STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1023

ADAM R. MAYHUGH,

Plaintiff-Appellant-Petitioner,

v.

STATE OF WISCONSIN, WISCONSIN DEPARTMENT OF CORRRECTIONS, and REDGRANITE 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.

ON REVIEW OF A WISCONSIN COURT OF APPEALS DECISION, DISTRICT IV, AFFIRMING THE DECISION OF THE WAUSHARA COUNTY CIRCUIT COURT, THE HONORABLE GUY D. DUTCHER PRESIDING

BRIEF AND APPENDIX OF DEFENDANTS-RESPONDENTS

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ISSUE PRESENTED FOR REVIEW

Under Wisconsin law, the legislature waives a state agency's sovereign immunity by giving it the power to "sue and be sued" and by expressly indicating that it is an entity independent of the state. The Wisconsin Department of Corrections has the power to "sue and be sued" but is not an entity independent of the state. Is the Wisconsin Department of Corrections entitled to sovereign immunity?

Answer by the circuit court: Yes.

Answer by the court of appeals: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for March 10, 2015 at 9:45 a.m. In light of the Court granting review, the Defendants-Respondents believe that publication is warranted in this case.

STATEMENT OF THE CASE

Nature of the case.

Petitioner Adam Mayhugh seeks review of a court of appeals decision affirming that the State of Wisconsin Department of Corrections (DOC) is immune from suit in tort. Applying longstanding precedent, the court of appeals and circuit court concluded that DOC is entitled to sovereign

immunity. This Court should affirm the court of appeals' decision.

Statement of the facts.

Mayhugh, an inmate at the Redgranite Correctional Institution (RGCI), was hit in the head by a foul ball while sitting on the bleachers watching an inmate softball game in the RGCI recreational yard. (R. 8:2-3). Mayhugh suffered serious injuries from the impact of the ball. (R. 8:4).

Mayhugh initiated a tort action against, among others, the State of Wisconsin acting through DOC and RGCI. (R. 1). The state, on behalf of DOC and RGCI, moved to dismiss the complaint on the grounds that sovereign immunity barred the action. (R. 6-7). Mayhugh filed an amended complaint adding individual state employees as defendants. (R. 8). The state moved to dismiss the amended complaint, arguing that the state and its agencies were entitled to sovereign immunity and that Mayhugh failed to comply with the notice of claim statute, Wis. Stat. § 893.82(3), with respect to the state employees. (R. 10; 11; 12).

At a hearing on November 16, 2012, the circuit court agreed with the state on both issues. (R. 21:5-11, lines 5-15). In its oral ruling, the circuit court unambiguously "dismiss[ed] this action as to Gary Hamblin, as to Michael Dittmann, as to Redgranite Correctional Institution, the

Wisconsin Department of Corrections, and the State of Wisconsin." (R. 21:11, lines 2-5).

The court, however, gave Mayhugh 30 days to indicate what he wanted to do with the case. (R. 21:11-13, lines 6-9). On January 9, 2013, Mayhugh filed a letter with the court indicating that he wanted to dismiss the case without prejudice. (Resp't App. 101; R. 18). On January 29, 2013, the court dismissed the case without prejudice, upon Mayhugh's motion.[1] (Resp't App. 102; R. 19). On April 29, 2013, Mayhugh filed a notice of appeal. (R. 20). He did not appeal the dismissal of the individual state employees. (R. 20).

Mayhugh appealed the dismissal of DOC, arguing that the legislature waived sovereign immunity for DOC by enacting the "sue and be sued" language of Wis. Stat. § 301.04 and by granting DOC statutory powers that make DOC an independent state agency. (Pet'r App. 1-4). The court of appeals affirmed the circuit court, reasoning that "Mayhugh has failed to demonstrate that the legislature clearly and expressly waived sovereign immunity in tort on behalf of DOC, or that DOC is an independent state agency

[1] The written order conflicts with the oral ruling. (Resp't App. 102; R. 19; 21:11-13, lines 6-9). When a court's oral ruling and its written order conflict, its oral ruling controls. *See State v. Perry*, 136 Wis. 2d 92, 113, 401 N.W.2d 748 (1987). If the written order controlled, Mayhugh would not have been aggrieved because the court granted his motion to dismiss his own case. *See Tierney v. Lacenski,* 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983) (only aggrieved parties have a right to appeal).

or body politic of the type not intended by the legislature to enjoy immunity." (Pet'r App. 3).

Mayhugh filed a petition for review, again arguing that DOC is not entitled to sovereign immunity in tort. After considering the petition and the state's response, this Court granted the petition for review.

STANDARD OF REVIEW

Whether the state or one of its agencies is immune from a particular claim or action is a question of law that the court decides de novo. *See Erickson Oil Prods., Inc. v. State,* 184 Wis. 2d 36, 42, 516 N.W.2d 755 (Ct. App. 1994).

ARGUMENT

I. The Wisconsin Department of Corrections is entitled to sovereign immunity in tort.

A. Only the legislature can consent to a suit against the state.

The defense of sovereign immunity derives from the Wisconsin Constitution, art. IV, § 27, which provides: "**Suits against the state.** Section 27. The legislature shall direct by law in what manner and in what court suits may be brought against the state."

