

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,
Defendants/Petitioners,
Sandra O'Rourke (f/k/a Sandra Ruble),
Plaintiff/Respondent,
and

Minnesota Board of Podiatric Medicine and Dr. Stephen Powless,
Third-Party Respondents.

BRIEF OF PETITIONERS

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
Peter A. Schmit, Esq. (#204365)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
(612) 349-8500

Attorneys for Respondent

BASSFORD REMELE
Rebecca Egge Moos, Esq. (#74962)
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
(612) 333-3000

Attorneys for Third-Party Respondent
Dr. Stephen Powless

(Counsel for Amici Curiae appear on reverse side cover)

MASLON EDELMAN BORMAN
& BRAND, LLP
David T. Schultz, Esq. (#169730)
David F. Herr, Esq. (#44441)
Jason A. Lien, Esq. (#028936X)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8200

Attorneys for Petitioners

MAYO CLINIC LEGAL DEPARTMENT
Joshua B. Murphy, Esq. (#0301139)
200 First Street S.W.
Rochester, MN 55905
(507) 538-1103

Of Counsel for Petitioners

MEAGHER & GEER, P.L.L.P.
William M. Hart (#150526)
Melissa Dosick Riethof (#282716)
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402-3707
(612) 338-0661

*Attorneys for Amici Curiae
Minnesota Medical Association and
Minnesota Podiatric Medical Association*

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii
Statement of Legal Issues	1
Statement of the Case	3
Statement of the Facts	4
A. The Medical Treatment	4
B. The Board Complaint and Resulting Proceedings.....	4
C. Settlement of the Board Complaint	6
D. The Malpractice Action	9
Argument	14
A. Introduction	14
B. The Agreement for Corrective Action in an Inadmissible Settlement Agreement Under Minn. R. Evid. 408	14
1. Rule 408 and its Underlying Public Policy	14
2. Rule 408 Applies to Settlements Reached With State Administrative Agencies, Including Licensing Boards.....	19
3. The District Court Exceeded its Authority When it Ordered the Admission of the Agreement for Corrective Action in Contravention of Rule 408	22
C. The Agreement for Corrective Action is Also Inadmissible Under Minn. R. Evid. 403	26
1. Introduction	26
2. Under Rule 403 Courts Routinely Exclude Licensing Board Evidence in Malpractice Lawsuits.....	26
3. The District Court Exceeded its Authority by Not Undertaking a Rule 403 Balancing Analysis and By Mischaracterizing Defendants’ Rule 403 Objection As Arising Under Rule 803(8)	29
D. Because the Agreement for Corrective Action is Inadmissible, it Cannot Be Used for “Impeachment” of Dr. Buckmaster at Trial	35
E. A Writ of Prohibition Should Issue	38
Relief Requested	43

TABLE OF AUTHORITIES

Page

STATE CASES

<i>Brooks Realty, Inc. v. Aetna Ins. Co.</i> , 128 N.W.2d 151 (Minn. 1964).....	39, 41
<i>Byrd v. Med. Ctr. of Cent. Georgia, Inc.</i> , 574 S.E.2d 326 (Ga. Ct. App. 2002)	1, 27, 28
<i>C.J. Duffy Paper Co. v. Reger</i> , 588 N.W.2d 519 (Minn. Ct. App. 1999)	15, 25, 40
<i>Carlson v. Riemenschneider</i> , 2007 WL 446643 (Minn. Ct. App. Feb. 13, 2007) (unpublished op.).....	1, 26, 27, 33
<i>Clark v. Clark</i> , 543 N.W.2d 685 (Minn. Ct. App. 1996).....	39
<i>Covell v. Super. Ct. of Los Angeles Cty.</i> , 159 Cal. App. 3d 39 (Cal. Ct. App. 1984)	40
<i>Esser v. Brophrey</i> , 3 N.W.2d 3 (Minn. 1942).....	2, 15, 19, 35, 36, 37, 38
<i>Farm Bur. Mut. Ins. Co. v. North Star Mut. Ins. Co.</i> , 2005 WL 3112014 (Minn. Ct. App. Nov. 22, 2005) (unpublished op.).....	39
<i>Francis v. Reynolds</i> , 450 S.E.2d 876 (Ga. Ct. App. 1994).....	28, 29, 33, 34
<i>Fryar v. Touchstone Physical Therapy, Inc.</i> , 229 S.W.3d 7 (Ark. 2006)	27, 28, 29, 33, 41
<i>Hancock-Nelson Mercantile Co. v. Weisman</i> , 340 N.W.2d 866 (Minn. Ct. App. 1983)	39
<i>Hentschel v. Smith</i> , 153 N.W.2d 199 (Minn. 1967)	15, 16
<i>Herbstreith v. De Bakker</i> , 815 P.2d 102 (Kan. 1991)	28
<i>In re Max Schwartzman & Sons, Inc.</i> , 670 N.W.2d 746 (Minn. Ct. App. 2003)	20, 21
<i>In re Petition for Disciplinary Action Against Wood</i> , 716 N.W.2d 341 (Minn. 2006)	1, 20
<i>Johnson v. St. Paul Ins. Co.</i> , 305 N.W.2d 571 (Minn. 1981).....	15
<i>Leininger v. Swadner</i> , 156 N.W.2d 254 (Minn. 1968).....	41, 42
<i>Malan v. Huesemann</i> , 942 S.W.2d 424 (Mo. Ct. App. 1987)	1, 16, 21, 40
<i>McClure v. Walgreen Co.</i> , 613 N.W.2d 225 (Iowa 2000).....	21, 22

<i>McGuire v. C & L Rest., Inc.</i> , 346 N.W.2d 605 (Minn. 1984).....	15
<i>Minneapolis Star & Tribune Co. v. Schumacher</i> , 392 N.W.2d 197 (Minn. 1986).....	15, 16
<i>Morey v. Board of Indep. Sch. Dist. No. 492</i> , 136 N.W.2d 105 (Minn. 1965).....	32
<i>Richardson v. School Board of I.S.D. No. 271</i> , 210 N.W.2d 911 (Minn. 1973).....	39
<i>Shea v. Esensten</i> , 622 N.W.2d 130 (Minn. Ct. App. 2001).....	1, 26, 29, 34
<i>State v. Bauer</i> , 598 N.W.2d 352 (Minn. 1999).....	30
<i>State v. Hodges</i> , 384 N.W.2d 175 (Minn. Ct. App. 1986).....	36
<i>State v. Turner</i> , 550 N.W.2d 622 (Minn. 1996)	39, 41
<i>Thermorama, Inc. v. Shiller</i> , 135 N.W.2d 43 (Minn. 1965).....	39, 41
<i>Vivian Scott Trust v. Parker</i> , 687 N.W.2d 731 (S.D. 2004).....	2, 4, 36, 37
<i>Waller v. Hayden</i> , 885 P.2d 1305 (Mt. 1994).....	28
<i>Wiseman v. Henning</i> , 569 S.E.2d 204 (W.Va. 2002)	40

FEDERAL CASES

<i>E.E.O.C. v. Gear Petroleum, Inc.</i> , 948 F.2d 1542 (10th Cir. 1991).....	37
<i>Stacey v. Bangor Punta Corp.</i> , 620 F. Supp. 636 (D. Me. 1985).....	37
<i>Stockman v. Oakcrest Dental Ctr., P.C.</i> , 480 F.3d 791 (6th Cir. 2007).....	37, 38

STATE STATUTES AND RULES

Minn. R. Civ. App. P. 120.03	14
Minn. R. Evid. 403	1, 2, 9, 26, 29, 30, 34, 41
Minn. R. Evid. 408	1, 2, 9, 12, 13, 14, 16, 20, 21, 22, 24, 25, 29, 31, 35, 36, 37, 39
Minn. R. Evid. 607	2
Minn. R. Evid. 803	10, 29, 30, 35
Minn. Stat. §§ 153.01-26	5, 17
Minn. Stat. § 153.20	5, 32
Minn. Stat. § 153.22	20, 23
Minn. Stat. § 214.01	19, 42
Minn. Stat. § 214.103	5, 8, 9, 10, 11, 12, 16, 19, 20, 23, 24

SECONDARY AUTHORITY

29 AM.JUR.2D <i>Evidence</i> § 508 (1994).....	22
4A MINNESOTA DISTRICT JUDGES ASS'N, MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES – CIVIL, CIV JIG 80.10 (Michael K. Steensen, Peter B. Knapp reporters, 5th ed. 2006).....	31
11 PETER N. THOMPSON, MINNESOTA PRACTICE § 408.01.....	15
JEAN R. STERNLIGHT, <i>Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia</i> , 80 NOTRE DAME L. REV. 681 (2005)	19

STATEMENT OF LEGAL ISSUES

1. Is an Agreement for Corrective Action (“Agreement”) between a health licensing board and its licensee, whereby the parties agree to a compromised resolution of a charge, inadmissible under Minn. R. Evid. 408?

The trial court held the Agreement was not a settlement agreement under Rule 408.

