
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.

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ARGUMENT

A. Introduction.

Settlement agreements are per se inadmissible to prove liability. Because Rule 408 is so clear, Plaintiff is left with only one substantive argument: that Rule 408 does not apply to the facts of this case. Plaintiff asks this Court to believe that an agreement between a licensing board and a licensee - which agreement's sole purpose was to impose limited corrective actions in lieu of formal discipline and to avert a contested case hearing - somehow fails to qualify as the compromise of a disputed claim.

To make this argument, Plaintiff's brief closes its eyes to the core of Defendants' argument, re-writes the essence of the trial court's order, and ignores a glaring deficiency - namely, that Plaintiff has not and cannot cite to a single decision in which a court has admitted into evidence a settlement agreement like the one in this case.

Plaintiff also resorts to procedural argument, suggesting that the trial court's order was just a run-of-the-mill evidentiary ruling that can await the outcome at trial. But that argument simply ignores what this Court has already stated in its Order granting this appeal: that review of the trial court's order cannot, in fact, await the outcome at trial. In the final analysis, Plaintiff's arguments, though clever and well written, avoid both the facts and the law. For the reasons set forth below, the Writ must issue to prohibit the trial court from admitting evidence of the settlement agreement between Dr. Buckmaster and the Board (the "Agreement").

B. The Trial Court's Admission of the Agreement for Corrective Action Violates Rule 408 and Thus Exceeds Its Authority.

1. Introduction.

The trial court's analysis below stemmed from a flawed premise so contrary to the law that even Plaintiff's brief attempts to marginalize it. According to Plaintiff, Defendants Rule 408 argument fails because it is based on a misreading of the trial court's "dicta" regarding "the Board's policy to protect the public." *Resp. Brief 18-19*. But Plaintiff's attempt to relegate the trial court's fundamentally flawed analysis to the status of mere dicta is quite clearly wrong. The trial court's finding that the Board was without authority to negotiate a settlement with Dr. Buckmaster was "the crux of the analysis, and what [it found] most troubling in any argument calling the interaction between the Board and Dr. Buckmaster a 'settlement'" *A. 29* (emphasis added). The trial court's order violated Rule 408 because the trial court summarily rejected the possibility that the Board could even enter into a settlement agreement. Plaintiff wants this Court to ignore this critical part of the trial court's holding because she cannot possibly defend it.

2. The Facts Do Not Support Plaintiff's Claim.

Plaintiff's brief argues that the Agreement is not an inadmissible settlement because there was never a "genuine dispute" between the Board and Dr. Buckmaster, nor any compromise of that dispute. Plaintiff's brief on this point so obfuscates the facts and the law that the big picture has been obscured. The big picture is this. The Plaintiff filed a complaint against Dr. Buckmaster with the Board. The Board made five allegations

against Dr. Buckmaster based upon that complaint. The Board and Dr. Buckmaster met to discuss those allegations and at that conference Dr. Buckmaster disputed the validity of the claims made against him. At that point either the Board or Dr. Buckmaster could have pressed the matter to a contested case hearing on the merits. Instead, two months after the conference the Board sent Dr. Buckmaster an offer of compromise that would resolve the matter short of a contested case hearing on the merits. The parties agreed to a compromise outcome in which both sides got something – the Board obtained some corrective measures; Dr. Buckmaster obtained freedom from the threat of discipline to his license; they both avoided the time, expense and uncertainty of a contested case hearing. This settlement was embodied in a written agreement which Plaintiff seeks to admit as evidence of negligence by Dr. Buckmaster. This is precisely what Rule 408 expressly prohibits and the trial court's order admitting the Agreement patently violated that rule.

Against this backdrop, Plaintiff argues that Rule 408 does not apply in this case because there was no “genuine dispute” between the parties. When the Board sent its first draft of the proposal to compromise the matter, Plaintiff's brief argues Dr. Buckmaster simply “agreed” that the Board was right and thus there was no dispute. This argument is flawed. First, it ignores everything that went on *before* the settlement agreement was drafted. The record clearly establishes that the Boards' Notice of Initial Conference centered on five allegations impugning several aspects of Dr. Buckmaster's medical care. *A. 105-6*. The record equally clearly establishes that at the conference, Dr. Buckmaster and his attorney, Mr. David Bunde, vigorously disputed these allegations made by the Board and were prepared to proceed to a contested case hearing if the Board

would not compromise its position on whether discipline was warranted. *A. 100.* Thus, even if Dr. Buckmaster had simply accepted the Board's first draft of the Agreement without change, it would be a settlement nonetheless.

