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July 13, 2009

HAND DELIVERED

David R. Schanker, Clerk
Wisconsin Court of Appeals
110 East Main Street, Room 215
Madison, WI 53703

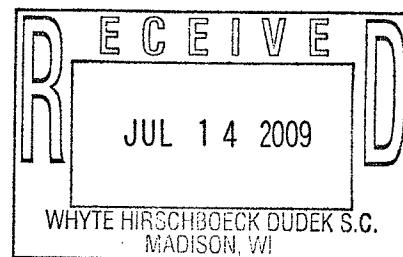
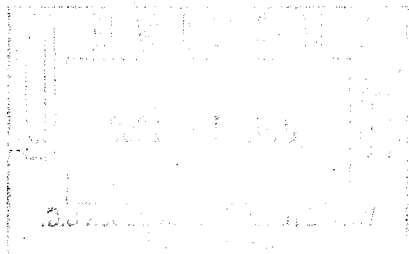
Dear Mr. Schanker:

Re: *Wisconsin Medical Society, Inc., et al.*
v. Michael L. Morgan;
Appeal No. 2009AP00728

Enclosed for filing please find an original and **five** copies of the following document in the above-referenced case:

- Opposition of *Amicus Curiae* The Wisconsin Academy of Family Physicians, The American Academy of Family Physicians, The Wisconsin Chapter of the American Collage of Physicians, The Milwaukee District Association of Osteopathic Physicians and Surgeons and The American Medical Association to Motion of Defendant-Respondent to Strike

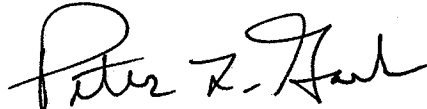
Please file the original and the appropriate copies and return one copy of the document to the awaiting messenger.



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Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me.

Yours very truly,



Peter L. Gardon

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Encs.

cc Thomas M. Pyper, Esq. ✓
Cynthia L. Buchko, Esq. ✓
Christopher J. Blythe, Esq.
Charlotte Gibson, Esq.
Anne Berleman Kearney, Esq.

COURT OF APPEALS OF WISCONSIN
DISTRICT IV

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

Plaintiffs-Appellants,

Appeal No. 2009AP000728

v.

MICHAEL L. MORGAN,

Defendant-Respondent.

APPEAL FROM THE DECEMBER 19, 2008 DECISION AND ORDER FROM
THE CIRCUIT COURT FOR DANE COUNTY
THE HONORABLE MICHAEL N. NOWAKOWSKI PRESIDING

**OPPOSITION OF *AMICUS CURIAE* 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 TO MOTION OF
DEFENDANT-RESPONDENT 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, the "Physician Amici"), pursuant to Wis. Stat. § 809.14(1), oppose the motion to strike filed by Defendant-Respondent Michael L. Morgan ("the State").

INTRODUCTION

On June 26, 2009, the Physician Amici filed a motion for leave to file a brief as amicus curiae and amicus curiae brief. The Physician Amici's brief and the appendix complied with all of this Court's rules, and will aid the Court in reaching a determination of the issues in this case. The State's motion to strike the Physician Amici's appendix and references to the appendix is an impermissible attempt to prevent relevant information from being considered by this Court and should be denied.

ARGUMENT

The State's Motion to Strike is Not Supported by Applicable Authority or Longstanding Procedural Rules.

The purpose of amicus briefs is to enable the Court to hear from parties with "special knowledge or experience in the matter at issue in the proceedings so as to render a brief from the movant of significant value to the court." Wis. Sup. Ct. IOP II(B)(6)(c). The Physician Amici have specialized knowledge and experience that will be of value to this Court, and will ultimately assist the Court in determining whether the State's raid on the Injured Patients and Families Compensation Fund was illegal.

For instance, the Physician Amici argued in their brief, that the State's raid on the Injured Patients and Families Compensation Fund will negatively impact physician recruitment and retention in Wisconsin. The Physician Amici properly referenced several publicly available articles in their brief, and cited those articles

in accordance with Wis. Stat. § 809.19(1)(e). For the convenience of the Court, the Physician Amici included those articles in its appendix.

The State has not objected to the format of citation, nor to the content of the information the Physician Amici cited to in their brief. The State apparently objects only to the inclusion of paper copies of the articles in the appendix and the Physician Amici's reliance on those articles solely because they are not part of the circuit court record. (Memorandum in Support of Defendant-Respondent Michael L. Morgan's Motion to Strike, p. 3.) Contrary to the State's view, the authorities cited by the Physician Amici are appropriate for the Physician Amici to refer to, and for this Court to rely upon. References to the articles included in the appendix are the same as references to authority regularly cited by amicus and relied upon by this Court. To suggest that an amicus curiae brief may cite only to authorities previously cited by the parties to a case, would prevent specialized knowledge likely to aid the Court from being considered, and would eliminate the purpose of an amicus brief. *See* Wis. Sup. Ct. IOP II(B)(6)(c).

The State cites to two cases in support of its argument that the Court should strike the Physician Amici's appendix and references to the appendix. Those cases are inapposite: both cases addressed situations where a party, not an amicus, attempted to include new evidence in its brief and appendix, in the form of either an affidavit, or a new contract not previously admitted in evidence. Here, an amicus curiae, nonparty to this case, is not attempting to supplement the

evidentiary record; rather, the Physician Amici are merely citing to respected authorities, and attaching them to their appendix for the convenience of this Court.

The State also cites to a case in a footnote to suggest that it is proper for the Court to strike an amicus curiae brief because "it relied on statements and assertions not in the record." (Memorandum in Support of Defendant-Respondent Michael L. Morgan's Motion to Strike, p. 3, *citing Silverberg v. Industrial Comm'n*, 24 Wis. 2d 144, 156, 128 N.W.2d 674 (1964).) That case is also inapposite. There, the amicus curiae brief sought to "challenge the validity of testimony in the evidentiary record by statements and assertions." *Silverberg*, 24 Wis. 2d at 156. Again, seeking to supplement the evidentiary record is far different from citing to respected authorities. The *Silverberg* court did not address citations to authority by *amicus curiae*, a practice that is regularly used by amici throughout the courts of this State.

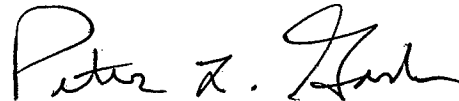
By its motion, the State again seeks to play by a different set of rules than its citizens. In raiding the fund, the State took funds from an irrevocable trust, held for the sole advantage of identified beneficiaries, with prohibitions on any other use. By moving to strike the Physician Amici's appendix, the State is asking this Court to prohibit the Physician Amici from taking advantage of a long-standing practice that the State itself has utilized. (*See e.g.* Amicus Curiae Brief and Appendix of State of Wisconsin, filed in the Supreme Court in *City of Janesville v. CC Midwest, Inc.*, No. 04AP267.)

CONCLUSION

The State's attempt to keep relevant, reputable authorities from this Court must be rejected. The State has cited no applicable authority in support of its position. Rather, the State's position contradicts the long-established history and practice of appellate procedure in this state. The Physician Amici respectfully request that this Court deny the State's motion to strike.

Dated this 13th day of July, 2009.

Attorneys for 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



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