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Geometwatch Corporation, Appellant, v. Alan Hall. Utah State University Research Foundation, Robert Behunin. Curtis Roberts, Utah State University Advanced Weather Systems Foundation and Scott Jensen, Appellees.

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GEOmetWATCH CORPORATION,

Plaintiff-Appellant,

v.

ALAN HALL, UTAH STATE UNIVERSITY
RESEARCH FOUNDATION, ROBERT
BEHUNIN, CURTIS ROBERTS, UTAH
STATE UNIVERSITY ADVANCED
WEATHER SYSTEM FOUNDATION, AND
SCOTT JENSEN,

Defendants-Appellees.

No. 20170264

**Response Brief of Utah State University Research Foundation,
Robert Behunin, and Curtis Roberts**

On certified questions from the United States District Court, District of Utah
The Honorable Jill N. Parrish, No. 1:14-CV-00060

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

GeoMetWatch's opening brief drains this case of suspense. As predicted, GMW's answer to the first certified question conflated sovereign immunity from liability, an issue of state law, with Eleventh Amendment immunity, an issue of federal law. GMW offers no persuasive reason to ignore the plain-language interpretation of "public corporation" and "instrumentality of the state" under state law and instead construe those terms according to that distinct federal doctrine. This Court should adhere to its traditional method of statutory construction, relying on the statutes' definitions and plain text. Doing so leads to the conclusion that Utah State University Research Foundation (USURF) qualifies as either type of entity and is thus entitled to the protections of the Governmental Immunity Act of Utah (Immunity Act).

GMW agrees with USURF's ultimate conclusions on the second and third certified questions: State subject-matter and venue statutes cannot alter federal subject-matter jurisdiction or federal venue, and whether a state has waived Eleventh Amendment immunity is a question of federal law. GMW's analytical errors in reaching (or going

beyond) those conclusions do not undermine the conclusions' veracity; they are correct for the reasons explained in USURF's opening brief. This Court should so hold, and return this case to the federal district court for further proceedings.

ARGUMENT

I. USURF Has Governmental Immunity Under The Immunity Act Because It Is Both A Public Corporation And An Instrumentality Of The State.

A. Eleventh Amendment immunity analysis is irrelevant to question 1.

As it did in federal district court, GMW conflates two separate inquiries: (1) the state-law question of whether USURF is a political corporation or instrumentality of the state under the Immunity Act, and (2) the federal-law question of whether USURF has Eleventh Amendment immunity as an arm of the state. That error fatally undermines GMW's arguments: Those are two different questions governed by two different legal tests. And the answer to one does not control the answer to the other. *See generally* USURF Br. at 17-18.

The relevant test for answering the first certified question is the state-law inquiry into USURF's sovereign immunity—its immunity from liability. That sovereign immunity is a “common-law doctrine that

long predates our Constitution and the Eleventh Amendment.”

Employees of Dep’t of Pub. Health & Welfare v. Dep’t of Pub. Health & Welfare, 411 U.S. 279, 288 (1973) (Marshall, J., concurring in result); *see also Alden v. Maine*, 527 U.S. 706, 713 (1999). Sovereign immunity was a settled feature of the common law when Utah became a state and its constitution was adopted. *Wilkinson v. State*, 42 Utah 483, 492-93, 134 P. 626 (1913).

Decades later, the common-law doctrine was superceded by the Immunity Act, which “barred all causes of action against the state and its political subdivisions unless expressly authorized by statute.”

Tindley v. Salt Lake City Sch. Dist., 2005 UT 30, ¶ 9, 116 P.3d 295. And as relevant here, the legislature specifically defined in the Immunity Act those entities that are entitled to immunity. Those definitions are binding on the Court. *Tesla Motors UT, Inc. v. Utah Tax Comm’n*, 2017 UT 18, ¶ 23, 398 P.3d 55.

The test for Eleventh Amendment immunity plays no role in that question of statutory construction. Proving the point, the legislature has specifically granted immunity from liability to entities that do not share the State’s Eleventh Amendment immunity from suit in federal

court. *See, e.g., Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 995, 997 (10th Cir. 1993) (en banc) (concluding that school districts “are not arms of the state for purposes of the Eleventh Amendment” despite the fact the Immunity Act defines them as “political subdivisions” of the State and “Utah courts have consistently held that school districts are entitled to share in the state’s sovereign immunity”).

Thus GMW’s efforts to impose the Eleventh Amendment’s “arm-of-the-state” test on the Immunity Act cannot be reconciled with the plain statutory language. Entities that the legislature plainly intended to have immunity would lose it because federal courts have held that those same entities fail the “arm-of-the-state” test. *See, e.g. Giddings v. Utah Transit Auth.*, 107 F. Supp. 3d 1205, 1207 (D. Utah 2015) (Utah Transit Authority is a governmental entity entitled to immunity under Immunity Act, but is not a state agency entitled to Eleventh Amendment immunity).