Authorities:

Minnesota Statute § 214.103

Minnesota Rule of Evidence 408

In re Petition for Disciplinary Action Against Wood, 716 N.W.2d 341 (Minn. 2006)

Malan v. Huesemann, 942 S.W.2d 424 (Mo. Ct. App. 1987)

2. Is an Agreement for Corrective Action Inadmissible under Minn. R. Evid. 403?

The trial court did not reach Defendant’s Rule 403 argument but held that portions of the Agreement were inadmissible as prejudicial and irrelevant.

Authorities:

Minnesota Rule of Evidence 403

Shea v. Esensten, 622 N.W.2d 130 (Minn. Ct. App. 2001)

Carlson v. Riemenschneider, 2007 WL 446643 (Minn. Ct. App. Feb. 13, 2007) (unpublished op.)

Byrd v. Med. Ctr. of Cent. Georgia, Inc., 574 S.E.2d 326 (Ga. Ct. App. 2002)

3. May the Agreement for Corrective Action be used at trial to “impeach” the licensee?

The trial court held that the inadmissible portion of the Agreement could nonetheless be used to impeach Dr. Buckmaster.

Authorities:

Minnesota Rules of Evidence 403, 408 and 607

Esser v. Brophay, 3 N.W.2d 3 (Minn. 1942)

Vivian Scott Trust v. Parker, 687 N.W.2d 731 (S.D. 2004)

STATEMENT OF THE CASE

During 2004 the Minnesota Board of Podiatric Medicine investigated Dr. Roy Wayne Buckmaster regarding a complaint brought against him by Sandra O'Rourke, plaintiff in the subsequent civil action in which this writ proceeding takes place. The proceedings before the Board were concluded by a compromise agreement entitled Agreement for Corrective Action dated April, 2005.

Plaintiff Sandra O'Rourke commenced a medical malpractice action relating to her treatment for a sore foot. In that case, the district court filed orders on March 12, and August 14, 2007, which determined that the Agreement for Corrective Action between the Board and Dr. Buckmaster was admissible to prove liability against Dr. Buckmaster in the medical malpractice action notwithstanding Rule 408 of the Minnesota Rules of Evidence. The district court further held that any inadmissible portions of the Agreement could nonetheless be used to impeach Dr. Buckmaster at trial. Petitioner challenged those orders by petition for writ of prohibition to this court. By order dated October 2, 2007, this court temporarily stayed the district court's orders and ordered full briefing and argument on the merits.

STATEMENT OF THE FACTS

A. The Medical Treatment

This medical malpractice case arises out of a bone fusion surgery and related procedures performed on Plaintiff's foot in July 2001 and January 2002. A.2-3. Years earlier, in 1989 when she was a sophomore in high school, Plaintiff had been diagnosed as suffering from chronic foot pain. A.193. During the ensuing twelve years, she had unsuccessfully tried orthotic shoe inserts, wrapping/bandaging of her foot, anti-inflammatory drugs and physical therapy. A.195. In July 2001, Dr. Buckmaster performed surgery to fuse her talonavicular joint, lengthen her achilles tendon and shave a portion of an enlarged bone. A.2. The joint, however, did not fuse and Dr. Buckmaster performed a second surgery in January 2002 during which he fused the joint again, inserted a bone graft (to help take pressure off the foot) and made an incision in her calf muscle to further lengthen her achilles tendon. A.3. Plaintiff was dissatisfied with her surgical outcome; she claims to have continuing pain and, due to the joint fusion, a feeling of stiffness in her foot. A.4-5. In this case, Plaintiff alleges that Dr. Buckmaster was negligent in that the fusion surgery he performed was not medically justified and did not properly address her medical condition. A.6. She alleges that Dr. Buckmaster should have first attempted further conservative treatment, such as prescribing orthotics and/or pain relievers, both of which had been tried unsuccessfully in the past. *Id.*

B. The Board Complaint and Resulting Proceedings

More than a year before she sued Dr. Buckmaster, Plaintiff filed a complaint regarding Dr. Buckmaster's care with the Minnesota Board of Podiatric Medicine (the

“Board”). *A.53; A.201.* The Board, the state agency that licenses podiatrists, is authorized under Minnesota law to investigate such complaints and impose discipline on its licensees. Minn. Stat. §§ 153.01–26. In deposition Plaintiff testified that she filed the Board complaint because an attorney told her that it might bolster a later malpractice suit against Dr. Buckmaster. *A.53.*

When a Board complaint is filed, it is turned over to the Complaint Resolution Committee (the “Committee”), which investigates the complaint. *A.74.* The Committee comprises two Board members, a licensed doctor of podiatric medicine, and a public member of the Board. *A.74.* The Committee, acting on behalf of the Board, has the authority to request the licensee’s written response to the allegations, may refer the matter to the Attorney General’s Office for investigation, or may schedule a conference with the licensee to discuss the allegations. *Id.*; Minn. Stat. § 214.103 By law, the licensee must cooperate fully with the investigation and failure to do so may itself result in discipline. Minn. Stat. § 153.20. Once its investigation is complete the Committee may initiate a formal hearing, dismiss the matter, or settle it by either entering into a stipulation for disciplinary action or a non-disciplinary “Agreement For Corrective Action.” *A.74.* Minn. Stat. § 214.103, subd. 6.

Upon reviewing Plaintiff’s complaint in this instance, the Committee, through its attorney—Assistant Attorney General Susan Damon—sent a Notice of Initial Conference to Dr. Buckmaster. *A.104-08.* The Notice raised several *allegations* regarding Dr. Buckmaster’s care and treatment of Plaintiff. *Id.* It alleged that Dr. Buckmaster’s care “may have departed from the minimal standards of acceptable and prevailing podiatric

medical practice” because (1) the fusion surgery did not appear to be justified; (2) the tendon-lengthening procedure appeared to have been unnecessary; (3) the x-rays were inadequate; (4) Dr. Buckmaster used an allograft rather than an autograft;¹ and (5) Dr. Buckmaster lengthened a bone in Plaintiff’s leg rather than shortening it. *A.105-06*. The Notice advised Dr. Buckmaster that one of the purposes of the conference was to “permit the Committee and you to seek *resolution and remedy of this matter without the necessity of instituting a formal hearing.*” *A.108*. (emphasis added). The Committee further explained that one possible outcome of the conference would be an “agreement for corrective action,” which it specifically referred to as a “settlement” that would avoid a “contested case hearing.” *A.107*.

The Committee convened its conference with Dr. Buckmaster on November 19, 2004. Dr. Buckmaster was represented by his attorney, Mr. David Bunde; the Committee was represented by Assistant Attorney General Susan Damon. *A.100*. At the conference Dr. Buckmaster, through his attorney, contested the merits of the Board’s allegations. *A.100*.

C. Settlement of the Board Complaint

Following the initial conference, the Board’s attorney, Ms. Damon, sent Mr. Bunde a letter proposing terms on which the Board would agree to settle the dispute. Ms. Damon proposed entering into an Agreement for Corrective Action and provided a draft of the agreement, stating “[i]f Dr. Buckmaster will agree to resolution of the pending

¹ The difference between an allograft and autograft refers to whether the graft tissue is a specimen from the patient or from someone else.

matter on the terms set forth in the Agreement, [he should] sign and date the document and return it to me. . . .” *A.109.* (emphasis added).

The terms of the Board’s proposal were unacceptable to Dr. Buckmaster, and further negotiations ensued. Mr. Bunde suggested several changes, asking Ms. Damon to “review these *proposed changes* with the Board and let me know their response.” *A.112.* (emphasis added).

Ms. Damon presented Dr. Buckmaster’s proposed changes to the Committee, which rejected the proposal but made a counteroffer:

The Committee will not agree to your proposal as drafted [but] will agree to compromise language set forth in paragraphs A.4 and A.5 of the enclosed redraft of the Agreement for Corrective Action. The compromise language adopts some of your proposed additions.

A.113.

The new “compromise language” comprised two additional paragraphs:

4. In response to the complaint and Committee’s investigation, Licensee states that he evaluated the patient’s condition, studied the applicable literature, consulted with two podiatric surgeons who have experience with rearfoot surgery and performed the January 4, 2002 procedure with the assistance of a podiatrist who had more experience with rearfoot surgery than Licensee.

5. It is the Committee’s view that despite the actions referenced in paragraph A.4, procedures performed by Licensee did not properly address the patient’s medical condition. Moreover, one of the surgeons Licensee consulted did not actually review the patient’s records or radiographs.

A.114.

Dr. Buckmaster reviewed the Committee’s counter-proposal and, solely as a means of settling the matter, agreed to the compromise language. *A.61.* The negotiated

Agreement for Corrective Action (the “Agreement”) was then executed by both parties. A.73.

