

RECEIVED

07-29-2013

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

COURT OF APPEALS
District IV

Adam R. Mayhugh,

Plaintiff-Appellant,

vs.

State of Wisconsin,
WI Department of Corrections,
Redgranite Cor. Inst.,
Defendants-Respondents

Case Code: 30107

Personal Injury -
Other

Case No. 12 CV 124

Gary Hamblin, Secretary
WI Dept of Corrections,
Dr. Michael A. Dittmann, Warden
Redgranite Cor. Inst.,
Officer John A. Doe,
Officer John B. Doe,
ABC Engineering Company,
DEF Construction Company,
GHI Insurance Company,
JKL Insurance Company,
MNO Insurance Company, and
PQR Insurance Company,

Appeal No. 13 AP 1023

Defendants.

PLAINTIFF-APPELLANT'S BRIEF

Appeal from the circuit court for Waushara County, Guy
D. Dutcher, Judge.

BOLLENBECK FYFE SC
Attorney Andrew Wagener
State Bar No. 1032494

W6260 Communication Court
Appleton, WI 54914
Phone: (920) 735-1711
Fax: (920) 735-1710

TABLE OF CONTENTS

i.	Statement of Issues.....	6
ii.	Statement on Oral Argument.....	6
1.	Statement of the Case.....	7
2.	Statement of Facts.....	7
3.	Summary of the Law.....	9
	A. Tort Immunity of Government Bodies.....	9
	B. Independent Governmental Body Subject to Tort Actions.....	15
4.	Standard of Review.....	16
5.	Argument.....	17
	A. Immunity.....	17
6.	Conclusion.....	29
7.	Certifications.....	32

TABLE OF AUTHORITIES

CASES

<i>Barker v. City of Santa Fe,</i> 47 N.W. 85, 136 P.2d 480, 482, (1943).....	11
<i>Board of Regents v. Personnel Com'n,</i> 103 Wis.2d 545, 551, 309 N.W.2d 366 (Ct. App. 1981)..	16
<i>Britten v. Eau Claire,</i> 260 Wis. 382, 386, 51 N.W.2d 30, 32 (1952).....	9, 10
<i>Bruno v. Milwaukee County,</i> 2003 WI 28, ¶¶8,20, 260 Wis.2d 633, 660 N.W.2d 656...	29
<i>Fowler v. City of Cleveland,</i> 100 Ohio St. 158, 176, 126 N.E. 72, 77, (1919).....	10
<i>Hargrove v. Town of Coca Beach,</i> 96 So.2d 130, 132, 60 A.L.R.2d 1193 (1957, Fla.).....	11
<i>Holytz v. City of Milwaukee,</i> 17 Wis.2d 26, 115 N.W.2d 618 (1962)..	6,9,12,19,20,29,30
<i>Majerus v. Milwaukee County,</i> 39 Wis.2d 311,315, 159 N.W.2d 86 (1968).....	16, 26
<i>Molitor v. Kaneland Community Unit District No.,</i> 302 (1959), 18 Ill.2d 11, 163 N.E.2d 89.....	11
<i>Muskopf v. Corning Hospital District,</i> 55 Cal.2d 211, 11 Cal.Rptr. 89, 90, 359 P.2d 457, 458, (1961).....	11
<i>Nottelson v. DILHR,</i> 94 Wis.2d 106, 116, 287 N.W.2d 763 (1980).....	16
<i>Phelps v. Physicians Ins. Co. of Wis.,</i> 2009 WI 74, ¶36, 319 Wis.2d 1, 768 N.W.2d 615.....	16
<i>Ortmann v. Jensen & Johnson, Inc.,</i> 66 Wis.2d 508, 520, 225 N.W.2d 635 (1975).....	18
<i>Sambs v. City of Brookfield,</i> 97 Wis. 2d 356, 373, 293 N.W.2d 504, 512 (1980).....	13

