

COPY

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.

APPELLANTS' REPLY BRIEF

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The critical issue presented to this Court on Augustine's indemnification claim is whether an individual who has admitted to and been adjudged to have committed acts constituting intentional fraud may ever, as a matter of law, argue that his conduct was "good faith" conduct and receive indemnification for criminal fines associated with that conduct. Augustine never addresses this prime issue. Instead, Augustine seeks to distract the Court and broadly challenge whether, under Minnesota law, plea agreements give rise to collateral estoppel.

Arizant does not rely on Augustine's guilty plea itself or even the elements of the crime Augustine admitted to having committed. Rather, Arizant argues that Augustine cannot now recant the three key facts he swore to in open court, which the Federal District Court entered as judicial findings of fact. Those three key admitted facts amount to intentionally fraudulent conduct. Such intentionally fraudulent conduct, as a matter of law, always falls outside the legal definition of "good faith" conduct.

With respect to his appraisal challenge, Augustine has misstated the controlling law in Minnesota and, as his response brief indicates, has never presented argument or evidence sufficient to allow a judicial challenge. Thus, Augustine was precluded under Minnesota law from asking a jury to determine that Arizant's stock should have been appraised at a higher value.

While neither claim should have gone to a jury, as both required judgment as a matter of law, the trial court compounded its errors and prejudice to Arizant by barring Arizant from presenting relevant evidence and impeaching Augustine with regard to his conduct and the underlying crime. The trial court further erred by refusing to provide

necessary instructions as to the law governing Augustine's claims. Augustine's response fails to demonstrate how the trial court's errors in this regard warrant anything less than a new trial.

ARGUMENT

I. INDEMNIFICATION

A. In This Situation, There Can Be No Good Faith as a Matter of Law

Augustine and Arizant agree that for Augustine to receive indemnification, he must be able to demonstrate that the conduct giving rise to his \$2 million criminal fine was "good faith" conduct. Minn. Stat. §302A.521, subd. 2. Both agree that, by statutory definition, such conduct must not have been dishonest conduct. Minn. Stat. §302A.011. Further, both now apparently agree that fraudulent conduct, by its nature and legal definition, is dishonest conduct. Thus, intentional fraud, such as that admitted to by Augustine, cannot be in good faith as a matter of law.

Augustine swore under oath to three key facts, and those three facts formed the basis of his criminal conviction. He received a benefit from admitting those facts and taking personal responsibility, a reduced sentence. (A84-89). At trial, Augustine testified he stood behind those three admitted facts. But he said one thing and did another. Minnesota law estops him from relitigating those three facts in an effort to have his cake and eat it too.

1. Augustine's admitted conduct was intentional fraud

Augustine admitted: (1) he received a letter from TriSpan, a fiscal intermediary of the Medicare Program, indicating TriSpan, which had earlier approved coverage for the Warm-Up product, had now determined that Warm-Up was "investigational;" (2) he

knew this determination was material to healthcare providers such as Southern Medical in deciding whether to purchase Warm-Up; (3) he thereafter knowingly and willfully aided and abetted Arizant employees under his charge in withholding from Southern Medical the fact that he had received the letter from TriSpan. (A84-91). Augustine swore to these facts on three separate occasions: in the Stipulation of Facts, in his sworn testimony at the June 29, 2004 Change of Pleas hearing, and in his sworn testimony on September 15, 2004, when Judge Montgomery entered judgment against him. (A84-91, 114-29, 165-68, 688-97). These three admitted facts and other indicia of taking personal responsibility for his crime resulted in a reduced criminal sentence. (A84-89). Augustine still stands by those sworn admissions and does not attempt to now contest them before this Court. (A688-90).

Augustine does not challenge in his response that knowingly withholding a fact when one knows that the fact is material is, by definition, intentionally fraudulent conduct. Nor does he dispute that such conduct, by legal definition, cannot be “good faith” conduct.¹ For this reason, Augustine cannot, as a matter of law, be indemnified for his \$2 million criminal fine. In fact, Augustine has ignored Arizant’s entire argument on this major point.

