

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case No. 2009AP000728

WISCONSIN MEDICAL SOCIETY, INC.,
AND DAVID M. HOFFMAN, M.D.,

Plaintiffs-Appellants,

v.

MICHAEL L. MORGAN,

Defendant-Respondent.

MEMORANDUM IN SUPPORT OF DEFENDANT-RESPONDENT
MICHAEL L. MORGAN'S MOTION TO STRIKE

ARGUMENT

The Wisconsin Hospital Association ("WHA") has moved this Court for leave to file a brief in this matter as *amicus curiae*. Defendant-respondent Michael L. Morgan moves this Court to strike WHA's appendix and all references to its appendix for the reasons listed below.

WHA's brief relies extensively on materials that are not part of the record of this matter. In addition, such materials post-date the briefings and argument in the trial court. The appendix to WHA's brief consists of four documents, none of which are part of the trial court record. WHA's brief includes ten references to the appendix materials, and relies heavily on such materials in support of its arguments.

The dates of the four documents are December 2, 2008, November 25, 2008, December 17, 2008, and May 5, 2009. Briefing in the trial court occurred during the summer of 2008, and oral arguments were held on August 25, 2008. As such, all four documents post-date the trial court proceedings and could not have been part of the record nor could they have been relied upon, cross-examined, or rebutted by any of the parties.

Documents that are not part of the trial court record are not to be considered by the court of appeals. The court of appeals is "limited to the record as it comes to us from the trial court." *State v. Flynn*, 190 Wis. 2d 31, 46, n.4, 527 N.W.2d 343 (Ct. App. 1994). In *Handy v. Holland Furnace Co.*, 11 Wis. 2d 151, 105 N.W.2d 299 (1960), the defendant-respondent attached to its brief a document that was not part of the trial court record and "made an argument based thereon." *Id.* at 155.

The Court stated: “Counsel well knows this is highly improper, since it is no[t] part of the record . . . and any future indulgence in such practices will evoke more than a reprimand from this court.” *Id.*

Because the items included in those pages are not contained in the circuit court record, the appendix to WHA’s brief should be struck in its entirety, as well as all references to the appendix and all arguments based on the documents in the appendix.

If the Court grants WHA's motion for leave to file an *amicus* brief, it should condition the grant on removal of the documents in the appendix and all references to documents not presented in circuit court.¹

Dated this 29th day of June 2009.

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¹See *Silverberg v. Industrial Comm'n*, 24 Wis. 2d 144, 156, 128 N.W.2d 674 (1964), in which the court struck an *amicus curiae* brief because it relied on statements and assertions not in the record.