

No. A06-1238

State of Minnesota
In Supreme Court

Scott D. Augustine, M.D.,

Appellant,

v.

Arizant, Inc., Arizant Healthcare, Inc.,
and Augustine Medical, Inc.,

Respondents.

BRIEF OF APPELLANT SCOTT D. AUGUSTINE, M.D.

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LEGAL ISSUE

DID THE COURT OF APPEALS ERR IN HOLDING THAT APPELLANT'S GUILTY PLEA CONCLUSIVELY BARRED INDEMNIFICATION?

The Court of Appeals held that, despite the existence of substantial evidence in the record that Appellant had acted in good faith, Respondents were entitled to summary judgment because Dr. Augustine's guilty plea "conclusively" barred him from seeking indemnification.¹

Most apposite authority:

- Minn. R. Civ. P. 56
- Minn. Stat. § 302A.521, subd. 2(b)
- Glens Falls Group Ins. Corp. v. Hoium, 200 N.W.2d 189 (Minn. 1972)

STATEMENT OF THE CASE

Dr. Scott Augustine, an anesthesiologist and inventor, founded Augustine Medical, Inc. (the "Company"). In 2002, Dr. Augustine left the Company pursuant to a Separation Agreement. In 2003, the United States charged the Company, Dr. Augustine, and others with Medicare fraud. Dr. Augustine contested the charges at trial, which was expected to last four months. However, in the middle of the trial, the government took the highly unusual step of offering to dismiss all felony charges against Dr. Augustine if he agreed to plead guilty to a single misdemeanor. He did so and paid a fine. Thereafter, Dr. Augustine commenced this action seeking indemnification for his misdemeanor fine pursuant to Minn. Stat. § 302A.521.

¹ Respondents made additional arguments in the Court of Appeals challenging the jury verdict and judgment on the indemnification issue, but chose not to file a cross-petition for review of those issues pursuant to Minn. R. Civ. App. P. 117, subd. 4.

Respondents moved for summary judgment on the ground that Dr. Augustine's guilty plea conclusively barred him from seeking indemnification. Dr. Augustine opposed the motion. The trial court ruled that issues of material fact precluded summary judgment. Thereafter, the case was tried to a jury. During the two-week trial, the jury heard evidence of the underlying events upon which the criminal charges were based, Dr. Augustine's guilty plea to the misdemeanor, and the full circumstances surrounding the plea. Based upon a consideration of all of the evidence, the jury determined that Dr. Augustine met the requirements of the indemnification statute, including that he had acted in good faith.

The Court of Appeals reversed, holding that Dr. Augustine's guilty plea to the misdemeanor conclusively barred Dr. Augustine from seeking indemnification. This Court granted limited review of the question "whether petitioner's guilty plea conclusively bars indemnification."

STATEMENT OF THE FACTS

I. DR. AUGUSTINE FOUNDED AUGUSTINE MEDICAL.

Dr. Augustine is an anesthesiologist and an inventor of products designed to improve patient care. T. 747, 3-5 (A 438); 749, 10-20 (A 439).² He invented a heated surgical blanket called the "Bair Hugger." T. 750, 15-751, 13 (A 440). The device is used to warm the patient during and after surgery, which results in less discomfort, faster healing time, and less risk of infection. T. 751, 22-752, 20 (A 441). In 1987, he gave up his anesthesiology practice and founded Augustine Medical to further develop the

² "T" refers to the page and line of the trial transcript. "Tr. Ex." refers to trial exhibit. "A" refers to Appellants' Appendix.

product. T. 754, 12–755, 6 (A 444). The Bair Hugger has been very successful and is now used in operating rooms throughout the country. T. 752, 18–753, 2 (A 442).

Dr. Augustine served as the CEO of Augustine Medical until July 2002. T. 769, 10-14 (A 446). During that time, he continued to invent new healthcare devices, including a device designed to manage chronic wounds by maintaining consistent levels of heat and moisture, called “Warm-Up Wound Therapy” (“Warm-Up”). T. 785, 10–786, 22 (A 447).

