

NO. A07-1682

State of Minnesota
In Court of Appeals

In re Dr. Roy Wayne Buckmaster, D.P.M., and
Albert Lea Medical Center – Mayo Health System,
Petitioners,
Sandra O'Rourke (f/k/a Sandra Ruble), et al.,
Respondents,
v.
Dr. Roy Wayne Buckmaster, D.P.M., et al.,
Petitioners.

BRIEF OF DR. STEPHEN POWLESS

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LEGAL ISSUE

May an Agreement for Corrective Action (“ACA”) Between a Health Licensing Board and its Licensee be Admitted into Evidence in a Medical Malpractice Action?

The trial court held that the ACA was admissible.

STATEMENT OF THE CASE AND THE FACTS

I. Statement of the Case

This proceeding arises from this Court's October 2, 2007 Order on a petition for a writ of prohibition to the Freeborn County District Court, the Honorable John C. Chesterman presiding. The trial court admitted an Agreement for Corrective Action ("ACA") into evidence in this medical malpractice action. Dr. Stephen Powless ("Dr. Powless") submits this brief to join the Petitioners, Dr. Roy Buckmaster ("Dr. Buckmaster"), and Albert Lea Medical Center – Mayo Health System, in their request that the Court grant a writ of prohibition reversing the trial court's ruling that the Agreement for Corrective Action ("ACA") is admissible.

II. Statement of the Facts

Dr. Powless, a member of the Minnesota Board of Podiatric Medicine ("Board"), volunteered to be a member of the Complaint Resolution Committee ("CRC") in the investigation of the complaint filed by Sandra O'Rourke ("O'Rourke") against Dr. Buckmaster. (Pet'r's A. 66). As a result of the investigation, Dr. Buckmaster and the CRC agreed to settle this complaint through an ACA. (Pet'r's A. 15).

In this medical malpractice case against Dr. Buckmaster, O'Rourke sought to use the ACA as evidence of Dr. Buckmaster's malpractice. (Pet'r's A. 35-6). Ruling on a motion in limine brought by Dr. Buckmaster, the trial court allowed the Background Information section into evidence, while keeping the Corrective Action section out. (Pet'r's A. 13). Petitioner brought a motion for reconsideration which was denied by the trial court. (Pet'r's A. 26).

As a result of the trial court's ruling, Dr. Buckmaster attempted to depose Dr. Powless, to discover what the Board did or did not consider in agreeing to the ACA. (Pet'r's A. 91, 95). Dr. Powless objected and sought a protective order, which the trial court granted. (Pet'r's A. 26). This Court denied the writ of prohibition regarding this ruling (Oct. 2, 2007, Order ¶ 1.), and this issue is no longer before the Court.

ARGUMENT

I. For All the Reasons Submitted by Petitioners, the Trial Court Committed Legal Error in Admitting the ACA.

In their brief, petitioners Dr. Buckmaster and Albert Lea Medical Center – Mayo Health System present cogent and compelling legal arguments pointing out why the admission of an ACA in a medical malpractice lawsuit is legal error. Dr. Powless adopts those arguments, and will not burden the Court with redundant arguments on that point. Instead, Dr. Powless will address the policy issues that support the position that an ACA should never be admissible in a medical malpractice action.

II. Allowing an ACA Into Evidence Would Have a Detrimental Effect on Future Operations of the Board and Would Discourage Others from Volunteering for the Board.

Allowing an ACA into evidence in a medical malpractice case would open the door to medical malpractice plaintiffs to use the volunteer members of licensing boards as de facto experts. The health professional licensing boards were not established for the purpose of becoming involved in civil litigation. Rather, they were established to regulate the practice of the healing arts through the licensing and disciplinary process.

Allowing the ACA into evidence will usurp the time, energy and other resources of the Board for a purpose which was not intended.

The statute establishing the Board of Podiatric Medicine does not contain a provision creating a private cause of action for violation of any of the grounds for disciplinary action set out in Minn. Stat. § 153.19. Like the Patient Bill of Rights contained in Minn. Stat. § 144.651, violations give rise to administrative procedures and remedies, not a claim for money damages, *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78 (Minn. App. 1989). Admitting ACAs into evidence in malpractice cases will transform the regulatory process into a vehicle for expert review for use in civil litigation, something never intended by the legislature.

