

2

NO. A09-1993

State of Minnesota  
**In Court of Appeals**

Torchwood Properties, LLC,  
a Minnesota limited liability company, as successor in interest  
to Anthony Magnotta and Lisa Magnotta, husband and wife,  
*Appellant,*

v.

Judith McKinnon,  
*Respondent.*

**APPELLANT'S BRIEF IN SUPPORT OF APPEAL  
AND APPENDIX**

Steven R. Coon  
1700 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-1421

*Attorneys for Respondent*

Justin L. Seurer (#336154)  
SCHLECK & ASSOCIATES, of  
*Counsel*  
505 Highway 169 North, Suite 260  
Minneapolis, MN 55441  
(612) 455-6669

*Attorney for Appellant*

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).

## TABLE OF CONTENTS

PROCEDURAL HISTORY.....	4
LEGAL ISSUES.....	5
STATEMENT OF THE CASE.....	6
STATEMENT OF THE FACTS .....	7
ARGUMENT .....	11
I. DISTRICT COURT SHOULD HAVE GRANTED APPELLANT TONY MAGNOTTA'S REQUEST FOR CONTINUANCE OF THE TRIAL.....	11
II. DISTRICT COURT SHOULD NOT HAVE CONSIDERED THE DEFENDANT'S HEALTH AS A FACTOR FOR PLAINTIFF'S REQUEST FOR CONTINUANCE OF THE TRIAL.....	13
III. PLAINTIFFS ARE ENTITLED TO A NEW TRIAL FOR RESPONDENT'S DELIBERATE WITHHOLDING OF DISCOVERY. ....	14
IV. CONCLUSION.....	19
V. ADDENDUM .....	21

## TABLE OF AUTHORITIES

### Cases

<i>Brecht v. Town of Bergen</i> , 235 N.W. 528 (Minn. 1931).....	14
<i>Bruno v. Belmonte</i> , 90 N.W.2d 899 (Minn. 1958) .....	18
<i>Clifford v. Geritom Med, Inc.</i> , 681 N .W.2d 680 (Minn. 2004) .....	14
<i>In re Hopper</i> , 228 B.R. 216, 219-220 (8th Cir.BAP Ark. 1999).....	12
<i>In re Wolfe</i> , 232 B.R. 741, 745 (8th Cir.BAP 1999).....	13

<i>Lake Superior Center Authority v. Hammel, Green &amp; Abrahamson, Inc.</i> , 715 N.W.2d 458 (Minn. Ct. App .2006) .....	16
<i>Morris v. Slappy</i> , 461 U.S. 1, 11-12, (insert year) .....	11
<i>Race v. State</i> , 417 N.W.2d 264, 267 (Minn. 1987).....	17
<i>Schiro v. Raymond</i> , 54 N.W.2d 329 (Minn. 1952).....	19
<i>State ex rel. Pula v. Beehler</i> , 364 N.W.2d 860 (Minn. Ct. App. 1985) .....	17
<i>Swanson v. Williams</i> , 228 N.W.2d 860 (Minn. 1975) .....	18
<i>United States v. Bernhardt</i> , 642 F.2d 251, 252 (8th Cir.1981) .....	12
<i>United States v. Larson</i> , 760 F.2d 852, 856-57 (8th Cir.1985) .....	12
<i>United States v. Weisman</i> , 858 F.2d 389, 391 (8th Cir. 1988).....	11
<i>Wild v. Rarig</i> , 234 N.W.2d 775 (Minn. 1975) .....	14
<i>Wolfson v. City of St. Paul</i> , 535 N.W.2d 384 (Minn. Ct. App. 1995).....	14
<b>Minnesota Statutes</b>	
Minn. R. Civ. P. 59.01(c) .....	16
Minn. R. Civ. Proc 59.01 .....	14, 16

## PROCEDURAL HISTORY

1. July, 7, 2008: The matter of *Torchwood Properties, et. al. v. Judith McKinnon* was filed in Albert Lea, Freeborn County, Minnesota.
2. August 13, 2009: The matter of *Torchwood Properties, et. al. v. Judith McKinnon* came on for Bench Trial in Albert Lea, Freeborn County, Minnesota.
3. September 1, 2009: Notice of Filing of Order and Findings and Order for Judgment filed by the Honorable Judge Chesterman.
4. September 8, 2009: Notice of Motion and Motion for New Trial filed by Appellant Tony Magnotta.
5. September 16, 2009: Plaintiff's Amended Notice of Motion and Motion for New Trial, Relief from Judgment and Stay of Enforcement of Judgment filed by Appellant Tony Magnotta.
6. October 8, 2009: Oral Argument heard by the Honorable Judge Chesterman.
7. October 15, 2009: Appellant received Order denying Motions by the Honorable Judge Chesterman.
8. November 4, 2009: Notice of Appeal filed.