II. THE COMPANY HIRED EXPERTS TO HELP IT UNDERSTAND AND FOLLOW THE MEDICARE RULES REGARDING WARM-UP.

Unlike the Bair Hugger, which is used primarily in hospitals, Warm-Up is designed for use in other settings such as nursing homes, home healthcare, and outpatient rehabilitation facilities. T. 785, 1-7 (A 447). This distinction meant that different and far more complex rules applied to Medicare reimbursement for Warm-Up than applied to the Bair Hugger blanket. *Id.*

The Company worked hard to understand and comply with the Medicare billing rules. T. 791, 18–792, 2 (A 451); 864, 3-23 (A 454); 201, 6–202, 9 (A 424); 617, 15-618, 7 (A 428). It created the position of Director of Reimbursement and hired Paul Johnson to fill the position. T. 792, 18-22 (A 452). The Company retained Philip Zarlengo – an outside consultant who specialized in Medicare reimbursement for medical devices – to provide guidance on reimbursement for Warm-Up. T. 793, 4-17 (A 453). Randy Benham, the Company’s in-house lawyer, who had previously worked at Oppenheimer, Wolff and Donnelly, LLP, also helped the Company determine and follow the reimbursement requirements for Warm-Up. T. 1071, 4–1072, 6 (A 464). Through Mr.

Benham, the Company hired the Oppenheimer law firm to serve as its primary outside counsel on Medicare reimbursement issues, with the Vinson & Elkins law firm serving as counsel on certain issues. T. 864, 11-23 (A 454). The attorneys provided a series of detailed advice letters and oral opinions to the Company about reimbursement for Warm-Up under the Medicare program. Id.

III. IN 2002, DR. AUGUSTINE ENTERED INTO A SEPARATION AGREEMENT THAT REQUIRES THE COMPANY TO INDEMNIFY DR. AUGUSTINE.

Dr. Augustine left the Company in December 2002. At that time, he and the Company entered into a Separation and Release Agreement (“Separation Agreement”). Tr. Ex. 81 (A 351). Paragraph 13 of the Separation Agreement requires the Company to indemnify Dr. Augustine consistent with Minnesota law:

Indemnification. The Company agrees to indemnify and hold Augustine harmless from and against all attorney’s fees, costs, disbursements and damages that he may incur as a result of and relating to any act or omission that he allegedly committed while serving as an officer, director and/or employee of the Company to the extent, and subject to the exceptions, that Minnesota law provides.

Tr. Ex. 81, p. 10 ¶ 13 (A 360).

IV. IN JANUARY 2003, THE COMPANY WAS INDICTED FOR MEDICARE FRAUD.

Notwithstanding the steps that the Company took to obtain guidance from legal counsel and expert consultants on the Medicare billing rules applicable to Warm-Up, it became the target of a federal criminal investigation into the advice it had given its

customers regarding Medicare reimbursement for the device.³ On January 24, 2003, the United States charged Augustine Medical, Philip Zarlengo, Paul Johnson, and Timothy Hensley (the Company's National Sales Manager) with five felony counts, including conspiracy to defraud the United States and mail fraud ("the Federal Case"). Dr. Augustine was not charged. Six months later, however, on June 29, 2003, the United States filed a Superseding Indictment adding Arizant, Inc.,⁴ Mr. Zarlengo's consulting business, Mr. Benham and Dr. Augustine as defendants in the Federal Case. Tr. Ex. 114 (A 363).

V. ON MAY 10, 2004, THE COMPANY PLEADED GUILTY TO A FELONY, PAID A FINE, AND SOUGHT INDEMNIFICATION FROM ITS INSURER.

On May 10, 2004, on the eve of trial, the Company entered into a plea agreement with the government. Tr. Ex. 239 (A 391). The Company pleaded guilty to conspiracy to defraud the United States as charged in the Superseding Indictment – a felony. (*Id.*) The Company paid criminal and civil fines. T. 622, 23–623, 21 (A 432); 214, 11-15 (A 427).

