

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.*

REPLY BRIEF OF DR. STEPHEN POWLESS

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## ARGUMENT

Respondent really does not come to grips with the policy issues that Dr. Powless raised in his initial brief. Worse, Respondent argues as if the legal issue before the Court is limited to this particular medical malpractice case -- even though this Court has already recognized the statewide nature of the problem here. See October 2, 2007 Order: "a ruling on whether an agreement between a health-related licensing board and a regulated person for corrective action is admissible in a civil trial will have state-wide impact."

In fact, denying the writ in this case and allowing Agreements for Corrective Action ("ACAs") to be introduced into evidence in malpractice actions would have a profound effect not only on how plaintiffs pursue medical malpractice lawsuits in Minnesota, but more important on how medical boards conduct their investigations and how doctors and other medical professionals respond to such investigations. Respondent's Brief simply does not recognize the seriousness of these issues.

*Standing:* Respondent suggests (at p. 13, footnote 1) that Dr. Powless no longer has an interest in or standing to appear in this matter. Nothing could be further from the truth.

As a threshold matter, this Court expressly requested that Dr. Powless continue briefing the remaining issues in its October 2, 2007 Order. If Respondent believes that was error, she hasn't explained why.

More fundamentally, because of the trial court's initial ruling admitting the ACA, Dr. Powless was forced to bring a motion for a protective order to oppose being deposed about his role on the Board in connection with this particular matter. He continues to be

involved in this appeal because Respondent's position in this Court threatens the very work of the Board on which he serves.

Moreover, this is obviously the type of situation which is capable of repetition yet evading review. *See In re McCaskill*, 603 N.W.2d 326, 327-28 (Minn. 1999) (holding that an appeal is not moot where the claim was capable of repetition, yet evading review). If this Court were to deny the writ here, in any number of future cases the same thing will happen, and the Board member will be drawn into the litigation, just as Dr. Powless was here.

Respondent's brief only serves to confirm Dr. Powless's concerns. Respondent suggests that the admissibility of any particular ACA can be determined on a case by case basis, depending on precisely how that ACA was reached. Respondent acknowledges that if facts in a future case affirmatively show with particularity that there was a genuine dispute in reaching an agreement, then admissibility would be barred under Rule 408. (Respondent's brief at p. 31). However, Respondent does not point out how this kind of particularized showing could be done without delving into the thought processes of the board members. And such an inquiry is legally inappropriate. *Mampel v. E. Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1977). It may be impossible to discern precisely why the boards made the decision to agree to an ACA instead of pursuing a formal hearing, or what the boards thought was appropriate language to put into an ACA, without delving into the thought processes of the members of each medical board in issue. That kind of showing is not required to invoke Rule 408.

Respondent completely ignores the fact that Dr. Powless has effectively been compelled to become an expert on behalf of the plaintiff in this matter. The fact that no Board member would need to testify at trial (Respondent's brief at p. 34) misses the point entirely. The issue is that *the use of the ACA itself* ipso facto brings Dr. Powless' views and expertise into this medical malpractice case. Dr. Powless serves on the Board in order to maintain high standards within his profession, not to assist parties in prosecuting medical malpractice claims. Respondent simply has no right to use Dr. Powless or the other Board members in this way.

Respondent also argues that such an order granting the use of an ACA would have limited precedential value, and that it would not change the way the medical boards conduct their investigations. Wrong. In fact, the trial court's order here is already being cited in medical malpractice cases in Minnesota courts. (A. 138).

If the writ is denied in this case, it will open the door to future medical malpractice plaintiffs to use various medical boards' investigation procedures to support their claims - - not to mention attempting to cloak their claims with the authority of the Board, as plaintiff is trying to do here. Indeed, if this Court allows the ACA to be admitted here, it would be tantamount to legal malpractice not to file a complaint with the Board preparatory to bringing a medical malpractice action. There would be the potential payoff of obtaining "Board support" for the malpractice claim, as Respondent is trying to do here, without any significant costs to the plaintiff. All the "costs" would be borne by the boards and the volunteers who serve on the boards, such as Dr. Powless. This would

be a serious drain on the already scarce resources of the boards and their volunteer members.

Finally, allowing ACAs to be admitted into evidence in malpractice cases would create a huge disincentive for the doctors or other medical professionals who are the subject of Board proceedings to enter into such an agreement, given the possibility that it could be used against them in a subsequent malpractice case. Indeed, such a ruling here could have the clearly adverse effect of prompting doctors and other medical professionals, who are frequently represented by legal counsel, *not* to settle by use of an ACA, but rather to gamble on the possibility that the investigation might ultimately be dismissed because of the scarce resources of the medical board, who would be relegated to pursuing action only in the most serious matters. This, in turn, would lead to an overall lowering of the standards that the boards strive to uphold.

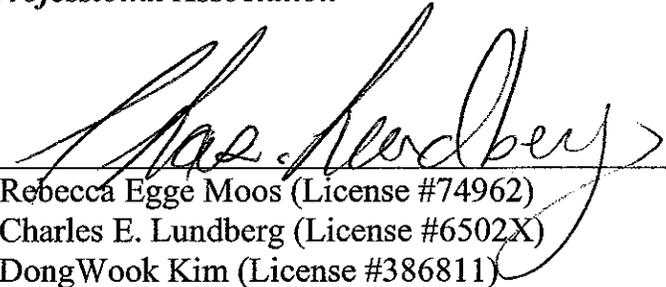
In sum, the investigation procedures of the medical boards were never meant to be a tool for private litigation. The writ should be granted.

**CONCLUSION**

For the foregoing reasons as well as the reasons stated in our initial brief, Dr. Powless respectfully requests that the Court issue the writ of prohibition.

**BASSFORD REMELE**  
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