

SUPREME COURT OF ALABAMA

Tad Brown, personal representative and/or administrator of the  
estate of Todd Brown, deceased v. Greater Mobile-Washington  
County Mental Health-Mental Retardation Board, Inc., and Alberta  
D. Abrams

944 So. 2d 954 (Ala. 2006) · No. 1050003 · Decided May 26, 2006

SUMMARY

The Alabama Supreme Court reviewed summary judgments entered for the Greater Mobile-Washington County Mental Health-Mental Retardation Board and its employee, Alberta D. Abrams, in a wrongful-death action arising from a passenger-van accident. Relying primarily on its related decision in *Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc.*, the court held that the Board had not established entitlement to sovereign immunity and that Abrams did not qualify for State-agent immunity. The court reversed and remanded.

CASE DETAILS

|                       |                                                                                                                                                                                                   |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Alabama                                                                                                                                                                          |
| WRITING FOR THE COURT | Harwood, Justice; Nabers, Chief Justice; See, Justice; Lyons, Justice; Woodall, Justice; Stuart, Justice; Smith, Justice; Bolin, Justice; Parker, Justice                                         |
| JURISDICTION          | Alabama                                                                                                                                                                                           |
| DECIDED               | May 26, 2006                                                                                                                                                                                      |
| DOCKET                | 1050003                                                                                                                                                                                           |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                             |
| PROCEDURAL POSTURE    | Plaintiff appealed from summary judgments entered for the defendants in a wrongful-death action.                                                                                                  |
| STANDARD OF REVIEW    | De novo review of summary judgments and immunity issues.                                                                                                                                          |
| PRECEDENTIAL VALUE    | Published Alabama Supreme Court opinion; precedential.                                                                                                                                            |
| PARTIES               | Tad Brown, personal representative and/or administrator of the estate of Todd Brown, deceased v. Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc., Alberta D. Abrams |

## TOPICS

wrongful death

summary judgment

civil procedure

constitutional law

torts

## PRACTICE AREAS

torts

constitutional law

civil procedure

## QUESTIONS PRESENTED

1. Whether the Board qualified as a State agency entitled to sovereign immunity under Article I, § 14, of the Alabama Constitution of 1901.
2. Whether Abrams qualified as a State agent entitled to State-agent immunity.
3. Whether the history and requirements of the Wyatt litigation established or supported the Board's status as a State agency entitled to sovereign immunity.

## HOLDINGS

1. The Board failed to show that it was a State agency entitled to sovereign immunity under Article I, § 14, of the Alabama Constitution of 1901.
2. Because the Board was not shown to be a State agency, Abrams could not be classified as a State agent entitled to State-agent immunity.
3. The Wyatt litigation did not establish that local community facilities had to be owned or operated by State entities protected by § 14 and did not contradict the court's analysis in Kininessi.

## KEY QUOTATIONS

*“'[M]atters not argued in an appellant's brief on original submission cannot be raised for the first time on application for rehearing.'”* (944 So. 2d at 956)

*“'[the Board] simply assumes that all actions taken in response to the Wyatt litigation must be taken by State entities that are within the scope of § 14 of the Constitution, but Wyatt is completely unconcerned with and has no bearing on that question.'”* (944 So. 2d at 956)

## FACTUAL BACKGROUND

Todd Brown was one of 11 residents of a group home traveling as a passenger in a van owned and operated by the Greater Mobile-Washington County Mental Health-Mental Retardation Board. The van was driven by Alberta D. Abrams, the group home's house manager, and Todd Brown was killed in the accident. Brown's personal representative brought a wrongful-death action against the Board and Abrams.

## PROCEDURAL HISTORY

The Mobile Circuit Court entered separate summary judgments for the Greater Mobile-Washington County Mental Health-Mental Retardation Board and Alberta D. Abrams, concluding that the Board was a State agency entitled to sovereign immunity and that Abrams was entitled to State-agent immunity. Brown appealed. The

Supreme Court of Alabama relied substantially on its contemporaneous decision in *Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc.* and reversed and remanded.

#### DISPOSITION

reversed\_and\_remanded

#### REMAND INSTRUCTIONS

The cause was remanded for further proceedings consistent with the opinion.

