

NO. A06-1365

State of Minnesota
In Court of Appeals

Fatih M. Uckun, M.D.,

Appellant,

vs.

Minnesota State Board of Medical Practice,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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LEGAL ISSUES

1. **Whether the Minnesota Board of Medical Practice is required by due process guaranteed by the United States and Minnesota Constitutions to use clear and convincing evidence -- rather than probable cause or preponderance of the evidence -- as the standard of proof in disciplinary proceedings to suspend a physician's medical license.**

The trial court held in the negative.

Apposite authorities:

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976)

Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979)

In re Wang, 441 N.W.2d 488 (Minn. 1989)

Nguyen v. Washington Dept. of Health Medical Quality Assurance Commission,
144 Wash.2d 516, 29 P.3d 689 (2001)

United States Constitution, Fourteenth Amendment, § 1

Minnesota Constitution, Article 1, § 7

2. **Whether publication of an interim order suspending a medical license in disciplinary proceedings by the Minnesota Board of Medical Practice -- before a physician has been afforded his due process rights and before a final decision by the Board -- violates the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01 et seq., and the Medical Practice Act, Minn. Stat. §§ 147.01 et seq.**

The trial court held in the negative.

Apposite authorities:

Doe v. State Board of Medical Examiners, 435 N.W.2d 45 (Minn. 1989)

Westrom v. Minnesota Department of Labor, 686 N.W.2d 27 (Minn. 2004)

Navarre v. South Washington County Schools, 652 N.W.2d 9 (Minn. 2002)

Minn. Stat. § 13.39, subd. 2(a)

Minn. Stat. § 13.41, subd. 2

Minn. Stat. § 13.41, subd. 4

Minn. Stat. § 147.01, subd. 4

STATEMENT OF THE CASE

This is an appeal from a final judgment entered in Ramsey County District Court on July 17, 2006, pursuant to an Order and Memorandum dated June 30, 2006, by the Honorable Stephen D. Wheeler. The Order and Memorandum (1) granted a motion by Respondent-Defendant Minnesota Board of Medical Practice to dismiss the Complaint of Appellant-Plaintiff Dr. Fatih Uckun pursuant to Minn. R. Civ. P. 12.02 for failure to state a claim upon which relief may be granted and (2) denied a motion by Appellant-Plaintiff for partial summary judgment pursuant to Minn. R. Civ. P. 56 on four of the Complaint's five counts.

STATEMENT OF THE FACTS

Respondent-Defendant Minnesota Board of Medical Practice ("Board") summarily suspended the medical license of Appellant-Plaintiff Dr. Fatih Uckun ("Dr. Uckun") by Non-Public and Public Suspension Orders dated January 27, 2006, pursuant to Minn. Stat. § 147.091, subd. 4.¹ Appendix ("A.") 11-33. Minn. Stat. § 147.091, subd. 4, allows the Board to suspend a medical license without notice and hearing when there is a serious risk of harm to the public, but the statute requires the Board promptly to commence a contested case proceeding pursuant to the Administrative Procedure Act

¹ The Non-Public Suspension Order was filed under seal with the district court pursuant to a protective order and remains under seal except for a redacted copy in the Appendix at A. 13-31.

whereby a physician is afforded due process rights before a final decision is made by the Board. Dr. Uckun was given notice of a brief hearing on January 21, 2006, regarding the Board's charges, and allowed twenty minutes of oral argument and the opportunity to submit written materials before the Board issued its Suspension Orders. Dr. Uckun, however, was not allowed to call or cross-examine witnesses or to supplement the record at the perfunctory hearing on January 21, 2006. A. 11.

Earlier, on November 12, 2005, the Board was advised by its attorneys that preponderance of the evidence was the required standard of proof for a license suspension pursuant to Minn. Stat. § 147.091, subd. 4. A. 34, 44. In its Non-Public Suspension Order, however, the Board adopted probable cause as the standard of proof in suspending Dr. Uckun's license. A. 30. The Board also said the evidence satisfied the preponderance of evidence and evidence "with heft" standards. A. 30-31.

On January 27, 2006, the Board published the interim Public Suspension Order on its website. The interim Public Suspension Order branded Dr. Uckun as unethical, unprofessional, fraudulent, acting with willful or careless disregard of the health and safety of his patients and a serious risk of harm to the public. A. 32-33. As a result of the Board's publication, Dr. Uckun's license suspension became front page news in the Minneapolis Star Tribune on January 28 and 29, 2006. A. 76, 81-90.

On February 3, 2006, the Board commenced a contested case proceeding as required by Minn. Stat. § 147.091, subd. 4. The contested case proceeding is currently pending before Administrative Law Judge George Beck; and hearings are scheduled in September and October 2006. Thus, Dr. Uckun has already been deprived of his license

for almost nine months, with no expectation of a final decision by the Board until late 2006 or early 2007, after a decision is rendered by the Administrative Law Judge.

Also on February 3, 2006, Dr. Uckun sued the Board in Ramsey County District Court alleging that (1) due process guaranteed by the United States and Minnesota Constitutions required the Board to use clear and convincing evidence as the standard of proof for suspending a medical license, and (2) the Board's publication of its interim Public Suspension Order prior to affording Dr. Uckun his full due process rights and before a final decision by the Board violated the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01 et seq., and the Medical Practice Act, Minn. Stat. §§ 147.01 et seq. Dr. Uckun's five count Complaint sought declaratory and injunctive relief and damages for the Board's publication of the interim Public Suspension Order. A. 1-10.

Without answering the Complaint, the Board moved to dismiss the lawsuit pursuant to Minn. R. Civ. P. 12.02 for failure to state a claim upon which relief may be granted. Dr. Uckun moved for partial summary judgment pursuant to Minn. R. Civ. P. 56 on Counts I, II, III, and IV of the Complaint seeking declaratory and injunctive relief. By Memorandum and Order dated June 30, 2006, the district court granted the Board's motion and denied Dr. Uckun's motion. A. 93-98.

The district court ruled that preponderance of the evidence was the standard of proof required by Minnesota law in disciplinary proceedings by the Board. In so ruling, the district court did not address Dr. Uckun's argument that the United States Supreme Court's due process analysis in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) and Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804 (1979) mandated the use of clear

and convincing evidence as the standard of proof. Nor did the district court rule on the Board's use of probable cause as the standard of proof for suspending Dr. Uckun's license.

Judgment dismissing the Complaint was entered on July 17, 2006. A. 98. Dr. Uckun filed his notice of appeal to the Court of Appeals on July 24, 2006. A. 99-100. On August 10, 2006, the Board filed a Notice of Review regarding the issues of exhaustion of administrative remedies and jurisdiction. Dr. Uckun filed a Petition for Accelerated Review with the Minnesota Supreme Court on July 24, 2006. The Supreme Court has not ruled on the Petition as of the date of this brief.

ARGUMENT

I. The Issues Raised in This Appeal Are Reviewed De Novo With No Deference Given to the District Court.

This case is on appeal from a judgment dismissing a complaint pursuant to Minn. R. Civ. P. 12.02. Therefore, the facts alleged in the Complaint are deemed true; and the issues raised are pure questions of law. E.g., Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003) (on a Rule 12.02 motion, the court is required to accept all alleged facts as true). For this reason and because the issues raised involve matters of constitutional law and statutory interpretation, this Court's review of the district court's decision is de novo. See, e.g., Fedziuk v. Commissioner of Public Safety, 696 N.W.2d 340, 344 (Minn. 2005) ("We review issues of constitutional interpretation de novo."); Westrom v. Minnesota Department of Labor, 686 N.W.2d 27, 32 (Minn. 2004) ("Statutory construction is . . . reviewed de novo."); Doe v. State Board of Medical

Examiners, 435 N.W.2d 45, 48 (Minn. 1989) (“The construction of a statute is a question of law and is subject to de novo review on appeal. * * * We need not give any weight to the [lower court’s] construction of the applicable statutes.”).

II. The Board Violated Due Process, In re Wang, 441 N.W.2d 488 (Minn. 1989), and Minn. Rule 1400.7300, subp. 5, in Adopting Probable Cause and/or Preponderance of the Evidence as Standards of Proof in Proceedings to Suspend a Medical License.