The case law applying Wis. Const. art. IV, § 27 is long standing. Sovereign immunity extends to state agencies. *Metzger v. Dep't of Taxation*, 35 Wis. 2d 119, 131-32,

150 N.W.2d 431 (1967). Only the legislature can consent to a suit against the state, and that consent must be "clear and express." *State v. P.G. Miron Constr. Co.*, 181 Wis. 2d 1045, 1052-53, 512 N.W.2d 499 (1994). The state is not subject to suit in tort. *Carlson v. Pepin Cnty.*, 167 Wis. 2d 345, 356, 481 N.W.2d 498 (Ct. App. 1992).

B. The phrase "sue and be sued" is not consent to be sued.

There must be express legislative authorization to waive the state's immunity from tort. The legislature has not taken such actions with respect to DOC.

Mayhugh argues that the language in Wis. Stat. § 301.04, providing that DOC "may sue and be sued," amounts to a clear, express waiver of the state's immunity in tort. Standing alone, however, "sue and be sued" provisions are not tantamount to the legislature's waiver of the state's immunity for tort suits.

In *Lindas v. Cady*, 142 Wis. 2d 857, 861-63, 419 N.W.2d 345 (Ct. App. 1987), *rev'd in part on other grounds*, 150 Wis. 2d 421, 441 N.W.2d 705 (1989), the court of appeals held that the phrase "sue and be sued" in the Department of Health and Social Services's statutes did not operate as a waiver of that agency's sovereign immunity. The court reasoned that the statute was in existence when the state enjoyed governmental immunity from suit in tort and,

therefore, it could not have been intended to permit suit. *Id.* at 861-63.

Bahr v. State Investment Board., 186 Wis. 2d 379, 391-93, 521 N.W.2d 152 (Ct. App. 1994), qualified *Lindas* somewhat. Although in *Lindas* "sue and be sued" was not consent, in *Bahr*, the court of appeals held that this was not "a blanket rule." *Id.* at 392-393 ("[W]e do not consider *Lindas* as stating a blanket rule that legislative consent for an agency to sue and be sued cannot be considered a waiver of sovereign immunity."). But the *Bahr* qualification of *Lindas* does not apply in tort. *Id.* at 392. And, in *Bahr*, the court went on to consider the "sue and be sued" language together with other indicia showing that the State of Wisconsin Investment Board was an independent going concern and did not enjoy sovereign immunity. *Id.* at 388-90, 394-99. Thus, *Bahr* did not reverse *Lindas*, and "sue and be sued" language does not by itself waive sovereign immunity.

Mayhugh suggests that the legislature indicated its intent for DOC's "sue and be sued" provision in section 301.04 to waive the agency's immunity in tort because the provision was enacted *after* this Court's decision in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), which partially abrogated governmental tort immunity. (Pet'r Br. at 8-10). There are three fatal flaws to this argument.

First, the premise of this argument was rejected in *Holytz*. This Court explicitly held that the abrogation of governmental immunity in *Holytz* had no effect on the state's sovereign immunity: "The decision in the case at bar removes the state's defense of nonliability for torts, but it has no effect upon the state's sovereign right under the Constitution to be sued only upon its consent." *Id*. at 41. Governmental immunity and sovereign immunity are two different doctrines. The former is a common law rule that extended even to municipalities; the latter is a constitutional doctrine that extends only to the state. *See Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 28-29 n. 11, 559 N.W.2d 563 (1997).

Second, the "sue and be sued" language in DOC's Wis. Stat. § 301.04 was enacted in 1990, 1989 Wis. Act 31, § 2569, when DOC was created. Prior to that time, the Department of Health and Social Services operated the state's correctional institutions. Wis. Stat. ch. 46 (1987-88). Under *Lindas*, the "sue and be sued" language did not constitute a waiver of sovereign immunity for the predecessor of DOC; therefore, it does not constitute a waiver of sovereign immunity for DOC. *See Arndt v. Dep't of Corrections*, 972 F. Supp. 475, 478 (W.D. 1996) (also citing *Fla. Dep't of Health v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 149 (1981) (per curiam) ("sue and be sued" not the equivalent of express waiver of immunity by state)).

Finally, many other state agencies and entities have the statutory power to "sue and be sued." *See, e.g.,* Wis. Stat. § 38.14(1) (Technical College System); § 46.017 (Department of Health Services); § 49.27 (Department of Children and Families); § 101.02(2) (Department of Safety and Professional Services); § 196.02(2) (Public Service Commission), among many others. The legislature cannot have intended to waive sovereign immunity for these agencies simply by reenacting this "sue and be sued" language. Legislative abrogation of sovereign immunity must be "clear and express." *P.G. Miron*, 181 Wis. 2d at 1052-53; *Townsend v. Wis. Desert Horse Ass'n*, 42 Wis. 2d 414, 421, 167 N.W.2d 425 (1969) (only legislation with the "most clear and definite language of consent to suit" would amount to a waiver of the defense). Reenacting language that by itself cannot lift the sovereign immunity bar is not clear and express waiver.

The phrase "sue and be sued" in Wis. Stat. § 301.04 does not waive DOC's sovereign immunity in tort, even though the provision was enacted after this Court abrogated governmental tort immunity. "Sue and be sued" provisions have another purpose entirely.

C. The phrase "sue and be sued" relates to an entity's capacity to be sued.

The purpose of "sue and be sued" language has nothing to do with immunity. Instead, the phrase "sue and be sued," by

itself, identifies an entity with the capacity to sue and be sued, but it neither creates causes of action nor abolishes defenses such as sovereign immunity.

