

# **Bond Case Briefs**

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## **POLITICAL SUBDIVISIONS - KANSAS**

### **Hennessey v. University of Kansas Hospital Authority**

**United States Court of Appeals, Tenth Circuit - November 9, 2022 - F.4th - 2022 WL 16828836**

Alleging that she was sexually assaulted by hospital radiology technician, patient brought action against state university hospital authority, asserting claim for negligent supervision.

Hospital authority moved to dismiss for lack of subject matter jurisdiction and based on Eleventh Amendment sovereign immunity. Finding that authority was an arm of the state, the United States District Court for the District of Kansas granted motion to dismiss. Patient appealed.

The Court of Appeals held that:

- As matter of first impression, authority bore the burden to establish its status as an arm of the state for purposes of sovereign immunity defense;
- Authority bore the burden to establish its status as an arm of the state for purposes of diversity jurisdiction;
- Limited role of governor and legislature with respect to board governing authority supported determination that it was not an arm of the state;
- Factor of ownership and control over property favored a finding that authority was an arm of the state;
- Ability of authority to form its own contracts favored supported determination that it was not an arm of the state;
- Ability of authority to set policies supported determination that it was not an arm of the state; and
- Vacatur of dismissal and remand to receive additional evidence was warranted.

State university hospital authority bore the burden to establish its status as an arm of the state for purposes of its Eleventh Amendment sovereign immunity defense, in patient's action against authority, asserting claim for negligent supervision based on alleged sexual assault by hospital radiology technician; authority possessed the evidence relating to its status, putting the burden on authority potentially obviated the need for discovery so that authority could benefit from immunity sooner, and assigning the burden to authority was consistent with precedent under the Foreign Sovereign Immunities Act (FSIA) placing burden on foreign sovereign to make a prima facie showing of immunity, and also consistent with general rule requiring defendants to bear the burden when asserting a defense.

State university hospital authority's possession of evidence as to its status as an arm of the state for purposes of Eleventh Amendment sovereign immunity supported placing the burden on authority to establish such status, in patient's action against authority, asserting claim for negligent supervision of hospital radiology technician who sexually assaulted patient, despite authority's contention that patient could obtain evidence about authority's status through an open records request; although the text of the act creating the authority was readily available to patient, the authority was in possession of key evidence regarding its finances, day-to-day operations, and operating procedures.

State university hospital authority bore the burden to establish its status as an arm of the state for purposes of an attack on patient's prima facie showing of district court's diversity jurisdiction over patient's action against authority, asserting claim for negligent supervision based on alleged sexual assault by hospital radiology technician; authority possessed the evidence relating to its status, courts had already shifted the burden to defendant on arm-of-the-state inquiry in sovereign immunity context such that it was natural to do so for purposes of diversity of citizenship, and placing the burden on authority was analogous to placement of burdens under the Foreign Sovereign Immunities Act (FSIA).

Under Kansas act establishing state university hospital authority, factor of authority's finances favored determination that authority was not an arm of the state entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; act provided for the authority to have its own funds, managed outside of the state treasury, allowing authority to open and maintain bank accounts, fix its rates, hire collection services, borrow money, make loans, and set the salaries of employees and provide supplemental benefits, and although authority could not levy taxes, act allowed it to issue bonds that were solely its responsibility and not backed by the state.

Under Kansas law, limited role of governor and legislature with respect to board governing state university hospital authority favored a finding that authority was autonomous from the State, thus supporting determination that it was not an arm of the state entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; although 13 of 19 board members had been appointed by governor and confirmed by legislature at authority's inception, governor now had to select from candidates chosen by the board when appointing a new member, governor did not choose who led the board or who was in charge of overseeing authority's daily operations, and governor could not remove a member of the board.

Under Kansas law, classification of employees favored a finding that state university hospital authority was autonomous from the State, thus supporting determination that it was not an arm of the state entitled to Eleventh Amendment immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; the act which created authority largely treated the authority like a private hospital for purposes of hiring, firing, and providing benefits for employees, in that it explicitly declared that employees of hospital and authority were not state employees, stated that it did not place any officer or employee of the authority under the civil service act, and gave authority discretion to create benefit programs and set terms of employment.

Under Kansas law, factor of ownership and control over property favored a finding that state university hospital authority was an arm of the state, and thus entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; although the act establishing authority allowed it to acquire and regulate the use of certain property and equipment, act did not transfer buildings and facilities to authority and did not allow authority to own buildings or facilities, including those constructed with funds from its revenues, and the act provided that disputes over transfer of property from university to authority would be resolved by governor.