<i>Smith v. Congregation of St. Rose,</i> 265 Wis. 393, 397, 61 N.W.2d 896, 898(1953).....	9, 10
<i>State ex rel. Kalal v. Circuit Court for Dane Cnty.,</i> 2004 WI 58, 271 Wis. 2d 633, 662-63, 681 N.W.2d 110, 123-24.....	28
<i>Sullivan v. Board of Regents of Normal Schools,</i> 209 Wis. 242, 244 N.W. 563 (1932).....	15
<i>Townsend v. Wisconsin Desert Horse Ass'n,</i> 42 Wis. 2d 414,423, 167 N.W.2d 425, (1969).....	15
<i>Williams v. City of Detroit,</i> 364 Mich. 231, 111 N.W.2d 1, 10(1961).....	11

STATUTES

Wis. Stat. Chs. 23-33.....	26
Wis. Stat. Chs. 80-85.....	26
Wis. Stat. §101.02(2).....	27
Wis. Stat. §301.02.....	18, 28
Wis. Stat. §301.04.....	15, 17, 18, 19, 20, 27
Wis. Stat. §301 <i>et al.</i>	6, 17, 20, 21, 22, 23
Wis. Stat. §302.....	20, 24
Wis. Stat. §303.....	20, 24, 25, 26
Wis. Stat. §304.....	20
Wis. Stat. §331.43.....	12
Wis. Stat. §893.80.....	7, 15, 17, 19
Wis. Stat. §895.43, 1965.....	12, 13, 15

MISCELLANEOUS

<i>Black's Law Dictionary</i> 695 (6 th ed. 1990).	26
Wis. Constitution §27, Art IV.	17, 27

i. STATEMENT OF ISSUES

1. Whether the Wisconsin Department of Corrections (hereinafter the "WDOC") is liable for the tort injuries caused by the negligent design of a baseball field at Red Granite Correctional Institution because Wisconsin has a unique history that establishes tort liability from *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962) and from that history the WDOC established a legislative intent to allow the WDOC to sue or be sued and also provided the WDOC with the unique power to govern under Wis. Stat. §301. Therefore the legislative intent that the WDOC is liable for torts can be drawn from the vast powers and scope of authority that was provided to the WDOC because in essence the WDOC is an independent agency independently responsible for regulating the prison population similar to any small municipality that can regulate its own population.

ii. STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Publication of the decision in this case would further clarify the points of law involved herein.

It is believed that the issues can be sufficiently set forth and argued in the briefs and therefore oral argument is not warranted and is not requested.

1. STATEMENT OF THE CASE

On October 21, 2011, Notice of Circumstances Giving Rise to Claim and Claim Pursuant to Wis. Stat. §893.80 was served on the WDOC by serving Liz Kennebeck, Service of Process Specialist and person authorized to accept service by the Office of the Secretary and on Redgranite Correctional Institution and Dr. Dittman personally by serving the warden, Dr. Michael A. Dittman. [R.13 p.4-7] On June 29, 2012 the Summons and Complaint was filed in this matter and subsequently served on the Attorney General's Office on July 16, 2012 and Redgranite Correctional Institution on July 11, 2012. [R.1, 2, 4, 5] On or about August 23, 2012, the State of Wisconsin acting through the Department of Corrections and Redgranite Correctional Institutions filed a Motion to Dismiss on the basis of sovereign immunity and lack of personal jurisdiction. [R.6] On September 18, 2012, plaintiff filed an Amended Summons and Amended Complaint adding Gary Hamblin, Secretary of the Department of Corrections, Michael A. Dittman, Warden of Red Granite Correctional Institution, Officer John A. Doe and Officer John B. Doe as parties to this action [R.8&9] The parties submitted briefs in support of each of their positions and ultimately the Court dismissed this action against the WDOC because "...the

doctrine of sovereign immunity not otherwise specifically statutorily relinquished by the State through the legislature..." [R.21 p.10]

2. STATEMENT OF FACTS

On July 1, 2011, Plaintiff, Adam R. Mayhugh (hereinafter "Adam"), was an inmate at Redgranite Correctional Institution (hereinafter "RCI") and was watching a baseball game on the bleachers of the baseball field in the recreational yard of RCI when he was hit in the head with a softball as a result of a foul ball being hit by another inmate. Adam was instructed to sit on the bleachers by the officers on duty in the recreation yard at RCI on July 1, 2011. Adam suffered injuries including, but not limited to a fracture of his right temporal lobe and severed artery which further resulted in a hematoma/blood clot, strokes and acute respiratory failure. Adam R. Mayhugh has permanent injuries from the Incident including, but not limited short term memory loss, weakness on his left side, impaired walking and emotional injuries. [R.1]

