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 OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

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There are no prior or related appeals.

STATEMENT OF JURISDICTION

In a memorandum and order filed on December 23, 2021, the United States District Court for the District of Kansas dismissed this matter for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). (ROA at 107). On that same day, the clerk entered judgment for defendant the University of Kansas Hospital Authority ("UKHA"). (ROA at 118). In its Order, the District Court properly found that it lacked jurisdiction, and Appellant's contention that the District Court had jurisdiction pursuant to 28 U.S.C. § 1332 is denied.

On December 31, 2021, Tamatha Hennessey ("Hennessey") filed a timely notice of appeal within 30 days of the entry of judgment. (ROA 119). Thus, Appellee concedes that this Court has jurisdiction to hear Ms. Hennessey's appeal of the District Court's December 23, 2021 final order, pursuant to 28 U.S.C. § 1291. (Fed. R. App. P. 4(a)(1)(A)).

STATEMENT OF THE ISSUES

I. Did the district court correctly dismissed Hennessey's suit for lack of subject matter jurisdiction, where the complaint failed to plead an adequate basis for diversity jurisdiction because UKHA is not a citizen of the state of Kansas?

II. Did the district court properly dismiss Hennessey's suit because UKHA, as an instrumentality of the state of Kansas, is entitled to Eleventh Amendment immunity?

III. Whether the District Court erred in not *sua sponte* ordering additional discovery to supplement the record before dismissing Hennessey's suit, where the pleadings were sufficient to determine the issue of subject matter jurisdiction?

STATEMENT OF THE CASE

Plaintiff-Appellant Tamatha Hennessey, a Missouri resident, brought suit against Defendant-Appellee the University of Kansas Hospital Authority ("UKHA"), asserting a single claim of negligent supervision arising under Kansas law. (ROA at 6-10). Hennessey's claim arises from an incident on February 13, 2019, in which she alleges that she was sexually assaulted by a radiation technician while undergoing a MRI at the University of Kansas Hospital in Kansas City, Kansas. (ROA at 48). The radiation technician alleged to have assaulted Hennessey is no longer employed by UKHA. (ROA at 48-49). The radiation technician was criminally charged by the Wyandotte County District Attorney in Case No. 2019-CR-504, which remains pending and is set for trial on October 31, 2022.

Hennessey originally filed this civil action in Kansas state court against the radiation technician and UKHA on September 21, 2020. (ROA at 28). UKHA then

filed a motion for judgment on the pleadings, primarily arguing that because it was a "governmental entity and instrumentality of the state of Kansas" it was immune from liability under the Kansas Tort Claims Act for acts outside the technician's employment. K.S.A. § 75-6101, *et seq*. (ROA at 47-58).[1] While the motion was pending, Hennessey's attorneys stipulated to dismissal of the case without prejudice, and the Wyandotte County, Kansas District Court filed an order dismissing the action on November 20, 2020. (ROA at 25).

On May 19, 2021, Hennessey, acting pro se, refiled the underlying case in federal court against only UKHA, alleging identical facts but a single claim of negligent supervision under Kansas law. (ROA at 1-14, 25). Hennessey's attorneys reportedly represented to her that they "wanted off the case" and declined to continue their representation. (ROA at 85). Hennessey consulted with at least five additional law firms, all of which declined to represent her in this matter. (ROA at 18-19). As such, she proceeded to litigate this matter *pro se* and was granted leave to proceed *in forma pauperis* pursuant to 28 U.S.A. § 1915(a)(1).

Hennessey's initial complaint filed in this case was titled "Petition for Damages" and expressly invoked jurisdiction and venue in state court; "In the

[1] Describing that Kansas has consented only to a limited waiver of its sovereign immunity in the passage of the Kansas Tort Claims Act, which defines the terms by which a government entity may be liable for damages caused by the acts or omissions of its employees while acting within the scope of their employment. *See Connelly v. State*, 271 Kan. 944, 26 P.3d 1246 (2001).

District Court of Wyandotte County, Kansas" (*Id.* at 7) (alleging venue was proper pursuant to K.S.A. § 60-604 because defendant operated a hospital in Wyandotte County, Kansas). Hennessey's complaint failed to allege any basis for federal jurisdiction and did not reference 28 U.S.C. §§ 1331 or 1332. The only facts contained in the Petition relating to jurisdiction simply alleged Hennessey that Hennessey was a "resident of the State of Missouri" and that UKHA was a "Kansas corporation and/or entity operating a hospital located in Kansas City, Wyandotte County, Kansas" (ROA at 6-7).

