No. 22-3000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TAMATHA HENNESSEY,
Plaintiff-Appellant,

v.

UNIVERSITY OF KANSAS HOSPITAL AUTHORITY,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Kansas (Civil Action No. 2:21-CV-02231, Hon. Eric F. Melgren)

BRIEF FOR APPELLANT

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STATEMENT OF PRIOR OR RELATED APPEALS

There are no prior or related appeals in this case.

STATEMENT OF JURISDICTION

Appellant Tamatha Hennessey brought this action for negligent supervision against Appellee University of Kansas Hospital Authority (the "Hospital Authority"). The district court had jurisdiction pursuant to 28 U.S.C. § 1332 because Ms. Hennessey is a citizen of Missouri, the Hospital Authority is a citizen of Kansas, and the amount in controversy is over $75,000. The district court granted the Hospital Authority's Motion to Dismiss on December 23, 2021 and entered final judgment that same day. (Judgment, ROA at 118.)[1] The notice of appeal was timely filed in the district court on December 31, 2021. (Notice of Appeal, ROA at 119.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Did the Hospital Authority meet its burden to show it was entitled to sovereign immunity when it made no argument and provided no evidence in its motion as to any of the four arm-of-

[1] Citations to "ROA" are to the record on appeal, Appellate ECF No. 6.

the-state factors?

2. Did the district court err when it nevertheless found that the Hospital Authority was an arm of the state and dismissed Ms. Hennessey's *pro se* complaint, when it based its decision on only three of the four arm-of-the-state test factors, and based its findings with respect to those factors on facts that the Supreme Court and Circuits have found to be legally irrelevant?
3. If enough information is not available in the present record to determine whether the Hospital Authority is an arm of the state, did the district court err in dismissing the *pro se* complaint without ordering discovery?

INTRODUCTION

Ms. Hennessey went to the emergency room of the University of Kansas Hospital seeking relief from severe pain. Hospital staff ordered MRI and CT scans to try and diagnose what was wrong. Ms. Hennessey, who had been given medication that made her drowsy, was taken by a technician to a remote part of the hospital, bypassing other scanning rooms, and fell asleep during one of the scans. When Ms.

Hennessey woke up, she found herself being sexually assaulted by the technician.

Soon after, she reported the sexual assault, and the technician was charged with Aggravated Sexual Battery. While the criminal matter was pending, Ms. Hennessey brought this civil action *pro se* against the Hospital Authority for negligent supervision.

The Hospital Authority filed a Motion to Dismiss contending over multiple paragraphs that the court lacked jurisdiction because Ms. Hennessey had failed to explicitly claim diversity jurisdiction. As a backup, in two sentences the Hospital Authority also declared without elaboration or argument that it was entitled to sovereign immunity.

The district court recognized that the Hospital Authority had the burden of proving it was entitled to a sovereign immunity defense. And it acknowledged that the Hospital Authority had not addressed any of the four factors courts use to determine whether an entity is an arm of the state entitled to such a defense, nor provided any evidence to support its assertion of immunity. Nevertheless, the district court undertook its own analysis of the four-factor test based on its own research, and held that the Hospital Authority was an arm of the state

entitled to Eleventh Amendment sovereign immunity.

The district court erred in two ways, and should be reversed.

First, the Hospital Authority failed to meet its burden by neither discussing the relevant arm-of-the-state factors nor providing any evidence pertinent to the arm-of-the-state analysis. The Hospital Authority's failure to meet its burden is fatal to its motion. Second, the district court erred in finding that the Hospital Authority is an arm of the state. Courts in this Circuit use four factors to determine whether an entity is an arm of the state; three of the four weigh strongly against finding that the Hospital Authority is an arm of the state. Thus, the Hospital Authority is not entitled to Eleventh Amendment sovereign immunity. For either reason, the lower court should be reversed.

STATEMENT OF THE CASE

I. The Hospital Authority Was Created To Privatize The Hospital So It Could Be Self-Sustaining.

This case arises out of the assault of Ms. Hennessey, described in the following section, by an employee of the University of Kansas Hospital, which is governed by the Hospital Authority. The Hospital Authority was created in 1998 by the Kansas Hospital Authority Act, Kan. Stat. Ann. § 76-3301 *et seq*. (the "Act").

Before 1998, the University of Kansas Hospital was under control of the Kansas Board of Regents. The University of Kansas Hospital was experiencing declining revenues resulting from increased write offs for indigent care and decreased admissions. Bonar Menninger, *KU Med Wants New Structure to Survive*, Kan. City Bus. J., (Jan. 26, 1997, 11:00 PM), https://www.bizjournals.com/kansascity/stories/1997/01/27/story7.html.[2] The Board of Regents wanted to make the hospital more economically viable, so it engaged a consulting firm to review the hospital structure and recommend how it should react to market changes. J. Duncan Moore Jr., *Under New Authority: KU Hospital Joins Movement Toward Independence*, Modern Healthcare (Feb. 17, 1997, 12:00 AM), https://www.modernhealthcare.com/article/19970217/PREMIUM/702170311/under-new-authority-ku-hospital-joins-movement-toward-independence.

Menninger characterized numerous problems identified by the

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[2] The article refers to the University of Kansas Hospital as the University of Kansas Medical Center Hospital. When the legislature spun off the University of Kansas Hospital to the Hospital Authority, it was separated from the School of Medicine and became the University of Kansas Hospital. The University of Kansas Health System, *Our History*, https://www.kansashealthsystem.com/about-us/our-history (last visited April 7, 2022).

report, including, among others, that the Hospital had "[l]imited management flexibility and decision-making autonomy, [l]ack of timely access to capital, [l]imited attractiveness to potential business partners, [and i]nefficient and costly operating practices." Menninger, *supra*.

With respect to inefficient and costly operating practices, the study reported that "state regulations and administrative practices add complexity and cost to department operations as compared to private sector operations, resulting in inefficient use of scarce resources and poor internal customer satisfaction." *Id*. (quoting the consultant's report). Specifically, the hospital had to get legislative approval to issue bonds and had to follow state procedures for hiring, joint ventures, procurement, and contracting, which resulted in an inability to compete in the market. *Id*.

The chairwoman of the Public Health and Welfare committee of the Kansas legislature, state Senator Sandy Praeger, commented in an interview at the time that running the hospital efficiently is "difficult to do in a state bureaucracy." Moore, *supra*. To solve the problem, she said "the mindset is for privatization." *Id*. Similarly, then-Chancellor Robert Hemingway recognized that the hospital would not "be able to

compete very effectively if it retains status as a state agency." *Id.*

The report produced by the consultants came to the same conclusion, and recommended that the Kansas legislature create the Hospital Authority to get the University of Kansas Hospital out from under the control of the Board of Regents to give it the flexibility and autonomy it needed to succeed. Menninger, *supra.* This transition, Chancellor Hemingway noted, would "give [the University of Kansas Hospital] the flexibility to operate with the discipline that comes from free-market competition." Moore, *supra.*

Following the recommendation of the report, the Board of Regents voted to create the Hospital Authority. Menninger, *supra.* The findings and purpose section of the Act provides that the needs of the citizens "will be best served if the university of Kansas hospital is transferred to and operated by an independent public authority." Kan. Stat. Ann. § 76-3302(a)(7) (2022). The legislature also found that to meet its mission, the hospital required "specialized management and operation to remain economically viable to earn revenues necessary for its operation." *Id.* § 76-3302(a)(6).

After the Hospital Authority was created, *id.* § 76-3304, the

legislature transferred control of and responsibility for the University of Kansas Hospital from the Board of Regents to the Hospital Authority, *id*. § 76-3310. This removed the hospital "from the regulatory purview" of the Board of Regents, and transferred to the Hospital Authority all liabilities and duties previously held by the Board of Regents with respect to the hospital. Robin Kempf, *1998 Legislative Update*, J. Kan. B. Ass'n at 18 (Aug. 1998). *See also* Kan. Stat. Ann. § 76-3309(b)(1) (2022) (assumption of liabilities, leases, duties, and responsibilities); *id.* § 76-3310 (after the transfer "the regents shall have no further control over, or responsibility for the operation of the university of Kansas hospital"). Employees of the hospital transferred to the Hospital Authority and were no longer categorized as state employees. *Id*. §§ 76-3311(c), 3303(h); Kempf, at 18.

According to the Frequently Asked Questions on the University of Kansas Health System[3] website, it is a "not-for-profit, independent

[3] Over time, the University of Kansas Hospital merged with other hospitals and clinics. *See* The University of Kansas Health System Fact Sheet, https://www.kansashealthsystem.com/-/media/Project/Website/PDFs-for-Download/hospital-fact-sheet-082020.pdf (entity now consists of over 100 locations). The entity supervised by the Hospital Authority is now called the University of Kansas Health System.

hospital authority" that "receives no state or local funding." The University of Kansas Health System, Frequently Asked Questions, https://www.kansashealthsystem.com/giving/contact-us/faq (last accessed April 7, 2022). *See also* The University of Kansas Health System, Our History, *supra* n.2 (noting that "when it became an independent hospital authority" in 1998, it began "receiving no state funding").

The Hospital Authority can issue bonds without legislative approval (which expressly do not "constitute a debt of the states or the regents"); hire its own employees; engage in joint ventures; and enter its own contracts and procurement arrangements. Kan. Stat. Ann. §§ 76-3308, 76-3312 (2022).

