IN THE SUPREME COURT, STATE OF WYOMING

CITY OF LARAMIE, WYOMING, Appellant (Plaintiff), v. UNIVERSITY OF WYOMING and UNIVERSITY OF WYOMING BOARD OF TRUSTEES, Appellees (Defendants).	S-23-0062

Appellant's Reply Brief

Thomas Szott
Wyoming Bar No. 7-5139
For Appellant City of Laramie, Wyoming
THE BERNHOFT LAW FIRM, S.C.
2232 Dell Range Blvd., Ste. 324
Cheyenne, WY 82009
(307) 275-8038
tszott@bernhoftlaw.com

Korry D. Lewis
Wyoming Bar No. 7-5151
For Appellant City of Laramie, Wyoming
THE BERNHOFT LAW FIRM, S.C.
2232 Dell Range Blvd., Ste. 324
Cheyenne, WY 82009
(307) 757-6872
kdlewis@bernhoftlaw.com

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Statement of New Issues and Arguments

1. In its principal brief, the City argued the University enjoys no sovereign immunity against a third-party claim under the 1965 Covenant.

a. This reply brief addresses the University's argument that sovereign immunity is not a jurisdictional issue.

b. This reply brief addresses the University's argument that its only pertinent activity was acquiring the property in 1965, which the University characterizes as "governmental" rather than "proprietary."

c. This reply brief addresses the University's argument that the City waived its contention under the proprietary-governmental distinction.

d. This reply brief addresses the University's argument that the proprietary-governmental distinction does not apply as a matter of law.

2. This reply brief addresses the University's claim that the City is raising equal protection arguments for the first time on appeal.

3. This reply brief addresses the University's contention that Dillon's Rule applies in Wyoming.

4. This reply brief addresses the University's contention that this Court should not apply a balancing analysis to evaluate whether the University must comply with the City Ordinance.

Argument

The standard of review in this appeal is *de novo*. (Appellant Br. at 14).

I. The University enjoys no sovereign immunity against enforcement of the 1965 Covenant.

a. Although separate non-jurisdictional claim rules exist, sovereign immunity is a jurisdictional issue.

In its principal brief, the City argued sovereign immunity does not bar enforcement of the 1965 Covenant, because the University's operation of Well B is "proprietary" rather than "governmental." (Appellant Br. at 16-20). The City did not invoke the proprietary-governmental distinction below.

Unlike most issues, this Court will consider "jurisdictional" or "fundamental" issues for the first time on appeal. *Peterson v. Meritain Health, Inc.*, 2022 WY 54, ¶ 20, 508 P.3d 696, 705 (Wyo. 2022). To avoid this allowance, the University argues sovereign immunity is not a jurisdictional issue, relying primarily on *Harmon v. Star Valley Medical Center*, 2014 WY 90, 331 P.3d 1174 (Wyo. 2014). (Appellee Br. at 7-9). But the University's argument is not supported by Wyoming law.

Sovereign immunity stems from common law and the Wyoming Constitution. *Campbell Cnty. Mem'l Hosp. v. Pfeifle*, 2014 WY 3, ¶¶ 17-18, 317 P.3d 573, 578 (Wyo. 2014). When the legislature passed the Wyoming Governmental Claims Act (WGCA), it waived sovereign immunity for specified claims. *E.g.*, *Wyo. State Hosp. v. Romine*, 2021 WY 47, ¶¶ 14, 18, 483 P.3d 840,

845, 846 (Wyo. 2021). However, the essential character of sovereign immunity did not change. It is not a mere defense to liability, but immunity from being sued in the first place. *Id.* ¶ 11, 483 P.3d at 844; *Pfeifle*, 2014 WY 3, ¶ 19, 317 P.3d at 578 ("The legislature sought to retain the common law principle that a governmental entity is generally immune from lawsuits . . . ."); *Weber v. State*, 2011 WY 127, ¶ 25, 261 P.3d 225, 232 (Wyo. 2011) ("Immunity prevents the State from being sued in the first place.").

