

NO. A06-1238

STATE OF MINNESOTA

IN SUPREME COURT

Scott D. Augustine, M.D,

Appellant,

VS

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

Respondents.

**BRIEF OF RESPONDENTS ARIZANT INC., ARIZANT HEALTHCARE INC.,
AND AUGUSTINE MEDICAL, INC.**

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LEGAL ISSUE

DID THE COURT OF APPEALS CORRECTLY RULE THAT APPELLANT'S SWORN ADMISSIONS OF FRAUDULENT MISCONDUCT PRECLUDED, AS A MATTER OF LAW, HIS DEMAND FOR INDEMNIFICATION?

The Minnesota Court of Appeals correctly ruled that Appellant could not, as a matter of law, meet the "good faith" requirement of Minnesota's corporate indemnification statute, Minn. Stat. § 302A.521, which requires a showing of "honesty in fact." Appellant gave undisputed sworn testimony that he engaged in intentional fraud in both the initial criminal proceeding and subsequent indemnification case. Such undisputed testimony was independent from the guilty plea itself. As such, the Court of Appeals correctly held that Appellant cannot, as a matter of law, be indemnified for intentional fraud—not because he terminated the prior criminal case through a plea of guilty, but because of his own undisputed sworn admissions of fraudulent conduct.

Most apposite authority:

- Minn. Stat. § 302A.521, Subd. 2(a)
- Minn. Stat. § 302A.011, Subd. 13
- In re P./R. Children, No. NN5613-19/06, 2007 WL 494919 (N.Y. Fam. Ct. Feb. 15, 2007)
- United States v. 415 East Mitchell Ave., 149 F.3d 472 (6th Cir. 1998)

STATEMENT OF THE CASE AND FACTS

I. STATEMENT OF THE CASE

Appellant Scott D. Augustine, M.D. ("Augustine" or "Appellant"), the former Chief Executive Officer of Augustine Medical, Inc., claimed that he was entitled to

statutory indemnification for a \$2 million criminal fine he paid as a result of his Medicare fraud conviction. Through a Stipulation of Facts he signed under oath, subsequent sworn testimony in his underlying criminal case, sworn testimony during his deposition in this indemnification case, and sworn testimony during trial of the indemnification case, Augustine admitted to knowingly and willfully aiding others in withholding a material fact from healthcare providers for use in determining rights to benefits and payments under Medicare (the "TriSpan Fraud").

During summary judgment, at the end of trial, and in post-trial motions, Respondents Arizant Inc., Arizant Healthcare Inc., and Augustine Medical, Inc. ("Arizant" or "Respondents") argued that these sworn admissions of intentional fraud precluded him as a matter of law from arguing that his conduct was undertaken in good faith. Thus, Arizant argued that Augustine was legally unable to meet the standards of Minnesota's indemnification statute, Minn. Stat. § 302A.521.

The trial court disagreed and held that, even with undisputed admissions of intentionally fraudulent conduct, Augustine was entitled to have a jury determine whether such conduct met the good faith requirements of § 302A.521. The trial court later upheld that ruling and allowed the jury verdict to stand despite Arizant's motion for judgment as a matter of law or, alternatively, for a new trial on the same grounds. On appeal, the Minnesota Court of Appeals overturned the trial court's ruling on this issue.

In his brief to this Court, Augustine grossly mischaracterizes the holding of the Court of Appeals when he writes "[t]he Court of Appeals reversed, holding that Dr. Augustine's guilty plea to the misdemeanor conclusively barred Dr. Augustine from

seeking indemnification.” (Appellant’s Brief, p. 2).¹ The Court of Appeals made crystal clear that it was not so holding, and that it neither based its holding on collateral estoppel nor on the mere fact that Augustine’s criminal proceeding terminated in a guilty plea. Augustine v. Arizant Inc., 735 N.W.2d 740, 744-45 (Minn. Ct. App. 2007). Rather, the Court applied the appropriate standards and found that, based on Augustine’s repeated and uncontradicted sworn admissions of intentional fraud, no questions of material fact existed as to good faith and that the issue could and should be decided as a matter of law.

Id. The “Decision” section, which concludes the Court of Appeals’ Opinion, reads:

The undisputed evidence that Respondent acted with fraudulent intent conclusively establishes that he did not act in good faith and is not entitled to indemnification under Minn. Stat. § 302A.521, subd. 2(a) (2006).

Augustine, 735 N.W.2d at 746.

Upon Augustine’s petition for review, this Court granted a limited review of the question “whether petitioner’s guilty plea conclusively bars indemnification.” (Order Granting Pet. For Review). The Court need not even reach that question, as both parties will agree that termination of a criminal proceeding in a guilty plea *alone* does not automatically operate as a bar to indemnification. Instead, Augustine attempts to bend the wording of Minn. Stat. § 302A.521 from the simple statement that the mere fact a criminal action *terminated* through a guilty plea, conviction, settlement, or otherwise, is insufficient by itself to preclude indemnification into a broad evidence exclusionary rule

¹ Nowhere in its Opinion does the Court of Appeals state that Augustine’s plea alone establishes that he is unentitled to indemnification. The synopsis of the case drafted by Westlaw, from which Augustine apparently pulled that language, so states but the Westlaw synopsis is obviously not part of the Court’s opinion. See Augustine v. Arizant Inc., 735 N.W.2d 740 (Minn. Ct. App. 2007).

whereby all sworn admissions related to a criminal action terminated through a guilty plea or otherwise are stripped of any legal effect and evidentiary weight on the right to indemnification under the statute. Minn. Stat. § 302A.521 certainly does not strip undisputed sworn testimony of intentional fraud, whether in the initial criminal case or subsequent indemnification case, of its binding effect. Because Augustine, for his own benefit, repeatedly admitted to dishonest conduct under oath, he could not raise a triable issue of fact on the question of whether he acted in good faith.