Suspecting that Hennessey did not intend to file in federal court, UKHA filed a motion to dismiss for lack of subject matter jurisdiction, noting the complaint "does not appear to plead federal jurisdiction on any basis." (ROA at 26). UKHA's motion further stated that even assuming Hennessey intended to assert diversity jurisdiction, she could not so proceed because the entity is an instrumentality of the state of Kansas and Eleventh Amendment immunity would also prohibit the exercise of jurisdiction over it. (ROA at 26). UKHA expressly cited prior cases from the United States District Court for the District of Kansas and the 10th Circuit affirming this finding in cases filed against UKHA in federal court. (ROA at 26-27).

In response to the motion to dismiss, Hennessey moved to amend her designation of place of trial from Wyandotte County District Court to the U.S. District Court for the District of Kansas. (ROA at 4). She did not move to amend her

Compliant. She then filed a competent and sophisticated response to Defendant's motion, citing case law and multiple statutes in opposition to the motion to dismiss. (ROA at 83-87). Therein, Hennessey asserted diversity jurisdiction under 28 U.S.C. § 1332 for the first time, based on an allegation that she "resides in Missouri and Defendant resides in Kansas," and that the amount in controversy exceeded $75,000. (ROA at 85). For those reasons, Hennessey contended that the pleadings established an adequate basis for federal diversity jurisdiction, and she made no claim that the factual record was inadequate to make that determination. (*Id*.) The remaining portion of her motion argued that the Eleventh Amendment did not bar her suit because (1) UKHA was a "corporate entity" and sovereign immunity did not apply to such political subdivisions; and (2) the state of Kansas has consented to suit in federal court. (ROA at 86).

On September 8, 2021, UKHA filed its Reply in Support of its Motion to Dismiss, arguing that Hennessey's Petition should be dismissed for lack of jurisdiction because she failed to plausibly plead diversity jurisdiction and because UKHA is immune from suit under the Eleventh Amendment. (ROA at 88-91). Therein, UKHA specifically cited a Kansas Court of Appeals opinion affirming that the entity is an independent "instrumentality of the State," as set out in its enacting statute, and held the Plaintiff was required to use the process required for "serving a governmental body." (ROA at 90).

On December 23, 2021, the District Court entered its Memorandum and Order dismissing this case for lack of subject matter jurisdiction, specifically finding that because UKHA is an arm of the state of Kansas, it is not a "citizen" for purposes of diversity jurisdiction and is entitled to Eleventh Amendment immunity. (ROA at 119). The District Court specifically noted that whether "UKHA is liable to Hennessey is a matter to be resolved in state court, not federal court." (ROA at 117). A timely notice of appeal followed. (ROA at 119).

UKHA is a public entity created by the Kansas legislature by means of the University of Kansas Hospital Authority Act ("Act"). K.S.A. § 76-3301, et seq. The purpose of the Act was to create a "*public* authority" acting as an instrumentality of the State of Kansas performing an essential governmental function for the benefit of the public welfare. K.S.A. 76-3304, (emphasis added); 76-3302(b). The Kansas legislature created UKHA for purpose of operating the University of Kansas Hospital, a state teaching hospital facilitating the education and training of persons affiliated with the University of Kansas medical and health sciences schools. (Id; K.S.A. 76-3302(a)(4).

The UKHA Board of Directors consists of 19 members. K.S.A. 76-3304(b). Thirteen of those members are directly appointed by the Governor of Kansas and confirmed by the Kansas Senate. Those members represent the general public, and each serves without compensation. (Id; K.S.A. 76-3304(h), (i).) The members

representing the general public must also include at least one member residing in each Kansas Congressional district. (Id.) The remaining members are ex officio voting members from various leadership positions affiliated with the hospital and the University of Kansas medical and nursing schools. (Id.) The Act grants UKHA the "duties, privileges, immunities, rights, liabilities, and disabilities of a body corporate and a political instrumentality of the state." K.S.A. § 76-3308(a)(1).

