

No. A06-1238  
STATE OF MINNESOTA  
IN THE COURT OF APPEALS

ARIZANT, INC., ARIZANT HEALTHCARE, INC.,  
and AUGUSTINE MEDICAL, INC.,

Appellants,

vs.

SCOTT D. AUGUSTINE, M.D.,

Respondent.

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BRIEF FOR UNITED STATES AS *AMICUS CURIAE*  
IN SUPPORT OF APPELLANTS

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**TABLE OF CONTENTS**

	<i>Page</i>
INTEREST OF THE UNITED STATES AS <i>AMICUS CURIAE</i> .....	1
LEGAL ISSUE .....	2
ARGUMENT .....	3
THE MINNESOTA INDEMNIFICATION STATUTE SHOULD BE INTERPRETED TO PRECLUDE A PERSON WHO PLEADED GUILTY TO KNOWINGLY AND WILLFULLY COMMITTING MEDICARE FRAUD FROM SEEKING INDEMNIFICATION FOR THE \$2 MILLION FINE IMPOSED ON HIM BY A FEDERAL DISTRICT COURT AS PART OF HIS CRIMINAL SENTENCE .....	3
CONCLUSION .....	12
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

### Cases:

<i>Bansbach v. Zinn</i> , 1 N.Y.3d 1, 801 N.E.2d 395 (N.Y. 2003) .....	2, 6-7
<i>Biondi v. Beekman Hill House Apt. Corp.</i> , 94 N.Y.2d 659, 731 N.E.2d 577 (2000) .....	11
<i>Bryan v. United States</i> , 524 U.S. 184 (1998) .....	6
<i>Buckman v. Plaintiffs' Legal Comm.</i> , 531 U.S. 341 (2001) .....	7
<i>Bunge Corp. v. Recker</i> , 519 F.2d 449 (8th Cir. 1975) .....	2, 6
<i>Equitex, Inc. v. Ungar</i> , 60 P.3d 746 (Colo. Ct. App. 2002) .....	7, 10, 11
<i>Globus v. Law Research Serv., Inc.</i> , 418 F.2d 1276 (2d Cir. 1969), <i>cert. denied</i> , 397 U.S. 913 (1970) .....	2, 9-10
<i>In re Landmark Land Co.</i> , 76 F.3d 553 (4th Cir. 1996) .....	2, 6, 11
<i>McLean v. Alexander</i> , 449 F. Supp. 1251 (D. Del. 1978), <i>rev'd on other grounds</i> , 599 F.2d 1190 (3d Cir. 1979) .....	10
<i>Nordstrom, Inc. v. Chubb &amp; Son, Inc.</i> , 54 F.3d 1424 (9th Cir. 1995) .....	6
<i>Travelers Ins. Co. v. Thompson</i> , 281 Minn. 547, 163 N.W.2d 289 (1969) .....	11
<i>United States v. Smith</i> , 13 F.3d 1421 (10th Cir. 1994) .....	6

### Statutes:

Minn. Stat. § 302A.011, Subd. 13 .....	2, 5
--	------

Minnesota Indemnification Statute:

Minn. Stat. § 302A.521 ..... 1, 2, 12  
Minn. Stat. § 302A.521, Subd. 2(a) ..... 5  
Minn. Stat. § 302A.521, Subd. 2(a)(1)-(5) ..... 5

18 U.S.C. § 3553(a)(2) ..... 10  
18 U.S.C. § 3571 ..... 4

28 U.S.C. § 517 ..... 1

42 U.S.C. § 1320a-7b(a)(2) ..... 4, 5, 8

**Rule:**

Minn. R. Civ. App. P. 129 ..... 1

**Miscellaneous:**

Black's Law Dictionary (5th ed. 1979) ..... 6

## **INTEREST OF THE UNITED STATES AS *AMICUS CURIAE***

The Attorney General of the United States files this *amicus curiae* brief on behalf of the United States pursuant to 28 U.S.C. § 517 and Minn. R. Civ. App. P. 129.

Respondent Scott D. Augustine pleaded guilty to violating a federal criminal statute that punishes knowing and willful fraud against the Medicare program. Because this is not a strict liability crime, the defendant's guilty plea establishes that his conduct was knowing and willful. Federal law, moreover, specifies the appropriate punishment for the crime, including (as in this case) a substantial fine. To construe the Minnesota Indemnification Statute, Minn. Stat. § 302A.521, to permit Augustine to argue that he acted in good faith and is therefore entitled to have a corporation pay his criminal fine would manifestly undermine the purpose and effectiveness of the federal criminal law. The United States has a strong interest in making sure that the State's indemnification statute is not interpreted in a manner that undermines the federal criminal law enforcement scheme by undoing a key aspect of a sentence imposed by a federal judge as a result of a conviction.

