
No. 15-113267

In the Supreme Court of the State of Kansas

Luke Gannon, by his next friends and guardian, *et al.*,
Appellees

v.

State of Kansas, *et al.*,
Appellants.

Appeal From Appointed Panel
Presiding in the District Court of Shawnee County, Kansas

Honorable Franklin R. Theis
Honorable Robert J. Fleming
Honorable Jack L. Burr

District Court Case No. 10C001569

BRIEF OF APPELLANT RON ESTES

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Oral Argument: not requested

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NATURE OF THE CASE

This is part of the ongoing school finance case. This portion of this appeal is by Kansas Treasurer Ron Estes, who was ordered by the Panel *sua sponte* to be joined as a contingently necessary defendant. After he was added, Estes moved to dismiss, which was denied by the Panel. Estes' portion of this appeal is from the denial of his Motion to Dismiss.

STATEMENT OF THE ISSUES

1. Whether the Panel erred in denying Estes' Motion to dismiss him in his individual capacity as a contingently necessary party.
2. Whether the Panel erred in denying Estes' Motion to dismiss him in his official capacity.

STATEMENT OF FACTS (As they pertain to Defendant Ron Estes)

In its March 13, 2005 Order, the Panel directed Plaintiffs to join as an additional Defendant (along with others) "the Kansas State Treasurer as contingently necessary parties forthwith. Such joinder shall be accomplished in both their official capacity and individually. No answer shall be required of such joined Defendants. (R. Vol. 128, pp. 19-20.)

On April 20, 2015, Defendant Estes filed his Motion to Dismiss. (R. Vol. 128, pp. 100.) In it he argued first that he should be dismissed as not contingently necessary in his individual capacity because there were no allegations concerning any act he had or might take in his individual capacity, and that the only possible relief contemplated against him would be injunctive relief for his future conduct involving his exercise of governmental power. (R. Vol. 128, pp 103-04.)

Estes then argued he should be dismissed as not contingently necessary in his official capacity, because under Kansas law, he has no discretion in what warrants to pay. (R. Vol. 128, pp 104-06.) By statute, the Director of Accounts and Reports draws up warrants based upon certification by the State Board of Education, and the Treasurer must pay them. (*Id.*)

A hearing was held from May 7 through May 8, 2015, at which time Estes was not called and did not testify. (R. Vols. 138-39.) Following the hearing, Estes submitted a proffer of evidence by Lucinda Anstaett, the Director of Cash Management for the Treasurer's office, which explained in specific detail how state aid to school districts is actually distributed, demonstrating that his duties were purely ministerial based upon statute. (This document was not included in the initial record on appeal. Counsel for Estes filed in Kansas Supreme Court Rule 3.02(d)(3) request to have it added to the record on appeal. Given the accelerated briefing schedule in this appeal, it is unlikely that a revised Table of Contents for the Record on Appeal will be available by September 2, 2015, the Appellants' briefing due date. Therefore a copy of the Motion for Addition of Record on Appeal is included in the Appendix to this brief as Appendix 1, and the document to be added—the Proffer of Evidence (with accompanying affidavit) has been added as Appendix 2.)

In its June 26, 2015 Order, the Panel granted injunctive relief against Estes (and others) saying,

The Kansas State Department of Education and any official thereof, the Kansas Department of Administration, its Secretary of Administration and any official or employee thereof, the Treasurer of the State of Kansas, and any other executive official of the State of Kansas are enjoined from issuing, following, or honoring any other directive, practice, or policy in regard to these Orders that would, whether directly or indirectly, act to

hinder, delay, offset, compromise, dilute, or diminish the effect or timely accomplishment of these Orders, including the, or an, exercise of authority granted, if any there be, by § 2 of 2015 Senate Substitute for HB2135.

(R. Vol. 136, p 1488-89)

As to Estes' Motion to Dismiss, the Panel said, "The Motions to Dismiss filed by the Kansas Secretary of Administration and the Kansas State Treasurer are overruled." (R. Vol. 136, 1502.)

