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No. 07-1682

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),
Respondent,

v.

Dr. Roy Wayne Buckmaster, D.P.M., et al.,
Petitioners.

BRIEF OF RESPONDENT

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

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

William M. Hart (#150526)
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661
Attorneys for Amici Curiae Minnesota Medical Association, Minnesota Podiatric Medical Association, American Medical Association, and American Podiatric Medical Association

Rebecca Egge Moos (#74962)
Charles E. Lundberg (#6502X)
Dong Wook Kim (#386811)
BASSFORD REMELE, P.A.
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402
(612) 333-3000
Attorneys for Dr. Stephen Powless

Peter A. Schmit (#204365)
Craig O. Sievereding (#387402)
ROBINS, KAPLAN, MILLER
& CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
(612) 349-8500
Attorneys for Respondent

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STATEMENT OF LEGAL ISSUES

1. Whether the district court's decision to not apply Minnesota Rule of Evidence 408 to the particular circumstances of this case, so as to not exclude from evidence an Agreement for Corrective Action, justifies the issuance of an extraordinary writ.

   The district court made a pretrial evidentiary ruling that the evidence was admissible

   Apposite Authority:

   In re Commodore Hotel Fire and Explosion Cases, 324 N.W.2d 245 (Minn. 1982); *C.J. Duffey Paper Company v. Reger*, 588 N.W.2d 519 (Minn. App. 1999); Minnesota Rule of Evidence 408.

2. Whether the district court's decision to not apply Minnesota Rule of Evidence 403 to the particular circumstances of this case, so as to not exclude from evidence an Agreement for Corrective Action, justifies the issuance of an extraordinary writ.

   The district court made a pretrial evidentiary ruling that the evidence was admissible

   Apposite Authority:

   Minnesota Rule of Evidence 403.

3. Whether the district court's decision to defer ruling on the admissibility of an Agreement for Corrective Action for impeachment purposes justifies the issuance of an extraordinary writ, particularly where Petitioners have not raised the issue below.

   The district court made a pretrial evidentiary ruling that it would consider this issue at a later time.

   Apposite Authority:

   Lake Superior Ctr. Auth. v. Hammel, Green, & Abrahamson, Inc., 715 N.W.2d 458 (Minn. App. 2006);
   City of Ramsey v. Holmberg, 548 N.W.2d 302 (Minn. App. 1996);
   Minnesota Rule of Evidence 408.

STATEMENT OF THE CASE

Roy Wayne Buckmaster, D.P.M. performed a fusion surgery on Sandra O'Rourke's left foot, leaving her with a permanent loss of motion and significant pain. Ms. O'Rourke complained about this aggressive care to the Minnesota Board of Podiatry ("Board") who, as a result, entered into an "Agreement of Corrective Action" with Dr. Buckmaster. In the agreement, the Board expressed its concerns with Dr. Buckmaster's care and required him to educate himself on rearfoot surgery.

Ms. O'Rourke subsequently filed this lawsuit against Dr. Buckmaster based on the inappropriate and aggressive care. Defendants moved to exclude from evidence the Agreement for Corrective Action under Minnesota Rules of Evidence 403 and 408. After the district court denied the motion for a second time, Dr. Buckmaster appealed the court's rulings in a Petition for Writ of Prohibition to this Court. By Order dated October 2, 2007, this Court stayed the trial court proceedings and requested additional briefing on the admissibility of the Agreement for Corrective Action.

STATEMENT OF THE FACTS

A. The Medical Care at Issue

Sandra O'Rourke presented to Roy Wayne Buckmaster, D.P.M. at the Albert Lea Medical Center – Mayo Health System on May 15, 2001, with a complaint of localized left foot pain. *A.195.* She reported that this problem had been present for a number of years and that she had tried orthotics twice before, six and twelve years ago. *Id.* Dr. Buckmaster assessed her with hypertrophy (enlargement) of the navicular tuberosity (a natural protuberance of the navicular bone in the foot) with resulting pain; pes planovalgus (flat feet); and pronation. *A.195, 206.* He recommended surgery. *A.206.*

On July 6, 2001, Dr. Buckmaster performed an extensive operation that included the fusion of the talonavicular joint of Ms. O'Rourke's left foot. *A.210-11.* This fusion procedure results in a permanent loss of motion and accordingly is used only when the patient has a greatly debilitating foot condition. *A.124-25.* Before this operation, Dr. Buckmaster had not performed the procedure, and on this occasion he performed it without the assistance of another podiatrist. *A.210-11, 231.*

The fusion was unsuccessful. Radiographic images demonstrated that the bones did not fuse, and Ms. O'Rourke soon complained of significant pain. *A.213-17.* Dr. Buckmaster recommended a second surgery, which he performed on January 4, 2002. *A.218-20.* Since that time, Ms. O'Rourke has continued to report significant pain in her left foot, permanent loss of motion, and a troubling gait. *A.93-94, 224-25.*

B. The Lawsuit

1. Plaintiffs' Allegations And Expert Support

Ms. O'Rourke filed this medical malpractice lawsuit in June 2005. *A.1-9.* She alleges that Dr. Buckmaster committed malpractice when he aggressively treated her minor complaints of localized foot pain and a flat-foot condition with the fusion surgery. *Id.* As Minnesota law requires, she supported her complaint with the opinion of a medical expert. *See* Minn. Stat. § 145.682 (2007) (requiring plaintiffs in a malpractice action to provide an affidavit of expert review to demonstrate that they have the necessary expert testimony to support a prima facie case).

In his affidavits, William Fishco, D.P.M. explained that the fusion procedure is a last resort intervention that "should be used when the only solution is to fuse the joint." *A.125.* A proper candidate for this procedure would be a patient with "extensive and severe arthritis, ruptured posterior tibial tendon, or gross instability of the foot." *A.238; see also A.125.* He reviewed the medical records and noted that no entry identified that Ms. O'Rourke suffered from any of these conditions. *A.123-25, 237-39.* The medical records, in fact, indicate that Ms. O'Rourke only reported localized foot pain and that Dr. Buckmaster believed that she was a candidate for surgery because she tried orthotics many years back. *A.195; see also A.123-25, 237-39.* Dr. Fishco explained that the proper course of treatment for Ms. O'Rourke, a young active woman, would have been additional conservative care. *A.125.* The aggressive care that Dr. Buckmaster provided, he opined, was negligent and caused Ms. O'Rourke permanent injuries. *A.123-25; A.237-39.*

Other podiatrists agreed with Dr. Fishco's assessment. After Ms. O'Rourke became discouraged with Dr. Buckmaster's care in the summer of 2002, she sought treatment from John Enger, D.P.M. *A.240.* Dr. Enger likewise opined, in his medical records, that Dr. Buckmaster's decision to perform a fusion procedure on Ms. O'Rourke was overly aggressive. *A.242-43, 245-46.*

> . . . I personally think that surgery was proceeded with too quickly and that everything went too soon and too fast without conservative care being rendered before proceeding with such extensive surgery on a young 29-year-old female. . . . . I also told her that I think if any surgery would have been done I would have been more conservative and only resected the dorsal exotosis off the talonavicular joint region and not done a fusion on a 29-year-old who has no history of trauma, no history of severe degenerative arthritis of the joint, and no history of fracture to the joint.

A.245.

