

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

SCOTT D. AUGUSTINE, M.D.,

Appellant,

vs.

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

Respondents.

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

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## **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 Court of Appeals correctly held that Augustine's conviction for knowingly and intentionally aiding and abetting the commission of Medicare fraud, along with his sworn admission that he acted with fraudulent intent, conclusively

establish that Augustine did not act in “good faith” for purposes of the Minnesota Indemnification Statute, Minn. Stat. § 302A.521, which requires that a corporate officer seeking indemnification have “acted in good faith.”

*United States v. Brown*, 478 F.3d 926, 928 (8th Cir. 2007); *United States v. Rice*, 449 F.3d 887, 896 (8th Cir.), *cert. denied*, 127 S. Ct. 601 (2006); *In re Landmark Land Co.*, 76 F.3d 553, 565 (4th Cir. 1996); *Bunge Corp. v. Recker*, 519 F.2d 449 (8th Cir. 1975); *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, BASED ON HIS SWORN ADMISSIONS, WAS CONVICTED OF 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. Augustine Was Convicted, Based On His Own Sworn Admission, Of Knowingly And Intentionally Aiding and Abetting Medicare Fraud.**

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 in federal district court to Medicare fraud. (See A 53-54; A 183).

At his plea hearing, Augustine admitted under oath to “‘knowingly and intentionally aid[ing] and abett[ing] 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 471).<sup>1</sup> Augustine also signed a stipulation of facts to the

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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

(continued...)

same effect. (A 53-54). As part of his sentence, Augustine was ordered to pay “criminal monetary penalties” in the amount of \$2 million. (A 193). As the district court advised Augustine, payment of the \$2 million fine was one of the “terms and conditions” of his sentence. (RA 101, 102).

**B. Augustine’s Sworn Admission And Fraud Conviction Preclude His Eligibility For Indemnification Under The Minnesota Indemnification Statute.**

1. 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).

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<sup>1</sup> (...continued)

or assistance by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than \$10,000 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 \$10,000 was appropriate and authorized under law. (A 183) (citing 42 U.S.C. § 1320a-7b(a)[(2)] and 18 U.S.C. § 3571).

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.

2. As explained, Augustine pleaded guilty to committing Medicare fraud in violation of 42 U.S.C. § 1320a-7b(a)(2). Section 1320a-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).

Because good faith is an essential element of an indemnification claim under the Minnesota Indemnification Statute, the Court of Appeals correctly determined that “[Augustine’s] indemnification claims fail as a matter of law.” (A 472). That

is, as the Court of Appeals held, “both the undisputed evidence of [Augustine’s] sworn admission that he acted with fraudulent intent and [his] conviction conclusively establish that he did not act in good faith . . . .” (*Ibid.*).

The great weight of federal and state authority establishes that willful fraud is equivalent to acting in bad faith, and that a person admitting to, or being convicted of, such conduct is ineligible, as a matter of law, for indemnification. See, e.g., *United States v. Rice*, 449 F.3d 887, 896 (8th Cir.) (“A defendant who knowingly made a false statement or acted with intent to defraud cannot fairly be said to have acted in good faith . . . .”), *cert. denied*, 127 S. Ct. 601 (2006); *United States v. Brown*, 478 F.3d 926, 928 (8th Cir. 2007) (holding that, based on the district court’s instruction on willfulness and intent, jury’s finding of guilt necessarily indicated that it had found that defendants “did not act with honest intentions in their transactions”); *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 decision of the Court of Appeals is entirely consistent with these cases and therefore should be sustained. Augustine affirmed under oath that he “knowingly and [willfully] aided and abetted the office of 42 U.S.C., Section

1320a-7b(a)(2).” As such, he “cannot fairly be said to have acted in good faith.”

*United States v. Rice*, 449 F.3d at 896.