The phrase "sue and be sued" relates to an entity's capacity to be party to judicial proceedings. *See, e.g., State v. Sweat*, 208 Wis. 2d 409, 424, 561 N.W.2d 695 (1997) (noting the "lack of capacity to sue and be sued" as a defense); *Elections Bd. v. Ward*, 105 Wis. 2d 543, 547, 314 N.W.2d 120 (1982) (discussing "capacity to sue and be sued"). Significantly, the Wisconsin statutes specifically authorize defenses based on the lack of "capacity" to sue and be sued as a party litigant. Wis. Stat. §§ 802.03(1), 802.06(2)(a)(1).

Some entities are suable and others are not. But a suable party is one of the requirements for a cause of action in Wisconsin. *See Wis. Natural Gas v. Ford, Bacon & Davis Constr. Corp.*, 96 Wis. 2d 314, 323, 291 N.W.2d 825 (1980). "[A] party, in order to be capable of being sued, must have an entity which the court can recognize, either as a natural or artificial person or a quasi-artificial person." 67A C.J.S. *Parties* § 48 (database updated Dec. 2014).

For example, in *Buchanan v. City of Kenosha*, 57 F.Supp.2d 675, 678-79 (E.D. Wis. 1999), the Federal District Court for the Eastern District of Wisconsin held that federal law claims against the Kenosha County District Attorney's Office must be dismissed because that office is not a suable

entity under Wisconsin law.[2] The court cited, among other decisions, *Abraham v. Piechowski*, 13 F. Supp. 2d 870, 873 (E.D. Wis. 1998), which held that the Waushara County Sheriff's Department was part of a county government and "not a separate suable entity." Thus, naming a non-suable entity in a court action "adds nothing." *West By and Through Norris v. Waymire*, 114 F.3d 646, 646-47 (7th Cir. 1997). And claims against non-suable defendants may not proceed. *See Chan v. Wodnicki*, 123 F.3d 1005, 1007 (7th Cir. 1997) (the "Chicago Police Department was dismissed because it was not a suable entity").

A capacity to sue creates no claims. *See, e.g., Racine Fire & Police Comm. v. Stanfield*, 70 Wis. 2d 395, 401-02, 234 N.W.2d 307 (1975); *PSC v. Wisconsin Bell*, 211 Wis. 2d 751, 757, 566 N.W.2d 496 (Ct. App. 1997). And a capacity to be sued does not waive the state's immunity. *See Lindas*, 142 Wis. 2d at 861. Indeed, courts in other states have explicitly held that "sue and be sued" provisions simply grant an entity the status and capacity to enter courts. *Self v. City of Atlanta*, 377 S.E.2d 674, 676 (Ga. 1989); *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund*, 658 N.E.2d 989, 995 (N.Y. 1995).

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[2] When federal courts address federal law claims, Wisconsin law determines if a defendant is suable. *See, e.g., Buchanan v. City of Kenosha*, 57 F. Supp. 2d 675, 678-79 (E.D. Wis. 1999).

Several examples illustrate the distinctions between the capacity to "sue and be sued" and the defense of sovereign immunity.

The State of Wisconsin itself plainly has the capacity to "sue and be sued," i.e., the legal status to appear as a party in court, but there can be no doubt that the state enjoys sovereign immunity under Wis. Const., art. IV, § 27. It is no different with the arms of the state.

The Board of Regents of the University of Wisconsin System, with all its programmatic responsibilities, has the capacity to sue and be sued, although not expressly stated in its enabling statute. Wis. Stat. ch. 36. It is the Board, not its campuses, which may appear as a party. *See, e.g., Derby v. Univ. of Wisconsin*, 54 F.R.D. 599, 600 (E.D. Wis. 1972), *aff'd*, 489 F.2d 757 (7th Cir. 1973) (dismissing UW-Madison and UW-Parkside because they are not natural or legal persons). Just as plainly, the Board is entitled to sovereign immunity. *See Lister v. Bd. of Regents*, 72 Wis. 2d 282, 293, 240 N.W.2d 610 (1976).

The final example comes from this case. Mayhugh initially named RGCI as a defendant, (R. 8:2), although he has abandoned his claim against RGCI on appeal. (Pet'r App. 1-4; Pet'r Br. at 3-12). RGCI is not a suable juristic entity. RGCI obviously is not a natural person. Nor is it an artificial person with proprietary powers separate from the state. *See Bahr*, 186 Wis. 2d at 391-93. RGCI is a place on the

map, a building which houses inmates and which has been assigned various programs as a part of the mission of the DOC. *See* Wis. Stat. § 302.01(1)(b) and ch. 302. But the legislature has determined that DOC, not RGCI, is the entity that can "sue and be sued." *See* Wis. Stat. § 301.04. Therefore, RGCI was appropriately dismissed from this case, and DOC, as an arm of the state, is entitled to assert the state's immunity.

D. Federal cases construing "sue and be sued" language do not apply here.

Federal courts have held that the phrase "sue and be sued" in federal statutes is a waiver of immunity.[3] In *Bahr*, the court of appeals, cited one such case, *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475 (1994). *Bahr*, 186 Wis. 2d

[3] *See, e.g., U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.,* 540 U.S. 736, 742 (2004) (stating that in the Postal Reorganization Act of 1971, "the sue-and-be-sued clause effects a broad waiver of immunity"); *Fed. Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 475 (1994) (stating that "[b]y permitting FSLIC to sue and be sued, Congress effected a 'broad' waiver of FSLIC's immunity from suit" for cognizable claims); *Loeffler v. Frank,* 486 U.S. 549, 554-556 (1988) (holding that a "sue and be sued" clause effects a broad waiver of immunity from suit); *Franchise Tax Bd. of Cal. v. U.S. Postal Serv.,* 467 U.S. 512, 519-23 (1984) (holding that by virtue of a sue-and-be-sued clause, the Postal Service was required to withhold unpaid state taxes from the wages of its employees even though the process was a state administrative tax levy, not an order issued by a state court); *Fed. Hous. Admin. v. Burr,* 309 U.S. 242, 245-46 (1940) (holding that the words "sue and be sued" in a federal statute creating the Federal Housing Administration authorized suits against the Administration, including a garnishment action in state court).

at 393-94. This needless commentary on federal entities was rendered harmless by the court's ultimate reliance on the separate entity analysis outlined in *Majerus v. Milwaukee County,* 39 Wis. 2d 311, 314-15, 159 N.W.2d 86 (1968). *Bahr*, 186 Wis. 2d at 395-98.