2. Defendants' Contentions

Defendants do not insist that Dr. Buckmaster's documentation provided a valid basis for foregoing conservative care and proceeding to the fusion surgery. Rather, Dr. Buckmaster claims that he observed evidence of moderate to severe arthritis at the talonavicular joint while he was performing the July 2001 operation. *A.232.* Evidence of severe degenerative arthritis is a recognized justification for the fusion surgery, and Defendants use this self-report by Dr. Buckmaster to justify his care. *A.232, 234, 249-50.* It should be noted that although Defendants refer to Ms. O'Rourke's past history of conservative foot care, no podiatrist believes that this past care justified the fusion surgery.

Dr. Buckmaster maintains that he made the critical finding of degenerative

arthritis during the July 2001 surgery, but there is no evidence of it. He did not document this finding, or that he discussed it, in the records of the initial and pre-operative visit nor in a pre-operative x-ray report. *A.194-95, 205, 206.* (Ms. O'Rourke denies that Dr. Buckmaster ever discussed the possibility of arthritis. *A.253-54.*) Critically, Dr. Buckmaster never documented the finding in his report of the July 2001 surgery, despite acknowledging a duty to record any significant intraoperative finding. *A.210-11, 230.* He also never documented it in a subsequent medical note, including the operative note of the January 2002 corrective surgery. *A.212-25.* In deposition, Dr. Buckmaster admitted to these failings. *A.230, 231, 233.*

C. The Agreement for Corrective Action

In November 2003, Ms. O'Rourke filed a written complaint with the Minnesota Board of Podiatry ("Board") concerning Dr. Buckmaster's care. *A.201-04.* Contrary to Petitioners' assertion, Ms. O'Rourke did not file the complaint to "bolster" a potential lawsuit against Dr. Buckmaster. *Pet'r Br. 5.* She, in fact, told defense counsel in deposition that she filed the complaint because she "wasn't getting any better and there was something wrong" with her care. A.53. Her frustration with Dr. Buckmaster's care is borne out in numerous entries in the medical records. *See, e.g., A.241, 242.*

The Board is the state licensing agency for podiatrists. Upon receiving a complaint against one of its licensees, the Board convenes a Complaint Resolution Committee ("Committee") to review the matter. *A.74.* The Committee is comprised of two Board members, a licensed podiatrist and a member of the public. *Id.* The Committee's investigation may include a conference and written correspondence with the

licensee. *Id.*; Minn. Stat. § 214.103, subd. 6 (2007). If the Committee decides to resolve the complaint, the Committee may do so by (1) recommending discipline to the full Board, (2) dismissing the complaint, (3) entering into an agreement for corrective action, or (4) proceeding to a contested case hearing. *A.74*; Minn. Stat. § 214.103, subd. 6-8 (2007).

With Ms. O'Rourke's complaint, the Board ultimately decided to enter into an "Agreement for Corrective Action" with Dr. Buckmaster. *A.72.* The Agreement for Corrective Action has two parts. The first part, entitled "Background Information," contains a summary of the Board's investigation. *Id.* In the third paragraph of this section, the Board asserted its concerns with Dr. Buckmaster's care: inadequate documentation and performance of a surgery for the first time without a proctoring surgeon present.

> 3. . . . . Based on the investigation and conference discussion, the Committee concluded that the documentation in Licensee's medical record of S.O. did not adequately justify the course of treatment. The Committee also questioned Licensee's performance without proctoring of a surgical procedure he had never done before.

Id.

In the following two paragraphs, the Board presented Dr. Buckmaster's response to the complaint and then restated its concerns on the care provided.

> 4. In response to the complaint and the Committee's investigation, Licensee states 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

Id.

The second part of the Agreement for Corrective Action, labeled "Corrective Action," listed the corrective steps that Dr. Buckmaster would need to complete in order to have the complaint dismissed. *A.73.* It provided that Dr. Buckmaster would have to submit his medical records to the Board for review of his record-keeping practices. *Id.* It also provided that Dr. Buckmaster would need to have all his rearfoot surgeries proctored for eighteen (18) months and that he must read twenty-five (25) journal articles pertaining to flat foot reconstructive surgeries. *Id.*

D. The District Court's Order Dated March 12, 2007

Defendants filed a motion in limine in November 2006 to have the Agreement for Corrective Action excluded from trial. They argued that the evidence was a product of negotiated compromise inadmissible under Minnesota Rule of Evidence 408 and otherwise too prejudicial under Minnesota Rule of Evidence 403. In an Order dated March 12, 2007, the Honorable John A. Chesterman granted Defendants' motion in part. The court ruled that it would exclude the "Corrective Action" portion of the Agreement for Corrective Action (which addressed the corrective measures) but admit the "Background Information" portion (which contained the Board's opinions on Dr. Buckmaster's care). *A.13.*

In a ten-page memorandum, the court outlined its analysis. The court explained that "there could be little doubt" that the Board's opinions were "relevant and helpful to a finder of fact when determining whether Dr. Buckmaster was negligent." *A.17.* On the Rule 408 claim, the court noted that for an agreement of any sort to be considered a "settlement" for purposes of Rule 408, there must be a "real compromise" of a disputed claim. *A.22* (citing Minn. R. Evid. 408, Comm. Cmt. (1977)). Reviewing the evidence of this case, the court concluded that there was no evidence suggesting "that the final contents of the ACA represented a mutually agreed upon resolution to Plaintiffs' complaint." The Court ruled that Rule 408 did not apply in this case. *A.23-24.*

E. The District Court's Order Dated August 14, 2007

Defendants sought leave to file a motion for the district court to reconsider this order. *A.160-62.* Before receiving a ruling on their request, however, they subpoenaed the testimony of Dr. Powless, the podiatrist who presided over Ms. O'Rourke's complaint to the Board. *A.95-98.* This filing triggered the involvement of the State of Minnesota (counsel for the Board) and counsel for Dr. Powless, both of whom opposed the subpoena. *A.65-69, 91-92.* The district court granted additional briefing and argument on the issues. *A.26.*

In support of their motion for reconsideration, Petitioners submitted the correspondence that the Board and Dr. Buckmaster engaged in while the Board was investigating Ms. O'Rourke's complaint. This information provided an insight into how the Board came to its conclusions on Dr. Buckmaster's care.

On November 3, 2004, a designee of the Attorney General's office notified

Dr. Buckmaster by letter that the Board scheduled a conference with him to discuss his treatment of Ms. O'Rourke. *A.104.* The substance of the notice included allegations to which Dr. Buckmaster was asked to respond in the first instance. The allegations demonstrated that the Board was concerned that Dr. Buckmaster's decision to proceed to surgery in July 2001 "did not appear to have been justified." *A.105-06.* The Board indicated, however, that it was in the process of investigating the allegations and had made no decisions on their substance. *A.105.*

On November 19, 2004, Dr. Buckmaster attended the conference, with an attorney representing him. *A.100.* Present for the Board were the two members of the Committee and the designee of the Attorney General's Office. *Id.*

On January 28, 2005, the Board sent Dr. Buckmaster a letter with a proposed agreement for corrective action. *A.109.* In the agreement, the Board identified its two concerns on the care provided: inadequate documentation and inexperience with the surgical procedure. The Board indicated that while it initially alleged that Dr. Buckmaster's care did not "appear" justified, it now "concluded that the documentation . . . did not adequately justify the course of treatment." A.110. The Board also indicated that while it never alleged that Dr. Buckmsater was inexperienced with the fusion procedure, it now "questioned" Dr. Buckmaster's decision to perform "without proctoring . . . a surgical procedure he had never done before." *Id.*

In addition to voicing its concerns, the Board required that that Dr. Buckmaster submit his complete medical records for up to ten (10) surgical patients so that the Board could review his record-keeping practices. *A.111.* The Board also required Dr.

