

Case No. A05-1523

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STATE OF MINNESOTA

IN COURT OF APPEALS

Mahoney & Hagberg, A Professional Association,  
*n/k/a* Mahoney & Emerson, A Professional Association  
and Mahoney & Emerson, Ltd.,

Respondents,

vs.

Tracy L. Newgard,

Appellant.

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**RESPONDENTS' BRIEF**

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**RESPONDENTS' STATEMENT OF ISSUE**

Whether Appellant Newgard is immune from a portion of the pending lawsuit pursuant to the doctrine of judicial immunity when the doctrine is raised in a non-defamation setting and strict adherence to the doctrine would negate the sanctity of attorney-client privilege.

The trial court impliedly held that immunity does not apply.

## ARGUMENT

### **A. Judicial Immunity Does Not Apply In A Non-Defamation Setting**

Appellant provided the trial court with two paragraphs of argument on this issue in her motion to dismiss. (Appellant's Appendix. A-23, 24). The additional five pages submitted by Appellant in her Brief offers little that is new, other than to explain the Matthis test, that is, whether the challenged statement has reference and relation to the subject matter of the action. Matthis v. Kennedy, 67 N.W.2d 413 (Minn. 1954). This, however, rather adroitly circumvents the fact that the doctrine of judicial immunity has been applied to witnesses in Minnesota only in defamation cases. Accordingly, in this action where the claims against Appellant are for breach of confidences, invasion of privacy, civil conspiracy, aiding and abetting, and for money owed, judicial immunity does not apply. (See Complaint A1-A9).

The United States Supreme Court has made clear this historical application of judicial immunity. In Briscoe v. Lahue, 460 U.S. 325, 103 S.Ct. 1108 (1983), the Court opined that:

The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law. [cites omitted.] Some American decisions required a showing that the witness' allegedly defamatory statements were relevant to the judicial proceeding, but once this threshold had been made, the witness had an absolute privilege.

103 S.Ct. at 1113. (See also, Footnote 11, listing numerous 19<sup>th</sup> Century state court opinions).

Minnesota has followed this approach. Matthis v. Kennedy, so strongly relied on by Appellant, was itself a defamation action based upon statements in a probate hearing

by the guardian of the ward. There, the Minnesota Supreme Court indicated:

The absolute privilege rule is confined within narrow limits, and the courts of this country as a rule have steadily refused to enlarge those limits, confining the cases to situations in which the public service or the administration of justice requires complete immunity from being called to account for language used.

67 N.W.2d at 417. (emphasis added).

The Minnesota cases cited by Appellant are all defamation cases. Zagaros v. Erickson, 558 N.W.2d 516 (Minn. App. 1997) (defamation claim against a psychologist who testified at a dissolution hearing); Milavetz, Gallop & Milavetz, P.A. v. Hill, 1998 WL 422229 (unpublished opinion)<sup>1</sup> (Minn. App. 1998) (defamation claim arising from settlement discussions); Plack v. Stempel, 2000 WL 890456 (unpublished opinion) (Minn. App. 2000) (defamation of fire investigator in settlement discussions); Woolley v. Panek, 2004 WL 1445244 (unpublished opinion) (Minn. App. 2004) (defamation by witnesses in discharge proceedings). The only other two cases cited by Appellant, Sloper v. Dodge, 426 N.W.2d 478 (Minn. App. 1988) and Elfstrom v. Knox, 2000 WL 53409 (unpublished opinion) (Minn. App. 2000), are inapposite because, while negligence claims, neither involves a witness who has raised judicial immunity as a defense.

The lack of Minnesota authority to support Appellant's proposition that immunity applies to a witness in cases sounding in claims other than defamation is made resoundingly evident by Appellant's citation instead to two federal decisions, neither of which are persuasive. Thomas v. Hungerford, 23 F.3d 1450 (8<sup>th</sup> Cir. 1994) is a claim for perjury

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<sup>1</sup> All unpublished opinions cited here refer to those cited and provided by Appellant in her Appendix.

brought against a police officer for his trial testimony. However, the absolute or judicial immunity defense dispositive of the claim had nothing to do with the nature of the claim itself, but instead related to the absolute immunity police officers have under 42 USC §1983 and Briscoe v. Lahue, 460 U.S. 325, 103 S.Ct. 1108 (1983). More significantly, Pinto v. Internationale Set, Inc., 650 F.Supp. 306 (D.Minn. 1986) actually supports Respondents' argument. There, the Plaintiffs brought an action against their former employer for intentional interference with business and contractual relations, defamation and trade libel. Not only did then District Judge Diana Murphy dismiss the defamation claim because the letter that it was premised on was absolutely privileged, but the Court also dismissed the claims for intentional interference with contractual and business relations, which were based entirely on the same letter. In emphasizing that judicial immunity is limited to a defamation setting, Judge Murphy added:

