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**CLERK OF SUPREME COURT
OF WISCONSIN**

STATE OF WISCONSIN
SUPREME COURT

Adam R. Mayhugh,

Plaintiff-Appellant-Petitioner,

v.

District: 4

Appeal No. 13 AP 1023

Circuit Court Case No. 12 CV 124

State of Wisconsin, Wisconsin Department
of Corrections and Red Granite Correctional
Institution,

Defendants-Respondents,

Gary Hamblin, Michael A. Dittmann, John A.
Doe, 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-PETITIONER'S BRIEF AND APPENDIX

APPEAL FROM THE FINAL ORDER OF THE CIRCUIT COURT FOR
WAUSHARA COUNTY, THE HONORABLE GUY D. DUTCHER PRESIDING

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STATEMENT ON ORAL ARGUMENT

Oral argument requested.

STATEMENT OF ISSUES

Whether the Wisconsin Legislature has waived sovereign immunity for the Wisconsin Department of Corrections (hereinafter the “WDOC”) by enacting Wis. Stats. §301.02 and §301.04 because the broad statutory powers of the WDOC allows the WDOC to govern and therefore creates an independent agency subject to tort lawsuits and whether current judicial policy on balance establishes that liability is required to protect the citizens of the state of Wisconsin from the negligent acts of the employees of the WDOC.

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]

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. Adam was instructed to sit on the bleachers by the officers on duty in the recreation yard at RCI on July 1, 2011. The bleachers were located along the foul ball lines of the prison’s baseball field. As the baseball game was being played Adam, as a spectator on the bleachers was struck in the head with a softball as a result of a foul ball being hit by another inmate. 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]

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. Whether a claim is barred by sovereign immunity is a question of law. *See Erickson Oil Prods., Inc. v. State*, 184 Wis.2d 36, 42, 516 N.W.2d 755 (Ct.App.1994). 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).

I. ARGUMENT

A. Statutory structure that creates an independent agency that waives Government immunity.

Wis. Stat. §301.02 specifically authorizes that the WDOC “shall maintain and govern the state correctional institutions” and Wis. Stat. §301.04 states that the WDOC “may sue or be sued.” Black’s Law Dictionary defines a “governing body” as having the “ultimate power to determine its policies and control its activities.” *Black’s Law Dictionary* Sixth Edition. Several Wisconsin Supreme Court cases focus on the fact that the right to govern combined with the right to sue establishes a waiver of immunity under Wis. Constitution §27 Art IV. See *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 315 159 N.W. 2d 86, 88 (1968). See also *Townsend v. Wisconsin Desert Horse Ass’n*, 42 Wis. 2d 414, 167 N.W.2d 414 (1969), and *Metzinger v. Wisconsin Department of Taxation*, 35 Wis. 2d 119, 131, 150 N.W.2d 431, 437 (1967). In applying prior decisions by the Wisconsin Supreme Court the WDOC is “sui juris”.

B. The Statutory Nature and Character of the WDOC Establishes the WDOC as a Legally Recognized Independent Agency Subject to Suit.

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* at 315. 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 statutory intent was to create an agency that has vast, diverse and broad powers. The scope of the statutory powers are spelled out in Wis. Stats. Ch. 301 through 304. [Wis. Stat. §301.001 *Purposes of Chapters.*] The statutory powers that the Wisconsin Legislature has provided to the WDOC exceed the scope of the powers outlined in *Majerus*. A summary of the WDOC powers are:

1. **Wis. Stat. §301.001, Purpose of Chapters**, states 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 WDOC shall *maintain and govern* correctional institutions. (*emphasis added*)
3. **Wis. Stat. §301.025**, allows the WDOC 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 WDOC 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 WDOC 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 the WDOC may sue or be sued.

8. **Wis. Stat. §301.045**, gives the WDOC the powers to investigate, hold hearings, subpoena witnesses and make recommendations to public or private agencies.
9. **Wis. Stat. §301.05**, allows the WDOC 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 inmate's property.
10. **Wis. Stat. §301.055**, allows the WDOC to control populations.
11. **Wis. Stat. §301.06**, allows the WDOC 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 WDOC 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 WDOC to contract with the federal government.
14. **Wis. Stat. §301.075**, allows the secretary of the WDOC to write checks from public funds.
15. **Wis. Stat. §301.08**, allows the WDOC to purchase services for care and goods as it relates to various institutions and care requirements.
16. **Wis. Stat. §301.085**, the WDOC can make benefit payments to authorized persons and charge counties for making those payments.
17. **Wis. Stat. §301.10**, provides audit powers to the WDOC and allows them to make payment on bills.
18. **Wis. Stat. §301.105**, allows the WDOC to collect commissions from telephone companies.
19. **Wis. Stat. §301.12**, allows the WDOC 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 WDOC to construct and refinance indebtedness for construction of new buildings, can convey title in fee simple on property that is owned by the WDOC 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 WDOC its own condemnation powers to acquire land, sell excess land, purchase land and lease powers.
22. **Wis. Stat. §301.29** gives the WDOC its own police powers and investigation authority.
23. **Wis. Stat. §301.30**, allows the WDOC to setup its independent wage scale for inmates.
24. **Wis. Stat. §301.37**, establishes that WDOC 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 allow 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.

As *Majerus* stated, it is the character of the agency that is relevant. The above statutory provisions describe an agency that is really a world of its own.