## LEGAL ISSUES

### Issue I:

**Should the District Court have granted Appellant Tony Magnotta's request for Continuance of the Trial?**

Ruling Below:

The District Court ruled in the negative.

Apposite Authority:

*United States v. Bernhardt*, 642 F.2d 251, 252 (8th Cir.1981)

*United States v. Larson*, 760 F.2d 852, 856-57 (8th Cir.1985)

### Issue II:

**Should the District Court have considered the Defendant's Health as a factor for Plaintiff's Request for Continuance during Trial?**

Ruling Below:

The District Court ruled in the negative.

Apposite Authority:

*In re Wolfe*, 232 B.R. 741, 745 (8th Cir.BAP 1999)

### Issue III:

**Should the District Court have considered the Defendant's Health as a factor for Plaintiff's Request for Continuance during Trial?**

Ruling Below:

The District Court ruled in the negative.

Apposite Authority:

*Race v. State*, 417 N.W.2d 264, 267 (Minn. 1987)

Minn.R.Civ.Proc 59.01

### STATEMENT OF THE CASE

The matter of *Torchwood Properties, et. al. v. Judith McKinnon* came on for Bench Trial on August 13, 2009 in Freeborn County, Minnesota. During and following the Trial, Plaintiff requested a Continuance and New Trial under Minnesota Rules of Civil Procedure 59, 60 & 62. Plaintiff contends that Defendant Judith McKinnon violated the Rules of Discovery by admittedly failing to produce requested documents. The Plaintiffs' Motions for Continuance and New Trial were denied. The Findings and Order of the Honorable Judge John Chesterman were filed on September 1, 2009. A Notice of Motion and Motion for New Trial was filed on September 8, 2009 and Oral Argument was heard on October 8, 2009. The Honorable Judge Chesterman denied the Motion for New Trial by Order dated October 15, 2009.

## STATEMENT OF THE FACTS

1. The matter of *Torchwood Properties, et. al. v. Judith McKinnon* came on for Bench Trial on August 13, 2009.
2. Defendant Judith McKinnon responded to Plaintiff's Request for Production of Documents on or about November 11, 2008. (Motion for New Trial; attached as Exhibit A).
3. Plaintiffs' Request #1 asked for, "Any and all statements by parties or non-parties concerning the above action or its subject matter that are in your possession or under your control." Defendant's response was, "All discoverable documents are attached. Investigation and discovery continues." (Motion for New Trial; Exhibit A, ¶ 1).
4. Plaintiffs' Request #3 asked for, "All documents in your possession, custody or control which are relevant to the action and/or which you intend to introduce at trial." Defendant's response was, "Trial exhibits have not been determined at this time." (Motion for New Trial; Exhibit A, ¶ 3).
5. Plaintiff's Request #6 asked for, "Copies of all investigative records or reports regarding the incident and related subject matter." (Motion for New Trial; Exhibit A, ¶ 6).

6. Plaintiff's Request #8 asked for, "All documents that relate to your efforts to remedy the damages in this matter." (Motion for New Trial; Exhibit A, ¶ 8).
7. Plaintiffs' Request #9 asked for, "All documents relating to the subject incident, including, but not limited to, any correspondence with another that refers or relates to Plaintiffs and their property and/or Defendant and her property." Defendant's response was, "All discoverable documents are attached. Investigation and discovery continues." (Exhibit A, ¶ 9).
8. Plaintiff's Request #14 asked for, "All documents connected to prior litigation relating to this property." (Motion for New Trial; Exhibit A, ¶ 14).
9. Plaintiff's Request #15 asked for, "All documents connected to any investigations related to this property." (Motion for New Trial; Exhibit A, ¶ 15).
10. Defendant Judith McKinnon's standard, canned response to the majority of these Discovery Requests was, "All discoverable documents are attached. Investigation and discovery continues."
11. Defendant Judith McKinnon admitted, during direct examination, under oath, that she had notes regarding conversations with City

Officials (and promises made to her by those City Officials) at her home that were not turned over to the Plaintiffs. (Testimony of Judith McKinnon, p.17:17-20; Motion for New Trial; Exhibit B).