Nor is it true that the Board did not change its "core concerns" through the process of compromise, as Plaintiff's Brief argues. *Resp. Brief 22-23.* Indeed three of the Board's initial allegations were dropped from the final Agreement, reflecting the process of give and take that had occurred.

Plaintiff tries to make this dispute simply disappear by arguing that the Initial Conference was merely part of the Board's investigation and thus that the Board's position (i.e. its claim) did not even emerge until after the conference. *Resp. Brief 24.* Since Dr. Buckmaster then agreed with that claim, Plaintiff argues, there was no genuine dispute. *Id.* This is like saying that if a plaintiff serves a three-count complaint but agrees, after taking discovery, to dismiss two counts and settle on the third count, there never was a genuine dispute as to the dismissed counts. That argument simply ignores reality and certainly ignores what happened in this case.

David Bunde, Dr. Buckmaster's attorney, advised the Board at the November 19, 2004 conference (before the Board made its settlement offer of January 28, 2005) that "Dr. Buckmaster denied [Plaintiff's] allegations and would defend himself against them." *A. 100.* This evidence shows that a genuine dispute existed between the Board and Dr. Buckmaster. *See Tagtow v. Carlton Bloomington Dinner Theatre, Inc.*, 379 N.W.2d 557, 562 (Minn. Ct. App. 1985) (holding that documentation and testimony showing that a

party disagreed with an initial bill demonstrated a genuine dispute existed for purposes of Minn. R. Evid. 408).

Nor is it accurate to suggest that Dr. Buckmaster subjectively agreed with the Board's concerns as reformulated and articulated in the executed Agreement. The very language of the Agreement itself describes the fact that the Board and Dr. Buckmaster disagreed about the merits of the Board's remaining allegations. Simply stated, they agreed to disagree. *A. 72.*

In response to this obvious disagreement, Plaintiff argues that because the parties did not engage in protracted debate over the language of the Agreement there could not have been a genuine dispute between them on the merits of the claim. *Resp. Brief 23-24.* This argument is unsupportable – Rule 408 imposes no requirement that a settlement is inadmissible only if the parties spend a defined minimum amount of time negotiating the language of their settlement agreement. Rule 408 bars admission of this evidence whether the parties arrive at a settlement quickly or engage in lengthy negotiations.

In addition, Plaintiff's statement that "[t]here is no reason to believe that Dr. Buckmaster would have objected to the Agreement for Corrective Action if he knew that the statements in the agreement would be used against him at a later time" is simply wrong. *Resp. Brief 31.* Dr. Buckmaster's attorney, David Bunde, testified in his affidavit that he would have advised Dr. Buckmaster not to sign the Agreement and contest the Board's allegations "[h]ad [he] known that the terms of the settlement could be used against Dr. Buckmaster in a subsequent civil lawsuit filed by [Plaintiff]" *A. 102.* Had that occurred, Dr. Buckmaster and his attorney would have developed their defense

to the complaint and presented the diagnosis of Mueller-Weiss syndrome to the full Board during formal proceedings. That never occurred because the parties entered into the Agreement to settle the disputed claim. Plaintiff is precluded from now offering that settlement agreement into evidence in this case.

Plaintiff also argues that the Agreement is not a settlement because there was no compromise by the Board. The gist of Plaintiff's argument is that the Board never "changed" its core view of Dr. Buckmaster's care of Plaintiff. *Resp. Brief 22-23*. Since it did not "compromise" its subjective views on the merits of Dr. Buckmaster's case, Plaintiff argues, there is no "compromise" under Rule 408. But this argument misreads Rule 408. Rule 408 does not require that a party change or "compromise" its subjective belief in the merits of its claim. As used in Rule 408, "compromise" is used in a different sense: it means that a party has given up something in order to resolve the matter. Here, the Agreement for Corrective Action is itself a compromise – the Board gave up its right to seek disciplinary action against Dr. Buckmaster; in return it got the certainty of non-disciplinary corrective measures and the avoidance of a contested case. It compromised.