Buckmaster to read "at least 25 journal articles pertaining to flat foot reconstructive surgeries within one year" and to have an experienced podiatrist proctor all his rearfoot reconstructive surgeries for the next eighteen (18) months. *A.110.*

On February 16, 2005, Dr. Buckmaster responded to the Board's letter with his own. He asked for the proposed agreement to be "slightly revised" to reflect his response to the underlying complaint. *A.112.* He particularly asked for the agreement to reflect that he "carefully evaluated" the patient, studied some medical literature, and consulted and performed the surgery with experienced surgeons. *Id.* He did not contest the substantive practice concerns outlined by the Board — inadequate documentation and performance of surgery for the first time without a proctoring surgeon present, nor did he contest the corrective measures required by the Board.

On March 11, 2005, the Board responded with a letter and a second proposed agreement for corrective action. *A.113.* In this proposed agreement, the Board included some of Dr. Buckmaster's "response" but made certain that the agreement would not read as if the Board adopted his substance. In a new paragraph, the Board indicated what Dr. Buckmaster "stated" in response to the complaint (while excluding the notion that Dr. Buckmaster "carefully" evaluated the patient).

> 4. In response to the Complaint and the Committee's investigation, Licensee states that he evaluated the patient's condition, studied the applicable literature, consulted with two podiatric surgeons . . . .

A.114. In another paragraph to follow, the Board reiterated and augmented its concerns about the care.

> 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.

Id.

Dr. Buckmaster accepted this Agreement for Corrective Action and signed the document on March 23, 2005. *A.73.*

Based on this correspondence, Defendants renewed their claim that the Agreement for Corrective Action was inadmissible. In an Order dated August 14, 2007, the district court denied Defendants' Motion for Reconsideration. *A.26.* In a Memorandum, the court carefully recited all the new evidence and reasoned that the new evidence would not alter its previous ruling. *A.29.*

The court recited each letter of correspondence between the Board and Dr. Buckmaster and cited the pertinent text of Rule 408. *A.28-29.* After reviewing this evidence and the law, the court held that "[i]n this particular instance, there is no evidence of 'valuable consideration,' a 'dispute,' or 'negotiations'" that would trigger the rule's application. *A.29* (emphasis added). In a full paragraph to follow, the district court elaborated,

> Indeed, it appears when drawing up the ACA, the [Board] made no concessions about the final analysis on the assessment of Dr. Buckmaster's care and treatment towards the Plaintiff. Rather, it simply inserted additional facts concerning the actions Dr. Buckmaster made in preparation of Plaintiffs' care. Such additional facts serve to provide only clarification and a more accurate final record of the course of conduct that eventually led to the Plaintiff's complaint. These additions of fact are not "negotiations," it did not constitute "valuable consideration," and it is not valid proof of any dispute between Dr. Buckmaster and the Board.

A.30. The court also quashed the subpoena for Dr. Powless's testimony. *A.26.*

F. The Writ of Prohibition

Petitioners subsequently filed a Petition for Writ of Prohibition to have this Court reverse the district court's ruling on the admissibility of the Agreement for Corrective Action and on the subpoena. In its Order dated October 2, 2007, this Court temporarily stayed the district court's orders and requested additional briefing on the issue of the admissibility of the Agreement for Corrective Action. This Court denied relief on the issue of the subpoena.[1]

[1] Respondent respectively notes that because this Court has denied review on Petitioners' motion to compel Dr. Powless's testimony, Dr. Powless no longer has an apparent interest in this appeal.

ARGUMENT

A. Writ of Prohibition

This appeal on the admissibility of the Agreement for Corrective Action comes prior to the presentation of any evidence and in the form of a extraordinary writ of prohibition.

Minnesota appellate courts issue a writ of prohibition "only in extreme cases where the law affords no other adequate remedy by motion, trial, appeal, certiorari, or otherwise." *State v. Turner*, 550 N.W.2d 622, 625 (Minn. 1996) (citation omitted). The petitioner must show that the district court exercised "unauthorized power" that "result[ed] in injury for which there is no adequate remedy." *Id.* (citations omitted); *see, e.g.*, *Mampel v. Eastern Heights State Bank of St. Paul*, 254 N.W.2d 375, 378 (Minn. 1997) (issuing writ to protect from broad discovery the thought processes by which administrative decisions are made); *State ex rel. Olson v. Schultz*, 200 Minn. 363, 364-65, 274 N.W. 401, 401-02 (1937) (issuing writ to prevent a district court judge from presiding over a matter in which a party disqualified him).

The Minnesota Supreme Court recently enumerated the particular circumstances under which the extraordinary writ could issue.

> We will issue a writ of prohibition only when one of the following four circumstances applies: [1] it appears that the court is about to exceed its jurisdiction or [2] where it appears the action of the court relates to a matter that is decisive of the case; [3] where the court has ordered the production of information clearly not discoverable and there is no adequate remedy at law; or [4] in rare instances where it will settle a rule of practice affecting all litigants.

In re Com'r of Public Safety, 735 N.W.2d 706, 710 (Minn. 2007) (emphasis added) (citing *Thermorama, Inc. v. Shiller*, 271 Minn. 79, 84, 135 N.W.2d 43, 46 (1965)). Under this authority, there are only two possible bases for granting the present writ — if the trial court was to exceed its jurisdiction or effectively determine the case by admitting the Agreement for Corrective Action.

Respondent discovered no case in which a Minnesota court issued a writ of prohibition to reverse a pretrial ruling on the admissibility of evidence. In their initial briefing, Petitioners cited two cases to say that this is not so. Neither case makes their point. In *Brooks Realty, Inc. v. Aetna Ins. Co.*, 268 Minn. 122, 128 N.W.2d 151 (Minn. 1964), the Minnesota Supreme Court issued a writ to prohibit the district court from applying the res judicata doctrine to prevent the litigation of issues. *Id.*, 268 Minn. at 124-25, 127, 128 N.W.2d at 153, 154. There was no evidentiary ruling to review in the case, and the appellate court made clear that it did "not resort to an examination of the evidence." *Id.*, 268 Minn. at 127, 128 N.W.2d at 154. In *Minnegasco, Inc. v. Carver City*, 447 N.W.2d 878 (Minn. 1981), the Minnesota Supreme Court also did not review a pretrial evidentiary ruling but a question of statutory interpretation on a summary judgment motion. *Id.* at 879-80.[2]

[2] In a footnote, the court in *Minnegasco, Inc. v. Carver City* noted that for an interlocutory ruling on the admissibility of evidence, "appellate review, if obtainable" would "probably" be by way of extraordinary writ. *Id.* at 880, n.4. This passing comment certainly does not support the proposition that Minnesota appellate courts have issued an extraordinary writ to review a pretrial ruling on the admissibility of evidence or that this Court should issue an extraordinary writ in this case.