2. Estoppel prevents Augustine from reversing his position for gain

Augustine’s sole response to the inescapable fact that his admitted conduct is intentional fraud and cannot be in good faith as a matter of law is to imply his three

¹ “Good faith” means honesty in fact in the conduct of the act or transaction concerned.” Minn. Stat. § 302A.011, subd. 13. “Good faith,” in turn, means “freedom from intention to defraud,” and “honest” means “not fraudulent.” See, e.g., Black’s Law Dictionary, 447 (6th Ed. 1983); Webster’s II New Riverside Dictionary, Revised Edition 331 (Houghton Mifflin Co. 1996).

admitted facts may not have estoppel effect because he swore to them during a plea process. Augustine fails to acknowledge, however, that the majority of courts hold that a guilty plea does estop Augustine from relitigating facts admitted and established as part of his prior plea agreement and conviction. Furthermore, the cases cited by Augustine do not establish a general rule against the application of estoppel to facts admitted in a criminal plea process in a subsequent civil action as he represents.² Rather, each turns on the facts of the case. Most important is this Court's continued and emphatic position against "a party that has taken one position in litigating a particular set of facts from later reversing its position when it is to its advantage to do so." Bauer v. Blackduck Ambulance Ass'n, 614 N.W.2d 747, 749 (Minn. Ct. App. 2000).

Contrary to Augustine's argument, existing Minnesota law contemplates that facts expressly admitted to during a plea proceeding have preclusive effect in a subsequent civil action. See Nevins v. Christopher Street, Inc., 363 N.W.2d 891, 893-94 (Minn. Ct. App. 1985). In Nevins, this Court expressly found that "Nevins was convicted by a plea of guilty of just the same actions she is accused of committing before the Department of Economic Security. Nevins had an opportunity to fully litigate the facts and chose to enter a plea of guilty." Id. at 893. The Court in Nevins, further noted, contrary to Augustine's attempt to distinguish the case, that the statute involved simply codified the doctrine of collateral estoppel as it was applied in Minnesota. Id. Nevins further distinguishes Glens Falls, a case from 1972 upon which Augustine relies, by noting that collateral estoppel in a subsequent civil action regarding a policy exclusion for intentional

² Augustine's own brief makes this point where he attempts to distinguish Arizant's authority with the statement that the cases to which Arizant cited involved "sworn admissions." (Respondent's Brief at 21) (emph. in original).

torts would not apply when the issue of intent was not determined or admitted as part of the simple assault plea. Id. at 894.

In an analogous case, Bauer v. Blackduck Ambulance Ass'n, 614 N.W.2d 747 (Minn. Ct. App. 2000), this Court addressed a case in which an individual sued her employer, Blackduck, for workers compensation on the ground she was an employee when she was injured. Id. at 748-49. In a subsequent action, she sued the employer for negligence claiming she was not an employee of Blackduck. Id. at 749. This Court stated:

Judicial estoppel prevents a party that has taken one position in litigating a particular set of facts from later reversing its position when it is to its advantage to do so. It is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.

Id. at 749-50; see also Port Auth. of the City of St. Paul v. Harstad, 531 N.W.2d 496, 500 (Minn. Ct. App. 1995) (similarly applying estoppel theory); Nova Consulting Group, Inc. v. Weston, Inc., No. C1-01-1592, 2002 WL 418205, at *4 (Minn. Ct. App. March 19, 2002) (same).

The only other Minnesota case Augustine cites for his proposition that guilty pleas never have estoppel effect is Illinois Farmers Ins. Co. v. Reed, 647 N.W.2d 553 (Minn. Ct. App. 2002), which was reversed on other grounds. 662 N.W.2d 529 (Minn. 2003). It does not stand for that proposition at all. Instead, Reed reiterates Minnesota's long-established distaste for a criminal defendant seeking to later profit from asserting inconsistent positions. Id. at 564. Reed further reiterates the Glen Falls holding that where facts critical to the subsequent civil litigation (such as "intent") are not a part of the facts sworn to in connection with a plea, estoppel will not preclude litigation of those facts. Id. at 559.