II. Ms. Hennessey Brought Suit After Being Sexually Assaulted During An MRI At The University of Kansas Hospital.

After experiencing two weeks of "excruciating" pain in her shoulder, Appellant Tamatha Hennessey sought treatment and relief at the University of Kansas Hospital emergency department. (Compl.

¶¶ 12–13.)[4] Ms. Hennessey had experienced this type of splitting pain before when a cervical fusion developed into osteomyelitis[5] requiring months of inpatient treatment, and was anxious this was the cause of her pain again. (*Id.* ¶ 13.) To help with her pain and anxiety, Ms. Hennessey was given several medications, including Ativan, which can have a sedative effect.[6] (*Id.* ¶ 15.) The nurse practitioner examining Ms. Hennessey also ordered a CT scan of her cervical spine and an MRI of her shoulder. (*Id.* ¶ 14.) Jonathan McIntire was assigned to perform these scans. (*Id.* ¶ 17.)

McIntire took Ms. Hennessey from her room, walked past a radiology room near the emergency department, and traveled over ten minutes to a radiology room in a remote part of the hospital. (*Id.* ¶¶ 19–21.) Once alone in the room, McIntire had Ms. Hennessey

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[4] Citations to the Complaint, ROA 6–16, are to the relevant paragraph(s) of the Complaint, not to the relevant page of the record on appeal.

[5] Osteomyelitis is a condition, usually resulting from an infection, that causes the bone tissue to become inflamed and swollen. Johns Hopkins Medicine, *Osteomyelitis*, https://www.hopkinsmedicine.org/health/conditions-and-diseases/osteomyelitis (last visited April 7, 2022).

[6] MNT Medical Network, *Ativan (lorazempam)*, (medically reviewed by Alex Brewer, Feb. 11, 2022) https://www.medicalnewstoday.com/articles/326015.

change in front of him before strapping her arms and legs to the MRI table. (*Id.* ¶¶ 23–26, 35.) The medication given to Ms. Hennessey earlier began to make her sleepy and she started to fall asleep during the MRI. (Memorandum and Order (hereinafter "Order"), ROA at 108.) Ms. Hennessey "awoke to [McIntire] sexually assaulting her." (*Id.*; *see also* Compl. ¶ 38 ("Plaintiff was awakened to Jonathan McIntire pinching her nipples very hard while she was still strapped down.").) The hospital employee continued to grope her breasts and put his mouth over them. (Compl. ¶ 39.) The records indicate than McIntire completed the scans four hours later. (*Id.*)

Ms. Hennessey reported to the hospital police that she had been sexually assaulted. (Compl. Exh. 1, ROA at 16.)

III. The Hospital Authority Failed To Provide Evidence Or Argument As To The Arm Of The State Test.

While the criminal investigation was ongoing, Ms. Hennessey filed her *pro se* complaint on May 19, 2021, alleging that the Hospital Authority was negligent in its supervision of McIntire. (Compl., Count I, ¶¶ k–o.) The Hospital Authority filed a motion to dismiss arguing lack of subject matter jurisdiction (Mot. Dismiss, ROA at 23–24), supported by a three-page memorandum (Mem. Supp. Mot. Dismiss,

ROA at 25–27.) Of those three pages, all but two sentences were dedicated to arguing that the court lacked subject matter jurisdiction, alleging that Ms. Hennessey had not adequately asserted diversity jurisdiction under 28 U.S.C. § 1332. (Mem. Supp. Mot. Dismiss, ROA at 25–27.) In those two remaining sentences, the Hospital Authority asserted that is an arm of the state immune from suit. (*Id.*, ROA at 26–27.) The Hospital Authority provided no argument with respect to the four-factor test for determining whether an entity is an arm of the state, nor did it provide any evidence to support its assertion of immunity. (*Id.*)

The Hospital Authority saved for its reply brief the only support for its assertion of Eleventh Amendment immunity: three citations, unsupported by argument or explanation, to two subsections of the Act that detail (i) the Hospital Authority's powers and duties, (ii) how its board is appointed and confirmed, and (iii) provide that the Hospital Authority is deemed to perform an essential government function. (Reply in Supp. Mot. Dismiss, ROA at 90.) At no point, either in its motion or in its reply brief, did the Hospital Authority address the four-factor test for determining whether an entity is an arm of the state

entitled to Eleventh Amendment sovereign immunity.

The district court acknowledged that the Hospital Authority bore the burden of proof as the party asserting Eleventh Amendment immunity. (Order, ROA at 111.) And it noted that the Hospital Authority provided no evidence or argument to support its assertion that it was entitled to immunity:

> In this case, [the Hospital Authority] has not addressed the four-factor test in arguing that it is entitled to Eleventh Amendment immunity. Instead, [the Hospital Authority] cursorily asserts in one paragraph that it is an arm of state and cites two statutes from the University of Kansas Hospital Act, which [the Hospital Authority] mislabels, in support of its argument.

(*Id.*) Rather than denying the motion, however, the district court took on "the task of analyzing the four-factor test based on its own review of the Act and the pertinent case law." (*Id.*)

As to the finance factor, which the district court recognized as "particularly important," the court found that it did not have sufficient information to determine whether that factor weighed in favor or against arm of the state status. (Order, ROA at 114–15.) As to the remaining factors, the district court found that the balance of the factors weighed in favor of arm of the state status, and thus concluded

that the Hospital Authority is an arm of the state entitled to Eleventh Amendment immunity. (Order, ROA at 116.) This appeal followed.

SUMMARY OF THE ARGUMENT

This Court should reverse the decision of the district court for two reasons: the Hospital Authority (1) did not meet its burden of proving that it is an arm of the state entitled to Eleventh Amendment sovereign immunity, and (2) could not have done so even if it had tried, because it is not an arm of the state.

The arm-of-the-state analysis is governed by the overarching "twin goals of the Eleventh Amendment": protecting the state's finances and respecting its dignitary interests. *Fresenius Med. Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63 (1st Cir. 2003) (citing *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39–41 (1994)). But "[n]ot all entities created by states are meant to share state sovereignty." *Id.* at 64. And it is "every bit as much an affront to the state's dignity and fiscal interests" when a federal court "find[s] erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty." *Id.* at 63.

To help avoid such errors, the burden of proving that an entity is an arm of the state entitled to Eleventh Amendment sovereign immunity rests on the entity asserting the defense. *See* part I.A. The Hospital Authority here did not meet that burden: it provided no argument as to any of the factors courts consider in determining whether an entity is an arm of the state, nor did it provide any evidence from which a court could determine such entitlement. *See* part I.B.

Second, even if the Hospital Authority had put on the bare minimum in the way of argument or evidentiary support, it is not an arm of the state and thus is not entitled to Eleventh Amendment immunity. *See* part II. Three of the four factors used by the Tenth Circuit weigh in favor of finding that the Hospital Authority is not an arm of the state: (i) the Hospital Authority is financially independent from the state, because it is responsible for its own debts and losses, can issue bonds, and does not rely on state funds, and the state is not legally liable for a judgment against the Hospital Authority; (ii) the Hospital Authority is autonomous from the state because it can sue and be sued in its own name, own property, and make contracts, and was created for the purpose of having this autonomy; and (iii) the Hospital

Authority's role as a provider of health services, which are not a uniquely governmental function, outweigh the way it is characterized under state law for purposes of the arm of the state test.

Thus, the district court erred in finding that the Hospital Authority was entitled to Eleventh Amendment sovereign immunity.

ARGUMENT

I. THE HOSPITAL AUTHORITY DID NOT MEET ITS BURDEN TO ESTABLISH A SOVEREIGN IMMUNITY DEFENSE.

The Hospital Authority failed to meet its burden to prove that it was entitled to an Eleventh Amendment sovereign immunity defense, and thus the lower court's decision should be reversed.[7] The Eleventh Amendment is an affirmative defense that provides immunity from suit to states and arms of the state. *Teichgraeber v. Mem'l Union Corp. of the Emporia State Univ.*, 946 F. Supp. 900, 903 (D. Kan. 1996). As such, the burden of proof is on the party asserting the defense, the Hospital Authority. *See* part I.A. The Hospital Authority failed to meet

[7] The granting of a motion to dismiss under 12(b)(1) is reviewed *de novo*. *Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004). The lower court addressed this issue in its opinion. (Order, ROA at 107.)

that burden, because it neither addressed nor provided any evidence to support the four-factor test[8] for determining whether an entity is an arm of the state entitled to sovereign immunity. *See* part I.B.

A. The Party Asserting Sovereign Immunity Bears The Burden Of Proof On That Defense.

As a preliminary matter, this Court should clarify what is already implicit in this Circuit and explicit in many others: that the burden of proof rests on the party asserting an Eleventh Amendment sovereign immunity defense. Every federal court of appeals to have addressed the question has so held. *Thomas v. Guffy*, No. CIV-07-823-W, 2008 WL 2884368, at *4 (W.D. Okla. July 25, 2008) (collecting cases and concluding that this Court would follow the other circuits); *see also Leitner v. Westchester Cmty. College*, 779 F.3d 130, 134 (2d Cir. 2015) ("All Circuits to have considered the question . . . require the party asserting Eleventh Amendment immunity to bear the burden of demonstrating entitlement."); *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014) (joining "every other court of appeals that has addressed the issue"); *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963

[8] *See* part II, *infra*.

(6th Cir. 2002); 17A Moore's Federal Practice – Civil § 123.25 ("The party asserting Eleventh Amendment immunity bears the burden of proving its applicability."). Courts have unanimously come to this conclusion, for two reasons.