The case law that Petitioners cite from other jurisdictions also does not support the issuance of a writ of prohibition in this case. *Pet'r Br. 40.* In *State ex rel. Malan v. Hueseman*, 942 S.W.2d 424 (Mo. App. 1997), the Missouri appellate court did not issue a writ of prohibition to merely correct a pretrial evidentiary ruling. The trial court in that case ruled the evidence of settlement was admissible and held that the evidence conclusively established an issue against the defendant, a party to the settlement. *Id.* at 427. The trial court effectively prevented the defendant from raising a defense to plaintiff's claims, a situation that is fundamentally different than the one present here. As shown below, the admission of the Agreement for Corrective Action would not prevent, let alone impede, Petitioners from raising their defense. Dr. Buckmaster, in fact, concedes the substance of the Board's concerns, namely that he failed to document critical findings and that he never performed the fusion procedure before. *A.230, 231, 233.*

Similarly, in *State ex. rel. Wiseman v. Henning*, 569 S.E.2d 204 (W.Va. 2002), the appellate court issued a writ of prohibition to prevent the trial court from excluding evidence of expert testimony that the plaintiff needed to prove their claim to damages. *Id.* at 207-09 (reversing trial court's ruling to prevent a plaintiff from presenting expert testimony on causation in a personal injury case). The trial court's ruling in *Wiseman*, as in *Malan*, effectively prevented a party from litigating their case.[3]

[3] The third case that Petitioners cite, *Covell v. Superior Court*, 159 Cal.App.3d 39 (Cal. App. 1984), is not on point. In *Covell*, the appellate court reviewed an order on a motion to compel deposition testimony. *Id.* at 42. The court in *Covell*, as Minnesota courts, recognized that "as a practical matter, an extraordinary writ is the only effective method

Even if in theory Minnesota courts would use an extraordinary writ to engage in piecemeal review of a pretrial evidentiary ruling, in practice the courts have not done so. The strong cautions against using the writ in general sound no truer than with these evidentiary rulings. There is no "immediate and irreparable harm" where a trial court acts within its well-established authority to issue a pretrial ruling on the admissibility of evidence. In fact, no harm may ever occur from such a ruling. It is well-acknowledged that many an event at trial — the verdict, the admission of other evidence, argument, and jury instructions — can render evidentiary issues that seem so pressing before trial to be *de minimis* or even moot afterward. There also is a well-established and "adequate remedy" for a pretrial evidentiary ruling. A post-trial appeal has served all other litigants with this grievance. Further, a ruling on the admissibility of evidence is not the "rare instance" where a ruling will settle a rule of practice affecting all litigants. Rulings and the admissibility of evidence invariably turn on the existence of predicate facts, which may or may not be present in any given case.

Petitioners ask this Court to cast aside these concerns and in the first instance overrule a pretrial evidentiary ruling by way of writ of prohibition. There is no basis for doing so.

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of reviewing the [discovery] issue" because the issue "unlikely . . . will surface in an appeal." *Id.*; *see*, *e.g.*, *Mampel*, 254 N.W.2d at 377 ("While pretrial discovery orders are not appealable as of right, . . . a writ of prohibition is an appropriate means to obtain review of a pretrial discovery order where the trial court orders discovery of information clearly not discoverable.")

B. The District Court Did Not Exceed Its Authority When It Ruled That the Agreement for Corrective Action Is Admissible

The district court had jurisdiction and the authority to determine whether the Agreement for Corrective Action was admissible at trial notwithstanding Minnesota Rules of Evidence 403 and 408.[4] It is the province of the district courts to determine what evidence will be admitted at trial. *In re Estate of Martignacco*, 689 N.W.2d 262, 268 (Minn. App. 2004) ("Evidentiary rulings rest within the sound discretion of the district court . . . .") (citing *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997)). In this case, the district court did not exceed all bounds of its broad discretion and authority when it considered whether there were facts to support the application of Rules 403 and 408 in "this particular instance" and concluded that there were not.

The arguments that Petitioners fashion to claim that the district court exceeded its authority are novel and without merit. On the Rule 408 issue, Petitioners contend that the trial court exceeded its jurisdiction when it commented on a competing policy concern at issue in this case. *Pet'r Br. 22-24.* In a Memorandum to its August 14, 2007 Order, the court commented on the Board's policy to protect the public. *A.28-29.* Petitioners are mistaken that the court exceeded its jurisdiction with the comments because (1) the comments were not essential to the court's decision, and (2) even if the court's comments

[4] Discussed in more detail in a later section, Minnesota Rule of Evidence 403 provides that otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other concerns. Minnesota Rule of Evidence 408 provides that evidence of compromise of a disputed claim is inadmissible to prove liability of that claim.

were essential, the court still acted within its authority to decide upon the admissibility of evidence. *A.29-30.* Indeed, the comments at issue are three sentences in the court's memorandum to the second order, in which the court considered new evidence and upheld its prior order. Moreover, these sentences are interspersed within and overshadowed by a detailed analysis in which the court carefully reviewed the relevant circumstances and decided that those circumstances did not justify the application of Rule 408 in this case. *Id.*; *C.J. Duffey Paper Co. v. Reger*, 588 N.W.2d 519, 524 (Minn. App. 1999) (instructing that the application of Rule 408 turns on the existence of several predicate facts). This analysis was entirely proper and provides no basis for an extraordinary writ.

On the Rule 403 issue, Petitioners contend that the trial court exceeded its authority when it failed to "directly" address their Rule 403 claim. *Pet'r Br. 29.* This claim also fails to articulate how the court exceeded its authority. It certainly is prudent for a trial court to provide a detailed explanation of why it is granting or denying each of a litigant's evidentiary claims. The failure to do so may result, on direct appeal, in a remand or a ruling on the merits. If the record is sufficient, the appellate court may uphold the ruling regardless of an incomplete analysis. The failure to directly address a evidentiary claim has never been the basis for an extraordinary writ. As any litigant on the losing end of an evidentiary issue, Petitioners are troubled that the district court evaluated the relevant circumstances differently than they. Coming to a different outcome on an evidentiary issue, however, is not acting without jurisdiction.

As shown below, the court was well within its authority when it issued its ruling. There was no reversible error in this case.

1. It Was Within the District Court's Authority To Hold That the Agreement for Corrective Action Does Not Qualify as a "Settlement" for Purposes of Minnesota Rule of Evidence 408

Minnesota Rule of Evidence 408 provides that evidence of compromise of a disputed claim is inadmissible to prove liability of that claim. In pertinent part, it reads,

> Evidence of . . . offering . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

As this Court has observed, the rule is one of exclusion, not discretion. Thus, "if a statement violates the rule, a trial court does not have discretion to admit the statement." In *C.J. Duffey Paper Co.*, 588 N.W.2d at 524 (citing 11 Peter N. Thompson, Minnesota Practice § 408.01, at 178 n. 4 (1992)).

In *C.J. Duffey Paper Co. v. Reger*, this Court made clear that the application of Rule 408 depends on the particular facts of any given case. This Court explained that, pursuant to the plain language of the rule, the rule applies only when several pertinent circumstances exist. 588 N.W.2d at 524. The evidence must be offered "to prove liability" and not for another legitimate purpose. *Id.* Also, the evidence of the purported compromise must concern "a claim which was disputed as to either validity or amount."

Id.; *see also* Minn. R. Evid. 408, Comm. Cmt. (1977) ("Before the rule of exclusion is applicable there must be a genuine dispute as to either validity or amount."). Absent a genuine dispute, there can be no real compromise to trigger the rule's application. *See* Minn. R. Evid. 408, Comm. Cmt. (1977).

In *C.J. Duffey Paper Co.*, this Court engaged in a "careful review of the extensive record" and upheld the admission of evidence of purported compromise. 588 N.W.2d at 525. The evidence was a letter from the company's attorney to its president, in which the attorney (1) asserted that the deferred compensation agreements at issue were of "dubious validity" and (2) offered to pay the president an amount less than that due under the terms of the agreements in order to settle a compensation issue. *Id.* at 523. This Court reviewed the events that led up to and followed this letter, including a number of meetings and communications between the parties, and concluded that the letter was not the product of a "genuine dispute." *Id.* at 524-25. This Court explained that the company, who wanted to exclude the evidence, "acknowledged that they owed [the president] almost $2.4 million under the terms of the [compensation agreements]" though offered to discount that figure in settlement. *Id.* at 524. This Court accordingly upheld the admission of the evidence in that case.