The Company subsequently filed a claim against its insurer, Chubb, to recover amounts paid in connection with the guilty plea. T. 207, 10-25 (A 426); 626, 19-628, 21 (A 434). Chubb refused to provide coverage based on an "intentional acts" exclusion in the policy. In response, the Company cited this Court's holding in Glens Falls Group Insurance Corporation v. Hoiium, 200 N.W.2d 189, 192 (Minn. 1972), for the proposition

³ The Company subsequently became aware that the government had targeted "thousands" of healthcare companies and had recovered billions of dollars in fines relating to Medicare. T. 620, 22–621, 13 (A 430).

⁴ After Dr. Augustine left the Company, Arizant, Inc. became the parent of Augustine Medical and Arizant Healthcare, Inc.

that a guilty plea is not conclusive evidence of the right to indemnification. The Company made the following argument:

To begin, [Chubb's] reliance on the Plea Agreement to establish the application of [the] intentional acts exclusion is misplaced. Under well-established Minnesota law, a guilty plea is not conclusive evidence of the application of the exclusion. Glens Falls Group Insurance Corporation v. Hoiium, 200 N.W.2d 189, 192 (Minn. 1972). An insured has the right to establish that it did not violate the law and to explain the inducement that led it to enter the plea. Id.

See letter from the Company's attorney to Chubb's attorney (June 24, 2004) (A 415).

The Company told Chubb that it pleaded guilty to avoid a "high profile and costly trial," and that even though it admitted to "knowingly and intentionally" committing the crime, it did not knowingly or intentionally violate the law:

Here, Arizant and AMI did not intentionally violate the law, and they settled when faced with a high profile and costly trial after their carrier wrongfully refused to defend.

(Id.) The Company eventually entered into a settlement agreement with Chubb.

VI. ALL FELONY CHARGES AGAINST DR. AUGUSTINE WERE DISMISSED.

Dr. Augustine proceeded to contest the charges against him at trial, which was scheduled to last three to four months. T. 788, 17-24 (A 449). In the middle of trial, before the prosecution had rested its case and before the defense called a single witness – the government offered to dismiss the felony indictment against Dr. Augustine in exchange for his plea to a single misdemeanor. T. 789, 1-16 (A 450); 868, 22-869, 19 (A 455). The government was then faced with proposing a misdemeanor to which Dr. Augustine would plead guilty.

A. The Government's Proposed Misdemeanor: Failure to Distribute the "TriSpan Letter" to Southern Medical Distributors.

TriSpan Health Services ("TriSpan"), as a "fiscal intermediary" of the Medicare program, assists the federal government in administering the program. TriSpan originally notified the Company that Medicare would reimburse for Warm-Up. T. 632, 9-11 (A 437); 877, 10-23 (A 459). After sending that notification, and as part of the government's "sting" operation, TriSpan sent a letter to the Company stating that Warm-Up was "investigational" ("TriSpan letter"). Tr. Ex. 39 (A 345). The term "investigational" means that the product has not been approved by the Food and Drug Administration. T. 875, 23-876, 16 (A 457). However, it was undisputed that Warm-Up had been approved by the Food and Drug Administration and, therefore, Warm-Up was not investigational. In other words, it was undisputed that the TriSpan letter was wrong. T. 875, 23-876, 16 (A 457).

The TriSpan letter was reviewed by the Company's executive management team, which included the Company's in-house lawyer. Tr. Exs. 42, 43, 45, 46 (A 346, 348, 349, 350). Because the letter was not accurate, the Company decided not to distribute the letter to potential purchasers of Warm-Up. T. 878, 23-24 (A 460).

The Company did, however, follow up on the TriSpan letter. Dr. Augustine himself called and spoke with the author of the letter, Dr. May. T. 879, 12-13 (A 461). Dr. Augustine told Dr. May that Warm-Up was not investigational, and confirmed the conversation in a letter. T. 879, 12-880, 19 (A 461).