This Court has consistently analyzed sovereign immunity as a jurisdictional barrier to suit, not an affirmative defense to liability. It construed sovereign immunity as a jurisdictional issue in pre-WGCA cases. *See Biscar v. Univ. of Wyo. Bd. of Trustees*, 605 P.2d 374, 377 (Wyo. 1980) ("[T]he district court was without jurisdiction to consider the merits of the case . . . ."); *Retail Clerks Loc. 187 AFL-CIO v. Univ. of Wyo.*, 531 P.2d 884, 887 (Wyo. 1975) ("[The assertion of sovereign immunity] raises the threshold question, of which disposal must be made before we can proceed further into this inquiry."); *Hjorth Royalty Co. v. Trustees of Univ. of Wyo.*, 222 P. 9, 9-11 (Wyo. 1924) (affirming the sustainment of a demurrer). And in WGCA cases, this Court has referred to immunized claims as "barred." *E.g.*, *City of Torrington v. Cottier*, 2006 WY 145, ¶ 7, 145 P.3d 1274, 1277 (Wyo. 2006); *Worden v. Vill. Homes*, 821 P.2d 1291, 1295 (Wyo. 1991). Nearly a century of case law confirms the jurisdictional nature of sovereign immunity.

However, sovereign immunity is not the only hurdle a would-be plaintiff must overcome. Even where sovereign immunity would not bar his claim, a would-be plaintiff must comply with certain constitutional and statutory claim requirements. Under the Wyoming Constitution, among other things, a claim against the State for payment must be "certified to under penalty of perjury." WYO. CONST. art. 16, § 7. And for its part, the WGCA imposes various claim requirements, including a requirement that the claimant sign under oath. WYO. STAT. § 1-39-113.

After originally construing these claim requirements as jurisdictional, this Court changed course in *Harmon*, 2014 WY 90, ¶ 31, 331 P.3d at 1182-83. In *Harmon*, the district court held it lacked jurisdiction over the plaintiff's negligence lawsuit, because the plaintiff's WGCA claim had not been signed under oath or certified under penalty of perjury. *Id.* ¶¶ 1, 9-10, 331 P.3d at 1176-77. This Court agreed the plaintiff's claim was invalid, but it held "the claim requirements of § 1–39–113 of the WGCA and Article 16, § 7 of the Wyoming Constitution, although substantive, are not jurisdictional." *Id.* ¶¶ 20-28, 31, 331 P.3d at 1179-82. More precisely, this Court held these claim requirements are conditions precedent to suit, which a government entity must raise "specifically and with particularity" as an affirmative defense under Wyoming Rule of Civil Procedure 9(c). *Id.* ¶¶ 49-51, 331 P.3d at 1188. "The important distinction is that the absence of subject matter jurisdiction can be

raised at any time, even on appeal, while failure to satisfy a condition precedent must be promptly raised as an affirmative defense or waived." *Id.* ¶ 49, 331 P.3d at 1188.

Here, the University's reliance on *Harmon* is inapt. According to the University, because district courts have jurisdiction in WGCA lawsuits where plaintiffs fail to comply with condition-precedent claim rules, courts "likewise have subject matter jurisdiction to decide if sovereign immunity exists." (Appellee Br. at 8-9).[1] But this argument mixes plums and pomegranates. Under *Harmon*, if a plaintiff were to present an otherwise-authorized claim under the WGCA without following the condition-precedent claim rules, the State could choose to invoke or waive the rules, because they are non-jurisdictional defenses to liability. However, if a plaintiff were to present a claim that is not authorized under the WGCA in the first place, the State could not choose to waive its sovereign immunity in litigation, because sovereign immunity is a jurisdictional barrier to suit.

[1] Courts are obligated to evaluate their own jurisdiction, including State invocations of sovereign immunity, and dismiss deficient claims. But this obligation does not somehow transform jurisdictional issues (like sovereign immunity) into non-jurisdictional issues.

And here, condition-precedent claim rules are not at issue. At issue, rather, is whether sovereign immunity bars the district court from declaring the City's right (or lack thereof) to enforce the 1965 Covenant as a third-party beneficiary and prohibiting the University from violating the covenant. This is a jurisdictional issue that may be raised at any time, including this appeal.

b. The University's activity under the 1965 Covenant is proprietary.

i. The University acted in a proprietary capacity when making the 1965 Covenant.