Here, the Court of Appeals, consistent with Minn. Stat. § 302A.521, correctly ruled that Augustine’s sworn admissions, which stood uncontradicted before the trial court and still stand uncontradicted today, establish as a matter of law that Augustine cannot receive indemnification for the criminal fine resulting from his admittedly fraudulent misconduct.

II. STATEMENT OF THE FACTS

A. Augustine’s Participation in Intentional Healthcare Fraud

1. Arizant’s policy to disclose TriSpan coverage decisions to healthcare providers

Since the late 1990s, Augustine, then the Chief Executive Officer of Arizant, was involved in efforts to promote and obtain Medicare coverage for a medical device called Warm-Up® Therapy (“Warm-Up”), which included initiatives to obtain favorable coverage decisions from regional fiscal intermediaries. (RA150-52).² A “fiscal intermediary” is an entity tasked by the federal government to make coverage decisions

² “RA” refers to Respondents’ Appendix and “A” refers to Appellant’s Appendix.

as to whether healthcare providers purchasing Warm-Up would be reimbursed by Medicare. (RA158-59). TriSpan Health Services ("TriSpan") was one of those governmental fiscal intermediaries. (RA158).

In November 1999, Augustine and Arizant became aware of a letter from TriSpan stating that "Medicare will not allow coverage of Warm-Up at this time." (A345, RA159-60). Despite internally believing that this 1999 TriSpan letter was incorrect, Arizant adopted the policy of: (1) immediately contacting TriSpan for clarification and (2) disclosing the 1999 TriSpan letter to affected healthcare providers who may purchase or use Warm-Up. (A345, RA108, RA174-79). As of December 1999, if Arizant learned that a healthcare provider was in TriSpan's territory, Arizant would fully disclose the existence of the TriSpan Warm-Up coverage exclusion, even though Arizant continued to disagree with the decision. Arizant's policy in this regard was consistent with the advice of Arizant's internal attorney at that time, Randy Benham. (Id.).

2. In June 2000, Augustine tells providers like Southern Medical that TriSpan now covering Warm-Up

Augustine and his team met with TriSpan on January 14, 2000 in an attempt to change TriSpan's position denying Warm-Up coverage. (RA109-10, RA161, RA179-80). Augustine was the lead presenter. (RA109-10, RA161).

By May 2000, Augustine's team believed its efforts had been successful and that TriSpan had changed its mind and would now cover Warm-Up. (RA162, RA180). Based on oral statements by TriSpan to Augustine's team that Warm-Up would now be covered, Augustine directed his team to launch an aggressive campaign to inform all healthcare

providers in TriSpan's region that TriSpan was now covering Warm-Up. (RA162). This campaign was in full swing by June 2000. (*Id.*). One of those providers was Southern Medical Distributors ("Southern Medical"). (*Id.*).

Southern Medical was seen by Augustine and Arizant as a significant potential purchaser of Warm-Up, having placed an initial order for over \$30,000 of product.³ (RA162-63). On June 22, 2000, Augustine and his team met with Southern Medical as part of the campaign involving providers in TriSpan's region. (*Id.*).

3. New TriSpan letter on June 27, 2000 was a "total about face"

On June 27, 2000, five days after the June 22 meeting with Southern Medical, Augustine received a letter from TriSpan that now characterized Warm-Up as "investigational." (RA111, RA164-65). Contrary to Augustine's expectations, the letter did not say TriSpan would cover Warm-Up. (*Id.*). On June 28, 2000, the member of Augustine's team who had been talking to TriSpan told Augustine that the June 2000 TriSpan letter was a "total about face from every verbal communication" with TriSpan and that investigational "general[ly] mean[s] that they won't cover it until additional studies are completed." (RA113).

Initially, Augustine's team had questions about whether TriSpan would use the new "investigational" finding to deny claims for Warm-Up. (RA143-46). Because of this uncertainty, Randy Benham, Arizant's internal counsel, initially advised Arizant not to disclose the letter to providers until it knew if TriSpan was in fact using the

³ Unbeknownst to Augustine, Southern Medical was in reality a governmental sting operation, posing as a distributor of healthcare products. (RA115-42).

“investigational” finding to deny claims. (RA181-82). On July 10, 2000, Benham was told by a customer that TriSpan was now denying claims for reimbursement based on Warm-Up’s investigational status. (RA114, RA182). As a result, after July 10, 2000, Benham advised Augustine and Arizant that the new June 2000 TriSpan letter should be disclosed to all providers in TriSpan’s territory. (RA183-85).