A. The Board Is Required by Due Process to Use Clear and Convincing Evidence as the Standard of Proof.

Due process guaranteed by the Minnesota Constitution, Article 1, § 7, and the United States Constitution, Fourteenth Amendment, § 1, is identical and provide that no person shall be deprived of life, liberty, or property without due process of law. E.g., Fedziuk, 696 N.W.2d at 344 n.4; McCollum v. State, 640 N.W.2d 610, 618 (Minn. 2002). “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901 (1976). This constitutional guarantee requires application of a clear and convincing standard of proof before the Board may suspend a physician’s license.

Due process “includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’” Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060 (2000). The standard of proof is a matter of due process and serves “to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate

decision.” Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808 (1979). As

Addington explained:

[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”

441 U.S. at 423, 99 S.Ct. at 1808.

Addington describes the three standards of proof developed by American jurisprudence to allocate risk consistent with due process. At one end of the spectrum is the preponderance of the evidence standard.

[Preponderance of the evidence is used in] the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff’s burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion.

441 U.S. at 423, 99 S.Ct. at 1808. At the other end of the spectrum lies criminal cases where due process requires the government prove guilt beyond a reasonable doubt. 441 U.S. at 423-424, 99 S.Ct. at 1808.

In between, an intermediate standard calls for proof by clear and convincing evidence.

One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff’s burden of proof. Similarly, this Court has used the “clear, unequivocal and convincing” standard of proof to protect particularly important individual interests in various civil cases.

441 U.S. at 424, 99 S.Ct. at 1808. The United States Supreme Court “has mandated [this] intermediate standard of proof -- ‘clear and convincing evidence’ -- when the individual interests at stake in a state proceeding are both ‘particularly important’ and ‘more substantial than mere loss of money.’” Santosky v. Kramer, 455 U.S. 745, 767, 102 S.Ct. 1388, 1402 (1982).

In Mathews, the United States Supreme Court adopted a three factor test used to determine the standard of proof required to satisfy due process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335, 96 S.Ct. at 903. See Carrillo v. Fabian, 701 N.W.2d 763, 776 (Minn. 2005) (applying Mathews in determining that due process required more than a “some evidence” standard in prison disciplinary proceedings); Fedziuk, 696 N.W.2d at 344-345 (applying Mathews in determining that the 2003 amendments to Minnesota’s Implied Consent Law violated due process).

Dr. Uckun’s property and liberty interests are both directly and severely impacted by the Board’s action. Application of the Mathews factors to these interests mandates that the Board prove its charges by clear and convincing evidence because both interests are particularly important and more substantial than mere loss of money.

The first Mathews factor weighs heavily in Dr. Uckun’s favor because of the serious and substantial deprivation wrought by the Board. Dr. Uckun has an important,

protected property interest in his license. “A license to practice medicine is a property right deserving constitutional protection, including due process.” Humenansky v. Minnesota Board of Medical Examiners, 525 N.W.2d 559, 566 (Minn. App. 1994). See, e.g., Nguyen v. Washington Dept. of Health Medical Quality Assurance Commission, 144 Wash.2d 516, 29 P.3d 689, 692 (2001) (“A medical license is a constitutionally protected property interest which must be afforded due process.”); Gray v. Superior Court, 125 Cal. App.4th 629, 23 Cal. Rptr.3d 50, 54 (2005)(“‘Unquestionably, a physician has a vested property right in his or her medical license.’”).

But much more than a property interest is at stake. “The individual’s interest in a professional license is profound.” Nguyen, 29 P.3d at 695. Loss of a license to practice medicine also results in the loss of the physician’s ability to practice his or her profession and to earn a living and severe, irreparable harm to the physician’s reputation in the medical and lay communities. See, e.g., Johnson v. Board of Governors of Registered Dentists, 913 P.2d 1339, 1345 (Okla. 1996) (“The loss of a professional license is more than a monetary loss; it is a loss of a person’s livelihood and loss of a reputation.”); In re Setliff, 2002 S.D. 58, 645 N.W.2d 601, 608 (“‘[T]he revocation of a license of a professional . . . carries with it dire consequences. It not only involves necessarily disgrace and humiliation, but it may mean the end of a professional career.’”); Mississippi Board of Psychological Examiners v. Hosford, 508 So.2d 1049, 1054 (Miss. 1987) (“Proceedings seeking suspension or termination of the license of a professional are serious matters. * * * Quite literally one’s ability to earn a living is at stake.”).

The United States Supreme Court has cautioned that a person's interest in continued employment is without doubt an important interest that ought not be interrupted without substantial justification. Federal Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 243, 108 S.Ct. 1780, 1789 (1988) ("We have repeatedly recognized the severity of depriving someone of his or her livelihood."). The Minnesota Supreme Court has echoed this concern.

"[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood."

Falgren v. State Board of Teaching, 545 N.W.2d 901, 909 (Minn. 1996) (quoting Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543, 105 S.Ct. 1487, 1494 (1985)). Thus, the Minnesota Supreme Court has categorized the disbarment of an attorney -- a discipline equivalent to suspending a physician's license -- as an "extreme sanction[]." In re Gillard, 271 N.W.2d 785, 805 (Minn. 1978). Accordingly, the Minnesota Supreme Court applies the clear and convincing standard of proof in disciplining attorneys. Id. at 805 n. 3 ("The standard of proof in disciplinary proceedings requires 'full, clear and convincing evidence.'").

Furthermore, there is an undeniable and profound stigma attached to a physician charged with endangering patients' lives and well being. See Addington, 441 U.S. at 425-426, 99 S.Ct. at 1809 ("a finding of probable dangerousness to self or others can engender adverse social consequences . . . [which] can have a very significant impact on the individual"). In this case, the Public Suspension Order states that Dr. Uckun has engaged in conduct "that is professionally incompetent in that it may create unnecessary

danger to any patient's life, health or safety" and that Dr. Uckun's "continued practice would create a serious risk of harm to others." A. 32-33.

This stigma to Dr. Uckun's reputation coupled with the deprivation of his license to practice medicine violates Dr. Uckun's liberty interest thereby invoking due process protection independent of his property interest in the license. See, e.g., Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155 (1976) (requiring due process protections when there is "stigma plus" -- a loss of reputation coupled with the loss of a property interest); DiBlasio v. Novello, 344 F.3d 292, 302 (2nd Cir. 2003) ("Stigma plus' refers to a claim brought for injury to one's reputation (the stigma) coupled with the deprivation of some 'tangible interest' or property right (the plus), without adequate process.").

[W]hen a state actor casts doubt on an individual's "good name, reputation, honor or integrity" in such a manner that it becomes "virtually impossible for the [individual] to find new employment in his chosen field," the government has infringed upon that individual's liberty interest to pursue the occupation of his choice.

Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 617 (7th Cir. 2002). See Fosselman v. Commissioner of Human Services, 612 N.W.2d 456, 461 (Minn. App. 2000) ("if a person's good name, reputation, honor, or integrity is at stake because of governmental action, the person is entitled to procedural due process").

Significantly, and independent of constitutional concerns, the Minnesota Supreme Court has made it clear that professional disciplinary proceedings are "no ordinary proceedings" with much more at stake than a property right in a license to practice a profession.

[P]roceedings brought on behalf of the state, attacking a person's professional and personal reputation and character and seeking to impose disciplinary sanctions are no ordinary proceedings. We trust that in all professional disciplinary matters, the finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft.

Wang, 441 N.W.2d at 492 (holding that Minn. Rule 1400.7300, subp. 5, required application of the preponderance of the evidence standard for dental disciplinary proceedings, without addressing the issue of due process).

Indeed, license revocation proceedings are very much quasi-criminal in nature. See generally In re Ruffalo, 390 U.S. 544, 550-551, 88 S.Ct. 1222, 1226 (1968) (proceedings for revocation of an attorney's license are "adversary proceedings of a quasi-criminal nature"); Friedman v. Commissioner of Public Safety, 473 N.W.2d 828, 832 (Minn. 1991) (referring to the "quasi-criminal consequences" to a citizen of "the revocation of a driver's license [which] has in most instances the same impact as the traditional criminal sanctions of a fine and imprisonment"); Nguyen, 29 P.3d at 695 ("If disbarment is quasi-criminal, so must be medical de-licensure. There is no distinction in principle."); Silva v. Superior Court of Sacramento County, 14 Cal. App.4th 562, 569, (1993) ("the purpose of attorney discipline proceedings and doctor license suspension proceedings is identical").