While the University of Kansas Hospital Authority Act altered the hospital's financial and governance structure to promote quality and efficiency in hospital operations, the governmental character of the authority and the intent to retain governmental immunities were re-affirmed throughout the Act. For example, the legislature gave the Authority the power to procure insurance, but stated that the purchase of insurance "shall not be deemed as a waiver or relinquishment of any *sovereign immunity* to which the authority or its officers, directors, employees or agents are otherwise entitled". (K.S.A. 76-3308(a)(13), emphasis added.) The Act also ensures that tort actions against UKHA are governed by the Kansas Tort Claims Act, which forms the basis for, and limitations of, suits against Kansas governmental entities. (K.S.A. 76-3315; 75-6101, et seq.).

In this appeal, Appellant asks the Court to find that in spite of the Act's repeated references to the creation of a "*public* authority" to run a *public* hospital for the purpose of the *public* health and welfare, UKHA was created to "privatize the

hospital so it could be self-sustaining." (Appellant's Brief, p. 4.) Based on this argument, Hennessey contends UKHA has no sovereign immunity.

SUMMARY OF THE ARGUMENT

The district court properly dismissed Tamatha Hennessey's case for lack of subject matter jurisdiction because: (1) the complaint failed to properly allege the citizenship of the parties and (2) the University of Kansas Hospital Authority as an "independent instrumentality" of the state of Kansas is entitled to Eleventh Amendment immunity.

As a political subdivision and instrumentality of the state of Kansas, the University of Kansas Hospital Authority is not a "citizen" for diversity purposes. Moreover, as "an independent instrumentality" of the state of Kansas, UKHA is entitled to Eleventh Amendment immunity. For these reasons, Plaintiff's complaint adequately demonstrated a lack of subject matter jurisdiction over this case, and the District Court properly ordered dismissal.

At the District Court level, Hennessey did not request to convert the motion to a summary judgment standard, nor was it alleged that discovery would be needed to create an adequate factual record to determine the issue. Instead, Plaintiff argued that her Complaint contained an adequate basis for diversity juridcition, and that the issue of sovereign immunity could be decided from the pleadings. She has not contended, much less demonstrated that discovery would be necessary to determine

the issue of citizenship and sovereign immunity. UKHA's status can clearly be determined from its enactment statutes, which are subject to judicial notice, and no discovery is required.

On appeal, Hennessey also complains that UKHA's briefing on this subject was inadequate and complains that the District Court undertook its own analysis "based on its own research" to find merit in UKHA's argument. Even if this allegation was true, a district court not only has the authority to determine its own subject matter jurisdiction, it has the *obligation* to make that determination independently. See *1mage Software, Inc. v. Reynolds & Reynolds Co*., 459 F.3d 1044, 1048 (10th Cir. 2006) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006)). The Court correctly engaged in this analysis and reached the correct conclusion. Accordingly, its order dismissing the action should be affirmed.

STANDARD OF REVIEW

A district court's dismissal under Fed. R. Civ. P. 12(b)(1) is reviewed *de novo*. *Barnes v. Harris*, 783 F.3d 1185, 1189 (10th Cir. 2015). While the ultimate question of whether diversity jurisdiction exists is reviewed *de novo*, this Court reviews a district court's citizenship findings for clear error. *Middleton v. Stephenson*, 749 F.3d 1197, 1201 (10th Cir. 2014).

Sovereign immunity is also a question of law reviewed *de novo*. *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000). Appellate courts will "give deference to state court decisions regarding whether a given entity is an arm of the state," but will not view these rulings as dispositive. *Couser v. Gay*, 959 F.3d 1018, 1026 (10th Cir. 2020) (citing *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007).

ARGUMENT

I. The District Court appropriately dismissed this case for lack of subject matter jurisdiction, where the lack of jurisdiction was apparent from the pleadings and facts subject to judicial notice.

The judgment of the District Court should be affirmed because it correctly determined that (A) Hennessey failed to sufficiently plead subject matter jurisdiction and (B) could not do so because the University of Kansas Hospital Authority was an alter-ego of the state of Kansas and not a "citizen" for diversity purposes. Hennessey's brief, however, focuses almost exclusively on a sovereign immunity analysis, not specifically addressing the jurisdictional burden. The order of analysis is material, however, because the party invoking diversity jurisdiction has the burden of proving its existence by a preponderance of the evidence. *Middleton v. Stephenson*, 749 F.3d 1197, 1200 (10th Cir. 2014).