Similarly, by July 18, 2000, Arizant’s management confirmed that Arizant would again follow the 1999 policy of clarification and disclosure. (RA143-48). John Thomas, CEO of Arizant at the time, testified that as of July 18, 2000, it was not Arizant’s policy to hide the TriSpan letter or to deny it existed. (RA148-49). Thomas testified that “...we were going to find out what [the letter] meant and we were going to do the right thing.” (RA146). As of July 18, 2000, “if anybody asked us about [the TriSpan letter] we’d tell them straight out just exactly that we had gotten a letter and what it was.” (RA144).

4. Contrary to Arizant’s policy, in August 2000 Augustine helps Hensley hide the new TriSpan letter from Southern Medical

In August 2000, without Arizant’s knowledge, Augustine and his team ignored the established Arizant policy and intentionally withheld the June 2000 TriSpan letter from Southern Medical. Augustine acted mainly in concert with his subordinate, Tim Hensley.

Arizant’s first meeting with Southern Medical after the June 27, 2000 negative TriSpan letter was on August 16, 2000, in Atlanta, Georgia. (RA166-69). During that August 16, 2000 meeting, Hensley failed to disclose the June 2000 TriSpan letter. (RA72, RA80-82).

On August 21, 2000, Hensley had a follow-up telephone call with Southern Medical about the August 16, 2000 Atlanta meeting. (RA1-21). When specifically questioned about any letter from TriSpan, Hensley flatly denied that Arizant had received any correspondence from TriSpan. (RA9, RA147).

MR. EDWARDS: Well, okay, but basically right now, Tim, you don't have anything from Tri-Span saying, yeah, go ahead, we approve it or anything like that . . .?

MR. HENSLEY: We don't have anything in writing.

MR. EDWARDS: Okay. All right. But y'all made a presentation, they were impressed, but you haven't gotten anything in writing?

MR. HENSLEY: True.

MR. EDWARDS: Okay. Good or bad; huh?

MR. HENSLEY: No.

(RA9).

The transcript of the August 21, 2000 telephone call reveals that Augustine was in fact intimately involved with Hensley regarding what to tell Southern Medical during that telephone call. During the call, Hensley and Southern Medical discussed Augustine by name again and again, referencing him eighteen times. (RA1-21). Augustine was, in fact, the only Arizant person ever referenced by Hensley or Southern Medical. (Id.). Hensley discussed with Southern Medical the directions he had received from Augustine as to what to tell Southern Medical. (RA10-14). Hensley and Southern Medical discussed Augustine's idea of a "bounty" to be paid for introductions to fiscal intermediaries. (Id.). Hensley and the Southern Medical employee then agreed to thereafter keep their

communications secret from others at Southern Medical and Arizant. They agreed that only Augustine would be informed of the communications.⁴ (RA10-12).

On June 29, 2004, Hensley and Augustine pleaded guilty to Medicare Fraud related to failure to disclose the TriSpan letter to Southern Medical. (RA45-98). During a hearing on June 29, 2004, Hensley first took the stand and testified that the intentional withholding of the TriSpan letter from Southern Medical took place during the August 16, 2000 Atlanta meeting. (RA67-82).

Q. Sir, on or about August 16th of 2000, did you attend a meeting in Atlanta, Georgia with representatives of Southern Medical?

A. Yes, sir, I did.

Q. And at that meeting, did you not disclose the June 27th Dr. May letter to Southern Medical Distributors?

A. That is correct. I did not disclose the letter.

Q. And, sir, by entering into this stipulation of facts, do you agree that you withheld from Southern Medical Distributors a material fact for use in determining rights to benefits and payments under the Medicare program?

⁴ At trial, and again in his brief to this Court, Augustine claims that he did in fact disclose the letter to Southern Medical. (Appellant's Brief, pp. 7-8). Augustine, however, carefully leaves out the date on which he allegedly told Southern Medical about the negative TriSpan decision to leave the impression he did that in August 2000. In fact, Augustine's only discussion with Southern Medical about the negative TriSpan decision occurred in January 2001, an entire five months after the fraud occurred in August 2000. (RA22-34). By that time, Augustine was engaged in secret bribe discussions with one employee of Southern Medical who affirmatively agreed he would not disclose such information to Southern Medical. (Id.).

A. Yes, sir.

(RA81). Augustine, who was present for this sworn testimony by Hensley, then took the stand and testified he had knowingly aided and abetted Hensley's misconduct.

(RA82-98):

Q. Shortly after receipt of that [June 27, 2000 TriSpan] letter, is it the case that you intentionally and knowingly aided and abetted others in deciding not to disclose that letter in general to providers?

A. Yes.

Q. And by entering into this stipulation of facts, you admit that the facts set forth in this stipulation establish that you knowingly and intentionally aided and abetted the offense of 42 U.S.C., Section 1320a-7b(a)(2), by causing to be withheld from Southern Medical Distributors a material fact for use in determining rights to benefits and payments under the Medicare program?

A. Yes, I did.

(RA96).

On June 29, 2004, Augustine also entered into a Stipulation of Facts, which became adjudicated findings of fact by the Federal District Court. (RA43-44). Those findings of fact include:

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 WarmUp. TriSpan had now determined that WarmUp 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 and is in fact guilty of that offense.

(Id.).