In *In re Commodore Hotel Fire and Explosion Cases*, 324 N.W.2d 245 (Minn. 1982), the Minnesota Supreme Court likewise engaged in a review of all the evidence at issue and upheld the admission of evidence of a purported settlement. The evidence was a settlement between a building owner and its insurance carrier over the amount of insurance coverage for a fire loss. *Id.* at 247. The court explained that there was no

"genuine dispute" over the amount of the building loss because the owner, who argued for the exclusion of the settlement, had learned of the amount of the loss and "never disavowed the figure." *Id.* at 248. The court accordingly upheld the admission of the evidence in that case.

As in those cases, the district court in this case carefully reviewed all the evidence and concluded that the application of Rule 408 was not required "in this particular instance." The court properly determined that Board never compromised its position on Dr. Buckmaster's care. There was no genuine dispute. Beyond "acknowledging" and "not disavowing" the concerns, Dr. Buckmaster has agreed with their substance.

The evidence plainly shows that the Board never compromised its concern on the documentation. The language of the Agreement for Corrective Action makes clear that the Board received Ms. O'Rourke's complaint, performed its own investigation, and then concluded that Dr. Buckmaster failed to document a condition that would justify the fusion procedure. *A.110.* From the face of the agreement, it is also clear that Dr. Buckmaster never disputed this point: he made some statements in response to the complaint but none germane to the issue of documentation. *Id.*

The correspondence, which Dr. Buckmaster provided, confirms that there was no such dispute or compromise. The Board initially alleged that based on the documentation the surgery did not appear justified, but then after meeting with Dr. Buckmaster the Board concluded that his documentation was insufficient. *A.105.* If Dr. Buckmaster only confirmed the Board's concern through the conference discussion, he cannot be said to have compromised their position. Further, when Dr. Buckmaster had his opportunity to

disagree with the Board's first proposed agreement (in his letter to the Board), he did nothing to try to correct the Board's conclusion that his documentation was lacking. He did not even comment on the documentation, accepting the Board's publicized concern on this issue and its demand for him to submit his medical records for review. *A.73, 112.* This evidence establishes that there absolutely was no dispute or compromise on this concern. Indeed, to the day, no podiatrist who has reviewed the documentation has claimed it was sufficient, including Dr. Buckmaster who agreed that his documentation did not justify the surgery. *A.230, 231, 233.*

There similarly was no compromise on the Board's concern with Dr. Buckmaster's inexperience and failure to have an experienced surgeon with him during the first operation. The Agreement for Corrective Action states that based on the Board's independent investigation it developed this concern. *A.72.* Dr. Buckmaster does not dispute these underlying facts, conceding that he was inexperienced with the procedure. *A.231.* After the Board notes in the agreement that Dr. Buckmaster claimed to have evaluated the patient's condition, studied the applicable literature, and consulted with two physicians, the Board states that "despite his claims," it believed that the "surgery did not properly address the patient's condition." *A.72.* The Board still questioned Dr. Buckmaster's experience. *Id.* Indeed, the Board required Dr. Buckmaster to take numerous steps to learn more about the fusion surgery. *A.73.*

The correspondence between Dr. Buckmaster and the Board only confirms that there was no dispute on this point. The correspondence shows that in response to Dr. Buckmaster's request to have his thoughts added to the agreement, the Board only

strengthened their concerns with his care. After receiving Dr. Buckmaster's input, the Board added a full new paragraph to expressly distance itself from his thoughts and to stress that they still viewed the course of his treatment as concerning. *A.114.* The correspondence also shows that Dr. Buckmaster wanted to have the Board make public that he "carefully" evaluated the patient, but the Board dropped all reference to "careful" care. *Id.* In correspondence, Dr. Buckmaster also never disputed the need for him to educate himself on rearfoot surgery. This evidence does not prove a compromise or a genuine dispute. To the contrary, the correspondence amplified the Board's concerns.

The evidence as a whole demonstrates that the Board formed its own opinions on the care at issue, by way of its own investigation and without any compromise with Dr. Buckmaster. The language of the Agreement for Corrective Action was not shaped by any genuine dispute. In this regard, the present situation is similar to those in *C.J. Duffey Paper Co.* and *In Re Commodore Hotel Fire And Explosion Cases*, wherein the courts concluded that the evidence before it did not demonstrate that the settlement offer and settlement were the product of a genuine dispute. The evidence in this particular instance also does not require the application of Rule 408 and the district court did not commit reversible error in concluding so.

In its two orders, the district court evaluated this same evidence, carefully and with a proper understanding of Rule 408 in mind. The district court recited the pertinent provisions of the Agreement for Corrective Action and the correspondence between the Board and Dr. Buckmaster. *A.28-29.* The court cited the pertinent language of Rule 408. *A.22-23, 29.* After this review, the court properly observed that the Board "made no

concessions about its final analysis on the assessment of Dr. Buckmaster's care and treatment towards the Plaintiff." *A.30.* "In this particular instance," the court concluded, Rule 408 would not apply. *A.29, 30* (emphasis added). This analysis was entirely proper. The Court looked into whether critical facts were present and determined that they were not. The court's ruling was not reversible error.

Petitioners contend that the district court erred by inquiring into whether there was a genuine dispute (as the court was required to do under Rule 408 and the case law). Petitioners claim that two facts, neither of which derive from the language of Rule 408 or the case law, are "determinative" to the rule's application in every case involving an agreement for corrective action. They claim that the court's inquiry should have begun and ended with the facts that (1) a Minnesota statutory provision authorizes the Board to enter into an agreement for corrective action and (2) the parties to the agreement have argued in this litigation that Rule 408 applies to the agreement. *Pet'r Br. at 16, 20.* Petitioners are mistaken.

Just because a party has the authorization to resolve a grievance does not turn any document that the party produces short of litigation — or short of a contested case hearing — into a "settlement" protected by Rule 408. It is not the identity of the party or their authority to settle a claim (which all private persons generally have) that determines the application of Rule 408. It is the particular circumstances that give rise to the challenged evidence that does so. *See In re Commodore Hotel Fire And Explosion Cases*, 324 N.W.2d at 248; *C.J. Duffey Paper Co.*, 588 N.W.2d at 524. Notably, nothing in the language of Minn. Stat. § 214.103, subd. 6(a)(2), the provision that authorizes the

Board to resolve a complaint by agreement for corrective action, suggests that all of the Board's agreements for corrective actions are based on "genuine disputes" as understood in Rule 408. Likewise, nothing in the language of Rule 408, or in any case interpreting that rule, suggests that all agreements from some persons — or state agencies — are "settlements" protected by the rule. Indeed, in *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141 (Minn. App. 1992), this Court ruled that a stipulation between a state agency and a power plant which reported the plant's wrongdoing but did not include an admission of fault was not barred by Rule 408. *Id.* at 145, 148.