**C. Precluding Indemnification Under The Circumstances Is Not Contrary To The Plain Terms Of Section 302A.521 Or Inconsistent With This Court’s Decision In *Glens Falls Group Ins. Corp. v. Hoium*.**

1. Augustine argues that, by the plain terms of the Indemnification Statute, “a conviction in a criminal proceeding does not bar eligibility for indemnification.” Br. for Appellant at 13. Augustine also argues that a corporation “must indemnify any director, officer or employee for costs incurred in connection with his or her conduct” if the person satisfies the requirements of the statute. *Ibid*. While it is true that the Minn. Stat. § 302A.521 does not automatically bar indemnification for every conviction, that is because not every conviction implicates the defendant’s “good faith” – convictions for strict liability crimes, or for criminal negligence, for example.

This point is emphasized by another subsection of the Indemnification Statute, which provides that a corporate director, officer or employee is not entitled to indemnification for costs incurred in connection with a criminal proceeding unless the person “had no reasonable cause to believe the conduct was unlawful.”

Minn. Stat. § 302A.521, Subd. 2(a)(4). Augustine’s sworn admission, and his

statements at his plea and sentencing hearings, leave no doubt that Augustine acted with willful intent to defraud the Medicare program, precluding any claim that he “had no reasonable cause to believe his conduct was unlawful.” A conviction necessarily implicating “bad faith,” moreover, precludes any showing that Augustine “acted in good faith,” as the plain terms of Minn. Stat. § 302A.521, Subd. 2(a)(2) require.

2. In this regard, Augustine’s reliance on this Court’s decision in *Glens Falls Group Ins. Corp. v. Hoium*, 294 Minn. 247, 200 N.W.2d 189 (S. Ct. Minn. 1972), see Br. for Appellant at 16-17, is misplaced. In *Glens Falls*, James Sheehan inflicted injuries on David Hoium in a barroom altercation. As a result of the injuries to Hoium, Sheehan was prosecuted and pleaded guilty to a charge of simple assault. The injured party sued Sheehan and his insurance company refused to defend, citing the policy provision excluding coverage for intentional torts. See *Glens Falls*, 294 Minn. at 248, 200 N.W.2d at 190. This Court concluded that the insurance company was required to defend Sheehan. It held that, despite the plea, “the question of intent remains unresolved as between Hoium and Sheehan” and, “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.” 294 Minn. at 251-52, 200 N.W.2d at 192.

*Glens Falls* was decided against the backdrop of the general common-law rule that a criminal judgment does not constitute a bar to subsequent civil action based upon the offense of which the party stands convicted and that the judgment of conviction is not admissible in evidence for that purpose. See *Nevins v. Christopher St., Inc.*, 363 N.W.2d 891, 893 (Minn. Ct. App. 1985). In refusing to apply collateral estoppel in *Glens Falls*, this Court determined that facts critical to the subsequent civil litigation (such as intent) were not part of the facts sworn to in connection with the plea. See *Glens Falls*, 294 Minn. at 252, 200 N.W.2d at 192. Here, however, the Court of Appeals did not purport to rely on collateral estoppel; the court expressly stated that because Augustine's guilty plea was not a final judgment on the merits, the "requisite[s] for collateral estoppel [were] not satisfied." (A 473 n.3). Instead, the Court of Appeals relied on "the undisputed evidence of [Augustine's] fraudulent intent and [Augustine's] conviction [for knowingly and wilfully aiding and abetting fraud]" as "establish[ing] that he did not act in good faith." For these reasons, *Glens Falls* is inapposite.

Furthermore, the Court of Appeals' decision is supported by the principle that precludes "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).

Here, in exchange for his pleading guilty to fraud and his agreement to pay a fine of \$2 million, the Government dismissed a number of charges against Augustine, and Augustine received a probationary term of three years instead of incarceration. After receiving the benefit of the plea bargain, Augustine “now wants to have it the other way,” arguing that he should be permitted to make the case that he did not act in bad faith. Augustine should not be allowed to profit from his wrong and reargue the issue of good faith in his indemnification action. See *Lowery v. Stovall*, 92 F.3d 219, 225 (4th Cir. 1996) (holding that, in light of guilty plea to maliciously causing bodily injury to a police officer, made in exchange for a drastically reduced sentence, defendant was not permitted to argue in a subsequent excessive force lawsuit that he did not maliciously attack the police officer), *cert. denied*, 519 U.S. 1113 (1997).

