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DISTRICT IV

July 13, 2009

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

2009AP728

Wisconsin Medical Society, Inc. v. Michael L. Morgan

Before Lundsten, J.

The Wisconsin Academy of Family Physicians, the American Academy of Family Physicians, the Wisconsin Chapter of the American College of Physicians, the Milwaukee District Association of Osteopathic Physicians and Surgeons and the American Medical Association (collectively, the physician amici) move for permission to file a joint nonparty brief pursuant to WIS. STAT. RULE 809.19(7)(a) and (c). Dean Health Systems, Marshfield Clinic and

Gunderson Lutheran Health System, Inc. (collectively, the Wisconsin Clinics) and the Wisconsin Medical College also request permission to file nonparty briefs. All three briefs were submitted with the motions, and we will accept them for filing.

Separately, Respondent Michael Morgan moves to strike the appendix and portions of the nonparty briefs filed by both the Wisconsin Hospital Association (WHA) and the physician amici on the grounds that they contain materials and references outside of the record which postdate the circuit court proceedings. Although the general rule is that both parties' and nonparties' briefs are to be based on materials of record, the Wisconsin Supreme Court has held that an appendix may include items outside the record and beyond the list of items required to be included in the appendix by WIS. STAT. RULE 809.19(2) if they could be of assistance to the court. *State v. Williams*, 2002 WI 58, ¶8 n.4, 253 Wis. 2d 99, 644 N.W.2d 919. Referring to documents outside the record may be appropriate, for example, where a party is asking the court to take judicial notice of certain facts or is arguing that an appeal has become moot by subsequent events.

Morgan has not described the specific documents to which he objects, or explained what, if any, impact they might have upon the merits of this case. To the extent that the nonparty briefs provide or refer to materials outside of the record to inform this court about the potential impact of the case, that is a common practice among amicus which merely serves to put the appeal in context, and does not warrant the sanction of striking the brief or appendix. To the extent that the briefs may be inappropriately relying upon outside materials to argue that the circuit court erred in its decision on the merits of the case, this court is able to disregard such materials and arguments without physically striking portions of the appendices and the briefs.

IT IS ORDERED that we will accept the nonparty briefs described above for filing.

IT IS FURTHER ORDERED that the motion to strike WHA's appendix and portions of its brief is denied.

David R. Schanker
Clerk of Court of Appeals