## LEGAL ISSUE

Whether the Minnesota Indemnification Statute, Minn. Stat. § 302A.521, which requires that a corporate officer seeking indemnification have acted in “good faith,” nonetheless permits such an officer to seek indemnification from the corporation for a \$2 million fine imposed on the officer as part of his federal criminal sentence for the intentional commission of Medicare fraud.

The trial court held that Augustine’s admission that he intentionally sought to defraud the Medicare program did not preclude a jury from considering whether Augustine satisfied § 302A.521’s “good faith” requirement and was entitled to indemnification.

*In re Landmark Land Co.*, 76 F.3d 553, 565 (4th Cir. 1996); *Bunge Corp. v. Recker*, 519 F.2d 449 (8th Cir. 1975); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *Bansbach v. Zinn*, 1 N.Y.3d 1, 13, 801 N.E.2d 395, 404 (N.Y. 2003).

Minn. Stat. § 302A.521; Minn. Stat. § 302A.011, Subd. 13.

## ARGUMENT

### **THE MINNESOTA INDEMNIFICATION STATUTE SHOULD BE INTERPRETED TO PRECLUDE A PERSON WHO PLEADED GUILTY TO KNOWINGLY AND WILLFULLY COMMITTING MEDICARE FRAUD FROM SEEKING INDEMNIFICATION FOR THE \$2 MILLION FINE IMPOSED ON HIM BY A FEDERAL DISTRICT COURT AS PART OF HIS CRIMINAL SENTENCE.**

A. As explained in Appellants' Opening Brief (at pp. 7-13), Scott D. Augustine was the former Chief Executive Officer of Augustine Medical, Inc., a medical technology company that manufactured and marketed WarmUp Active Wound Therapy. The company worked to convince Medicare fiscal intermediaries that the product should be covered by Medicare. However, on June 27, 2000, TriSpan Health Services, a Medicare program fiscal intermediary that had earlier approved coverage for WarmUp, sent Augustine a letter advising him that it now had determined that WarmUp was "investigational." Augustine understood that "investigational" generally meant that a product would not be covered by Medicare and that, in fact, TriSpan was using WarmUp's investigational status to deny claims. Nonetheless, Augustine intentionally withheld the letter from Southern Medical Distributors. Augustine subsequently pleaded guilty to Medicare fraud. (See A 90-91; A 86).

At his plea hearing, Augustine admitted that he “knowingly and intentionally aided and abetted the offense of 42 U.S.C., Section 1320a-7b(a)(2), by causing to be withheld from Southern Medical Distributors a material fact for use in determining rights to benefits and payments under the Medicare program.” (A 143).<sup>1</sup> Augustine also signed a stipulation of facts to the same effect. (A 90-91). As part of his sentence, Augustine was ordered to pay “criminal monetary penalties” in the amount of \$2 million. (A 168). As the district court advised Augustine, payment of the \$2 million fine was one of the “terms and conditions” of his sentence. (A 162, 163).

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<sup>1</sup> Section 1320a-7b(a)(2) provides:

Whoever . . . at any time knowingly and willfully makes or causes to be made any false statement or representation of a material fact for use in determining rights to [any] benefit or payment [under a Federal health care program] . . . shall . . . (ii) in the case of such a statement, representation, concealment, failure, conversion, or provision of counsel or assistance by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than \$100,000 or imprisoned for not more than one year, or both.

The parties agreed, as part of the plea agreement that, under the circumstances, a greater fine than \$100,000 was appropriate and authorized under law. (A 86) (citing 42 U.S.C. § 1320a-7b(a)[(2)] and 18 U.S.C. § 3571).

B. The Minnesota Indemnification Statute provides that, subject to prohibitions or limitations on indemnification in a corporation's articles or bylaws, "a corporation shall indemnify a person made or threatened to be made a party to a proceeding by reason of the former or present official capacity of the person against judgments, penalties, fines, including, . . . attorneys' fees and disbursements, incurred by the person in connection with the proceeding . . . ." Minn. Stat. § 302A.521, Subd. 2(a).