3. The Law Does Not Support Plaintiff's Claim.

The cases that Plaintiff cites to support her "no genuine dispute" argument in reality prove Defendant's point. In *In re Commodore Hotel Fire and Explosion Cases*, 324 N.W.2d 245 (Minn. 1982), an insurer and its insured agreed that the insured's fire loss was a covered loss which exceeded the applicable policy limits. When the insurer tendered those limits, the insured accepted them. Though the parties memorialized that agreement in a document they labeled a settlement, the court found that Rule 408 did not

apply because the agreement was not a settlement at all. The parties had simply never disagreed as to either the validity or amount of the claim. *Id. at 247-48.*

Similarly, in *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519 (Minn. Ct. App. 1999), this Court held that an employer's letter proposing to pay a reduced amount in exchange for a release of claims that the employee might have was not subject to Rule 408 because, prior to the proposed letter, neither party had asserted any claims against the other party. Since no claim had been asserted at the time the letter was sent and since the employee was still employed and fully expected that the employer would honor the parties' agreements, the letter was not an offer to compromise a disputed claim. *Id. at 524.* Conversely, here the Board had asserted a claim of professional malfeasance against Dr. Buckmaster and had threatened disciplinary action, which Dr. Buckmaster disputed. Only after the claim had been made and disputed did the Board send its January 28 letter offering to compromise by entering into a non-disciplinary Agreement for Corrective Action. This is not a case like *Reger*, where the letter pre-dated the assertion of a claim and the disputing of that claim.

Likewise, Plaintiff cites *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141 (Minn. Ct. App. 1992), as holding that a stipulated agreement between the MPCA and a power plant as to the plant's wrongdoing was not a settlement. In fact, the agreement was a settlement which was not admitted into evidence. Rather, only one sentence of the stipulation was admitted and then only to establish the uncontested fact that years earlier a notice of violation had been issued by the MPCA against the Plant. The stipulation itself was not admitted, as Plaintiff intends in this case, to prove liability.

Plaintiff's attempt to distinguish the cases cited by Defendants is equally unavailing. Plaintiff's brief misperceives the Minnesota Supreme Court's decision in *In re Petition for Disciplinary Action Against Wood*, 716 N.W.2d 341 (Minn. 2007), arguing that in *Wood* the evidence of an offer to compromise a licensing dispute was excluded as irrelevant and not as a settlement offer under Rule 408. However, an accurate reading of the case demonstrates otherwise. The lower court had excluded the evidence under Rule 408; the Supreme Court, affirming that exclusion, rejected the plaintiff's argument that the Rules of Evidence did not apply (thus affirming that Rule 408 governed) and rejected plaintiff's argument that the evidence was relevant.¹ Plaintiff also criticizes Defendants for citing this Court's decision in *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746 (Minn. Ct. App. 2003), even though she acknowledges, as she must, that the Court held in that case that a settlement proposal from the MPCA was "evidence of compromise protected under Rule 408." *Resp. Brief 29*.

Finally, Plaintiff unsuccessfully attempts to diminish the significance of the licensing board Rule 408 cases from other jurisdictions. *Resp. 29-30*. There are no meaningful differences between the agreements struck between the health licensing boards and their licensees in those cases and the one at issue here. Plaintiff argues that *Malan v. Huesemann*, 942 S.W.2d 424 (Mo. Ct. App. 1987) is not persuasive because the

¹ Plaintiff misses the fundamental point here. The reason that the evidence was deemed irrelevant in *Wood* is precisely because it was an offer of compromise. A central rationale for Rule 408's exclusion of such evidence is that settlements are not relevant because they are an expression of a desire for peace, not an admission of liability. See *Esser v. Brophy*, 3 N.W.2d 3 (Minn. 1942).

settlement agreement contained language that the agreement was entered into solely for the purposes of settlement and that the inclusion of this language was “critical” to the court’s analysis. *Resp. Brief 30*. Setting aside the fact that Rule 408 does not require the inclusion of such “magic language” in an agreement, Plaintiff overlooks the fact that the Agreement in this case specifically states that it is being entered “pursuant to the authority of Minn. Stat. § 214.103, subd. 6(a)(2),” the statutory authority that allows the Board to informally settle disputes, and that both parties to the Agreement have testified that the Agreement was intended to be a settlement and not an admission of liability. In addition to being wrong, Plaintiff’s argument on this point is internally inconsistent. In one section the brief argues that simply because the parties have called the Agreement a settlement is “not determinative of [Rule 408]’s application,” *Resp. Brief 26*, yet in distinguishing the *Malan* decision the brief asserts that the failure to include certain language of that intent is “critical” to the analysis.