3. SUMMARY OF THE LAW

A. Tort Immunity for Government Bodies

The Wisconsin Supreme Court in *Holytz* criticized the tort immunity for government bodies and specifically stated:

There are probably few tenets of American jurisprudence which have been so unanimously berated as the governmental immunity doctrine. This court and the highest courts of numerous other states have been unusually articulate in castigating the existing rule; text writers and law reviews have joined the chorus of denunciators. Some examples of the condemnation are here presented.

In *Britten v. Eau Claire* (1952), 260 Wis. 382, 386, 51 N.W.2d 30, 32, this court stated:

'The doctrine that immunity from liability should be granted to the state and municipalities while engaged in governmental operations rests upon a weak foundation. Its origin seems to be found in the ancient and fallacious notion that the king can do no wrong.'

In *Smith v. Congregation of St. Rose* (1953), 265 Wis. 393, 397, 61 N.W.2d 896, 898, we again stated:

'* * * this court has long felt that the reasons for granting such immunity to charitable and religious organizations, as well as to municipal corporations, are archaic.'

The Wisconsin Supreme Court in *Holytz* went on to reference a number of other jurisdictions that criticized government immunity from tort action:

Criticism of the Rule of Tort Immunity

Some examples of the condemnation are here presented.

In *Britten v. Eau Claire* (1952), 260 Wis. 382, 386, 51 N.W.2d 30, 32, this court stated:

'The doctrine that immunity from liability should be granted to the state and municipalities while engaged in governmental operations rests upon a weak foundation. Its origin seems to be found in the ancient and fallacious notion that the king can do no wrong.'

In *Smith v. Congregation of St. Rose* (1953), 265 Wis. 393, 397, 61 N.W.2d 896, 898, we again stated:

'* * * this court has long felt that the reasons for granting such immunity to charitable and religious organizations, as well as to municipal corporations, are archaic.'

Some of the judicial expressions in other states which have sharply decried the rule of immunity are as follows:

'This doctrine has been shot to death on so many different battlefields that it would seem utter folly now to resurrect it * * *.' *Fowler v. City of Cleveland* (1919), 100 Ohio St. 158, 176, 126 N.E. 72, 77, 9 A.L.R. 131 (concurring opinion, Wanamaker, J.)

'Little time need be spent in determining whether the strict doctrine of municipal immunity from tort liability should be repudiated. All this is old straw. The question is not 'Should we?'; it is 'How may the body be interred judicially with non-discriminatory last rites?' No longer does any eminent scholar or jurist attempt justification thereof.' *Williams v. City of Detroit* (1961), 364 Mich. 231, 111 N.W.2d 1, 10 (separate opinion, Black, J.)

"It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be

implicit in the maxim, 'the King can do no wrong', should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs." *Barker v. City of Santa Fe* (1943), 47 N.W. 85, 136 P.2d 480, 482.

'We, therefore, feel that the time has arrived to declare this doctrine anachoristic [sic] not only to our system of justice but to our traditional concepts of democratic government.' *Hargrove v. Town of Cocoa Beach* (1957, Fla.), 96 So.2d 130, 132, 60 A.L.R.2d 1193.

'After a re-evaluation of the rule of governmental immunity from tort liability we have concluded that it must be discarded as mistaken and unjust.' *Muskopf v. Corning Hospital District* (1961), 55 Cal.2d 211, 11 Cal.Rptr. 89, 90, 359 P.2d 457, 458.

'We conclude that the rule of school district tort immunity is unjust, unsupported by any valid reason, and has no rightful place in modern day society.' *Molitor v. Kaneland Community Unit District No. 302* (1959), 18 Ill.2d 11, 163 N.E.2d 89, *Holytz* at 33-34.

In *Holytz* the Court concluded that "we are now of the opinion that it is appropriate for this court to abolish this immunity notwithstanding the legislature's

failure to adopt corrective enactments." *Holytz* also addressed the scope of the abrogation and concluded that, "In our opinion, this is an unwise limitation, and we consider that the abrogation should apply broadly to torts, whether they be by commission or omission." *Id* at 39. The *Holytz* court further clarifies the rule by stating "[p]erhaps clarity will be afforded by our expression that henceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity." *Id* at 39.

