



Whyte Hirschboeck Dudek S.C.

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July 7, 2009

**VIA HAND DELIVERY**

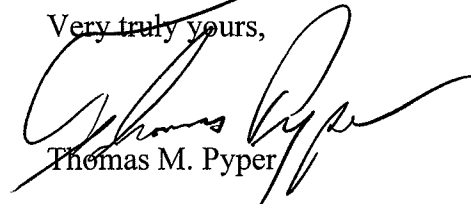
Clerk of Court  
Wisconsin Court of Appeals, District IV  
110 E. Main St., Suite 215  
Madison, WI 53703

Re: *Wisconsin Medical Society, Inc. and David M. Hoffmann, M.D. v.  
Michael L. Morgan*  
Appeal No. 2009AP000728

Dear Clerk:

Enclosed for filing please find the original and five copies of the Opposition of Wisconsin Medical Society, Inc. and David M. Hoffmann, M.D. to Michael L. Morgan's Motion to Strike Please file-stamp one set of copies and return them to the waiting messenger. Copies of the enclosed are being served by U.S. Mail today on counsel for defendant-respondent.

Very truly yours,



Thomas M. Pyper

TMP/das  
Enclosures

cc: Christopher J. Blythe, Esq. (w/enc.)  
Anne B. Kearney, Esq. (w/enc.)  
Sean Lanphier, Esq. (w/enc.)  
Michael B. Van Sicklen, Esq. (w/enc.)  
Peter L. Gardon, Esq. (w/enc.)

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bcc: Ruth M. Heitz, Esq. (w/enc.)  
Amici (w/enc.)

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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APPEAL NO. 2009AP000728

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

Plaintiffs-Appellants,

vs.

MICHAEL L. MORGAN,

Defendant-Respondent.

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Appeal From The December 19, 2008 Decision And Order From The  
Circuit Court For Dane County  
The Honorable Michael N. Nowakowski, Presiding

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**OPPOSITION OF WISCONSIN MEDICAL SOCIETY, INC. AND  
DAVID M. HOFFMANN, M.D. TO MICHAEL L. MORGAN'S  
MOTION TO STRIKE**

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*Amicus Curiae* the Wisconsin Hospital Association (“WHA”) filed a Brief and Appendix, which have been accepted for filing by the Court. WHA’s Appendix consists of four public records that are not part of the trial court record, nor could the public records have been part of the trial court record because they were created either after summary judgment briefing or after the trial court issued its Decision. Defendant-Respondent Secretary Michael L. Morgan (“Secretary Morgan”) filed a Motion to Strike the Appendix, and portions of WHA’s Brief, alleging that this Court may only consider the trial court record on appeal. Secretary Morgan is wrong, and his Motion to Strike should be denied.

“[J]udicial Notice may be taken at any stage of the proceeding, and this means that an appellate court may take judicial notice when that is appropriate.” *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶11, 313 Wis.2d 411, 756 N.W.2d 667 (citation and internal quotations omitted). Public records and documents from the files of government agencies are particularly appropriate for judicial notice. *Id.*; *see also Meyers v. Bayer*, 2007 WI 99, ¶81, 303 Wis.2d 295, 735 N.W.2d 448 (judicial notice may be taken of facts from the public records of government agencies). Moreover, appellate courts are “free to take judicial notice of subsequent developments in cases that are a matter of public record and are relevant to the appeal.” *Rothenberg v. Sec. Mgmt. Co.*, 667 F.2d 958, n.8 (11th Cir. 1982); *see also Hoxhallari v. Gonzales*, 468 F.3d 179, n.5 (2d Cir. 2006) (same).

Of particular importance here is an April 30, 2009 letter from Secretary Morgan to the Legislature. (Amicus App. 72-73.) In the letter, Secretary Morgan advises the Legislature that, on March 31, 2009, the Fund’s cash balance closed at a negative \$76.8 million due to the transfer of \$200 million from the Fund, and the Fund is being charged interest based on Secretary Morgan’s temporary reallocations of balance authority:

On March 1, 2009, the **Injured Patients and Families Compensation Fund** cash balance closed at a negative \$73.2 million. This negative balance continued through March 31, 2009, when the fund’s cash balance closed at a negative \$76.8 million. The **Injured Patients and Families Compensation Fund** cash balance reached its intra-month low of a negative \$77.0 million on March 27, 2009. The negative balance was due to the transfer of \$200 million to the Medical Assistance Trust Fund per 2007 Wisconsin Act 20, and the pending liquidation of fund securities necessary to offset this shortfall.

\* \* \*

The distribution of interest earnings to investment pool participants is based on the average daily balance in the pool and each fund’s share. Therefore, the monthly calculation by the State Controller’s Office will automatically reflect the use of these temporary reallocations of balance authority, and as a result, the

funds requiring the use of the authority will effectively bear the interest cost.

(Amicus App. 72-73.)

To support his assertion that certain of WMS's claims are barred by sovereign immunity, Secretary Morgan has argued that the \$200 million transfer has been fully implemented. (Resp.-Br. 30.) As of Secretary Morgan's April 30, 2009 report to the Legislature, the transfer was not fully implemented. Because the Fund did not have sufficient liquid assets for the \$200 million Raid, the State had to "reallocate" monies from another fund and has been charging the Fund interest on that borrowing until further Fund assets can be transferred to the fund from which the monies were reallocated, thereby depleting Fund assets beyond the original \$200 million. An injunction to stop further Fund transfers and accrual of interest is not barred by sovereign immunity so that the documents are "relevant to the appeal" and appropriate for this Court's judicial notice. *Sisson, supra*; *Rothenberg, supra*.

Dated this 24<sup>th</sup> day of July, 2009.

WHYTE HIRSCHBOECK DUDEK S.C.

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