); and Hutchinson v. Board of Trs. of the Univ. of Alabama, 288 Ala. 20, 256 So. 2d 281 (1971)(recognizing that the operation of a university hospital is a governmental function and that even if operating a university hospital was a business function, the State could not be sued because the

result of allowing a suit would be to directly affect the financial status of the State treasury).

In Armory Commission of Alabama v. Staudt, 388 So. 2d 991 (Ala. 1980), the Court set out the test to determine if an entity is part of the State and therefore entitled to sovereign immunity:

> "Whether a lawsuit against a body created by legislative enactment is a suit against the state depends on the character of power delegated to the body, the relation of the body to the state, and the nature of the function performed by the body. All factors in the relationship must be examined to determine whether the suit is against an arm of the state or merely against a franchisee licensed for some beneficial purpose."

388 So. 2d at 993.

In the present case, the issue is whether a health-care authority established by a State university operating a medical school is entitled to sovereign 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 corporations. 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 Health Care Authorities Act of 1982, § 22-21-310 et seq., Ala. Code 1975 ("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 the intent of the HCA Act:

> "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 that immunity); Clark v. Mobile Cnty. Hosp. Bd., 275 Ala. 26, 151 So. 2d 750 (1963)(holding that the county hospital board was a public agency performing a 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 Cnty., 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); and Moore v. Walker Cnty., 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 Board 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 seeking 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 at § 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 Title 22, § 204(24), Code of Ala. 1940 (Recomp. 1958)(now § 22-21-77, Ala. Code 1975), which allowed a county hospital board "to sue and be sued and to defend suits against it," but also Title 12, §§ 3 and 115, and Title 7, § 96, Code of Ala. 1940 (Recomp. 1958)(now § 11-1-2, § 11-12-5, and § 6-5-20, Ala. Code 1975, respectively), which permitted the county "to sue or be sued" and provided for a 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 such boards expressly provided for suits against them, county hospital boards no longer had immunity from tort liability. 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 damages 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 of Trustees of the University of Alabama ("the Board") created a health-care authority -- the Authority. In accordance with the 2003 amendment to the HCA Act, the Board adopted a resolution creating a health-care authority. Section 22-21-312, Ala.

Code 1975, setting out the legislature's intentions in creating the HCA Act, provides that the purpose of the HCA Act is to "promote the public health of the people of the state ... 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), Ala. Code 1975. 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.

Kay E. Davis, the plaintiff below, 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, therefore, she argues, 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 facilities" 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 facilities 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 facilities. The omission of "private" hospital from the definition does not mean that the legislature intended that health-care authorities could purchase only public hospitals. I 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 University of Alabama at Birmingham Health System ("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 the authority so created would take possession of and 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, Ala. Code 1975, 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 a health-care 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; 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. There is a 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.

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 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 Staudt, supra: (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 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-Washington County Mental Health Board 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), Ala. Code 1975. In Greater Mobile-Washington County Mental Health Board, 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. It is the clear language of the enabling provisions of the HCA Act that a health-care authority created under the HCA Act acts as an agency or instrumentality of its authorizing subdivision and as a political subdivision of the State.

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, 388 So. 2d at 933 (addressing the factor "the relation of the body to the state"); see also Tennessee Valley Printing Co. v. Health Care Auth. of Lauderdale Cnty., 61 So. 3d 1027 (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, Ala. Const. 1901, provides "[t]hat the State of Alabama shall never be made a defendant in any court of law or equity." "The manifest purpose of section 14 ... was to prohibit the Legislature from passing any act authorizing the State to be sued in any court, and clearly any authorization to that end would be void because in violation of the constitutional provision." Alabama Girls' Indus. Sch. v. Reynolds, 143 Ala. at 585, 42 So. at 116. I recognize that § 22-21-318(a)(2), Ala. Code 1975, 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 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).

I disagree with the majority's position that a health-care authority is "an agency or instrumentality of its authorizing subdivision and ... a political subdivision of the State" only in the context of anticompetitive activity. ___ So. 3d at ___. Section 22-21-318 sets out the powers of a health-care authority. The legislature clearly recognizes that a health-care authority, in exercising the broad powers granted it, may engage in anticompetitive activity. However, the legislature chose to allow State universities operating medical schools to create health-care authorities. The Board is the authorizing subdivision of the Authority and, as such, is an agent of the State. The legislature, in allowing a State agency to create a health-care authority cannot then

limit the State agency's immunity to anticompetitive activity.

Accordingly, I believe the circuit court did not have subject-matter jurisdiction over this action; thus, the judgment is void, and the appeal should be dismissed. See Alabama Dep't of Corr. v. Montgomery County Comm'n, 11 So. 3d 189 (Ala. 2008)(holding that because of the State's immunity from suit, a complaint filed solely against the State or one of its agencies is a nullity and void ab initio, and any action taken by a court without subject-matter jurisdiction -- other than dismissing the action -- is void). Therefore, I must dissent.