In 1963 the legislature in response to *Holytz* enacted sec. 331.43, Stats. 1963 (now sec. 895.43, Stats.), generally allowing actions founded on tort against political corporations, governmental subdivisions or agencies and officers, agents, or employees and limiting recovery to \$25,000. In 1973, the legislature limited the amount recoverable in a suit against a state officer to \$100,000. Laws of 1973, ch. 333, sec. 182c, sec. 895.45, Stats. *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 373, 293 N.W.2d 504, 512 (1980)

Sec. 895.43, Stats.1965, provides:

895.43 Tort actions against political corporations, governmental subdivisions or agencies and officers, agents or employees; notice of claim; limitation

of damages and suits. (1) No action founded on tort, except as provided in s. 345.05, shall be maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of such corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment unless within 120 days after the happening of the event causing the injury or damage or death complained of, written notice of the time, place and circumstances of the injury or damage signed by the party, his agent or attorney is served on such volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 262.06. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the damage or injury and the injured party shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee.

(2) The amount recoverable by any person for any damages, injuries or death in any action founded on tort against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof and against their officers, officials, agents or employees for acts done in their official capacity or in the course of their agency or employment, whether proceeded against jointly or severally,

shall not exceed \$25,000. No punitive damages shall be allowed or recoverable in any such action.

(3) No suit shall be brought against any political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor shall any suit be brought against such fire company, corporation, subdivision or agency or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

(4) Except as hereinafter provided, the provisions and limitations of this section shall be exclusive and shall apply to all actions in tort against a volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency or against any officer, official, agent or employee thereof for acts done in an official capacity or the course of his agency or employment. Nothing in this section shall bar an action or impose limitations in any action against any such officer, official, agent or employee individually for intentional torts. When rights or remedies are provided by any other statute against any political corporation, governmental subdivision or agency or any officer, official, agent or employee thereof for injury, damage or death, such statute shall apply and the limitations in sub. (2) shall be inapplicable. *Sams* at 378

Wis. Stat. §895.43 was renumbered to Wis. Stat. §893.80 in 1979 pursuant to the Judicial Council Committee's notes of Wis. Stat. §893.80. "Previous s.

895.43 is renumbered for more logical placement in restructured ch. 893. " *Wis. Stat. Ann. § 893.80*.

Finally, Wis. Stat. §301.04 was passed in 1989. Wis. Stat. §301.04 states that "[t]he department may sue or be sued."

B. Independent Governmental Body Subject to Tort Actions

Legislative intent can also be determined by the fact that the Wisconsin Department of Corrections has been set up as an independent agency. When the state creates an independent agency it waives sovereign immunity. *Townsend v. Wisconsin Desert Horse Ass'n*, 42 Wis. 2d 414, 423, 167 N.W.2d 425, (1969). A factor to determine whether or not a department is set up as an independent agency is whether the department was given the power to sue and be sued. *Id.* *Townsend* involved a tort case. *Id.* at 417. In *Sullivan v. Board of Regents of Normal Schools*, the Wisconsin Supreme Court stated that two factors were whether the agency was just performing administration functions and whether or not there was any property to collect against from the agency. *Sullivan v. Board of Regents of Normal Schools*, 209 Wis. 242, 244 N.W. 563 (1932). In *Majerus* the Court looked at factors of whether or not they could convey real estate, dispose of personal property without the express authority

from the state, and whether debts could be incurred and satisfied from property that was acquired by the agency. *Majerus v. Milwaukee County*, 39 Wis.2d 311,315, 159 N.W.2d 86 (1968). The *Majerus* court also specifically excluded the notion that the ability to have the power to tax, that property it acquires is held in trust, and the complete lack of property to collect against is determinative of an independent agency. *Id.* Specifically, the *Majerus* Court stated that it is not necessary to have all the powers enumerated in *Sullivan*. *Id.* Rather, *Majerus* looked to the distinct character of the organization. *Id.*

4. STANDARD OF REVIEW

Whether the facts fulfill a particular legal standard is a question of law. *Nottelson v. DILHR*, 94 Wis.2d 106, 116, 287 N.W.2d 763 (1980). The construction of statutes is a question of law. *Phelps v. Physicians Ins. Co. of Wis.*, 2009 WI 74, ¶36, 319 Wis.2d 1, 768 N.W.2d 615. Legal questions are reviewable *ab initio*. *Board of Regents v. Personnel Com'n*, 103 Wis.2d 545, 551, 309 N.W.2d 366 (Ct. App. 1981).