As part of the "sting," the federal government set up an undercover business front known as Southern Medical Distributors, which posed as a business interested in

purchasing Warm-Up. Southern Medical arranged a telephone call with Dr. Augustine. During the call, Dr. Augustine told Southern Medical that the Company received the TriSpan letter and that the letter incorrectly referred to Warm-Up as investigational. In other words, while Southern Medical was not given a copy of the letter, it was told exactly what was in the letter. T. 883, 4-23 (A 463).

The government proposed that Dr. Augustine plead guilty to participating in (aiding and abetting) the decision not to distribute the TriSpan letter to Southern Medical. As set forth above, Dr. Augustine had specifically told Southern Medical about the letter and its content, but it was true that Dr. Augustine participated in the decision not to distribute the letter itself.

B. Dr. Augustine Pleaded Guilty to the Government's Proposed Misdemeanor Charge.

To bring the ordeal of a four-month trial to an end, and to remove the cloud of the felony charges, Dr. Augustine agreed to plead guilty to the misdemeanor of participating in the decision not to distribute the TriSpan letter to Southern Medical. The agreement was described in a Stipulation of Facts:

1. The Defendant was CEO of Augustine Medical, Inc. ("AMI"), a Minnesota corporation that manufactured and sold Warm-Up Active Wound Therapy ("Warm-Up").
2. The Defendant knew that claims for Warm-Up were periodically submitted by others for reimbursement to the Medicare program, a Federal health care program.
3. On or about June 27, 2000, Defendant Scott D. Augustine received a letter from TriSpan Health Services, a fiscal intermediary of the Medicare program which had earlier approved coverage for Warm Up. TriSpan had now determined that Warm Up was

investigational. Defendant believed that this determination was material.

4. Shortly thereafter, the Defendant knowingly and intentionally aided and abetted others in deciding not to disclose the June 27th letter to Southern Medical Distributors.

5. By entering into this Stipulation of Facts, the Defendant admits that the facts set forth herein establish that he knowingly and intentionally aided and abetted the offense 42 U.S.C. Section 1320a-7b(a)(2) as set forth in an Information filed herewith and is in fact guilty of that offense.

Tr. Ex. 1270 (A 418). This narrow factual basis excluded the majority of the allegations originally asserted against Dr. Augustine in the Superseding Indictment. Under the terms of his plea agreement, Dr. Augustine paid a fine of \$2 million.⁵

VII. THE COMPANY REJECTED DR. AUGUSTINE'S REQUEST FOR INDEMNIFICATION AND THEREAFTER DR. AUGUSTINE COMMENCED THIS ACTION.

Dr. Augustine requested that the Company indemnify him for his fine pursuant to Minnesota's indemnification statute, § 302A.521. Even though the Company had previously taken the position with its insurer that the Company's own guilty plea did not conclusively bar it from seeking indemnification, it took the position that Dr. Augustine's plea conclusively barred him from seeking indemnification. Dr. Augustine filed this case on December 15, 2004.

⁵ Respondents have asserted that the amount of Appellant's fine had independent significance. However, the Company believed that the government was asking for large fines because it knew that the Company was going to be sold and that the money the shareholders (including Dr. Augustine) were to receive would be available to pay fines. T. 192, 19-195, 13 (A 420).

A. Respondents Moved for Summary Judgment.

On January 18, 2005, before any discovery had been taken, Respondents moved for summary judgment.⁶ Respondents argued that Dr. Augustine's guilty plea alone conclusively barred him from seeking to prove that he acted in good faith. Dr. Augustine opposed the motion. See Pl.'s Mem. in Opp'n to Def.'s Motion for Partial Summ. J. (A 2). Dr. Augustine argued that Minn. Stat. § 302A.521 subd. 2(a) specifically provides that a "conviction ... does not, of itself, establish that the person did not meet the criteria ... [for indemnification]. (A 21). Dr. Augustine also cited Glens Falls, 200 N.W.2d 189 (1972) for the rule that a guilty plea is not conclusive evidence of bad faith. (A 29).

