



Whyte Hirschboeck Dudek S.C.

Thomas M. Pyper
608-258-7122
tpyper@whdlaw.com

August 20, 2010

VIA HAND DELIVERY

Mr. Christopher Paulson
Deputy Clerk of Supreme Court
110 E. Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

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

Dear Mr. Paulson:

On August 10, 2010, Respondent Michael L. Morgan stated by letter that he “objects” to the Petitioners’ Statement of Costs in the above-referenced matter. Pursuant to Wis. Stat. § 809.25(1)(c), Respondent was required to file a motion if he wished to object to the Statement of Costs. Notwithstanding Respondent’s failure to comply with the statute, we are responding to the issues raised in his letter of objection.

On behalf of Respondent, Attorney Gibson argues that Petitioners request an award of costs for briefs in excess of those allowed “by the rules.” In support of her argument, she totals only the number of briefs required to be filed with the Court of Appeals and the Supreme Court and served on Respondent. Each of her tallies ignores the number of briefs required to be served on the numerous amici. The correct total should be 130 briefs, rather than the 71 briefs stated by Attorney Gibson, calculated as follows:

Court of Appeals Brief	
Court	10 copies
Morgan	3 copies
Amici	12 copies (3 copies each to Attorneys Kearney, Lanphier, Van Sicklen and Gardon)
Total	25 copies

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Court of Appeals Reply Brief	
Court	10 copies
Morgan	3 copies
Amici	12 copies (3 copies each to Attorneys Kearney, Lanphier, Van Sicklen and Gardon)
Total	25 copies
Supreme Court Brief	
Court	17 copies (per Court, no copies to Respondent Morgan or amici because they had already received copies)
Total	17 copies
Supreme Court Reply Brief	
Court	17 copies (per Court, no copies to Respondent Morgan or amici because they had already received copies)
Total	17 copies
Court of Appeals Reply Brief	
Court	22 copies
Morgan	3 copies
Amici	21 copies (3 copies each to Attorneys Kearney, Lanphier, Van Sicklen, Gardon, Weis, Laufenberg and Pines)
Total	46 copies

The costs for such briefs expressly required to be filed and served on all parties and amici is \$2846.71. The Statement of Costs requested the costs for only 18 additional copies of the five sets of briefs for the Petitioners and their attorneys, which total only \$403.03. Respondent's assertion that the amount requested is for "far more" than allowed under Wis. Stat. § 809.25(1)(b)(1) is without merit. The 18 additional briefs, totaling \$403.03, is reimbursable under Wis. Stat. § 809.25(1)(b)(5) ("[o]ther costs as directed by the court"). Similarly, if the \$123.75 cost for the transcript from the hearing before the trial court on summary judgment, which was made part of the record (R. 40), is not recoverable under Wis. Stat. § 809.25(1)(b)3, it likewise is recoverable under Wis. Stat. § 809.25(1)(b)5.

Respondent's argument that sovereign immunity bars Petitioners' Statement of Costs is also incorrect. While "[i]t has been said that the state's immunity from suit extends to its arms or

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agencies,” Respondent is neither the State nor an agency of the state. *Lister v. Board of Regents*, 72 Wis.2d 282, 291, 240 NW 2d 610 (1976). Respondent was sued in his capacity as a public officer. The cases cited by Respondent do not address such a situation; instead, they all are suits either against the State or a state agency.

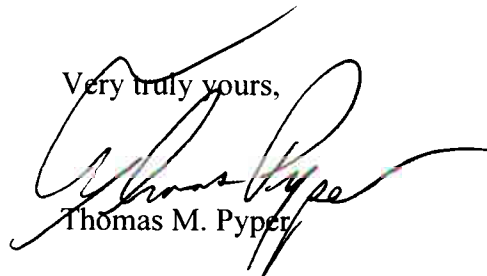
A public officer is not shielded by sovereign immunity.

“Because an objection based on the state’s sovereign immunity is effective only as to “suits against the state,” it cannot appropriately be asserted in response to a claim seeking to hold a public officer personally liable for damages.” *id* at 299.

Just as in *Lister*, Respondent here was not shielded by sovereign immunity to prevent the action against him and, accordingly, he is not shielded by sovereign immunity against Petitioners’ Statement of Costs.

Nonetheless, because the amount of the Statement of Costs is so small in comparison with the \$200,000,000.00 that the Supreme Court found had been unconstitutionally taken from the Injured Patients and Families Compensation Fund, so as to expedite the return of the money with accrued earnings and interest, Petitioners are hereby withdrawing their Statement of Costs so as to allow the Remittitur to be issued without further delay caused by the State’s opposition to the Statement of Costs.

Very truly yours,



Thomas M. Pypers

TMP/vls

cc: Ruth M. Heitz, Esq.
Christopher J. Blythe, Esq. and Charlotte Gibson, Esq.
Anne B. Kearney, Esq.
Sean Lanphier, Esq., William Shenkenberg, Esq. and Michael A. Marx, Esq.
Michael B. Van Sicklen, Esq. and Bree Grossi Wilde
Peter L. Gardon, Esq. and Jessica Polakowski
Lester A. Pines, Esq.
Lynn R. Laufenberg, Esq.
D. James Weis, Esq.