5. ARGUMENT

A. Immunity

The history behind government tort liability as it applies to the Wisconsin Department of Corrections

establishes that the WDOC has waived its immunity by passing Wis. Stat. §301.04. In addition, the WDOC is its own independent agency and is subject to suits in tort as the statutory structure under Wis. Stat. §301 et al. effectively creates an independent agency and therefore the state of Wisconsin has waived its right to immunity under the Wis. Constitution §27, Art IV.

Liability to the WDOC for tort action stems from the *Holytz* decision. In *Holytz* the Wisconsin Supreme Court clearly established that tort was a substantive liability as to the State of Wisconsin. *Holytz* at 41. Further, that any right to sue was subject to §27 Article IV of the Wisconsin Constitution. *Id.* In response to *Holytz* legislation was passed to limit liability to government entities which is now reflected under the current Wis. Stat. § 893.80.¹ Subsequent to that response the WDOC was

¹. Prior to 1961 local units of government in Wisconsin were generally immune from tort liability because of the judicial doctrine of governmental immunity. There were a number of judicial and statutory exemptions to this rule which made the immunity far from a blanket protection. In 1961 the case of *Holytz v. Milwaukee* (1961), 17 Wis.2d 26, was decided which abrogated the principal of governmental immunity from tort liability. It was only as to those harms which are torts that governmental bodies were to be liable by reason of this decision. The case also stated that governmental bodies would be responsible for the torts of its employees under respondeat superior. The opinion did not impose liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or

created and in particular Wis. Stat. §301.02 and §301.04 which specifically gave the WDOC the right to govern and also states that the WDOC may sue or be sued. Wis. Stat §301.02 and §301.04 were created within the context that *Holytz* created substantive tort liability against government agencies. "The legislative intent may be ascertained by examination of the language of the statute in relation to its scope, its history, the general statutory context, the subject matter, and the object intended by the legislature to be accomplished or the ill to be remedied." *Ortmann v. Jensen & Johnson, Inc.*, 66 Wis.2d 508, 520, 225 N.W.2d 635 (1975).

To elaborate further, *Holytz* clearly set the premise that government tort immunity was archaic and that courts were frustrated with its implementation. *Holytz* at 33. *Holytz* also stated that immunity to tort suits was the exception. *Id* at 36. *Holytz* also created specific judicial exceptions to liability. In particular, liability does not arise in the exercise of legislative or judicial or quasi-legislative or quasi-judicial functions. *Id* at 40. In

quasi-judicial functions, and to that extent a part of the immunity doctrine remained intact.

Wis. Stat. Ann. § 893.80 (West)

light of the judicially created law that imposes tort liability on any agency in the state including

[W]e consider that abrogation of the doctrine applies to all public bodies within the state: the state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivisions of the state—whether they be incorporated or not. By reason of the rule of *respondeat superior* a public body shall be liable for damages for the torts of its officers, agents and employees occurring in the course of the business of such public body. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618, 625 (1962)

Subsequent to these judicially established principles legislation is passed for the WDOC pursuant to Wis. Stat. §301.04 specifically stating that the Wisconsin Department of Corrections can sue or be sued. The result is that the state, based on the historical context, has waived immunity as to the WDOC. They have waived it because *Holytz* provides a unique historical setting establishing tort liability and when Wis. Stat. §301.04 was created it did not specifically generate any specified exceptions as directed to do so by the *Holytz* court. *Holytz* essentially admonished the legislature for its failure to act.