First, sovereign immunity shares common characteristics with other affirmative defenses. *See Wisconsin Dep't Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (characterizing sovereign immunity as a defense). Like other affirmative defenses—and unlike subject matter jurisdiction—sovereign immunity can be waived, *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984), and a court need not raise the issue *sua sponte*, *Schacht*, 524 U.S. at 389. *See, e.g.*, *Hutto,* 773 F.3d at 543 (reasoning that sovereign immunity is akin to an affirmative defense, rather than a traditional jurisdictional issue). And because, like other affirmative defenses, the party asserting sovereign immunity would benefit from its protection, the asserting party must prove it applies. *Christy v. Pennsylvania Turnpike Commission*, 54 F.3d 1140, 1144 (3rd Cir.), *cert. denied*, 516 U.S. 932 (1995) (placing burden of proof of Eleventh Amendment sovereign immunity defense on defendant seeking protection of the defense); *see also Teichgraeber*, 946

F. Supp. at 903 (same); *Gragg*, 289 F.3d at 963 (same); *Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000) (same); *ITSI TV Prods. v. Agricultural Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993) (same).

Second, assigning the burden of proof to the party raising the defense supports considerations of fairness. *Teichgraeber*, 946 F. Supp. at 903 (citing *ITSI TV Prods.*, 3 F.3d at 1292). Disputes of Eleventh Amendment immunity generally arise "only where a relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state." *ITSI TV Prods.*, 3 F.3d at 1291. "In such cases, the 'true facts' as to the particulars of the arrangement will presumably 'lie peculiarly within the knowledge of' the party claiming immunity.'" *Id.* Given that, "'[c]onsiderations of fairness' . . . support the conclusion that the public entity ought to bear the burden of proving the facts that establish its immunity under the Eleventh Amendment." *Id.* at 1292. *Cf. United States v. New York, New Haven & Hartford R.R. Co.*, 355 U.S. 253, 256 n.5 (1957) ("The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.").

This Court should confirm the standard district courts within this circuit are already employing (*see* Order, ROA at 111), and acknowledge that the burden of proof lies with the party claiming entitlement to Eleventh Amendment sovereign immunity.

B. The Hospital Authority Did Not Meet Its Burden Of Proof.

The Hospital Authority failed to meet its burden to demonstrate it was entitled to Eleventh Amendment sovereign immunity.

In a three-page memorandum of law accompanying its Motion to Dismiss, the Hospital Authority dedicated all but two sentences to the issue of diversity jurisdiction, claiming that Ms. Hennessey had not adequately pled diversity jurisdiction under 28 U.S.C. § 1332. (Mem. Supp. Mot. Dismiss, ROA at 26.) As a fallback position, in those two remaining sentences the Hospital Authority asserted that it is "an instrumentality of the State of Kansas, and Eleventh Amendment immunity would prohibit a federal exercise of personal jurisdiction." (*Id.*)

The Hospital Authority made no argument as to any of the factors courts consider in deciding whether an entity is an arm of the state. *See* part 1. And it provided no evidence—evidence uniquely in its control—

to support findings as to any of the factors. *See* part 2. Thus, it failed to meet its burden to show that it was entitled to sovereign immunity.

1. The Hospital Authority did not put forward any arguments about the arm-of-the-state analysis.

The Hospital Authority failed to meet its burden of proving it was entitled to sovereign immunity as an arm of the state when it did not address any of the factors courts use to determine whether an entity is an arm of the state. A party fails to meet its burden of proving it is an arm of the state when it does not provide an analysis for each arm-of-the-state factor. *See, e.g.*, *Smith v. Fisher*, 12-CV-02449, 2013 U.S. Dist. LEXIS 105274, at *1 (D. Colo. July 26, 2013) (denying motion to dismiss where defendant did not discuss arm-of-the-state factors); *Robinson v. Paulhus*, No. CV-1912572, 2020 WL 2732132, at *2 (D.N.J. May 22, 2020) (same); *Brady v. Off. of the Cty. Prosecutor, Cty. of Bergen*, No. CV-1916348, 2020 WL 5088634, at *3 (D.N.J. Aug. 28, 2020) (same).

For example, in *Smith v. Fisher*, the defendant moved to dismiss on sovereign immunity grounds, asserting that the Eleventh Amendment bars federal actions against a state entity. Motion to Dismiss (Docket #23) at 7, *Smith v. Fisher*, 12-CV-02449-MSK-BNB, (D. Colo. Dec. 12, 2012). Though the defendant stated that it was "a

subdivision of the State of Colorado," *id.* at 3, and described the inapplicability of an exception to Eleventh Amendment immunity in its case, *id.* at 7, the district court denied the defendant's motion to dismiss because it did not discuss the four *Steadfast* factors for establishing that it was an arm of the state, *Smith*, 2013 U.S. Dist. LEXIS 105274, at *3–4. The court recognized the need for the defendant to provide "thorough discussion of the *Steadfast* factors and supporting evidence" before it could assess the defendant's entitlement to sovereign immunity. *Id.*

Similarly, in *Brady*, the court held that the defendants failed to meet their burden of proof on a sovereign immunity defense in their motion to dismiss where they "[did] not frame their arguments in terms of the [arm-of-the-state] factors." 2020 WL 5088634, at *3. Likewise, in *Robinson*, the county prosecutor defendants moved to dismiss a *pro se* plaintiff's claim based on arm-of-the-state sovereign immunity. 2020 WL 2732132, at *1. The defendants' motion, however, did not discuss the arm-of-the-state factors.[9] *Id.* at *2. "[B]y omitting necessary

[9] The Third Circuit's arm-of-the-state test is substantially similar to the Tenth Circuit's test, and *Robinson* arose in the same 12(b)(1) motion to dismiss context as here. *See id.* at *2–3 (listing the Third Circuit's arm-of-the-state factors as "(1) the funding factor: whether the state treasury is legally responsible for an adverse judgment entered

discussion of the [arm-of-the-state] factors," the defendants failed to meet their burden of proof. *Id.* at *2.

Here, like in *Smith* and *Brady*, the district court acknowledged that the Hospital Authority "cursorily assert[ed] in one paragraph that it is an arm of state," but failed to address any of the arm-of-the-state factors. (Order, ROA at 111.) In a three-page memorandum of law accompanying the Motion to Dismiss, the Hospital Authority mentioned the idea of sovereign immunity in two sentences. (Mem. Supp. Mot. Dismiss, ROA at 26.) In those two sentences, the Hospital Authority did not discuss the arm-of-the-state factors.[10] In its Reply to

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against the alleged arm of the State; (2) the status under state law factor: whether the entity is treated as an arm of the State under state case law and statutes; and (3) the autonomy factor: whether, based largely on the structure of its internal governance, the entity retains significant autonomy from state control.").

[10] In fact, the phrase "arm of the state" does not appear until the Hospital Authority's Reply to Hennessey's Response. As a general rule, a party is prohibited from raising new arguments and issues in a reply brief. *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1175 (10th Cir. 2000). A court's choice to rely on those arguments generally requires it to give the plaintiff an opportunity to file a sur-response. *Mike v. Dymon, Inc.*, No. CIV. A. 95-2405-EEO, 1996 WL 427761, at *2 (D. Kan. July 25, 1996). After the Hospital Authority raised the issue of arm of the state sovereign immunity for the first time in its Reply, Hennessey sought permission to file a sur-response addressing the new arm of the state issue. (Pl. Mot. Leave to File a Sur-Response Mem., ROA at 100; Sur-

Hennessey's Response, the Hospital Authority used the term "arm of the state" for the first time, but it still ignored the *Steadfast* factors. (Reply, ROA at 90.) Thus, as in *Smith* and *Brady*, the Hospital Authority failed to meet its burden of proof and the motion should not have been granted. *See Smith*, 2013 U.S. Dist. LEXIS 105274, at *3–4; *Brady*, 2020 WL 5088634, at *3.

Rather than acknowledging or discussing the *Steadfast* factors, the Hospital Authority cited to a single district court case without discussing it. (*See* Mem. Supp. Mot. Dismiss, ROA at 26 (citing *Perkins v. Univ. of Kan. Med. Ctr.*, 2014 U.S. Dist. LEXIS 47491, *9–10 (D. Kan. Apr. 7, 2014).) But a single citation to a past case, without more, is not enough to satisfy the burden of proving entitlement to a sovereign immunity defense. *See Robinson*, 2020 WL 2732132, at *2 (finding citation to inapposite case to be insufficient to meet burden).

Not only was the citation to *Perkins*, standing alone, insufficient to meet the Hospital Authority's burden, *see id.*, but *Perkins* does not even help the Hospital Authority. For one, *Perkins* does not address

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Response to Defs.' Mot. Dismiss, ROA at 102–05.) The district court denied her request. (Order, ROA at 107.)

whether the Hospital Authority is an arm of the state or any of the factors that might make such a showing. There, the University of Kansas Hospital Authority moved for dismissal based on five separate grounds. 2014 U.S. Dist. LEXIS 47491, at *6. The court granted the motion without identifying the grounds on which it was doing so, because the motion was "completely unopposed" by the plaintiff. *Id.* at *9–10. Furthermore, the Hospital Authority cited to the portion of *Perkins* granting the University of Kansas *Medical Center*'s motion to dismiss. *See* ROA at 26–27 (citing *Perkins* and noting its reliance on *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1196 (10th Cir. 1998)). But the University of Kansas Medical Center was a separate defendant than the University of Kansas Hospital Authority in the *Perkins* suit, *see Perkins*, 2014 U.S. Dist. LEXIS 47491, at *1, and is an entirely different entity than the Hospital Authority, *see Hajda v. Univ. of Kansas Hosp. Auth.*, 51 Kan. App. 2d 761, 768 (2015) ("The record is very clear that KUHA [University of Kansas Hospital Authority] is not the same entity as the Hospital or KUMC [University of Kansas Medical Center]." Thus, *Perkins* was both insufficient and inapposite in any event.