As negotiated, the Agreement consists of two parts. A.72. The initial part, labeled “Background Information,” includes certain routine factual matters (*e.g.*, date of complaint, etc.) and the parties’ contentions and disagreements regarding Dr. Buckmaster’s care of Plaintiff. The “compromise language” referred to above is found at paragraphs 4 and 5 of the Background Information section. *Id.* Among other things, this Background section states that it is *the Board’s view* that “the procedures performed . . . did not properly address the patient’s medical condition,” and that the “*documentation in [the] medical record . . . did not adequately justify the course of treatment*” (*i.e.*, a charting issue). *Id.* (emphasis added). The majority of the Board’s original allegations – those which criticized the tendon lengthening procedure, the adequacy of the x-rays, the use of an allograft rather than an autograft, and the alleged lengthening of a bone in Plaintiff’s leg – are simply dropped from the final settlement agreement. *Id.* In addition, there is no stipulation, much less any factual “finding,” that the surgery was unnecessary or that Dr. Buckmaster departed from the applicable standard of care as originally alleged by the Board. *Id.*

The second part of the Agreement recites the corrective actions that Dr. Buckmaster agreed to undertake in order to avoid the adjudication and potential discipline that a contested case hearing might impose. A.73. The corrective actions, which as a matter of law are not disciplinary action, were: (1) that Dr. Buckmaster would have all rearfoot reconstructive surgeries he performed in the ensuing 18 months

proctored by a licensed podiatrist or orthopedic surgeon; (2) that he would read at least 25 current journal articles pertaining to flat foot reconstructive surgeries; and (3) that he would, upon request, submit medical records for up to 10 surgical patients for the Committee's review of his record-keeping practices. *Id.* The Agreement provided that upon completion of these tasks the Board would dismiss the complaint against Dr. Buckmaster.² *Id.* Dr. Buckmaster completed these tasks, and the Board's complaint was dismissed. *A.56.* Because the matter was settled through an Agreement for Corrective Action, there was no contested case hearing and, accordingly, no factual findings by any administrative agency.

D. The Malpractice Action

Three months after the Board settled its dispute with Dr. Buckmaster, Plaintiff commenced her planned medical malpractice action. *A.1.* In her complaint, Plaintiff drew heavily upon the contents of the Agreement between the Board and Dr. Buckmaster, frequently parroting language from the "Background Information" section, and attaching a copy of the Agreement to the Complaint itself. *A.1-11.* Moreover, both of Plaintiff's designated experts likewise quoted directly from the language of the Agreement for Corrective Action. Dr. John Enger – from whom Plaintiff sought treatment after she quit seeing Dr. Buckmaster – obtained a copy of the Board Agreement, and copied portions of it directly in his medical chart. *A.197.* Similarly, Dr. William Fishco, a retained expert, issued an affidavit in which he quoted at length from

² This dismissal procedure is a statutory requirement of any Agreement for Corrective Action. *See* Minn. Stat. § 214.103 subd. 6(a)(2).

the Agreement. Dr. Fishco equated the recitations in that Agreement with factual findings by the Board and opined that he “agrees” with these so-called “findings.” *A.122-125*. Both in deposition questions and in argument to the district court, Plaintiff’s counsel has made it clear that he will argue to the jury that the Agreement for Corrective Action is a “finding” of negligence by the Board and an “admission” of negligence by Dr. Buckmaster. *See, e.g., A.47*.

On December 21, 2006, Defendants moved to exclude at trial all evidence of the Board proceedings and of the Agreement for Corrective Action on grounds that admission of such evidence violated Minnesota Rules of Evidence 403 and 408. By order filed March 12, 2007, the district court denied Defendants’ motion, holding that the Agreement was not a settlement agreement as there was no evidence that the parties had actually negotiated a compromise of a disputed claim. *A.22-24*. The district court did not directly address Defendants’ Rule 403 argument, instead reasoning that the Agreement constituted a report of a government investigation and was therefore admissible non-hearsay under Rule 803(8). *A.18-21*. Though the district court admitted the “Background Information” section of the Agreement, it did exclude the “Corrective Action” portion of the Agreement as irrelevant and prejudicial. *A.17-18*. It qualified this ruling, however, by holding that the entire Agreement could be used to impeach Dr. Buckmaster at trial. *Id.*

By letter dated March 16, 2007, Defendants sought leave to file a Motion for Reconsideration, noting that the district court had failed to address Defendants’ Rule 403

argument, and requested an opportunity to introduce additional evidence regarding the negotiation of the settlement between the Board and Dr. Buckmaster. *A.160.*

While this request was pending, Defendants also served a trial deposition subpoena on Dr. Powless. *A.95.* Dr. Powless, serving as a member of the Committee, had been involved in settling the complaint against Dr. Buckmaster. *A.93.* Subsequent to that settlement, he had also treated Plaintiff. *Id.* His treatment records reference his involvement as a reviewer of the Board Complaint and state that “it has been my theory that [Plaintiff] may have needed [a different kind of foot surgery than that performed by Dr. Buckmaster].” *A.94.* Defendants sought testimony from Dr. Powless to establish the lack of an adequate basis for this statement and to establish that the Agreement for Corrective Action was indeed a settlement, *not* a finding or admission of negligence. *A.182-184.* To counter the obvious prejudice that would result from admission of the Agreement at trial, Defendants intended to elicit from Dr. Powless testimony that the Board Committee had not considered certain evidence establishing the appropriateness of Dr. Buckmaster’s care and that, had it done so, the Board and Dr. Powless might well have had a different view of the care provided. *Id.*

Dr. Powless, represented by the Attorney General in his Board capacity and by private counsel in his private capacity, moved to quash Defendants’ subpoena, arguing in part that he was not subject to compelled testimony because the Agreement was an inadmissible settlement agreement. *A.67; A.91.* In light of these arguments, the district court ordered all interested parties to brief the issues raised by the proposed Powless deposition and granted Defendants’ request to file a Motion to Reconsider the order

admitting evidence of the Agreement for Corrective Action. *A.26.* Both the Attorney General and Dr. Buckmaster submitted to the district court copies of the correspondence between Ms. Damon and Mr. Bunde negotiating the terms of the Agreement for Corrective Action. *See A.99.*

On June 11, 2007, the district court heard argument on the Motion for Reconsideration of its March 12th Order. At the hearing, the Attorney General, Dr. Powless and Dr. Buckmaster all agreed that the Agreement for Corrective Action was an inadmissible settlement agreement under Rule 408. *A.163.* Only Plaintiff argued otherwise. *Id.*

Despite the undisputed evidence documenting the parties' negotiation of the Agreement and establishing the parties' understanding that their Agreement was a settlement of a disputed claim, the district court again ruled that the Agreement would be introduced into evidence at trial. *A.26.* The district court found no evidence that the Board complaint was a "dispute", that the parties' agreement to resolve it involved an exchange of valuable consideration, or that any "negotiation" had occurred between the parties. *A.29.* Ultimately, the district court reasoned, "the crux of the analysis, and what the court finds most troubling in any argument calling the interaction between the Board and Dr. Buckmaster a 'settlement,' is that the . . . Board . . . is a state agency whose solemn obligation is to oversee its licensees and uphold standards that ensure patients will receive the best care possible . . . It would be a strict injustice . . . as well as an anathema against public policy, to entertain the supposition that the Board may

‘negotiate’ with doctors when drawing up its final assessment about the quality of care the patients received.” *A.29-30*.³

By petition for a writ of prohibition, Defendants challenged the district court orders admitting the Agreement into evidence. Because Rule 408 is a rule of exclusion not a rule of discretion and because the resolution of this issue, which is undecided in Minnesota, will have statewide impact, this Court temporarily stayed the district court’s orders admitting the evidence and ordered full briefing and argument on the merits.

³ The district court also quashed, without explanation, the subpoena of Dr. Powless. This Court declined to grant extraordinary relief regarding this aspect of the district court’s orders. This issue is thus not within the scope of the current review.

ARGUMENT

A. Introduction

This appeal raises an issue never before decided by an appellate court in Minnesota – whether an agreement between a health licensing board and a licensee that resolves a complaint against the licensee short of a contested case hearing is an inadmissible settlement under Minnesota Rule of Evidence 408. Though the issue is undecided it is not a close question. The Agreement in this case in particular (and such agreements generally) fall well within the purview of Rule 408. The language of Rule 408 and the sound policy reasons for which it was adopted compel the conclusion that the evidence must be excluded. Because Rule 408 is a rule of exclusion and not one of discretion the court below exceeded its authority. Because the district court also failed to even address Defendants’ Rule 403 argument it exceeded its authority in this manner as well. Accordingly, this Court properly issued temporary relief and stayed the district court proceedings under Minn. R. Civ. App. P. 120.03. It should now issue a writ prohibiting the admission of any evidence at trial related to the Agreement for Corrective Action.

