



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Christopher J. Blythe
Assistant Attorney General
blythecj@doj.state.wi.us
608/266-0180
FAX 608/267-2223

March 26, 2010

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

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

Dear Mr. Schanker:

Enclosed for filing please find an original and nine (9) copies of defendant-respondent Michael L. Morgan's Response to Petition to Intervene in the above-entitled matter. Copies are being mailed this date to counsel of record.

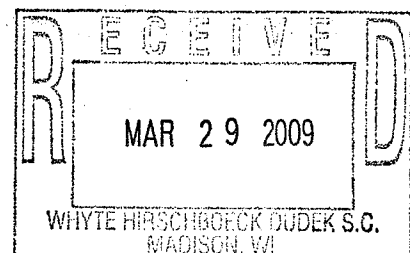
Sincerely,

Christopher J. Blythe
Assistant Attorney General
State Bar #1026147

CJB:ajw

Enclosures

c: Cynthia L. Buchko/Thomas M. Pyper
Anne Berleman Kearney
Sean Lanphier/William L. Shenkenberg
Peter L. Gardon/Jessica Hutson Polakowski
Michael B. Van Sicklen/Bree Grossi Wilde
Lynn R. Laufenberg
D. James Weis
Lester A. Pines



STATE OF WISCONSIN
IN SUPREME COURT

No. 2009AP728

WISCONSIN MEDICAL
SOCIETY, INC., AND
DAVID M. HOFFMAN,

Plaintiffs-Appellants,

v.

MICHAEL L. MORGAN,

Defendant-Respondent.

RESPONSE TO PETITION TO INTERVENE

J.B. VAN HOLLEN
Attorney General

CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845

Attorneys for Defendant-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0180

STATE OF WISCONSIN
IN SUPREME COURT

No. 2009AP728

WISCONSIN MEDICAL
SOCIETY, INC., AND
DAVID M. HOFFMAN,

Plaintiffs-Appellants,

v.

MICHAEL L. MORGAN,

Defendant-Respondent.

RESPONSE TO PETITION TO INTERVENE

The Wisconsin Association for Justice (“WAJ”) and Mark R. Patton (“Patton”) (collectively, “Proposed Intervenors”)—only one month before oral argument—have moved to intervene in this action.¹ To justify their intervention, the Proposed Intervenors emphasize that they will “bring very different arguments to the table than those which have already been presented, especially in terms of trust law.” (Petition at 13).

¹Proposed Intervenors filed a “Motion to Intervene” pursuant to Wis. Stat. § 809.13, which, in fact, refers to a “petition to intervene.” Defendant-respondent will use the terminology of the statute and will refer herein to the motion as “Petition.”

Defendant-respondent Michael L. Morgan (“Morgan”) urges the Court to deny intervention at this late juncture, for the reasons stated below.

To qualify for intervention, a movant must meet the requirements of Wis. Stat. § 803.09(1) (mandatory intervention) or (2) (permissive intervention), with timeliness as a factor to be considered under both. Where, as here, the request to intervene is made during an appeal, the petition is governed by Wis. Stat. § 809.13, which requires satisfaction of the requirements of Wis. Stat. § 803.09.

To qualify for mandatory intervention, the proposed intervening party must “claim[] an interest relating to the property or transaction which is the subject of the action.” Wis. Stat. § 803.09(1). The Proposed Intervenors plainly fail to qualify for mandatory intervention under the statute.

First, to characterize the Petition as untimely is to risk understatement. This case was filed in October, 2007, amidst substantial publicity, and Proposed Intervenors were well aware of this litigation. In fact, WAJ was following this issue before the legislation that authorized the transfer was passed, as evidenced by their press release of October 1, 2007, a copy of which is attached.²

Further, by their own admission, the Proposed Intervenors have long been aware of this lawsuit. Their Petition refers to the circuit court proceedings, at which level “WAJ was hopeful that . . . the rights of claimants . . .” would be discussed and argued. (Petition at 6). The Petition also states that “WAJ and its members

²Press release printed from the following url: <http://www.wisjustice.org/WI/index.cfm?event=showPage&pg=DonorRaidFunds>.

have followed this litigation since it was certified to the Supreme Court on December 10, 2009.” (*Id.* at 3).