Under these circumstances, “to permit a retrial of the facts and issues already determined in the criminal proceeding would be an imposition on the courts and only tend to embarrass or bring into disrepute the judicial process.” *Travelers Ins. Co. v. Thompson*, 281 Minn. at 555, 163 N.W.2d at 294. Augustine should not be permitted to play fast and loose with the courts in this manner. See *Dotson v. United States Postal Serv.*, 977 F.2d 976, 978 (6th Cir. 1992) (“A party cannot create a factual dispute by filing an affidavit, after a motion for summary judgment

has been made, which contradicts earlier testimony.”), *cert. denied*, 506 U.S. 892 (1992).

**D. The Court Of Appeals Did Not Err In Reversing The District Court’s Denial Of Summary Judgment.**

Augustine argues that, because his fraud conviction was not conclusive with regard to the issue of good faith, genuine issues of material fact existed with regard to whether Augustine acted in good faith, and that, as a result, the Court of Appeals erred in reversing the district court’s denial of summary judgment. See Br. of Appellant at 18-20. In other words, Augustine argues that the Court of Appeals should not have taken Augustine’s prior sworn admissions and fraud conviction to be dispositive of the issue of good faith but, instead, should have considered the “substantial evidence” Augustine submitted on good faith to dispute the evidence submitted by the Respondents. See *id.* at 19.

But, as explained above, when Augustine admitted under oath in open court, and in his stipulation of facts, that he knowingly and willfully aided and abetted the commission of fraud, “[his] sworn admissions leave no room for finding that he was entitled to indemnification by [his employer] 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.” *Bansbach v. Zinn*, 1 N.Y.3d 1, 13, 801 N.E.2d 395, 404 (N.Y. 2003). In this regard, while

a determination of whether someone acted in good faith ordinarily “is a question for the trier of fact,” as Augustine asserts in his brief (at p. 18), 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 – as the Court of Appeals correctly held (A 472). The Court of Appeals, therefore, did not err in reversing the district court’s denial of summary judgment.

**E. Construing The Minnesota Indemnification Statute To Permit Indemnification In These Circumstances Would Undermine The Federal Scheme For Punishing Criminal Efforts To Defraud Federal Health Care Programs And Violate Federal Public Policy.**

Reversing the Court of Appeals’ ruling here would undermine the federal scheme for punishing individuals who seek to defraud federal health care programs and violate federal public policy. “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 193). 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. (RA 90-93, 97-98, 100-103).

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.” (RA 90). 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.” (RA 92-93).

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” (RA 97), 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” (RA 98). 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.” (RA 101-02).

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

In this regard, allowing Augustine to argue, despite his sworn admission and guilty plea in federal court, that he did not act in bad faith and is entitled to have a corporation pay his criminal fine would be contrary to federal public policy inasmuch as it plainly would undermine the purpose and effectiveness of the federal punishment scheme in general and of the federal punishment imposed on Augustine in particular. See *Globus v. Law 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).

## 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 Court of Appeals is affirmed.

Respectfully submitted,

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DECEMBER 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 3,680 words (using WordPerfect 9), and has been prepared in a proportional Times New Roman font of 14 points.

  
Michael E. Robinson

AFFIDAVIT OF SERVICE BY FEDERAL EXPRESS

STATE OF MINNESOTA

APPELLATE COURT  
NUMBER A06-1238

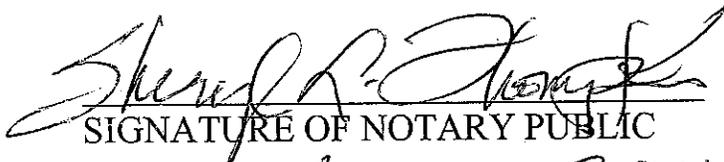
CASE TITLE: Augustine v. Arizant

Michael E. Robinson, being duly sworn, says that on the 30<sup>th</sup> day of November, 2007, he served the Brief of United States as Amicus Curiae in Support of Respondents in the above-entitled case upon David R. Marshall, Esq., and David B. Potter, Esq., by Federal Express Overnight Mail Delivery true and correct copies thereof in a Federal Express envelope addressed as follows:

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SIGNATURE OF NOTARY PUBLIC

  
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This 30 day of November  
2007