To be eligible for indemnification, however, the person requesting indemnification must satisfy five criteria: The official must show that he "(1) Has not been indemnified by another organization or employee benefit plan for the same judgments, penalties, [or] fines . . . ; (2) Acted in good faith; (3) Received no improper personal benefit . . . ; (4) In the case of a criminal proceeding, had no reasonable cause to believe the conduct was unlawful; and (5) In the case of acts or omissions occurring in the official capacity . . . reasonably believed that the conduct was not opposed to the best interests of the corporation. . . ." *Id.* § 302A.521, Subd. 2(a)(1)-(5). "Good faith' means honesty in fact in the conduct of the act or transaction concerned." Minn. Stat. § 302A.011, Subd. 13.

C. As explained, Augustine pleaded guilty to committing Medicare fraud in violation of 42 U.S.C. § 1230a-7b(a)(2). Section 1230a-7b(a)(2) requires the

person charged with committing fraud to have acted “knowingly and willfully.” As the Supreme Court has stated, “[a]s a general matter, when used in the criminal context, a ‘willful’ act is one undertaken with a ‘bad purpose.’” *Bryan v. United States*, 524 U.S. 184, 191 (1998).

Although this appears to be an issue of first impression in the Minnesota courts, other jurisdictions have held that willful fraud is equivalent to acting in bad faith, and that a person admitting to, or being convicted of, such conduct is precluded, as a matter of law, from indemnification. See, e.g., *In re Landmark Land Co.*, 76 F.3d 553, 565 (4th Cir. 1996) (“An agent who has intentionally participated in illegal activity or wrongful conduct against third persons cannot be said to have acted in good faith, even if the conduct benefits the corporation.”); *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1434 (9th Cir. 1995) (“[T]he fact that the directors and officers induced the fraud by approving the allegedly misleading public statements precludes invocation of the good faith defense.”); *United States v. Smith*, 13 F.3d 1421, 1425 (10th Cir.) (“‘Bad faith’ and ‘fraud’ are synonymous.”) (quoting Black’s Law Dictionary (5th ed. 1979)), *cert. denied*, 513 U.S. 878 (1994); *Bunge Corp. v. Recker*, 519 F.2d 449 (8th Cir. 1975) (“[B]ad faith is synonymous with ‘fraud.’ . . . Bad faith generally implies or involves actual or constructive fraud or a design to mislead or deceive another.”); *Bansbach v.*

*Zinn*, 1 N.Y.3d 1, 13, 801 N.E.2d 395, 404 (N.Y. 2003) (president of corporation's sworn admissions in plea allocution that he engaged in illegal scheme to circumvent the Federal Election Campaign Act "leave no room for finding that he was entitled to indemnification by [the corporation] because he acted in good faith, for a purpose he reasonably believed to be in the best interest of the corporation and had no reasonable cause to believe that his conduct was unlawful"); *Equitex, Inc. v. Ungar*, 60 P.3d 746, 751 (Colo. Ct. App. 2002) (where "defendant's breach of fiduciary duty was 'attended by circumstances of fraud or malice or willful and wanton conduct' . . . [t]he intentional and willful nature of defendant's actions precludes a finding that he acted in good faith.").

The trial court, however, construed the Minnesota Indemnification Statute to permit Augustine to argue to the jury, contrary to the weight of authority, that he acted in "good faith" and to require defendant Arizant to indemnify him under the statute. (See A 404, 425). The trial court's construction of the Minnesota Indemnification Statute would seriously undermine the effectiveness of the federal scheme for punishing criminal efforts to defraud federal health care programs.

"Policing fraud against federal [programs]" is a uniquely federal interest. See *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). As explained, federal law makes it a crime to "knowingly and willfully" make "any false

statement or representation of a material fact” for use in determining rights to a benefit or payment under a federal health care program. 42 U.S.C. § 1320a-7b(a)(2). The statute also provides for an appropriate punishment, including a substantial criminal fine. Here, the federal district court imposed a \$2 million fine on Augustine as part of his sentence. (A 168). It is clear from the plea hearing and the sentencing hearing that the federal court imposed punishment with the intention that Augustine be personally responsible for that punishment. (A 137-140, A 144-145; A 161-164).

For example, at the plea hearing, the federal district court asked Augustine if he understood that “the agreement in [his] case” was that “the Government’s going to recommend the imposition of a fine, which in your case is \$2 million.” Augustine responded “Yes, your Honor.” (A 137). Going through the plea again, the court stated: “Page 5, paragraph 9, talks again about the imposition of fine in the amount of \$2 million which will be due at the time of your sentencing in September and you agree to pay the entire sum at that time. Is that your understanding as well?” Augustine again answered, “Yes, your Honor.” (A139-140).