At sentencing on September 8, 2004, Federal District Court Judge Montgomery noted that Augustine had “demonstrated recognition and affirmative acceptance of personal responsibility for his conduct.” (RA99). In fact, the government recommended that Augustine’s sentence be reduced because he had accepted personal responsibility for his criminal conduct. (RA37-43, RA172).

On September 15, 2004, Judge Montgomery entered judgment against Augustine. (A190-93). In the Judgment, the court “adjudicated that [Augustine] is guilty of withholding a material fact for use in determining rights and payments under a federal healthcare program.” (A190). Judge Montgomery ordered Augustine to pay a \$2 million fine. As a further result of Augustine’s admissions and criminal conviction, the United States Department of Health and Human Services has excluded him from dealing with Medicare for five years. (RA172-73).

B. Trial of the Subsequent Indemnification Case

On July 14, 2004, Augustine requested indemnification for his \$2 million criminal fine. (A273-78). Following the Arizant Board of Directors’ denial of his request, Augustine brought the indemnification claim under Section 302A.521 of the Minnesota Business Corporations Act. (See Compl.).

During discovery in the indemnification case, Augustine was deposed and again provided sworn testimony that he intentionally helped withhold the TriSpan letter from Southern Medical after he knew that it was material. (RA104 (Dep. page 80, lines 1-8)). Augustine also was questioned at his deposition about the details of his participation in the August 2000 fraud on Southern Medical. Augustine testified that it was possible he knew that Hensley and others met with Southern Medical on August 16, 2000 in Atlanta. (RA105). Augustine admitted that he “talked to Tim about all kinds of subjects” and was “sure Southern Medical was one of them. . .” (RA106-07). He testified that he very well could have talked to Hensley about what to do with Southern Medical before he went to meet with them in August 2000 in Atlanta, and that it was possible that he talked to Hensley about the August 21, 2000 follow-up telephone call with Southern Medical. (Id.). Augustine further testified that it was possible that he had told Hensley prior to the August 21, 2000 follow-up telephone call with Southern Medical about an offer Hensley should make to Southern Medical. (RA107). Augustine also testified that Hensley might have talked to Augustine after the August 21, 2000 telephone call about denying that Arizant had received anything in writing, good or bad, from TriSpan. (Id.).

Augustine’s indemnification claim proceeded to trial on January 30, 2006. (See Order dated Jan 9, 2006). At trial, Augustine testified that he stood behind everything that he admitted under oath in the Stipulation of Facts—that everything in the Stipulation of Facts is true. (RA170). Augustine testified that these facts were the reason he was found guilty of a federal crime. (Id.). Augustine further testified that he believed that the TriSpan letter was material to providers such as Southern Medical, and shortly after he

knew that the TriSpan letter was material he intentionally and knowingly aided and abetted others in deciding not to disclose the letter to Southern Medical. (RA170-71). Despite this testimony, the jury found that Augustine was entitled to full indemnification for his \$2 million fine. (A467-68).

After the jury verdict, Arizant renewed its summary judgment motion as a post-trial motion for judgment as a matter of law. (See generally Def.'s Notice of Mot. and Mot. for J. Not Withstanding the Verdict and, in the Alternative, for a New Trial). Arizant again argued that Augustine's undisputed sworn admissions of intentional fraud during the criminal proceedings, during his deposition, and during testimony at trial bar a finding of good faith as a matter of law. (Id.). The trial court again denied Arizant's motion.

C. The Court of Appeals' Decision on Indemnification

Arizant appealed to the Court of Appeals, both on the trial court's denial of summary judgment and post-trial judgment as a matter of law, but also on the trial court's improper exclusion of the very evidence of Augustine's actual fraud in August 2000,⁵ the

⁵ Despite Augustine's sworn admissions of fraudulent conduct, Augustine claimed through his own testimony at trial that he did nothing wrong and tried to distance himself from any knowledge of or responsibility for the August 2000 communications with Southern Medical. (RA150). Augustine repeatedly testified: ". . . we were convinced we had done nothing wrong. . . ." (RA150). He testified that he did not know that the August 21, 2000 telephone call with Southern Medical even took place. (RA169). In response to Augustine's contradictory testimony, Arizant attempted to impeach Augustine using Augustine's prior sworn deposition testimony, a transcript of the August 21, 2000 telephone call, Augustine's sworn testimony from his criminal hearing, and the transcript of the January 2001 telephone call. (RA1-25, RA28-35, RA 67-98). All of this evidence and attempted impeachment was excluded on relevancy, foundation, and hearsay grounds. (RA154-55, RA156-57, RA166-68).

trial court's erroneous jury instructions on "good faith," and the trial court's award of attorney's fees to Augustine. (See Court of Appeals Brief, filed Sept. 13, 2006). After oral argument, the Court of Appeals ruled that Augustine's undisputed admissions, which establish intentional fraud, preclude him from proving an essential element of his claim for indemnification—that he acted in good faith. Thus, the Court of Appeals ruled that Augustine's sworn admissions of intentional fraud cannot be good faith as a matter of law. Augustine, 735 N.W.2d at 744. Consequently, the Court of Appeals did not reach the issues of whether the exclusion of evidence or the jury instructions required a new trial on indemnification or whether Augustine was entitled to attorney's fees. Id. at 745, 745 n.2.

