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The Times They Are A Changin':

Governmental Immunity's Return to "Exception" Status

While the current makeup of our state Supreme Court has been a source of concern for the members of this organization, the conservative-leaning majority was splintered in a recent decision pertaining to governmental immunity in negligence cases. Our firm was able to convince an interesting mix of Justices that there should in fact be liability exposure for a state employee. The vote was 4-3, a somewhat normal headcount for the current court. However, it was the composition of each voting bloc that deserves significant attention. In *Pries v. McMillon*,[1] the majority opinion was written by Justice Crooks and joined by Chief Justice Abrahamson (wrote concurring opinion), Justice Prosser and Justice Ziegler. Dissenting were Justices Walsh-Bradley, Roggensack and Gableman. The majority affirmed the court of appeals, and the trial court, finding in favor of the Plaintiff-Respondent, Michael Pries.

The facts of *Pries* are not overly important, but some background may help in understanding the precise question the court was answering in the decision. Michael Pries was an inmate who, along with other inmates, was brought to the State Fair grounds in order to help deconstruct the horse stalls after the fair was over. Ray McMillon was the state employee who was supervising the work of the inmates. There were printed instructions regarding the safe process for taking the stalls apart.

McMillon had full knowledge and understanding of the guidelines, the most important of which indicated the procedure for taking down the stalls:

a. *Always have someone holding up the piece that you are taking down*.
b. Take out the top pins on the top of the stall piece and then lift the stall piece off the bottom pins.
c. The sides can be stacked horizontally with 15 to a stack.
d. Fronts must be stored vertically, if possible put in storage racks.
e. Make sure all of the pins are picked up and put into the storage box.

When a piece of one of the stalls became stuck, McMillon decided to jump on it in an attempt to free it from the other pieces. While he jumped on the piece, there was nothing securing the other pieces, nor was anyone holding up the pieces of the stall to keep them from falling. When McMillon's jumping finally freed part of the stall, it fell and struck Mr. Pries, causing a substantial injury to his foot.

The precise question at issue before the Supreme Court, as stated by Justice Crooks, was:

> "Did the instructions establish a ministerial duty that McMillon then violated when he jumped on and shook the stuck stall knowing that "the chains were undone" and knowing of the instructions to "[a]lways have someone holding up the piece that you are taking down?"[2]

The majority answered that key inquiry in the affirmative. However, in a way, it is the question itself that leads this analysis back to its focus. The *Pries* case, along with all the other governmental immunity cases in the last fifty years, have been analyzed to see if the conduct by the governmental employee fits the ministerial duty exception. Wisconsin jurisprudence shows that there are generally two mechanisms for triggering the ministerial duty exception. To be clear, it is this specific approach to these cases, which I believe is erroneous. Further, it appears that at least two current Wisconsin Supreme Court Justices agree that such an approach is flawed.

In *Pries*, the trial court, along with both the court of appeals and the Supreme Court addressed the two "accepted" exceptions to governmental immunity. The first exception is the ministerial duty exception found when the duty is imposed by law or by another set of established guidelines. The ministerial duty exception was first articulated by the Wisconsin Supreme Court in *Meyer v. Carman*.[3] The court in *Meyer* cited a Florida case that defined a ministerial duty as:

> "Official action, the result of performing a certain specific duty arising from designated facts, is a ministerial act. …Another way of expressing the same thought is that a duty is to be regarded as ministerial when it is a duty that has been positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated"[4] (Citation omitted.)

The trial court found that McMillon had violated the ministerial duty imposed on him by the printed guidelines, specifically, the guideline which instructed that there was always to be someone holding up the piece that was being taken down.

The second exception analyzed in *Pries* was the "known and present danger" exception. The principle is that a "known and present danger" gives rise to a ministerial duty. The court of appeals used this exception as the basis for affirming the trial court's finding. As pointed out by Chief Justice Abrahamson in her concurrence, the seminal case regarding the "known and present danger" exception is *Cords v. Anderson*.[5] In her concurrence, Chief Justice Abrahamson articulates: "the known danger reasoning in our precedent establishes that where 'the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act,' a ministerial duty arises."[6]

While the above framework and

analysis are almost uniformly applied in cases where negligence of a governmental employee is alleged, there exists a strong foundation for the argument that such analysis is no longer necessary and is in fact, with all deference to the Supreme Court, illogical.