Petitioners' broad application of Rule 408 is also improper because a district court should not substitute a litigant's argument on the rule's application for its own analysis. It is a truism at the core of our legal system that a court should undertake its own independent analysis of an evidentiary issue and not adopt the positions of interested parties. Indeed, for Rule 408, this Court has made clear that a party's argument to the effect that evidence is a "settlement" for purposes of Rule 408 is not determinative of the rule's application. In *C.J. Duffey Paper Co.*, this Court upheld the admission of the letter of settlement even though the "letter itself was couched in terms of settlement of a dispute and included typical settlement documents, including a release of all claims." 588 N.W.2d at 525; *see also In re Commodore Hotel Fire And Explosion Cases*, 324 N.W.2d at 247-48 (upholding the admission of an agreement titled as a "settlement" notwithstanding Rule 408). In the present case, the trial court properly inquired into whether there was enough evidence to say that "a claim . . . was disputed as to either

validity or amount." Minn. R. Evid. 408 (2007). This analysis, nor the court's conclusion, is a ground for reversal.

The amicus organizations are similarly mistaken when they claim that all agreements for corrective action from the Board and all other state licensing boards are protected under Rule 408. *Amicus Br. 6.* As noted, the application of Rule 408 depends on circumstances not on identities. Just as agreements between private parties may or may not trigger Rule 408, depending on the circumstances of the case, the same is true between state agencies and their licensees. *See McKay's Family Dodge*, 480 N.W.2d at 145, 148 (upholding the admission of a stipulation of wrongdoing between a state agency and a power plant). The circumstances in this case plainly support the court's decision to not apply Rule 408. As discussed, the Board came to its criticisms on Dr. Buckmaster's care independently and without compromise. As a result of Dr. Buckmaster's attempt to interject this own thoughts, the Board only issued a stronger censure of his care. Dr. Buckmaster also has conceded, as he must, the substance of the Board's concerns. On these facts, it is not reversible error to determine that Rule 408 does not apply.

In their argument for extraordinary relief, Petitioners also miscast the events that gave rise to the Agreement for Corrective Action. They present the conference between Dr. Buckmaster and the Board's representatives as undisputed evidence that Rule 408 applies in this case. *Pet'r Br. 16-18.* The Board's initial presentation of its allegations did not create a dispute. Even if the conference could be considered "an offer of settlement," the "offer itself cannot be the mechanism that creates the dispute." *C.J. Duffey Paper Co.*, 588 N.W.2d at 524-25 (citing *In re Commodore Hotel Fire And*

Explosion Cases, 324 N.W.2d at 247-48); *see also* Minn. Stat. § 214.103, subd. 6(a) (2007) (authorizing the Board to hold a conference for several purposes of investigation). A dispute, if it was to occur, would manifest itself in Dr. Buckmaster's response. His response, as discussed, did not have the Board compromise its concerns.

In a similar argument, Petitioners mistakenly rely on the fact that the Board initially presented several allegations on Dr. Buckmaster's care to him yet ultimately incorporated only two concerns into the agreement. *Pet'r Br. 17.* For the reasons noted in the paragraph above, this fact is also not undisputed evidence of compromise. At the time of the conference, there was no settlement proposal. The Board was plainly engaged in its investigation and sought Dr. Buckmaster's response. *A.105.* Thus, the fact that Dr. Buckmaster might have satisfactorily clarified an allegation, e.g., whether he used an allograft or autograft procedure during the conference, does not trigger wholesale protection under Rule 408 for concerns on other facets of his care that (1) Dr. Buckmaster never disputed and (2) that became part of the Agreement for Corrective Action.

Petitioners cite no case law to justify a reversal of the district court's decision to admit the Agreement for Corrective Action over Rule 408. They now acknowledge that no Minnesota appellate court decision is on point. *Pet'r Br. 20.* Their continued reliance on other "analogous cases" is mistaken. In *In re Petition for Disciplinary Action against Wood*, 716 N.W.2d 341 (Minn. 2006), an attorney attempted to admit his hearsay account of a prior settlement offer from the attorney licensing board in a disciplinary action. *Id.* at 346. On the facts, it would have been difficult, if not impossible, to say that the evidence proved "the invalidity" of the board's claim, as required for the application of

Rule 408, and the Minnesota Supreme Court never analyzed the referee's decision to apply Rule 408 to exclude the hearsay account. Rather, the court expressly held that exclusion was justified because the evidence were irrelevant to the issues at hand. *Id.*

Petitioners cite *In re Max Schwartzman & Sons, Inc.*, 670 N.W.2d 746 (Minn. App. 2003) as the other Minnesota decision that supports their position. *Pet'r Br. 20-21.* In *In re Max Schwartzman & Sons*, a company (1) argued that the Minnesota Pollution Control Agency was unreasonable in requiring the removal of waste within six months and (2) sought to admit a letter in which the agency indicated a prior willingness to consider a longer time frame. 670 N.W.2d at 753. This Court held that it would not consider the letter on appeal because the court had concluded previously that the letter was not part of the agency record and was evidence of compromise protected under Rule 408. *Id.* There was no analysis in the opinion why Rule 408 might serve as an alternative ground to not consider the evidence. In any event, Petitioners cite this case in support of their position yet fail to acknowledge that in *McKay's Family Dodge*, this Court upheld the admission of a stipulation between the same state agency and a power plant notwithstanding Rule 408. 480 N.W.2d at 145, 148. The pairing of these two cases illustrates that the application of Rule 408 does not turn on the identity of the parties to a purported settlement, as Petitioners and amicus claim, but on the circumstances of any given case.

Petitioners cite court decisions from other jurisdictions, but these decisions invariably draw from a different body of case law and different circumstances. *Pet'r Br. 20.* In *State ex rel. Malan v. Hueseman*, 942 S.W.2d 424 (Mo. App. 1997), the Missouri

appellate court ruled that the trial court could not admit evidence of a stipulation between a pharmacist and the State Board of Pharmacy. In the stipulation, the pharmacist "agreed, . . . solely for the purposes of settlement and not as an admission of liability, that she incorrectly filled prescriptions and substituted drugs." *Id.* at 427. (As noted earlier, the trial court planned to admit this evidence and prevent the pharmacist from denying negligence in the malpractice action on this same care. *Id.*) This language proved critical to the court's analysis. *Id.* Here, the circumstances are substantially different — as discussed, Dr. Buckmaster did not accept liability in the agreement and he does not directly dispute the substance of the Board's concerns. These differing circumstances, and the broad discretion granted to trial courts on evidentiary matters, certainly allow for a court in Missouri to come out one way on the admissibility of a particular stipulation between a pharmacist and her licensing board and a court in Minnesota to rule otherwise on a particular agreement between a podiatrist and his licensing board.[5]

Petitioners base their appeal for an extraordinary writ on an appeal to policy. They claim that because Minnesota law recognizes the importance of encouraging settlements in general, this Court should reverse the district court and hold that Rule 408 bars the admission of the agreement between Dr. Buckmaster and the Board in this particular instance. *Pet'r Br. 24. Cf. Minneapolis Star & Tribune Co. v. Schumacher*,

[5] Petitioners also cite *McClure v. Walgreen Co.*, 613 N.W.2d 225 (Iowa 2000), but the Iowa Supreme Court did not apply Rule 408 to exclude any "analogous" evidence. *Id.* at 234-36. The evidence was allegations of statutory violations that carried a criminal penalty. *Id.* at 234-35, 237. The court upheld the exclusion of the evidence because it was not relevant to the particular issues germane to the litigation and because the "tone of criminality" was unfairly prejudicial. *Id.* at 236-37.

392 N.W.2d 197, 205 (Minn. 1986) ("This court has often stated that it favors settlement of disputed claims without litigation"). The admission of the Agreement for Corrective Action would not undermine this general policy of promoting settlement. There 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. As must in the face of undisputed evidence, Dr. Buckmaster does not contest that his documentation was lacking or that he had never performed the surgery previously and without a proctoring surgeon present.