B. The Agreement for Corrective Action is an Inadmissible Settlement Agreement Under Minn. R. Evid. 408

1. Rule 408 and its Underlying Public Policy

Minnesota Rule of Evidence 408 provides that evidence of settlement discussions and of completed settlements are inadmissible to prove liability. Minn. R. Evid. 408. Rule 408 is a rule of exclusion and the district court does not have discretion to admit

evidence that violates the rule. *C.J. Duffy Paper Co. v. Reger*, 588 N.W.2d 519, 524 (Minn. Ct. App. 1999), *review denied* (Minn. Apr. 28, 1999) (*citing* 11 PETER N. THOMPSON, MINNESOTA PRACTICE § 408.01). Evidence must be excluded under Rule 408 if: (1) it constitutes a compromise or an offer to compromise a claim that is disputed as to either validity or amount; (2) it is offered to prove validity or invalidity of the claim or its amount; and (3) it is not offered for another legitimate purpose. *Id.* at 524. Settlement evidence is inadmissible under Rule 408 to prove liability even where the case in which it is offered involves different parties than those who were involved in the settlement itself. *See McGuire v. C & L Rest., Inc.*, 346 N.W.2d 605, 615 (Minn. 1984).

“This exclusionary rule . . . is based on principles of relevancy and privilege.” 11 MINNESOTA PRACTICE at § 408.01. Rule 408 is also founded on the sound, long-standing public policy of encouraging the settlement of disputed matters. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 205 (Minn. 1986) (“[t]his court has often stated that it favors the settlement of disputed claims without litigation”); *see also Johnson v. St. Paul Ins. Co.*, 305 N.W.2d 571, 573 (Minn. 1981); *Esser v. Brophay*, 3 N.W.2d 3, 4 (Minn. 1942). As explained by the Minnesota Supreme Court, “[t]he reason for the rule . . . is that the law favors the settlement of controversies out of court and if a man could not settle one claim out of court without fear that this would be used in another suit as an admission against him many settlements would not be made.” *Hentschel v. Smith*, 153 N.W.2d 199, 204 (Minn. 1967). The exclusion of settlements

under Rule 408 promotes this policy by facilitating frank and fruitful settlement discussions between parties.⁴

In this particular case there is no question that the Agreement For Corrective Action is a settlement of a disputed claim inadmissible under Rule 408. The Agreement specifically states that it is entered into between Dr. Buckmaster and the Board's Committee "pursuant to the authority of Minnesota Statutes Section 214.103, subdivision 6(a)(2)" – the statutory authority that allows the Board to informally settle disputes. *A.72*. Moreover, the only parties to this agreement – the Board and Dr. Buckmaster intended and understood that the Agreement For Corrective Action was a settlement of a disputed claim. *A.102; A.61*. The Agreement was entered into solely for purposes of settlement, not as an admission of wrongdoing. *A.61*. That the Agreement is identified as a settlement in Minnesota Statutes and the parties intended it to be such is determinative of the Agreement's status. *See Malan v. Huesemann*, 942 S.W.2d 424, 428-29 (Mo. Ct. App. 1987).

Furthermore, the district court's analysis regarding the evidence before it was fundamentally flawed. The district court found that there was no evidence of a dispute, no evidence of consideration and no evidence of any negotiations. In this case, the dispute arose from the complaint filed by the Plaintiff with the Board. The Board

⁴ In furtherance of this policy, Minnesota courts have avoided creating precedent or rules that discourage the use of settlements. *See Schumacher*, 392 N.W.2d at 205 (affirming the denial of access to records because to allow access "would tend to discourage settlements rather than encouraging them"); *Hentschel*, 153 N.W.3d at 204 ("[t]o apply the rule in *Pangalos* to cases like this one would certainly interfere with the policy favoring settlements . . .").

investigated that complaint and, based upon its investigation, made allegations against Dr. Buckmaster, which it embodied in its written Notice of Conference. In the Notice of Conference the Board advised Dr. Buckmaster that the allegations, if true, “may be grounds for discipline under Minn. Stat. Ch. 153.” *A.105*. The Notice, just like a complaint in a civil action, was *served* on Dr. Buckmaster on November 3, 2004. *A.104*. (stating “enclosed and served upon you . . . is a Notice of Conference . . .”). Thus, a claim of professional misfeasance was made by the Board against Dr. Buckmaster.

It is also uncontradicted that the allegations raised by the Board were disputed – largely successfully – by Dr. Buckmaster. *A.101*. The Board initially alleged that Dr. Buckmaster had “departed from the minimum standards of acceptable and prevailing podiatric medical practice for several reasons.” The Agreement settling this dispute makes no such statement and in fact eliminates four of the five specific medical concerns initially raised by the Board.⁵ Thus, Dr. Buckmaster successfully disputed most of the Board’s allegations. Even as to the remaining concern, the parties agreed to disagree as reflected in the language that it is the *Board’s view* that the procedures performed by Dr. Buckmaster did not properly address Plaintiffs’ medical condition. In the process of settling the allegations, the Board and Dr. Buckmaster compromised their dispute on this allegation. For the district court to have found otherwise is contrary to law, fact and common sense. There is simply no basis to distinguish this settlement from every other

⁵ Specifically, the Agreement contains no criticism of Dr. Buckmaster’s tendon lengthening procedure, the adequacy of his X-rays, the decision to use an allograft instead of an autograft, or the lengthening of the lateral column of Plaintiff’s leg bone. *A.72-73*.

settlement entered into in the broad spectrum of disputes and proceedings that exist in our legal system and more broadly, in our society. The Rules of Evidence offer no support for the distinction the trial court attempted to create.

The district court's finding that no consideration was exchanged is also inexplicable. Dr. Buckmaster gave up his right to a contested case hearing on the merits and a potential exoneration on all allegations raised, and agreed to undertake certain corrective measures. In return, he was not disciplined. The Board likewise gave good and valuable consideration. It dismissed several allegations, made no finding that Dr. Buckmaster failed to meet the minimally acceptable standard of care, and gave up its right to pursue formal disciplinary action. In return, it obtained corrective measures, which Dr. Buckmaster has now completed.

So too, the district court's finding that there was "no negotiation" is unsupportable. In a nutshell, the district court found there was little true negotiation because, in its view, the Board merely decided what its "findings" would be and unilaterally imposed them upon Dr. Buckmaster, a holding flatly contradicted by the record. The undisputed record unequivocally demonstrates that the Board and Dr. Buckmaster, through their attorneys, negotiated the language that was ultimately included in the Agreement For Corrective Action. This fact is evident in the contemporaneous documents they exchanged which proposed and counter-proposed the terms of their Agreement. *See A.109-15*. As the Minnesota Attorney General argued below, the mere fact that the negotiations occurred between lawyers experienced in these matters and thus were not protracted is of no consequence. *A.180-81*.

2. Rule 408 Applies to Settlements Reached With State Administrative Agencies, Including Licensing Boards

The settlement agreements that are often addressed in case law involve private disputes between individuals and/or businesses. *See, e.g., Esser*, 3 N.W.2d at 3. However, state and federal administrative agencies are increasingly utilizing settlements to resolve disputes with the persons and businesses they regulate. JEAN R. STERNLIGHT, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681, 693 (2005). Minnesota is no exception.

One such statute in Minnesota that authorizes administrative agencies to enter into settlements is Minnesota Statutes Section 214.103, which applies to all seventeen health licensing boards⁶ in the State. This statute specifically empowers these Boards to settle disputes with licensees based on complaints filed against them:

Subd. 6. Attempts at resolution. (a) At any time after receipt of a complaint, the executive director or the designated board member may attempt to resolve the complaint with the regulated person. The available means for resolution include a conference or any other written or oral communication with the regulated person. A conference may be held for the purposes of investigation, negotiation, education, or conciliation. The results of attempts at resolution with the regulated person may include a recommendation to the board for disciplinary action, an agreement between the executive director or the designated board member and the regulated person for corrective action, or the dismissal of a complaint. If

⁶ The seventeen licensing boards are the Board of Examiners of Nursing Home Administrators, the Office of Unlicensed Complementary and Alternative Health Care Practice, the Board of Medical Practice, the Board of Nursing, the Board of Chiropractic Examiners, the Board of Optometry, the Board of Physical Therapy, the Board of Psychology, the Board of Social Work, the Board of Marriage and Family Therapy, the Office of Mental Health Practice, the Board of Behavioral Health and Therapy, the Board of Dietetics and Nutrition Practice, the Board of Dentistry, the Board of Pharmacy, the Board of Podiatric Medicine, and the Board of Veterinary Medicine. Minn. Stat. § 214.01, subd. 2.

attempts at resolution are not in the public interest or are not satisfactory to the executive director or the designated board member, then the executive director or the designated board member may initiate a contested case hearing.

Minn. Stat. § 214.103, subd. 6(a). The two specific forms of compromise authorized under this statute are a “stipulated formal disciplinary action,” which is disciplinary action, and an “agreement for corrective action,” which is not disciplinary action. Minn. Stat. § 214.103, subd. 6(a)(1)-(2); *see also* Minn. Stat. § 153.22. All Agreements for Corrective Action between a health licensing board and its licensee must provide “for dismissal of the complaint upon successful completion by the regulated person of the corrective action.” Minn. Stat. § 214.103, subd. 6(a)(2). The statute is clear – an Agreement for Corrective Action such as the one involved in this case is a settlement.