The *Bahr* court failed to observe that, like *Majerus*, federal courts consider "sue and be sued" provisions in the enabling statutes of federally-created entities as evidence that the entity is separate from the United States government and, as a result, outside the scope of immunity protection. *See, e.g., Fed. Hous. Admin. v. Burr*, 309 U.S. 242, 246-47 (1940); *Meyer*, 510 U.S. at 480. The Federal Deposit Insurance Corporation in *Meyer* argued that, being a separate entity from the federal government, it should be treated the same as "private entities" rather than subjected to greater liabilities. *Meyer*, 510 U.S. at 481-83. The critical point, missed in *Bahr*, is that any examination of "sue and be sued" capacity in *Meyer*, *Burr*, and similar federal decisions turned on the independent proprietary character of the sued entity. The Supreme Court has itself warned that the rationale for finding a waiver under federal law is not applicable to "municipalities, counties, and the like." *Burr*, 309 U.S. at 247.

So the phrase "sue and be sued" does not alone waive sovereign immunity. But, as discussed below, it is one

consideration in determining whether an entity is independent of the state.

E. The Department of Corrections is not an independent going concern.

1. The legislature waives sovereign immunity by expressly indicating that an agency is an entity independent of the state.

Courts have concluded that the legislature indicates its intent to waive sovereign immunity not simply by using the phrase "sue and be sued," but by expressly indicating that an agency is an entity independent of the state.

The legislature "may create an agency with independent proprietary powers or functions and sufficiently independent of the state to be sued as such." *Canadian Nat. R.R. v. Noel*, 2007 WI App 179, ¶ 7, 304 Wis. 2d 218, 736 N.W.2d 900 (quoting *Kegonsa Jt. Sanitary Dist. v. City of Stoughton,* 87 Wis. 2d 131, 143-44, 274 N.W.2d 598 (1979)). When the state creates such an "independent going concern," it waives sovereign immunity for that body. *Id.* This is a "traditionally narrow exception." *Id.* (quoting *Busse v. Dane Cnty. Reg. Plan. Comm'n,* 181 Wis. 2d 527, 539, 511 N.W.2d 356 (Ct. App. 1993)).

Only three agencies have ever been held to be independent going concerns for the purposes of finding an exception to sovereign immunity. *Id.* ¶ 9. These agencies are the State Armory Board in *Majerus,* 39 Wis. 2d at 315; the

State Housing Finance Authority in *State ex rel. Warren v. Nusbaum,* 59 Wis. 2d 391, 424-25 n. 16, 208 N.W.2d 780 (1973); and the State Investment Board in *Bahr,* 186 Wis. 2d at 399. In each of these three cases, the courts noted the agencies had broad statutory authorization to "sue and be sued" and were created as bodies corporate and/or politic. *Canadian Nat. R.R.*, 304 Wis. 2d 218, ¶ 9.

In *Majerus*, this Court held that the Armory Board was an independent going concern, not an arm of the government, where it was designated by the legislature as "a body politic and corporate," a status the court held was almost unique among state agencies. *Majerus*, 39 Wis. 2d at 315. The Board could "sue and be sued" and it also received no appropriations from the legislature and had independent power to borrow money, sell bonds, and satisfy its debts out of its own income. *Id*. at 314-15.

Similarly, in *Bahr*, the court of appeals held that the state waives its sovereign immunity from suit when it creates an agency as an "independent going concern." *Bahr*, 186 Wis. 2d at 395. The court found that the Investment Board was such an agency where it not only was a "body corporate with power to sue and be sued in [its] name," but the legislature also expressly stated its "intent . . . that the board be an independent agency of the state . . . ." *Id*. at 395-96, 399. The board operated on its own revenue; had exclusive control of the investment and collection of the

principal and interest from its investments; could indemnify others against its failures and losses; and could secure insurance. It was also exempt from all state purchasing, contracting, and building responsibilities. *Id.* at 395-97.

In contrast, in *Lister*, this Court found that the University of Wisconsin Board of Regents was not an independent going concern. The Board of Regents had no power to raise money or incur liability beyond the amount appropriated by the legislature, could not dispose of property without express authority from the state, and its funds were in the custody of the state treasurer. *Lister*, 72 Wis. 2d at 293.

As the courts below correctly concluded, DOC is arm of the state—like the Board of Regents, not the Investment Board. Both DOC and the University of Wisconsin are large agencies, charged to administer complex, important programs. But they remain arms of the government under the state's direction as to spending, obtaining appropriations, purchasing real estate, and other functions. Accordingly, as discussed in detail below, DOC is not an independent going concern.

2. DOC has none of the indicia of an independent going concern with independent proprietary powers.

a. DOC is not a body corporate and/or politic.