As a party seeking to intervene at a late stage in litigation, the burden is on the Proposed Intervenors to show entitlement to and justification for intervention. *Sewerage Commission of City of Milwaukee v. State Dept. of Natural Resources*, 104 Wis. 2d 182, 188-89, 311 N.W.2d 677 (Ct. App. 1981) (citing *United States v. Associated Milk Producers, Inc.*, 534 F.2d 113, 116 (8th Cir. 1976)). WAJ simply states that it “was hopeful that [the other litigants] would . . . discuss and argue the rights of claimants.” (Petition at 6). WAJ’s misplaced reliance on other parties to present and argue its points is hardly justification for allowing an eleventh-hour intervention that seeks to raise new and different arguments and legal issues. “[P]ostjudgment motions for intervention will be granted only upon a *strong showing* of justification for failure to request intervention sooner.” *Olivarez v. Unitrin Property & Casualty Insurance Co.*, 2006 WI App 189, 296 Wis. 2d 337, 723 N.W.2d 131 (emphasis added).

Second, WAJ lacks standing, which “require[s] ‘a personal stake in the outcome of a controversy.’” *City of Waukesha v. Salbashian*, 128 Wis. 2d 334, 350, 382 N.W.2d 52 (1986) (citation omitted). This Wisconsin rule of standing has two parts: first, whether the challenged action caused direct injury to the petitioner’s interest and second, whether the interest affected is one recognized by law. *Wisconsin’s Environmental Decade, Inc. v. PSC*, 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975) (herein after “WED”). In *WED*, the court recognized a special variation of this standing rule for associations when it allowed an organization devoted to environmental protection and preservation to sue, provided it could demonstrate sufficient facts on remand to show that a member of the organization could have sued under the standing standard. *See id.* at 17, 20.

In this case, however, WAJ, as an association, has not demonstrated that any member of its organization would have standing to sue under the test articulated by the court. WAJ is an association of attorneys. It cannot show a direct injury to a member's interest, nor that any such alleged interest is recognized by law. Moreover, any alleged collateral interest WAJ or its members might have is insufficient to grant standing. "Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical.""*Fox v. DHSS*, 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)).

As for the claim of Proposed Intervenor Patton, he lacks standing to assert the claims WAJ asks the Court to address. According to the Petition (movants have not attached a proposed complaint), Patton has an account for future medical expenses under Wis. Stat. § 655.015. That statute provides that the amount placed into the account by Patton shall be separately accounted for, with expenses paid out of it as medical expenses arise. Wis. Stat. § 655.015; Wis. Admin. Code § Ins 17.26. Patton does not and could not assert that the transfer of funds under 2007 Wisconsin Act 20 had any impact on that account.

Nor is Patton's claim ripe. He has made no showing that there are inadequate funds to pay his claim, nor can he show that such a situation is likely. "[T]he ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify

judicial intervention.” *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶ 281 n.1, 285 Wis. 2d 236, 701 N.W.2d 523, quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153-54 (5th Cir. 1993). A determination in this case would not impede Patton’s ability to protect any asserted interest. If the Patients’ Compensation Fund (“Fund”) and the \$100 million backstop³ were ever actually exhausted and if Patton still had existing unpaid claims, he could present his claim at that time. Until such a situation occurs, however, any claim alleged by Patton is extremely speculative.

The untimeliness of the Petition and the lack of a sufficient interest in the Fund defeat the Proposed Intervenors’ claim for mandatory intervention.