Finally, Dr. Augustine submitted substantial evidence to support the conclusion that he acted in good faith. See February 17, 2005 Affidavit of Scott D. Augustine (A 34); Affidavit of Emily Duke (A 55). The evidence included a detailed description of Dr. Augustine's conduct and state of mind, the facts and circumstances underlying the plea, and the reason Dr. Augustine pled guilty.

B. Based on the Evidence in the Record, the District Court Concluded that Fact Issues Precluded Summary Judgment.

On a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, and summary judgment may be granted only if "there is no genuine issue as to any material fact." Minn. R. Civ. P. 56.03; State Farm Fire and Cas. v. Aquila, Inc., 718 N.W.2d 879, 883 (Minn. 2006). The trial court

⁶ Respondents filed the motion for summary judgment with their Answer to the Complaint. (A 1).

considered the law and Dr. Augustine's evidence of his good faith. In denying the motion, the trial court ruled:

Plaintiff's prior plea to a misdemeanor does not, of itself, resolve the issue of indemnification which leaves issues of material fact. See Minn. Stat. § 302A.521, subd. 2(b).

(A 343).

VIII. THE JURY FOUND THAT DR. AUGUSTINE ACTED IN GOOD FAITH.

The case proceeded to trial. The jury heard evidence of the underlying events upon which the criminal charges were based, Dr. Augustine's guilty plea, and the circumstances surrounding the plea. After the two-week trial, the jury found that Dr. Augustine met all of the elements of the indemnification statute. (A 467). The jury found that Dr. Augustine acted in good faith, did not receive a personal benefit from his actions, had no reasonable cause to believe his conduct was unlawful, and reasonably believed his conduct was in the best interests of the Company.

STANDARD OF REVIEW

In an appeal from summary judgment, review is *de novo*. The role of the appellate court is limited to "review[ing] two determinations: whether a genuine issue of material fact exists, and whether an error in the application of the law occurred." Fairview Hosp. and Health Care Servs. v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn. 1995); Baker v. Chaplin, 517 N.W.2d 911, 914 (Minn. 1994), cert. denied, 513 U.S. 1077 (1995). "It is axiomatic that on a summary judgment motion a court may not weigh the evidence or make factual determinations, but must take the evidence in a light most favorable to the nonmoving party." Fairview Hosp., 535 N.W.2d at 341; Abdallah v.

Martin, 65 N.W.2d 641, 646 (Minn. 1954) (a reviewing court “must take a view of the evidence most favorable to the one against whom the motion was granted.”). Any doubts as to whether an issue of material fact exists must also be resolved in favor of the non-moving party. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 111 (Minn. 1992).

A court should exercise “great care” in granting a motion for summary judgment “so as to permit a litigant to have a right to a trial if there is a reasonable doubt as to the facts.” Abdallah, 65 N.W.2d at 646. Thus, summary judgment is authorized “only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, [and] that no genuine issue remains for trial ... the purpose of [summary judgment] is not to cut litigants off from their right of trial by jury if they really have issues to try.” Id. (citing Sartor v. Arkansas Gas Corp., 321 U.S. 620 (1944)).

The construction of a statute is a question of law. Reiter v. Kiffmeyer, 721 N.W.2d 908, 910 (Minn. 2006). To the extent the Court’s review involves the interpretation of statutes, that review is also *de novo*. Boatin v. Lafleur, 591 N.W.2d 711, 714 (Minn. 1999).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN APPLYING THE LAW BY CONCLUDING THAT APPELLANT’S MISDEMEANOR PLEA “CONCLUSIVELY” ESTABLISHED BAD FAITH.

