



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

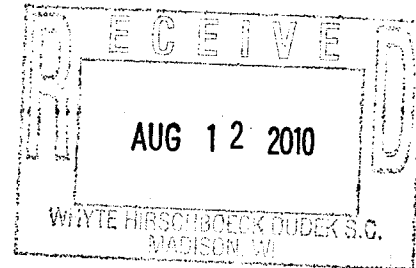
17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Charlotte Gibson
Assistant Attorney General
gibsoncj@doj.state.wi.us
608/266-7656
FAX 608/267-8906

August 10, 2010

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

Re: *WMS v. Morgan*
Case No. 2009AP00728



Dear Mr. Paulson:

Respondent the Secretary of the Department of Administration objects to the attempted taxation of costs by the Wisconsin Medical Society on the grounds that there has been no waiver of the State's sovereign immunity through unambiguous legislation expressly authorizing the taxation of appellate costs against the State.

Former Secretary Michael Morgan was sued solely in his official capacity in a suit challenging the constitutionality of a statute. The majority opinion refers to the respondent throughout as "Secretary Morgan." *WMS v. Morgan*, 2010 WI 94, ¶ 1. Although Mr. Morgan has now left that position for other employment, the caption will simply be amended to reflect the current occupant of that post.

An official capacity suit against a state officer is a suit against the State when the real substantial party is the State. *Lister v. Board of Regents*, 72 Wis. 2d 282, 292, 240 N.W.2d 610 (Wis. 1974). Here, the transfer of monies into the Injured Patients and Families Compensation Fund will come from other state accounts and legislative appropriations, not from former Secretary Morgan's personal bank account. The State was the real substantial party in this case.

Costs are not taxed against the State. In *Frankenthal v. Wisconsin R. E. Brokers' Bd.*, 3 Wis. 2d 249, 257-57a, 88 N.W.2d 352, 89 N.W. 25, this Court held:

Costs may not be taxed against the state unless authorized by statute. *Sandberg v. State* (1902), 113 Wis. 578, 589, 89 N.W. 504; *Frederick v. State* (1929), 198 Wis. 399, 224 N.W. 110; and *Holton & Hunkel Greenhouse Co. v. State* (1957), 274 Wis. 337, 345, 80 N.W.2d 371. This principle is equally applicable to state administrative agencies such as the defendant board, and this court has

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consistently adhered to the practice of not permitting costs to be taxed on appeal against state administrative agencies.

In *Sandberg v. State*, 113 Wis. 578, 589, 89 N.W. 504 (1902), the Court explained:

No court is authorized to render judgment for costs against the sovereign state, in absence of [a] statute giving express authority. We find no statute giving such authority. The doubt expressed by RYAN, C. J., in *Noyes v. State*, 46 Wis. 250, 252, whether general cost statutes might apply against the state in civil actions is readily resolved by reference to the rule that general statutes are not to be construed to include, to its hurt, the sovereign.

(Citations omitted.) See also *Martineau v. State Conservation Comm.*, 54 Wis. 2d 76, 79, 194 N.W.2d 664 (1972); *Dept. of Transp. v. Wis. Personnel Comm.*, 176 Wis. 2d 731, 736-38, 500 N.W.2d 664 (1993).


Even if this were a suit against a state employee in his individual capacity, respondent would object to specific items in the motion for costs.

A party may seek only the costs of printing and assembling the number of copies of briefs and appendices required by the rules. Wis. Stat. § 809.25(1)(b)1. WMS seeks costs for far more copies than were required by the rules: (1) 30 copies of its court of appeals brief and appendix, rather than 13; (2) 31 copies of its court of appeals reply brief, rather than 13; (3) 20 sets of its reply brief in the supreme court, rather than 17; and (4) 50 copies of a response to an amicus brief, rather than 28.

In addition, WMS seeks the taxation of the cost of transcription of oral argument in the circuit court. Wis. Stat. (Rule) § 809.25(b)3. permits taxation of the “[c]ost of the preparation of the transcript of testimony.” Oral argument in the circuit court is not testimony.

An original and eight copies of this objection are enclosed. One copy is being mailed this date to counsel of record.

Sincerely,


Charlotte Gibson
Assistant Attorney General
State Bar #1038845

CG:lf

c: Thomas M. Pyper