2. The Hospital Authority did not provide evidence demonstrating that it is an arm of the state.

The Hospital Authority also failed to meet its burden of proof because it did not provide any evidence that would enable the lower court to determine whether it was an arm of the state based on the four *Steadfast* factors. For a defendant to meet its burden of proof on a sovereign immunity defense, it must put forth the facts relevant to make that determination that "lie peculiarly within the knowledge of" the party claiming immunity." *ITSI TV Prods.*, 3 F.3d at 1291. Mere citations to the statute creating the entity are not enough because they often do not provide enough information for a district court to accurately determine all of the *Steadfast* factors. *See Ross v. Colo. DOT*, 11-CV-02603, 2012 WL 5975086, at *5–6 (D. Colo. Nov. 14, 2012). *See also, e.g.*, *Teichgraeber*, 946 F. Supp. at 905 (statute, without more, cannot help a court determine whether a federal suit "would be an affront to the dignity of the state" without evidence of the statute's real-world impact).

For example, in *Ross* the defendant asserted that it was a "principal department" of the state and cited to a statute that described the purpose of the statute creating the Department of Transportation as

"to effect the grouping of state agencies into a limited number of principal departments primarily according to function." 2012 WL 5975086, at *5–6 (quoting C.R.S. §24-1-101). While the district court acknowledged the statute's characterization of the defendant, it nevertheless found that the defendant had "fail[ed] to elaborate what this characterization portends in relevant context." *Id.* And the court was unable to appropriately analyze the statute's significance without the defendant "more fully flesh[ing] out the ramifications of this designation in terms of 'the extent of guidance and control exercised by the state.'" *Id.*

Here, as in *Ross*, the Hospital Authority's motion to dismiss and accompanying memorandum of law did not provide any factual support for its assertion that it is an arm of the state. (*See* Mem. Supp. Mot. Dismiss, ROA at 26.) The Hospital Authority's Motion merely "cite[ed] two statutes from the University of Kansas Hospital Act, which [it] mislabel[ed], in support of its argument." (Order, ROA at 111.) But citations to statutes, without more, do not provide a court with sufficient information about the real-world ramifications of statutory language to determine the *Steadfast* factors. *See Ross*, 2012 WL

5975086, at *5–6; *Teichgraeber*, 946 F. Supp. at 905. The district court below acknowledged as much when it noted that it could not determine whether the finance factor—the single most important *Steadfast* factor—weighed in favor or against arm-of-the-state status "because [the Hospital Authority] has not submitted any evidence to the Court regarding its finances." (Order, ROA at 114.) *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994) (primary inquiry of the sovereign immunity analysis is focused on the impact on a state's finances).

* * *

The Hospital Authority made no arguments about the four *Steadfast* factors for determining whether an entity is an arm of the state. Nor did it provide any evidence to support its claim of entitlement to sovereign immunity. Thus, the Hospital Authority failed to meet its burden, and the lower court's decision should be reversed.

II. THE HOSPITAL AUTHORITY IS NOT PROTECTED BY SOVEREIGN IMMUNITY.

Putting aside whether the Hospital Authority met its burden—and it did not—the Hospital Authority is not entitled to Eleventh

Amendment immunity because it is not an arm of the state.[11] The Supreme Court set forth twin reasons for granting sovereign immunity to the States: to protect (i) the dignity of the States, and (ii) their financial solvency. *Hess*, 513 U.S. at 30–31.

Courts consider four factors to determine whether an entity is an "arm of the state." *Mt. Healthy v. Doyle*, 429 U.S. 274, 280 (1977). These are known as the *Steadfast* factors in the Tenth Circuit:

(1) "the character ascribed to the entity under state law," *Steadfast Ins. Co. v. Agricultural Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007);

(2) the degree of autonomy the entity has under state law, *id.*;

(3) whether the entity will place a financial burden on the state, including whether (i) it receives state funds, (ii) it has the ability to issue bonds and levy taxes, and most importantly, (iii) the state will be liable for a judgment against it, *Sturdevant*, 218 F.3d at 1166–69; *Hess*, 513 U.S. at 49 (liability is most important factor); *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 980 (10th Cir. 1997) (same); and

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[11] Whether an entity is entitled to sovereign immunity is reviewed *de novo*. *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000). The lower court addressed this issue. (Order, ROA at 110-117.)

(4) "whether the entity in question is concerned primarily with local or state affairs," *Steadfast*, 507 F.3d at 1253.

If the factors do not clearly indicate whether the entity is an arm of the state, then the court should deny immunity if the dignitary and financial purposes of sovereign immunity would not be advanced. *Hess*, 513 U.S. at 30–31; *see also U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 721 (10th Cir. 2006) (abrogated on other grounds). Courts should be cautious in granting immunity because "[i]t would be every bit as much an affront to the state's dignity and fiscal interests were a federal court to find erroneously that an entity was an arm of the state, when the state did not structure the entity to share its sovereignty." *Fresenius*, 322 F.3d at 63.

Here, three of the four factors, as well as the twin purposes for sovereign immunity, indicate that the Hospital Authority is not an arm of the state entitled to Eleventh Amendment immunity.

A. The Hospital Authority Is Financially Independent From The State And The State Does Not Have Legal Liability For Judgments Against The Hospital Authority.

The most important factor—whether the entity will place a financial burden on the state—indicates that the Hospital Authority is

not an arm of the state. The Hospital Authority is not financially dependent on the state, *see* part 1, and the state is not liable for judgments against the Hospital Authority, *see* part 2.[12]

1. The Hospital Authority is financially independent from the state.

The Hospital Authority is financially independent from Kansas. When an entity has "anticipated and actual financial independence" from the state and enters the private sector to "compete as a commercial entity," this factor indicates the entity is not an arm of the state. *Sikkenga*, 472 F.3d at 721. Here, the Hospital Authority has three hallmarks of financial independence: it (i) is responsible for paying its own debts or losses, (ii) is revenue-generating, and (iii) can issue bonds that are not repaid by the state.

i. The Hospital Authority pays its own debts and losses.

The Hospital Authority is financially independent from the state

[12] Although the district court believed it could not decide this factor because the Hospital Authority had failed to provide it with any information about its finances (Order, ROA at 114–15)—which should have been grounds for either denying the motion, *see* part I, *supra*, or ordering discovery, *see* part III, *infra*—this Court could rely on the statutory scheme to find that the Hospital Authority is financially independent from, and thus not an arm of, the state.

because it pays its own debts and losses. Entities that pay their own debts and losses are considered financially independent from the state for purposes of the arm-of-the-state test. *See Hess*, 513 U.S. at 52; *Takle v. Univ. of Wisconsin Hosp. & Clinics Auth.*, 402 F.3d 768, 770 (7th Cir. 2005); *Firefighters' Retirement Sys. v. Consulting Group Servs., LLC*, 541 B.R. 337, 350 (M.D. La. 2015) (hereinafter *Firefighters*).

For example, in *Hess*, the Supreme Court reasoned that because the port authority was responsible for paying its own debts and the states involved in the case were not "legally nor practically obligated to pay" its debts, the port authority was financially independent of the states and not entitled to Eleventh Amendment sovereign immunity because the twin concerns of dignity and financial solvency would not be implicated. *Hess*, 513 U.S. at 51–52. Likewise, in *Takle*, the court reasoned that because, among other things, "the state is not liable for the hospital[authority]'s debts" "there is nothing to indicate that the hospital should be viewed as a part of state government" for purposes of the arm-of-the-state factors. *Takle*, 402 F.3d at 770. And in *Firefighters*, the court reasoned that because the state was not liable for debts, losses, or financial shortfalls on behalf of the pension plan, the

pension plan was financially independent from the state. 541 B.R. at 391–92. *See also Fresenius*, 322 F.3d at 72–73 (the Commonwealth is not obligated to pay entity's debts, indicating the entity is financially independent).

Here, like in *Hess*, *Takle*, and *Firefighters*, the Hospital Authority is financially independent from the state because it pays its own debts and losses. The Hospital Authority must "indemnify and hold harmless" the state against all debts and losses arising from, e.g., "contracts," employment claims, and any of the Hospital Authority's "errors and omissions." *See* Kan. Stat. Ann. § 76-3309(b). As for bonds the Hospital Authority issues, *see* part iii *infra*, the legislature expressly relieved the state of any obligation to satisfy bonds if the Hospital Authority were to default. *Id*. § 76-3312(n) (2022). *See also Takle*, 402 F.3d at 770 (citing a similar provision in the statute establishing the hospital authority there, and noting that such a provision indicates that the hospital authority was not an arm of the state).

Thus, this factor weighs in favor of finding that the Hospital Authority is not an arm of the state. *See Hess*, 513 U.S. at 52; *Takle*, 402 F.3d at 770; *Firefighters*, 541 B.R. at 350.

ii. The Hospital Authority generates its own revenues and does not rely on state funding.