Apart from arguing sovereign immunity is not jurisdictional, the University argues this Court should limit the scope of its proprietary-governmental analysis. (Appellee Br. at 10-15). Specifically, the University argues this Court should disregard its actions between 2019 and 2023 and only examine "whether UW's purchase of the property in 1965 was proprietary or governmental." (Appellee Br. at 10-11, 13). As support for this premise, the University argues the "issue must be analyzed by looking to the law at the time the quitclaim deed was executed" and that "[i]n 1965, UW had absolute immunity from any suit based on a contract." (Appellee Br. at 11).

The City agrees the issue of sovereign immunity must be analyzed under pre-WGCA law, because the 1965 Covenant predated the WGCA. That is why the proprietary-governmental distinction remains controlling. *See generally* WYO. STAT. § 1-39-102(b). However, as this Court's precedent demonstrates,

the University did not enjoy "absolute immunity" against the enforcement of contracts or covenants under pre-WGCA law.

In *Harrison v. Wyo. Liquor Comm'n*, 177 P.2d 397, 398 (Wyo. 1947), a brandy supplier sued the Wyoming Liquor Commission after the Commission cancelled the supplier's contract. After noting the Commission generally performed governmental functions, this Court considered whether the Commission's "power to buy and sell intoxicating liquor as a wholesaler" rendered its activity proprietary "to that extent." *See id.* at 403. As part of its analysis, this Court rejected the plaintiffs' argument "that neither the contract to purchase the liquor involved herein nor the cancellation of that contract was pursuant to any police power." *Id.* at 404. Instead, this Court held the Commission's governmental function "must include the right to procure the liquor to be distributed" and "all of the various incidents in connection therewith." *Id.*

In *Biscar*, 605 P.2d at 375, a former assistant professor sued the University's president and trustees after after he was terminated without a formal tenure hearing, claiming his employment had been represented as "tenure-track." This Court held "hiring professors" is "a constitutionally mandated governmental function" that "bears no resemblance to the proprietary activities contemplated by [a prior case]." *Id.* at 377. Specifically,

this governmental function included "contract negotiations with those seeking employment as instructors." *See id.* at 376.

The principles of *Harrison* and *Biscar* should guide this Court here. *Harrison* established a test to determine whether a particular activity falls within an entity's broader governmental function: the particular activity is governmental if it is a necessary incident of the broader function. *See* 177 P.2d at 404. *See also Biscar*, 605 P.2d at 376-77. Furthermore, where the particular activity is contractual, the subject-matter is determinative. Thus, the State did not enjoy sovereign immunity against breach-of-contract claims in *Harrison* and *Biscar* because of "absolute immunity" against the enforcement of contracts. Rather, the State enjoyed immunity because the contractual subject-matter involved underlying governmental functions—wholesale liquor distribution and hiring professors, respectively.

Here, the University argues its acquisition of the property in 1965 was a governmental function *per se*, because its trustees enjoy statutory and constitutional custody and management of University property. (Appellee Br. at 12-13). But this is unremarkable and begs the question. The University is undeniably a State entity, but it does not invariably acquire property in its governmental capacity each time it obtains land. And in any event, the pertinent inquiry is not whether the University acts in a governmental capacity when it acquires real property. Rather, the pertinent inquiry is

whether the University necessarily must make restrictive water-well covenants as an incident of acquiring real property.

The answer is "no." As a general matter, the Liquor Commission could not distribute liquor without procuring liquor in the first place, and the University could not hire professors without pre-employment discussions. But the University can easily acquire real property without making covenants that restrict its operation of water wells. Furthermore, operating water systems is a proprietary activity for the University. (Appellant Br. at 18-20). Therefore, whereas the contractual subject matter in *Harrison* and *Biscar* involved underlying governmental functions, the subject-matter of the 1965 Covenant involves an underlying proprietary function. Indeed, it would be strange to conclude that by covenanting to refrain from proprietary activity, the University nevertheless was acting in a governmental capacity.[2] Therefore, because covenanting to restrict the operation of water wells is not a necessary

[2] The University might have a stronger argument for sovereign immunity if the subject-matter of the covenant were different. For instance, suppose the University had covenanted not to hold classes on the property. If sued for breaching such a covenant, the University might argue the subject-matter implicates one of its governmental functions, *i.e.*, classroom instruction. But operating a water system is not a governmental function of the University.

incident of acquiring real property, and because the underlying subject-matter of the 1965 Covenant is proprietary, the University acted in its proprietary capacity when making the covenant.