D. The Scope of the Courts' Review

In his Petition, with respect to the indemnification claim, Augustine sought review of whether the Court of Appeals erred in finding that Augustine could not meet the good faith requirement of Minn. Stat. § 302A.521 as a matter of law. (Petitioner's Pet. For Review). In its Order dated September 26, 2007, this Court granted a limited review of the indemnification issue as to "whether petitioner's guilty plea conclusively bars indemnification." (Order on Pet. For Review.) While the Court of Appeals based its decision on the trial court's error in denying summary judgment, Arizant also appealed the trial court's denial of Arizant's post-trial motion for judgment as a matter of law. Therefore, if the Court of Appeals is reversed on the narrow grounds of the Court of Appeals' ruling on the trial court's denial of summary judgment, either this Court or the Court of Appeals must address the trial court's denial of Arizant's post-trial motion,

which argued that Augustine could not meet the good faith requirement as a matter of law based on the full evidentiary record in the indemnification case, including Augustine's sworn testimony at trial in the indemnification case.

Moreover, in the event this Court reverses on the issue of whether Augustine cannot meet the good faith requirement of Minn. Stat. § 302A.521 as a matter of law, all other issues related to indemnification appealed by Arizant but left undecided by the Court of Appeals' opinion would then need to be remanded and decided by the Court of Appeals. The issues appealed by Arizant but not addressed by the Court of Appeals include the right to a new trial of the indemnification claim based on both the exclusion of evidence and inadequate jury instructions, as well as the award of attorney's fees.⁶

STANDARD OF REVIEW

The issue of whether undisputed evidence bars a plaintiff from establishing good faith, either on a motion for summary judgment or on post-trial motions, is reviewed *de novo*. Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855-56 (Minn. 1998) (internal citation omitted).

⁶ In his Brief, Augustine notes that Arizant did not bring a cross-petition under Minn. R. Civ. App. P. 117, subd. 4 related to the indemnification issues raised by Arizant to the Court of Appeals but that are beyond either Augustine's Petition or this Court's Order granting review. (Appellant's Brief, p. 1). Because the Court of Appeals expressly stated that it need not reach those issues because it granted Arizant's request for reversal on the basis that the trial court failed to rule as a matter of law, there were no issues for Arizant to bring before this Court on a cross-petition. Augustine, 735 N.W.2d at 745.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY BASED ITS HOLDING ON AUGUSTINE'S SWORN ADMISSIONS AND NOT SOLELY ON AUGUSTINE'S GUILTY PLEA

A. Augustine Misstates the Court of Appeals' Holding

With the very first sentence of Augustine's argument, Augustine misstates the holding of the Court of Appeals in this case. Augustine argues "the Court of Appeals erred in applying the law by concluding that Appellant's misdemeanor plea 'conclusively' established bad faith." (Appellant's Brief, p. 12). Such was not the Court's holding at all. Rather, the Court of Appeals held that "[u]ndisputed evidence that a person . . . acted with fraudulent intent in committing the crime conclusively establishes that the individual did not act in good faith . . ." (emphasis added). Augustine v. Arizant Inc., 735 N.W.2d 740, 741, 746 (Minn. Ct. App. 2007). The Court of Appeals did not hold that the mere fact that the United State's criminal case terminated via a guilty plea alone conclusively established Augustine's lack of good faith and inability to seek indemnification. Rather, the Court of Appeals looked beyond the crime alleged, beyond the manner in which the criminal case was terminated, and beyond the fact that Augustine pleaded guilty and was convicted. The Court of Appeals correctly relied on the undisputed evidence of Augustine's own sworn admissions of knowingly fraudulent misconduct in the record as conclusive evidence that he failed to act in good faith. Augustine's attempt to use Minn. Stat. § 302A.521 to somehow exclude such undisputed evidence—sworn admissions which he voluntarily made to avoid potential jail time—finds no support in the statute or in any case law.

B. The Basis for the Court of Appeals' Holding Is Proper under Minnesota Law

Because the Court of Appeals' holding is based on undisputed evidence in the record, and not solely on Augustine's plea, the Court's holding is entirely consistent with Minn. Stat. § 302A.521 and applicable Minnesota precedent. Minn. Stat. § 302A.521, Subd. 2(b) does in fact state: "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" (emphasis added). The Court's holding is in line with subdivision 2(b). The Court's holding that Augustine did not act in good faith turned in no way on the termination of Augustine's criminal proceeding "*of itself*," but rather on sworn testimony offered by Augustine himself in both the underlying criminal proceeding and in the subsequent indemnification case. Augustine, 735 N.W.2d at 744-45.⁷

Augustine's argument, which was rejected by the Court of Appeals, is that this Court should summarily disregard his sworn admissions of dishonest conduct *because* they have some relation to the termination of the prior criminal proceeding through his guilty plea. In other words, Augustine seeks to use his guilty plea as a shield to bar consideration of the sworn admissions he made in both the criminal proceeding and

⁷ Similarly, Augustine's argument that the Court's holding somehow deprives him of an "independent determination" of whether he acted in good faith is meritless. (Appellant's Brief, p. 14-15). The independent determination referenced by Augustine, at the outset, is to be made by the Company, Arizant, and the Court of Appeals made a further independent determination. The statute provides no right to have a jury make that "independent determination" regardless of the undisputed evidence.

subsequent indemnification case. In effect, Augustine attempts to turn Minn. Stat. § 302A.521 into a statute of exclusion—not only exclusion of Augustine’s sworn admissions against interest in the criminal proceeding but exclusion of Augustine’s admissions against interest *in this* proceeding. That is not what Minn. Stat. § 302A.521 provides.

