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STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT IV

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No. 2009AP000728

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

*Plaintiffs-Appellants,*

v.

MICHAEL L. MORGAN,

*Defendant-Respondent.*

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**OPPOSITION OF AMICUS CURIAE  
WISCONSIN HOSPITAL ASSOCIATION  
TO MOTION OF DEFENDANT-RESPONDENT TO STRIKE  
AMICUS BRIEF AND APPENDIX THERETO**

Wisconsin Hospital Association (WHA), which is amicus curiae in this matter by virtue of this Court's recent order, hereby opposes the motion of Defendant-Respondent Michael L. Morgan ("the State") to strike WHA's amicus brief. The State's motion proceeds on a mistaken conception of the appropriate role and permissible format of amicus briefs. It is, as well, belied by appellate practices in Wisconsin. WHA elaborates as follows.

1. On June 22, 2009, WHA filed with this Court a motion for leave to file a brief as amicus curiae and enclosed the brief with its motion. WHA's proposed brief complied with all of this Court's rules. In its substantive respects, the brief discussed the effect of the State's unlawful (as plaintiffs and amicus see it) diversion of \$200,000,000 from the injured patients and families compensation fund ("Fund").

2. In particular, WHA's contribution as amicus is a discussion of the ongoing ill effects of this diversion upon the health of the Fund and the reasons that this diversion is both unlawful and remediable—indeed, the constitutional reasons. To demonstrate these ill effects, WHA made appropriate reference to a number of documents—public records—that are related to the administration of the Fund. As a courtesy to the Court (and to counsel for the parties), WHA attached, as an appendix to its brief, those documents.

3. This Court promptly granted WHA's motion for leave to file its amicus brief as submitted. In its order, entered June 26, 2009, the Court specifically noted the inclusion of an appendix in WHA's amicus brief and permitted the brief to be thus filed.

4. Notwithstanding this Court's explicit resolution of the permissibility here of WHA's filing its amicus brief with an appendix,

the State has now filed a motion seeking “to strike WHA’s appendix and all references to its appendix.” Memorandum in Support of Defendant-Respondent Michael L. Morgan’s Motion to Strike, at 1 (June 29, 2009) (“State’s Memorandum”). Its specific complaint is that “WHA’s brief relies extensively on materials that are not part of the record of this matter” and that those materials are included in the brief’s appendix. *Id.* at 2.

5. The State’s motion fundamentally misunderstands both the theory and practice of amicus briefs in the Wisconsin appellate system.

6. *First*, like the United States Supreme Court, the Wisconsin Supreme Court and this Court proceed under what is generally termed an “open-door” policy towards amicus briefs. The leading academic study of amicus briefs explains that courts so proceeding “grant nearly all motions for leave to file as amicus curiae [even] when consent is denied by a party.” Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 762 (2000). This approach is grounded in “the most common reaction among lawyers and judges,” which is to regard amicus briefs as capable of “provid[ing] valuable assistance to the

Court in its deliberations.” *Id.* at 745. The Court’s prompt granting of WHA’s motion reflects this Court’s basic thinking on the matter.<sup>1</sup>

7. It should be no occasion for surprise (or objection) that an amicus brief such as WHA’s makes reference to matters outside the record. For whatever may have been the case almost a half century ago,<sup>2</sup> the very purpose of amicus briefs in Wisconsin today is to enable a court to get the benefit of “special knowledge or experience” possessed by amicus but not perhaps (or at least not in the same way or to the same extent) by the parties to a case. Wis. Sup. Ct. IOP II(B)(6)(c). Indeed, to the extent that WHA had ***not*** relied on such matters as its own experience with the Fund and had simply made the same arguments based on the same matters as the plaintiffs here, ***that***