Plaintiff’s attempt to distinguish *McClure v. Walgreen Co.*, 613 N.W.2d 225 (Iowa 2000) is equally unpersuasive. *Resp. Brief 30, n. 5*. In *McClure* the Iowa Supreme Court excluded from evidence in a malpractice action an agreement between the Iowa Board of Pharmacy and its licensee, which had resolved an earlier administrative matter for discipline of the licensee. Plaintiff’s brief contends that the Iowa Supreme Court “did not apply Rule 408” to exclude the evidence. *Resp. Brief 30*. Yet, even a cursory review of the court’s opinion shows that the court specifically held that the agreement was irrelevant because it was “motivated by a desire for peace rather than from a concession of the merits of the claim” and cited 29 AM.JUR.2D EVIDENCE § 508, which explains that

“settlements and offers of settlement” are generally inadmissible. *Id.* at 236. *McClure*, like *Malan*, is indistinguishable from this case. Plaintiff cannot escape the fact that Rule 408 mandates exclusion of the Agreement for Corrective Action and that the trial court’s order must be reversed.

C. The Trial Court Exceeded Its Authority By Failing to Undertake the Balancing Analysis Mandated By Rule 403.

Plaintiff’s brief characterizes Defendants’ Rule 403 argument in a manner designed to cure the defect in the trial court’s order. *Resp. Brief 19*. However, contrary to Plaintiff’s contention, Defendants do not assert that the trial court did not “directly address” the Rule 403 argument or that it failed to adequately explain its analysis. Rather, Defendants contend that the trial court failed to undertake the requisite analysis at all. Once a party has moved to exclude evidence under Rule 403, the “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 supplied). Instead of engaging in this required analysis, the trial court simply recast Defendants’ Rule 403 argument as a Rule 803 objection and overruled it. In doing so, the trial court also exceeded its authority.

Plaintiff is wrong that a trial court’s failure to undertake a required balancing analysis has “never been the basis for an extraordinary writ.” *Resp. Brief 19*. Just last month, the Minnesota Supreme Court issued a writ of prohibition because a trial court had failed to undertake the required balancing test for determining whether to stay civil discovery pending the resolution of a related criminal trial. *See State v. Deal*, 740

N.W.2d 755, 769-70 (Minn. 2007). In this case, had the trial court engaged in the requisite analysis, it would have had no choice but to exclude the evidence under Rule 403.

Recognizing the need to undertake this analysis, Plaintiff's brief attempts to persuade this Court that the Agreement in this case is both highly probative and minimally prejudicial. *Resp. Brief* 32-35. To minimize its prejudicial impact Plaintiff's brief relegates the Agreement to the status of "any piece of evidence" which the jury will have to weigh. *Id.* But this argument is belied by Plaintiff's own actions. In her brief on the underlying medical issues Plaintiff characterizes her medical malpractice action as a virtual slam dunk on liability.² That argument, though irrelevant to the issues under Rule 408, vividly illustrates what the law and common sense demonstrate. Namely, that admission of the Agreement is entirely unnecessary to proving malpractice. After all, had Plaintiff never filed a complaint with the Board, her case would have proceeded like any other medical malpractice action. If she can prove her case at all, she can do so through her experts and through cross-examination of the Defendant, just like every other medical malpractice plaintiff. Indeed, Plaintiff's own brief admits the non-necessity of

² Defendants, of course, quite vigorously dispute the allegation of malpractice in this case - just as Dr. Buckmaster disputed the allegations raised by the Board. Defendants also disagree with Plaintiff's characterization of the evidence on liability. For example, contrary to Plaintiff's assertion, several witnesses will testify to the presence of arthritis justifying surgery. So too, Defendants will prove that Plaintiff had a rare disease called Mueller-Weiss syndrome, a condition for which the only treatment is the very fusion surgery that Plaintiff received. This particular evidence was not presented to the Board because the matter was resolved on favorable terms prior to a contested case hearing - itself another reason why the Agreement for Corrective Action is inadmissible at trial.

admitting the Agreement for Corrective Action: "...the opinions in the Agreement [can] be independently presented to the jury by other witnesses...." *Resp. Brief 33*. Drs. Fishco and Enger can utter those opinions without reference to the Board or the Agreement for Corrective Action. This, of course, begs the question why has Plaintiff fought tooth and nail to admit a document that she herself characterizes as "just another piece of evidence?" Precisely because that document is so prejudicial. Plaintiff's brief foretells the prejudicial misuse to which it will be put at trial:

The concerns expressed in the Agreement...are made by an unbiased Board of Dr. Buckmaster's own peers, respectful members of the Minnesota community with the mission to protect the public from incompetent and improper medical care. What the Board found deficient in Dr. Buckmaster's care is very probative in this case.