#### CASES CITED

- *Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc.*, 940 So. 2d 990 (Ala. 2006)
- *Rich v. City of Mobile*, 410 So. 2d 385 (Ala. 1982)
- *Ex parte Cranman*, 792 So. 2d 392 (Ala. 2000)
- *Wyatt ex rel. Rawlins v. Sawyer*, 219 F.R.D. 529 (M.D. Ala. 2004)
- *Wyatt v. Rogers*, 985 F. Supp. 1356 (M.D. Ala. 1997)
- *Wyatt v. King*, 803 F. Supp. 377 (M.D. Ala. 1992)
- *Wyatt v. Wallis*, Civ. A. No. 3195-N (M.D. Ala. Sept. 22, 1986)
- *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala. 1971)
- *SouthTrust Bank v. Copeland One, L.L.C.*, 886 So. 2d 38, 43 (Ala. 2003)
- *Vesta Fire & Insurance Corp. v. Milam & Co. Construction*, 901 So. 2d 84, 104 (Ala. 2004)

#### OPINION

##### PER CURIAM.

944 So. 2d 954 (2006) *Tad BROWN*, personal representative and/or administrator of the estate of *Todd Brown, deceased v. GREATER MOBILE-WASHINGTON COUNTY MENTAL HEALTH-MENTAL RETARDATION BOARD, INC.*, and *Alberta D. Abrams*. 1050003. Supreme Court of Alabama. May 26, 2006. *Toby D. Brown*, *George W. Finkbohner III*, and *George M. Dent III* of *Cunningham, Bounds, Crowder, Brown & Breedlove, L.L.C.*, Mobile; and *L. Daniel Mims*, Mobile, for appellant.

*W. Austin Mulherin III* and *Kathryn T. Hamilton* of *Frazer, Greene, Upchurch & Baker*, Mobile; and *Edward M. Weed* of *Martin Weed, LLC*, Birmingham, for appellees. *HARWOOD*, Justice. This case arises out of an accident involving a passenger van owned and operated by the Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc. ("the Board"). At the time of \*955 the accident, 11 residents of a group home operated by the Board were passengers in the van.

This Court's opinion in *Ex parte Greater Mobile-Washington County Mental Health-Mental Retardation Board, Inc.*, 940 So. 2d 990 (Ala.2006) (hereinafter "*Kininessi*"), described the accident involving the van, in which Dwight Eric Kininessi, a resident of the group home, was killed. One other passenger, Todd Brown, was killed in the accident. Kininessi's mother and Brown's father filed separate wrongful-death actions against the Board and Alberta D. Abrams, the house manager of the group home who was driving the van at the time of the accident (hereinafter referred to jointly as "the defendants").

In each action 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 absolute "sovereign immunity" under Art. I, § 14, Alabama Constitution of 1901, and Abrams claiming "State-agent" immunity.

The circuit judge assigned the case involving Kininessi denied the motions for a summary judgment filed in it, and the defendants petitioned this Court for a writ of mandamus directing the judge to grant their motions. This Court undertook a thorough review of the caselaw relating to the criteria for determining whether a particular entity qualifies as a State agency for purposes of § 14 and concluded that the Board had not shown that it qualified as a State agency and, consequently, that Abrams could not be classified as a State agent.

The Court also explained why it rejected the Board's alternative claim of "substantive immunity" of the type recognized by *Rich v. City of Mobile*, 410 So. 2d 385 (Ala.1982), and its progeny. In the present appeal, the plaintiff, Tad Brown, proceeding as "personal representative and/or administrator of the estate of Todd Brown," appeals from the ruling of a different circuit judge handling his case.

The judge in Brown's case entered judgments for the Board and for Abrams, based on his conclusion that the Board was entitled to sovereign immunity as a State agency and that Abrams, as its employee, was entitled to State-agent immunity, as articulated in *Ex parte Cranman*, 792 So. 2d 392 (Ala.2000). Our opinion in *Kininessi* essentially disposes of all of the arguments presented by the Board in this present appeal; for that reason and other reasons hereinafter explained, we reverse the summary judgments for the Board and Abrams entered by the Mobile Circuit Court on August 23, 2005.

In their joint brief filed with this Court on March 16, 2006, the Board and Abrams acknowledge this Court's opinion in *Kininessi* issued on March 3, 2006, but they do not undertake to examine, or to distinguish, its rationale and holding.