Nor does the request for permissive intervention have merit. Such intervention requires a timely motion, and consideration of whether “the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.” Wis. Stat. § 803.09(2).

Not only is the Petition untimely, as addressed above, but intervention at this late stage would clearly prejudice the rights of the state. The Petition raises fact-intensive issues that were not raised or explored in the courts below. There has been no factual development of the circumstances of Patton’s claim, beyond those facts alleged in the Petition. Additional discovery and development of the factual record would be needed in order for Morgan to be able to evaluate and respond to the specifics of Patton’s claim. There is clearly insufficient time to accomplish such discovery, evaluate the evidence, and brief the issues prior to oral arguments.

³Wis. Stat. § 20.145(2)(a).

Further, the Petition raises new legal arguments that have not been briefed or addressed to date by any of the parties in this matter. By its own admission, the Petition characterizes such arguments as “new” and “different.” (Petition at 12-13). The Petition also states that the current litigants have “never once advanced any significant arguments concerning the rights of claimants under Chapter 655.” *Id.* at 7. It is simply unreasonable to ask Morgan to evaluate and respond to new legal arguments in the last two weeks prior to oral arguments in a case that has been litigated for 2½ years.

Finally, even if Proposed Intervenors are limited to amicus status, Morgan would have inadequate time to respond to any new arguments. As noted above, oral arguments are now only a little more than two weeks away. If the Court allows the Proposed Intervenors to participate either as intervenors or in an amicus capacity, it should postpone oral arguments in order to afford Morgan sufficient time to review, research, analyze, and brief any new legal issues or arguments raised by Proposed Intervenors.

CONCLUSION

Proposed Interveners are coming to this litigation far too late in the proceedings. Allowing them to participate as either interveners or in an amicus capacity two weeks before oral arguments would substantially prejudice Morgan's ability to adequately defend this action. The Petition should be denied.

Dated this 26th day of March 2010.

J.B. VAN HOLLEN
Attorney General



CHRISTOPHER J. BLYTHE
Assistant Attorney General
State Bar #1026147

CHARLOTTE GIBSON
Assistant Attorney General
State Bar #1038845


Attorneys for Defendant-
Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0180

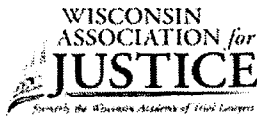
CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. § 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,458 words.

Dated this 26th day of March 2010.



CHRISTOPHER J. BLYTHE
Assistant Attorney General


[about us](#)
[members](#)
[seminars & events](#)
[government relations](#)
[news](#)
[the truth about
the state of justice](#)

Don't Raid Injured Patients' Fund

Monday, October 1, 2007

MADISON - The Wisconsin Academy of Trial Lawyers (the Academy) today called upon legislative leaders to rule out any transfer of money from the Injured Patients and Families Compensation Fund (the Fund) as a means of balancing the budget. Recent reports suggest that such a raid is possible, perhaps even in excess of the proposed amount of \$175 million.

"By law the Fund is an "irrevocable trust" designed to compensate injured patients and their families," said Academy President Rob Jaskulski. "A raid on the Fund would be a serious violation of the law enacted specifically to prevent this very conduct.

"The Academy strongly opposes efforts to balance the budget on the backs of future injured patients and their families," said Jaskulski. "While we understand these are tight fiscal times, a raid on the Fund would come at the detriment to all involved - doctors, their patients, and the public."

In addition to aiding injured patients and their families, the Fund works to keep doctors' medical liability insurance rates low. According to the American Medical Association, Wisconsin is one of only eight states in the country that is not facing a medical liability crisis, which can be largely attributed to the existence of this fund.

"Now is the time all of us should stand up and oppose this unseemly legislative deal making that threatens the rights of the injured to fair compensation as well as the stability of Wisconsin's health care system and the public's access to care," said Jaskulski.

© 2010 Wisconsin Association for Justice.

our sponsors

TRIALSMITH
Your best resource for investigating experts.