Resp. Brief 32.

Just two pages later, Plaintiff's brief asserts the opposite position by arguing that there is no prejudice because:

the Boards' concerns are not opinions on negligence. It is not as if the Board opined that Dr. Buckmaster violated a standard of care. There accordingly is no real risk the jury would substitute the Boards finding for its own.

Resp. Brief 34. Plaintiff desires the admission of the evidence because the jury will believe that the Board - an official agency of the State - has made a finding of negligence.

Thus, Plaintiff attached the Agreement for Corrective Action to her complaint filed in this matter as evidence of negligence and provided that document to her own

expert, Dr. Fischo, who has opined that he agrees with the Board's "findings" in the Agreement. *A.1-11, A. 124.*³

Ultimately, the only thing the Agreement for Corrective Action possibly adds to this case is the *appearance* of a state agency regulating and disciplining Dr. Buckmaster for the care he provided to Plaintiff, when in fact no disciplinary action resulted at all. Plaintiff's argument that the Agreement for Corrective Action is benign because it contains no specific finding that Dr. Buckmaster's treatment fell below the standard of care is a red herring.

In her brief, Plaintiff has also attempted to minimize the prejudicial impact of the Agreement for Corrective Action by addressing only the Agreement's reference to inadequate documentation and lack of proctoring. The brief has failed to even acknowledge the statement in the Agreement that "it is the Committee's view that...procedures performed by [Dr. Buckmaster] did not properly address the patient's medical condition." *A. 72.* Plaintiff's brief omits reference to this statement in the Agreement because a jury could easily infer from this language that the Board believed that Dr. Buckmaster was negligent. Such an inference is highly inflammatory and prejudicial; indeed it would be outcome determinative.

³ Yet, Plaintiff's brief also tries to minimize the obvious prejudice of the evidence by now characterizing the statements in the Agreement as "mere opinions" or "concerns" of the board, whereas she previously argued the Agreement was admissible because it contained "findings" of a formal governmental investigation and admissions by Dr. Buckmaster. Compare *Resp. Brief 33-34* with *A. 39-44*. In the final analysis, whether at trial Plaintiff's counsel calls the Agreement "opinions" of the Board or "factual findings" by the Board, that distinction will be lost on the jury.

As the Arkansas Supreme Court in *Fryar v. Touchstone Physical Therapy, Inc.*, 229 S.W.3d 7 (Ark. 2006) explained in excluding similar board evidence under Rule 403, “[t]hough the Board concluded only that [the defendant] was guilty of a statutory violation and did not find that [defendant’s] practice of chiropractic medicine was negligent or below the standard of care, a jury would be inclined to reach such a conclusion based solely on the Board’s actions.” *Id. at 304*. That is exactly why Plaintiff wants the Agreement in this case shown to the jury, and exactly why the Agreement should be excluded. The trial court’s exclusion of the portion of the Agreement labeled “Corrective Action” – the portion that explains that the Agreement is not disciplinary action – only enhances its prejudicial impact.

Moreover, contrary to Plaintiff’s assertion, Defendants do not “have all the means to combat” the unfair prejudice resulting from the admission of this evidence. *Resp. Brief 34*. The jury will be told that the Agreement for Corrective Action reflects the expert “opinions” of the Board, whom Plaintiff characterizes as “Dr. Buckmaster’s own peers, respected members of the Minnesota community with the mission to protect the public from incompetent and improper medical care.” *Resp. Brief 32*. Yet, Defendants have no opportunity to cross-examine these absent experts. As the Georgia Court of Appeals noted in *Francis v. Reynolds*, 450 S.E.2d 876, 877 (Ga. Ct. App. 1994), Defendants inability to cross-examine Dr. Powless and the Board highlights the need to exclude this evidence.