All three agencies that courts have held to be independent going concerns for the purposes of finding an exception to sovereign immunity have statutory authorization to "sue and be sued" *and* were created as bodies corporate and/or politic. *See Canadian Nat. R.R.*, 304 Wis. 2d 218, ¶ 9 (citing *Majerus,* 39 Wis. 2d at 315; *Warren,* 59 Wis. 2d at 424-25 n. 16; *Bahr,* 186 Wis. 2d at 399). No entity has been found to be independent without both features.

Although DOC may "sue and be sued," the legislature has made no pronouncement that DOC is an independent body corporate and/or politic or similar type of body.

b. DOC is not established as an independent agency of the state.

In *Bahr*, the court of appeals placed special emphasis on the fact that the Investment Board – in addition to being a "body corporate" with the power to "sue and be sued" – was intended to be "'an independent agency of the state.'" *Bahr,* 186 Wis. 2d at 399 (quoting Wis. Stats. §§ 25.17 and 25.15(1)). The Investment Board is also classified as an independent agency under subchapter III of Wis. Stat. ch. 15. Wis. Stat. § 15.76.

Unlike the Investment Board, DOC is classified with other departments under subchapter II of chapter 15, as opposed to independent agencies under subchapter III of chapter 15. *See* Wis. Stat. ch. 15. A "department" is defined as an agency "within the executive branch of Wisconsin state government." Wis. Stat. § 15.01(5).

c. Any money or revenue DOC has belongs to the state, and its budget is under the exclusive control of the legislature.

This Court noted the following as indicating that an entity is not an independent going concern.

> All funds belonging to the institution, whether derived from appropriations or from the sale of property, are in the custody of the state treasurer and can only be disbursed on a warrant drawn by the secretary of state.

Sullivan v. Bd. of Regents of Normal Sch., 209 Wis. 242, 244, 244, N.W. 563 (1932). Similarly, in holding that the former University Hospital enjoyed sovereign immunity, the court of appeals noted that all budgeting decisions were subject to the same state controls as applied to other agencies. *Walker v. Univ. of Wis. Hosp.*, 198 Wis. 2d 237, 244, 542 N.W.2d 207, 210 (Ct. App. 1995).

The facts are the same here. DOC has no custody or control of its funds that are separate or independent from the control of the legislature through the appropriations

process. *See* Wis. Stat. § 20.410. It has no power to issue bonds or invest. *See* Wis. Stat. ch. 301.

DOC follows the same procedures of all state agencies at budget time by submitting to the Department of Administration (DOA) its budget requests as required by Wis. Stat. § 16.42. These budget requests, as modified by DOA, then become part of the Governor's executive budget bill, which is presented to the legislature as required by Wis. Stat. § 16.47. After the budget is passed, DOA closely monitors state agency expenditures. Wis. Stat. § 16.50(1)(a) provides that "[e]ach department . . . shall prepare and submit to the secretary an estimate of the amount of money which it proposes to expend, encumber or distribute under any appropriation in ch. 20." DOC is subject to this provision and has no money not subject to this DOA control.

Accordingly, the state owns everything DOC has, and DOC's budget is subject to the same exclusive control as in the case of any other state agency. DOC is not independent of the state.

d. DOC is subject to state controls in the purchase of real estate, goods and services.

In *Bahr*, the Investment Board was not considered to be part of the state in part because it was exempt from the provisions in Wis. Stat. ch. 16, resting all state purchasing, contracting and building responsibilities in the Department of Administration. *Bahr,* 186 Wis. 2d at 396-97.

Nothing in Wis. Stat. ch. 16 or ch. 301 exempts DOC from the ch. 16 rules as to purchasing. All of DOC's purchasing of goods and services is done pursuant to the same requirements of Wis. Stat. ch. 16 as apply to all state agencies. And, just like other state agencies, DOC's power to buy or sell real estate is also subject to the involvement of the DOA under Wis. Stat. § 16.848. *See* Wis. Stat. § 301.235(2)(a).

e. DOC cannot incur any liability beyond the amount appropriated to it.

This Court has also considered whether an entity may incur "any liability beyond the amount appropriated to it by act of the legislature." *Sullivan*, 209 Wis. at 244. This consideration was reiterated in *Walker*: "[A] primary test for sovereign immunity is 'whether a judgment for the plaintiffs on their claims . . . would require payment from state funds.' If so, the action is barred." *Walker*, 198 Wis. 2d at 245. *Id*. at 245 (quoting *Lister*, 72 Wis. 2d at 292).

DOC may not incur any liability beyond amounts authorized by the legislature. No statute empowers DOC to pay for a judgment against it. The sole source for payment is under Wis. Stat. § 20.865(1)(fm) (supplementing the "appropriations of state agencies . . . to pay for state liability arising from judgments and settlements").

3. DOC's statutory powers do not show that it is an independent going concern.

DOC has none of the characteristics of an independent going concern as set forth in the case law. There is no definitive list of "independent proprietary powers" for the court to consult in considering the nature of a state agency for a sovereign immunity analysis. *Canadian Nat. R.R.*, 304 Wis. 2d 218, ¶ 8 (citing *Majerus*, 39 Wis. 2d at 311). Even so, the list of DOC's statutory powers that Mayhugh has provided does not indicate the legislature's intent to create an independent going concern.

a. The power to "govern" and other general DOC functions do not make DOC an independent going concern.

Mayhugh emphasizes that under Wis. Stat. § 301.02, DOC "governs" the administration of prisons, (Pet'r Br. 3), but he offers no explanation of how an agency's governance of a state program makes it independent from the state. All state agencies "govern" the programs they are charged to administer, but they remain arms of the government.