Though no Minnesota appellate decisions have addressed whether Rule 408 bars admission into evidence of such an Agreement in a subsequent civil action, several decisions considering analogous settlement agreements with similar professional licensing boards and/or administrative agencies have found them inadmissible under Rule 408.

In *In re Petition for Disciplinary Action Against Wood*, 716 N.W.2d 341 (Minn. 2006), the Minnesota Supreme Court affirmed the trial court’s ruling that an offer to compromise a disciplinary action between the Office of Lawyers Professional Responsibility and an attorney was inadmissible under Rule 408. 716 N.W.2d at 346-47. Similarly, in *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746 (Minn. Ct. App. 2003) this Court noted that a letter from the Minnesota Pollution Control Agency

proposing settlement of an environmental dispute with regulated parties was an inadmissible settlement negotiation under Rule 408. See *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d at 753.

Moreover, though no Minnesota appellate court has reached the issue as to health licensing boards specifically, courts in other jurisdictions have. In *Malan v. Heuseman*, 942 S.W.2d 424 (Mo. Ct. App. 1987) the Missouri Court of Appeals held that stipulations in a settlement between a pharmacist and the Missouri Board of Pharmacy were inadmissible in a subsequent pharmaceutical malpractice case. *Malan*, 942 S.W.2d at 428-29. In *Malan*, the plaintiff offered evidence of the stipulations, including one which involved her and the pharmacist, to prove malpractice. The court excluded this evidence under Rule 408 as a settlement agreement, explaining that there was a danger “that the trier of fact may believe that the fact that a settlement was attempted is some indication of the merits of the case.” *Id.* at 428. In addition, the court noted that admitting the evidence would negate the policy expressed in the Missouri licensing board statutes that encouraged the settlement of administrative actions:

To now admit the stipulations contained in the settlement in this civil action would clearly be contrary to the intent of the settling parties, and would discourage further settlements in future cases, in derogation of the policy favoring settlements.

Id. at 429.

The Iowa Supreme Court reached the same result in *McClure v. Walgreen Co.*, 613 N.W.2d 225 (Iowa 2000). In *McClure*, plaintiff had complained to the Iowa Board of Pharmacy regarding the pharmacy’s improper filling of her prescription. To resolve

this complaint the Iowa Board of Pharmacy and the licensee entered into a stipulation and consent order pursuant to Iowa licensing board statutes, which authorized the resolution of charges without proceeding to a formal contested administrative hearing. *Id.* at 235-36. In return for resolving the charges, the licensee agreed to: 1) accept probation of its license, 2) pay a civil penalty, 3) take several corrective measures, and 4) be subject to random inspections. *Id.* at 236. Subsequently, the complainant commenced a malpractice action against the pharmacy. The stipulation and consent order between the Board and the pharmacy was then admitted into evidence at the trial of the malpractice action against the pharmacy. The Iowa Supreme Court reversed, finding that the trial court had committed reversible error in admitting the stipulation and consent order because it was a settlement agreement:

The stipulation and consent order was therefore ‘motivated by a desire for peace rather than from a concession of the merits of the claim,’ and for that reason the document was irrelevant.

Id. (citing 29 AM.JUR.2D *Evidence* § 508, at 588-89 (1994)).

3. The District Court Exceeded its Authority When it Ordered the Admission of the Agreement for Corrective Action in Contravention of Rule 408

In finding that the Agreement was not a settlement under Rule 408 the court below ignored the plain language of Rule 408 and frustrated the policy on which it rests. The district court apparently disregarded the Rule because it disagreed with the result mandated by that rule, and found it inconceivable as a matter of public policy that a Minnesota licensing board could lawfully negotiate a compromise of a complaint against a treating physician:

Perhaps the crux of the analysis, and what the court finds most troubling in any argument calling the interaction between the Board and Dr. Buckmaster a “settlement”, is that the [Board] is a state agency whose solemn obligation is to oversee its licensees and uphold standards that ensure patients will receive the best care possible. When presented with a complaint by a patient, the Board must investigate the circumstances, with an eye toward protecting the public health. It would be a strict injustice against all podiatry patients, as well as an anathema against public policy, to entertain the supposition that the Board may “negotiate” with the doctors when drawing up its final assessment about the quality of care the patients receive.

A.29.

Thus, according to the district court, the Agreement for Corrective Action cannot be a settlement because the Board is without legal authority to negotiate and compromise Board complaints. This public policy pronouncement, untethered by any citation to Minnesota statutes, regulations or decisions, contravenes the unambiguous statutory authority of the health licensing boards. Minnesota Statutes Section 214.103 specifically empowers these Boards to settle disputes by entering into “Agreements For Corrective Action.” Minn. Stat. § 214.103, subd. 6. This power to negotiate a compromise contrasts with the other options that the Boards have at their disposal – to dismiss the complaint or proceed to a formal contested case hearing (*i.e.*, to trial). *See* Minn. Stat. § 214.103, subd. 6(a). Dismissal lies at one end of the spectrum of the Board’s authority; a contested case hearing lies at the other. The right to compromise through negotiation lies in the middle; the form of that compromise may either be stipulated formal disciplinary action or an Agreement For Corrective Action which is not disciplinary action. *See id.*; Minn. Stat. § 153.22.

Moreover, the district court's pronouncement – that the Board's attempt to compromise a complaint against a licensee violates public policy – contradicts the plain language of the statute. The very statutory section that authorizes the settlement of Board complaints specifically recognizes that it is precisely the Board's job, and not the courts, to determine whether a settlement is in the public interest: "If attempts at resolution are not in the public interest . . . [the Board] may initiate a contested case hearing." Minn. Stat. § 214.103, subd. 6(a). Nor was the district court's reasoning consonant with common sense. Not every complaint filed with a licensing board should proceed to a contested case hearing. Some claims are so lacking in merit that they may be dismissed either after an investigation or, in appropriate circumstances, even before an investigation is undertaken. *See* Minn. Stat. § 214.103. Other claims are best suited to a compromise settlement. As the statute makes clear, public policy is also served when the Boards resolve complaints through compromise, as it allows the Board to direct its limited resources to those cases where they are most needed. In the final analysis, it is the Board who decides whether the public is best served by a trial on the merits or by a negotiated settlement, and on what terms. The district court's order directly contravenes both the unambiguous language and the clear logic of Minnesota Statutes.

It also undermines the policy of both the statute and of Rule 408 – to promote the use of settlements to resolve disputes. If settlements like the Agreement in this case were made routinely admissible in subsequent malpractice actions – or even if trial courts could randomly rule them so in derogation of the Rules of Evidence – fewer licensees will settle their Board Complaints as there will be less incentive and greater risk to do so

and greater incentive to litigate the matter all the way through to a formal contested case. The workload of the health licensing Boards (and their volunteer members, like Dr. Powless, who give of their time to serve on them) will inevitably increase. Some members may decline to serve as a result. So too, the demand for attorneys to represent the Board in contested case hearings at taxpayer expense will increase. Moreover, admissibility of such settlements encourages would-be plaintiffs to file complaints with licensing boards in order to create evidence for their later subsequent malpractice lawsuits, thereby further increasing the Boards' workload. This conscious effort to obtain a tactical advantage, undertaken expressly under the guidance of a malpractice lawyer, is present in this case. These concerns are the very policies that undergird Rule 408, which is intended to encourage settlement of disputes.

The record below demonstrates that: (1) the Agreement For Corrective Action compromised a claim between the Board and Dr. Buckmaster that was disputed as to its validity; (2) the Agreement is being used by the Plaintiff in this malpractice case to prove liability of Dr. Buckmaster; and (3) the Agreement is not being offered for any other legitimate purpose. Therefore, the district court was required to exclude this evidence under Minn. R. Evid. 408. *Reger*, 588 N.W.2d at 524. The district court's order admitting the Agreement For Corrective Action thus exceeds its authority, and is plainly contrary to law and public policy.

C. The Agreement for Corrective Action is Also Inadmissible under Minn. R. Evid. 403

1. Introduction

Rule 403 provides that even otherwise admissible evidence may be excluded if its probative value is:

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Minn. R. Evid. 403. “This rule requires courts to balance the probative worth of the evidence against its potential for harm.” *Shea v. Esensten*, 622 N.W.2d 130, 136 (Minn. Ct. App. 2001) (emphasis added). Because the district court did not engage in this required balancing analysis, it exceeded its authority and the writ of prohibition should issue on this ground as well.

2. Under Rule 403 Courts Routinely Exclude Licensing Board Evidence in Malpractice Lawsuits

Every Minnesota decision that has applied Rule 403 to stipulations between licensees and health licensing boards in civil malpractice cases has held that such evidence is inadmissible due to its obvious danger of unfair prejudice, confusing the issues and misleading the jury. In fact, this Court has twice excluded evidence of professional licensing board settlements in health professional malpractice cases due to the extreme prejudice of admitting such evidence. *See Shea*, 622 N.W.2d at 137; *Carlson v. Riemenschneider*, 2007 WL 446643 (Minn. Ct. App. Feb. 13, 2007) (unpublished op.) (located at A.87).