The scope of the legislative intent 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 for torts 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 of the powers of the WDOC statutory structure creates an independent agency.

C. Policy Considerations

In *Holytz* the Wisconsin Supreme Court clearly states 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. Likewise, the theory of an independent agency was created as a judicial exception to the Wisconsin Constitution Article IV, Section 27 that grants the State of Wisconsin immunity from suit. In *Holytz* and *Townsend* more than 40 years ago this Court indicated that tort immunity was the exception, but refrained from comment on sovereign immunity, hoping that the Legislature would act. The Court stated as follows:

This decision is not to be interpreted as imposing liability on a governmental body in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions. See *Hargrove v. Cocoa Beach* (1957, Fla.), 96 So.2d 130, 133, 60 A.L.R.2d 1193. Also, the instant decision does not create any liability against a county for acts of a sheriff which are within the provisions of sec. 4, Art. VI of the Wisconsin Constitution.

Holytz v. City of Milwaukee, 17 Wis. 2d 26, 40, 115 N.W.2d 618, 625 (1962)

We think all that the legislature had in mind at the time it passed the section was to consent to be sued in cases only where there then existed a liability for the claim, and it is a little late in the day for this court now to say that the legislature also intended to include a consent to be sued for tort claims if this court at sometime in the future reversed itself and abolished governmental tort immunity. We cannot now put more meaning into this section as a consent to be sued because *Holytz v. City of Milwaukee* (1962), 17 Wis.2d 26, 115 N.W.2d 618, *421 has removed the defense of tort immunity. *Holytz* did not decide this issue but expressly anticipated it and reserved it for future determination.

Townsend v. Wisconsin Desert Horse Ass'n, 42 Wis. 2d 414, 420-21, 167 N.W.2d 425, 428 (1969)

In addition, since Wis. Stat. §301.04 was enacted it appears to be just taking up statutory code section space. A Westlaw search indicates that there are no substantive decisions relating to Wis. Stat. §301.04. It is reasonable to assume that when the statute was passed in the context of *Holytz* in 1989 that the legislature intended it to have some legal significance in relation to the judicial concept that tort immunity is the exception.

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.

Adam Mayhugh’s case demonstrates that there is a current public need for the judiciary to redefine the meaning of the language provided in Wis. Stat. §301.04. The Constitution also provides the citizens of Wisconsin the right to be remedied for the wrongs of others.

W.S.A. Const. Art. 1, § 9

§ 9. Remedy for wrongs

Section 9. Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

The State has previously suggested in pleading that Mr. Mayhugh has a

remedy under Wis. Stat. §893.80, however, that remedy is limited to the negligent performance of a ministerial duty. *See Pries v. McMillon*, 2010 WI 63, 326 Wis.2d 37, 784 N.W.2d 648. In this case, the placement of Adam Mayhugh on the side line is a discretionary act by the officers of RCI and therefore immune which leaves Mr. Mayhugh without an avenue of recovery.

Adam Mayhugh's case brings to the forefront the tension between the two constitutional provisions of sovereign immunity under Article IV, Section 27 and Article I §9 of the Wisconsin Constitution. What does it mean to be an agency that is truly an arm of the state not subject to suit because the legislature did not waive sovereign immunity by legislative actions versus the issue of whether the citizens of the State of Wisconsin have the right to recover for the negligent acts of state employees. On balance there is the policy to protect of the state budget¹ versus leaving a citizen to fend for themselves without adequate compensation for the negligent acts of state employees that cause personal injury. This is the right conclusion considering the scope of the legislation and the agency that was created by the Wisconsin Legislature because it is clear that the legislatures intended the WDOC to be an independent agency subject to law suits and liability.

In summary, policy considerations require that the WDOC be responsible for its negligent tortuous conduct. The policies behind the judicial ruling that "government immunity is the exception" as decided in *Holytz* and the statutory

¹. See *Bostco LLC v. Milwaukee Metro Sewerage Dist.*, 2013 WI 78, 350 Wi.2d 554, 835 N.W.2d 160.

structure of the WDOC that was created in light of the *Hoyltz* decision establishes that the correct policy is to hold the WDOC liable for its negligent acts. The policy The balance between how much recovery a citizen of this state will be allowed will be up to the legislature after such a ruling by this Court. The legislature will act after more than forty years of inaction just like it did after the *Hoyltz* decision.

II. CONCLUSION

The Court should find that based on Wis. Stats. §301.02 and §301.04 that the legislature intended to establish the WDOC as an independent agency and therefore waived sovereign immunity under Art. IV §27 of the Wisconsin Constitution. Further, that the broad powers of the WDOC support that the legislature intended to create an independent agency. Finally, solid judicial policy supports the notion that the WDOC should be responsible for tortuous conduct that causes injury to the citizens of the State of Wisconsin.

Dated: December 15, 2014

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and 809.62(4), Stats., for a brief produced using the following font:

Proportional font: 1.5 inch margin on the left side and 1 inch margin on the right side. The length of this brief is 11 pages and contains 3,137 words.

Dated this 15th day of December, 2014.

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CERTIFICATION OF DELIVERY

I certify that this brief was deposited with FedEx for delivery to the Supreme Court of Wisconsin on December 15, 2014. I further certify that the brief was correctly addressed and cost of delivery was prepaid.

Dated this 15th day of December, 2014.

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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 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 15th day of December, 2014.

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