The second Mathews factor -- the risk of an erroneous result -- also weighs heavily in favor of a higher standard of proof. The risk of a wrong decision in a professional license revocation proceeding is substantial. See, e.g., Johnson, 913 P.2d at 1346 ("There is a high risk [of error] when an agency seeks to revoke a professional license."); Painter v. Abels, 998 P.2d 931, 941 (Wyo. 2000) ("The risk of error is high in a proceeding

seeking to revoke a medical license”). “[T]he risk increases when the agency acts as an investigator, prosecutor, and decision maker,” id., as is the case here.

The right to judicial review of an adverse Board decision provides little solace when the Board errs, for as the court in Nguyen observed, judicial review of a decision by a medical licensing board “is high on deference but low on correction of errors.” 29 P.3d at 695. See In re Friedenson, 574 N.W.2d 463, 465 (Minn. App. 1998) (asserting that “an agency’s decision is presumed correct” and that “[c]ourts should defer to an agency’s expertise” in reviewing the Board’s decision to revoke a license). The judicial deference afforded Board determinations only heightens the risk that an erroneous Board decision will go unchecked.

Furthermore and in any event, appellate review of a Board’s decision cannot cure the Board’s use of a constitutionally inadequate standard of proof. See Santosky, 455 U.S. at 757 n.9, 102 S.Ct. at 1397 n.9 (“the Court [has not] treated appellate review as a curative for an inadequate burden of proof”).

The risk of an erroneous license revocation is aggravated given that the standard of conduct in medical disciplinary proceedings is often highly subjective in nature. See Nguyen, 29 P.2d at 696 (“[i]t is difficult to imagine a more subjective and relative standard than that applied in a medical discipline proceeding where the minimum standard of care is often determined by opinion”). For example, the Board is authorized by statute to revoke a license for “unprofessional conduct” which is defined to mean “any departure from or failure to conform to the minimal standards of acceptable and prevailing medical practice” and for “unethical conduct” which is defined to include

medical practice which is “professionally incompetent.” Minn. Stat. § 147.091, subd.1(g), (k).

The Board has argued that the expertise of its members and multiple levels of review make the risk of error in medical disciplinary proceedings lower than in most civil cases. But other procedural safeguards cannot substitute for a constitutionally infirmed standard of proof. See Santosky, 455 U.S. at 757 n.9, 102 S.Ct. at 1397 n.9 (“we would rewrite our precedents were we to excuse a constitutionally defective standard of proof based on an amorphous assessment of the ‘cumulative effect’ of state procedures”); Nguyen, 29 P.3d at 695 (“The problem with this approach, however, is that none of these procedural safeguards can substitute for, nor is even relevant to, failure to impose the requisite burden of proof which is specifically designed ‘to impress the factfinder with the importance of the decision’ and thereby reduce the chance of error.”).

In Addington, the United States Supreme Court adopted the clear and convincing standard rather than beyond a reasonable doubt for civil commitment proceedings, citing the “subtleties and nuances” associated with psychiatric diagnosis and the fact such diagnosis are “to a large extent based on medical ‘impressions’ drawn from subjective analysis and filtered through the experience of the diagnostician.” 441 U.S. at 430, 99 S.Ct. at 1811. Those same medical subtleties and subjective considerations also increase the risk of an erroneous decision if the standard of proof is set below the clear and convincing evidence standard.

The third Mathews factor is “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute

procedural requirement would entail.” 424 U.S. at 335, 96 S.Ct. at 903. Regarding fiscal and administrative matters, requiring a clear and convincing standard of proof rather than a preponderance of the evidence standard entails no significant additional burdens on the Board. See Santosky, 455 U.S. at 767, 102 S.Ct. at 1402 (requiring clear and convincing evidence to terminate parental rights creates no “real administrative burdens” for the state); Nguyen, 29 P.3d at 696 (“An increased burden of proof [in a medical license revocation proceeding] would not have the slightest fiscal impact upon the state, as it would not appreciably change the nature of the hearing per se.”).

Minnesota already requires clear and convincing evidence in attorney disciplinary proceedings and in a wide variety of other proceedings of far less importance than suspending a physician’s license to practice medicine.² It would not unduly burden the

² Minnesota has adopted clear and convincing evidence as the standard of proof in a wide variety of cases. See, e.g., Jensen v. Walsh, 623 N.W.2d 247, 250 (Minn. 2001) (punitive damages available “only upon clear and convincing evidence”); In re Estate of Eriksen, 337 N.W.2d 671, 674 (Minn. 1983) (imposition of constructive trust requires the court to “be persuaded by clear and convincing evidence”); Republic Nat. Life Ins. Co. v. Marquette Bank, 295 N.W.2d 89, 93 (Minn. 1980) (“the party seeking to prove abandonment of a contract must present clear and convincing evidence of an intention by the other party to abandon its rights”); Oehler v. Falstrom, 273 Minn. 453, 457, 142 N.W.2d 581, 585 (1966) (an intervivos gift “can only be established by clear and convincing evidence”); In re Estate of Reay, 249 Minn. 123, 81 N.W.2d 277, 280 (1957) (“the burden of proving undue influence [is] by proof that is clear and convincing”); Simpson v. Sheridan, 231 Minn. 118, 120, 42 N.W.2d 402, 403 (1950) (“adverse possession may be established only by clear and positive proof”); Buttruff v. Robinson, 181 Minn. 45, 46, 231 N.W. 414, 414 (1930) (evidence to establish a lost deed “must be clear and convincing”); Gordon v. Emerson-Brantingham Implement Co., 168 Minn. 336, 339-340, 210 N.W. 87, 88 (1926) (“once a homestead is acquired, the exemption from the claims of creditors is presumed to continue until it is shown by clear and convincing evidence that the right has been abandoned.”).

Board to require the same degree of certainty for disciplining physicians as is required for disciplining attorneys, proving a lost deed or proving an inter vivos gift.

Regarding the government's other interests, the government has a strong interest in ensuring that constitutional rights are not violated. See generally Carrillo, 701 N.W.2d at 776 ("government . . . has an interest in promoting fair procedures, and the government derives no benefit from disciplining inmates who have committed no offense"). The government also has an interest in insuring that patients are not erroneously deprived of their physician's services. Nguyen, 29 P.3d at 526 (state has an important interest that public access to doctors not be infringed by an erroneous license revocation).

To be sure, the government also has an interest in protecting the public from incompetent and unscrupulous physicians. But given medical subtleties, the often subjective nature of the practice of medicine, and the continued development of new methods of treating patients, the government also has an interest in insuring that competing physicians and physicians who may practice more conservative or traditional medicine do not use the Board to ruin other physicians who are creatively but safely developing new and improved approaches to extending and saving lives.

The Board will argue that the need to protect the public supersedes the rights of physicians to practice medicine. This argument is based on a false premise. Balancing the needs of due process to protect against unconstitutional deprivations of physicians' property and liberty interests and the Board's right to protect the public from questionable medical professionals is not a zero sum process where heightening the disciplinary standard of proof means less protection for the public. A heightened

standard of proof in order to comply with due process does not alter the Board's right to discipline a physician or the conduct for which a physician may be disciplined. Rather, a heightened standard of proof simply ensures that when the Board acts to protect the public, the Board acts correctly in a process which has the confidence of both physicians and the public.

Courts in other states which have addressed the issue of whether medical disciplinary proceedings require the use of the clear and convincing standard appear evenly divided. See Nguyen, 29 P.3d at 691 n.3 (listing nine jurisdictions which have held the preponderance standard is appropriate in professional disciplinary proceedings and nine which require clear and convincing evidence). However, six of the last eight state supreme courts to address the issue have held that the clear and convincing standard is the required standard. Setliff (South Dakota); Nguyen (Washington); Painter (Wyoming); Johnson (Oklahoma); Davis v. Wright, 243 Neb. 931, 503 N.W.2d 814 (1993); Mississippi State Board of Nursing v. Wilson, 624 So.2d 485, 493 (Miss. 1993). Contra Perry v. Medical Practice Board, 169 Vt. 399, 737 A.2d 900 (1999); Anonymous v. State Board of Medical Examiners, 329 S.C. 371, 496 S.E.2d 17 (1998).

For all the above reasons, due process mandates that the Board's determination regarding Dr. Uckun's license be governed by the clear and convincing evidence standard of proof.

B. In re Wang, 441 N.W.2d 488 (Minn. 1989) Is No Bar to Requiring Clear and Convincing Evidence as the Standard of Proof.

The district court held that the Minnesota Supreme Court's decision in Wang required use of the preponderance of the evidence standard. Wang did hold that the standard of proof for disciplinary proceedings involving a dentist was preponderance of the evidence.