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<sup>1</sup> The Wisconsin Supreme Court’s thinking is very much along the same lines. Consider, for example, that *every* civil case decided by the Supreme Court appearing in a recent volume of the *Wisconsin Reports* included at least one amicus curiae brief, variously filed not just by associations and other collective organizations but also by corporations and individuals with varying levels of connection to the issues before the Court. *See Town of Rhine v. Bizzell*, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780; *Watton v. Hegerty*, 2008 WI 74, 311 Wis. 2d 52, 751 N.W.2d 369; *Estate of Otto v. Physicians Ins. Co.*, 2008 WI 78, 311 Wis. 2d 84, 751 N.W.2d 805; *Walgreen Co. v. City of Madison*, 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687; *Larry v. Harris*, 2008 WI 81, 311 Wis. 2d 326, 752 N.W.2d 279; *Town of Madison v. County of Dane*, 2008 WI 83, 311 Wis. 2d 402, 852 N.W.2d 260; *Stuart v. Weisflog’s Showroom Gallery, Inc.*, 2008 WI 86, 311 Wis. 2d 492, 753 N.W.2d 448; *Estate of Sustache v. American Fam. Mut. Ins. Co.*, 2008 WI 87, 311 Wis. 2d 548, 751 N.W.2d 845; *Wisconsin Dep’t of Revenue v. Menasha Corp.*, 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95.

<sup>2</sup> *Compare* State’s Memorandum at 4 n.1 (relying on 1964 Wisconsin Supreme Court case) *with* *Kearney & Merrill*, *supra* para. 6, at 764-65 (recounting liberalization of attitudes towards amicus briefs in the 1960s).

might have provided a basis for criticism.<sup>3</sup> Nor can the State's objection be saved on the ground that WHA had the courtesy to save the Court and counsel a trip to the library (or the internet) by including an *appendix* consisting of the various public documents to which its amicus brief—consistently with the foregoing theory of amicus briefs—appropriately refers.<sup>4</sup>

8. *Second*, all aspects of the foregoing theory can be seen in *practice* in the routine operations of this Court and the Wisconsin Supreme Court.

9. This is so with respect to amicus briefs as routinely filed in the Wisconsin appellate system. One cursorily paging through the most recent briefs filed in this Court and the Supreme Court (as available in volumes bound by and available at the Marquette University Law

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<sup>3</sup> For the objection to amicus briefs, in some quarters (not the Wisconsin appellate system), is that too many of them “duplicate the arguments made in the litigants’ briefs,” Kearney & Merrill, *supra* para. 6, at 746 n.8 (quoting *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, J., in chambers)), or that a particular brief “does not tell us a single new fact,” *id.* n.9 (quoting *Craig v. Harney*, 331 U.S. 367, 397 (1947) (Jackson, J., dissenting)); again, to be sure, this view does not prevail in Wisconsin.

<sup>4</sup> It merits mention that there is nothing in WHA’s amicus brief to which the State points as being factually incorrect. In these circumstances, granting the State’s motion would serve only to obstruct the Court’s access to documents containing facts whose truth has not been contested. This would be especially inappropriate with respect to documents of which this Court, in any event (i.e., quite apart from any reference to them in an amicus brief), can take judicial notice—and the Wisconsin Supreme Court has specifically recognized that Wisconsin Patients Compensation Fund documents are such documents. *See State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 516 n.11, 261 N.W.2d 434, 446 (1978).

Library) will find numerous amicus briefs that contain appendices consisting of materials not in the record; some examples are cited in the margin here.<sup>5</sup>

10. In this regard, WHA would particularly refer the Court to such a brief filed by the State itself: Amicus Curiae Brief and Appendix of State of Wisconsin, filed in the Supreme Court in *City of Janesville v. CC Midwest, Inc.*, No. 04AP267. Indeed, the only unusual thing about that brief is that the Appendix contains *affidavits* that the State prepared especially for its amicus brief. While perhaps *that* practice might cause one to raise his (or her) eyebrows, the fundamental point is not that it is curious for the State, having filed such an amicus brief, to complain of—indeed, move to strike—WHA’s amicus brief (which does not contain affidavits specially manufactured for its brief but rather preexisting public documents). For while this is true—