Other jurisdictions that have faced the issue concur that an individual may not swear to certain facts as a basis for a plea agreement only to then recant them in a subsequent action—particularly where the individual seeks to profit from that action. In Lowery v. Stovall, 92 F.3d 219 (4th Cir. 1996), a highly analogous case, a criminal defendant pleaded guilty to maliciously causing bodily injury to a police officer. As part of the plea, he specifically admitted to attacking the officer. During a subsequent excessive force claim against the officer, he denied he attacked the officer. Id. at 221, 224. The court held he was estopped from later claiming he did not attack the officer because his position in the civil litigation was contradictory to the position he took when he pleaded guilty. Id. As the court noted, the defendant received a reduced sentence by pleading guilty, received a benefit from the plea bargain and then subsequently wanted “to have it the other way.” Id. at 224-25.

Iowa, as another example, holds that a guilty plea conclusively establishes all issues necessarily determined by the conviction, including the essential elements of the crime. Ideal Mut. Ins. Co. v. Winker, 319 N.W.2d 289, 293-95 (Iowa 1982). Similarly, the federal court in Maine holds that a guilty plea has collateral estoppel effect because the criminal defendant has a full and fair opportunity to litigate the relevant issues and because the consequences of his or her plea provide sufficient incentive to assert his or her innocence. Robinson v. Globe Newspaper Co., 26 F. Supp. 2d 195, 199 (D. Me. 1998) (citing United States v. Broce, 488 U.S. 563, 569 (1989)). In summary, courts

routinely hold that a guilty plea is, for purposes of estoppel, equivalent to a conviction subsequent to trial. Leach v. Schlaegel, 447 S.E.2d 1, 4 (W. Va. Ct. App. 1994).³

The cases from other jurisdictions cited by Augustine provide no persuasive assistance because Arizant does not argue that Augustine's guilty plea in and of itself has estoppel effect. Instead, Arizant argues that it is the three sworn facts voluntarily made during the plea process that have estoppel effect. All cases cited by Augustine are distinguishable as none involved such sworn stipulated findings of fact.

For example, in Stidham v. Millvale Sportsmen's Club, a criminal defendant pleaded guilty to third degree murder. 618 A.2d 945 (Pa. Sup. Ct. 1992). In a subsequent

³ See also, Ray v. Stone, 952 S.W.2d 220, 224 (Ky. Ct. App. 1997) (giving collateral estoppel effect to guilty plea); Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 369 (2d Cir. 1995) (holding that a stipulation in a prior action had collateral estoppel effect in a subsequent action on the same facts); Fontneau v. United States, 654 F.2d 8, 10 (1st Cir. 1981) (holding that taxpayer was barred from relitigating the issue of fraud as determined in his criminal conviction based on guilty plea); Mayberry v. Somner, 480 F.Supp. 833, 838 (E.D. Pa. 1979) (stating that the majority rule is that a judgment of conviction, based on a guilty plea, is conclusive in a civil suit on all issues that would have been determined by a conviction after a contested trial); Ivers v. United States, 581 F.2d 1362, 1367 (9th Cir. 1978) (holding that the court must take the defendant's plea of guilty to be an admission of each and every essential element of the crime charged); United States v. Podell, 572 F.2d 31, 35 (2d Cir. 1978) (stating that it is "well-settled that a criminal conviction, whether by jury verdict or guilty plea, constitutes estoppel in favor of the United States in a subsequent civil proceeding as to those matters determined by the judgment in the criminal case"); United States v. Cripps, 460 F.Supp. 969, 975 (E.D. Mich. 1978) (holding that collateral estoppel effect of a prior criminal conviction in a subsequent civil proceeding is operative whether the conviction is obtained by a jury verdict or through a guilty plea); Nathan v. Tenna Corp., 560 F.2d 761, 763 (7th Cir. 1977) (stating that a criminal conviction based upon a guilty plea conclusively establishes for purposes of a subsequent civil proceeding that the defendant engaged in the criminal act for which he was convicted); Metros v. U.S. Dist. Ct. for the Dist. of Co., 441 F.2d 313, 316 (10th Cir. 1971) (stating that where a prior conviction resulted from a guilty plea, there is greater warrant for the application of collateral estoppel than a conviction based on a jury trial, because the defendant has admitted the truth of the charges contained in the indictment).

civil action, the criminal defendant's insurer argued that his guilty plea conclusively established specific intent, thus bringing his actions within a policy coverage exclusion. Id. at 950. Contrary to Augustine's argument that guilty pleas have no estoppel effect, the court held that the guilty plea conclusively established that the criminal defendant did shoot and kill the victim. Id. at 952-53. The court simply did not find that the guilty plea conclusively established the issue of intent. Id. at 951-52, 953.

