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OF WISCONSIN**

COURT OF APPEALS
District IV

Adam R. Mayhugh,

Plaintiff-Appellant,

vs.

State of Wisconsin,
acting through the
WI Department of Corrections,

Redgranite Cor. Inst.,

Defendants-Respondents,

Case Code: 30107
Personal Injury -
Other

Case No. 12 CV 124

Appeal No. 13 AP 1023

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,

Defendants.

PLAINTIFF-APPELLANT'S REPLY BRIEF

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

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1. ARGUMENT

A. Sovereign Immunity

The general principle behind the decision in *Townsend v. Wisconsin Desert Horse Asso.*, 42 Wis.2d 414, 418, 167 N.W.2d 425, 427 (1969), was based on the fact that *Holytz* had abolished tort immunity. Further, in *Lindas*¹, the court referenced *Townsend* stating that the "sue and be sued language" was only added to cover existing liabilities at the time because of the *Holytz* decision that abolished immunity. *Lindas* at 862. *Lindas* was decided in 1987 and the sue and be sued language for the Department of Corrections was established in 1989. The decision behind *Lindas* is not applicable if the Department of Corrections is a successor agency to the DHSS. There are no existing lawsuits when a state agency is created pursuant to sovereign immunity. Therefore the policy behind *Lindas* is not applicable to the Department of Corrections.

If the policy behind *Townsend* and *Lindas* are not applicable then the focus of the analysis as it applies to the Department of Corrections is the fact that in principle *Holytz* abolished immunity. The legislature knew that at the time it passed Wis. Stat. §301.04. It is also relevant to look at the scope of the statutes that were created in

1989 as it relates to the Department of Corrections and immunity. As discussed in Plaintiff-Appellant's Brief there are numerous statutes that allow the Department of Corrections to contract or enter into relationships with various third parties.² The range of authority includes the ability to build and approve the design of prison systems, to contract with housing for people on release or placement, allows the department to purchase services for care and goods as it relates to various institutions and care requirements, condemnation powers, purchase sell and lease land, and its own police powers, purchase machinery, purchase raw materials, maintain auto shops and construct barracks. These types of relationships are also susceptible to being conducted negligently. The statutes indicate that negligence was a clear possibility. It is the scope of authority that makes it clear that the legislature foresaw the fact that this type of agency will be susceptible to being sued and the legislature foresaw this fact when it created the sue or be sued language. It is not necessary under these circumstances to specifically spell out the words that the Department of Corrections can be sued for torts. The result is for the Department of

¹ . *Lindas v. Cady*, 142 Wis.2d 857, 419 N.W.2d 345 (1987 App.) reversed on other grounds.

Corrections to be an effective organization and follow the general policy principle and goals of Wis. Stats. §301.001 and §303.01(6). The goal of Wis. Stat. §301.001 is to avoid incarceration meaning entering into contracts with 3rd parties and the goal of 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." In order to achieve those goals negligent conduct would have been anticipated and therefore under these circumstances and this statutory scheme the legislature intended to waive immunity to torts.

B. Independent Agency

Majerus stands for the principle that there does not have to be a specific express authority granting an agency independent authority. Rather, it is the character of the agency that is relevant. *Majerus v. Milwaukee County*, 39 Wis.2d 311,315, 159 N.W.2d 86,87-88 (1968). First, *Majerus* points out that the sue and be sued language is a relevant factor. *Id.* In addition, the purpose of establishing the agency is also significant. *Id.* In this case the Department of Corrections' statutory guidelines as

² Wis. Stat. §301.045, §301.06, §301.065, §301.07, §301.08, §301.105, §301.325, §301.24

discussed above and in the Plaintiff-Appellant's Brief is to create an agency that has broad powers, including police powers, design powers, and population control. The statutory powers give the Department of Corrections "independent proprietary powers" *Id.*

In *Kegonsa*³ the court again relies on the language of independent proprietary powers, meaning the character of the agency. The DNR is a different statutory agency at the time of the *Kegonsa* decision and is still a different agency then the Department of Corrections as they exist today. In particular, the DNR lacks the sue and be sued language from its statutory scheme. There is a difference between making a claim of broad powers versus the character of what a statutory scheme allows an agency to perform. In the case of the DNR they are primarily an oversight agency of the environmental condition of the State of Wisconsin's resources. This is provided in Wis. Stat. §281.11.

The department shall serve as the central unit of state government to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private. Continued pollution of the waters of the state has aroused widespread public concern. It endangers public health and threatens the general welfare. A comprehensive action program directed at all present and potential sources of water pollution whether

³. *Kegonsa Joint Sanitary Dist. v. City of Stoughton*, 87 Wis.2d 131, 274 N.W.2d 598 (1979).

home, farm, recreational, municipal, industrial or commercial is needed to protect human life and health, fish and aquatic life, scenic and ecological values and domestic, municipal, recreational, industrial, agricultural and other uses of water. The purpose of this subchapter is to grant necessary powers and to organize a comprehensive program under a single state agency for the enhancement of the quality management and protection of all waters of the state, ground and surface, public and private. To the end that these vital purposes may be accomplished, this subchapter and all rules and orders promulgated under this subchapter shall be liberally construed in favor of the policy objectives set forth in this subchapter. In order to achieve the policy objectives of this subchapter, it is the express policy of the state to mobilize governmental effort and resources at all levels, state, federal and local, allocating such effort and resources to accomplish the greatest result for the people of the state as a whole. Because of the importance of Lakes Superior and Michigan and Green Bay as vast water resource reservoirs, water quality standards for those rivers emptying into Lakes Superior and Michigan and Green Bay shall be as high as is practicable.

Wis. Stat. Ann. § 281.11 (West)

In particular, the statute specifically states that the agency DNR is a "central unit of state government". The legislature expressly states that even though there are broad powers it is still a state agency. There is no such language in the Department of Corrections statutory framework. AS argued before, the character of the Department of

Corrections is in its powers to acquire assets, its own police powers, to 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 Department of Correction's character is that of an independent agency. Further, it is not conclusive if the agency collects taxes or spends its own money as stated in *Majerus. Supra.* These factors are only one of the factors among many to be considered. The Department of Corrections is an independent agency based on the character of its statutory powers.

2. CONCLUSION

This case should be remanded to proceed forward as to the lawsuits against the Department of Corrections and Redgranite Correctional Institution because the Legislature, through its statutory scheme for the Department of Corrections, has waived immunity and the Department of Corrections is an independent agency.

Dated: August 28, 2013

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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 6 pages.

Dated this 28th day of August, 2013.

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CERTIFICATION OF MAILING

I certify that this brief was sent via courier with FedEx for delivery to the Clerk of the Court of Appeals on August 29, 2013. I further certify that the brief was correctly addressed and postage was prepaid.

Dated this 28th day of August, 2013.

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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 29th day of August, 2013.

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