Estes timely appealed. (R. Vol. 137, p 1515.)

ARGUMENT

K.S.A. 2014 Supp. 60-219(a) provides:

(a) Persons required to be joined if feasible. (1) Required party. A person who is subject to service of process must be joined as a party if:

(A) In that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) As a practical matter, impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest.

(2) Joinder by court order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss the party.

I. Ron Estes is not a contingently necessary party in his individual capacity.

Official capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent. *Copeland v. Robinson*, 25 Kan. App. 2d 717, 721 (1998), citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n. 55 (1978). In *Schmeidler v. Drees*, No. 89,251, 2003 WL 21948155 (Kan. Ct. App. Aug. 8, 2003), the Court of Appeals affirmed the dismissal of a damages suit against two county prosecutors who plaintiff alleged had filed a wrongful child in need of care case. The court said, “We agree with the district court that all of Drees' and Scott's actions were in their official capacities and that Schmeidler has failed to demonstrate that they acted in any individual capacity. Schmeidler has failed to state a claim upon which relief could be granted against Drees and Scott as individuals.” 2003 WL 21948155 * 8

There were no factual allegations in this case that in any way implicated Estes' past or potential future conduct as an individual. Presumably the panel anticipated the possibility of some sort of injunctive relief against Estes in his official role as Treasurer. While Kansas precedent does not directly address that issue, other jurisdictions have. Under the federal cause of action 42 U.S.C. § 1983, suits against state officers and employees seeking prospective injunctive relief must be brought against them in their official capacity. *See e.g., Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985). A state official so sued, however, must have “some connection with the enforcement of the act.” *See Confederated Tribes & Bands v. Locke*, 176 F.3d 467, 469 (9th Cir.1999) (quoting *Ex Parte Young*, 209 U.S. 123, 157 (1908)). Setting aside Eleventh Amendment complications raised by federal causes of action against state officials, the same rule is generally applied to state causes of action in state court. *See e.g., Mullis v. Sechrest*, 347

N.C. 548, 552, 495 S.E.2d 721, 723 (1998) (“If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant [must be] named in an official capacity.”)

By any stretch of the pleadings, no relief was contemplated in this case against Estes outside of the possibility of injunctive relief for actions he might take as part of his official duties. For fairness to Estes and his peace of mind, he should have been dismissed in his individual capacity.

II. Ron Estes is not a contingently necessary party in his official capacity.

Treasurer Estes’ job duties, under both the old school finance structure, and under the new S.B. 7, grant him no authority or discretion in what warrants he pays. The Treasurer does **not** determine what warrants **should** be issued, or the amounts that should be paid. As will be discussed, the Treasurer’s job is to pay warrants that someone else issued.

Prior to S.B. 7, K.S.A. 2014 Supp. 72-6417(c) (repealed by S.B. 7) set forth how state general aid was distributed:

The state board of education shall prescribe the dates upon which the distribution of payments of general state aid to school districts shall be due. Payments of general state aid shall be distributed to districts once each month on the dates prescribed by the state board. The state board shall certify to the director of accounts and reports the amount due as general state aid to each district in each of the months of July through June. Such certification, and the amount of general state aid payable from the state general fund, shall be approved by the director of the budget. The director of accounts and reports shall draw warrants on the state treasurer payable to the district treasurer of each district entitled to payment of general state aid, pursuant to vouchers approved by the state board. Upon receipt of such warrant, each district treasurer shall deposit the amount of general state aid in the general fund, except that, an amount equal to the amount of federal impact aid not included in the school financing sources of a district may be disposed of as provided in subsection (a) of K.S.A. 72-6427, and amendments thereto.

In short, the Treasurer's role is to pay warrants, warrants drawn by the Director of Accounts and Reports upon certification by the State Board of Education of the amounts due and dates payable.