While Hennessey complains that UKHA failed to meet a perceived burden to prove sovereign immunity, the threshold burden is hers to establish subject matter jurisdiction. Not only did she fail to do so, her initial pleading specifically implied it was mistakenly filed in federal court, and that Hennessey, acting pro se, had intended to re-file in state court. When UKHA raised the issue of jurisdiction, Hennessey asserted diversity jurisdiction for the first time, based on an incorrect perception that UKHA is a corporation.

While the District Court's order characterized UKHA's argument as asserting it is not a "citizen" because it is an arm of the state that enjoys Eleventh Amendment immunity, these were separate, but related, contentions. UKHA is not considered a citizen for purposes of diversity jurisdiction *and* it would be entitled to sovereign immunity. A finding of immunity is not necessarily required to find that the state is not a citizen for purposes of diversity jurisdiction, however. As stated above, this is a material distinction, because proving jurisdiction was Hennessey's burden. If there is no subject matter jurisdiction, there is no reason to continue the analysis. Regardless, the District Court clearly reached the right conclusion and dismissed the case, and it had appropriate grounds for doing so.

A. Hennessey's complaint failed to articulate a sufficient basis for federal jurisdiction.

Article III of the United States Constitution confines federal court jurisdiction to matters authorized by the Constitution or federal statutes. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). The basic statutory grants of federal court subject matter jurisdiction are found in 28 U.S.C. §§ 1331 and 1332. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 (2006). Section 1331 serves as a basis for federal question jurisdiction, while § 1332 provides for diversity of citizenship jurisdiction. *Id.*

"Jurisdiction presents a threshold question that a federal court must address prior to any merits-based determination. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S. Ct. 1181, 1193 (2010). There is a presumption *against* federal court jurisdiction, and the burden of establishing such jurisdiction lies with the party asserting it. *Kokkonen*, 511 U.S. at 377 (internal citations omitted, emphasis added). A party invoking federal jurisdiction bears "the burden of alleging the facts essential to show jurisdiction and supporting those facts with competent proof." *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d

1156, 1160 (10th Cir. 1999). "Mere conclusory allegations of jurisdiction are not enough." *Id*.

Hennessey failed to plead federal jurisdiction on any basis. (ROA at 6-15). This is readily apparent from the face of the Complaint that was captioned "In the District Court of Wyandotte County, Kansas," and invoked jurisdiction and venue in state court. (*Id.* at 7). The invocation of state court jurisdiction was consistent with Hennessey's prior attempt to litigate this matter in state court, which was previously filed and dismissed in the District Court of Wyandotte County, Kansas. (ROA at 28, 70).

After UKHA filed a motion to dismiss for lack of subject matter jurisdiction, Hennessey moved to amend her designation of place of trial from Wyandotte County District Court to the United States District Court for the District of Kansas, (ROA at 4). She then filed a response asserting diversity jurisdiction under 28 U.S.C. § 1332 for the first time, (ROA at 83-87). In this response, Ms. Hennessey alleged that she "resides in Missouri and Defendant resides in Kansas" and that the amount in controversy exceeded $75,000. (*Id.* at 85). The allegations in the Complaint alleged only that Hennessey was a "resident of the State of Missouri" and that UKHA was a "Kansas corporation and/or entity operating a hospital located in Kansas City, Wyandotte County, Kansas" (*Id*. at 6-7).

Hennessey's Complaint failed to adequately allege the citizenship of UKHA, because it incorrectly alleged UKHA had a "place of incorporation," then incorrectly alleged where that incorporation occurred. While UKHA is not a "corporation," Appellant's manner of pleading citizenship of a corporation would have been improper regardless. *See American Motorists Ins. Co. v. American Emp'r's Ins. Co.*, 600 F.2d 15, 16 n.1 (5th Cir. 1979) ("For purposes of determining diversity of citizenship a corporation is deemed 'a citizen of any State by which it has been incorporated and of the State where it has its principle place of business . . . .' The plaintiffs are required to provide this information in their pleadings.") (internal citation omitted); *Variable Annuity Life Ins. Co. v. Adel*, 197 F.App'x 905, 906 (11th Cir. 2006) (holding that corporate plaintiff's complaint which alleged its state of incorporation was inadequate absent allegations of its principal place of business as well). These facial defects in Hennessey's Complaint alone warranted dismissal under Fed. R. Civ. P. 12(b)(1), especially where jurisdiction was expressly challenged and there was no attempt to amend to correct the defects. *See* (ROA at 85) (arguing that "diversity jurisdiction has been established as delineated in [the response]").