In *Shea*, the plaintiff attempted to introduce evidence of a stipulated agreement for disciplinary action between the doctor accused of malpractice and the Minnesota Board of Medical Examiners for the doctor's conduct in self-prescribing drugs. The stipulated disciplinary action placed restrictions on the doctor's practice but was eventually removed after compliance. This Court found that the doctor's misconduct, for which he was professionally disciplined, was too remote in time and in nature to be admissible and that its admission would have been extremely prejudicial. *Id.* at 137.

More recently, in *Carlson*, this Court found that evidence of both a Stipulated Agreement for Disciplinary Action and an Agreement for Corrective Action between a licensed dentist and the Minnesota Board of Dentistry were not admissible in a dental malpractice case. *Carlson*, 2007 WL 446643 at * 3. In holding that this evidence was inadmissible under Minn. R. Evid. 403, this Court explained "the risk is that the evidence could substantially and unfairly prejudice [the dentist] by confusing the issues presented to the board with the issues that the jury must consider." *Id.* Further, this Court agreed with the district court that "admitting evidence of the board's actions would invade the province of the jury because the jury might infer that [the dentist] was negligent in this case based on facts determined by the board in other matters, rather than on facts determined by the jury in this matter." *Id.*

Courts in other jurisdictions agree. In *Fryar v. Touchstone Physical Therapy, Inc.*, 229 S.W.3d 7 (Ark. 2006), the Arkansas Supreme Court excluded as unfairly prejudicial evidence of board disciplinary action and findings against a chiropractor in subsequent a civil malpractice case. In *Byrd v. Med. Ctr. of Cent. Georgia, Inc.*, 574 S.E.2d 326, 331

(Ga. Ct. App. 2002), the Georgia Court of Appeals excluded from a medical malpractice action evidence relating to prior disciplinary action taken against doctor. *See also Francis v. Reynolds*, 450 S.E.2d 876, 877 (Ga. Ct. App. 1994) (denying request to stay civil malpractice trial against dentist pending the results of dental board proceedings because any board findings or related evidence would invade the province of the jury and be prejudicial to dentist); *Waller v. Hayden*, 885 P.2d 1305, 1310 (Mt. 1994) (excluding evidence of disciplinary proceedings in medical malpractice case because they were either irrelevant, or if relevant, more prejudicial than probative); *Herbstreith v. De Bakker*, 815 P.2d 102, 112-13 (Kan. 1991) (excluding evidence of emergency discipline order from board and related consent order entered between board and licensee in medical malpractice case).

Significantly, two of these decisions involved the precise issue raised in this case and excluded evidence of board proceedings even where that proceeding involved the same treatment that was at issue in the subsequent malpractice lawsuit. In *Fryar*, the plaintiff filed a complaint against the defendant with the Arkansas Board of Chiropractic Examiners. *Fryar*, 229 S.W.3d at 7. In her later malpractice action the plaintiff sought to introduce evidence of that Board's findings to establish the defendant's negligence. *Id.* at 9-10. The Arkansas Supreme Court affirmed the trial court's exclusion of this evidence because its probative value was substantially outweighed by the danger of unfair prejudice. *Id.* at 13-14. The Court excluded the evidence even though it involved factual findings that had resulted from a full-blown contested case hearing. The Arkansas Supreme Court affirmed that exclusion because it was concerned that if the board's

findings were admitted, the jury would be placed in a position of being “forced to either reach a conclusion different from that reached by an official agency of the State of Arkansas or to adopt that same conclusion, despite believing that the evidence actually supported a different conclusion because it was made by an official agency.” *Fryar*, 229 S.W.3d at 14.

Similarly, The Georgia Court of Appeals in *Francis* held that evidence relating to board of dentistry proceedings involving the same plaintiff and defendant were inadmissible in a subsequent malpractice case. Concluding that such evidence would invade the province of the jury, the court held:

Treating the Board’s findings as outcome determinative on this issue would be tantamount to relieving plaintiff of this burden of proof at trial and would impermissibly invade the province of the jury as the sole arbitrator of disputed or contested facts.

Francis, 450 S.E.2d at 877. The *Francis* court also found that introducing the evidence would unfairly prejudice the defendant at trial because he would have no opportunity to cross-examine members of the board as it would other experts testifying at trial called by the plaintiff. *Id.*

3. The District Court Exceeded its Authority By Not Undertaking a Rule 403 Balancing Analysis and By Mischaracterizing Defendants’ Rule 403 Objection As Arising Under Rule 803(8)

The district court exceeded its authority when it refused to undertake the analysis required by Rule 403. As this Court has previously noted, once a party has moved to exclude evidence under 403, the “rule requires courts to balance the probative worth of the evidence against its potential for harm.” *Shea*, 622 N.W.2d at 136. Instead of

engaging in this required analysis, however, the district court recast Defendants' Rule 403 arguments as a Rule 803 objection:

Although argued under the guise of admissibility under Minn. R. Evid. 403, Defendants' [sic] essentially claim that the ACA is both untrustworthy and unreliable and cannot be admitted under Rule 803(8)

....

A.81. In so doing the district court once again exceeded its authority.

As shown by the record below, Defendants never once relied upon or invoked Rule 803(8) to exclude the Board Agreement. Nor would such an argument make sense as Rule 803(8) concerns the public record and report exception to the hearsay rule. *See* Minn. R. Evid. 803(8). Rather, it was Plaintiff who raised Rule 803(8) in opposition to Defendants' motion *in limine* and argued, incorrectly, that if the Agreement was not hearsay under 803(8), that rule automatically rendered the Agreement admissible. A.39-43. In response, Defendants correctly explained that Rule 803(8) did not automatically render any evidence admissible, but simply meant that the evidence is not excluded as hearsay. *See* A.161; Minn. R. Evid. 803, comm. cmt. – 1989. As Defendants further argued and the Minnesota Supreme Court has explained, evidence falling under a hearsay exception like Rule 803(8) must still pass muster under Rule 403 in order to be admissible. *State v. Bauer*, 598 N.W.2d 352, 367 (Minn. 1999) (“[e]ven if not violative of the hearsay rule . . . evidence is subject to exclusion if its relevance is substantially outweighed by the danger of unfair prejudice”).

Had the district court applied the balancing test of Rule 403, as it was required to do, and had it considered the applicable case law, it would have found that the probative

value of the Agreement for Corrective Action was substantially outweighed by its danger to confuse the issues, mislead the jury, and unfairly prejudice the Defendants. Here, the probative value of the Agreement for Corrective Action is minimal at best.⁷ The Board made no findings that Dr. Buckmaster's treatment of the Plaintiff violated the standard of care. Rather, in order to settle the matter, Dr. Buckmaster merely conceded that a Committee of the Board held the view that Dr. Buckmaster's charting was incomplete and that his treatment of Plaintiff did not successfully resolve her problems. This stipulation does not signify—implicitly or explicitly—that Dr. Buckmaster's treatment of Plaintiff fell below the applicable standard of care. In fact, it would be impermissible for a jury to infer from the statements in the Agreement that Dr. Buckmaster was negligent. *See* 4A MINNESOTA DISTRICT JUDGES ASS'N, MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES – CIVIL, CIV JIG 80.10 at 229 (Michael K. Steensen, Peter B. Knapp reporters, 5th ed. 2006) (“A doctor is not negligent simply because his efforts are unsuccessful”). Thus, the terms of the settlement agreement are not relevant to the claims in this litigation.

In comparison, the danger that this evidence will mislead the jury and unfairly prejudice the evidence Defendants is grave. If the Board Complaint, proceedings and the Agreement for Corrective Action are admitted at trial in this case, Defendants will have no choice but to elicit testimony from Dr. Buckmaster as to his subjective understanding of the settlement and his reasons for agreeing to it. Dr. Buckmaster would be forced to

⁷ As already discussed the Agreement for Corrective Action is irrelevant and per se excluded under Minn. R. Evid. 408 because it is a settlement agreement.

defend himself by introducing evidence regarding the Board process and procedures, the initial investigative methods used by the Board, and the Board guidelines that encourage resolution of complaints, which may well be a complex and lengthy task to mitigate the prejudice resulting from the admission of this evidence. Thus, the trial will be diverted, and the jury sidetracked, from the real issue. Rather than considering whether defendant committed malpractice, considerable time and energy will be focused upon what the settlement means, why it was entered into and how much weight it should be given. This diversion into collateral issues will surely disrupt the trial proceedings, and present a high risk of misleading and confusing the jury as to the true issues before them.

Moreover, that misdirection will potentially confuse the jury as to the proper burden of proof. The Board's authority to resolve complaints such as this is governed by vastly different evidentiary and procedural rules than a civil action in district court. First, a licensed podiatrist is required to comply fully with all board investigations, including requests for interviews, production of patient files, and other information. Minn. Stat. § 153.20. Further, administrative matters such as this apply lower standards of admissibility of evidence compared to those that exist in civil courts. *See Morey v. Bd. of Indep. Sch. Dist. No. 492*, 136 N.W.2d 105, 107-08 (Minn. 1965) ("It is true that an administrative body acting quasi-judicially is not bound by strict procedural rules which circumscribe the action of a court, and that incompetent evidence is not fatal to its determination"). The broad power of the Board, combined with the lower standard of admissibility and relevance in an administrative context, make any action taken by the

Board much less probative in a subsequent civil malpractice action that is governed by different procedural rules and standards of evidence.