Further, when government counsel asked the court to “inquire whether the defendant and his counsel agree that the imposition of a fine in the amount of \$2

million is appropriate and authorized under law” (A 144), the court asked: “You understand, Dr. Augustine, because it’s above the statutory limit there needs to be a separate agreement in your case, that that’s what you are agreeing to do as part of this plea agreement, correct?” Augustine responded, “Yes, I agree” (A 145). At sentencing, the court sentenced Augustine to “a probationary term of three years under [a set of] terms and conditions,” which included an order “to pay the fine of \$2 million, which is due and payable immediately.” (A 162-163).

It is clear, then, that having Augustine be personally responsible for payment of the \$2 million was integral to the plea agreement he made with the Federal Government and to the sentence imposed by the federal district court. Allowing Augustine in these circumstances to argue, despite his guilty plea in federal court, that he did not act in bad faith and is entitled to have a corporation pay his criminal fine is contrary to federal public policy inasmuch as it plainly undermines the purpose and effectiveness of the federal punishment scheme in general and of the federal punishment imposed on Augustine in particular.<sup>2</sup> See *Globus v. Law*

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<sup>2</sup> Federal law requires a court, when imposing sentence, to consider “the need for the sentence imposed -- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant, and (D) to provide the defendant with needed educational or vocational training, medical care, or other corrective treatment in the most effective

(continued...)

*Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969) (noting that corporations are barred from indemnifying a director for securities fraud because such action is against public policy), *cert. denied*, 397 U.S. 913 (1970); *McLean v. Alexander*, 449 F. Supp. 1251, 1266 (D. Del. 1978) (“[T]he great weight of authority establishes that indemnification against actual wrongdoing as contrasted with negligent conduct is considered void as to public policy . . . .”), *rev’d on other grounds*, 599 F.2d 1190 (3d Cir. 1979); *Equitex*, 60 P.3d at 750 (“Public policy prohibits indemnifying a party for damages resulting from intentional or willful wrongful acts.”) (citation and internal quotation marks omitted).

Despite these considerations, the trial court here held that the issue of Augustine’s “good faith,” and ultimately his entitlement to indemnification of the Indemnification Statute, should be left to the jury to decide. The trial court held that Augustine’s admissions in his plea and stipulation of facts “did not address the issue of bad faith and therefore Plaintiff Augustine was not collaterally estopped in the present action from asserting that he acted in good faith when deciding not to disclose the TriSpan letter.” (A 425). This conclusion, too, however, is contrary to the weight of authority. Although, “[i]n some cases, whether the defendant acted

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<sup>2</sup> (...continued)  
manner.” 18 U.S.C. § 3553(a)(2). Indemnification here would plainly undermine several of these goals.

in good faith . . . may be a question of fact,” *Equitex*, 60 P.3d at 751, a conviction for knowing and willful fraud is equivalent to a showing that the defendant acted in bad faith, and a subsequent court proceeding on the issue of indemnification ought not allow the parties to relitigate the issue of good faith. See, e.g., *Landmark*, 76 F.3d at 563 (in making the good faith determination, “a court cannot ignore the factual findings made during the underlying proceeding for which the agent seeks indemnification”); *Biondi v. Beekman Hill House Apt. Corp.*, 94 N.Y.2d 659, 667, 731 N.E.2d 577, 581 (2000) (“Because the underlying Federal judgment establishes that [defendant’s] acts were committed in bad faith, [defendant] is not entitled to indemnification and cannot relitigate the good faith versus bad faith issue here . . . .”); *Travelers Ins. Co. v. Thompson*, 281 Minn. 547, 552, 163 N.W.2d 289, 292 (1968) (doctrine of collateral estoppel applied to issues necessarily decided in prior criminal conviction “where the convicted defendant attempts by subsequent civil litigation to profit from his own crime”).

For these reasons, this Court should interpret the Minnesota Indemnification statute in a manner that does not cause it to undermine the enforcement of a criminal sentence under federal law.

## CONCLUSION

For the foregoing reasons, the Court should rule that Augustine is not entitled to indemnification under Minn. Stat. § 302A.521, and that the judgment of the trial court therefore is reversed.

Respectfully submitted,

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SEPTEMBER 2006

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Minn. R. Civ. App. P. 132.01, Subd. 3(c)(1). The brief, excluding exempted portions, contains 2,520 words (using WordPerfect 9), and has been prepared in a proportional Times New Roman font of 14 points.

  
Michael E. Robinson

## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of September, 2006, I filed with the Court the foregoing Brief for the United States as Amicus Curiae in Support of Appellants and served it on the following counsel, by causing two copies of the Brief to be sent by U.S. mail, upon:

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