Moreover, Hennessey failed to present any competent evidence of UKHA's citizenship in response to the motion to dismiss. The Supreme Court has unanimously stated that "*[w]hen challenged on allegations of jurisdictional facts,*

the parties must support their allegations by competent proof." *Hertz Corp.*, 559 U.S. at 96-97. (emphasis added). Indeed, "[w]hen reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995).

UKHA appropriately challenged Hennessey's 'jurisdiction fact' in asserting that it was not a Kansas corporation, but a legislatively-created instrumentality of the state of Kansas. For that reason, UKHA is not a "citizen" of Kansas for the purposes of establishing diversity jurisdiction. (ROA at 26, 89). In response, Hennessey failed to offer any "competent proof" or really even any analysis on the issue, aside from simply repeating a conclusory allegation that UKHA is a "corporation," and that because "Defendant resides in Kansas…diversity jurisdiction has been established… ." (ROA at 85.) Accordingly, the District Court could have simply dismissed the Complaint on Hennessey's failure to adequately plead a basis for jurisdiction, without delving further into the analysis.

B. The District Court correctly determined that Hennessey cannot demonstrate that UKHA is a 'citizen' for purposes of diversity jurisdiction, because it is an instrumentality of the state of Kansas.

While the District Court could have dismissed the Complaint for its failure to properly plead jurisdiction, it did engage in a substantive analysis of whether UKHA is a "citizen" for purposes of diversity jurisdiction. It reached the correct conclusion in that analysis as well.

It is a long-standing principle that a state is not a citizen for purposes of diversity jurisdiction. *Postal Tel. Cable Co. v. State of Alabama*, 155 U.S. 482, 487 (1894). Moreover, entities that are arms or alter egos of the state are not citizens of that state for purposes of diversity jurisdiction. *See Moor v. Alameda County*, 411 U.S. 693, 720 (1973). To determine whether an entity is an instrumentality of alter-ego of a state, courts may also look to factors used to determine whether an entity is cloaked with Eleventh Amendment immunity in making that determination. *See Kansas State Univ. v. Prince*, 673 F. Supp. 2d 1287, 1299 (D. Kan. 2009) (stating Eleventh Amendment immunity test is "equally applicable in determining one's citizenship for the purpose of diversity jurisdiction").

When determining whether a subordinate agency can be sued in Federal court, courts will consider whether the entity is an instrumentality or an "arm of the state."

Steadfast, 507 F.3d at 1253. In *Steadfast*, this Court established four factors to be considered when determining whether an entity is an instrumentality of the state. *Id.* These four factors are: (1) the character ascribed to the entity under state law; (2) the autonomy accorded to the entity under state law; (3) the entity's finances; and (4) whether the entity is concerned primarily with local or state affairs. *Id.* All four of these factors emphatically establish that UKHA is "an arm of the state," and therefore not a "citizen" for purposes of diversity jurisdiction.

1. The statutes creating the University of Kansas Hospital Authority clearly establish that UKHA is a governmental body acting as an instrumentality of the state.

When determining whether a party is a governmental entity, the first point of analysis is how the entity is characterized under state law. *Sturdevant v. Paulsen*, 218 F.3d 1160, 1164 (10th Cir. 2000). This involves "conducting a formalistic survey of state law to ascertain whether the entity is identified as an agency of the state." *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007). In *Sturdevant*, the Court stressed that the fundamental goal of the analysis was to distinguish political subdivisions from governmental agencies that are effectively arms of the state. *Sturdevant*, 218 F.3d at 1165. In *Steadfast*, the Tenth Circuit looked to the defendant's foundational statute and state statutory and case law in examining the defendant's character. *Id.* at 1253-54. In Steadfast, the Tenth Circuit found that

Oklahoma statutory and case law identified the defendant as an agency of the State, as the enactment statute described it as a "governmental agency of the State of Oklahoma." State statutes also described the agency as "a nonappropriated agency" of the state, and case law described defendant as a "state agency." *Id.* at 1254.