If a statute is “plain and unambiguous,” the Court applies the words of the statute according to their plain meaning and does not engage in further construction. Reiter v. Kiffmeyer, 721 N.W.2d at 910. Section 302A.521 of the Minnesota Statutes is plain and

unambiguous. It provides that a corporation must indemnify any director, officer or employee for costs incurred in connection with his or her conduct if the person:

- (1) Has not been indemnified by another organization ... for the same [costs] ... incurred by the person in connection with the proceeding with respect to the same acts or omissions;
- (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) ... reasonably believed that the conduct was in the best interests of the corporation

Minn. Stat. § 302A.521, subd. 2(a). See also Minn. Stat. § 302A.521 reporter's note (1981) (“...[I]f the person meets those criteria, and if the articles or bylaws do not prohibit or limit indemnification, the corporation must indemnify that person...”). The statute requires indemnification for “judgments, penalties, fines, ... settlements, and reasonable expenses, including attorneys’ fees and disbursements ...” Minn. Stat. § 302A.521, subd. 2(a).

A. Section 302A.521 Plainly States that a Conviction Does Not Conclusively Bar Indemnification.

Section 302A.521, subd. 2(b) expressly provides that a conviction in a criminal proceeding does not bar eligibility for indemnification:

The termination of a proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent does not, of itself, establish that the person did not meet the criteria....

See also Minnesota Practice, 20A § 34.14(a) (“... all monetary exposure from a proceeding, including monetary exposure for criminal acts, is covered if the

representative is acting in his or her official capacity and satisfies the statutory standards.”).

The reporter’s note to § 302A.521 confirms that one who is convicted and pays a fine is entitled to an “independent determination” of whether he is entitled to indemnification:

The trend in recent years has been to move away from a judicial determination [of innocence] and towards a non-judicial internal determination of the nature of the conduct.

* * *

Subdivision 2(b) merely states that an unsuccessful defense of a proceeding does not automatically bar eligibility for indemnification. Instead, an independent determination of whether or not the criteria for eligibility have been satisfied is to be made as set forth in subdivision 6.

Finally, even though one who is convicted of a crime may seek indemnification, he still must meet very “stringent” criteria for indemnification, leaving little chance that bad conduct will be encouraged or rewarded:

... the requirement that the person must meet specific, stringent criteria associated with the standard of conduct before indemnification will be permitted certainly forecloses a reward for bad conduct.

Minn. Stat. § 302A.521 reporter’s note (1981).

B. The Plain Meaning of Minn. Stat. § 302A.521 is Consistent with this Court’s Holding in Glens Falls.

Section 302A.521 provides that, despite a conviction, one is entitled to an “independent determination” of whether his conduct qualifies for indemnification. Section 302A.521 does not distinguish between a conviction after a trial on the merits or

a plea. However, for at least two reasons, the right to an independent determination of whether one meets the criteria for indemnification is particularly appropriate in the context of a plea agreement. First, as the Eighth Circuit has noted, “[p]ersons plead guilty for many reasons – pangs of conscience, remorse, desire to get the ordeal over with, a hope for leniency and other innumerable reasons” Ford v. United States, 418 F.2d 855, 859 (8th Cir. 1969). Second, when an individual pleads guilty, “no issue [is] ‘actually litigated’ ... since [the defendant has] declined to contest his guilt in any way.” Haring v. Prosise, 462 U.S. 306, 316 (1983). See also, Ohio v. Johnson, 467 U.S. 493, 500 n.9 (1984). (“[T]he taking of a guilty plea is not the same as an adjudication on the merits after full trial”)

For years, Minnesota courts have drawn a clear distinction between the estoppel effect of a conviction based on a guilty plea and a conviction after a trial on the merits. Compare Traveler’s Ins. Co. v. Thompson, 163 N.W.2d 289, 296 (Minn. 1968) (holding that conviction after trial on the merits had collateral estoppel effect in subsequent civil case) with Glens Falls Ins. Co. v. Hoium, 200 N.W.2d 189, 192 (Minn. 1972) (holding that plea of guilty to assault in criminal case did not have preclusive effect on issue of intent in subsequent civil case); see also Illinois Farmers Ins. Co. v. Reed, 647 N.W.2d 553, 559 (Minn. Ct. App. 2002) (drawing a distinction between the estoppel effect of a conviction based on a full trial on the merits and a conviction based on a plea agreement), rev’d on other grounds, 662 N.W.2d 529 (Minn. 2003).