The only new argument they advance in support of their immunity theory is the suggestion that this Court in *Kininessi* "overlooked" the recent history and current operations of the State of

Alabama's mental-health system as described and mandated over the course of what they refer to as the "Wyatt litigation," comprising *Wyatt ex rel. Rawlins v. Sawyer*, 219 F.R.D.

529 (M.D.Ala.2004); *Wyatt v. Rogers*, 985 F. Supp. 1356 (M.D.Ala.1997); *Wyatt v. King*, 803 F. Supp. 377 (M.D.Ala.1992); *Wyatt v. Wallis*, Civ. A. No. 3195-N, September 22, 1986 (M.D.Ala.1986) (not reported in F.Supp.); and *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D.Ala.1971).

We reject the notion that we "overlooked" the Wyatt litigation in *Kininessi*, for the simple reason that in their briefs filed in *Kininessi* the Board and Abrams never cited any of those cases or alluded to them in any fashion whatsoever in either \*956 the trial court or their submissions to this Court, until after our opinion in *Kininessi* was issued on March 3, 2006.

In their application for rehearing in *Kininessi*, the Board and Abrams argued for the first time that implications of the Wyatt litigation supported their contention that the Board was due recognition as a State agency clothed with sovereign immunity.

However, "[m]atters not argued in an appellant's brief on original submission cannot be raised for the first time on application for rehearing." *SouthTrust Bank v. Copeland One, L.L.C.*, 886 So. 2d 38, 43 (Ala.2003) (opinion on application for rehearing). Likewise, in this case neither the Board nor Abrams cited the Wyatt litigation in their respective motions for a summary judgment and neither the 19-page summary-judgment order the trial judge entered for the Board nor the 24-page summary-judgment order the judge entered for Abrams contained any reference to the Wyatt litigation.

Only in the Board's brief filed with this Court 13 days after our opinion in *Kininessi* was issued did the Board turn to the Wyatt litigation as support for its position that it was entitled to sovereign immunity as a State agency.

However, subject to limited exceptions based on due-process constraints requiring notice at the trial level, "an appellate court will affirm a summary judgment on the basis of a law or legal principle not invoked by the moving party or the trial court, even though an appellate court will not reverse a summary judgment on the basis of a law or legal principle not first argued to the trial court by the nonmoving party."

*Vesta Fire & Ins. Corp. v. Milam & Co. Constr.*, 901 So. 2d 84, 104 (Ala.2004). Nonetheless, we do not find those features of the Wyatt litigation the Board now discusses to be contrary to our analysis and holding in *Kininessi*.

The Wyatt litigation simply required that the Alabama Department of Mental Health and Mental Retardation develop a broad range of community facilities and programs so that persons theretofore hospitalized in State institutions but not requiring institutionalization could experience

the benefits of community placement. How that was accomplished, and through what mechanisms and facilities, was not dictated by the Wyatt litigation; those decisions did not undertake to specify by whom the local community facilities should be owned or operated.

Nothing in those decisions indicated that local community facilities could not or should not be owned and operated by the State of Alabama, as opposed to private entities, local governmental entities, some form of public corporation, or combinations thereof.

As Brown aptly points out in his reply brief, "[the Board] simply assumes that all actions taken in response to the Wyatt litigation must be taken by State entities that are within the scope of § 14 of the Constitution, but Wyatt is completely unconcerned with and has no bearing on that question." (Brown's reply brief, p. 8.)

The legislation authorizing the creation of public corporations such as the Board was enacted in 1967, well in advance of the first of the decisions in the Wyatt litigation, and it is therefore clear that those public corporations were not created simply to implement the mandates of the Wyatt litigation.

Having concluded that our opinion in Kinnessi fully addresses and disposes of all contentions and arguments now advanced by the Board and Abrams, other than their arguments concerning the implications of the Wyatt litigation, which we today reject, we again hold that the Board has not shown itself to be a State agency entitled to sovereign immunity under § 14, Ala.

Const.1901, and that Abrams consequently \*957 does not qualify as a State agent. We reverse the summary judgments entered in favor of the Board and Abrams and remand the cause for further proceedings consistent with this opinion. REVERSED AND REMANDED. NABERS, C.J., and SEE, LYONS, WOODALL, STUART, SMITH, BOLIN, and PARKER, JJ., concur.