For similar reasons, the other policy arguments of Petitioners and the various amicus organizations are overstated. The admission of this Agreement for Corrective Action will not grind the complaint review process of numerous state agencies to a halt, open floodgates for litigation, scare doctors away from serving on peer review boards, etc. *Amicus Br. 5-8; Pet'r Br. 24-25.* The district court's ruling in this case is made on the particular circumstances of this case. *A.29.* The court's ruling certainly does not hold that all like agreements for corrective action are admissible against any licensee in subsequent litigation. The decision is not precedential authority. If facts in a future case show that there was a genuine dispute in reaching the final agreement then Rule 408 would apply to bar admission of that agreement. There would be no radical change with this ruling.

There is nothing unfair about these well-established principles. If the district court, or if this Court, held that Rule 408 applied to exclude the evidence, the ruling

likewise would not be a blanket ruling on the issue so that all future argument on the matter is foreclosed. The ruling, as it must, would turn on the particular facts of the case.

For these reasons, the district court's ruling on the Rule 408 issue is not a ground for a writ of prohibition.

2. It Was Within the District Court's Authority To Hold That the Agreement for Corrective Action Is Admissible Notwithstanding Minnesota Rule of Evidence 403

Petitioners are also mistaken that Rule 403 serves as a basis for issuing a writ of prohibition. Minnesota Rule of Evidence 403 precludes the admission of evidence whose probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, waste of time, and other concerns. Minn. R. Evid. 403 (2007). In this case, there are no overriding concerns to require exclusion under Rule 403.

The agreement is certainly relevant and highly probative to the issues at hand. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. The Agreement for Corrective Action, as the Complaint in this case, is based on the care provided to Ms. O'Rourke. The concerns expressed in the Agreement for Corrective Action are made by an unbiased Board of Dr. Buckmaster's own peers, respected 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.

Indeed, Dr. Buckmaster to some degree has made this case turn on his credibility. Despite never documenting a critical finding in any medical record, as accepted standards of medical practice require, Dr. Buckmaster maintains that he made this finding of arthritis thereby justifying the surgery. During its investigation, the Board considered the inferences to be drawn from the lack of documentation and whatever position that Dr. Buckmaster took on the issue, if any, and concluded that public censure and corrective measures were necessary. This result is certainly very probative to jurors when they are considering whether to believe Dr. Buckmaster's story that he saw critical findings and "simply forgot" to document them is his lengthy medical records.

This value is not "substantially outweighed" by unfair prejudice or other concerns. "Prejudice does not mean damage to the opponent's case that results from the legitimate probative force of the evidence; rather, it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Ferguson*, 581 N.W.2d 824, 834 (Minn. 1998)

There would be no unfair prejudice in this case because the opinions in the Agreement for Corrective Action either would be independently presented to the jury by other witnesses, not disputed by Dr. Buckmaster, or both. All expert witnesses would testify that Dr. Buckmaster's documentation failed to justify the care provided. Even Dr. Buckmaster concedes that he erred in this regard. Dr. Fishco, the plaintiff's expert, further would testify that he too questions Dr. Buckmaster's decision to perform a surgery that he never performed before and that he performed without the assistance of an

experienced physician. *A.238-39.* Dr. Buckmaster admits that he never performed the fusion procedure before operating on Ms. O'Rourke. *A.231.*

The Board's concerns, as Petitioners argue, are not opinions on negligence. *Pet'r Br. 31, 38.* It is not as if the Board opined that Dr. Buckmaster violated a standard of care. There accordingly is no real risk that the jury would substitute the Board's findings for its own.

The Agreement for Corrective Action, by its own terms, is also not an admission by Dr. Buckmaster. The language is quite clear that the Board had its concerns, and Dr. Buckmaster had his response to the complaint. A jury would not read the agreement, believe that Dr. Buckmaster admitted the fault simply because he signed the agreement, and then unfairly infer wrongdoing.

Further, there would be no confusion of the issues if the evidence was admitted. The Board's opinion is one piece of evidence, and one of several opinions on the care provided. Juries in malpractice cases always weigh varying opinions on the quality of care to arrive at their judgment and would do the same here. Jury instructions further ensure that they would direct their inquiry appropriately.

To the extent that the Board's opinions carry an unfair inference of negligence, Petitioners have all the means to combat it. Notably, Dr. Buckmaster would be the only person to speak to how the agreement came to be and he would point to the agreement and explain that it was not a finding of negligence, it was not discipline, that he and the Board "agreed to disagree" on some minor points of his care, etc. No Board member would testify to expand on or justify the opinion, or even defend it.

Petitioners also would submit evidence that would directly undercut any unfair inferences that could be taken from the agreement. The Board's concern draws on the lack of documentation and Dr. Buckmaster would contend, as he has done in deposition, that he merely forgot to document the findings that would justify the surgery. *A.230.* Assuming that a jury finds Dr. Buckmaster credible, the jury would dismiss the Board's concerns upon hearing this testimony. Dr. Buckmaster also would contend that the Board never considered the diagnosis of Mueller-Weiss syndrome, and the defense would argue that if the Board had this theory in mind, the Board would have dismissed the complaint.

Admission of the evidence would not divert the trial. There would be no "trial within a trial." As Petitioners acknowledge, the Agreement for Corrective Action speaks for itself — the Board investigated Dr. Buckmaster's care of Ms. O'Rourke, the Board concluded that his documentation was insufficient and questioned his inexperience, and Dr. Buckmaster felt he did an adequate study of the patient and procedure. There is no need for Petitioners to go into any great detail to deflect the impact of the evidence. Their claims to far-ranging evidence are overstated.

Petitioners cite several cases in support of their claim that the evidence is inadmissible under Rule 403 but none is on point. In *Shea v. Esensten*, 622 N.W.2d 130 (Minn. App. 2001), for example, this Court held that the district court did not abuse its discretion when it excluded evidence of a prior disciplinary action that was too remote, in time and nature, from the alleged acts of malpractice to fall within Minnesota Rule of Evidence 404. *Id.* at 137. Because the disciplinary action concerned criminal conduct, occurred almost a decade before the lawsuit, and did not concern any of the allegations in

the lawsuit, this Court also noted that evidence would have been prejudicial to the defense. *Id.* at 137. The present situation is fundamentally different. Aside from Rule 404 not being at issue here, the Board's investigation occurred shortly before the lawsuit and concerned the very same conduct of the lawsuit.

The other decisions cited by Petitioners likewise are not on point. In *Carlson v. Riemenschneider*, 2007 WL 446643 (Minn. App. 2007), the plaintiff attempted to admit evidence that the state licensing board for dentists cited the defendant for failing to maintain sanitary conditions. *Id.* at *3. This Court upheld the exclusion of the evidence because although the evidence was relevant "the jury might infer that [the dentist] was negligence in this case because on facts determined by the board in other matters." *Id.* In *Byrd v. Medical Center of Central Georgia*, 574 S.E.2d 326 (Ga. App. 2002) and *Waller v. Hayden*, 885 P.2d 1305 (Mont. 1994), the courts likewise upheld the exclusion of evidence about a licensing board's findings of improper care in an unrelated action that occurred many years in the past. 574 S.E.2d at 331; 885 P.2d at 1310. As discussed, the Board in this case made no findings of negligence, and the concerns that it did express related to the issues of the present case.