Mayhugh claims that "[s]everal 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." (Pet'r Br. 3). But the cases Mayhugh cites do not support this proposition.

The *Majerus* court, as discussed above, relied on numerous factors beyond the power to "sue and be sued." *Majerus*, 39 Wis. 2d at 314-15. This Court did not mention the power to govern. *Id*. Mayhugh's citation to *Townsend v. Wisconsin Desert Horse Association*, 42 Wis. 2d 414, 423-24, 167 N.W.2d 425 (1969) and *Metzger v. Wisconsin Department of Taxation*, 35 Wis. 2d 119, 131-32, 150 N.W.2d 431 (1967), is curious because in both cases this Court found that the state entity was *not* independent of the state and *was* entitled to sovereign immunity.

Mayhugh also offers a long list of other DOC functions, like holding hearings, controlling populations, or giving grants to religious organizations, (Pet'r Br. 4-6), but he fails to explain how any of these specific powers or duties would bear on the legislature's intent as to DOC's immunity.

b. The power to contract does not make DOC an independent going concern.

Mayhugh points to DOC's power to contract under Wis. Stat. §§ 301.031, 301.065, 301.07, and 301.08. (Pet'r Br. 4-6). But state agencies with the power to enter into binding contracts do not lose their sovereign immunity.

All of DOC's contracting is subject to DOA procedures and approval. Wisconsin Statute §§ 16.71, *et seq*. set forth the basic structure for state agency power to enter into binding contractual agreements. DOA may delegate the authority to enter such agreements. § 16.71(1). Buy on low

bid is the rule, with some exceptions. Section 16.75. There are many other regulations relating to agency power to contract. *See* Wis. Admin. Code Chs. Adm. 5, 7, 8, 9, 10, 21.

If a state agency's power to contract for services meant it was longer part of the state, the state could not contract. There would, for example, be no way to buy paper clips. As soon as an agency entered into a contract for paper clips, it would be considered an independent going concern with independent proprietary powers, which is an absurd result. Indeed, being subject to chapter 16 contracting requirements is evidence that an agency is part of the state and enjoys sovereign immunity. In fact, as least one state agency has power to contract separate from the chapter 16 requirements. *See* Wis. Stat. § 85.08 (Department of Transportation may enter into contracts). And it still enjoys sovereign immunity. *See Canadian Nat. R.R.*, 304 Wis. 2d 218, ¶ 10.

c. The power to lease property does not make DOC an independent going concern.

Mayhugh also mentions DOC's power to lease property under Wis. Stat. §§ 301.235 and 301.24. (Pet'r Br. 5-6). But it is not uncommon for state agencies that unquestionably are entitled to sovereign immunity to have the power to lease property to private entities.

For example, under Wis. Stat. § 46.035(2)(b), the Department of Health Services (DHS) has the "power to lease

to a nonprofit corporation for a term or terms not exceeding 50 years each any land and any existing buildings thereon owned by, or owned by the state and held for, the department . . . ." This provision is almost identical to one of DOC's lease provisions. *See* § 301.235(2)(a)2. DHS's predecessor agency, the Department of Health and Family Services, enjoyed sovereign immunity. *See Lindas*, 142 Wis. 2d at 861.

The same is true of the Department of Transportation (DOT). Under Wis. Stat. § 85.15(1) it "may . . . lease any property acquired for highway, airport or any other transportation purpose until the property is actually needed for any such purpose." Wis. Stat. § 85.15(1). There can be no doubt that DOT enjoys sovereign immunity. *See Canadian Nat. R.R.*, 304 Wis. 2d 218, ¶ 10.

The legislature's decision to permit state agencies like DOC to lease property when it is not in use is only prudent. Doing so hardly makes the agency separate from the state. To the contrary, it demonstrates state control over the property.

d. The power to delegate police power does not make DOC an independent going concern.

Mayhugh lists DOC's police power and investigatory authority under Wis. Stat. § 301.29 as evidence of the legislature's intent to create DOC as an independent state agency. (Pet'r Br. 6). First, it is important to note that correctional officers are not law enforcement officers under

Wis. Stat. § 165.85. Second, this argument makes little sense because police power is an inherent attribute of sovereignty.

For example, the university hires police officers for several campuses. Wis. Stat. § 36.11(2). "There is no question that the board of regents is an arm or agency of the state for sovereign immunity purposes." *Walker*, 198 Wis. 2d at 243 (citing *Lister*, 72 Wis. 2d at 292-93). DOT employs state troopers who police the highways, and this Court has held that DOT is an arm of the state entitled to sovereign immunity. *See Canadian Nat. R.R.*, 304 Wis. 2d 218, ¶ 10. The Department of Natural Resources (DNR) wardens are law enforcement officers. *See* Wis. Stat. §§ 23.10 and 29.921. That hardly makes DNR an independent going concern not entitled to sovereign immunity. Even DOA can hire police to protect state property and persons. Wis. Stat. § 16.84(2). DOA surely is not independent of the state.

Thus, being able to run a police force does not make the entity an independent going concern with independent proprietary functions and powers.

e. The power to administer the prison industries program does not make DOC an independent going concern.

Mayhugh points to the powers and duties of the Prison Industries Board, the body responsible for administering the prison industries program for inmates under Wis. Stat. § 303.015. (Pet'r Br. 6-7). The activities of the Prison

Industries Board are not at issue here. Even if they were, Mayhugh points to nothing in the statutes indicating that the legislature intended for that Board to be independent of the state and outside the constitutional sovereign immunity otherwise afforded to state agencies.