B. GMW fails to address the operative statutory text.

The first certified question asks whether USURF or AWSF are “entitled to immunity under the Governmental Immunity Act of Utah as a public corporation and/or instrumentality of the state?” GMW

quickly concludes that since neither “public corporation” nor “instrumentality of the state” is defined in the Immunity Act, this Court should immediately jump outside Utah law and jurisprudence to create its own test melding Eleventh Amendment cases and unrelated court decisions from sister states. GMW Br. at 20, 23.

But that’s not how this Court construes statutory text. The goal is determining what the Utah Legislature intended the statutory terms “public corporation” and “other instrumentality of the state” to mean in the Immunity Act. *See Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶14, 267 P.3d 863. USURF conducted that analysis based on the Immunity Act’s plain language and related statutory definitions. USURF Br. at 8-17. GMW skips that analysis. And that is why the many cases GMW cited in its brief are not particularly helpful or persuasive; none of those cases interpreted the precise terms of the Immunity Act in the context of Utah law. GMW Br. at 20-22 n.3.

C. USURF is a public corporation.

Indeed, GMW fails to acknowledge or even mention that the legislature has already defined “public corporation” as “an artificial person, public in ownership, individually created by the state as a body

politic and corporate for the administration of a public purpose relating to the state or its citizens.” Utah Code § 63E-1-102(7). The facts in the record show that USURF meets that definition.

USURF was created, and is wholly owned, by USU. *See* Utah Code §§ 53B-18-501, 53B-7-103; *see also* USURF’s Articles of Incorporation, R. 267. USURF was specifically created to help USU satisfy its many “charitable, scientific, literary, research, educational, and service” goals. Utah Code § 53B-18-501(1); R. 267. In other words, USURF was created for “a public purpose relating to the state or its citizens.” Utah Code § 63E-1-102(7). USURF is thus a “public corporation,” and under section 63G-7-102(8) is entitled to immunity under the Immunity Act. *See* USURF Br. at 10-11. GMW has made no argument that undermines or alters that conclusion.

D. USURF is an instrumentality of the state.

GMW also never examines what “instrumentality” means. As explained in USURF’s opening brief, an “instrumentality of the state” under Utah Code § 63G-7-102 (10) is an entity: (1) created by the state or a state agency that (2) performs a public purpose or other governmental function and (3) is subject to some public control,

management, or oversight. *See* USURF Br. at 12-14.

Although GMW addresses some related factors, it fails to meaningfully address the facts and reaches the wrong conclusions. Take, for example, legislative or executive oversight. Contrary to GMW's assertions, USURF does have government oversight. The legislature allowed USU to create USURF. Utah Code § 53B-18-501(1) ("Utah State University may form nonprofit corporations or foundations controlled by the president of the university and the State Board of Regents"). Under the Immunity Act, USU is the State. Utah Code § 63G-7-102(10). USU's president has power over who serves on USURF's board. USURF's Articles of Incorporation, R. 268. The Board of Regents must approve "all contracts and research or development grants or contracts requiring the use or commitment of facilities, equipment, or personnel." Utah Code § 53B-7-103(4). Those executive bodies have the power, provided by legislative enactment, to oversee USURF.

Likewise, USURF was created by legislative enactment. Utah Code §§ 53B-18-501, 53B-7-103. And state law allows USURF to assist USU in satisfying its charitable, scientific, literary, research, and

educational missions. Utah Code § 53B-18-501(1); *see also* USURF's Articles of Incorporation, R. 267.

In sum, USURF is an entity created by the state to perform a public purpose and is subject to state oversight. It is therefore an “instrumentality of the state” that is entitled to the Immunity Act's protections.

II. The Parties Agree That Sections 501 And 502 Do Not Affect Federal Court Subject Matter Jurisdiction Or Venue Rules.

The second certified question could be read three different ways and USURF answered accordingly: (1) sections 501 and 502 vest exclusive jurisdiction and venue in Utah district courts and appropriate counties because those provisions define jurisdiction and venue only in relation to Utah state tribunals; (2) it would be futile to construe those provisions as affecting federal court jurisdiction or venue because the Utah Legislature lacks any authority to do so; and (3) those provisions' impact on the State's Eleventh Amendment immunity against suit in federal court is solely a question of federal law. USURF Br. at 20-24.

GMW approaches the second question somewhat differently but its response doesn't contradict any of USURF's conclusions. In

particular, GMW agrees that federal law dictates whether USURF has waived its Eleventh Amendment immunity from suit in federal court.

GMW Br. at 36 (“The Eleventh Amendment of the United States Constitution—not the Act—governs whether a Utah governmental entity has sovereign immunity from suits in federal court.”).