There is no basis for reversing the trial court's decision to admit the Agreement for Corrective Action notwithstanding Rule 403. The decision was made within its well-established discretion and is certainly not a basis for a writ of prohibition.

3. It Was Within the District Court's Authority To Defer Ruling on the Admissibility of the Agreement for Corrective for Impeachment Purposes

Petitioners also claim that the district court erred in ruling that the Agreement for Corrective Action would be proper impeachment evidence. *Pet'r Br. 35-38.* The district court, however, never made this ruling. In its March 12, 2007 order, the district court ruled that it would reserve the right for either party to use the agreement for impeachment purposes "provided they obtain prior written or verbal consent from the court." *A.80.*

Petitioners did not properly present their argument to the trial court. They did not raise the matter in their letter requesting a motion for reconsideration, in their briefing on the motion for reconsideration, in oral argument, or in the original writ of prohibition. *See Lake Superior Ctr. Auth. v. Hammel, Green, & Abrahamson, Inc.*, 715 N.W.2d 458, 481 (Minn. App. 2006) ("when a party fails to object to evidence at trial, that party has generally waived any objection"); *City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996) ("a party must file a notice of review to challenge the district court's ruling on a particular issue.").

Nonetheless, assuming that Rule 408 applies to the Agreement for Corrective Action, the rule does not prohibit the use of the evidence for impeachment purposes. Rule 408, in fact, expressly states that it "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness . . . ." Minn. R. Evid. 408. Minnesota courts accordingly recognize that a party may introduce evidence of compromise negotiations to impeach a witness. *See Peterson v. Little-Giant Glencoe Portable Elevator Div. of Dynamics Corp. of America*, 366 N.W.2d 111, 115

(Minn. 1985) (explaining that counsel could have used the evidence of compromise to impeach any witness at trial) (citing *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978); *Gibbon Farmers Elevator Co. v. Herschmann*, 160 Minn. 326, 328, 200 N.W. 293, 294 (1924) (upholding the admission of evidence of lawsuit and settlement of that lawsuit to impeach a witness). Other federal and state courts routinely allow parties to use evidence of compromise for impeachment purposes. *See Hernandez v. State*, 52 P.3d 765, 767-69 (Ariz. 2002) (surveying and commenting that most federal courts, and state courts as well, allow the use of compromise evidence to impeach a witness) (citing numerous cases).

It is impossible to say on the present record, before the presentation of any testimony, whether or not the admission of the Agreement for Corrective would be proper impeachment evidence. The use of impeachment evidence hinges on the balancing of the evidence's prejudicial impact against its impeachment value, which will only become apparent with testimony. *Cf.* Minn. R. Evid. 401, 403 (2007). The trial court's ruling on this issue is thus entirely prudent and proper. The court deferred its ruling on the issue of impeachment and asked that the parties obtain its permission before seeking to impeach a witness with the agreement. *A.80.* This course is wholly appropriate and certainly not a basis for a writ of prohibition.

Petitioners apparently seek to prevent Respondent from using the agreement to impeach Dr. Buckmaster when he claims that his care was appropriate. *Pet'r Br. 35.* Whether or not Petitioners can exclude the evidence, as noted, depends on the testimony at issue. Petitioners' broad claim that the "law is quite clear" that this evidence is not

admissible to impeach under any circumstances is baseless and in contravention to the plain language of Rule 408. *Pet'r Br. 35.* Courts frequently admit evidence of compromise negotiations to impeach witnesses and employ cautionary instructions, and other means, to guide the jury's consideration appropriately. *See Hernandez v. State*, 52 P.3d 765, 767-69 (Ariz. 2002) (citing numerous cases for the proposition that courts routinely allow the use of compromise evidence to impeach a witness); *see, e.g., Perry v. Magic Valley Regional Medical Center*, 995 P.2d 816, 827 (Idaho 2000) (holding that trial court properly admitted evidence of a settlement over hospital's objection where the trial court restricted comment on the settlement in argument, limited its use to eliciting bias, and included a cautionary instruction).

C. Admission of the Agreement for Corrective Action Will Not Decide the Case against Petitioners

An extraordinary writ also should not issue because the trial court's decision to admit the Agreement for Corrective Action is not "decisive of the case." For the same reasons why the admission of the Agreement for Corrective Action would not result in unfair prejudice, the admission of this evidence would not decide the case. Other witnesses would independently introduce the same concerns raised by the Board, and Dr. Buckmaster would not contest the substance of those concerns. This is not a situation where the admission of the evidence will prevent, or even impede, Petitioners from raising a defense.

Furthermore, there can be no "irreparable harm" here because Petitioners have an established and adequate remedy to their perceived ill. They, like all litigants who

continue to dispute the admissibility of evidence, are able to raise their grievance in an ordinary appeal after all the evidence, argument, and testimony has been presented at trial. At that time, the issue will be properly in the context of the trial, and This court will have a full record before it.

Petitioners decry the prospect of expending unnecessary resources on the trial, but the Minnesota Supreme Court has made clear that the time and expense involved in undergoing a trial then an appeal "is not sufficient to justify circumventing the normal procedure." *State ex. rel. Ryan v. Cahill*, 253 Minn. 131, 134-35, 91 N.W.2d 144, 147 (Minn. 1958) (citation omitted). Certainly, no extreme circumstances justify abandoning the ordinary route of appeal for a piecemeal review of this case. *See Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 208 (Minn. 1986) (explaining that ordinary appeal was inadequate where the press sought access to court files because "time is of the essence" in such a case and because the issues typically are decided at the appellate level); *State ex rel. Sheehan v. District Court of Minnesota In and For Hennepin County*, 253 Minn. 462, 467-68, 93 N.W.2d 1, 5-6 (1958) (explaining that ordinary appeal was inadequate where the court threatened to proceed in a matter over which it has no jurisdiction). Defendants have no claim to emergency relief.

CONCLUSION

This court should not issue a writ of prohibition to reverse the trial court's ruling on the admissibility of the Agreement for Corrective Action. No circumstances exist to justify this extraordinary relief. The trial court did not exceed its authority in issuing the ruling and admission of the evidence will not decide the case.

DATED this 26th day of November, 2007

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: Peter A Schmit

Peter A. Schmit (#204365)
Craig O. Sieverding (#387402)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
612-349-8500

ATTORNEYS FOR PLAINTIFF/RESPONDENT

CASE NO. A-07-1682
STATE OF MINNESOTA
IN COURT OF APPEALS

In Re Roy Wayne Buckmaster, D.P.M., and Albert Lea Medical Center – Mayo Health System,

Petitioners,

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

Plaintiff/Respondent

vs.

Dr. Roy Wayne Buckmaster, D.P.M., and Albert Lea Medical Center – Mayo Health System,

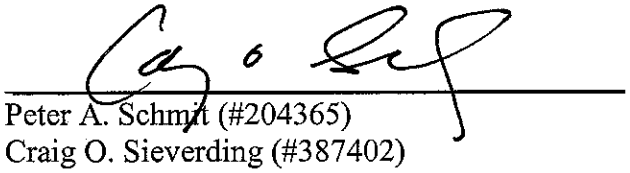
Defendants/Petitioners.

CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. 132.01, subds. 1 and 3 for a brief prepared with proportional font. This brief contains 11,819 words, inclusive of all text, and complies with the typeface requires of Rule 132.01. This brief was prepared using Microsoft Word 2003.

Dated this 16 day of November, 2007

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.



Peter A. Schmit (#204365)
Craig O. Sieverding (#387402)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402-2015
612-349-8500

Attorneys for Respondent