In Minnesota, a Plaintiff cannot elude the absolute privilege by relabeling a claim that sounds in defamation. See, e.g., Freier v. Independent School District 197, 356 N.W.2d 724 (Minn. App. 1984) (where defamation and infliction of emotional distress were "merely two different labels for the same alleged tort ... the doctrine of absolute privilege applies with equal force to both claims).

650 F.Supp. At 309.

The law in Minnesota is clear and compelling that absolute judicial immunity for a witness applies only when sued for defamation, or a defamation claim that has been relabeled. The present case offers neither of these alternatives. The Complaint states claims for breach of confidences, invasion of privacy and civil conspiracy, and has no attributes or intimation of defamation.

**B. The Doctrine Of Judicial Immunity Does Not Supersede The Attorney-Client Privilege.**

While not raised in its Brief, Appellant's implicit argument is that the doctrine of judicial immunity is so absolute that it includes statements by the witness that breach attorney-client privilege. Appellant offers no support for this proposition. The attorney-client privilege is the oldest of privileges for confidential communications known to the common law. "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Company v. United States, 449 U.S. 383, 103 S.Ct. 677 (1981); see also Trammel v. United States, 445 U.S. 40, 100 S.Ct. 906 (1980); Fischer v. United States, 425 U.S. 391, 96 S.Ct. 1569 (1976).

The historical importance of the attorney-client privilege has long been recognized in Minnesota as well. In Kahl v. Minnesota Wood Specialty, Inc., 277 N.W.2d 395 (Minn. 1979), the court stated:

Section 595.02(2) was first enacted in 1851. It was recognized in Struckmeyer v. Lamb, 75 Minn. 366, 77 N.W. 987 (1899), as embodying the common law privilege which since the 18<sup>th</sup> Century has had universal acceptance as indispensable to an attorney's relationship with his client. Unlike the exclusionary rules of evidence, which have for their purpose finding the truth of a factual dispute by excluding unreliable, prejudicial or misleading evidence, the rules suppressing disclosure of confidential communications from the client as well as advice from the attorney has for its purpose perfecting a narrowly prescribed relationship, preservation of which by prohibiting such disclosure is regarded as of greater social importance than the benefits which would be gained by the state's exercise of its coercive or supervisory powers to compel the client and the attorney to make their private discussions public.

277 N.W. 2d at 398.

Consequently, in order to justify a breach of the attorney-client privilege, there must be a strong and compelling reason. Appellant advances none and offers no authority for such a proposition, but would have this Court give its imprimatur to such a violation cloaked in the guise of judicial immunity. The implications of this course are extraordinary: as long as it occurs in the context of a judicial proceeding, a witness may breach the attorney-client privilege and not be held accountable. Such a result neither serves the underlying purpose of the judicial immunity doctrine nor that of the attorney-client privilege.

### CONCLUSION

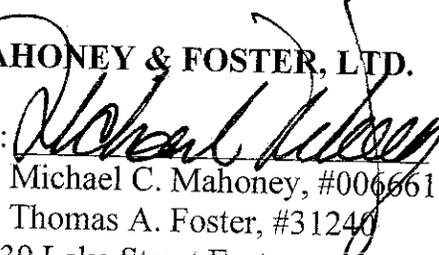
The judicial immunity doctrine does not apply in this case, which is not grounded in defamation. Moreover, neither case authority nor public policy supports extending the doctrine to instances of communication that violate the attorney-client privilege.

For the foregoing reasons, the trial court should be affirmed.

Respectfully Submitted,

Dated: Sept 30, 2005

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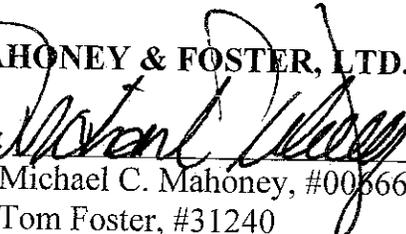
**Appellate Court  
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**CERTIFICATE OF  
BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 subds. 1 and 3 for a brief produced with proportional font. The length of this brief is 1,249 words, and the font size is 13 point. This brief was prepared using Microsoft Word 2002 software.

Dated: Sept. 30, 2005

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