In Aetna Cas. & Sur. Co. v. Niziolek, an insurer sued its insured to recover proceeds of a fire policy paid to the insured after the insured pleaded guilty to arson charges. 481 N.E.2d 1356 (Mass. 1985). The insurer argued that the guilty plea conclusively established the insured's intent, but because the plea at issue was not accompanied by stipulated and sworn admissions of fact, the court held that "because there have been no findings, a conviction after a plea of guilty does not present the possibility of inconsistent factual determinations." Id. at 1358, 1364. See also, Prudential Prop. & Cas. Co. v. Kollar, 578 A.2d 1238, 1240 (N.J. Sup. Ct. 1990) (refusing to apply collateral estoppel because insured's conviction was not necessarily based on a factual finding which would be decisive of whether he acted with intent, as there was no finding accompanying his plea that he actually started the fire); Brohawn v. Transam. Ins. Co., 347 A.2d 842, 845 (Md. Ct. App. 1975) (holding that the guilty plea was not conclusive on the issue of intent because testimony heard by the court before accepting the guilty plea revealed conflicting accounts of what occurred at the nursing home).⁴

⁴ Additional cases cited by Augustine are likewise distinguishable. In Peterson v. Maul, res judicata was asserted against a third party, not the criminal defendant. 145 N.W.2d 699, 704 (Wis. 1966). In Safeco Ins. Co. v. McGrath, the court limited its holding that a guilty plea does not have collateral estoppel effect to an Alford-type guilty plea, in

In Augustine's case, because there are sworn stipulated facts and ultimate factual findings, there is no question about Augustine's underlying conduct. That distinguishes this case from the "intent" cases cited by Augustine. Augustine specifically stipulated to the three facts and those facts preclude indemnification.⁵ Augustine's indemnification claim should have been decided as a matter of law.

B. The Trial Court Excluded the Evidence of the Very Crime For Which Augustine Seeks Indemnification

The conduct for which Augustine seeks indemnification was intentionally aiding and abetting the withholding of the TriSpan Letter from Southern Medical when it was known that the letter was material to Southern Medical. It is undisputed that such withholding was done by Tim Hensley, Augustine's subordinate, on August 16, 2000. Augustine admitted he aided and abetted that conduct. However, during trial, Augustine tried to disclaim any involvement in the August 2000 Southern Medical communications and made selective exculpatory comments about his dealings with Southern Medical. When Arizant attempted to impeach him on these issues, it was shut down time and time again.

1. Augustine denied involvement in the August 2000 Southern Medical communications

which the criminal defendant maintains his or her innocence. 708 P.2d 657, 660 (Wash. Ct. App. 1985).

⁵ Finally, Augustine cites a letter that Arizant sent its insurance carrier during a dispute over what legal fees (including Augustine's) the insurance carrier would cover under its policy. (Respondent's Brief at 17-18). Augustine argues that because Arizant sought insurance proceeds from its insurer, it cannot argue that estoppel applies to preclude Augustine from relitigating the facts underlying his guilty plea. *Id.* First, Arizant never sought reimbursement for its criminal fine as Augustine is here. Second, Arizant never argued it was not estopped from disputing the facts underlying the plea, but asked to be permitted to litigate whether its admitted conduct fell within one of the defined exclusions under the policy. (RA292).

Augustine argues that it was somehow inappropriate for Arizant to attempt to “introduce evidence of Hensley’s crime and then argue that Respondent was responsible in some way for that crime.” (Respondent’s Brief at 24). But this is the very definition of aiding and abetting.