Thus, even if this Court were to disregard the University's conduct between 2019 and 2023, this Court should nevertheless reject the University's claim of sovereign immunity.

ii. The University's conduct from 2019 to 2023 is at least categorically relevant to the sovereign immunity analysis.

As discussed above, even if this Court were to accept the University's theory that its only pertinent conduct occurred in 1965, the University would enjoy no sovereign immunity in connection with the 1965 Covenant. However, the University offers no pertinent legal analysis to support its theory. (Appellee Br. at 10-11). And as discussed below, the University's conduct from 2019 to 2023 is at least categorically relevant to the proprietary-governmental analysis.

To the City's knowledge, this Court has not previously analyzed governmental versus proprietary activity in a breach-of-covenant case. But in tort cases, this Court has examined the particular category of conduct alleged to be tortious in assessing whether an entity was acting in its governmental or proprietary capacity. *E.g.*, *Villalpando v. City of Cheyenne*, 65 P.2d 1109, 1112 (Wyo. 1937); *Chavez v. City of Laramie*, 389 P.2d 23, 25-26 (Wyo. 1964). Under

such analysis, the University's conduct between 2019 and 2023 would be categorically relevant, if nothing else.

But "[c]ovenants are contractual in nature." *Sweetwater Station, LLC v. Pedri*, 2022 WY 163, ¶ 13, 522 P.3d 617, 622 (Wyo. 2022). Therefore, *Harrison* and *Biscar* are the controlling precedents, because they involved State entities facing breach-of-contract claims.

As discussed above, *Harrison* and *Biscar* focused on contractual subject-matter and its relationship with the State entity's broader governmental function. However, *Harrison*'s analysis was more nuanced, because this Court not only considered whether the Liquor Commission performed a governmental function when it made liquor contracts, but also when it cancelled them. *Harrison*, 177 P.2d at 404. Specifically, this Court considered the consequence of holding the Commission liable for a breach, reasoning that because "the debt due for goods sold under a contract is . . . the debt of the state, it would be incongruous to hold that damage for breach of the same contract is differently situated." *Id.* Thus, because making liquor contracts was a governmental activity entailing the consequence of State debt, cancelling liquor contracts was likewise governmental, because liability for breach would entail a like consequence.

Similarly, in evaluating whether the University's function is governmental or proprietary here, this Court should consider the consequence

of permitting the City to enforce the 1965 Covenant. Money damages are not at issue; the City is only seeking a declaration that it may prohibit the University from producing water from Well B. (R. 013). The question is whether such a prohibition would implicate a governmental function of the University. And to answer that question, this Court should consider what is actually happening on the ground, *i.e.*, what the University has done with Well B from 2019 to 2023.

But alternatively, the University's conduct from 2019 to 2023 is at least categorically relevant. In other words, even if this Court does not consider what the University has actually done with Well B, this Court should consider whether prohibiting this category of conduct would implicate a governmental function of the University. In other words, this Court should consider whether the University would act in a proprietary or governmental capacity when it drills and operates a production well to supply its landscape irrigation system. Again, for reasons argued in the City's principal brief, this category of conduct would be proprietary for the University. (Appellant Br. at 18-20).

Ultimately, regardless of how this Court applies its proprietary-governmental analysis, the outcome should be the same. The University acted in its proprietary capacity when it made the 1965 Covenant, because making covenants related to the proprietary operation of water wells was not a necessary incident of the University's authority to acquire real property. The

University also acted in its proprietary capacity when it breached the 1965 Covenant, because the consequence of enforcing the covenant would be to prohibit the University from engaging in a proprietary activity. One way or the other, the University enjoys no sovereign immunity against the 1965 Covenant.

iii. The University cannot otherwise claim immunity.