Admissions against interest, such as Augustine’s, made in a prior proceeding are admissible as substantive evidence in a subsequent proceeding both because they are prior statements by a witness inconsistent with testimony and statements by a party-opponent. See Minn. R. Evid. 801(d)(1), (2). Nothing about § 302A.521 operates to change the rules of evidence in Minnesota or to strip the otherwise binding effect of prior sworn admissions against interest. The Minnesota indemnification statute simply directs that the fact that a prior proceeding terminated in a way that resulted in the obligation to pay money, whether through a guilty plea, a judgment, or even a settlement, is not, of itself, enough to automatically deny indemnification. The Court of Appeals’ ruling is directly in line with this directive.

C. Glens Falls Is Inapplicable to the Court of Appeals’ Decision

Augustine’s reliance on Glens Falls Group Ins. Co. v. Hoium, while relentless, is misplaced. Glens Falls does not relate to the Court of Appeals’ holding, or to the issue before this Court on appeal. Glens Falls related to whether a third-party insurance company could use collateral estoppel to prove application of an intentional misconduct exclusion in a policy because its insured pleaded guilty to aggravated assault. 200 N.W.2d 189, 190 (Minn. 1972). The Glens Falls court determined that because all of

the elements of collateral estoppel had not been met, the plea of assault in and of itself did not preclude the insured from subsequently arguing the issue of intent as it related to that insurance policy exclusion. Id. at 192.⁸

The Court of Appeals here expressly stated that because a final judgment on the merits in Augustine's prior criminal adjudication was lacking, collateral estoppel was not applicable to this indemnification case and that it formed no basis for the Court's holding. Augustine, 735 N.W.2d at 745 n.3. As such, the Court of Appeals clearly states that its holding in this case was not based on collateral estoppel, but rather on Augustine's various under-oath statements in this indemnification action, which because they were not contested, left no triable issue of material fact for a jury. Augustine, 735 N.W.2d at 745 n.3.⁹

⁸ Moreover, in Glens Falls, the facts critical to the subsequent civil litigation were not a part of the facts sworn to in connection with the plea. Glens Falls Group Ins. Co., 200 N.W.2d at 191. As a result, while Sheehan's plea was admissible evidence in Glens Falls, a triable issue of material fact remained simply due to the nature of the facts that needed to be proven in that particular case. Id. at 192. In this case, the Court of Appeals found that Augustine's sworn admissions did in fact establish, as an evidentiary matter, that he acted with fraudulent intent. Because he acted with fraudulent intent, no question of fact remained on the issue of good faith and thus his claim failed as a matter of law. Augustine, 735 N.W.2d at 744-45.

⁹ Augustine sweepingly alleges that "[t]he Court of Appeals decision did not review or analyze the evidence submitted by Dr. Augustine in opposition to the motion for summary judgment . . . it is difficult to imagine how the Court could have concluded that Respondent's evidence was 'undisputed.'" (Appellant's Brief, p. 19). Augustine later, with no citation to the record, states that he "submitted substantial evidence to dispute the evidence submitted by Respondents." (Id.). While all "evidence" Augustine submitted to the trial court during summary judgment was made part of the record before the Court of Appeals and this Court, Augustine fails to bring anything before this Court that he submitted that recants or otherwise contradicts his prior sworn admissions of intentional fraudulent misconduct. (Appellant's Brief; A1-341).

The appropriateness of the Court of Appeals' holding is bolstered by the principle that Minnesota courts will not permit "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) (plaintiff, who in previous workers compensation action successfully argued she was an employee, was not permitted in subsequent action from claiming she was not an employee). Here, Augustine has testified under oath to intentional fraud in a criminal case. He did so to secure the benefit of a more lenient sentence, which he did in fact obtain. Now, Augustine seeks to avoid the binding effect of those sworn admissions to gain a further advantage—to have his \$2 million criminal fine paid for by Arizant.

D. In Any Case, Sworn Admissions in Prior Criminal Proceedings Remain Binding in Subsequent Civil Litigation

Minnesota follows the near universal rule that admissions against interest of a party-opponent made in a prior proceeding are admissible as substantive evidence in a subsequent proceeding. See Minn. R. Evid. 801(d)(2). Courts in other jurisdictions have used sworn admissions in prior criminal proceedings to enter judgment as a matter of law in subsequent civil proceedings.

