



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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July 7, 2009

Mr. David Schanker
Clerk of Court of Appeals
Post Office Box 1688
Madison, WI 53701

Re: *Wisconsin Medical Society, Inc., et al. v. Michael Morgan*
Case No. 2009AP728

Dear Mr. Schanker:

Enclosed for filing pursuant to Wis. Stat. § 809.14, please find the original and 4 copies of the following:

- (1) Defendant-Respondent Michael L. Morgan's Motion To Strike; and
- (2) Memorandum In Support Of Defendant-Respondent Michael L. Morgan's Motion To Strike.

We are also filing a copy of the Motion and Memorandum in Support with the Clerk of Circuit Court for Dane County pursuant to Wis. Stat. § 809.14(3)(c). Thank you for your attention to this matter. Please contact me with any questions.

Sincerely,

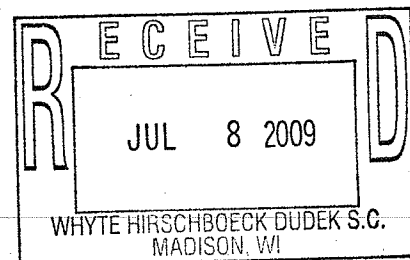
Christopher J. Blythe
Assistant Attorney General

CJB:ajw

Enclosures

c: Thomas M. Pyper
Peter L. Gardon

Carlo Esqueda
Clerk of Circuit Court
Dane County



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.

DEFENDANT-RESPONDENT MICHAEL L. MORGAN'S
MOTION TO STRIKE

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 "Physician Organizations") have filed a motion for leave to file a brief as *amicus curiae* in this matter. The Physician Organizations'

appendix to their brief consists of eight documents that are not part of the trial court record. Such submissions are contrary to appellate procedure and the law.

For the reasons stated in the memorandum of law in support of this motion, defendant-respondent Michael L. Morgan, by his attorneys, Attorney General J.B. Van Hollen and Assistant Attorneys General Christopher J. Blythe and Charlotte J. Gibson, hereby moves the Court to strike the Physician Organizations' appendix to their brief, as well as all references to the appendix in the brief and all arguments based thereupon.

Dated this 7th day of July 2009.

J.B. VAN HOLLEN
Attorney General



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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 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 "Physician Organizations") have 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 the Physician Organizations' appendix and all references to its appendix for the reasons listed below.

The Physician Organizations' brief relies extensively on materials that are not part of the record of this matter. In addition, two of the documents post-date the briefings and argument in the trial court. The appendix to the Physician Organizations' brief consists of eight documents, none of which are part of the trial court record. The Physician Organizations' brief includes numerous references to the appendix materials, and relies heavily on such materials in support of its arguments. Because the documents were not part of the trial court proceeding, there was no opportunity in the trial court for cross-examination or rebuttal by any of the parties.

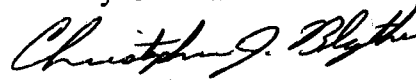
Documents that are not part of the trial court record are not to be considered by the court of appeals. The court of appeals is "limited to the record as it comes to us from the trial court." *State v. Flynn*, 190 Wis. 2d 31, 46, n.4, 527 N.W.2d 343 (Ct. App. 1994). In *Handy v. Holland Furnace Co.*, 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 the appendix are not contained in the circuit court record, the appendix to Physician Organizations' 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 the Physician Organizations' 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 7th day of July 2009.

J.B. VAN HOLLEN
Attorney General



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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.