Examining Kansas statutory and case law, it is clear UKHA is similarly identified as an agency or instrumentality of the state. UKHA is specifically described as a governmental entity and instrumentality of the State of Kansas in its enactment statutes, and its "exercise of…rights, powers and privileges" are "deemed and held to be the performance of an essential government function." K.S.A. § 76-3304(a). Furthermore, the Act explicitly grants UKHA the "duties, privileges, immunities, rights, liabilities, and disabilities of a body corporate and a *political instrumentality of the state*. K.S.A. § 76-3308(a)(1). The legislature also ensured that UKHA would be subject to the Kansas Tort Claims Act, which exclusively controls the tort liability principles of Kansas governmental entities, including the extent to which Kansas waives its entitlement to immunity in state courts. *See* K.S.A. § 76-3315. The KTCA defines the "State" as "the state of Kansas and any department or branch of state government, or any agency, **authority**, institution, or other **instrumentality** thereof…" K.S.A. § 75-6102 (emphasis added). Overwhelmingly, Kansas statutes make clear that the Kansas legislature intended the University of Kansas Hospital Authority to be an instrumentality or arm of the state.

2. UKHA does not have sufficient autonomy to be considered independent of the State of Kansas.

The second factor to be considered in the analysis involves the autonomy accorded to the entity under state law. *Steadfast*, 507 F.3d at 1253. When assessing this factor, the Court will consider the degree of control the state exercises over the entity. *Sturdevant*, 218 F.3d at 1164.

The University of Kansas Hospital Authority Act demonstrates that the State of Kansas intended to make UKHA an arm of the state, even if it can conduct day-to-day operations independently. It retained measures of control that include, but are not limited to, the following facts found in the enacting statutes:

(1) The Governor of Kansas appoints the majority of the UKHA board, subject to confirmation of the Kansas Senate. (K.S.A. 76-3304(b).)

(2) Subject to specific enumerated exceptions set by the legislature, UKHA records are required to be maintained as governmental records that are subject to the Kansas Open Records Act. (K.S.A. 76-3305(b).)

(3) UKHA's board members are subject to Kansas governmental ethics provisions and oversight. (K.S.A. 76-3307).

(4) The Kansas legislature specifically restricts the performance of abortions at the University of Kansas Hospital, and those restrictions

are not equally applicable to private hospitals under state law. (K.S.A. 76-3308(i).)

(5) UKHA is statutorily required to submit a "complete and detailed operating and financial" report to the governor and legislature on an annual basis, which may be subject to legislative oversight auditing. (K.S.A. 76-3312(p).)

(6) UKHA is exempted from state and local taxation laws, but has no authority to levy taxes itself. (K.S.A. 76-3313.)

(7) The hospital may not be merged or sold without legislative approval. (K.S.A. 76-3318.)

(8) The Kansas legislature has the authority to dissolve UKHA, and the entity has no power to do so itself. (K.S.A. 76-3304(n).)

Against this backdrop, Hennessey argues that UKHA was created to "privatize" the University of Kansas Hospital, so the hospital could be more "economically viable." As evidence of this purpose, she cites to articles and internet websites that are neither proper evidence, nor were submitted to the district court in the briefing on UKHA's motion to dismiss. Regardless, Hennessey's argument treats transfer of hospital control by the Kansas *Board of Regents* to UKHA as synonymous with divesting the state of control altogether. As can be seen in the statutes cited above, this is simply not a valid conclusion. Even if UKHA is entitled

to issue bonds, hire employees, engage in joint ventures, and/or procure its own contracts, Hennessey's brief fails to explain how these facts would establish that the entity is truly autonomous under Kansas law, particularly when weighed against the other statutory provisions establishing governmental oversight of its operations. Presumably, an entity can hardly be said to be operating with autonomy from the state when the state government appoints its board of directors, establishes the scope of its powers, controls its maintenance of records, and controls the ultimate disposition of its finances and property. To the contrary, the State controls UKHA's very existence.

3. The University of Kansas Hospital Authority's finances indicate it is an arm of the state.

The third factor involves an examination of the entity's financing sources. *Steadfast*, 507 F.3d at 1255. Here the Court examines the entity's funding, including whether it can issue bonds and levy taxes. *Steadfast*, 507 F.3d at 1253. In *Steadfast*, the agency had the power to issue bonds, but it could not levy taxes. *Id.* The Court held that "the absence of taxing authority and the ability to issue bonds, with certain state guidance, renders an agency more like an arm of the state than a political subdivision." *Id.* (citing *Sturdevant*, 218 F.3d at 1169-70).