In In re P./R. Children, a father pleaded guilty to attempted sexual abuse in a prior criminal proceeding. No. NN5613-19/06, 2007 WL 494919, at *1 (N.Y. Fam. Ct. Feb. 15, 2007). The plea minutes revealed that the father admitted under oath to engaging in certain sexual acts with his daughter. Id. Subsequently, a child protective proceeding was commenced in which the Administration for Children's Services ("ACS") filed a

motion for summary judgment, asserting that no triable issues of fact existed as to whether the father abused the child, based on the father's sworn admissions during his plea allocution. *Id.* In granting summary judgment to the ACS, the court held that no triable issue of fact remained because the father had allocuted under oath that he had engaged in sexual acts with his eleven-year-old child. With those facts established through sworn admissions, the court determined that abuse occurred as a matter of law in that subsequent civil case. *Id.*

Similarly, in United States v. 415 East Mitchell Ave., 149 F.3d 472 (6th Cir. 1998), a criminal defendant pleaded guilty to trafficking in drugs for cultivation of marijuana. *Id.* at 475. During his plea hearing, he admitted under oath that his conduct involved the cultivation of marijuana at his residence. *Id.* at 476. Subsequently, the United States filed a civil forfeiture action against real property owned by the defendant, in which the United States was required to show probable cause that there was a connection between the defendant's property and drug activity. *Id.* In affirming summary judgment, the court held that the defendant's sworn admission in the prior criminal case that he cultivated marijuana at his residence, apart from his plea to trafficking drugs for cultivation, established the probable cause necessary to show a connection between the property and drug activity. *Id.* See also, United States v. 802 North Main St., No. 06-cv-02296-LTB-MEH, 2007 WL 1725250 (D. Colo. June 12, 2007) (in similar drug forfeiture proceeding, in denying suppression motion as premature, the court held that defendant's sworn admission during his plea that police found a certain quantity of drugs in his residence may prevent him from arguing that no probable cause existed,

depending on how the defendant would try to meet his evidentiary burdens at summary judgment).

Here, the Court of Appeals' ruling was neither based on the mere fact of a guilty plea nor on application of collateral estoppel. Here, as with In re P./R. Children, United States v. 415 East Mitchell Ave., and United States v. 802 North Main St., it was based on Augustine's sworn admissions of specific dishonest and fraudulent conduct.

II. THE COURT OF APPEALS CORRECTLY HELD THAT AUGUSTINE'S ADMITTED CONDUCT PRECLUDED INDEMNIFICATION AS A MATTER OF LAW

Augustine does not dispute that to receive indemnification he must have shown that his conduct that gave rise to his \$2 million criminal fine was "good faith" conduct. Minn. Stat. § 302A.521, Subd. 2. Augustine has never disputed that, by statutory definition, such conduct must not have been dishonest conduct. Minn. Stat. § 302A.011. Augustine has never disputed that intentional fraudulent conduct, by its nature and legal definition, is dishonest conduct. Because the undisputed evidence of Augustine's sworn admissions established that he committed intentional fraud, the Court of Appeals properly held that no triable issue of fact remained on the question of whether Augustine's conduct was in good faith because one who commits fraud "cannot fairly be said to have acted in good faith." Augustine, 735 N.W.2d at 744 (citing United States v. Rice, 449 F.3d 887, 896 (8th Cir. 2006)).

A. Intentional Fraud, Which Is Inherently Dishonest, Can Never Be Committed in Good Faith

Prior to this case, Minnesota courts have not directly faced how good faith under the indemnification statute relates to intentionally fraudulent conduct. As a plain language matter, the common usage of “good faith” means “freedom from intention to defraud.” Black’s Law Dictionary 477 (6th Ed. 1983). Moreover, the Minnesota statute itself defines “good faith” as “honesty in fact.” “Honest,” in turn, is defined as “not fraudulent.”¹⁰ Therefore, intentional fraud, by definition, can never be “honest in fact,” and a corporate officer who undisputedly committed intentionally fraudulent acts may not, as a matter of law, receive indemnification for that conduct under Minn. Stat. § 302A.521, Subd. 2(a).

Courts in states that have faced the issue routinely recognize that fraudulent acts by a corporate officer, by definition, constitute bad faith. See, e.g., Bunge Corp. v. Recker, 519 F.2d 449, 452 (8th Cir. 1975) (“[m]any other courts have held that bad faith is synonymous with ‘fraud’ . . . [b]ad faith generally implies or involves actual or constructive fraud or a design to mislead or deceive another”); see also 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

¹⁰ Webster’s II New Riverside Dictionary, Revised Edition 331 (Houghton Mifflin Co. 1996). Minnesota courts routinely consult dictionaries in defining statutory terms. See In re Wren, 685 N.W.2d 721, 724 (Minn. Ct. App. 2004) (citing Fiveland v. Bollig & Sons, Inc., 436 N.W.2d 478, 480 (Minn. Ct. App. 1989) (using dictionary to interpret statutory term “defective”)); Brandt v. Hallwood Mgmt. Co., 560 N.W.2d 396, 399-400 (Minn. Ct. App. 1997) (using Webster’s Dictionary to define “construction”).

public policy); Raychem Corp. v. Fed. Ins. Co., 853 F. Supp. 1170, 1177 (N.D. Cal. 1994) (noting that it is only appropriate to permit indemnification for fraud when the claimant settles without admitting wrongdoing).¹¹