Nor is Plaintiff correct that the admission of this evidence will not divert the trial. The extensive briefing already submitted by the parties and the multitude of proceedings

surrounding this issue is just a preview of what the jury will be asked to analyze if this evidence is admitted at trial. Plaintiff's claim that "[t]here is no need" for Defendants to go into any great detail at trial to defend themselves from the evidence is incredible. *Resp. Brief 35*. Dr. Buckmaster's professional reputation has been assailed by the Plaintiff and he will do everything in his power to combat the prejudicial effect of the evidence if admitted; in the process, the trial will surely be diverted and the jury will be sidetracked from the real issue.

Plaintiff's attempt to distinguish this case from the numerous cases that have excluded similar board evidence under Rule 403 is unpersuasive. *Resp. Brief 35-36*. Those courts have excluded such evidence in malpractice cases precisely because of the inevitable unfair prejudice to the defendant, invasion of the province of the jury, and confusion of the issues. Notably, Plaintiff makes no attempt to distinguish the two decisions cited by Defendants, *Fryar* and *Francis*, both of which excluded board evidence in a subsequent civil malpractice suit, even though that evidence involved the same treatment at issue in the malpractice case. That Plaintiff has failed to cite one single case that admitted board evidence over a Rule 403 objection speaks volumes.

In summary, the trial court's decision to ignore Defendants' Rule 403 argument was not "within its well-established discretion." Controlling case law required the trial court to undertake a balancing analysis that weighed the probative value of the evidence against the danger of unfair prejudice, confusion of the issues and misdirection of the jury. The trial court admittedly failed to do so and thereby exceeded its authority, further justifying the issuance of a writ.

D. The Agreement for Corrective Action Cannot Be Used As Impeachment Evidence at Trial.

In ruling that the Agreement may be admitted for impeachment, the trial court gave Plaintiff yet another avenue for admission of clearly inadmissible and highly prejudicial evidence. In defending that ruling Plaintiff's brief unfortunately distorts the record below.

Plaintiff's argument that Defendants waived this issue by not raising it below is contrary to the record. *Resp. Brief 37*. Defendants specifically objected to the trial court's unexpected impeachment ruling by raising it in their March 16, 2007 letter requesting leave to move for reconsideration. *A. 162, n. 1*. When the trial court granted reconsideration, the Defendants expressly argued that the impeachment ruling contradicted Minn. R. Evid. 408 because Plaintiff's only stated purpose for offering the settlement evidence was to show that Dr. Buckmaster violated the standard of care. *See Defendants' Memorandum of Law Relating to Evidence From the Board of Podiatry in Support of Motion for Reconsideration dated May 25, 2007, at pp. 11-12*. Plaintiff's "waiver" argument must therefore be rejected.

Plaintiff's argument on the merits of this issue fails no better. Contrary to Plaintiff's assertions, Defendants do not argue that Rule 408 *per se* precludes settlement evidence from being offered for *proper* impeachment purposes. *Resp. Brief 37*. As Defendants acknowledged in their opening brief, Rule 408 allows settlement evidence to be used for impeachment, *provided* it is offered for a legitimate purpose other than to prove liability, such as bias or prejudice of the witness. *Pet. Brief 36*. But that is not the

case here. Plaintiff has never articulated any legitimate basis for impeachment within the confines of Rule 408. *Resp. Brief 38-39*. Instead, Plaintiff's repeated description of the Agreement as an admission by Dr. Buckmaster and as evidence of negligence reveals that her only purpose for offering it is to show liability – precisely what Rule 408 prohibits, even if ostensibly only offered for purposes of impeachment. *Pet. Brief 26-27*. Thus, the trial court should be prohibited from allowing Plaintiff to improperly offer the Agreement under the guise of impeachment evidence.

E. Plaintiff's Procedural Re-Argument That a Writ Should Not Issue is Meritless.

Plaintiff's brief argues that the writ should be denied as a procedural matter – a position that this Court initially rejected in its October 2, 2007 Order. Plaintiff's repetition of this argument does not change the analysis. Three of the four circumstances justifying issuance of a writ, as set forth in *In re Com'r of Public Safety*, 735 N.W.2d 706, 710 (Minn. 2007), are present in this case. *Resp. Brief 15*.

First, contrary to Plaintiff's argument, the trial court has, in fact, exceeded its authority. Plaintiff's brief suggests that the trial court's refusal to apply Rule 408 to the Agreement in this case is just an ordinary exercise of the trial court's inherent discretion over matters of evidence. *Resp. Brief 26*. But Rule 408 is not a rule of discretion, it is a rule of exclusion. *Farm Bur. Mut. Ins. Co. v. North Star Mut. Ins. Co.*, 2005 WL 3112014 (Minn. Ct. App. Nov. 22, 2005) (unpub. op.) (located at *A. 190*). Since the Agreement is a settlement, the trial court did not have the discretion to admit this

evidence. Similarly, the trial court did not have the discretion to avoid the required Rule 403 balancing analysis. *State v. Deal*, 740 N.W.2d 755, 770 (Minn. 2007).