The Hospital Authority is also financially independent from the state because it generates its own revenues from medical services and purports on its own website to receive no state funding.

When an entity does not rely on state funding, but instead generates its own revenues, it is financially independent from the state. *Hess*, 513 U.S. at 52; *Firefighters*, 541 B.R. at 390–92. In *Hess*, the Supreme Court reasoned that the fact that the port authority generated its own revenue supported a finding that it was "financially self-sufficient" and the Eleventh Amendment was not implicated. *Hess*, 513 U.S. at 52. In *Firefighters*, the court noted that the pension plan was not funded by the state, but instead by *ad valorem* taxes, assessments on insurers, and employer and employee contributions. *Firefighters*, 541 B.R. at 391–92. Thus, the court held the source of funding indicated the pension plan was financially independent from the state. Likewise, in *Takle*, the court reasoned that because it was clear from the statutes that the hospital authority was not financed by the state, the court found that the state's sovereignty was not implicated and moved on to the remaining factors, ultimately holding that the hospital

authority was not an arm of the state. *Takle*, 402 F.3d at 769–72.[13] *See also Fresenius*, 322 F.3d at 72–73 (entity has independent sources of income, indicating financial independence).

Here, although the Hospital Authority failed to provide information about this factor, like in *Takle*, the Hospital Authority is in the business of health care and thus it is likely that the Hospital Authority relies on patient billings for the majority of its funding. *See, e.g.*, The University of Kansas Health System, Reimagining Healthcare: 2019 Annual Report at 18–19 (2019), *available at* https://secure.viewer.zmags.com/publication/215723a3 (reporting $2,723,129,000 in operating revenues; 83,880 emergency room visits; 51,972 inpatient discharges; and 1,990,775 outpatient visits). The Hospital Authority also holds itself out as being a "not-for-profit, independent hospital authority" that "receives no state or local funding." The University of Kansas Health System, Frequently Asked Questions, *supra*; *See also* The University of Kansas Health System, Our History, *supra* note 2

[13] Receiving some payments from the state for services rendered by the entity does not make the entity financially dependent on the state. *Fresenius*, 322 F.3d at 74–75 (payments akin to insurance payments for medical services rendered); *Baxter v. Fulton-DeKalb Hosp. Auth.*, 764 F. Supp. 1510, 1522 (N.D. Ga. 1991) (same).

(noting that "when it became an independent hospital authority" in 1998, it began "receiving no state funding").

Because the Hospital Authority generates its own revenues and receives no state funding (according to its own website), it is financially independent from the state, and this factor weighs in favor of finding that it is not an arm of the state entitled to Eleventh Amendment sovereign immunity.

iii. The Hospital Authority issues its own bonds that are not repaid by the state.

The Hospital Authority is financially independent from the state because it has the authority to issue bonds without legislative approval and the bonds are not guaranteed by the state. When an entity has the ability to issue bonds, and the state cannot be held liable for their repayment in the event of default, the entity is considered financially independent of the state. *See, e.g.*, *Takle*, 402 F.3d at 770; *Fresenius*, 322 F.3d at 72–73.

In *Takle*, the Seventh Circuit looked to the legislative scheme that created a hospital authority, which gave the authority the ability to issue bonds and established that the state would not have to pay in the event the hospital defaulted on them. These features, the Seventh

Circuit found, indicated that the hospital authority was financially independent from the state. *Takle*, 402 F.3d at 770. *See also Fresenius*, 322 F.3d at 72–73 (the ability to issue bonds which are not guaranteed by the Commonwealth indicates the entity is financially independent).

Here, like in *Fresenius* and *Takle*, the Hospital Authority has the ability to issue bonds and the bonds are not guaranteed by the state. *See* Kan. Stat. Ann. §§ 76-3308, 76-3312(n) (2022). Thus, like in *Fresenius* and *Takle*, this factor indicates that the Hospital Authority is not an arm of the state.[14]

* * *

The state is not responsible for paying debts or losses incurred by the Hospital Authority. The Hospital Authority does not rely on state funding, instead generating its own revenues. And the Hospital

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[14] The district court found that this factor was neutral because the Hospital Authority can issue bonds but cannot levy taxes. (Order, ROA at 114.) The court cited no authority in support of the proposition that an entity's ability to issue bonds is offset in the analysis by its inability to levy taxes, and Appellant has been unable to find any authority supporting such a proposition. Indeed, both *Takle* and *Fresenius* implicitly reject that proposition, because the entities in *Takle* and *Fresenius* could not levy taxes, but both courts found that the fact they could issue bonds indicated this factor weighed in favor of finding that the entities were not arms of the state. *See Takle*, 402 F.3d at 770; *Fresenius*, 322 F.3d at 72–73.

Authority can issue bonds without legislative approval and the state is not liable for them. All three factors indicate that the Hospital Authority is financially independent, and thus not an arm of the state.

2. The state is not legally liable for a judgment against the Hospital Authority.

Most importantly, the state is not liable for any judgments against the Hospital Authority, and thus one of the twin aims of sovereign immunity would not be advanced by its application here.

The most important consideration in determining whether an entity is an arm of the state entitled to sovereign immunity is "whether any judgment would be paid from the state treasury." *Hess*, 513 U.S. at 51. *See also Duke*, 127 F.3d at 980 ("whether the state treasury would be at risk of paying a judgment" is "the most important" factor).

Here, the statutory scheme makes clear that any judgment against the Hospital Authority is to be paid by the Hospital Authority, not out of the state treasury. Section 3309(b) requires that the Hospital Authority "shall assume responsibility for and shall defend, indemnify and hold harmless the regents and the state . . . with respect to . . . claims related to the authority's errors and omissions." Kan. Stat. Ann. § 76-3309(b). Thus, there can be no question that the Hospital

Authority, not the state, would have to pay damages on Ms. Hennessey's claim for negligent supervision.[15]

Because any judgment would be paid by the Hospital Authority, the finance factor weighs in favor of finding that the Hospital Authority is not an arm of the state. *See, e.g.*, *Hess*, 513 U.S. at 51.

B. The Hospital Authority Is Autonomous From The State.

The autonomy factor weighs in favor of finding that the Hospital Authority is not an arm of the state. The Hospital Authority is not under state control because its day-to-day operations are not controlled by the state, *see* part 1. Further, when a state creates an entity to privatize a formerly public function, courts consider that entity to have been removed from state control, *see* part 2.

1. The Hospital Authority's daily operations are not under state control.

The Hospital Authority is autonomous from the state because it

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[15] The district court did not consider the finance factor in its analysis because it believed that the statutory scheme (and lack of evidence from the Hospital Authority) made it unclear whether the Hospital Authority was financially dependent upon the state. (Order, ROA at 114–15.) But as demonstrated above, both the statutory scheme and the record make clear that it is not.

performs its day-to-day operations without state control or supervision. *See* part i. The district court erred in relying on irrelevant factors such as how the board is appointed or what lands the Hospital Authority operates on. *See* part ii.

i. The Hospital Authority performs its day-to-day operations without state supervision.

The Hospital Authority performs its daily functions without state supervision, and thus is autonomous from the state. An entity is autonomous from the state if it performs its day-to-day operations independently, with little input from the state. *Sikkenga*, 472 F.3d at 720–21. When an entity performs many responsibilities and duties without state control or supervision, such as setting fees, buying and selling property, issuing bonds, making employment decisions, and having the ability to sue or be sued, it indicates that the entity is autonomous. *Sturdevant*, 218 F.3d at 1168; *see also Duke*, 127 F.3d at 979.

In *Duke*, this Court found that the school board was autonomous because the statute gave it "control, management and direction" over the schools "including financial direction, distribution of school funds and financial accounting," and the school board could enter into

contracts, make purchases, purchase and sell property, and sue and be sued. 127 F.3d at 979 (citation and quotation marks omitted). Because it exercised all of these functions outside of state direction and without needing state approval, this Court held that this factor weighed against finding that the school board was an arm of the state. *Id.*

Here, like in *Duke* and *Sikkenga*, the Hospital Authority has abilities indicative of autonomy: it can "sue and be sued in its own name," "make and execute contracts," "borrow money and . . . issue bonds," "purchase, lease, trade, exchange or otherwise acquire, maintain, hold, improve, mortgage, sell, lease and dispose" of property, "develop policies and procedures," bank, obtain insurance, set and collect fees for services, enter into joint ventures, buy other companies, and do "any activities authorized" by the creating statute. *See* Kans. Stat. Ann. § 76-3308. Thus, this factor indicates that the Hospital Authority is not an arm of the state.

ii. The composition of the board and ownership of the Hospital Authority's land are irrelevant.

Rather than looking to what the Hospital Authority could do in its day-to-day operations without state oversight, the district court relied on two facts to find that the Hospital Authority was under state control:

the way its board was appointed and confirmed, and the ownership and control of the land on which the University of Kansas Hospital operated. (Order, ROA at 112–13.) Both facts were insufficient as a matter of law to overcome the significant autonomy provided in the statute.

First, the district court found that because members of Hospital Authority's board are appointed by the governor and confirmed by the senate, "the state controls . . . the overall operation of [the Hospital Authority]." (*Id.*) But that is wrong: "the power to appoint is not the power to control." *Takle*, 402 F.3d at 770 (board of directors appointed by the governor or "by virtue of holding a public office" not sufficient to demonstrate state control). Indeed, the Supreme Court has held that the way a board is appointed is insufficient to find that the entity is controlled by the state when the entity has the indicators of daily autonomy discussed above. *See Auer v. Robbins*, 519 U.S. 452, 456 (1997) (superseded by statute on other grounds) (rejecting argument that defendant was arm of the state where four of five members of its board were appointed by the governor, but entity was not subject to state control in other respects).

