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DISTRICT IV

June 3, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1023

Adam R. Mayhugh v. State of Wisconsin, Wisconsin Department of Corrections, and Redgranite Correctional Institution (L.C. #2012CV124)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Adam Mayhugh appeals an order dismissing his tort action against the State and the Department of Corrections (DOC). On appeal, Mayhugh argues that the doctrine of sovereign immunity should not bar recovery for personal injuries he suffered while in the custody of DOC. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Mayhugh was an inmate at Redgranite Correctional Institution when he was hit in the head by a foul ball while sitting on a bleacher observing a softball game. The impact of the ball resulted in serious, permanent injuries to Mayhugh. Mayhugh initiated a tort action against the respondents. The State, on behalf of DOC and Redgranite, moved to dismiss the complaint on the grounds that sovereign immunity barred the action. The circuit court granted the motion. Mayhugh now appeals, arguing that the legislature waived sovereign immunity for DOC by enacting WIS. STAT. § 301.04 and by granting DOC statutory powers that make DOC an independent political body or independent state agency of the type not intended by the legislature to enjoy immunity. For the reasons discussed below, we reject these arguments and affirm the circuit court.

WISCONSIN STAT. § 301.04 states: “The department may sue and be sued.” Mayhugh argues that this language constitutes a waiver of DOC’s sovereign immunity. The legislature has the exclusive right to consent to a suit against the state, and the 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). This court has held that the phrase “sue and be sued” was not a consent by DOC’s predecessor agency, the Department of Health and Social Services (DHSS), to be sued. *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). Given the holding in *Lindas*, we do not construe the phrase “sue and be sued” in § 301.04 as clear and express consent for DHSS’s successor, DOC, to be sued. *See Lindas*, 142 Wis. 2d at 861-63.

We turn next to Mayhugh’s argument that, as a result of the many powers granted to DOC by the legislature, DOC is its own independent political body or independent state agency, and is subject to suit in tort. In support of his argument, Mayhugh cites *Majerus v. Milwaukee*

County, 39 Wis. 2d 311, 159 N.W.2d 86 (1968). In *Majerus*, the court held that the Wisconsin State Armory Board did not enjoy sovereign immunity from tort liability because it was not an arm of the government but, rather, was an independent going concern that had been designated by the legislature as “a body politic and corporate.” See *id.* at 314-15. In reaching this conclusion, the *Majerus* court considered the power of the armory board to hold and disburse funds “independent of state warrants,” the fact that it did not receive any appropriations from the legislature, and its authority to borrow money and sell bonds to accomplish its purposes and to satisfy its debts out of rents and interest received from property it acquired. See *id.*

To contrast, DOC’s programs are funded by general purpose revenue appropriated by the state through the state budget. See WIS. STAT. § 20.410. Additionally, unlike the armory board in *Majerus*, DOC has not been designated by statute as a body politic and corporate. Nor is DOC an independent agency of the state, like the State of Wisconsin Investment Board. In *Bahr v. State Investment Board*, 186 Wis. 2d 379, 521 N.W.2d 152 (Ct. App. 1994), we held that the investment board was not entitled to sovereign immunity because “[t]he investment board not only is specifically authorized ‘to sue and be sued in [its own] name,’ but the legislature has expressly stated its ‘intent ... that the board be an independent agency of the state’ Sections 25.17 and 25.15(1), STATS.” *Id.* at 399. No express legislative intent similarly classifies DOC as an independent agency.

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 or body politic of the type not intended by the legislature to enjoy immunity.

IT IS ORDERED that the order is summarily affirmed under Wis. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals