



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 18, 2008

HAND DELIVERED

The Honorable Michael Nowakowski
Circuit Court Judge, Br. 13
Dane County Courthouse
215 South Hamilton Street, Room 5109
Madison, WI 53703-3289

Re: *Wisconsin Medical Society, Inc., et al. v. Michael L. Morgan*
Case No. 07-CV-4035

Dear Judge Nowakowski:

Enclosed for filing in the above-referenced matter, please find Defendant's Brief in Opposition to Plaintiffs' Motion to Strike. A copy is being hand-delivered this date to opposing counsel.

In addition, we note to the Court a factual error in Plaintiffs' Reply Brief. Plaintiffs state that "Assembly Amendment 2 was then passed by the Assembly on October 23, 2003. Buchko Aff., ¶ 6, Exh. E." (Reply Brief at 15) In fact, Assembly Amendment 2 was laid on the table on October 2, 2003, and was never taken up or passed by the Assembly, as reflected in the legislative history (Exhibit E) attached to Ms. Buchko's Affidavit. Plaintiffs' statements on pages 14-15 of their reply brief with respect to this erroneous statement of fact must, therefore, be disregarded.

Sincerely,

Christopher J. Blythe
Assistant Attorney General

CJB:ajw

Enclosure

c: Thomas M. Pyper

WISCONSIN MEDICAL
SOCIETY, INC., et al.,

Plaintiffs,

v.

Case No. 07-CV-4035

MICHAEL L. MORGAN,
in his official capacity as Secretary
of the Wisconsin Department of
Administration,

Defendant.

DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE

INTRODUCTION

Plaintiffs (collectively, "WMS") have filed a motion to strike a memorandum identified as Exhibit "C" attached to the Affidavit of David P. Schmiedicke filed by defendant Michael L. Morgan ("Defendant"). WMS asserts that the memorandum constitutes an offer to compromise under Wis. Stat. § 904.08, and should therefore be struck. For the reasons below, WMS' motion should be denied.

I. THE WMS MEMO DOES NOT CONSTITUTE AN OFFER TO
COMPROMISE UNDER WIS. STAT. § 904.08.

Defendant's brief referred to a memo from WMS Senior Vice-President Mark Grapentine sent to Department of Administration ("DOA") officials, in which WMS proposed a \$100 million transfer from the Injured Patients and Families Compensation Fund ("the Fund") to help cover funding for the state's health care costs, and asked, in exchange, for other legislative concessions. *See Schmiedicke Aff.*, ¶ 7. WMS' offer to support a transfer from the Fund to

underwrite the state's health care costs does not constitute an offer to compromise under Wis. Stat. § 904.08. That statutory provision arises under the chapter of the statutes titled "Evidence – Relevancy and Its Limits." Wisconsin Stat. § 904.01 includes the definition of "relevant evidence" and makes specific reference to "the action."

The language in Wis. Stat. ch. 904 makes clear that it is referring to compromise proposals that arise in the context of litigation. Wisconsin Stat. § 904.08 states, in part:

Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

The above-cited language clearly refers only to offers of compromise that arise in a litigation context, and not in lobbying the Legislature or communicating with other government officials with respect to proposed policy options. WMS' proposed construction would take the statute far beyond its plain language. As noted, the statute states, in part, that an offer to compromise arises with respect to "a claim which was disputed as to either validity or amount" and that such offer "is not admissible to prove liability for or invalidity of the claim." *Id.* WMS' memo was an attempt to influence government policy; it did not involve a claim¹ and there were no issues of liability involved. It is self-evident that the statute refers to litigation-related matters.

WMS' memo is a public document that was sent to DOA officials in an effort to influence certain proposals that were being considered as policy options. At that point, no

¹In fact, until a claim is rejected, a dispute does not even arise. *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage*, 50 F.3d 476, 481 (Ct. App. 1995). Here, as noted, there was not even a claim involved.

legislative action had been taken and there certainly was no litigation pending. Under WMS' strained reading of the statute, *all* letters and communications from citizens or interest groups to government officials regarding legislative proposals or government policy options could be construed as "offers of compromise." That certainly is not what is contemplated by the provisions of Chapter 904. That chapter refers to compromise offers that arise in the context of ongoing litigation, not legislative deliberations or discussions of governmental policy options.

Basic hornbook law regarding Rule 408 under the federal rules of evidence (the federal counterpart to Wis. Stat. § 904.08) supports the notion that an offer of compromise under the rules of evidence refers to offers that arise in the context of ongoing litigation or when litigation appears imminent:

Discussions between two parties have been regarded as settlement negotiations where, after the plaintiff has filed an action, the parties meet to talk about their interpretation of the matter in dispute, with the assistance of outside counsel, and counsel for the parties agree that the discussions in the meeting would not be later used for any purpose. Likewise, discussions constitute settlement negotiations where it is contemplated that litigation might be necessary, the parties retain outside counsel, and counsel for the parties then concede in a written communication between themselves that litigation is possible.

29 Am. Jur. 2d *Evidence* § 523 (2008) (footnoted citations omitted). In this matter, no litigation was ongoing, no litigation was imminent, nor did the parties concede via outside counsel that litigation was probable. This simply involved lobbying efforts by WMS in an attempt to affect potential legislative proposals.

Nowhere in Chapter 904 is there even a hint of suggestion that offers to compromise include lobbying government officials or proposing alternative legislative approaches to certain subjects. Citizens and other private parties are, of course, free to suggest proposals, amendments, or other ideas to the government, but the Legislature has the final say. It is not the same as litigation, in which both sides must agree for a compromise to be reached. The


Legislature is under no obligation whatsoever to compromise with any outside entity, whether an individual citizen or WMS. In short, WMS cannot compromise on legislative proposals because WMS has no votes on legislative proposals—thus it cannot characterize suggested policy approaches to the Legislature or to DOA as “offers to compromise” in the context of Wis. Stat. § 904.08.

In summary, there is no statutory authority for WMS’ assertion that its January 2007 letter to DOA constitutes an offer to compromise as contemplated by the plain language of Wis. Stat. § 904.08, nor has WMS cited any case law indicating that the statute should be so broadly construed as to include communications with government agencies on proposed policy options.

For the reasons stated above, WMS’ motion to strike should be denied.

Dated this 18th day of August 2008

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