Take, for example, the entity in *Sikkenga*. There, as here, the entity could sue or be sued, enter into contracts, maintained its own bank accounts, and "operate[d] with little, if any guidance or interference from the University or the State," although it was "subject to the governance of the State Board of Regents, which is appointed by the Governor and approved by the State Senate." *Sikkenga*, 472 F.3d at 719–21. Despite the appointment process of the board, this Court held that the entity was autonomous from the state because of all the other indicators of daily autonomy—indicators shared by the Hospital Authority here. *See* Kans. Stat. Ann. § 76-3308. Thus, the district court was wrong to find that the autonomous factor weighed in favor of finding that the Hospital Authority was an arm of the state based on the way its board was appointed and confirmed.

The district court also cited as evidence of the state's control the fact that the Hospital Authority required state approval for repairs or new construction to its buildings on state property; that such repairs and construction became property of the state; and that the terms of the transfer must be favorable to the regents. (Order, ROA at 112.) But it is well established that an entity's buildings being on or part of the

state's property does not indicate that the entity is controlled by the state. *Takle*, 402 F.3d at 771 (finding the fact that the state owned the hospital's buildings to be insignificant).

* * *

Because the Hospital Authority can sue and be sued in its own name, own property, make contracts, maintain its own bank accounts, and perform its day-to-day responsibilities without state oversight or control, the autonomous factor weighs in favor of finding that it is not an arm of the state.

2. Privatizing an entity removes it from state control.

The Kansas legislature specifically created the Hospital Authority to operate without state control or supervision, and therefore it is autonomous from the state. When a state creates an entity to privatize a formerly public function, courts consider that entity to have been removed from state control. *Takle*, 402 F.3d at 770. *See also Sikkenga*, 472 F.3d at 721–22 (finding *Takle* persuasive).

In *Takle*, the Wisconsin legislature created a hospital authority and transferred management of the university hospital to the hospital authority. *Takle*, 402 F.3d at 770. The legislature took this action

because it found the university hospital was unable to compete in the market with private hospitals. *Id.* By creating an independent hospital authority, the legislature could maintain the financial solvency of the hospital by increasing its ability to compete with other hospitals without the "restrictions imposed by state law on hiring, tenure, and compensation of state employees and on the making of contracts relating to construction and procurement." *Id.* *See also Fresenius*, 322 F.3d at 64 ("Not all entities created by states are meant to share state sovereignty. Some entities may be part of an effort at privatization, representing an assessment by the state that the private sector may perform a function better than the state.").

In holding that the hospital authority in that case was not an arm of the state, the Seventh Circuit in *Takle* reasoned that when a state privatizes a previously-state function, that privatization should not "be treated as a farce" by allowing the entity to enjoy both the freedom of not being the state and the benefit of the state's sovereign immunity. *Takle*, 402 F.3d at 770.

Here, the Hospital Authority is analogous to the hospital authority in *Takle*. Like in *Takle*, the Kansas legislature was concerned

about the financial solvency of the University of Kansas Hospital. The legislature created the Hospital Authority and gave it control over the hospital to help limit state control, improve its competitiveness in the market, and make it economically viable. Kan. Stat. Ann. §§ 76-3302(a)(6)-(7) (2022). *See also* Statement of the Case, part 1, *supra* (detailing the process whereby the legislature hired consultants, the consultants reported that the hospital needed to be removed from state control to enhance its competitiveness, and the legislature adopted the report's recommendations in creating the Hospital Authority). Like in *Takle*, the Hospital Authority does not have to follow state procedures for hiring employees, Kans. Stat. Ann. § 76-3303(n), contracting, *id.* § 76-3308(a)(5), and procurement, *id.* § 76-3308(a)(11). The Hospital Authority also possesses the same indicators of autonomy as the hospital authority in *Takle*, such as having the ability to (i) sue and be sue in its own name, (ii) own property, (iii) make contracts, and (iv) operate in much the same manner as any private hospital. *See Takle*, 402 F.3d at 770. Moreover, the Act provides that as of the transfer date, the "the regents shall have no further control over, or responsibility for the operation" of the hospital. Kan. Stat. Ann. § 76-

3310 (2022). As a result, like the hospital authority in *Takle*, there is nothing to indicate that the Hospital Authority is part of the state government. And thus, as in *Takle*, the Hospital Authority cannot have it both ways: it cannot have been freed from state restrictions to make it more competitive, yet also able to cloak itself in the state's sovereign immunity. This factor indicates that the Hospital Authority is not an arm of the state.

C. The Hospital Authority Is Not Characterized As An Arm Of The State By The Act.

Finally, the Hospital Authority is also not an arm of the state because it is not identified as an arm of the state in the Act. How an entity is characterized under state law is determined by "conducting a formalistic survey of state law to ascertain whether the entity is identified as an agency of the state." *Steadfast*, 507 F.3d at 1253. In surveying state law, the court considers whether the entity is explicitly defined as an arm of the state or a political subdivision. *Sturdevant*, 218 F.3d at 1167. Absent an explicit definition, as here, courts turn to other statutory indicators of the nature of the entity. *Id*. at 1167–68 (noting that the entity is instead defined as a body corporate, and turning to other state statutes to determine legislative characterization

of the entity); *see also Takle*, 402 F.3d at 770 ("It would be nice if the hospital's organic statute stated outright that the hospital is a private entity rather than an arm of the state—that would resolve the issue—but it does not say that.")

An important statutory indicator is the function performed by the entity; when an entity does not perform a uniquely government function, it indicates the entity is not an arm of the state. *Fresenius*, 322 F.3d at 71. Health care services are not a uniquely government function. *Id.*; *Takle*, 402 F.3d at 770. The court in *Fresenius* determined that "nothing about [the health-care-providing public corporation in that case] marks it as serving a uniquely government function" because both public and private entities provide medical care to the poor. *Fresenius*, 322 F.3d at 71. *See also Baxter*, 764 F. Supp. at 1522 (holding that hospital authority was not an arm of the state despite being "deemed [by the legislature] to exercise public and essential government functions"). Similarly, in *Thomas*, the court reasoned that the hospital authority's function was more private than governmental, because "[t]he very functions performed by the Hospital Authority are performed by private hospitals and the Hospital

Authority is in direct competition with these private hospitals for patients." *Thomas v. Hosp. Auth. of Clarke Cty.*, 264 Ga. 40, 43 (1994). When "an instrumentality of the government" enters into "an area of business ordinarily carried on by private enterprise," it is "engage[d] in a function that is not 'governmental,'" and should be "charged with the same responsibilities and liabilities borne by a private corporation." *Id.*

Here, the Hospital Authority is not explicitly characterized as an arm of the state in the Act. Thus, other indicators of its character must be considered. Like in *Takle*, *Fresenius*, *Baxter*, and *Thomas*, the Hospital Authority provides health care services, which are not a uniquely governmental function.

Therefore, because the statute does not explicitly characterize the Hospital Authority as an arm of the state and health care services provided by the Hospital Authority are not a uniquely governmental function, this factor does not indicate that the Hospital Authority is an arm of the state.

* * *

As demonstrated above, three of the four *Steadfast* factors weigh in favor of finding that the Hospital Authority is not an arm of the

state. Regardless of the factors, granting the Hospital Authority sovereign immunity would not advance either the dignitary or financial solvency concerns of the Eleventh Amendment. Thus, the Hospital Authority is not entitled to Eleventh Amendment sovereign immunity, and the district court's decision should be reversed.

III. If More Information Is Needed To Make An Arm-Of-The-State Determination, This Court Should Reverse And Remand To Allow For Limited Discovery.

This Court should reverse the lower court's decision because the Hospital Authority failed to meet its burden of proof to demonstrate it was entitled to an Eleventh Amendment sovereign immunity defense. *See* part I. This Court should also reverse because the Hospital Authority is not an arm of the state, based on the statutory scheme that created the Hospital Authority and admissions the Hospital Authority makes on its own website. *See* part II. But at a minimum, if this Court finds that more information is needed as to any of the arm-of-state factors, this case should be remanded with instructions to allow for limited discovery related to the *Steadfast* factors.

The arm-of-the-state analysis is a fact-intensive inquiry and it is appropriate for a district court to allow limited discovery as to the

Steadfast factors where evidence is not provided in the defendant's motion to dismiss. *See STC.UNM v. Quest Diagnostics Inc.*, CV 17-1123, 2018 WL 3539820 at *3–4 (D.N.M. July 23, 2018) (noting that "the entity's finances and the entity's focus on local versus state affairs, involve factual inquiries"). Other courts in the Tenth Circuit "have recognized the need for factual inquiry and accordingly, have permitted limited discovery" under these circumstances. *Id.* (first citing *Moore v. Univ. of Kansas*, 124 F. Supp. 3d 1159, 1170 (D. Kan. 2015), and then citing *Schwartz v. Jefferson Cty. Dep't of Human Servs.*, 09-CV-915, 2010 WL 1350832 (D. Colo. Mar. 31, 2010).