Hensley, in pleading guilty on June 29, 2004, swore under oath to committing this crime on or about August 16, 2000. (A128). Minutes later, Augustine pleaded guilty to aiding and abetting Hensley’s August 16, 2000 crime. (A143). At trial, however, Augustine attempted to disclaim knowledge of or connection to Hensley’s actions and acted as though he had no idea when or how any crime was committed.⁶ (A656-58; A681-86). At the same time, Augustine was permitted to testify he personally told Southern Medical about the contents of the TriSpan letter, implying that such “disclosure” had also been in August 2000 when the crime was committed.

2. Arizant was not permitted to impeach Augustine after he opened the door

At trial, Arizant attempted to impeach and cross-examine Augustine using his own deposition; the transcript of the August 21, 2000 follow-up telephone call between Hensley and Southern Medical; Augustine and Hensley’s testimony from the June 29, 2004 hearing before the Federal District Court; and the transcript of Augustine’s January 2001 teleconference with Southern Medical. The trial court ruled that Arizant could not

⁶ Augustine argues that because his Misdemeanor Information states that the “aiding and abetting” of fraud occurred “on or about July 7, 2000,” Augustine’s conduct could have nothing to do with the actual TriSpan Fraud that occurred on August 16, 2000. However, here the Stipulation of Facts and sworn testimony, not the underlying complaint, are what is controlling. Those admitted facts establish that Augustine’s crime was the aiding and abetting of Tim Hensley in the August 16, 2000 nondisclosure of the TriSpan Letter to Southern Medical. (A92, 128, 143).

reference any of this through impeaching questions because the court viewed it as irrelevant.

Augustine baldly asserts that Arizant was not precluded from impeaching Augustine with his deposition. (Respondent's Brief at 27). Arizant did indeed identify where in the record Augustine testified inconsistently with his deposition (Appellants' Brief at 28-30; A681-82, 683-85, 686; A193, 207-08, 648-50) and where Arizant attempted and was not allowed to use the deposition testimony. (Appellants' Brief at 30; A665-66, 679-80, 684-85).

Augustine argues that it was proper for the trial court to refuse to allow Arizant to impeach Augustine with the recording/transcript of the August 21, 2000 telephone call because Augustine did not participate in that call. Again, of course Augustine did not participate in the call, otherwise he would have been charged with a direct crime, not aiding and abetting. The purpose of the impeachment was to show Augustine's involvement with Hensley before the call. Arizant was not permitted to do so, even after Augustine opened the door. (A659-60).

During trial, the trial court went so far as to preclude Arizant from even referencing the Southern Medical communications, such as the August 21, 2000 follow-up phone call. During trial, the sole basis of this broad ban on such cross-examination and impeachment was relevancy. (A659-661). However, even if the August 21, 2000 transcript was not admissible as substantive evidence, a point never reached in trial because of the early preemptive relevancy rulings, Arizant should have been allowed to ask about Augustine's knowledge of statements Hensley made about him in the August

21, 2000 transcript.⁷ See State v. Harris, 713 N.W.2d 844, 848 (Minn. 2006); Graffie v. Ryan, No. C3-00-157, 2000 WL 1468030, at *3 (Minn. Ct. App. Oct. 3, 2000) (otherwise admissible evidence may be used to impeach or cross examine a witness).

As to the June 29, 2004 transcript, Augustine argues that it was not appropriate for Arizant to ask Augustine what he learned about the August 2000 events in 2004. (Respondent's Brief at 26-27). This is not what Arizant argues. Hensley and Augustine testified back-to-back. Each testified about what happened in August 2000, not in 2004. Hensley testified that on or about August 16, 2000, he intentionally withheld the TriSpan letter from Southern Medical. (A128). Directly after, Augustine testified that he aided and abetted that very withholding of the TriSpan letter. (A143). Yet Arizant was precluded from asking Augustine about that testimony when he claimed at trial to have had no idea about what Hensley did in August 2000. (A685-86).

Finally, Arizant attempted to cross-examine Augustine after he said he told Southern Medical about the contents of the TriSpan letter the first time he talked to Southern Medical. He did so without date or context, leaving the impression he had told Southern Medical about the content of the TriSpan letter in August 2000. (A883). Arizant sought to use the transcript of the January 2001 telephone call between Augustine and Joe Edwards, an employee of Southern Medical, to demonstrate Augustine's "disclosure" came five months after the fraud occurred in August 2000. (A54, 56-57, 61-62). By that time, Augustine was engaged in secret bribe discussions with Joe Edwards of Southern

⁷ In post trial rulings, the court added foundation and hearsay as additional bases to exclude the August 21, 2000 and January 2001 telephone conferences. (A425-26). These *ex post facto* rulings do not support a preclusion on using the evidence for impeachment purposes.