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<sup>5</sup> See, e.g., Amicus Curiae Brief and Appendix of Wisconsin Farm Bureau Federation, Cooperative, *Gumz v. Northern States Power Co.*, No. 05AP1424 (filed in the Supreme Court and containing Wisconsin 2006 Agricultural Statistics from the Wisconsin Agricultural Statistics Service); Wisconsin Realtors Association’s Amicus Curiae Brief, *Baer v. DNR*, No. 05AP668 (filed in this Court and containing appendix with Correspondence/Memorandum from G. Meyer to DNR District Directors, etc.); Nonparty Brief and Appendix on Behalf of the Board of Regents of the University of Wisconsin System, *Rouse v. Theda Clark Medical Center, Inc.*, No. 05AP2743 (filed in the Supreme Court and containing lengthy document, An Evaluation: University of Wisconsin Hospital and Clinics Authority, prepared by the Legislative Audit Bureau); Amicus Curiae Brief and Appendix on Behalf of the Wisconsin Academy of Trial Lawyers, *id.* (containing numerous documents in Appendix); Citizens Utility Board, Inc. Amicus Curiae Brief, *Butcher v. Ameritech Corp.*, No. 05AP2355 (filed in this Court and containing two documents in Appendix).

specifically, that it is curious for the State so to complain—the ***fundamental*** point is that the phenomenon to which the State objects not only is not prohibited by the rules but is a routine practice for amicus briefs.

11. Indeed, it is not merely that various amici file such briefs; surely, it is relevant as well—indeed, dispositive—that the courts of the Wisconsin appellate system think it entirely appropriate to *rely* on such briefs. Thus it is that the Supreme Court in *Ferdon v. Wisconsin Patients Compensation Fund*, 2005 WI 125, 284 Wis. 2d 573, 701 N.W.2d 440, discussed and relied on information “available in the Amicus Curiae Brief and Appendix of the Wisconsin Academy of Trial Lawyers at App. I,” *id.*, ¶ 133, n.165, 284 Wis. 2d at 643, 701 N.W.2d at 475, and on “Office of Medical Mediation information [which had been] reprinted in th[at] Amicus Curiae Brief & Appendix . . . at B-1,” *id.*, ¶ 127, n.154, 284 Wis. 2d at 639, 701 N.W.2d at 473.

12. While no doubt these examples of the practices of Wisconsin amici and courts could be multiplied, the foregoing suffices to demonstrate the unfounded nature of the State’s motion. In these circumstances, WHA would add only that none of the foregoing is in derogation of—or even in tension with—the principle that “[t]he court

of appeals is ‘limited to the record as it comes to us from the trial court,’” State’s Memorandum at 2 (quoting *State v. Flynn*, 190 Wis. 2d 31, 46 n.4, 527 N.W.2d 343, 349 (Ct. App. 1994)), or the fact (upon which the State mistakenly relies) that it may be improper for a “*defendant-respondent* [to] attac[h] to its brief a document that was not part of the trial court record and ‘ma[k]e an argument based thereon,’” *id.* (quoting *Handy v. Holland Furnace Co.*, 11 Wis. 2d 151, 155, 105 N.W.2d 299, 301 (1960)) (emphasis added). Amicus briefs cohabit comfortably with the broad principles that the State invokes. For these principles are honored by the requirement that *the error* on whose basis exception is made to a judgment must *exist* in the record as it comes to this Court. The fact that such an error sometimes may be more clearly *seen* (or its existence disproved) because of an amicus brief and its supporting materials is not to the contrary. And it is why this Court permits amicus briefs.

13. In short, the State’s motion (a) seeks to relitigate a matter already decided by this Court, (b) relies on no applicable rule, and (c) cannot be squared with either the theory or practice of amicus briefs in this Court and the Wisconsin Supreme Court. It should therefore be denied.

Respectfully submitted,

/s/ ANNE BERLEMAN KEARNEY

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