The standard of proof required for administrative hearings is "a preponderance of the evidence, unless the substantive law provides a different * * * standard." Minn. Rule 1400.7300, subp. 5 (1987). Since no different standard of proof appears to be required by our statutory or case law in disciplinary proceedings involving persons with dentist licenses, and the parties have not claimed otherwise, the preponderance standard applies in these cases as well.

441 N.W.2d at 492 (emphasis added). But Wang is not controlling here because the parties there did not argue for a different standard of proof, and the court never considered the constitutional strictures of due process. Subsequent lower Minnesota courts which have held that the preponderance standard is appropriate in disciplinary proceedings similarly fail to address the due process dimension using the analysis required by Mathews and Addington.³

Wang based its decision on a rule which specified the preponderance standard in administrative proceedings generally. But, "[t]he 'minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the

³ Subsequent to Wang, the Minnesota Court of Appeals has held in several cases that the preponderance of the evidence standard is appropriate in license revocations proceedings. See, e.g., Friedenson, (medical license); In re Agents' Licenses of Kane, 473 N.W.2d 869 (Minn. App. 1991) (insurance agents' license).

State may have specified its own procedures that may be deemed adequate for determining the preconditions to official action.” Santosky, 455 U.S. at 755, 102 S.Ct. at 1396 (quoting from Vitek v. Jones, 445 U.S. 480, 491, 100 S.Ct. 1254, 1262 (1980)). See, e.g., Painter, 998 P.2d at 939-941 (declaring due process and equal protection required the clear and convincing standard for medical disciplinary proceedings despite a state statute specifying preponderance of the evidence standard). Thus, the administrative rule relied on by Wang cannot circumscribe the protections required by due process.

In fact, the rule cited by Wang can be construed consistent with due process. Minn. Rule 1400.7300, subp. 5, specifies a preponderance of the evidence standard in administrative hearings “unless the substantive law provides a different . . . standard.” As demonstrated above, due process requires a different substantive standard -- proof by clear and convincing evidence. Application of this higher standard of proof in medical disciplinary proceedings thus is not contrary to or inconsistent with Minn. Rule 1400.7300, subp. 5.

If anything, Wang supports the proposition that due process requires a higher standard of proof in professional disciplinary proceedings. As quoted earlier, the court in Wang was clearly troubled by the use of the preponderance standard in professional disciplinary proceedings, emphasizing the serious nature of the proceedings and requiring that the fact finder only act on the basis of “evidence with heft.”

[P]roceedings brought on behalf of the state, attacking a person’s professional and personal reputation and character and seeking to impose disciplinary sanctions, are no ordinary proceedings. We trust that in all professional disciplinary matters, the

finder of fact, bearing in mind the gravity of the decision to be made, will be persuaded only by evidence with heft.

441 N.W.2d at 492. Without resolving a possible equal protection argument based on disparate treatment in the discipline of dentists and attorneys, Wang noted that the standard of proof for attorney discipline was clear and convincing evidence because of society's "heightened interest in the outcome of attorney discipline." 441 N.W.2d at 492 n.5. Society's interest in the outcome of physician discipline is equally high.

Wang is no bar to the adoption of the clear and convincing standard of proof given the posture of that case, the concerns the court there cited, the due process requirements here presented, and the trend from other jurisdictions, which all command the higher standard of proof.

C. The Board Violated In re Wang, 441 N.W.2d 488 (Minn. 1989) and Minn. Rule 1400.7300, subp. 5, in Adopting Probable Cause as the Standard of Proof.

The Board adopted probable cause as the proper standard of proof in suspending Dr. Uckun's license.

[T]he Board therefore finds that a showing of these violations by meeting a probable cause standard is the appropriate standard. * * * Applying the probable cause standard here, the Board finds the CRC [the Board's Complaint Review Committee] met its burden in showing that a temporary suspension must issue.

A. 30. This ruling by the Board is particularly egregious given that there is clear, established law to the contrary. The Board's use of probable cause not only violates due process but also is directly contrary to and in clear violation of Wang and Minn. Rule 1400.7300, subp. 5, which -- absent the demands of due process -- require the Board to use the preponderance of the evidence standard in disciplinary proceedings.

The Board cited as primary authority for its adoption of the low probable cause standard an unpublished Minnesota district court decision and an unpublished decision by the Minnesota Court of Appeals in the same case. A. 30. Neither decision provides support for the Board's position.

The Board's first cited authority is XYZ v. Minnesota Board of Medical Practice, File 96-3808 (Henn. Cty. D. Ct., April 15, 1996). A. 30, 117-127. But the district court in XYZ failed to cite a single statute, rule, or court decision for its opinion; ignored Wang and Minn. Rule 1400.7300, subp. 5; and ignored the controlling three factor test required by Mathews for determining the standard of proof necessary to satisfy due process.

The Board's second cited authority is the Minnesota Court of Appeals' unpublished opinion on appeal from the XYZ district court opinion. A. 30. But the Court of Appeals there expressly declined to address the standard of proof issue, stating that "the standard of proof [is] more appropriately raised during the contested case proceeding before the administrative law judge." A. 129.

As secondary authority for its position on probable cause, the Board cited Court of Appeals' decisions in Friedenson and Humenansky. Neither decision, however, addressed the issue of whether the probable cause standard satisfied due process. In fact, the phrase "probable cause" does not appear in either opinion. And contrary to the Board's assertion, Friedenson held that "the preponderance of the evidence standard applies to professional disciplinary proceedings in Minnesota." 574 N.W.2d at 466.

The Board's adoption of the probable cause standard is all the more egregious given that the decision is contrary to formal advice the Board received from its own legal

counsel just three months earlier. Minutes of a public Board meeting on November 12, 2005, record that:

Margaret Chutich, J.D., and Tom Vasaly, J.D. Assistant Attorney Generals, made a presentation to the Board on the legal aspects of hearings for temporary suspension of a practitioner's credentials. They went into the evidentiary standard, burden of proof, board deliberations, decision-making, and subsequent hearings before the Office of Administrative Hearings.

A. 55, 71. The Board's counsel advised the Board at that meeting in a written presentation that preponderance of the evidence was the required standard of proof for a license suspension pursuant to Minn. Stat. § 147.091, subd. 4. A. 34, 44.

The Board's error in adopting probable cause is further highlighted by legislation on the standard of proof for Board action. The Minnesota legislature is well aware of probable cause as a standard of proof for actions taken by the Board. In exceptional cases where the legislature deems probable cause the appropriate standard for suspending a physician's license, it has expressly so provided. See, e.g., Minn. Stat. § 147.092 (authorizing the Board to use probable cause as the standard of proof in taking action against a physician because of sexual misconduct); Minn. Stat. § 214.104, subd. c (authorizing the Board to temporarily suspend a physician's license based on probable cause where there is risk to a vulnerable person).

The fact Minn. Stat. § 147.091, subd. 4, does not authorize the Board to temporarily suspend a physician's license for probable cause, while two other statutes expressly authorize the Board to use that standard in other circumstances, is strong evidence the legislature never authorized or intended the Board to use probable cause as the standard for a temporary suspension under Minn. Stat. § 147.091, subd. 4. See, e.g.,

Barnhart v. Sigmon Coal, Inc., 534 U.S. 438, 452-453, 122 S.Ct. 941, 951 (2002) (“[W]hen ‘Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.’”); Hosley v. Armstrong Cork Co., 383 N.W.2d 289, 293 (Minn. 1986) (in construing statutes, the legislature’s “distinctions in language are presumed intentional”); Transport Leasing Corp. v. State, 294 Minn. 134, 199 N.W.2d 817, 819 (1972) (“Distinctions of language [in statutes] in the same context must be presumed intentional and must be applied consistent with that intent.”).

D. The Board Cannot Escape Judicial Review of Its Use of the Probable Cause Standard By Arguing Mootness or Exhaustion of Administrative Remedies.

The Board will seek to avoid judicial review of its use of probable cause as a standard of proof for suspending a medical license by arguing the doctrines of mootness and exhaustion of administrative remedies. The Board will argue its adoption of probable cause should not be reviewed by this Court because (1) the temporary suspension process has now moved on to a contested case proceeding where preponderance of the evidence will be the standard, and (2) the Board also considered the preponderance standard when it suspended Dr. Uckun’s license. The Court should reject the Board’s attempt to immunize from judicial review the Board’s patently illegal use of probable cause as a disciplinary standard of proof. If the Court does not address the issue here, the Board will simply continue using probable cause in future disciplinary proceedings.

