NO. A07-1682

State of Minnesota

In Court of Appeals

In re Dr. Roy Wayne Buckmaster, D.P.M., and
Albert Lea Medical Center – Mayo Health System,

Petitioners.

Sandra O'Rourke (f/k/a Sandra Ruble), et al.,

Respondents,

v.

Dr. Roy Wayne Buckmaster, D.P.M.,

Petitioners.

BRIEF OF *AMICI CURIAE* THE MINNESOTA MEDICAL ASSOCIATION, MINNESOTA PODIATRIC MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION AND AMERICAN PODIATRIC MEDICAL ASSOCIATION

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STATEMENT OF LEGAL ISSUES

1. Is an Agreement for Corrective Action entered into between a podiatric physician and the Complaint Resolution Committee of the Minnesota Board of Podiatric Medicine admissible into evidence at trial in a civil action?

   The district court said "yes."

   Apposite authority:

   Minn. R. Evid. 408
   Minn. Stat. § 214.103, subd. 6(a)(2)
   Hentschel v. Smith, 278 Minn.86, 153 N.W.2d 199 (1967)
   C.J. Duffey Paper Co. v. Reger, 588 N.W.2d 519 (Minn. App. 1999), *review denied* (Minn. Apr. 28, 1999).

INTEREST OF *AMICI CURIAE*[1]

Because the court's decision in this case has the potential to broadly influence the development of the law and to impact the quality of patient care in Minnesota and elsewhere, the *amici curiae's* interest in this case is public in nature. But because the issue is also of critical importance to individual members of the *amici curiae* organizations, their appearance has a private aspect as well.

The Minnesota Medical Association

The Minnesota Medical Association is a professional association representing approximately 10,500 physicians, residents, and medical students in the State of Minnesota. The MMA seeks to promote excellence in health care, to insure a healthy practice environment, and to preserve the professionalism of medicine through advocacy, education, information, and leadership. For more than 150 years, the MMA and its members have worked together to safeguard the quality of medical care in Minnesota as well as the future of medical professionalism.

Minnesota Podiatric Medical Association

The Minnesota Podiatric Medical Association is a professional association consisting of approximately 160 podiatric physicians and surgeons in the State of Minnesota. The MPMA seeks to continually advance the code of ethics and guidelines

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[1] Pursuant to Rule 129.03, the undersigned certifies that no counsel for a party authored this brief in whole or in part and that no one made a monetary contribution to the preparation or submission of this brief other than the *amici curiae* and their counsel.

for the practice of podiatric medicine, to promote the art and science of podiatric medicine, and to promote the betterment of public health.

American Medical Association

The American Medical Association is an Illinois non-profit corporation with some 240,000 members, making it the largest professional association of physicians and medical students in the United States. Its members practice in every state, including Minnesota, and in every medical specialty. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health. More than 150 years later, these still remain its core purposes.[2]

American Podiatric Medical Association

The American Podiatric Medical Association, founded in 1912, is a District of Columbia non-profit corporation. The APMA has more than 11,000 members, representing more than 75% of the practicing podiatric physicians nationwide. The APMA advances and advocates for the profession of podiatric medicine and surgery for the benefit of its members and the public.

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[2] The AMA appears in its own capacity and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts.

ARGUMENT

I. The district court erred as a matter of law in ruling that an Agreement for Corrective Action is admissible evidence in a civil trial.

It is not the purpose of this brief to address every legal argument that demonstrates the district court's error. The purpose, instead, is to provide policy analysis that will help the court better understand the implications of its decision. In addition to the short legal analysis below, therefore, the *amici curiae* refer the court to the thorough and well-presented legal arguments set forth in petitioners' opening brief.

The district court ruled that an Agreement for Corrective Action ("ACA") entered into between a podiatric physician and the Complaint Resolution Committee of the Minnesota Board of Podiatric Medicine ("Committee") is admissible evidence at trial in this civil action, which alleges malpractice against the podiatric physician who was a party to that agreement. The ACA, entered into under the authority of Minn. Stat. § 214.103, subd. 6(a)(2), resolved a complaint filed by the plaintiff in this case. The ACA followed the Committee's Notice of Conference, which advised the licensee that one "purpose of the conference is . . . to permit the Committee and you to seek resolution and remedy of this matter without the necessity of instituting a formal hearing." (A.108). The parties participated in the conference in November 2004 (A.105), engaged in back-and-forth negotiations in ensuing months, through counsel, over the compromise terms of a proposed ACA (A.109-115), and then finalized and executed an ACA in April 2005. (A.72).

The *amici curiae* respectfully submit that Rule 408 forbids the district court's ruling. *See* Minn. R. Evid. 408 (providing that evidence of compromise of claim disputed as to validity is inadmissible to prove liability). Rule 408 is a rule of exclusion, not of discretion. *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519, 524 (Minn. App. 1999), *review denied* (Minn. Apr. 28, 1999). If proffered evidence violates the rule, the court lacks discretion to admit it. *Id.* Here, the parties disputed the validity of the Board's claim against the licensee; they negotiated over and compromised that claim through the statutorily authorized ACA mechanism; they each surrendered substantial rights as part of the compromise; and now plaintiff seeks to use evidence of the compromise to prove the licensee's civil liability. Allowing the ACA into evidence in these circumstances plainly contradicts Rule 408. The district court's ruling is so fundamentally flawed and beyond its authority, and its effect would so undermine the trial, that extraordinary relief is appropriate to place the case on proper evidentiary footing and to avoid what would almost certainly be a second trial.