The problem with GMW’s response is that it stretches its arguments too far. First, GMW appears to argue that the Immunity Act in general—not just sections 501 and 502—doesn’t apply in federal court. *See, e.g.*, GMW Br. at 36 (stating “the Act is inapplicable to the Federal Case”). That’s plainly incorrect and misapprehends the important differences between state sovereign immunity and Eleventh Amendment immunity. Whereas Eleventh Amendment immunity is an immunity from suit in federal court, a “state [also] enjoys another kind of sovereign immunity besides immunity from suit that it may invoke even after agreeing to [suit in federal court]—immunity from liability.” *Trant v. Oklahoma*, 754 F.3d 1158, 1172 (10th Cir. 2014).

“Consequently, [federal] courts must look to the law of the particular state in determining whether it has established a separate [sovereign] immunity against liability for purposes of waiver.” *Id.* (internal

quotation marks omitted). And “[u]nlike a state’s waiver of its immunity from suit in federal court, the state’s waiver or retention of a separate immunity from liability is not a matter in which there is an overriding federal interest justifying the application of a federal rule.” *Id.* (internal quotation marks omitted). Thus “the Constitution permits a state whose law provides that it possesses an immunity from liability separate from its immunity from suit [in federal court] to show that its waiver of one does not affect its enjoyment of the other.” *Id.* (internal quotation marks omitted).

So “the base line” that federal courts “are obligated to enforce” when Utah and its entities are sued in federal court “is immunity.” *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1315 (10th Cir. 2012). That comprises both immunity *from suit in a federal forum*—Eleventh Amendment immunity—and immunity *from liability*, derived from the State’s broader sovereign immunity. Utah can waive one type of immunity without waiving the other. The Immunity Act therefore dictates the scope of Utah’s sovereign immunity from liability (and any statutory immunity waivers) in both state and federal court actions—regardless of any Eleventh

Amendment immunity. *See, e.g., Giddings*, 107 F. Supp. 3d at 1207 (noting Utah Transit Authority is an entity entitled to immunity under Immunity Act, but is not a state agency entitled to Eleventh Amendment immunity).

Second, GMW also appears to argue that it hasn't asserted any claims governed by the Immunity Act (and the Act's waivers of immunity) because GMW sued in federal court. GMW Br. at 38-39. But as explained, the Immunity Act still applies to claims filed in federal court. The Immunity Act "governs all claims against governmental entities" and retains immunity for any "governmental entity" unless expressly waived in the Act. Utah Code § 63G-7-101(2)-(3). Neither GMW nor any other plaintiff can plead around that.

To the extent GMW asks the Court to opine about the nature of GMW's claims and whether they are brought under the Immunity Act, that goes well beyond the certified questions accepted by this Court. The Court agreed to answer whether USURF and AWSF are a "public corporation" and/or "instrumentality of the state" under the Immunity Act. That does not involve addressing other aspects of GMW's complaint.

III. The Parties Agree That A State Entity's Ability To Waive Eleventh Amendment Immunity In Federal Court Is A Federal Question.

In answer to the third certified question, USURF explained that section 501's and 502's jurisdictional and venue requirements cannot be waived in state court proceedings. But again, those provisions do not control whether the Attorney General or other state entities can waive Eleventh Amendment immunity in federal court because that is a federal question. USURF Br. at 24-27. GMW agrees at least with that much. GMW Br. at 40 ("the question of a sovereign's waiver of its immunity from suit in federal court is not governed by the Act, but rather the Eleventh Amendment and federal case law").

More broadly, GMW argues that governmental entities can waive the Immunity Act's jurisdictional and venue provisions in state court. GMW Br. at 39. While that issue is not before the Court, GMW's assertion confuses governmental immunity protections with subject matter jurisdiction. Even if a governmental entity can waive the former it cannot waive the latter. *Barnard v. Wasserman*, 855 P.2d 243, 248 (Utah 1993) (subject matter jurisdiction cannot be waived). The cases GMW's cites don't hold otherwise.

CONCLUSION

Nothing GMW argues undermines USURF's arguments. The Court should answer the certified questions as follows:

1. USURF is a "public corporation" for purposes of Utah Code section 63G-7-102(8) and an "instrumentality of the state" under Utah Code section 63G-7-102(10). For either reason, USURF is a "governmental entity" entitled to the Immunity Act's protections.

2. The Immunity Act's exclusive jurisdiction and venue provisions reflect the Utah Legislature's intent to limit the State's waivers of sovereign immunity to suits brought in the specified Utah district courts. But those limits apply only as to other state forums; they do not limit federal subject-matter jurisdiction or federal venue in federal-court cases because the Utah Legislature cannot constitutionally limit federal subject-matter jurisdiction or federal venue.

3. No litigant can waive the Immunity Act's jurisdiction or venue provisions when litigating in Utah state court. But that conclusion does not affect the State's ability to invoke or waive Eleventh Amendment immunity defenses when litigating in federal court because Eleventh Amendment issues are federal questions governed by federal law.

Respectfully submitted,

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