For example, in *Jones v. Hunstman Cancer Hosp.*, 12CV814, 2013 WL 2145764, at *2–3 (D. Utah May 15, 2013), the district court denied the defendant's motion to dismiss on Eleventh Amendment sovereign immunity grounds and granted leave to conduct limited discovery. The court found that the record was insufficient to determine whether the defendant was an arm-of-the-state and permitted the plaintiff "to conduct discovery limited to whether [the defendant was] an arm of the state, considering the factors set forth in [*Sturdevant* and *Sikkenga*]." *Id.* at *2. In *Schwartz v. Jefferson Cty. Dep't of Human Servs.*, the court

granted the plaintiff's request for limited discovery in response to the defendant's motion to dismiss. 2010 WL 1350832 at *1. Despite various cases defining county human services departments as arms-of-the-state, the court stated that the question of immunity was "fact intensive" and limited discovery was appropriate. *Id.* Similarly, Courts of Appeals in other circuits have reversed and remanded to allow for limited discovery. *See, e.g.*, *Lang v. Penn. Higher Educ. Assistance Agency*, 610 F. App'x 158, 162 (3d Cir. 2015) (explaining that applying the arm of the state "factors requires a fact-intensive review that calls for individualized determinations," and vacating the district court's judgment of dismissal and remanding for further development of the factual record).

Thus, this Court should, at a minimum, reverse and remand for instructions to allow limited discovery relating to the *Steadfast* factors.[16]

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[16] Though Ms. Hennessey did not request discovery before the district court, that is understandable given that she was *pro se* and that the Hospital Authority did not discuss the arm-of-the-state test until its reply brief. And discovery, particularly into the Hospital Authority's finances, would likely confirm that the Hospital Authority is not an arm of the state. *See, e.g.*, The University of Kansas Health System, Frequently Asked Questions, *supra* (describing itself as an

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the district court's decision.

STATEMENT REGARDING ORAL ARGUMENT

Because of the importance of the issues presented in this appeal, counsel believes that the Court's decisional process will be significantly aided by oral argument.

Respectfully submitted,

/s/ Matthew R. Cushing

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April 8, 2022

"independent hospital authority" that "receives no state or local funding").

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/s/ Matthew R. Cushing
April 8, 2022 Counsel for Appellant

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I hereby certify that on April 8, 2022, I electronically filed a copy of the foregoing brief with the Clerk of the United States Court of Appeals for the Tenth Circuit using the Court's appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users who will be served by the appellate CM/ECF system.

/s/ Matthew R. Cushing
April 8, 2022 Counsel for Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TAMATHA HENNESSEY,

Plaintiff,

vs.

UNIVERSITY OF KANSAS HOSPITAL AUTHORITY,

Defendant.

Case No. 21-2231-EFM-TJJ

MEMORANDUM AND ORDER

Pro se Plaintiff Tamatha Hennessey brings this lawsuit against Defendant University of Kansas Hospital Authority ("UKHA") asserting a state law claim of negligent supervision. UKHA has filed a Motion to Dismiss (Doc. 8) for lack of subject matter jurisdiction, and Hennessey has filed a Motion for Leave to File Sur-Response (Doc. 25) to UKHA's Reply. The Court denies Hennessey leave to file the Sur-Response.[1] For the following reasons, the Court grants UKHA's Motion to Dismiss.

[1] District of Kansas Rule 7.1 allows parties to file a motion, response, and reply, but makes no mention of a sur-response or surreply. The Court may authorize a sur-response or surreply but only in "extraordinary circumstances after a showing of good cause." *Mike v. Dymon, Inc*., 1996 WL 427761, at *2 (D. Kan. 1996) (citation omitted). Good cause exists when a reply brief improperly makes new arguments. *Id*. In this case, UKHA has not raised new arguments in its Reply brief supporting its Motion to Dismiss. Therefore, Hennessey has not shown good cause as to why the Court should grant her leave to file her Sur-Response, and her motion is denied.

I. Factual and Procedural Background[2]

Defendant UKHA is an entity established by the Kansas legislature under the University of Kansas Hospital Act (the "Act").[3] The Act grants UKHA the authority to operate the University of Kansas hospital,[4] located in Kansas City, Kansas. UKHA operates the hospital for the benefit of the University of Kansas Medical Center and the residents of Kansas, "providing high quality patient care and providing a site for medical and biomedical research."[5]

Plaintiff Hennessey is a Missouri resident. On February 12, 2019, Hennessey presented to the emergency room of the University of Kansas hospital with complaints of severe right shoulder and left jaw pain. A nurse practitioner ordered an MRI of Hennessey's right shoulder and a CT scan of her cervical spine. Hennessey also received a lidocaine patch, Motrin, and Ativan to help her relax. The Ativan made Hennessey sleepy and as a result, she fell asleep during the MRI. She awoke to the radiologist technician sexually assaulting her.

In May 2021, Hennessey filed suit against UKHA asserting a state law claim of negligent supervision. Hennessey's Complaint alleges that UKHA had a duty to monitor its male radiology technologist when providing treatment to a sedated female patient. The Complaint further alleges that UKHA directly caused or contributed to her injuries from the sexual assault. In response to Hennessey's Complaint, UKHA filed a Motion to Dismiss for lack of subject matter jurisdiction. This motion is now ripe for the Court's ruling.

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[2] Unless otherwise noted, the facts are taken from Hennessey's Complaint, which Hennessey has entitled "Petition for Damages."

[3] K.S.A. § 76-3301 *et seq*.

[4] K.S.A. § 76-3302(a)(7).

[5] *Id*.

II. Legal Standard

"Federal courts are courts of limited jurisdiction."[6] Under Rule 12(b)(1), the Court may dismiss a complaint based on a lack of subject matter jurisdiction. Generally, a Rule 12(b)(1) motion takes one of two forms: a facial attack or factual attack.[7] "[A] facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true."[8] A factual attack goes "beyond allegations contained in the complaint and challenge[s] the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations."[9] A court therefore "has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)."[10]

Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers."[11] A pro se litigant is entitled to a liberal construction of his pleadings.[12] If the Court can reasonably read a pro se complaint in such a way that it could state a claim on which it could

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[6] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

[7] *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425 (2001).

[8] *Holt*, 46 F.3d at 1002-03 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)).

[9] *Id.* at 1003 (citing *Ohio Nat'l Life*, 922 F.3d at 325).

[10] *Id.* (citations omitted).

[11] *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

[12] *See Trackwell v. United States Gov't*, 472 F.3d 1242, 1243 (10th Cir. 2007) ("Because [the plaintiff] appears pro se, we review his pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys.") (citations omitted).

prevail, the Court should do so despite "failure to cite proper legal authority . . . confusion of various legal theories . . . or [Plaintiff's] unfamiliarity with pleading requirements."[13] However, it is not the proper role of the district court "to assume the role of advocate for the pro se litigant."[14]

III. Analysis

UKHA argues that Hennessey's suit must be dismissed because the Court lacks subject matter jurisdiction. Federal subject matter jurisdiction arises on the basis of a federal question at issue or diversity of citizenship. Federal question jurisdiction exists if the action arises under the Constitution, laws, or treaties of the United States.[15] Diversity jurisdiction exists if the amount in controversy exceeds $75,000, and the plaintiff is a citizen of a different state than each defendant.[16]

Hennessey argues that the Court may exercise diversity jurisdiction because this action is between citizens of different states and the amount in controversy exceeds $75,000. According to Hennessey, diversity exists between the parties because she resides in Missouri and UKHA is in Kansas. She also seeks $2.5 million in damages.

In response, UKHA argues that it is not a "citizen" of Kansas because it is an arm of the state that enjoys Eleventh Amendment immunity. Diversity jurisdiction only exists for actions "between citizens of different [s]tates,"[17] and an "arm or alter ego of a state" cannot characterized as a citizen for diversity purposes.[18]

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[13] *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

[14] *Id.*

[15] 28 U.S.C. § 1331.

[16] *Id.* § 1332(a)(1).

[17] *Id.*

[18] *Dougherty v. Univ. of Okla. Bd. of Regents*, 415 F. App'x 23, 25 (10th Cir. 2011) (citations omitted); *Moor v. Cnty. of Alameda*, 411 U.S. 693, 717 (1973).

The Eleventh Amendment grants immunity to states from suits brought in federal courts by its own citizens or those of another state.[19] This immunity extends "not only to a state but also to an entity that is an arm of the state."[20] The determination of whether an entity is an "arm of the state" depends on the "nature of the entity created by state law."[21] Eleventh Amendment immunity generally extends to state entities but not to political subdivisions, such as counties, municipalities, or other local government entities.[22] In analyzing whether an entity acted as an arm of the state, the Tenth Circuit applies a four-factor test, considering: (1) "the character ascribed to the entity under state law"; (2) the "autonomy accorded the entity under state law"; (3) "the entity's finances"; and (4) "whether the entity in question is concerned primarily with local or state affairs."[23] The defendant asserting Eleventh Amendment immunity bears the burden of proof.[24]

In this case, UKHA has not addressed the four-factor test in arguing that it is entitled to Eleventh Amendment immunity. Instead, UKHA cursorily asserts in one paragraph that it is an arm of state and cites two statutes from the University of Kansas Hospital Act, which UKHA mislabels, in support of its argument. As a result, the Court is left with the task of analyzing the four-factor test based on its own review of the Act and the pertinent case law.

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[19] U.S. CONST. amend. XI.

[20] *Couser v. Gay*, 959 F.3d 1018, 1022 (10th Cir. 2020).