1. Mootness

As explained in Jasper v. Commissioner of Public Safety, 642 N.W.2d 435, 439 (Minn. 2002), there are at least two relevant exceptions to the mootness doctrine:

The mootness doctrine . . . “is a flexible discretionary doctrine, not a mechanical rule that is invoked automatically.” [Citation omitted.] There is a well-established exception to the mootness doctrine, for example, for issues that are capable of repetition yet evading review. [Citations omitted.] In addition, this court has exercised its discretion to decide issues that are technically moot when the issue is “functionally justiciable” and one of public importance and statewide significance that should be decided immediately. [Citation omitted.] “A case is functionally justiciable if the record contains the raw material (including effective presentation of both sides of the issues raised) traditionally associated with effective decision making.”

In this case, both exceptions to the mootness doctrine are applicable.

First, the issue is clearly capable of repetition yet evading review because of the short time line involved. Minn. Stat. § 147.091, subd. 4, requires that the Board initiate a contested case hearing under the Administrative Procedure Act within thirty days of its temporary suspension order. Thus, if the Board’s mootness argument is accepted, it will always be the case that the Board’s use of the probable cause standard will evade judicial review, because the Board can always claim, after summarily stripping a physician of his or her license using probable cause, that the Board is promptly moving on to the next phase of the disciplinary process where a higher standard of proof will be used.

According to the Board’s Biennial Report for the period July 1, 2002, to June 30, 2004, in fiscal year 2004, there were 17,093 physicians and surgeons regulated by the

Board; and the Board received 941 complaints that year against those professionals.⁴ A. 112, 113. All of those professionals and all pending and future disciplinary proceedings against them (under Minn. Stat. § 147.091, subd. 4, or otherwise) are subject to the Board's use of probable cause as the disciplinary standard of proof. To prevent the Board from repeatedly using an improper standard, the Court should decide the important legal issue raised by this appeal. See, e.g., Fedzuik, 696 N.W.2d at 344 n.3 (issue regarding driver's due process rights in license revocation proceeding is not moot because, due to the short duration of the revocations from 90 to 360 days, the issue is capable of repetition yet evading review); In re Civil Commitment of Raboin, 704 N.W.2d 767, 769 n.1 (Minn. App. 2005) (issue regarding six-month commitment is not moot because, due to the relatively short duration of the commitment, the issue is capable of repetition yet evading review).

Second, the issue of whether probable cause is the proper standard of proof in proceedings to suspend a medical license is functionally justiciable in this case. The Board's adoption of probable cause is undisputed and the only issue to be decided is the legal issue of whether the standard comports with due process, Wang, and Minn. Rule

⁴ The Board is required by Minn. Stat. § 214.07, subd. 1b, to prepare a Biennial Report on its activities. The Board's most recent Biennial Report, for the period July 1, 2002, to June 30, 2004, is publicly available on the Board's web site at www.state.mn.us/portal/mn/jsp/home.do?agency=BMP by going to "about us" and then "general information". A copy of the Biennial Report is at A. 101-116. The Court may consider public records on appeal. See, e.g., State v. Rewitzer, 617 N.W.2d 407, 411 (Minn. 2000); In re Estate of Turner, 391 N.W.2d 767, 771 (Minn. 1986) (court may consider on appeal a public record containing statistical information on Minnesota medical assistance).

1400.7300, subp. 5. That issue is certainly important to the public and of state wide importance since it affects the power of the Board to discipline more than 17,000 physicians in this state.

2. Exhaustion of Administrative Remedies.

The doctrine of exhaustion of administrative remedies does not bar this Court from addressing the Board's use of an improper and unconstitutional standard of proof because it is well settled the doctrine does not apply where, as here, it would be futile to seek administrative relief before petitioning the court. See, e.g., City of Richfield v. Local No. 1215, Intern. Ass'n of Fire Fighters, 276 N.W.2d 42, 51 (Minn. 1979) ("The doctrine of exhaustion of administrative remedies is not applicable where it would be futile to seek such redress; consequently a party so situated may go to the courts for redress."); McShane v. City of Faribault, 292 N.W.2d 253, 256 (Minn. 1980) ("We have consistently held that administrative remedies need not be pursued if it would be futile to do so.").

First, paragraph 18 of the Complaint alleges that the Board "has and will continue to use the probable cause and/or preponderance of the evidence standards of proof . . . in subsequent administrative proceedings regarding the Suspension Order," an allegation which for purposes of this appeal is deemed true. E.g., Bodah, 663 N.W.2d at 553 (on a Rule 12.02 motion, the court is required to accept all alleged facts as true).

Second, the Board has flatly and unequivocally adopted probable cause as the standard of proof for suspending a medical license. The Board having clearly staked out its position in its Non-Public Suspension Order on the use of probable cause, the

exhaustion doctrine has no application. State Board of Medical Examiners v. Olson, 295 Minn. 379, 206 N.W.2d 12, 17 (1973) (doctrine of exhaustion of administrative remedies is not applicable in a declaratory judgment action where the Board of Medical Examiners “have unequivocally committed themselves” on the issue in question).⁵ For both reasons, it is therefore futile to expect the Board to change its stance on the use of probable cause.

The exhaustion doctrine also has no application because the issue here is one of constitutional law. Courts, not agencies, are charged with determining questions of constitutional law. See, e.g., Ace Property and Cas. Ins. v. Federal Crop Ins. Corp., 440 F.3d 992, 1000 (8th Cir. 2006) (“A party may be excused from exhausting administrative remedies if the complaint involves a legitimate constitutional claim.”); Vargas v. United States Dept. of Immigration & Naturalization, 831 F.2d 906, 908 (9th Cir. 1987) (“due process claims generally are exempt from [the exhaustion doctrine] because the [agency] does not have jurisdiction to adjudicate constitutional issues”); Conner v. Township of Chanhassen, 249 Minn. 205, 81 N.W.2d 789, 793-794 (1957) (plaintiff is not required to exhaust administrative remedies before pursuing a declaratory judgment action where the controversy involves a constitutional question requiring judicial interpretation).

In short, the exhaustion doctrine does not require this Court to defer to the Board’s administrative procedures before deciding whether the Board violated Dr. Uckun’s due process rights in suspending his license to practice medicine.

⁵ The Board has also unequivocally rejected the use of the clear and convincing standard in disciplinary proceedings against Dr. Uckun, having rejected that standard when it issued the Suspension Orders and when it moved to dismiss Dr. Uckun’s Complaint.

III. The Board Violated the Minnesota Government Data Practices Act and the Medical Practice Act by Publishing the Public Suspension Order.

A. The Minnesota Government Data Practices Act (“MGDPA”) and the Medical Practice Act (“MPA”) Apply to Private, Confidential Data Obtained and Generated by the Board.

The MGDPA regulates the release of government data by state agencies. Minn. Stat. § 13.01, subd. 3. “Government data” includes “all data collected, created, received, maintained or disseminated by any state agency.” Minn. Stat. § 13.02, subd. 7. The Board is a state agency subject to the MGDPA. See Minn. Stat. § 13.02, subd. 17 (“state agency” includes any state “board”); Doe, 435 N.W.2d at 48 (MGDPA governs data generated and maintained by the Board).

The MPA also governs the release of government data, including data relating to Board disciplinary proceedings. Doe, 435 N.W.2d at 50 (“The MGDPA and the MPA operate to establish a complex set of rules which classify various data generated in disciplinary hearings as ‘public,’ ‘private,’ ‘confidential’ and ‘privileged.’”).

Minn. Stat. § 13.08, subd. 1, renders a state agency liable to any person who suffers damages as a result of government data released in violation of the MGDPA. Minn. Stat. § 13.08, subd. 2, provides that any state agency “which violates or proposes to violate this chapter may be enjoined by the district court” and authorizes the court to “make any order or judgment as may be necessary to prevent the use or employment by any person of any practices which violate this chapter.”

Minn. Stat. § 13.08, subd. 4, provides that any aggrieved person “may bring an action in district court to compel compliance with this chapter and may recover costs and

disbursements, including reasonable attorney's fees." Dr. Uckun, as an aggrieved person who has suffered irreparable injury to his reputation, livelihood and privacy from the Board's unlawful publication of the Public Suspension Order, has standing to maintain this action. Annandale Advocate v. City of Annandale, 435 N.W.2d 24, 27 (Minn. 1989) (plaintiff may maintain action under MGDPA to prohibit the release of confidential data which would injure his reputation and privacy).