I also write to address Davis's assertion on rehearing that allowing the Authority immunity will automatically lead to immunity for physicians and employees. I disagree. For example, I note that UAB Hospital and the Board, as extensions of the State, are immune. See Liberty National, supra (noting the correct designation for the hospital and the Board and recognizing their immunity). However, the University of Alabama at Birmingham Health Services Foundation, P.C., is not immune. See Liberty National, supra

(describing the Foundation as a nonprofit, independent professional corporation established by the faculty of the medical school that in part attends to billing services for those physicians and, as such, is not protected by immunity). Physicians working for the Foundation are not immune from suit. Rivard v. University of Alabama Health Servs. Found., P.C., 835 So. 2d 987 (Ala. 2002)(reversing a summary judgment for UAHSF and one of its physicians in a medical-malpractice case in which the plaintiff was treated at UAB Hospital); Waites v. University of Alabama Health Servs. Found., P.C., 638 So. 2d 838 (Ala. 1994)(noting the dismissal of UAB Hospital as a defendant on the basis of immunity but affirming a summary judgment in favor of the UAHSF, physicians, and residents because the plaintiff failed to rebut expert testimony of malpractice). I recognize that a State official or agent may be entitled to State-agent immunity as to actions asserted against him or her in his or her individual capacity. In Ex parte Cranman, 792 So. 2d 392 (Ala. 2000), a medical-malpractice case against a resident physician employed by the University of Alabama's health center, this Court traced the evolution of State-agent immunity, restated the law of State-

agent immunity, and suggested the formulation of a new test for determining when State employees sued in their individual capacities would be entitled to the benefits of State-agent immunity. In Cranman, the resident physicians were not entitled to State-agent immunity. See also Hauseman v. University of Alabama Health Servs. Found., P.C., 793 So. 2d 730 (Ala. 2000)(addressing State-agent immunity under Cranman and holding that physician and resident physicians were not entitled to State-agent immunity); Wimpee v. Stella, 791 So. 2d 915 (Ala. 2000)(holding that resident physicians employed by the University of South Alabama Hospital were not entitled to State-agent immunity). In the present case, Davis also sued two physicians and several fictitiously named parties. Davis did not oppose the properly supported summary-judgment motions filed by the physicians, and it does not appear that any parties were substituted for the fictitiously named parties.

Last, I note that there is an obvious legislative remedy to Davis's assertion that the Authority's immunity will lead to private hospitals' placing their assets in a health-care authority established by a State university operating a

medical school to secure State immunity, which is to repeal the 2003 amendment to the HCA Act. I also note that this Court in Hutchinson v. Board of Trustees of University of Alabama, 288 Ala. 20, 256 So. 2d 281 (1971), addressed criticisms of sovereign immunity and the options advanced in those criticisms. The Court acknowledged that some jurisdictions have judicially abandoned sovereign immunity in cases involving hospitals connected to a State university, but recognized that in Alabama a constitutional amendment would be required to permit legislative implementation of a tort-claims system of compensation at the State level. The Court also recognized that, in the early years of our State,

> "our rule of state governmental responsibility was directly opposite from what it is today. Our first Constitution provided:
>
> > "'The general assembly shall direct, by law, in what manner, and in what courts, suits may be brought against the State.' Ala. Const. Art. 6 § 9 (1819)."

288 Ala. at 23, 256 So. 2d at 282-83.

Accordingly, I respectfully dissent.

Stuart, J., concurs.

SHAW, Justice (dissenting).

In enacting the Health Care Authorities Act of 1982, § 22-21-310 et seq., Ala. Code 1975 ("the HCA Act"), the legislature recognized that publically owned hospitals, and not investor-owned or community-nonprofit hospitals, furnish a substantial part of indigent health-care services in Alabama. The HCA Act thus established a structure wherein certain governmental entities in the State could create organizations--health-care authorities--to operate health-care facilities such as hospitals. In this case, the Board of Trustees of the University of Alabama ("the Board") organized such an authority ("the Authority"). As noted in the main opinion, the Authority is controlled by a board of directors, a majority of which are appointed by the Board. The Authority owns and operates several hospitals, provides community-based health-care services in the Montgomery area, and supports the academic and research mission of the Board.

The law is clear that the Board is an arm of the State; under the Alabama Constitution, it cannot be sued. Ala. Const. 1901, Art. I, § 14. The question that arises is

whether the Authority shares that protection from suit. I believe that it does.

In Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc., 940 So. 2d 990 (Ala. 2006), which is discussed extensively in the main opinion and in Justice Bolin's dissent, this Court applied the three-part test found in Armory Commission of Alabama v. Staudt, 388 So. 2d 991 (Ala. 1980), to determine whether a public corporation qualified as the State of Alabama for purposes of § 14. I see no need to repeat the extensive discussions of Greater Mobile-Washington County Mental Health Board found in those writings; instead, I will note that I believe that the case is distinguishable. The public corporation in that case acted autonomously with minimal oversight and assisted State and local agencies through contracts. 940 So. 2d 1004. Here, the Authority is controlled by a board of directors dominated by the Board's nominees, and it was created as a means through which the Board's expertise and resources could be used to rescue the hospitals the Authority now owns and operates from the financial difficulties of their previous owner, Baptist Health. The Authority operates to serve a public purpose--to

provide health care--and to support the Board's academic and research missions and the other entities the Board controls. Unlike the isolated or autonomous entity in Greater Mobile-Washington County Mental Health Board, I cannot separate the purpose, role, and existence of the Authority from that of its creator, the Board.

Furthermore, Ala. Code 1975, § 22-21-318(c)(2), explicitly states that the Authority "acts as an agency or instrumentality of its authorizing subdivision[] and as a political subdivision of the state." This means that the Authority acts as "a political subdivision of the state" and an "agency or instrumentality" of the Board, its "authorizing subdivision," which, under the constitution, "shall never be made a defendant in any court of law or equity." Ala. Const. 1901, Art. I, § 14. If this is true, as the legislature states, I find it difficult to take the internally inconsistent view that the Authority is to be considered "the State" when competing in the health-care marketplace but not considered "the State" when dispensing health care to patients.

Stuart, J., concurs.