While UKHA can issue bonds pursuant to K.S.A. § 76-3308, it notably cannot levy taxes. K.S.A. § 76-3308. This arrangement is identical to the powers granted to

the defendant agency in *Steadfast*. This Circuit has found that this fact tends to suggest the agency is an arm of the state. *Steadfast*, 507 F.3d at 1255.

4. UKHA is primarily concerned with state affairs.

The final factor addresses whether the entity is concerned with local or state affairs, specifically examining the agency's function, composition, and purpose. *Steadfast*, 507 F.3d at 1253. In UKHA's governing act, the Kansas legislature declared that the mission of the University of Kansas Hospital was (1) "facilitate and support education, research, and public service activities"; (2) "provide patient care and specialized services not widely available elsewhere in the state"; and (3) "continue the historic tradition of care by the University of Kansas hospital to medically indigent *citizens of Kansas*." K.S.A. § 76-3302(a)(4)(emphasis added). Moreover, the Act provides that the UKHA's powers are "an essential government function "in matters of public necessity for the *entire state* in the provision of health care, health sciences education, and medical research. K.S.A. § 76-3302(b). UKHA is devoted to state affairs, not local matters, a fact most succinctly demonstrated by the Kansas legislature's requirement that each Congressional district in Kansas be represented on UKHA's board of directors. K.S.A. 76-3304(b). Hennessey appears to concede that this point in the analysis favors UKHA's contention.

In conclusion, all four the of *Steadfast* factors weigh in favor of the University of Kansas Hospital Authority being an instrumentality and arm of the state of Kansas, as the legislature specifically described it. Kansas law clearly characterizes

UKHA has an instrumentality of the State of Kansas, the state exercises a considerable amount of control over UKHA, including its board of directors, property, and finances, UKHA cannot levy taxes, and UKHA is primarily concerned with state affairs. Therefore, the District Court correctly determined that the University of Kansas Hospital Authority is an arm of state of Kansas, and not a "citizen" for purposes of diversity jurisdiction. The judgment should be affirmed.

II. The district court properly dismissed Hennessey's suit for lack of subject matter jurisdiction because the claim was barred by sovereign immunity.

Apart from the jurisdiction analysis, the District Court properly found that since UKHA is an arm of the State of Kansas, it is also immune from suit in federal court.

The Eleventh Amendment to the Constitution of the United States provides, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The United States Supreme Court has continuously held that an unconsenting state is immune from suits brought in federal courts by its own citizens, as well as citizens of another State. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Eleventh Amendment immunity applies equally to states and entities that are arms of the state.

Couser v. Gay, 959 F.3d 1018, 1022 (10th Cir. 2020). Thus, the fundamental goal over the sovereign immunity analysis is "distinguishing political subdivisions from governmental entities that are effectively arms of the state." *Sturdevant*, 218 F.3d at 1165 (citing *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280, 97 S. Ct. 568 (1997)). Sovereign immunity is also a "jurisdictional bar" that can be raised for the first time on appeal. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73, 116 S.Ct. 1114 (1996).

Hennessey argues that the district court improperly granted dismissal on sovereign immunity grounds, because UKHA did not fully analyze the four factors this circuit generally uses to determine whether an entity is an instrumentality of the state. She argues this was UKHA's burden to meet. UKHA contends that construing the law in this manner would constructively impose a burden on UKHA to *disprove* jurisdiction simply because it is the state. Adopting this test would seem to defy controlling authority and would create conflicting standards for a jurisdictional analysis. Ostensibly, a state would then need to prove sovereign immunity to establish the court did not have jurisdiction. Furthermore, even if the Court adopted this burden-shifting standard for the first time in this appeal, it would be prejudicial to retroactively apply a new standard of proof against UKHA as to the underlying issue raised here.

Regardless, UKHA's motion to dismiss adequately established sovereign immunity by specifically citing prior findings of both the federal and state courts granting UKHA and the University Medical Center Eleventh Amendment immunity. (ROA at 26-27, 89-90). As the Court noted in its order, UKHA did not engage in a full analysis of the "arm of the state" factors in its reply, but this was because it cited to a case where the same analysis had already been conducted as to UKHA. Contrary to Hennessey's assertions, UKHA did not "ignore" the *Steadfast* factors, it simply referred to a case where the analysis had already been done.