Prior to S.B. 7, pursuant to K.S.A. 2014 Supp. 72-8814(c), capital outlay aid was distributed in a like manner, with the State Board of Education certifying the amounts due and payable, the Director of Accounts and Reports issuing warrants accordingly, and the Treasurer paying the warrants.

Now, under S.B. 7 Section 6, the State Board of Education determines the amount of state general aid pursuant to Section 6 and appropriation, then under Section 7(c), the amounts are approved by the Director of Budget, the Director of Accounts and Reports issues warrants, and the Treasurer pays the warrants:

The state board of education shall prescribe the dates upon which the distribution of payments of general state aid to school districts shall be due. Payments of general state aid shall be distributed to districts once each month on the dates prescribed by the state board. The state board shall certify to the director of accounts and reports the amount due as general state aid to each district in each of the months of July through June. Such certification, and the amount of general state aid payable from the state general fund, shall be approved by the director of the budget. The director of accounts and reports shall draw warrants on the state treasurer payable to the district treasurer of each district entitled to payment of general state aid, pursuant to vouchers approved by the state board. Upon receipt of such warrant, each district treasurer shall deposit the amount of general state aid in the general fund.

Other provisions in S.B. 7 are in accord.

In district court, Treasurer Estes submitted an affidavit by Lucinda Anstaett, the Director of Cash Management for the Treasurer's office, which set forth in specific detail the steps in the distribution process. (Appendix II.) Treasurer Estes statutory role in redeeming payments provides his office with no discretion to determine whether or not to

distribute state funds to local school districts after receiving an order from the State Board of Education and the warrant from the Director of Accounts and Reports, and the practical steps his office takes in fulfilling this duty show his lack of discretion.

K.S.A. 75-604 places all public moneys in the state treasury within the custody of the State Treasurer “until the same is ordered by the proper department or officer of state government to be transferred or paid out according to law,” and requires the State Treasurer to “when such orders for the transfer or payment are received, faithfully and promptly to make the same as directed.” K.S.A. 75-611 provides a mechanism for enforcing this duty by providing:

If at anytime it shall appear from the accounts of the State Treasurer, or in any other way, that the State Treasurer has not accounted for and paid over the public moneys of the State as directed by law, the State may proceed by civil action against the State Treasurer and his or her sureties in any court of competent jurisdiction.

These statutes demonstrate that the Kansas State Treasurer’s role in making payments from the state treasury is similar to that of the banker who simply makes payments based upon the depositor’s orders to pay in the form of a check. Although the State Treasurer’s co-signature is required on state warrants pursuant to K.S.A. 75-3732, the process for auditing and issuing state warrants is controlled by the Department of Administration, Division of Accounts & Reports. The State Treasurer has absolutely no role in deciding whether to issue state warrants or the amount of the warrant.

The injunction to Treasurer Estes requiring him to make payments other than in accordance with the warrants sent to him by the Director of Accounts and Reports which were certified and directed by the State Board of Education, would put Estes in an impossible situation and require him to violate his statutory job duties were he to receive


warrants contrary to the injunction. Treasurer Estes is not the proper party for any injunction contemplated by the panel, and he should have been dismissed from this action in his official capacity.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, the State requests that the Panel's decision be reversed, with directions to the Panel to dismiss Kansas Treasurer Estes both in his individual and official capacity.

Respectfully submitted,

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DEREK SCHMIDT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of September, 2015, true and correct copies of the above and foregoing Brief of Appellant Ron Estes

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APPENDIX I

RECEIVED

AUG 27 2015

HEATHER L. SMITH
CLERK OF APPELLATE COURTS

IN THE SUPREME COURT OF THE STATE OF KANSAS

LUKE GANNON, *et al.*,
Plaintiffs,

v.

THE STATE OF KANSAS, *et al.*,
Defendants.