Further, legislative intent that the WDOC can be sued is established by the fact that there is a vast statutory

structure that makes the WDOC its own independent political body. As indicated in *Majerus* the relevant analysis is the character of the agency that is relevant. The WDOC is an agency that covers Wis. Stat. §301, §302, §303, and §304. The statutory powers that the Wisconsin Legislature has provided to the WDOC is diverse and exceeds the scope of the powers outlined in *Majerus*. A summary of the powers are:

1. **Wis. Stat 301.001, Purpose of Chapters,** states that the legislative intent that the state continue to avoid sole reliance on incarceration of offenders and continue to develop, support and maintain professional community programs and placements.
2. **Wis. Stat 301.02, Institutions Governed,** provides that the department shall ***maintain and govern*** correctional institutions. (***emphasis added***)
3. **Wis. Stat 301.025,** allows the department to establish a separate division for juveniles with sanction powers provided under Wis. Stat. 938.538.
4. **Wis. Stat 301.03, General Corrections Authority,** describes how the department is to maintain, preserve and care for correctional institutions, various other treatment programs, provide notifications regarding the issuance of a civil judgment against released prisoners, and Examine all institutions authorized by law to receive and detain witnesses, prisoners or convicted persons, and inquire into

all matters relating to their management, including the management of witnesses, prisoners or convicted persons, and the condition of buildings and grounds and other property connected with the institutions, establish a fee system for juveniles, waive liability or compromise liability for services received as the department considers necessary to efficiently administer this sub section and delegate to the county departments other providers of care and services the powers and duties vested in the department and return 50% to the counties 50% of the collected delinquent accounts.

5. **Wis. Stat 301.031** gives the department budgeting, assessment and contracting powers for youth programs.
6. **Wis. Stat 301.035** sets up its own division for hearings and appeals related to parole and probation
7. **Wis. Stat 301.04** provides that department may sue or be sued.
8. **Wis. Stat 301.045**, gives the department the powers to investigate, hold hearings, subpoena witnesses and make recommendations to public or private agencies.
9. **Wis. Stat 301.05**, allows the department to accept gifts, grants, or money donations and hold personal property transferred to the state in trust because it is in its control or an inmates property.
10. **Wis. Stat 301.055**, allows the department to control populations.
11. **Wis. Stat 301.06**, allows the department to setup its own educational

system and conduct studies and accept funds from federal, state or private sources.

12. **Wis. Stat 301.065,** allows the department to contract with religious organizations and provide them with grants or contracts to make available religion within the prison system and ensure that those religious entities are independent of the department of corrections.
13. **Wis. Stat 301.07** allows the department to contract with the federal government.
14. **Wis. Stat 301.075,** allows the secretary of the department of corrections to write checks from public funds.
15. **Wis. Stat 301.08,** allows the department to purchase services for care and goods as it relates to various institutions and care requirements.
16. **Wis. Stat 301.085,** the department can make benefit payments to authorized persons and charge counties for making those payments.
17. **Wis. Stat 301.10,** Provides audit powers to the department and allows them to make payment on bills.
18. **Wis. Stat 301.105,** allows the department to collect commissions from telephone companies.
19. **Wis. Stat 301.12,** allows the department to enforce and seek judgments, compel payments, charge interest against liable persons, present documents to the court to seek further payment, appoint counsel to seek enforcement of collection and deportation.

20. **Wis. Stat 301.235**, allows the department of corrections to construct and refinance indebtedness for construction of new buildings, can convey title in fee simple on property that is owned by the department or the State of Wisconsin, lease property, the power to pledge and assign any revenues coming in from the properties, charge use and occupancy fees of buildings.
21. **Wis. Stat 301.24** gives the department of corrections its own condemnation powers to acquire land, sell excess land, purchase land and lease powers.
22. **Wis. Stat 301.29**, gives the Department of Corrections its own police powers and investigation authority.
23. **Wis. Stat 301.30**, allows the department to setup its independent wage scale for inmates.
24. **Wis. Stat 301.37**, establishes that department has design control and approval authority over various facilities in Wisconsin.

Wis. Stat. §302 *et al* is a statutory section that regulates the incarcerated population of the state of Wisconsin and the individuals that work within the system. It provides the responsibilities of wardens and the requirements necessary to monitor and regulate incarcerated individuals.