Further, allowing the use of ACAs in civil litigation would inevitably have a chilling effect on the Board's ability to carry out its duties. The Board may be more reluctant to agree to an ACA, if by doing so it may become embroiled in a future malpractice case. The Board may decide that voluntary resolution of complaints such as occurred with Dr. Buckmaster should be abandoned because of potential use of the settlement document in litigation, thereby eliminating the ACA as an effective regulatory tool.

Physicians who are being investigated by the medical boards would also be less willing to settle with the CRC through an ACA, to the extent that it could potentially be used against them in a subsequent malpractice lawsuit. Fewer settlements of the investigations by the medical boards will in turn lead to cases taking more time and effort from everyone involved: the physician being investigated, the volunteer members of the

CRC who are investigating the physicians, and finally the Attorney General and the Board who eventually will have to bring an action against the physician if no settlement can be reached.

Finally, allowing the ACA into evidence would have a chilling effect on those individuals who volunteer for the Boards and CRC, such as Dr. Powless. Here, the court's ruling admitting the ACA into evidence promptly led to a subpoena for Dr. Powless's testimony. He had to spend time and money seeking a protective order. In doing so, Dr. Powless has lost time from focusing on his practice. Other physicians who potentially can take part in the CRC may be understandably reluctant to go through what Dr. Powless has gone through. Even without the threat of a subpoena, the physicians would lose more time from their practices, as the CRC would expend more time and effort handling these complaints, as investigated physicians would be less willing to settle. Doctors such as Dr. Powless selflessly volunteer their time in order to maintain high standards in their profession, not to serve as an expert panel for potential medical malpractice plaintiffs.

III. Allowing ACAs as Evidence in a Medical Malpractice Suit Would Improperly Compel Expert Opinions from a Non-Party.

Admitting the ACA into evidence would effectively require the members of the CRC, including Dr. Powless, to give expert testimony. The Background Information section of the ACA states, "It is the Committee's view that ... procedures performed by [Dr. Buckmaster] did not properly address the [O'Rourke's] medical condition." (Pet'r's A. 72). Admitting the ACA would be tantamount to having Dr. Powless or another

doctor on the CRC testify that Dr. Buckmaster did not properly address the patient's medical condition.

It has long been the rule in Minnesota that expert testimony cannot be compelled from a non-party. In *Anderson v. Florence*, 181 N.W.2d 873 (Minn. 1970) the Court allowed a party to compel testimony from a defendant physician, and the Court later required co-defendants to be subject to questioning in order to "to permit the production in each case of all pertinent and relevant evidence that is available from the parties to the action". *Cornfeldt v. Tongen*, 262 N.W.2d 684, 696 (Minn. 1977). But this rule only applies to parties. Dr. Powless is a non-party who is unwilling to testify. Allowing his opinions to be submitted into evidence would in effect be to compel his testimony.

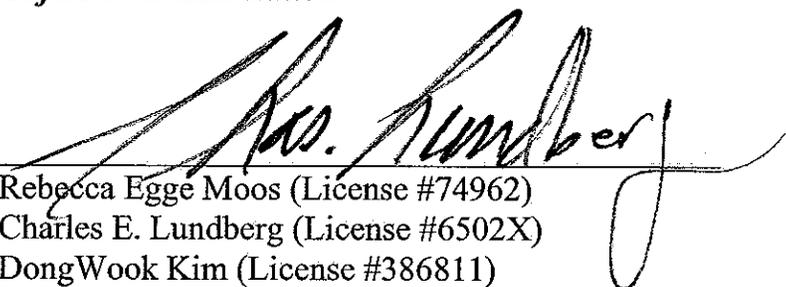
Other jurisdictions have looked at various other factors in determining whether an unwilling, non-party expert may be compelled to testify. Most courts have denied compelling expert testimony on the basis that the issue is a matter of contract or bargain. *See, e.g., Mason v. Robinson*, 340 N.W.2d 236, 242 (Iowa 1983) (protecting doctor who received information as the director of the National Bariatric Surgery Registry at the University of Iowa Hospitals and Clinics from being compelled to testify, because he is free to decide whether or not he wishes to provide opinion testimony for a party); *Agnew v. Parks*, 343 P.2d 118, 123 (Cal. App. 1959) (holding that there is no duty on a doctor's part to agree to serve as an expert witness for one with whom he has no pre-existing contractual relationship). Dr. Powless has no contractual agreement with O'Rourke or with Dr. Buckmaster, and he has no obligation to provide expert testimony for either of them. He is also unwilling to testify for either of them.

CONCLUSION

For the foregoing reasons, Dr. Stephen Powless respectfully requests that the Court issue the writ of prohibition.

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Dated: 11/2/07

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