Medical who affirmatively stated he would not disclose such information to Southern Medical. (A54-55, 57, 66-67). When Augustine testified that he told Southern Medical about the letter, Arizant should have been allowed to cross-examine him about the context and the date of such alleged “disclosure.”

In sum, Arizant attempted to introduce evidence of the very crime for which Augustine was convicted of aiding and abetting. The trial court ruled the evidence was irrelevant. This was reversible error. The trial court committed further reversible error by not allowing Arizant to impeach Augustine with this evidence once he opened the door. While Arizant asserts that the evidence was highly relevant as substantive evidence, even otherwise inadmissible evidence may be used to impeach a witness, and its admissibility has no bearing on its use for impeachment purposes.⁸

II. APPRAISAL CHALLENGE

Augustine does not contest that under Minnesota law, where parties to a contract agree to hire a third-party appraiser to determine the value of something, the result of the appraisal is conclusive and cannot later be judicially challenged except in very limited circumstances. Sanitary Farm Dairies, Inc. v. Gammel, 195 F.2d 106, 113 (8th Cir. 1952) (applying Minnesota law). Augustine does, however, completely misrepresent the narrow exception to this black letter preclusion on challenging a contractual appraisal by claiming an appraisal may be challenged “if (a) it is not conducted by an independent

⁸ Regarding the jury instruction on “good faith,” Arizant does not dispute that the trial court instructed the jury that “good faith means honesty in fact in the conduct of the act or transaction concerned.” Where Arizant finds error is the trial court’s refusal to instruct the jury on the definition of “good faith” as it relates specifically to intentional fraud and with respect to the definition of “honesty,” which was necessary. (*E.g.*, A339 (Arizant’s proposed jury instruction)).

appraiser, (b) if the appraiser does not use proper applicable appraisal process or (c) the appraisal was fraudulent or contains gross errors.” (Respondent’s Brief at 35) (citing Sanitary Farm Dairies, 195 F.2d at 114-15). But “(a)” and “(b)” do not appear at all in the case Augustine cites, and “(c)” is, at best, a gloss over the true standard.

In reality, the court in Sanitary Farm Dairies held that an appraisal is, “equally with an arbitration result, not open to escape by either [party], except where it is capable of impeachment for ‘fraud, or such mistake as would imply bad faith, or a failure to exercise honest judgment.’” Sanitary Farm Dairies, 195 F.2d at 113-14. The court further held:

Thus, such an appraisal result cannot be judicially examined as a mere question of adequacy or inadequacy of amount but only as an issue of moral infirmity In other words, under Minnesota law, an appraisal or evaluation which the parties to a contract have provided for, and whose result they have bound themselves to accept, is conclusive upon them, except as it is vulnerable for moral taint, including mistake so fundamental or penetrative as to require its rejection, not as a question of inadequate factual result but as a matter of irresponsible legal product.

Sanitary Farm Dairies, 195 F.2d at 114 (citations omitted). Augustine’s appraisal challenge was and is just that—a question as to adequacy of amount. Nowhere before or during trial did Augustine present any evidence whatsoever to establish corruption on the part of the appraiser or a mistake so gross as to impute bad faith or “moral infirmity” to the appraisal result. The trial court erred in allowing Augustine to submit his appraisal challenge to the jury.

B. The Parties Agreed that the Annual Appraisal Was Determinative

The threshold issue on which the trial court erred during summary judgment and in post-trial motions was its holding that “[g]enuine issues of material fact exist as to

whether the Separation and Release Agreement signed between [the parties] . . . expressly stipulated that the appraisal was to be conclusive.” (A320). The court applied the wrong standard. The appropriate standard of law is much lower. In its review, all the court needed to determine is that it is “fairly inferable” from the plain language of the Separation Agreement that the parties agreed that the appraisal was to be determinative.