More significantly is the fact that Wis. Stat. §303 *et al* allows the WDOC to set up an independent prison

industries board for the employment of inmates. The prison industries provisions allows the WDOC to set up a manufacturing business within the WDOC for the sale of items to a variety of entities. The powers are provided below:

(2) Powers of department. In the administration of the prison industries program, the department may:

(a) Submit bids for any state contract;

(b) Submit bids for any contract or subcontract with a nonprofit organization as defined in s. 108.02(19);

(c) Purchase machinery and raw materials;

(d) Operate a central warehouse and central generating station with the employment of prisoners to supply its institutions;

(e) Maintain auto shops in connection with auto schools and may receive from licensed automobile dealers and regularly established automobile repair shops vehicles to be repaired, painted or otherwise processed by inmates or residents of the school;

(em) Lease space, with or without equipment, within the precincts of state prisons, as specified in s. 302.02, or within the confines of correctional institutions operated by the department for holding in secure custody persons adjudged delinquent, to not more than 2 private businesses to employ prison inmates and institution residents to manufacture products or

components or to provide services for sale on the open market. . . .

(f) Lease or purchase land within the state for the employment of prisoners or residents; and

(g) Construct barracks for the safekeeping of prisoners or residents employed in the prison industries outside the prison or institution proper on the prison or institution premises.

Finally, the goal of prison industries under Wis. Stat. §303.01(6) is "To the extent possible, prison industries shall be operated in a manner that is similar to private business and industry. The primary goal of prison industries shall be to operate in a profitable manner." The Prison Industries Board has vast powers as well under Wis. Stat. §303.015. These powers include budgeting, marketing of prison industries products and purchases of up to \$250,000 without board approval. Wis. Stat. §303.06 allows and regulates the sale of prison industry products on the open market. In addition, §303.21 and §303.215 allows prisoners who are injured while working to benefit from the workers compensation pool.

As *Majerus* stated, it is the character of the agency that is relevant. The above summary provides a description of an agency that is really a world of its own. In

particular, the Wisconsin Legislation indicated that the WDOC is to govern its correctional institutions and that the WDOC can be sued or sue. *Black's Law Dictionary* defines govern as "To direct and control the actions or conduct of, either by established laws or by arbitrary will; to direct and control, rule, or regulate, by authority. To be a rule, precedent, law or deciding principle for. *Black's Law Dictionary* 695 (6th ed. 1990). Other Wisconsin agencies are not given the power to govern and sue or be sued. For example, the Department of Transportation regulated under Wis. Statutes Chapters 80 through 85, The Wisconsin Department of Natural Resources under Wis. Statutes Chapters 23 through 33, the Wisconsin Department of Public Instruction, or the Wisconsin Department of Revenue. The Department of Workforce Development is given the power to sue or be sued under Wis. Stat. §101.02(2), but not the power to govern. The power to govern and the power to sue and be sued is a unique feature to the WDOC. It demonstrates the legislature's intent to create an independent agency so the WDOC can achieve its goal to create an independent system to achieve a goal where incarceration is not the only means of rehabilitation.

The scope of this goal is reflected in the WDOC's powers to acquire assets, its own police powers, buy and

sell property, approve designs of property, collect money and receive money outside taxes, lease property from other entities or to other entities. In addition, it regulates its own population in terms of compensation, care, and punishment. It has the power to set up its own divisions and contract with other governments. It can create its own business for commercial profit. The conclusion is that the WDOC is a mini government of its own that has the authorities of any local municipality within this state and therefore is an independent agency not subject to immunity under §27 Article IV of the Wisconsin Constitution and therefore is liable. The WDOC is liable because the legislature intended that the WDOC be liable when it created Wis. Stat §301.04 allowing it to sue or be sued and the ability to govern its population under Wis. Stat. §301.02. The intent and scope powers of the WDOC statutory structure creates an independent agency.

In *State ex rel. Kalal v. Circuit Court of Dane County*, The Wisconsin Supreme Court described how legislative intent can be determined from a statute:

Accordingly, we now conclude that the general framework for statutory interpretation in Wisconsin requires some clarification. It is, of course, a solemn obligation of the judiciary to faithfully give effect to the laws enacted by the legislature, and to do

so requires a determination of statutory meaning. Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language. Extrinsic evidence of legislative intent may become relevant to statutory interpretation in some circumstances, but is not the primary focus of inquiry. It is the enacted law, not the unenacted intent, that is binding on the public. Therefore, the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.