Finally, Hennessey also moved to proceed in forma pauperis, and the District Court granted this motion pursuant to 28 U.S.C. § 115(a)(1). (ROA at 22). Courts are required to screen complaints in forma pauperis, (28 U.S.C. § 1915(e)(2)), and a court must dismiss a case at any time if the court determines that the action or appeal seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B)(iii). The District Court had an independent obligation to review not only jurisdiction but also potential immunities for a plaintiff proceeding *in forma pauperis*, therefore, even if UKHA failed to carry an unestablished burden to prove its sovereignty as an affirmative defense, the failure to do so was harmless.

Lastly, Hennessey's primary argument in her response to the UKHA's motion to dismiss was that the entity was a "corporation" that waived its constitutional protections and consented to suit. (ROA at 83-87). This is another argument raised

for the first time on appeal. Generally, arguments raised for the first time on appeal are not to be considered. *Turner v. Pub. Serv. Co.*, 563 F.3d 1136, 1143 (10th Cir. 2009).

For these reasons outlined above, the District Court correctly dismissed Hennessey's state law claims in finding that UKHA was entitled to Eleventh Amendment immunity, and this Court should affirm.

III. The District Court did not err in failing to order discovery *sua sponte*.

As a fallback, Hennessey argues that this Court should remand for limited discovery into the *Steadfast* factors, despite her admission that she failed to request any discovery below. (Appellant's Br. at 52, n. 16) (noting that "Ms. Hennessey did not request discovery before the district court.")

Federal appellate courts generally do not consider an issue not passed upon below. *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (holding that the Court may assume the appellant did not preserve the issue for appeal where he failed to satisfy requirements of 10th Cir. R. 28.1(A)). Indeed, because the record is devoid of such a request and Hennessey affirmatively admits this issue was not preserved, the Court should find this issue waived. *See Pignanelli v. Pueblo Sch. Dist. No. 60*, 540 F.3d 1213, 1217 (10th Cir. 2008) (this Court generally does "not review claims on appeal that were not presented below.")

Regardless, a district court also does "not abuse its discretion in failing to order discovery *sua sponte*." *Reagor v. Okmulgee Cty. Family Res. Ctr., Inc.*, 501 F. App'x 805, 811 (10th Cir. 2012) (citing *Flaim v. Med. Coll. of Ohio,* 418 F.3d 629, 644 (6th Cir. 2005) ("Where the district court accepts the plaintiff's allegations as true, but concludes that those allegations are insufficient as a matter of law, it is not an abuse of discretion to limit discovery *sua sponte.*" Because she failed to request discovery, Hennessey cannot show an abuse of discretion by arguing the court failed to do what she failed to ask of it.

Finally, Hennessey's complaints that UKHA did not discuss the "arm of the state test" until its reply brief must again be challenged. (Appellant's Br. at 52, n. 10, 16). As stated above, UKHA was not even required to address the "arm of the state" analysis in the original motion, because Hennessey did not even *plead* federal jurisdiction, and her Complaint specifically references a Kansas venue statute. (ROA at 107, n. 1).

Hennessey's belated request for remand for discovery is particularly improper because sovereign immunity, like qualified immunity, is an *immunity from suit* rather than a mere defense to liability. *See Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004) (describing qualified immunity "like absolute immunity*"* as an entitlement not to stand trial or face the other burdens of litigation.) "Even such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind

can be peculiarly disruptive of effective government." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

In sum, Hennessey's request for discovery was not preserved and she cannot demonstrate an abuse of discretion when she did not ask for discovery prior to the District Court's ruling. Even ignoring these fundamental issues, she was not entitled to discovery because her complaint was facially deficient, and the District Court was required to dismiss it. Hennessey lacked the necessary facts to carry her burden to demonstrate diversity jurisdiction and a blanket request for unspecified discovery now will not resolve that issue.

CONCLUSION

The district court did not err in finding that the University of Kansas Hospital Authority is an arm of the state of Kansas and is therefore not a "citizen" of Kansas for diversity jurisdiction purposes. It further correctly determined that UKHA was entitled to Eleventh Amendment immunity. Dismissal was the appropriate remedy, and the order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not requested by UKHA.

Respectfully submitted,

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Date: June 10, 2022

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I hereby certify that with respect to the foregoing:

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I hereby certify that on June 10, 2022, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for Tenth Circuit Court by using the 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.

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