There is also no question that introduction of the Agreement for Corrective Action would unfairly prejudice the Defendants. It is difficult to conceive of evidence in a medical negligence case that is more likely to unfairly inflame jurors than this evidence. If the Agreement is admitted at trial, the jury will be told that it is evidence of negligence. They will almost certainly infer from the mere fact of settlement that Dr. Buckmaster must have done something wrong. Thus, the jury will be placed in a position of being “forced to either reach a conclusion different from that reached by an official agency of the State of [Minnesota] or to adopt that same conclusion, despite believing that the evidence actually supported a different conclusion because it was made by an official agency.” *Fryar*, 229 S.W.3d at 14. In addition, as explained by this Court in *Carlson*, there is a “risk that the evidence could substantially and unfairly prejudice [Defendants] by confusing the issues presented to the board with the issues the jury must consider” and “invade the province of the jury” *Carlson*, 2007 WL 446643 at * 3; *see also Francis*, 450 S.E.2d at 877 (holding that admitting evidence of board of dentistry proceedings involving same defendant and plaintiff would invade the province of the jury in malpractice lawsuit). Plaintiff’s heavy reliance on the Agreement for Corrective Action in pretrial proceedings suggests that she intends to encourage just such a result at trial.

Given that the Board is partially comprised of licensed podiatrists, the jury will also likely give the Agreement the same weight as it would the testimony offered by an

expert witness. “This would clearly be prejudicial to defendant[s], who would have no opportunity to cross-examine the members of the Board as it would other experts testifying at trial.” *Francis*, 450 S.E.2d at 419. In fact, Defendants attempted to depose the one podiatrist, Dr. Powless, who served on the Committee that investigated Plaintiff’s complaint. That deposition was quashed by the district court. The propriety of that ruling is not presently before this court and thus no argument is made or intended as to that issue. However, given that Defendants cannot cross-examination the Board as to what the settlement means or as to the adequacy of the Board’s investigation, the risk of unfair prejudice and confusion attendant upon its admission are all the greater. Thus, that Defendants cannot cross-examination Board members further highlights the need to exclude the evidence.

Finally, while Defendants would be unfairly prejudiced by admission of the evidence, Plaintiff will not be prejudiced by its exclusion. Simply stated, Plaintiff does not need this evidence to present her case. Plaintiff has identified two medical experts for trial and will have ample opportunity to present her case to the jury with that testimony and all other permissible evidence. Plaintiff does not seek to introduce the evidence because it is necessary to prove her case, but rather because it provides an unfair advantage in doing so. The unfairness of allowing the Agreement for Corrective Action into evidence, as well as the danger it presents of confusing the issues and misleading the jurors, warrants its exclusion under Rule 403. *See Shea*, 622 N.W.2d at 136.

The district court simply failed to perform the required balancing test under Rule 403. In doing so, the district court exceeded its authority and compounded that error by

ruling that Rule 803(8), a hearsay exception, mandated admissibility of the Agreement for Corrective Action.

D. Because the Agreement for Corrective Action is Inadmissible, it Cannot Be Used for “Impeachment” of Dr. Buckmaster at Trial

In its March 12th order the district court ruled that even if inadmissible, the Agreement for Corrective Action can properly be used to impeach Dr. Buckmaster at trial. *A.18*. Such use of the Agreement, however, would effectively undermine the very purpose for its exclusion. Consequently, this court must clearly and unequivocally reverse the district court’s order allowing misuse of the settlement agreement in this fashion.

Plaintiff will no doubt argue that she should be permitted to use the Agreement under the limited exception allowing Rule 408 evidence to be used for purposes other than to establish liability, such as for impeachment purposes. In essence, Plaintiff will suggest that if Dr. Buckmaster testifies at trial that he did not deviate from the standard of care then Plaintiff should be allowed to impeach him with the Agreement. This argument fails because the applicable case law is to the contrary, and because the language of the Agreement does not contain anything with which Plaintiff can impeach Dr. Buckmaster in any event.

Minnesota law is quite clear that the Agreement cannot be admitted under the guise of impeachment evidence. Evidence of a settlement agreement that is inadmissible under Rule 408 may not be offered for impeachment purposes because of the inherent danger in exposing such evidence to the jury. *Esser v. Brophay*, 3 N.W.2d 3, at 6 (Minn.

1942). Indeed, neither Plaintiff nor the district court have articulated any cogent explanation of why evidence of a settlement agreement that cannot be used to establish liability can be used to impeach Dr. Buckmaster if he denies liability. The only stated purpose for using the Agreement to impeach Dr. Buckmaster at trial is to argue that the agreement is an admission by Dr. Buckmaster that he violated the standard of care – the very thing that Rule 408 prohibits. Plaintiff cannot do indirectly that which she cannot do directly; she cannot misuse Rule 607 (impeachment) in this fashion. *Esser*, 3 N.W.2d at 6; *see also State v. Hodges*, 384 N.W.2d 175, 184 (Minn. Ct. App. 1986), *aff'd as modified*, 386 N.W. 709 (stating “[a] party may not misuse Rule 607 to introduce hearsay which is otherwise inadmissible in the guise of impeachment”).

Nor is this result unique to Minnesota, as numerous courts have ruled that evidence of an inadmissible settlement agreement, cannot be used for impeachment. In *Vivian Scott Trust v. Parker*, 687 N.W.2d 731 (S.D. 2004), the South Dakota Supreme Court held that it was error for the trial court to admit a letter written during the course of settlement discussions where the letter was being offered to show that the defendant had previously made a statement contrary to the defense’s position at trial. 687 N.W.2d at 736. The court recognized that although Rule 408 allows settlement evidence to be used for “another purpose,” such evidence may not be used to impeach or to prove a disputed issue. *Id.* Doing so is “fraught with danger of misuse of the statements to prove liability” *Id.* (quotation omitted). As the court noted, admitting the settlement letter either to establish a prior inconsistent statement or to prove an issue directly related to a disputed issue in the litigation would undermine the very purpose for excluding the

evidence under Rule 408. *Id.* The court concluded that “[c]learly, this is the kind of evidence the rule seeks to protect.” *Id.*

Other courts have likewise prohibited the use of settlement evidence for impeachment purposes as such use would unduly influence the jury’s analysis of liability. *See, e.g., Stockman v. Oakcrest Dental Ctr., P.C.*, 480 F.3d 791, 797-99 (6th Cir. 2007) (district court abused its discretion in admitting settlement offer under Rules 403 and 408 where the evidence being admitted goes to the very claim at issue in the case); *E.E.O.C. v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1546 (10th Cir. 1991) (“[T]he risks of prejudice and confusion entailed in receiving settlement evidence are such that often . . . the underlying policy of Rule 408 require[s] exclusion even when a permissible purpose can be discerned”) (quotation omitted); *Stacey v. Bangor Punta Corp.*, 620 F. Supp. 636 (D. Me. 1985) (“Although Defendants claim to be offering the settlement for purposes of impeachment or credibility determination, sometimes those issues are inextricably bound up with issues of causation and liability and the offer runs afoul of Rule 408.”).

Further, there is no limiting instruction that could adequately cure the wrongful use of this evidence. As the court in *Esser* noted, quoting Justice Lamar, a limiting instruction cannot cure the prejudice resulting from admission of settlement evidence:

“[It is generally accepted that] the error in the admission of the evidence [is not] cured by instructing them that the evidence as to the settlement could only be considered for purposes of impeachment. The rule against allowing evidence of compromise is founded upon recognition of the fact that such testimony is inherently harmful, for the jury will draw conclusions therefrom in spite of anything said by the parties at the time of discussing the compromise, and in

spite of anything which may be said by the judge in instructing them as to the weight to be given such evidence.”

3 N.W.2d at 6 (citations omitted); *see, also, Stockman*, 480 F.3d at 805.

Moreover, the statements in the Agreement cannot be used to impeach Dr. Buckmaster (or his expert, Dr. Uglem) for another, more fundamental, reason. If either Dr. Buckmaster or Dr. Uglem testifies at trial that Dr. Buckmaster complied with the standard of care, the agreement does not impeach that testimony. That is so because the Agreement specifically states that Dr. Buckmaster merely concluded that it was “The Committee’s view” that the surgery did not address Plaintiff’s medical condition and that the documentation did not support the care provided. The fact that Dr. Buckmaster believes his care was entirely appropriate is not inconsistent with his prior statement that he understood the Board took a different view. If Dr. Buckmaster testifies at trial that he complied with the standard of care, he cannot be impeached by the Agreement because the Agreement does not state that he believes that he had deviated from the standard of care. Nor can Plaintiff properly bootstrap her way into impeachment by first asking Dr. Buckmaster if he agrees that the Board of Podiatry considered his care substandard, as the predicate question is itself a violation of Rules 403 and 408. To misuse the Agreement in this fashion under the guise of impeachment is to end-run the exclusion of the evidence.