Before moving on from sovereign immunity, two other claims by the University merit cursory replies. *First*, the University claims the City waived its proprietary-governmental argument by failing to make the same argument or present supporting evidence when responding to the University's motion for summary judgment or judgment on the pleadings. (Appellee Br. at 10). But the University is wrong. As discussed above, the issue of sovereign immunity is a jurisdictional question of law that can be raised for the first time on appeal. And a party opposing summary judgment has no burden to present factual evidence except as may be necessary to show a genuine dispute of material fact. *Wiese v. Riverton Mem'l Hosp., LLC*, 2022 WY 150, ¶ 30, 520 P.3d 1133, 1142 (Wyo. 2022). Here, the City did not—and does not—dispute the material facts in the record, which show the University made and subsequently breached the 1965 Covenant. These facts support the City's claim that the University lacks sovereign immunity.

Second, the University claims, "it is very doubtful that the proprietary/governmental test applies when the state itself is exercising its sovereign immunity," and that "[t]here are no cases post 1975 applying the proprietary/governmental sovereign immunity test with regard to a claim against the state." (Appellee Br. at 11-12). These claims are unaccountable, however, because this Court in 1980 discussed and applied the proprietary-governmental distinction in *Biscar*, 605 P.2d at 376-77. And not only did the University cite *Biscar* in its brief, it also cited *Oyler v. State*, 618 P.2d 1042, 1056 (Wyo. 1980) (Raper, C.J., dissenting and concurring in part), which noted *Biscar*. (Appellee Br. at 11). This Court should reject the University's misstatement of its precedent.

II. The City's argument under Article 3, Section 27 of the Wyoming Constitution is properly before this Court.

In its principal brief, the City applied this Court's established equal-protection framework and argued the University Water Statute is an unconstitutional "special law" under Article 3, Section 27 of the Wyoming Constitution ("Section 27"). (Appellant Br. at 21-31). Without responding in substance, the University now claims the City forfeited its arguments by "not rais[ing] these arguments before the trial court." (Appellee Br. at 38).

The University is mistaken. To be sure, except for issues involving jurisdiction or fundamental fairness, parties on appeal "are bound by the

theories which they advanced below." *Anderson v. Bd. of Cnty. Comm'rs of Teton Cnty.*, 2009 WY 122, ¶ 15, 217 P.3d 401, 405 (Wyo. 2009). But the City is not advancing a new theory here.

To the contrary, the City invoked Section 27 in its complaint and submitted detailed briefing to the district court. (R. 014-015, 160-164). Admittedly, the City's briefing did not use the term "equal protection" except in a block quotation, (R. 163), but this is immaterial. As a matter of law, Section 27 is an equal protection provision. *Baessler v. Freier*, 2011 WY 125, ¶ 17, 258 P.3d 720, 727 (Wyo. 2011). Therefore, any Section 27 claim is necessarily an equal protection claim. Below and on appeal, the City's Section 27 claim has invoked several of the same cases.[3] And the substance of City's claim has remained consistent, *i.e.*, that the University Water Statute specially classifies and prefers the University over similarly situated entities without a reasonable or rational basis. (R. 160-164, Appellant Br. at 26-31). These

[3] Common cases include *Baessler*, 2011 WY 125, 258 P.3d 720, (R. 163, Appellant Br. 24); *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, 71 P.3d 717 (Wyo. 2003), (R. 162, Appellant Br. 24, 26, 28-29); *May v. City of Laramie*, 131 P.2d 300 (Wyo. 1942), (R. 161, Appellant Br. 30-31); and *State v. Le Barron*, 162 P. 265 (Wyo. 1917), (R. 162-163, Appellant Br. 30, 31).

arguments were raised below, addressed by the district court, and are now properly before this Court on appeal.

III. This Court should reject Dillon's Rule.

In its brief, arguing the City's power is limited while its own is expansive, the University invokes Dillon's Rule. (Appellee Br. at 21-23). "Municipal corporations," the University argues, "have only such powers as granted to them by the Wyoming Legislature." (Appellee Br. at 22).