[21] *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1253 (10th Cir. 2007) (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 & n.5 (1997)).

[22] *Id.*

[23] *Id.* (citations omitted); *see also Couser*, 959 F.3d at 1025 (applying the same four factors).

[24] *See Teichgraeber v. Mem'l Union Corp. of Emporia*, 946 F. Supp. 900, 903 (D. Kan. 1996) (agreeing with cases holding that Eleventh Amendment immunity should be treated as an affirmative defense and must be proved by the party that asserts it).

A. Characterization Under State Law

In addressing this factor, the Court "conduct[s] a formalistic survey of state law to ascertain whether the entity is identified as an agency of the state."[25] The Act does not expressly identify UKHA as a state agency. But, it does describe UKHA as a "independent instrumentality of this state," whose exercise of rights, powers, and privileges are "deemed and held to be the performance of an essential governmental function."[26] The Act also grants UKHA the "duties, privileges, immunities, rights, liabilities, and disabilities of a body corporate and a political instrumentality of the state."[27] These statutory provisions indicate that the legislature intended UKHA to act as an agency of the state. Thus, this factor weighs in favor of granting UKHA Eleventh Amendment immunity.

B. Autonomy of UKHA Under State Law

Under the second factor, the Court considers "the degree of control the state exercises over the entity."[28] The Act provides that UKHA is governed by a nineteen-member board of directors, thirteen of which are appointed by the governor and subject to confirmation by the senate.[29] Furthermore, upon the termination or expiration of these board members' terms, a nominating committee of the board will submit a slate of new directors for the governor to pick from, subject

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[25] *Steadfast*, 507 F.3d at 1253 (citing *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164, 1166 (10th Cir. 2000)).

[26] K.S.A. § 76-3304(a).

[27] *Id*. § 76-3308(a)(1).

[28] *Steadfast*, 507 F.3d at 1253 (citing *Sturdevant*, 218 F.3d at 1162, 1164, 1166); *see also Crouse*, 959 F.3d at 1027 (citation omitted).

[29] K.S.A. § 76-3304(b).

to senate approval.[30] These requirements show that the state controls the composition of the board of directors, and consequently, the overall operation of UKHA.

The Act also contains several provisions evidencing the state's control over UKHA with regard to the hospital building itself and additional hospital assets. To construct new buildings or repair currently existing buildings on the University of Kansas Medical Center property, UKHA must first obtain approval from the state board of regents and the secretary of the administration.[31] Upon completion, the new buildings and repairs become state-owned property.[32] Furthermore, any transfer of hospital assets from the state board of regents to UKHA must be completed on terms favorable to the state board of regents, and any dispute arising during the transfer is resolved by the governor.[33]

Overall, these provisions show that the state board of regents, the secretary of the administration, and the governor exert control over UKHA. Thus, this factor weighs in favor of finding that UKHA is an arm of the state.

C. Finances

Under the third factor, the Court studies the entity's finances, including how much state funding it receives and whether the entity can issue bonds and levy taxes.[34] The Court also looks

[30] *Id.* § 76-3304(e).

[31] *Id.* § 76-3308a.

[32] *Id.*

[33] *Id.* § 76-3309.

[34] *Steadfast*, 507 F.3d at 1253; *see also Crouse*, 959 F.3d at 1029 (citation omitted).

at whether a "money judgment sought is to be satisfied out of the state treasury," focusing on legal liability for judgment instead of the practical impact a judgment would have on a state's treasury.[35]

This factor is difficult for the Court to analyze because UKHA has not submitted any evidence to the Court regarding its finances. The Act indicates that UKHA receives at least some funding from the state. K.S.A. 76-3309(a) states that UKHA is compensated from moneys appropriated by the legislature for providing services such as "education, research, patient care, care to the medically indigent and public service activities" of the University of Kansas Medical Center. The Court assumes, however, that UKHA also receives revenue from patient billings, which cuts against a finding of Eleventh Amendment immunity.

As to the ability to issue bonds and levy taxes, the Tenth Circuit has explained that bond-issuing and tax-levying authority are important considerations because they are "characteristic attribute[s] of political subdivisions," which are not entitled the Eleventh Amendment immunity.[36] Here, UKHA has the authority to issue bonds[37] but may not levy taxes.[38] Thus, these considerations are neutral as whether UKHA is entitled to Eleventh Amendment immunity.

The final consideration under this factor—whether a judgment against UKHA would be satisfied by the state treasury—is especially problematic because the Tenth Circuit has described this consideration as "particularly important"[39] and the Court has no evidence regarding how a

[35] *Sturdevant*, 218 F.3d at 1164 (citation omitted).

[36] *Id*. at 1170.

[37] K.S.A. § 76-3312.

[38] *See generally id*. § 76-3308 (not including levying taxes as part of the powers granted to UKHA under the Act).

[39] *Sturdevant*, 218 F.3d at 1164 (citation omitted).

money judgment would be satisfied by UKHA. This lack of evidence, however, is not fatal to UKHA's motion. In *Sturdevant*, the Tenth Circuit noted the importance of this consideration but then declined to resolve the issue because the financial evidence presented by the parties was ambiguous.[40] Instead, the Circuit focused on the other factors delineated in the arm-of-the-state analysis.[41] Accordingly, in the absence of evidence regarding UKHA's finances, the Court will focus on the remaining arm of the state factors to determine if they definitively show UKHA is entitled to Eleventh Amendment immunity.

D. Local or State Concerns

Under the fourth factor, the Court looks at whether the entity is concerned with local or state affairs, examining "the agency's function, composition, and purpose."[42] UKHA was created by the Kansas legislature to operate the University of Kansas hospital and provide a site for medical research for the University of Kansas Medical Center.[43] The mission of the hospital is to (1) "support the education, research and public service activities of the University of Kansas [M]edical [C]enter"; (2) "provide patient care and specialized services not widely available" in other areas of Kansas; and (3) care for medically indigent Kansas citizens.[44] The Act also states that UKHA's powers "are deemed an essential government function in matters of public necessity *for the entire state* in the provision of health care, medical and health sciences education and research."[45] These

[40] *Id*. at 1165-66.

[41] *Id*. at 1166.

[42] *Steadfast*, 507 F.3d at 1253 (citing *Sturdevant*, 218 F.3d at 1166, 1168-69); *see also Couser*, 959 F.3d at 1030.

[43] K.S.A. § 76-3302(a)(7).

[44] *Id*. § 76-3302(a)(4).

[45] *Id*. § 76-3302(b) (emphasis added).

provisions show that UKHA is concerned with the medical health of all Kansas citizens, not just those in a local city or county. Thus, this factor weighs in support of finding that UKHA is entitled to Eleventh Amendment immunity.

E. Balance of the Factors

After examining the evidence before it, the Court concludes that UKHA is not autonomous from the state. UKHA is defined as an instrumentality of the state by the state legislature, the state exerts control over its board of directors, controls the construction and repair of any buildings it operates, and UKHA provides an essential governmental function for all Kansas citizens. The unknown factor is whether UKHA is financed by the state. But, the lack of evidence on this factor is overcome by the weight of evidence showing that UKHA is an arm of the state. Overall, UKHA is far more akin to a state agency than it is to a political subdivision. Therefore, UKHA is entitled to Eleventh Amendment immunity as an arm of the state of Kansas.

Hennessey argues that the Eleventh Amendment does not apply in this case because UKHA has waived its application. The Supreme Court has recognized two circumstances in which Eleventh Amendment immunity is waived.[46] The first is when Congress "authorize[s] such a suit in the exercise of its power to enforce the Fourteenth Amendment."[47] The second is when the state consents to suit in federal court.[48] Neither circumstance applies in this case. Hennessey's Complaint asserts a state law negligence claim, not a claim arising under federal law.

[46] *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

[47] *Id.* (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976)).

[48] *Id.* (citing *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883)).

Whether UKHA is liable to Hennessey is a matter to be resolved in state court, not federal court. Because UKHA is arm of the state of Kansas, it is not a "citizen" for purposes of diversity jurisdiction and is entitled to Eleventh Amendment immunity.[49] Accordingly, the Court lacks subject matter jurisdiction over Hennessey's claim. This case is dismissed.

IT IS THEREFORE ORDERED that Hennessey's Motion for Leave to File Sur-Response (Doc. 25) is **DENIED**.

IT IS FURTHER ORDERED that UKHA's Motion to Dismiss (Doc. 8) is **GRANTED**.

IT IS SO ORDERED.

This case is closed.

Dated this 23rd day of December, 2021.

Eric F Melgren

ERIC F. MELGREN
CHIEF UNITED STATES DISTRICT JUDGE

[49] *Dougherty*, 415 F. App'x at 25.

United States District Court

---------- DISTRICT OF KANSAS----------

TAMATHA HENNESSEY,

Plaintiff,

v. **Case No: 21-2231-EFM**

UNIVERSITY OF KANSAS HOSPITAL AUTHORITY,

Defendant,

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a jury trial. The issues have been tried and the jury has rendered its verdict.

☒ Decision by the Court. This action came before the Court. The issues have been considered and a decision has been rendered. IT IS ORDERED

that pursuant to the Memorandum and Order filed on December 23, 2021, Doc. 26, Defendant's Motion to Dismiss, Doc. 8, is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File Sur-Response, Doc. 25, is DENIED.

This case is closed.

December 23, 2021
Date

SKYLER O'HARA
CLERK OF THE DISTRICT COURT

by: s/ Cindy McKee
Deputy Clerk