Second, the decision to admit an Agreement for Corrective Action, as this Court noted in its October 2nd Order, necessarily has statewide impact. The Agreement for Corrective Action mechanism is authorized for use by all seventeen health licensing boards as a means of compromising a licensing dispute. See Minn. Stat. § 214.103. Though Plaintiff now asserts that the trial court's order in this case applies only to these particular facts and does not have application beyond this case, the trial court's order has already circulated in the medical malpractice bar and other plaintiffs have cited the order as authority for the broad proposition that such licensing board agreements are routinely admissible. See *A. 138*. Clearly, the decision in this case will affect a broad range of litigants.

Third, as already demonstrated, issuance of the writ is appropriate because the trial court's ruling will determine the outcome at trial.

Plaintiff incorrectly asserts that no Minnesota authority supports the issuance of a writ regarding an evidentiary ruling. In *Brooks Realty, Inc. v. Aetna Ins. Co.*, 128 N.W.2d 151 (Minn. 1964), a writ of prohibition was issued because the trial court had wrongfully excluded evidence based on an erroneous application of res judicata principles. Specifically, the trial court's order that precipitated the writ in that case limited the "proof" (i.e., the evidence) at trial due to the doctrine of res judicata. *Id. at 153*. Similarly, Plaintiff's attempt to downplay the Minnesota Supreme Court's clear comment in *Minnegasco v. Carver Cty.*, 447 N.W.2d 878, 880, n. 4 (Minn. 1981) that

approved interlocutory appellate review of an evidentiary ruling “by an extraordinary writ” is unpersuasive. In point of fact, there is no Minnesota case holding that a writ of prohibition may not issue in response to an evidentiary ruling and Plaintiff has cited none. This is predictable. The issuance of the writ is not dependent on the type of order issued below, but rather on the impact of that order. Where, as here, the evidentiary ruling exceeds the trial court’s authority, determines the outcome at trial and has a statewide impact on a broad range of litigants, the writ of prohibition is appropriate.

Plaintiff’s attempt to distinguish cases from other jurisdictions that have granted writs in circumstances similar to this case is unpersuasive. In *Malan*, 942 S.W.2d 424 the Missouri Court of Appeals did not issue the writ because the trial court had “conclusively established an issue against the defendant,” as Plaintiff argues, but precisely because the trial court had exceeded its authority in admitting evidence of the settlement agreement between the board and its licensee. The court in *Malan* issued the writ to avoid unnecessary, inconvenient and expensive litigation through a retrial. *Id. at 425*. Similar circumstances exist here.⁴

Finally, Plaintiff’s brief paints the trial court’s ruling as a run-of-the-mill evidentiary ruling which, if successfully made subject to a writ, would cause an endless stream of interlocutory appeals from routine evidentiary holdings. This argument, however, simply misses the mark. The order below is not a garden-variety evidentiary

⁴ For similar reasons, Plaintiff fails to distinguish *Wiseman v. Henning*, 569 S.E.2d 204 (W. Va. 2002) and *Covell v. Super. Ct. of Los Angeles Cty.*, 159 Cal.App.3d 39 (Cal.Ct.App. 1984), which both show that a writ is appropriate under the circumstances existing in this case.

ruling; it is a flagrant violation of Rule 408's prohibition and of Rule 403's mandate to undertake a balancing analysis. The admission of this evidence, which subverts the important public policy favoring settlement and threatens to overwhelm all other issues in the case, was not "within the ordinary discretion" of the trial court.

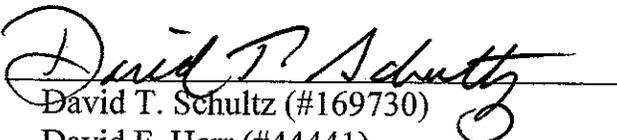
CONCLUSION

For the reasons set forth herein and those set forth in its opening brief, Defendants respectfully request that this Court make its temporary writ permanent and prohibit all evidence relating to the Board proceedings from being offered into evidence at trial.

Dated: December 10, 2007

Respectfully submitted,

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