In addition, courts in other jurisdictions nearly uniformly hold that fraud is synonymous with bad faith. See Nordstrom, Inc. v. Chubb & Son, Inc., 54 F.3d 1424, 1434 (9th Cir. 1995) (citing case that stated that a controlling person who approves actions constituting fraudulent activity cannot invoke a good faith defense, in action by corporation seeking payment under directors' and officers' liability policy); United States v. Smith, 13 F.3d 1421, 1425 (10th Cir. 1994) (stating generally that bad faith and fraud are synonymous); United States v. Schwab, 88 F. Supp. 2d 1275, 1283 (D. Wyo. 2000) (in discussing a general definition, stating "bad faith" and "fraud" are synonymous, and also a synonym of dishonesty and citing Black's Law Dictionary); Acord v. Chrysler Corp., 399 S.E.2d 860, 862 (W. Va. 1990) (stating the right of rejection of satisfaction of a contract is absolute, and the "reasons cannot be investigated, if in good faith, that is, not fraudulent"); Kelley v. Jacobs, No. 21953-1-II, 1999 WL 305232, at *5 (Wash. Ct. App. May 14, 1999) (stating that fraud by non-

¹¹ See also, Frick v. McClelland, 384 Pa. 597, 122 A.2d 43, 45 (1956); Commonwealth v. Smith, 242 Ky. 365, 46 S.W.2d 474, 478 (1923); Pabst Brewing Co. v. Nelson, 108 Okla. 286, 236 P. 873, 875 (1925); Polikoff v. Fin. Serv. Co., 205 N.C. 631, 172 S.E. 356, 358 (1934); Bansbach v. Zinn, 801 N.E.2d 395, 769 N.Y.S.2d 175 (N.Y. Ct. App. 2003); Pilipiak v. Keyes, 286 A.D.2d 231, 231-32, 729 N.Y.S.2d 99 (N.Y. 2001) (finding under a nearly identical statute that if a judgment or conviction includes a finding of deliberate dishonesty or bad faith, indemnification is precluded as a matter of law).

disclosure or concealment in contract negotiations is bad faith); In re Foxmeyer Corp., 296 B.R. 327, 336 (Bankr. D. Del. 2003) (quoting language that “good faith” means the same thing as without actual fraudulent intent in bankruptcy, fraudulent transfer claim); In re Dewberry, 266 B.R. 916, 918 (Bankr. S.D. Ga. 2001) (stating that a debtor cannot show good faith when debtor’s omission of a creditor from his or her schedules occurred because of fraud or intentional design).¹²

B. The Court of Appeals Correctly Held that Augustine’s Conduct Was Not in Good Faith as a Matter of Law

Augustine’s sworn admissions, which were separate and apart from his actual guilty plea, established that (1) Augustine received a letter from TriSpan, a fiscal intermediary of the Medicare Program, indicating that TriSpan, which had earlier approved coverage for the Warm-Up product, had now determined that Warm-Up was “investigational;” (2) Augustine knew this determination was material to healthcare providers such as Southern Medical in deciding whether to purchase Warm-Up;

¹² Courts in other states have similarly found that the statutory criteria of acting in good faith cannot be met by a party whose misconduct was knowing and/or willful. See Equitex, Inc. v. Ungar, 60 P.3d 746, 751 (Colo. Ct. App. 2002) (holding that the defendant’s intentional conduct demonstrated a lack of good faith that, as a matter of law, precluded indemnification); Biondi v. Beekman Hill House Apt. Corp., 709 N.Y.S.2d 861, 731 N.E.2d 577, 581 (2000) (“[b]ecause the underlying . . . judgment establishes that [defendant’s] acts were committed in bad faith, [defendant] is not entitled to indemnification and cannot relitigate the good faith versus bad faith issue here. . . .”); In re Landmark Land Co., 76 F.3d 553, 565 (4th Cir. 1996) (“[a]n 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”); McLean v. Alexander, 449 F. Supp. 1251, 1266-67 (D. Del. 1978) rev’d on other grounds, 599 F.2d 1190 (3d Cir. 1979) (indemnity under section 145 is subject to the general public policy against indemnifying a party for his intentional wrongdoing).

(3) Augustine thereafter knowingly and willfully aided and abetted employees under his charge in withholding from Southern Medical the fact that he had received the letter from TriSpan. (RA37-44); see Augustine, 735 N.W.2d at 744-45.

Whether during the summary judgment stage or at trial, Augustine has never disputed that he made those admissions under oath and in open court or that the substance of his admissions is true. (RA104, RA170-71). Augustine confirmed these facts in his deposition, and he testified at trial that he stood behind his sworn admissions. (Id.).

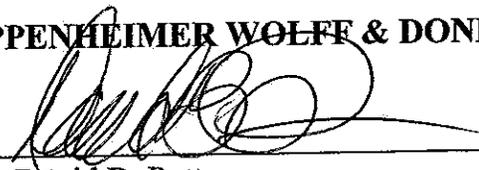
Therefore, the Court of Appeals simply found that once this *undisputed evidence* was weighed, it did not matter what other additional evidence Augustine presented. Any evidence Augustine argues he is entitled to present of “the inducements which led him to enter his plea” would not, as a matter of law, affect the resolution or outcome of the case. No genuine issue of material fact therefore existed. Thus, the Court of Appeals was correct in holding that Arizant was entitled to judgment as a matter of law on Augustine’s indemnification claim.

CONCLUSION

The Court of Appeals correctly reversed the trial court’s decision and correctly held that Augustine cannot be indemnified for his knowingly fraudulent misconduct because such conduct is inherently dishonest and cannot meet the statutory “good faith” standard as a matter of law. Arizant therefore respectfully requests that this Court affirm the judgment of the Court of Appeals.

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