County Appealed From:
District Court Shawnee County, Kansas, in
the Matter of Proceedings Before the Three-
Judge Panel Appointed Pursuant to K.S.A.
72-64b03 *in re* School Finance Litigation

District Court Case No.: 2010CV1569

Proceeding Under Chapter: 60

DEFENDANT ESTES' MOTION FOR ADDITION TO RECORD ON APPEAL

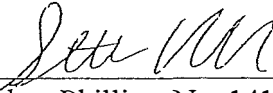
Defendant Ron Estes, Kansas Treasurer, respectfully requests that the following item from the district court record be added to the record on appeal pursuant to Rule 3.02(d)(3) of the Kansas Supreme Court Rules: "05/15/2015 Proffer of Evidence INF: Information (Generic)" (with accompanying affidavit).

A proposed order accompanies this motion.

Dated this 27th day of August, 2015.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
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*Attorney for Defendant Ron Estes in his individual
and official capacities.*

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Addition to Record On Appeal served by depositing same in the United States Mail, first class postage prepaid, this 27th day of August 2015, addressed as follows:

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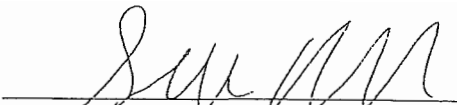
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District Court Case No.: 2010CV1569

Proceeding Under Chapter: 60

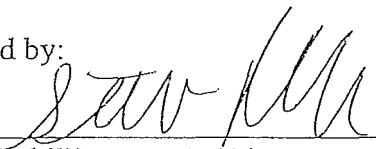
ORDER FOR ADDITION TO RECORD ON APPEAL

The Court having considered Defendant Ron Estes, Kansas Treasurer's Motion for Additions to the Record on Appeal, and being advised in the premises, finds that good cause is shown and it is therefore ordered that "05/15/2015 Proffer of Evidence INF: Information (Generic)" (with accompanying affidavit) be added to the record on appeal.

IT IS SO ORDERED this ____ day of August, 2015.

For the Court

Prepared by:



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*Attorney for Defendant Ron Estes in his individual
and official capacities.*

CERTIFICATE OF SERVICE

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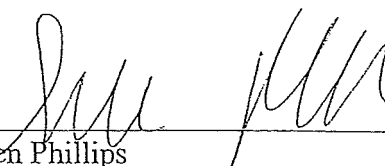
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Stephen Phillips

APPENDIX II

AFFIDAVIT

State of Kansas)
)
County of Shawnee) **ss:**

Comes now Lucinda Anstaett, the Director of Cash Management for State Treasurer Ron Estes, with the following statement regarding distributions of state aid to school districts.

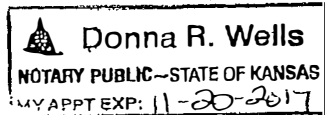
1. Vouchers for distributions to school districts pursuant to K.S.A. 72-6417(c) are prepared by the Department of Education, School Finance Section, which is led by S. Craig Neuenswander, School Finance Director.
2. When the voucher is created, the School Finance Section sends an email to the Department of Administration notifying them of the voucher numbers and pending deposit dates.
3. The School Finance Section also sends a formal letter and email to the Division of the Budget seeking their approval.
4. Approval from the Division of the Budget is provided by a letter from Director Shawn Sullivan to both the Department of Education and the Department of Administration with a confirming email.
5. Once approval is received, the Department of Education, Fiscal Services and Operations Section, led by Bill Schafer, submits the electronic INFO2 payment file to SMART.
6. After the vouchers are entered into the system, they must be approved by the Department of Administration, Audit Team, supervised by Janette Martin.
7. On the second day, SMART runs the pay cycle and creates the ACH payments which are transmitted to US Bank by 10pm. The ACH payments settle two days later.

The State Treasurer's Office has no role in the issuance of vouchers or the ACH payments generated to pay them. Our role is limited to redeeming payments and settling the ACH's after they are issued against our bank account records.

FURTHER AFFIANT SAITH NOT!

Lucinda Anstaett
Lucinda Anstaett, Director of Cash
Management for State Treasurer Ron Estes

Subscribed and sworn to before me this 15th day of May, 2015.



Donna R. Wells
Notary Public