The legislature is presumed to know how the courts have interpreted its enactments. *Belding v. Demoulin*, 2014 WI 8, ¶ 38, 352 Wis. 2d 359, 843 N.W.2d 373. Decades have passed since *Lindas* interpreted "sue and be sued" not to operate as a legislative waiver of the state's immunity, and the legislature has not acted to subject DOC to suit in tort.

F. Mayhugh's argument subverts the legislature's program for controlling the procedures and costs associated with state employee torts.

Mayhugh's argument is contrary to legislative intent. If successful, it would render meaningless the legislative program imposing procedures and cost controls when state employees commit torts. Indeed, it would defeat the program.

Unlike state agencies, state employees who have committed tortious acts are subject to suit as long as the procedural prerequisites to suit are followed; where they are acting in the scope of their employment, the state indemnifies them. Wis. Stat. §§ 893.82, 895.46.

This legislative scheme would be pointless if a plaintiff could sue the state. There would be no reason to have a

mechanism for suing state employees with an entitlement to state indemnity if a plaintiff can sue the state or a state agency directly. Statutes are to be construed in a way that avoids surplusage. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Contrary construction would also undermine the legislature's caps on tort suits. The history of the state's tort program begins with *Chart v. Gutmann*, 44 Wis. 2d 421, 171 N.W.2d 331 (1969), an automobile accident case, where this Court held that sovereign immunity barred an action against the state agency defendant. "Our first inquiry must be whether there is historical authority which would permit tort claimants to sue the state. The short answer is: 'No.'" *Id.* at 427. The Court's conclusion was "bolstered by seventy-one years of further judicial decisions and seventy-one years of legislative acquiescence . . . ." *Id.* at 430.

The same accident case returned to this Court four years later in *Chart v. Dvorak*, 57 Wis. 2d 92, 203 N.W.2d 673 (1973), but this time the defendants were state employees in their individual capacities. The plaintiff alleged that two Wisconsin highway commission employees were negligent in the placement of intersection warning signs. This Court rejected the employees' argument that they enjoyed the state's tort immunity because they were on state business. *Id.* at 102-03.

After *Chart v. Dvorak*, the legislature needed to take action because state employees had become vulnerable in tort even if on state business. *Holytz* had made it clear that, since its decision was under the common law and legislative in nature, the legislature was free to set damage caps or reinstate governmental immunity altogether if it chose.

> 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, 17 Wis. 2d at 40.

In the case of municipalities and their employees, the legislature enacted a program allowing for direct actions against the municipality and imposing notice requirements and damage caps. *See* Wis. Stat. § 893.80. In the case of the state, it did not need to do anything because *Holytz* did not abrogate sovereign immunity. *Holytz*, 17 Wis. 2d at 40-41.

After *Chart v. Dvorak*, however, the legislature needed to do something about tort suits against state employees. And the state budget was at risk because the legislature much earlier had agreed to indemnify state employees for any judgments rendered against them. *See* Wis. Stat. § 895.46(1).[4]

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[4] The state indemnifies state employees for tort judgments entered against them, but this does not create any right of action against the state itself. *Fiala v. Voight*, 93 Wis. 2d 337, 348, 286 N.W.2d 824 (1980).

The legislature enacted what is now Wis. Stat. § 893.82, which sets forth purposes, procedures, and liability limits in tort suits against state employees.

To summarize the program: (1) suit may proceed against the state employee only if a notice of injury is filed within 120 days of the event, and the notice requirements must be strictly met; (2) no punitive damages are permitted; and (3) compensatory damages are capped, currently at $250,000.

The goal of controlling state costs permeates section 893.82. First, "no civil action or civil proceeding may be brought against any state officer, employee or agent" unless timely notice is given. Wis. Stat. § 893.82(3).

Second, these purposes are expressly stated in the statute itself:

> (1) The purposes of this section are to:
>
> (a) Provide the attorney general with adequate time to investigate claims which might result in judgments to be paid by the state.
>
> (b) Provide the attorney general with an opportunity to effect a compromise without a civil action or civil proceeding.
>
> (c) Place a limit on the amounts recoverable in civil actions or civil proceedings against any state officer, employee or agent.

Wis. Stat. § 893.82. Case law is replete with statements of the cost-controlling purposes.[5]

Third, damage caps are established. "The amount recoverable by any person . . . in any civil action or civil proceeding against a state officer, employee or agent . . . shall not exceed $250,000." Wis. Stat. § 893.82(6).

Fourth, punitive damages are not allowed. "No punitive damages may be allowed or recoverable in any such action." Wis. Stat. § 893.82(6).

Fifth, compliance with section 893.82 is jurisdictional. *Ibrahim v. Samore*, 118 Wis. 2d 720, 726, 348 N.W.2d 554 (1984).

Sixth, strict compliance is required. Section 893.82(2m) provides: "No claimant may bring an action against a state officer, employee or agent unless the claimant complies strictly with the requirements of this section." Substantial compliance is insufficient; "a claimant must adhere to each and every requirement in the statute." *Kellner v. Christian*, 197 Wis. 2d 183, 195, 539 N.W.2d 685 (1995).

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[5]*See Ibrahim v. Samore*, 118 Wis. 2d 720, 727, 348 N.W.2d 554 (1984) (the purpose of the notice statute is to enable the Attorney General to investigate fresh claims which might result in a judgment to be paid by the state under the indemnity statute); *J.F. Ahern Co. v. Building Commission*, 114 Wis. 2d 69, 83, 336 N.W.2d 679 (Ct. App. 1983) (the purpose of the notice requirement is to give the state an opportunity to investigate claims while fresh; the state needs that opportunity whether or not its agent acted pursuant to an invalid law or in excess of authority).