The University is wrong. Under the amendment in Article 13, Section 1(b) to the Wyoming Constitution, "home rule" has replaced Dillon's Rule. "The succinct difference is that under Dillon's Rule, Wyoming municipalities could not act until given legislative authorization, whereas under Article 13, Section 1 (b), they may determine their local affairs by ordinance, unless preempted by statute." Thomas S. Smith & Shane T. Johnson, *No Home on the Range for Home Rule*, 31 LAND & WATER L. REV. 791, 799 (1996). *See also Baessler*, 2011 WY 125, ¶ 30, 258 P.3d at 729 (Kite, C.J., dissenting).

To be sure, at least one commentator has opined "the ghost of Dillon's Rule continues to haunt effective home rule in Wyoming." Smith & Johnson, 31 LAND & WATER L. REV. at 809. Not surprisingly, the University wants the haunting to endure. But this Court should banish Dillon's Rule once and for all. And this Court should hold the City Ordinance was a proper exercise of municipal "home rule" authority. (Appellant Br. at 47-50).

IV. Any balancing analysis should apply to the University.

In its principal brief, after arguing the University enjoys no intrinsic immunity from local regulation, the City alternatively argued this Court should limit any such immunity under a balancing analysis adopted in other jurisdictions. (Appellant Br. at 51-53). In response, the University protests that the balancing analysis would be contrary to Wyoming law. (Appellant Br. at 38-39). And because the balancing analysis purportedly "would overrule numerous cases that UW had correctly relied on both statutorily and constitutionally in developing the non potable water system," the University argues the analysis should only apply prospectively. (Appellant Br. at 39).

To be sure, the balancing analysis would be contrary to the University's belief that it enjoys "virtually unlimited" power in this area. (Appellee Br. at 12). But apart from conclusory assertions, the University does not explain how the analysis would undermine Wyoming law. (Appellee Br. at 38-39).

Furthermore, if utilized, the balancing analysis should apply to the University in this case. "Generally, . . . judicial decisions apply retroactively and prospectively." *Mills v. State*, 2020 WY 14, ¶ 15, 458 P.3d 1, 7 (Wyo. 2020). This Court's current framework for determining whether to apply a decision prospectively is uncertain, but assuming a new rule exists, pertinent factors may include the purpose of the new rule, the extent of reliance on the old rule, whether retrospective operation would further the new rule's purpose, the

effect of a retrospective application on the administration of justice, and whether retrospective application would generate injustice or hardship. *See id.* n.5; *Best v. Best*, 2015 WY 133, ¶¶ 29-33, 357 P.3d 1149, 1156-57 (Wyo. 2015).

Here, there would be nothing revolutionary or inequitable about requiring the University to comply with local land-use regulations where local interests are paramount. And for its part, the University does not identify the "numerous cases" it purportedly relied on when developing its proprietary water system. Accordingly, even if this Court were to construe the balancing analysis as a new rule of law, the rule (as necessary) should apply in this case. At minimum, the University should be subject to the City Ordinance in future.

Conclusion

This Court should reverse the dismissal of the City's complaint. This Court also should declare the University Water Statute is unconstitutional.

DATED this 30th day of June, 2023.

s/ Thomas Szott
THOMAS SZOTT
Attorney for Appellant

s/ Korry D. Lewis
KORRY D. LEWIS
Attorney for Appellant

Certificate of Service

I, Thomas Szott, hereby certify that a true and correct copy of the foregoing was or will be filed and served electronically through the C-Track Electronic Filing System this 30th day of June, 2023, on the following:

Patrick J. Crank
Abbigail C. Forwood
Attorneys for Appellees
Crank Legal Group, P.C.
1815 Evans Ave.
Cheyenne, WY 82001
pat@cranklegalgroup.com
abbi@cranklegalgroup.com

Robert W. Southard
Attorney for Appellant
City Attorney
City of Laramie
P.O. Box C
Laramie, WY 82073
southard.laramie@gmail.com

Christopher M. Brown
Abigail Christine Boudewyns
Patrick Dean Kent
Wyoming Attorney General's Office
109 State Capitol
Cheyenne, WY 82002

I hereby certify that a true and correct copy of the foregoing was or will be served via U.S. Mail this 30th day of June, 2023, on the following:

Teresa Rachel Evans
Attorney for Appellees
U.W. Office of General Counsel
1000 E. University Ave., Dept. 3434
Laramie, WY 82071

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s/ Thomas Szott
Thomas Szott (7-5139)