The basis for arguing that the ministerial duty analysis is misguided has its genesis in three factors: (1) the abrogation of governmental immunity by the Supreme Court in *Holytz v. City of Milwaukee*[7] and the codification of that abrogation found in Wis. Stat. § 893.80(4); (2) the government's acceptance of the *respondeat superior* relationship with its employees as discussed in *Holytz* and codified in Wis. Stat. §895.46(1); and (3) the lack of precedential basis for the Supreme Court's articulations in *Lister v. Board of Regents*[8] and later *Kimps v. Hill*[9] that "*Under the general rule as applied in Wisconsin, state officers and employees are immune from personal liability for injuries resulting from acts performed within the scope of their official duties.*"[10] By reviewing Justice Prosser's concurrence in *Umansky v. ABC Ins. Co*.[11] and Justice Gableman's dissent in *Pries*, we find that we have been presented with an opportunity to change the way Wisconsin courts analyze these cases.

As Justice Gableman's dissent in *Pries* correctly articulates, the Supreme Court, in *Holytz*, made clear that going forward, in the case of municipal employees, "liability is the rule – the exception is immunity."[12] That jurisprudential abrogation of governmental immunity was an open invitation for the legislature to wade into the area of immunity. The legislature, one year after *Holytz*, codified the notion that liability is the rule and immunity is the exception with Wis. Stat. § 893.80(4). That statute provides:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

To his credit, Justice Gableman wants to apply the letter of the law, which to him, clearly indicates that there are, generally, only two situations where a lawsuit against a governmental entity is barred. Other than that, the government is fair game. That Justice Gableman is willing to support the notion that liability is the rule and immunity is the exception should be seen as a significant step forward for our clients.

Next, Wis. Stat. § 895.46(1) makes clear that the government has the same respondeat superior relationship with its employees that any other business has. That is, if an employee, in the scope of their employment, causes an injury due to their negligence, the government, as that person's employer, will be ultimately responsible for payment of the judgment. That principle was addressed in the *Holytz* decision as well.

Justice Prosser, in *Umansky*, exposed the flaw in having wide-ranging immunity for government employees when there exists a respondeat superior relationship. A governmental employee need not fear personal liability for injuries caused by their negligent conduct in the scope of their employment when respondeat superior applies.

Lastly, the Supreme Court in *Lister* provided an immunity to state employees that had no precedential basis in Wisconsin jurisprudence. The court instead cited a section from American Jurisprudence (Am. Jur.). Twenty years later, the court, in *Kimps* then blew open the immunity for all state employees while still trying, via a footnote, to pay homage to *Holytz* and the abrogation of immunity for *municipal* employees. These two decisions have been the basis for a widespread immunity for municipal employees that was never intended and was in fact expressly disavowed in *Holytz*. Nonetheless, many plaintiffs have had their cases dismissed on the basis of the flawed expansion of municipal employee immunity. But, as a noted 20th century "poet" stated many years ago: the times, they are a changing'.[13]

No article of this length could properly summarize the scholarly concurrence written by Justice Prosser in *Umansky*. I strongly urge all of you to read that concurrence. Additionally, Justice Prosser's dissent in *Scott v. Savers Prop. & Cas. Ins. Co*.,[14] contains his first appeal to his colleagues on the Supreme Court to reign in immunity as it then existed. However, the entire point of this analysis is to expose the apparent window that, after *Pries*, is open to our present and future clients in this area of the law.

Justice Gableman intentionally "tipped his hand" in his dissent. He wrote that he now joins Justice Prosser's call for the Supreme Court to reexamine its jurisprudence in this area of the law. He opined that, to him, the jurisprudence in this area was "troublingly untethered" from the governing statutory language found in Wis. Stat. §893.80(4).[15]

I believe that should the right case come along, one in which the facts were painfully simple, and the allegations no broader than ordinary negligence, the Supreme Court may finally embrace Justice Prosser's scholarly opinions in this area. We know for certain that Justices Prosser and Gableman would be on board. That, to me, is a fantastically enviable start to securing a Supreme Court majority on any of our issues.

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(Endnotes)

[1] 2010 WI 63, 784 N.W. 2d 648 (2010).
[2] *Id*. at ¶33.
[3] 271 Wis. 329, 73 N.W.2d 514 (1955).
[4] *Id*. at 332, 73 N.W.2d at 515.
[5] 80 Wis.2d 525, 259 N.W.2d 672 (1977).
[6] *Pries* at ¶ 44.
[7] 17 Wis. 2d 26, 115 N.W.2d 618 (1962).
[8] 72 Wis.2d 282, 240 N.W.2d 610 (1976).
[9] 200 Wis. 2d 1, 546 N.W.2d 151 (1996).
[10] *Kimps,* 200 Wis. 2d at 10, 546 N.W.2d at 156 quoting *Lister* at 72 Wis. 2d at 300.
[11] 2009 WI 82, 319 Wis. 2d 622, 769 N.W.2d 1.
[12] *Holytz*, 17 Wis. 2d at 39, 115 N.W.2d at 625.
[13] Bob Dylan, *The Times They Are A-Changin'* (1963).
[14] 2003 WI 60, 262 Wis. 2d 127, 663 N.W.2d 715 (2003).
[15] *Pries* at ¶85.