Glens Falls is directly applicable to this case. In Glens Falls, Sheehan injured Hoium in a bar room altercation. Sheehan was prosecuted for and plead guilty to

aggravated assault. As part of his plea, Sheehan admitted that he “intentionally inflicted great bodily harm” on Hoium. 200 N.W.2d at 191. Hoium subsequently sued Sheehan in a civil action. Sheehan tendered the claim to his liability insurer, Glens Falls. The insurer denied coverage based on an “intentional acts” exclusion in the policy. This Court held that while the plea may be evidence that Sheehan acted intentionally, it is not “conclusive evidence”:

... we hold that, although Sheehan’s plea of guilty may be received in evidence as an admission, it is not conclusive evidence that he committed an intentional tort. Pursuant to our holding in Jankowski, Sheehan may show, if he can, the inducements which led him to enter his plea.

200 N.W.2d at 192.

C. The Court of Appeals’ Decision in this Case is Directly Contrary to Minn. Stat. § 302A.521 and the Holding of Glens Falls.

Without citing either Minn. Stat. § 302A.521, subd. 2(b), or Glens Falls, the Court of Appeals held that Dr. Augustine’s conviction had an implicit admission of bad faith, which required the trial court to grant summary judgment in favor of Respondents.⁷ That conclusion was wrong. As set forth above, pursuant to Minn. Stat. § 302A.521 subd. 2(b), a conviction “does not, of itself, establish that the person did not meet the criteria.” Rather, Dr. Augustine was entitled to an independent determination of whether he met the criteria for indemnification. In addition, pursuant to Glens Falls, Dr. Augustine was

⁷ Appellant never testified or stipulated that he acted in bad faith. However, the Court of Appeals concluded that while 42 U.S.C. Section 1320a-7b(a)(2) does not have an element of “bad faith,” one who pleads guilty to violating the statute “cannot fairly be said to be acting in good faith.” (A 472).

entitled to show “the inducements which led him to enter his plea,” and present evidence showing that he acted in good faith.

The Legislature has the sole authority to determine the criteria for corporate indemnification, and did so in § 302A.521. The statute is based on vitally important public policy: qualified individuals may not be willing to serve as corporate leaders if they are unable to rely on the assurance that, as long as they act in good faith (as Dr. Augustine was found by the jury to have acted), they will be protected by the corporation for whatever civil or criminal liability may arise out of their service. See Minn. Stat. § 302A.521 reporter’s note (1981). Any weakening of the corporate indemnification statute will make qualified people less willing to serve in corporate governance roles in Minnesota.

In addition, most crimes that corporate officials are charged with include an element of intent. Pursuant to the Court of Appeals’ reasoning, one who is convicted of a crime (pursuant to a plea or after a trial on the merits), which includes an explicit or implicit element that is not consistent with the criteria for indemnification, will be conclusively barred from indemnification. The effect of the Court of Appeals’ decision will be to chill settlement efforts, because corporate representatives will be disinclined to risk a settlement or plea if doing so might “conclusively” forfeit important statutory indemnification rights.

II. BECAUSE GENUINE ISSUES OF MATERIAL FACT EXISTED, THE COURT OF APPEALS ERRED IN REVERSING THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT.

Before any discovery had been conducted in this case, Respondents moved for summary judgment. Respondents argued that the plea alone supported summary judgment. Respondents framed the issue for the trial court as follows:

The key issue before the Court on Defendants' Motion for Partial Summary Judgment is the collateral estoppel effect of Augustine's Medicare Fraud conviction on his request for indemnification under Minn. Stat. § 302A.521.

