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**CLERK OF SUPREME COURT
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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 REPLY BRIEF

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

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I. ARGUMENT

A. “Sue and Be Sued” and Capacity.

The issue in this case is not whether the state of Wisconsin has sovereign immunity under the Wisconsin Constitution art. IV §27, but rather how far does the State of Wisconsin have to go to through its legislation to waive sovereign immunity. More precisely, the question really is, what does the legislature have to do to “direct by law in what manner and in what courts suits may be brought against the state.” *Id.* The result of this language has lead to a variety of judicial interpretations. Early on in the state’s history the analysis simply focused on whether laws were passed that “authorized” an action against the state. *Houston v. State*, 98 Wis. 481, 74 N.W. 111 (1898). The State argues that there must be “express legislative authorization to waive the state’s immunity in tort.” [Respondents’ Brief, Page 5] The state makes this conclusion from the long judicial history of cases since *Houston* that have implied that an express waiver for tort actions are required even though a literal reading of the Wis. Const. art. IV § 27 does not require such an express waiver, but rather a direction on how to sue the state or its agencies.

The “sue and be sued” language has been interpreted judicially both ways as a waiver or not a waiver. [Respondents’ Brief, Page 6] In *F.D.I.C. v. Meyer*, the United States Supreme Court determined that the proper approach of interpretation of the “sue and be sued” language is that it is a broad expression of sovereign waiver and that to exclude a suit express language would be required.

F.D.I.C. v. Meyer, 510 U.S. 471, 480, 114 S. Ct. 996, 1003, (1994). Wis. Const. art. IV §27 is considered to be a procedural rule that bars a state court of personal jurisdiction over the state of Wisconsin. *Lister v. Board of Regents of University Wisconsin System*, 72 Wis.2d 282, 291, 240 N.W.2d 610, 617 (1976). In addition, what is an express and clear intent of the waiver of sovereign immunity remains undefined. See *Scocos v. State Dept. of Veteran Affairs*, 343 Wis.2d 648, 660, 819 N.W. 2d 360, 366, 2012 WI App 81, ¶20. Given the fact that pursuant to *Holytz* there is an existing policy by the Court that states that immunity is the exception, Petitioner is urging the Court not to adopt the state's position that there needs to be a clear and express waiver of sovereign immunity. *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618, 625 (1962). Rather, there is existing law and policy to adopt a view that the "sue and be sued" language is a broad waiver on what is merely a procedural rule. This policy is more appropriate when considering the other substantive constitutional right in Wis. Const. art I §9 that entitles every person to a remedy. This change is appropriate considering that Wis. Const. art IV §27 contains language that uses "Shall Direct" and the legislative branch has failed to act. A broader interpretation of the "sue and be sued" language provides that appropriate balance.

The state's argument that the WDOC does not have the capacity to be sued ignores the fact that Wis. Stat. §301.02 authorizes that the WDOC "shall maintain and govern the state correctional institutions". In effect, the statute creates the WDOC as a governing body and therefore meeting the requirement to have the

capacity to be sued.

B. Independent Agency

The State attempts to dissect every statute as independently not establishing that the WDOC is an independent agency. This approach misses the point behind Petitioner's argument that it is an independent agency. The analysis is provided in *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 159 N.W.2d 86, 88 (1968). It is the character of the agency that is relevant. *Majerus* at 315. The scope of the WDOC's statutory structure is unique in Wisconsin's history as it applies to an agency. As argued in the main brief in the context of *Majereus* it is the statutory nature of the WDOC as an agency that makes its character an independent going concern. Petitioner is not arguing that one statute alone establishes independence as approached in the state's analysis, but rather the overall statutory structure creates the character of an independent agency. For the balance of the argument on independent going concern Petitioner defers to the original brief.

C. Prospective Application.

Petitioner has no response as to the application to other cases, but adopts the reasoning in *Kojis* that any modification to the state law should apply to his case as outlined in *Kojis*. *Kojis v. Doctor's Hospital*, 12 Wis.2d 367, 107 N.W.2d 292 (1961).

‘At least two compelling reasons exist for applying the new rule to the instant case while otherwise limiting its application to cases arising in the future. First, if we were to merely announce the new rule without applying it here, such announcement would amount to mere *dictum*. Second, and more important, to refuse to apply the new rule here would deprive appellant of any benefit from his effort and expense in challenging the old rule which we now declare erroneous. Thus there would be no incentive to appeal the upholding or precedent since appellant could not in any event benefit from a reversal invalidating it.’

For similar reasons the change in rule announced in our original opinion is made applicable to the defendant.

Kojis v. Doctors Hospital, 12 Wis. 2d 367, 374, 107 N.W.2d 292, 294 (1961)

II. CONCLUSION

The current policies regarding governmental immunity require an interpretation that the “sue and be sued” language of Wis. Stat. §301.04 requires a broader view as a complete waiver to sovereign immunity. If government immunity is to be the exception and liability is the rule then this approach logical given the fact that Wis. Const. art. IV §27 is a procedural rule only. This is appropriate on balance with Wis. Const. Art I §9 that provides a substantive legal remedy for an individual. Finally, the WDOC is an independent agency. The WDOC is an independent agency because of its unique statutory character and the scope of its statutory powers throughout Wis. Stat. §301 - §303. In particular, the WDOC is given the unique power to govern unlike any other agency in the state of Wisconsin. It is the combined statutory character and its statutory powers that make the WDOC’s character an independent agency.

Dated: January 14, 2015.

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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 4 pages and contains 1,078 words.

Dated this 14th day of January, 2015.

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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 January 14, 2015. I further certify that the brief was correctly addressed and cost of delivery was prepaid.

Dated this 14th day of January, 2015.

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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 14th day of January, 2015.

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