Minn. Stat. § 13.03, subd. 1, provides in relevant part that government data is public "unless classified by statute . . . with respect to data on individuals, as private or confidential." Thus data classified as private or confidential as to individuals are not public data. "Private data on individuals" is defined in Minn. Stat. § 13.02, subd. 12, to mean "data which is made by statute or federal law applicable to the data: (a) not public; and (b) accessible to the individual subject of that data." "Confidential data on individuals" is defined in Minn. Stat. § 13.02, subd. 3, to mean "data which is made not public by statute or federal law applicable to the data and is inaccessible to the individual subject of that data."

Minn. Stat. § 13.03, subd. 4(b), states that "[i]f data on individuals is classified as both private and confidential by this chapter, or any other statute or federal law, the data is private." Pursuant to Minn. Stat. § 13.05, subd. 4, private data on individuals may not be released without proper authorization. Keezer v. Spickard, 493 N.W.2d 614, 616 (Minn. App. 1992). In addition, Minn. Rule 1205.0400, subp. 2, provides that access to private data shall be available only to the subject of the data, individuals within the entity whose work assignments reasonably require access to the data, agencies as authorized by

statute, and entities and individuals given access by express direction of the data subject. Similarly, Minn. Rule 1205.0600, subp. 2, provides that access to confidential data is restricted to agencies which are authorized by statute to gain access to the data and individuals within an entity whose work assignments reasonably require access.

B. The Public Suspension Order Is an Interim Disciplinary Action Which Is Private, Confidential Data Barred from Public Disclosure by the Minnesota Government Data Practices Act and the Medical Practice Act.

The Public Suspension Order is an interim disciplinary action by the Board, which may or may not be sustained following a contested case hearing and a final decision by the Board. As such, the interim disciplinary action is classified as private data and confidential data by at least three separate sections of the MGDPA: (1) Minn. Stat. § 13.41, subd. 2; (2) Minn. Stat. § 13.39, subd. 2(a); and (3) Minn. Stat. § 13.41, subd. 4. The Board is thus barred from disclosure of the interim action. In addition, Minn. Stat. § 147.01, subd. 4, classifies any interim disciplinary action involving Dr. Uckun as confidential and privileged, thus also precluding the Board from disclosing the Public Suspension Order.

1. Minn. Stat. § 13.41, subd. 2.

Minn. Stat. § 13.41 deals specifically with data “collected, created or maintained” by a “licensing agency.” The Board is a licensing agency subject to Minn. Stat. § 13.41. Minn. Stat. § 13.41, subd. 1 (defining “licensing agency” to mean “any board . . . which is given the statutory authority to issue professional . . . licenses,” with an exception not

here relevant); Doe, 435 N.W.2d at 48 (Minn. Stat. § 13.41 “governs data generated by licensing agencies, such as the Board of Medical Examiners”).

Minn. Stat. § 13.41, subd. 2, classifies as private data “the record of any disciplinary proceeding,” with one exception:

The following data collected, created or maintained by any licensing agency are classified as private, pursuant to section 13.02, subdivision 12: . . . record of any disciplinary proceeding except as limited by subdivision 5.

The one exception to Minn. Stat. § 13.41, subd. 2, is Minn. Stat. § 13.41, subd. 5, which classifies as public data only those matters relating to (1) a final disciplinary action or (2) a disciplinary action following a public hearing or pursuant to an agreement of the parties. Thus, Minn. Stat. § 13.41, subd. 5, provides:

Licensing agency minutes, application data on licensees except nondesignated addresses, orders for hearing, findings of fact, conclusions of law and specification of the final disciplinary action contained in the record of the disciplinary action are classified as public, pursuant to section 13.02, subdivision 15. The entire record concerning the disciplinary proceeding is public data pursuant to section 13.02, subdivision 15, in those instances where there is a public hearing concerning the disciplinary action. If the licensee and the licensing agency agree to resolve a complaint without a hearing, the agreement and the specific reasons for the agreement are public data. (Emphasis added.)

As an exception to Minn. Stat. § 13.41, subd. 2’s classification of “the record of any disciplinary proceeding” as private data, Minn. Stat. § 13.41, subd. 5, must be construed to exclude all other exceptions. See, e.g., Minn. Stat. § 645.19 (“Exceptions expressed in a law shall be construed to exclude all others.”); Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 84 N.W.2d 593, 599 (1957) (same).

A temporary license suspension is by definition not a final disciplinary action; and there was no public hearing or agreement by Dr. Uckun on the temporary suspension.

Therefore, the temporary license suspension is classified as private data pursuant to Minn. Stat. § 13.41, subd. 2, and should not have been disclosed by the Board.

2. Minn. Stat. § 13.39, subd. 2(a).

Minn. Stat. § 13.39, subd. 2(a), states that “data collected by state agencies . . . as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action . . . are classified as protected nonpublic data pursuant to section 13.02, subdivision 3, in the case of data on individuals.” A “pending civil legal action” as used in Minn. Stat. § 13.39 is defined to include any “judicial, administrative or arbitration proceedings.” Minn. Stat. § 13.39, subd. 1.

“Under the plain meaning of the MGDPA, data collected by political subdivisions ‘as part of an active investigation undertaken for the purpose of the commencement or defense of a pending civil legal action, or which are retained in anticipation of a pending civil legal action’ are generally classified as ‘protected nonpublic’ or ‘confidential.’” Navarre v. South Washington County Schools, 652 N.W.2d 9, 29 (Minn. 2002) (citing Minn. Stat. § 13.39, subd. 2(a)). “Although the MGDPA creates a presumption in favor of public data, civil investigative data are statutorily exempt from that presumption.” Anjoorian v. Minnesota Dept. of Public Safety, 1998 WL 405042 *2 (Minn. App.) (unpublished, a copy of which is at A. 131-133).

In Westrom the Minnesota Supreme Court carefully examined Minn. Stat. § 13.39 and held that not only the data collected by a state agency in connection with an investigation but also orders issued prior to a public hearing by the state agency in connection with that investigation were confidential data protected from disclosure by the

statute. The plaintiffs there were employers under investigation by the Minnesota Department of Labor for not maintaining workers' compensation insurance. During the course of the investigation and prior to a final determination, the Department released to the news media orders by the Department requiring plaintiffs to obtain insurance and to pay a monetary penalty and plaintiffs' objections to the orders.

The plaintiffs sued the Department for violating the MGDPA, claiming the orders and objections were part of the Department's active investigation file and therefore were confidential, protected nonpublic data under Minn. Stat. § 13.39, subd. 2(a). The Supreme Court agreed, holding that the orders and objections were part of the Department's investigative data and as such were protected from disclosure. The Supreme Court rejected the Department's assertion that the orders and objections were not data collected for its investigation, stating:

these orders are inextricably linked to and are the product of the data collected by [the Department] during its investigation. To the extent that the orders reflect [the Department's] conclusions, drawn from examining data gathered in the course of its investigation, we conclude that the orders constitute "data collected" under Minn. Stat. § 13.39, subd. 2(a) (2002).

686 N.W.2d at 34.

An interim order by the Board to suspend temporarily Dr. Uckun's license similarly is inextricably linked to and the product of the Board's investigation of Dr. Uckun. As such, the order is classified by Minn. Stat. § 13.39, subd. 2(a), as confidential pursuant to Minn. Stat. § 13.02, subd. 3. The Board was mandated by Westrom to keep confidential its decision to temporarily suspend Dr. Uckun's license pending a final decision by the Board after a contested case hearing.

3. Minn. Stat. § 13.41, subd. 4.

The Board's interim decision to suspend Dr. Uckun's license also is classified as confidential data by Minn. Stat. § 13.41, subd. 4. As noted, Minn. Stat. § 13.41 applies specifically to licensing agencies such as the Board. Whereas Minn. Stat. § 13.39, subd. 2(a), which was the subject of Westrom, classifies as confidential active investigation data in connection with a pending civil legal action by all state agencies, Minn. Stat. § 13.41, subd. 4, independently also classifies the same data as confidential when the investigation is being conducted by a licensing agency. Minn. Stat. § 13.41, subd. 4, states:

The following data collected, created or maintained by any licensing agency are classified as confidential, pursuant to section 13.02, subdivision 3: active investigative data relating to the investigation of complaints against any licensee.