Defendants' Reply Memorandum in Support of their Motion for Partial Summary Judgment, p. 1 (A 342). Dr. Augustine opposed the motion and submitted substantial evidence supporting the conclusion that he acted in good faith and was, therefore, entitled to indemnification. (A 34; 55).

The Court of Appeals correctly noted that the determination of whether someone acted in good faith is a question for the trier of fact:

A determination of whether someone acted in good faith necessarily involves factual findings. Tonka Tours, Inc. v. Chadima, 372 N.W.2d 723, 728 (Minn. 1985). "It is for the trier of fact to evaluate the credibility of a claim of 'honesty in fact' and, in doing so, to take account of the reasonableness or unreasonableness of the claim." Id. When the evidence is dispositive of this issue, a district court may find that no questions of fact exist and decide the issue as a matter of law.

(A 472). The Court also correctly concluded that the plea had no collateral estoppel effect. (A 473, note 3).

It is at this point the Court of Appeals erred. Rather than recognizing that the plea was one piece of evidence bearing on the question of good faith, the Court found that Dr. Augustine's implicit admission of bad faith was "undisputed" and, therefore, dispositive:

Because both the undisputed evidence of respondent's sworn admission that he acted with fraudulent intent and respondent's conviction conclusively establish that he did not act in good faith and because good faith is an essential element of an indemnification claim, respondent's indemnification claims fail as a matter of law. Therefore, the district court erred in denying Dr. Augustines' motion for summary judgment.

(A 472). The Court of Appeals' decision did not review or analyze the evidence submitted by Dr. Augustine in opposition to the motion for summary judgment. Because the decision did not review the evidence, it is difficult to imagine how the Court could have concluded that Respondents' evidence was "undisputed." It is possible that when the Court referred to "undisputed evidence of respondent's sworn admission that he acted with fraudulent intent," it may simply have been observing that it was undisputed that the Stipulation of Facts relating to Augustine's plea states that he "knowingly and willfully" committed the offense. That observation, however, is not dispositive for the reasons set forth above in Section I.

If, on the other hand, the Court meant what it said, that the evidence in the summary judgment record was undisputed, it was simply wrong. Dr. Augustine submitted substantial evidence to dispute the evidence submitted by Respondents. Moreover, on summary judgment, both the trial court and the Court of Appeals were required to view the evidence in the light most favorable to Dr. Augustine, and doubts as to whether issues of fact existed had to be resolved in favor of Dr. Augustine. In

applying that standard, the trial court found the existence of genuine issues of material fact. Therefore, the trial court was required, as a matter of law, to deny the motion. Accordingly, because the conviction was not conclusive, and because genuine issues of material fact existed at the summary judgment stage, the Court of Appeals erred in reversing the decision of the trial court.

CONCLUSION

For the reasons set forth above, Dr. Augustine respectfully requests that this Court reverse the decision of the Court of Appeals and affirm judgment in favor of Dr. Augustine on his claim for indemnification and attorneys' fees.

Respectfully submitted,

Dated: October 26, 2007



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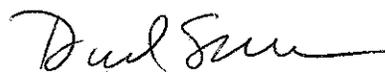
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WORD COUNT COMPLIANCE CERTIFICATE

The undersigned hereby certifies that Appellant's Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and subd. 3(a)(1), for a brief produced with a proportional font. The font used in this brief is Times New Roman 13 point. The length of this brief is 6,021 words, including the cover page, Table of Contents and Table of Authority. This brief was prepared using Microsoft Word 2003.

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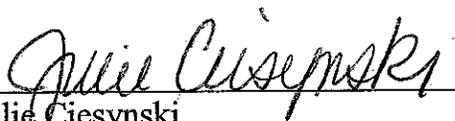
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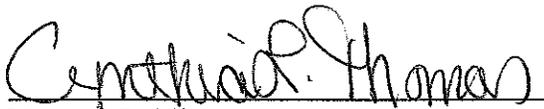
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Subscribed and sworn to before me
this 26th day of October, 2007.


Notary Public
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