Augustine discusses PVI, Inc. v. Ratiopharm, 253 F.3d 320, 324 (8th Cir. 2001) in an effort to distinguish the language used in the 2002 Separation Agreement because in PVI the agreement under review provided that the expert’s determination “shall be final, binding and conclusive.” But Augustine fails to point out that the contractual language reviewed in Sanitary Farm Dairies, the controlling Minnesota case, simply provided that “an audit shall be made by an independent auditor . . . and the earnings determined by such audit shall be controlling.” 195 F.2d at 114. Here, in nearly identical language, the 2002 Separation Agreement provides:

(b) Determination of Fair Market Value. For purposes of this Agreement, the fair market value of Common Stock (the “Fair Market Value”) ***will be determined*** as follows:

(i) Unless the Common Stock is registered . . . the Company will complete an appraisal of the value of the Common Stock, which appraisal will be conducted by an appraiser selected by the Board. The Fair Market Value of the Common Stock ***will be an amount determined*** by such appraisal.

(A245-56) (emph. added).⁹

There simply is nothing ambiguous about the contractual requirement that the Fair Market Value of Arizant’s stock “will be determined” by an appraisal and that the value

⁹ Minnesota courts make clear that the use of the phrase “will be” is mandatory language. For example in City of Morris v. Duinick Bros. Inc., 531 N.W.2d 208 (Minn. Ct. App. 1995), the court construed and enforced a contract containing language that all disputes “will be decided by arbitration . . .”

“will be an amount determined by such appraisal.”¹⁰ Had the court applied the appropriate standard, it should have, as a matter of law, found that it was beyond “fairly inferable” from the 2002 Separation Agreement that the parties intended the appraisal to be determinative.

D. The Appraisal Was Not the Product of Fraud

Even now, Augustine goes no further than arguing that the “appraisal was flawed and inaccurate.” (Respondent’s Brief at 11). In fact, Augustine presented nothing in his argument whatsoever to claim that the appraisal was a product of fraud or was somehow “morally tainted.” Instead, Augustine set forth several irrelevant points with no effort to demonstrate how any could compromise the integrity of the Harris Nesbitt appraisal to the level required for challenging the appraisal in court.

Augustine argues that Harris Nesbitt was not truly independent because an affiliate business line of Harris Nesbitt had historically loaned Arizant money and because Arizant paid \$150,000 for the appraisal. (Respondent’s Brief at 11-12). Augustine offers nothing, however, to demonstrate how that compromised Harris Nesbitt’s independence or somehow made the appraisers impartial.

Augustine claims that Harris Nesbitt, a well-respected investment banking firm, lacked the qualifications to perform an appraisal. Of course, Augustine happily agreed with the validity of valuations performed by Piper Jaffrey, another investment bank, and

¹⁰ Augustine posits that he offered parol evidence at trial as to the meaning of the appraisal clause. This position lacks merit for two reasons: (1) Augustine, himself, sought to preclude the submission of parol evidence as to the meaning of the clause and (2) Augustine simply offered his own, internal subjective interpretation of the clause, not evidence of anything discussed or agreed to between the parties in negotiating the clause. That is not “parol” evidence and could not be given weight in determining the meaning of the appraisal clause.

Harris Nesbitt for fiscal years ending in 1998-2003—despite the fact that Piper Jaffrey and Harris Nesbitt in 2003 were no more in the “appraisal business” than Harris Nesbitt was in 2004. (A702, A704, A706). Further, Harris Nesbitt’s lead appraiser testified that the firm frequently performs business valuation work as part of its regular course of business. (T. 1195-96; 1200-1202).

Augustine claims that the appraisal was “flawed” in that Harris Nesbitt did not expressly follow certain standards that some, but not all, appraisers use as a guide in conducting appraisals, referred to as “USPAP.” Of course, nowhere in the Separation Agreement is any given appraisal standard specified or required, and, importantly USPAP was not followed in the 1998 to 2003 appraisals—appraisals he did not contest. (A702, A704, A706). Further, even Augustine’s own hired expert testified that he had no disagreement with Harris Nesbitt’s appraisal methods except for its decision not to increase share value in anticipation of a potential sale. (T.558-68).