Applying Westrom's mandate, the interim decision of the Board to temporarily suspend Dr. Uckun's license is inextricably linked to and is the product of the Board's active investigation of Dr. Uckun. As such, the Public Suspension Order is classified as confidential data and should not have been disclosed to the public.

4. Minn. Stat. § 147.01, subd. 4.

Minn. Stat. § 147.01, subd. 4, classifies as confidential and privileged data received by or disclosed to the Board relating to persons within its jurisdiction, subject to certain exceptions:

Subject to the exceptions listed in this subdivision, all communications or information received by or disclosed to the board relating to any person or matter subject to its regulatory jurisdiction are confidential and privileged and any disciplinary hearing shall be closed to the public.

Again applying Westrom's mandate, this classification includes interim orders which are inextricably linked to and are the product of communications and information received by or disclosed to the Board. Thus, a temporary license suspension is classified as confidential and privileged by Minn. Stat. § 147.01, subd. 4, and disciplinary proceedings regarding the same are closed to the public, unless there is an applicable exception in subdivision 4.

The Board will argue that the confidentiality mandate in Minn. Stat. § 147.01, subd. 4, is subject to an exception in Minn. Stat. § 147.01, subd. 4(b), which states in relevant part:

If the board imposes disciplinary measures of any kind, whether by contested case or by settlement agreement, the name and business address of the licensee, the nature of the misconduct, and the action taken by the board are public data.

The Board will assert that the phrase "disciplinary measures of any kind" includes interim disciplinary actions and thus that it is free to make public a temporary license suspension. This is a patent misreading of the statute.

The phrase "disciplinary measures of any kind" is qualified by the immediately following phrase "whether by contested case or by settlement agreement." This latter phrase limits and defines the former phrase. See State v. Wilson, 524 N.W.2d 271, 273 (Minn. App. 1994) ("[b]ased on principles of statutory construction, that ["whether"] phrase qualifies the immediately preceding clause"). Properly construed, Minn. Stat. § 147.01, subd. 4(b), authorizes the Board to make public only disciplinary measures which

result from a “contested case” or a “settlement agreement.”⁶

Indeed, to read “disciplinary actions of any kind” to mean anything else would impermissibly ignore the qualifying phrase “whether by contested case or by settlement agreement.” The Board’s interpretation of Minn. Stat. § 147.01, subd. 4(b), would simply eliminate the phrase “whether by contested case or by settlement agreement” from the statute, contrary to Minnesota’s well established rules of statutory construction. See, e.g., Minn. Stat. § 645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”); Anderson v. Commissioner of Taxation, 253 Minn. 528, 93 N.W.2d 523, 525 (1958) (“a statute is to be construed as a whole so as to harmonize and give effect to all its parts, and where possible, no word, phrase, or sentence will be held to be superfluous, void, or insignificant”).⁷

In this case, the Board’s temporary suspension of Dr. Uckun’s license was an interim disciplinary measure taken without a contested case proceeding and without a settlement agreement. Thus, Minn. Stat. § 147.01, subd. 4(b), provides no exception to the confidentiality mandate of Minn. Stat. § 147.01, subd. 4.

⁶ “Contested case” refers to contested case proceedings before the Board, which is a full due process hearing involving witnesses and cross-examination, not a temporary suspension hearing limited to a few minutes of oral argument as Dr. Uckun was given on January 21, 2006. See Minn. Stat. § 14.02, subd. 3; Minn. Rules Ch. 5615.

⁷ Properly read, “disciplinary measures of any kind” simply refers to the wide variety of disciplinary measures the Board is authorized to take under Minn. Stat. § 147.141, all of which follow either a contested case hearing or a stipulation, including (1) revoking a license, (2) suspending a license, (3) revoking or suspending registration to perform interstate telemedicine, (4) imposing limitations or conditions on the practice of medicine, (5) imposing civil penalties, (6) ordering unremunerated professional services be provided to health care facilities, and (7) censure or reprimand.

This reading of Minn. Stat. § 147.01, subd. 4, is consistent with and supported by Doe. Doe held that the Board was prohibited from including in its final decision data relating to charges which the Board ultimately dismissed. 435 N.W.2d at 50-51 (“when complaints are dismissed, they cannot become part of the Board’s decision and are not ‘public data’ under the MGDPA”). The Board’s interim decision in this case may or may not later be sustained in a final decision by the Board after a contested case proceeding where Dr. Uckun has the right to call and cross-examine witnesses. If the charges relied upon by the Board for the temporary license suspension are ultimately dismissed by the Board, those dismissed charges remain nonpublic data, which Doe holds must not be published. But by publishing its interim decision, the Board has prematurely disclosed that data and thus violated the MGDPA and the MPA. See Navarre, 652 N.W.2d at 24 (disclosing comments about complaints under investigation before a final disciplinary action violates the MGDPA), 26 (investigative data prematurely released violates MGDPA), 28 (disclosure of information that “teacher had been suspended before there had been a final disposition of a disciplinary action” violates the MGDPA).

Reading Minn. Stat. § 147.01, subd. 4(b), to exclude the publication of disciplinary decisions which are not the result of a contested case proceeding or a settlement is also consistent with the provisions of Minn. Stat. § 13.41, subd. 5. Minn. Stat. § 13.41, subd. 5, classifies licensing agency data as public data where the data relate to a “final disciplinary action” (i.e., after a contested case hearing) or where “a licensee and licensing agency agree to resolve a complaint without a hearing” (i.e., a settlement

agreement). Minn. Stat. § 13.41, subd. 5, thus classifies as public data only disciplinary actions which are final, either as a result of a contested case proceeding or a settlement.

Although Minn. Stat. § 13.41, subd. 5 (which applies to all state licensing agencies, including the Board), and Minn. Stat. § 147.01, subd. 4 (which applies to the Board as a state licensing agency) use slightly different words, the two statutes seek the same result -- to prevent the disclosure of non-public data during an investigation until a final decision is rendered. Because Minn. Stat. § 13.41, subd. 5, and Minn. Stat. § 147.01, subd. 4, are in pari materia, they must be construed together. Doe, 435 N.W.2d at 49 (“Section 147.01, subd. 4 and section 13.41, subd. 4,⁸] both govern the same subject matter in that they both relate to the question of what data generated by the Board in a disciplinary action will be public. Because both statutes have the same purpose, they are in pari materia and should be construed together.”). Construed together, the two statutes classify Board disciplinary data as private, confidential data until and unless there is a disciplinary action resulting from either a contested case hearing or a settlement.

C. The Board’s Contrary Reliance on Minn. Stat. § 147.01, subd. 4(b), and Minn. Stat. § 147.02, subd. 6, Must Be Rejected.

As made clear by Westrom, Doe and Navarre and the above cited sections of the MGDPA and the MPA, there is a demonstrated judicial and legislative concern with, and prohibition against, disclosing interim licensing board determinations made during an active investigation, particularly where the interim determination (1) was made without

⁸ Minn. Stat. § 13.41, subd. 4, which was analyzed in Doe, was renumbered Minn. Stat. § 13.41, subd. 5, in 2000. See Vol. 3A, Minn. Stat. 365-366 (West 2005).

affording a licensee due process rights and (2) may be dismissed ultimately in a final decision after due process has been afforded.⁹

Citing Minn. Stat. § 147.01, subd. 4(b), and Minn. Stat. § 147.02, subd. 6, the Board nevertheless asserts the right to do the exact opposite -- i.e, the right to publish an interim disciplinary decision containing and inextricably linked to data which is part of an active investigation before completion of a contested case hearing and a final decision by the Board.

The unbridled damage caused by the Board's asserted right is readily apparent. The Board is authorized by Minn. Stat. § 147.091, subd. 4, to temporarily suspend a physician's license without notice or hearing. The Board asserts the right, and exercised that asserted right in this case, to temporarily suspend Dr. Uckun's license based, inter alia, on nothing more than probable cause. The Board also asserts the right, and exercised that asserted right here, to immediately publish its interim decision to suspend Dr. Uckun's license.

A physician subject to this scheme thus has his or her reputation irreparably injured without the most minimal protections of due process, even though the Board may well later conclude -- after affording the physician notice of the charges, the opportunity

⁹ See also Minn. Stat. § 147.151 which provides that "[u]pon judicial review of any board disciplinary action taken under sections 147.01 to 147.22, the reviewing court shall seal the administrative record, except for the board's final decision, and shall not make the administrative record available to the public." It would be anomalous indeed if the Board were free to publish an interim disciplinary decision during the course of a confidential contested case proceeding but on any appeal relating to a final disciplinary action in the same matter the interim decision was required to be kept under seal in the court's records.

to defend himself or herself in a contested case hearing before an administrative law judge, and the application of a higher standard of proof -- that there was no misconduct or that the alleged misconduct did not warrant suspension.