II. Upholding the district court's ruling would undermine the purpose and function of health licensing boards and adversely affect patient care in Minnesota.

Rule 408 protects Minnesota's time-honored goal of encouraging settlements, which promote finality in resolving disputes, thereby enabling parties to avoid the uncertainty and expense of litigation. *See, e.g., Heinz v. Vickerman Const.*, 306 N.W.2d 888, 890 (Minn. 1981) ("[S]ettlements avoid litigation, with resulting economies in time and expense, and are ordinarily encouraged as in the best interests of the parties"); *Weikert v. Blomster*, 213 Minn. 373, 375-76, 6 N.W.2d 798, 799 (1942) (acknowledging

"the policy that there should be an end to litigation and that compromises and settlements should be encouraged"). In the context of civil litigation, an already-overburdened judicial system relies on settlement to prevent case loads from overwhelming the courts. *See Schmidt v. Clothier*, 338 N.W.2d 256, 260 (Minn. 1983) (encouraging settlements to mitigate litigation expenses, delays in claim payments, and the burden on the court system); *see also Karon v. Karon*, 435 N.W.2d 501, 504 (Minn. 1989) ("In the interest of judicial economy, parties should be encouraged to compromise their differences and not to litigate them."); *Beach v. Anderson*, 417 N.W.2d 709, 712 (Minn. App. 1988) ("[R]eliance on * * * settlements should be encouraged" to advance the "efforts of trial courts to hear and determine [an] ever-increasing number of cases"). Without Rule 408, however, a person "could not settle one claim out of court without fear that this would be used in another suit as an admission against [the settling party]." *Hentschel v. Smith*, 278 Minn. 86, 98, 153 N.W.2d 199, 208 (1967). As a result, "many settlements would not be made." *Id.*

These policies and outcomes are no different when applied to health licensing boards. But because they have much smaller staffs and far fewer resources than the Minnesota judiciary, the consequences of the decision below for health licensing boards could greatly compromise oversight of Minnesota's health system. For example, the Minnesota Nursing Board reports that this state now has more than 100,000 licensed nurses. *http://www.state.mn.us/portal/mn/jsp/home.do?agency=NursingBoard*. If Minnesota's nurses can't depend on Rule 408 – not to mention the licensees overseen by the 16 other health licensing boards – those having a pending complaint with the Nursing

Board would understandably be reluctant to utilize Agreements for Corrective Action, thus forcing a Board responsible for 100,000 licensees to address easily correctable deficiencies through formal contested disciplinary proceedings or not at all. Recall that an important purpose for the informality of the ACA process is to "permit the Committee and you to seek resolution and remedy of this matter *without the necessity of instituting a formal hearing.*" (A.108) (emphasis added). Because the decision below would encourage licensees to widely reject the resolution process, formal hearings would too often become the Board's only alternative. Effective ACA tools like mentoring, one-on-one education, literature review, supervision, and professional coursework would become far less available even though those tools often directly address and quickly and efficiently resolve a noted deficiency.

And because the mere existence of evidence suggesting a deficiency by no means assures a corresponding contested-case outcome finding grounds for discipline, health licensing boards would likely face the need to dismiss many complaints based only on a balancing of board resources against either the uncertainty of successfully proving the case in a contested proceeding or the limited urgency of the matter vis-à-vis the board's other pending matters. Thus, less-certain and less-pressing problems would be dismissed, thereby increasing the possibility that the licensee will later return with a serious disciplinary issue that could have been addressed the first time through a remedial ACA.

This is not to suggest that every refusal to enter an ACA would result in dismissal. To the contrary, the result below will require health licensing boards to proceed with many more contested case hearings than before. But then Minnesota's 17 health

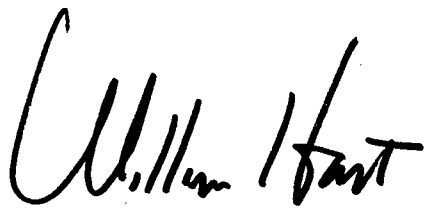
licensing boards would face a mounting backlog, still further compromising their ability to oversee the health system. Slowing down the process not only would compromise the public's need for swift resolution of meritorious complaints, it would compromise the licensee's due process expectations for swift resolution of non-meritorious complaints. And a backlog would not be the only slowing mechanism. ACAs are negotiated and executed at the Committee level, thus allowing for speed and nimble action in the process. Disciplinary action, by contrast, must be approved at the board level, and many health licensing boards meet only once every several months. Moreover, upholding the decision below would give plaintiffs incentive to use board complaints as a litigation tactic in hopes of developing support for pending or future litigation. Such a tactic would further tax licensing board resources, would potentially compromise the board's ability to fully investigate and satisfactorily resolve every complaint, and would still further slow the process of resolving complaints that are in the system for non-litigation reasons.

CONCLUSION

Nothing about enforcing Rule 408 for ACAs will hinder a plaintiff's ability to discover and prove the circumstances of alleged medical malpractice upon which he or she bases a civil suit. Every avenue of discovery will remain open. Every right to retain and consult with experts will remain unhindered. By contrast, ignoring Rule 408 for ACAs not only would mislead juries into believing that the state had already "proved" malpractice against the licensee, it would lead to consequences that would undermine the purpose for establishing health licensing boards in the first place and thereby adversely affect patient care in Minnesota. For all of these reasons, the *amici curiae* support the petitioners in urging the court to issue a writ of prohibition.

Respectfully submitted,

Dated: 9 November 2007

By 

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