Augustine argues that a draft engagement letter penned by Harris Nesbitt’s attorneys demonstrated that Arizant instructed Harris Nesbitt not to consider the potential sale of Arizant. Augustine ignores, however, the irrefuted testimony that, on Arizant’s insistence, that language be stricken and that the actual Harris Nesbitt appraisers themselves testified they received no instruction from Arizant whatsoever on how to conducted the appraisal. (T1243-48, 1258-59).

Augustine discusses that Marie Humbert, in her regular communications with Harris Nesbitt, noted to Harris Nesbitt that the appraisal would have a “significant impact” on Augustine’s bonus and her later communication to Harris Nesbitt that the

Company had accrued for his bonus based on a value of \$39 per share. Augustine offers no explanation or argument that those statements had any impact whatsoever on Harris Nesbitt's analysis and fails to point out that the lead Harris Nesbitt appraiser testified unequivocally that he was not influenced in any manner by Arizant. (T.1258-59).

Augustine points out that Arizant, prior to the appraisal, had received offers to purchase the entire company at a per-share value of \$71.78. Augustine ignores, however, the irrefuted testimony that as of the appraisal date, March 31, 2004, there were no longer any buyers interested in purchasing Arizant unless and until the Department of Justice action against it was resolved—something that did not happen for months to come. (A625-33). Augustine further fails to discuss the trial testimony of an actual Arizant shareholder who was in the market Arizant shares near the time of the appraisal who said that without the DOJ Matter resolved, the shares were not worth trading above \$16.00. (T.1188-91).

Augustine has simply provided no evidence of the kind of fraud or malfeasance on the part of Harris Nesbitt that Minnesota law requires in order for him to judicially challenge the Harris Nesbitt appraisal. Instead, he attempted to, and the trial court erroneously allowed him to, submit a claim to the jury that the appraisal was inadequate in terms of value. That is precisely what established Minnesota law precludes.

E. The Trial Court's Jury Instructions and Special Verdict Form Were Inadequate

The trial court submitted Augustine's appraisal challenge to the jury purportedly on the ground that a fact issue existed as to whether the parties agreed that the appraisal was to be conclusive. But the trial court did not submit that question to the jury. Nor did

the trial court instruct the jury on the controlling law under Sanitary Farm Dairies, Inc. The trial court allowed Augustine to ask the jury to completely disregard the appraisal and with nothing more than a bare “breach of contract” jury instruction.

Moreover, the trial court refused to include on the special verdict form the threshold question as to the meaning of the 2002 Separation Agreement and whether it was fairly inferable that the parties intended to be bound by the appraisal—the very question the trial court claimed was to go to the jury. By submitting Augustine’s appraisal challenge to the jury and doing so with inadequate instruction the trial court committed reversible error.

III. ATTORNEY FEES

Arizant does not dispute that Minn. Stat. § 302A.467 provides a court with some discretion in awarding attorney fees to a shareholder who brings suit for corporate wrongs that cause damage to that person in his or her capacity as a shareholder. That discretion, however, is restricted by the statute itself, which was intended to aid shareholders, not corporate officers and directors. Augustine does not point to a single case in which a corporate officer or director, who sued the company in his or her capacity as an officer or director, received attorney fees under the statute. It is only those claimants suing in their capacity as shareholders that have received attorney fees.

Augustine’s reliance on PJ Acquisition Corp. v. Skoglund, 453 N.W.2d 1 (Minn. 1990) only underscores the point. Even that case was brought by a corporation, as shareholder of the defendant corporation, against officers and directors of the defendant corporation, alleging various acts of misconduct. Id. at 2 (referring to the matter as a

“shareholder complaint”). Furthermore, Justice Yetka’s dissent is of no avail to Augustine. He argued simply that when a shareholder brings an action against the corporation, it does not matter whether it is brought directly or derivatively for standing purposes. Id. at 13-14. Both types of suits necessarily involve a claimant suing in the capacity as shareholder. Augustine’s claims did not and do not. Minn. Stat. §302A.467 is inapplicable and it was error to use it as a basis to award Augustine his fees and expenses.

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Respectfully Submitted,

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