24 ¶45 Thus, we have repeatedly held that statutory interpretation "begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry." *Seider*, 236 Wis.2d at 232, 612 N.W.2d 659; see also *Setagord*, 211 Wis.2d at 406, 565 N.W.2d 506; *Williams*, 198 Wis.2d at 525, 544 N.W.2d 406; *Martin*, 162 Wis.2d at 893-94, 470 N.W.2d 900. Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning. *Bruno v. Milwaukee County*, 2003 WI 28, ¶¶ 8, 20, 260 Wis.2d 633, 660 N.W.2d 656; see also Wis. Stat. § 990.01(1).

State ex rel. Kalal v. Circuit Court for Dane Cnty., 2004 WI 58, 271 Wis. 2d 633, 662-63, 681 N.W.2d 110, 123-24.

The WDOC statutory structure comes out of the history of the *Holytz* case that established tort liability. "If the legislature deems it better public policy, it is, of course, free to reinstate immunity. The legislature may also impose ceilings on the amount of damages or set up administrative requirements which may be preliminary to the commencement of judicial proceedings for an alleged tort." *Holytz* at 40. In the face of judicial direction from the Wisconsin Supreme Court, the Wisconsin Legislature intended to create an independent state agency that did not set any limits or immunities as it applies tort liability.

6. CONCLUSION

This case should be remanded to proceed forward as to the lawsuits against the WDOC and Redgranite Correctional Institution. This is the correct result. The WDOC is its own political body with the equivalent powers of any municipality that has control over its population within its jurisdiction. In the case of the WDOC, it is a prison population that has absolutely no control over its own health and safety as it is completely regulated, designed and enforced by the WDOC. Under the current system everybody can recover for tort injuries except a prison inmate who is harmed as a result of the negligent design of the WDOC. In this case, Adam Mayhugh was injured without

no fault of his own. He was directed to be a spectator of a baseball game at the direction of the WDOC. He was directed to sit there by the WDOC. He was injured by a ball that was hit by a another prison inmate and as a result of that he has suffered extensive damage to his brain and is permanently damaged by no fault of his own. Anybody else within the WDOC system would be able to recover from this tort injury. The WDOC employees and prison inmate employees all have avenues of recovery for the negligent design of the baseball field or the placement of spectators through workers compensation except Adam Mayhugh because of government immunity. This case goes back to the bad policy regarding tort immunity as being archaic as stated in *Holytz*. The better policy is to find tort liability and not immunity.

Dated: July 29, 2013

BOLLENBECK FYFE, SC Attorneys for
Plaintiff-Appellant, Adam R. Mayhugh

By: s/Andrew Wagener
State Bar No. 1032494

PO ADDRESS:
W6260 Communication Court
Appleton, WI 54914
Phone: (920) 735-1711
Fax: (920) 735-1710

CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

Monospaced font: 10 characters per inch; double-spaced; 1.5 inch margin on the left side and 1 inch margin on the right side. The length of this brief is 24 pages.

Dated this 29th day of July, 2013.

BOLLENBECK FYFE, SC

Attorneys for Plaintiff-Appellant,
Adam R. Mayhugh

By: s/Andrew Wagener
State Bar No. 1032494

PO Address:
W6260 Communication Court
Appleton, WI 54914
920) 735-1711

CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by first-class mail on July 29, 2013. I further certify that the brief or appendix was correctly addressed and postage was prepaid.

Dated this 29th day of July, 2013.

BOLLENBECK FYFE, SC

Attorneys for Plaintiff-Appellant,
Adam R. Mayhugh

By: s/Andrew Wagener
State Bar No. 1032494

CERTIFICATION OF COMPLIANCE WITH WIS STAT. §809.19(12)

I certify that I have submitted an electronic copy of this brief and the appendix which complies with the requirements of Wis. Stat. §809.19(12). I further certify that this brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this 1st day of August, 2013.

BOLLENBECK FYFE, SC

Attorneys for Plaintiff-Appellant,
Adam R. Mayhugh

By: s/Andrew Wagener
State Bar No. 1032494