E. A Writ of Prohibition Should Issue

A writ of prohibition should issue when the district court exceeds its lawful authority or so abuses its discretion as to cause injury for which no ordinary remedy is

adequate. *Hancock-Nelson Mercantile Co. v. Weisman*, 340 N.W. 2d. 866, 868 (Minn. Ct. App. 1983); *see also Richardson v. Sch. Bd. of I.S.D. No. 271*, 210 N.W.2d 911, 913 (Minn. 1973) (including requirement that “the exercise of such power is unauthorized by law”); *Clark v. Clark*, 543 N.W. 2d. 685, 687 (Minn. Ct. App. 1996). A writ is not routinely issued to correct pre-trial orders, but it is appropriately issued when the pre-trial orders create exceptional circumstances such as when a court orders production of clearly undiscoverable information or, conversely, when it refuses access to clearly relevant evidence, thus prejudicing one party’s ability to obtain a fair trial (*see, e.g., Thermorama, Inc. v. Shiller*, 135 N.W.2d 43 (Minn. 1965) (writ may issue where trial court has ordered production of information clearly not discoverable); *State v. Turner*, 550 N.W.2d 622 (Minn. 1996) (writ may issue where trial court improperly quashed trial subpoena)). Similarly the writ will issue when a court’s pre-trial evidentiary ruling has inappropriately affected the scope of trial and rectifying that error after trial and appeal would be wasteful and inefficient. *See Brooks Realty, Inc. v. Aetna Ins. Co.*, 128 N.W.2d 151 (Minn. 1964). The district court’s orders in this case fit squarely within the limited role of extraordinary writs.

Here, the test for issuance of the writ is satisfied in two ways. First, the district court exceeded its authority by admitting evidence of the Settlement Agreement in direct contravention of Rule 408. Rule 408 provides that evidence of settlement discussions and of completed settlements are inadmissible to prove liability. Rule 408 is a rule of exclusion and the district court does not have discretion to admit evidence that violates that rule. *See Farm Bur. Mut. Ins. Co. v. North Star Mut. Ins. Co.*, 2005 WL 3112014

(Minn. Ct. App. Nov. 22, 2005)) (unpublished op.) (located at *A.190*) (citing *Reger*, 588 N.W.2d. at 524. In ordering the admission of the Settlement Agreement between Dr. Buckmaster and the Board the district court did not merely exercise discretion, it exceeded its proper authority.

Though no Minnesota Appellate Court decision has resolved the issue, decisions from other jurisdictions support the issuance of a writ in these circumstances. In *Malan v. Huesemann*, 942 S.W.2d 424 (Mo. Ct. App. 1997), the trial court ordered the admission in a malpractice action of a prior stipulated agreement between the Missouri Board of Pharmacy and one of its licensees. The appellate court found the agreement obviously a settlement under Rule 408 and issued the writ, holding that the trial court's order was beyond its authority and the writ would avoid unnecessary, inconvenient and expensive litigation. 942 S.W.2d at 425; *see also Covell v. Super. Ct. of Los Angeles Cty.*, 159 Cal. App. 3d 39 (Cal. Ct. App. 1984) (writ will issue to prohibit discovery of settlement discussions); *Wiseman v. Henning*, 569 S.E.2d 204 (W.Va. 2002) (writ issued where evidence improperly excluded).

Second, the district court's orders constitute an abuse of discretion, which, if enforced, would determine the outcome of the trial, deprive Defendants of their right to a fair trial, have a significant impact on all litigants, and would disrupt the orderly processes of Minnesota's professional licensing boards.

It would be wasteful and inefficient to have this case proceed to trial only to be reversed on appeal and remanded for a new trial. The trial of this matter will last a week and involve the testimony of seven medical doctors, all of whom will be summoned to

testify again at the retrial of this matter. In such circumstances, issuance of a writ of prohibition is the appropriate remedy. *See, e.g., State v. Turner*, 550 N.W.2d 622, 626 (Minn. 1996); *Brooks Realty, Inc. v. Aetna Ins. Co.*, 128 N.W.2d 151, 155 (Minn. 1964).

Admitting the improper evidence of the settlement between Dr. Buckmaster and the Board of Podiatric Medicine and treating the unproven allegations of the Board as proven facts will determine the outcome at trial. Plaintiffs' counsel and experts have argued that the Agreement is a factual finding by the Board and an admission of liability by Dr. Buckmaster. It is too fine a task to require that a jury parse the language in a settlement agreement and distinguish it from a finding of negligence at trial. *See, e.g., Fryar v. Touchstone Physical Therapy, Inc.*, 229 S.W.3d 7 (Ark. 2006). Dr. Buckmaster cannot obtain a fair trial on the merits if the settlement agreement is admitted into evidence for the very reason that a jury will infer wrongdoing from the very fact of settlement. Because admission of this settlement agreement is contrary to Rules 403 and 408 and is outcome determinative, the writ of prohibition should issue. *Thermorama, Inc. v. Shiller*, 135 N.W.2d 43 (Minn. 1965); *Leininger v. Swadner*, 156 N.W.2d 254, 260 (Minn. 1968).

In addition, the writ should issue because the district court's order will otherwise interfere with the orderly processes of the health licensing boards. As the Attorney General noted below, these Agreements for Corrective Action "are a very useful tool that all of the [health licensing] boards...use...to settle issues with their licenses." *A.180*. While this case works its way through trial and appeal, the ability of the Boards to settle matters before them is compromised. Those professionals who have matters currently

pending before the Boards may hesitate to enter into such settlements for fear that those settlements will be later admitted in a subsequent civil action. This reluctance will mean that more matters, left unresolved, will proceed to contested case hearing. This is not a phantom concern. Already, the district court's March 12th order has been cited in other civil cases as a basis for admitting similar settlement agreements between professionals and their licensing boards. *A.138*. While the district court's order remains in effect, other litigants will continue to use it to argue the admissibility of similar settlement agreements. This too will have a chilling effect on the work of the boards as they try to resolve matters currently pending.

The writ is also appropriate because the issue involved affects a wide array of litigants. The rule of practice involved here – that settlement agreements between licensing boards and their licensees are now admissible – affects more than the Board of Podiatric Medicine. It affects, at a minimum, the seventeen health licensing boards and the eight non-health licensing boards. *See* Minn. Stat. § 214.01, subs. 2 and 3. Where an issue affects a general rule of practice affecting a variety of litigants a writ of prohibition is an appropriate remedy. *Leininger*, 156 N.W.2d at 260.

Finally, the issue is an important one for resolution now. To the extent that the district court's order is outcome determinative it may well impel Petitioners to settle this litigation, which will mean that the district court's orders will not be reviewed in the normal appellate process and will continue to impede the boards' ability to settle matters before them. Because the admission of such board settlements in the future may cause future litigants to settle other cases like this, the issue will continue to arise and yet evade

appellate review. Currently, though there is no appellate decision on this point, there is split among the district courts. Very recently the Steele County District Court, in a case that is now settled, issued an order finding that a settlement agreement between the Board of Medical Practice and a physician relating to the claim of the same patient who later brought a medical malpractice lawsuit was an inadmissible settlement agreement. *A.135*. That ruling conflicts with the district court's orders in this matter. This split among the district courts, which may not be resolved through the ordinary appellate process – at least not for some time – provides further reason why the writ of prohibition should issue here.

RELIEF REQUESTED

For all the foregoing reasons, Defendants respectfully request that this Court issue a peremptory writ that prohibits any reference to the Board proceedings, any substantive admission of the Agreement for Corrective Action at trial and any use of that Agreement for purposes of impeachment of any witness who testifies at trial.

Dated: November 2, 2007

Respectfully submitted,

MASLON EDELMAN BORMAN & BRAND, LLP

By: David T. Schultz
David T. Schultz (#169730)
David F. Herr (#44441)
Jason A. Lien (#28936X)

3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 672-8200
(612) 672-8397 (Fax)

ATTORNEYS FOR PETITIONERS

553604v3

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,
Defendants/Petitioners*

Sandra O'Rourke (f/ k/ a Sandra Ruble)

Plaintiff/Respondent

and

Minnesota Board of Podiatric Medicine and Dr. Stephen Powless

Third-Party Respondents

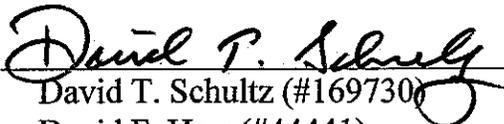
CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 11,267 words. This brief was prepared using Microsoft Word 2003.

Dated: November 2, 2007

Respectfully submitted,

MASLON EDELMAN BORMAN & BRAND, LLP

By: 

David T. Schultz (#169730)

David F. Herr (#44441)

Jason A. Lien (#28936X)

3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 672-8200
(612) 672-8397 (Fax)

ATTORNEYS FOR PETITIONERS