Neither Minn. Stat. § 147.01, subd. 4(b), nor Minn. Stat. § 147.02, subd. 6, read in context, authorizes the publication of an interim disciplinary decision. As noted, Minn. Stat. § 147.01, subd. 4(b), authorizes the Board to publish “disciplinary measures of any kind, whether by contested case or by settlement agreement.” Contrary to reading the “whether” clause as a limitation on the immediately preceding phrase “disciplinary measures of any kind”, the Board argues that the “whether” clause is not a limitation on the immediately preceding words, citing a short line of cases from several other jurisdictions which indicate that the word “whether” when used in a statute is not a word of limitation.

But the Board’s cases from other jurisdictions are all based directly or indirectly on an 1845 Pennsylvania decision which construed the word “whether” according to what a Pennsylvania court considered to be the “common parlance” of the word at the time, Voegtly v. Third Ward School Directors, 1 Pa. 330, 1845 WL 5098 (Pa.). What was common parlance in Pennsylvania one hundred and sixty years ago does not control the interpretation on a Minnesota statute today, particularly when the Board’s statutory interpretation runs afoul of other in pari materia statutes.

“In a legal sense, ‘whether’ is defined as meaning which of two or several, which of two alternatives.” Showell v. Horn, 65 N.J. Super. 374, 167 A.2d 832, 837 (1961). Thus, while “whether” in another statute in another state at another time may be

construed to mean something else, here “whether” is a predicate to the two alternatives of “by contested case or by settlement agreement” which serves as a limitation on, and a qualification of, the phrase “disciplinary measures” in Minn. Stat. § 147.01, subd. 4(b).

The Board’s reading of Minn. Stat. § 147.01, subd. 4(b), also runs afoul of Minn. Stat. § 13.41, subd. 2, which classifies as private data the “record of any disciplinary proceeding [by a state licensing agency] except as limited by subdivision 5.” As quoted above, the exception in subdivision 5 classifies as public data only those matters (1) relating to a final disciplinary action or (2) where a disciplinary action has been taken following a public hearing or pursuant to an agreement of the parties. If the Board’s reading of Minn. Stat. § 147.01, subd. 4(b), were accepted, the two statutes would be in irreconcilable conflict. Under Minn. Stat. § 13.41, subs. 2 and 5, non-final disciplinary measures taken without a public hearing or an agreement by the licensee are classified as private data. But the Board would have Minn. Stat. § 147.01, subd. 4(b), construed to authorize the Board to disclose the very same interim or non-final disciplinary measures taken without a public hearing or a settlement agreement. This conflict is avoided if the MGDPA and the MPA are read in pari materia as required by Doe -- and Minn. Stat. § 147.01, subd. 4(b), is read consistent with Minn. Stat. § 13.41, subs. 2 and 5 -- to prohibit the disclosure of interim disciplinary measures not based on a public hearing or a settlement agreement.

The second statute cited by the Board as authority for publishing an interim disciplinary decision is Minn. Stat. § 147.02, subd. 6, which provides that “[a]t least annually, the board shall publish and release to the public a description of all disciplinary

measures taken by the board.” The short answer to this assertion is that the Board did not publish the January 27, 2006, Public Suspension Order on January 27, 2006, as part of the Board’s annual publication of disciplinary measures. The Board published the Public Suspension Order the same day it was issued.

Furthermore, there is nothing in Minn. Stat. § 147.02, subd. 6, to suggest that it applies to interim disciplinary decisions based on active investigation data which the Board otherwise is prohibited from disclosing by Minn. Stat. §§ 13.39, subd. 2(a); 13.41, subd. 2; Minn. Stat. § 13.41, subd. 4, and 147.01, subd. 4. See Doe, 435 N.W.2d at 49 (“The Board cannot purposely or inadvertently change private data, as classified by statute, into public data by placing that data within a public document.”).

The Board cannot be heard to say it needs to publish the Public Suspension Order so the public is informed who is licensed. The public has every right to know who is licensed; and that right is enshrined in Minn. Stat. § 214.071 which requires the Board to maintain a directory of physicians who are licensed. Nothing in this case prevents the Board from advising the public who is licensed and who is not by removing Dr. Uckun’s name from its directory of licensed physicians.

Finally, even assuming either one of the two statutes relied on by the Board authorizes the publication of an interim disciplinary decision, the Board’s publication of the Public Suspension Order exceeded what the statutes allowed. According to the Board, Minn. Stat. § 147.01, subd. 4(b), allows the disclosure of the “nature of the misconduct” and Minn. Stat. 147.02, subd. 6, allows disclosure of a “description of [the] disciplinary measures taken by the board.” The Public Suspension Order, however, was

not limited to disclosing the “nature” of the alleged misconduct and included much more than “a description of the disciplinary measure” taken. Rather, the Order consists of a disparaging string of generic, conclusory characterizations by the Board that Dr. Uckun was unethical, unprofessional, professionally incompetent, fraudulent, and a risk to the public.

A similar issue was before the court in Navarre. There a school teacher successfully sued a school district for disclosing in violation of the MGDPA personnel data regarding complaints against the teacher before the final disposition of a disciplinary action. The school district defended in part by arguing it was authorized by the MGDPA to disclose “the existence and status of any complaints or charges against the employee” before a final decision was rendered. 652 N.W.2d at 22. The school district, however, had disclosed specific allegations. The court held such disclosures went beyond that authorized by the MGDPA and found the school district liable.

The type of complaint is separate and distinct from its existence and status. Had the legislature desired the type of complaint to be disclosed before final disposition of any disciplinary action, it could have easily so provided, but it did not. * * * Any disclosure by the government entity during the investigation that describes any quality or characteristic of the complaint, whether general or specific, goes beyond the mere existence of the complaint, and therefore violates Section 13.43, subdivision 2(a)(4).

Id. at 22, 23.

In this case, the Public Suspension Order went beyond Minn. Stat. § 147.02, subd. 6, because it disclosed more than the disciplinary measure taken, i.e., more than the fact Dr. Uckun’s license had been suspended.

The Public Suspension Order also went beyond Minn. Stat. § 147.01, subd. 4(a), because it disclosed more than the “nature” of the alleged misconduct. The “nature” of the misconduct means the essential character of the conduct, such as, by way of example unrelated to these proceedings, failing to pay taxes or operating on the wrong organ. See generally Nyman v. McDonald, 966 P.2d 1210, 1214 (Utah App. 1998) (statute requiring that a notice of default set forth the “nature” of the breach is satisfied by a statement that a person failed to make a monthly payment as required by a note); People v. Margelis, 246 Mich. 459, 224 N.W. 605, 606 (1929) (statute requiring defendant to be notified of the “nature” of the accusation requires a statement of the “acts of his [that] are claimed to constitute the crime”).

In this case, the Board did not limit its disclosure to the “nature” of what Dr. Uckun allegedly did wrong; instead the Public Suspension Order is a laundry list of disparaging conclusions. The Board is fully capable of describing the “nature” of the misconduct when it publicizes disciplinary actions without pejorative characterizations. For example, the Board published a final disciplinary action against a physician on February 24, 2006, and there described the “Nature of the Misconduct” as “Failure to satisfy a Minnesota tax delinquency.” A. 92.

It is no response for the Board to say that the disparaging conclusions in the Public Suspension Order parrot the language of the statutes which the Board said were violated. Even under the Board’s reading of Minn. Stat. § 147.01, subd. 4(a), the Board is only authorized to publish the nature of the violation, not the statutes violated. Cf. Navarre, 652 N.W.2d at 22, 23 (holding that under the MGDPA there is distinction between the

government disclosing the existence of a complaint, which is authorized, and disclosure qualities and characteristics of the complaint, which are not).

IV. CONCLUSION

Based on the foregoing points and authorities, Dr. Uckun respectfully requests that the Judgment entered on July 17, 2006, be vacated, that partial summary judgment on Counts I, II, III, and IV of the Complaint be granted to Dr. Uckun, that Count V of the Complaint be permitted to proceed in the trial court pursuant to the Minnesota Rules of Civil Procedure, and that Dr. Uckun be awarded his costs and disbursements on this appeal.

Dated: August 22, 2006

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).