The legislature has carefully crafted a program controlling the procedures and costs associated with state employee torts. If Mayhugh's argument prevails, it would circumvent these cost controls. There would be no damage caps. Nothing would limit punitive damages. There would be no notice of injury requirement. Mayhugh's argument would make this program pointless; therefore, it cannot be what the legislature intended.

G. Mayhugh's remedy was to sue individual state employees in tort, but that remedy was foreclosed by Mayhugh's own failure to file a notice of claim.

Mayhugh was not left without a remedy. His remedy was to sue individual state employees for their allegedly negligent acts. Mayhugh's own actions in failing to file a notice of claim excluded this remedy.

A state employee or officer can be sued in his individual capacity for committing a tort in the course of his employment. *See Chart v. Dvorak*, 57 Wis. 2d at 102-03. The plaintiff must, however, follow certain procedural requirements. He must file a notice of claim with the Attorney General within 120 days of the event. *See* Wis. Stat. § 893.82(3).

Mayhugh filed an amended complaint naming Gary Hamblin, the former DOC Secretary, and Michael Dittmann, the RGCI Warden. (R. 8:2-4). But Mayhugh failed to file a notice of claim as required by Wis. Stat. § 893.82(3). (R. 10,

21:7-11, lines 22-5). He did not appeal this ruling. (R. 20). Therefore, Mayhugh's tort remedy was foreclosed by his own actions.

Mayhugh argues that this remedy was not available to him because "the placement of Adam Mayhugh on the side line is a discretionary act by the officers of RCI and therefore [they would be] immune which leaves Mayhugh without an avenue of recovery." (Pet'r Br. 10-11). While this may be true, this is not the reason why the individual state defendants were dismissed; they were dismissed solely because Mayhugh failed to file a notice of claim. (R. 10, 21:7-11, lines 22-5).

And whether individual state employees might be entitled to discretionary act immunity and are, therefore, immune from liability, is a separate inquiry from whether they are entitled to sovereign immunity and are immune from suit. *See Anderson v. City of Milwaukee*, 208 Wis. 2d 18, 28-29 n. 11, 559 N.W.2d 563 (1997) (discussing the difference between sovereign immunity, governmental immunity, and discretionary immunity). Thus, Mayhugh's argument regarding discretionary act immunity is irrelevant to whether state employees are immune from suit.

There is no question that the doctrine of sovereign immunity does not apply to suits for damages against public officers as individuals. *Yao v. Chapman*, 2005 WI App 200, ¶ 18 n. 6, 287 Wis. 2d 445, 705 N.W.2d 272. Mayhugh could

have brought a suit against individual state employees, but he did not follow the procedural prerequisites for such a claim.

II. In the alternative, if this Court concludes that DOC is not entitled to sovereign immunity, the holding should be applied prospectively.

Given the number of state agencies and entities that could be affected by this decision, especially if this Court decides that the legislature's use of the phrase "sue and be sued" alone is a waiver of sovereign immunity, the state must be given the opportunity to make financial arrangements to meet the liability implicit in such a holding. *See* Wis. Stat. § 66.0137(2) (regarding liability insurance for the state).

When tort law is changed, this Court has been concerned about exposing to liability individuals and institutions who would have obtained liability insurance had they known they would no longer enjoy immunity. *Harmann by Bertz v. Hadley*, 128 Wis. 2d 371, 381, 382 N.W.2d 673, 677 (1986). In several cases abrogating tort immunities, this Court has held that the decision applies to the case at bar and cases arising in the future. See, *e.g., Kojis v. Doctors Hospital,* 12 Wis. 2d 367, 107 N.W.2d 131, 107 N.W.2d 292 (1961) (abrogating charitable immunity); *Holytz,* 17 Wis. 2d 26 (abrogating governmental immunity); *Widell v. Holy Trinity Catholic Church,* 19 Wis. 2d 648, 121 N.W.2d 249 (1963)

(abrogating immunity of religious entity). If this Court concludes that DOC is not entitled to sovereign immunity, it should do the same here.

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There must be clear and express legislative consent to waive sovereign immunity in tort. The legislature has not taken this action with respect to DOC. The phrase "sue and be sued" in DOC's enabling statutes refers simply to DOC's capacity to enter into courts. It does not create a cause of action or waive sovereign immunity. "Sue and be sued" provisions are relevant to determining whether an entity is independent of the state, such that it is not entitled to the state's immunity. But DOC is not such an entity. The legislature has not designated DOC as a body corporate and/or politic, nor has it established DOC as an independent agency of the state. DOC is entirely under state control as to obtaining appropriations, spending, purchasing real estate, and other functions. It has none of the characteristics of an independent going concern with independent proprietary powers. Therefore, DOC is an arm of the state entitled to sovereign immunity in tort.

CONCLUSION

The Defendants-Respondents request that this Court affirm the decision of the court of appeals.

Dated this 5th day of January, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,798 words.

Dated this 5th day of January, 2015.

s/ Karla Z. Keckhaver
KARLA Z. KECKHAVER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 5th day of January, 2015.

s/ Karla Z. Keckhaver
KARLA Z. KECKHAVER
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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 5th day of January, 2015.

s/ Karla Z. Keckhaver
KARLA Z. KECKHAVER
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