12. Specifically, when asked about the Hazardous Building document she signed, Respondent Judith McKinnon stated, "I had notes at home, what they promised me when I signed this. I don't have them with me." (Testimony of Judith McKinnon, p.17:18-20 and Hazardous Building document attached as Exhibit C (Trial Exhibit 9)).

13. Respondent Judith McKinnon was then asked, "Did you ever provide those notes to your attorney?" – to which she responded, "No. I didn't think it was relevant." (Testimony of Judith McKinnon, p.17:21-22; emphasis added).

14. Attorney for the Plaintiffs, Justin Seurer, requested a brief continuance so that Defendant Judith McKinnon could go to her home and retrieve the undisclosed notes. (Testimony of Judith McKinnon, p.19:12-21).

15. Defendant Judith McKinnon again stated, "But, I don't think they are relevant," during the Court's discussion regarding the request

for Continuance due to her failure to produce the notes. (Testimony of Judith McKinnon, p.20:13-14).

16. At one point, the Honorable Judge Chesterman stated, "All right, so I guess my thought is, if you think that you need a con – that you need to have these things, we'll end the trial at this point and we are going to come back the next time you are available. Civil cases don't have priority in our schedule, you might be coming back after Christmas." (Testimony of Judith McKinnon, p.20:23-21:3).

17. The Honorable Judge Chesterman stated "your client may or may not be able to find them..." (Testimony of Judith McKinnon, p.22:1-2).

18. The Defendant was later asked by Attorney Seurer, "You took notes of your conversations with city officials, correct?" This time, McKinnon stated, "No." (Testimony of Judith McKinnon, p.25:10-12).

19. The Honorable Judge Chesterman eventually denied the Plaintiffs' Motion for Continuance. (Testimony of Judith McKinnon, p.19-31).

20. Attorney for Appellant (Seurer) then made a record of his objection to the Court's denial of request for a Continuance of Trial (Testimony of Judith McKinnon, p.31:14-33:16).

21. The Honorable Judge Chesterman then indicated in response to Attorney Seurer's objection, "Again, you know, I think your point is right. I think – my decision is based on my observation of Ms. McKinnon and what I am concluding is an extremely fragile physical condition that she's in. I don't think she could find them. ..." (Testimony of Judith McKinnon, p.33:4-8).

22. Plaintiff then requested a New Trial under Minnesota Rule of Civil Procedure 59.01. (Testimony of Judith McKinnon, p.34:20-35:25).

23. The Plaintiffs' Motion for New Trial was denied. (Testimony of Judith McKinnon, p.36).

## ARGUMENT

### ***I. DISTRICT COURT SHOULD HAVE GRANTED APPELLANT TONY MAGNOTTA'S REQUEST FOR CONTINUANCE OF THE TRIAL.***

Respondent McKinnon's blatant violation of the Rules of Discovery supports the Appellants' request for Continuance of the Bench Trial in this matter. "Continuances are not favored and should be granted only when compelling reason has been shown." *United States v. Weisman*, 858 F.2d 389, 391 (8th Cir. 1988) (citing *Morris v. Slappy*, 461 U.S. 1, 11-12, (insert year)). In this case, Defendant McKinnon admitted, without solicitation,

that she had taken notes of conversations with City Officials regarding the razing of her Hazardous Building. (Motion for New Trial; *Exhibit B*, p.17:18-22). She admitted twice on the record that she didn't turn these notes over to her attorney, because she didn't think these notes were "relevant." (Motion for New Trial; *Exhibit B*, p. 17:18-22 & p.20:13-14). As a compelling reason is clearly present, the continuance should have been granted.

When determining the necessity of continuance, five articulated factors should be examined. Those factors include: 1) the nature of the case and whether the parties have been allowed adequate time for trial preparation; 2) the diligence of the moving party; 3) the conduct of the opposing party and whether a lack of cooperation has contributed to the need for continuance; 4) the effect of the continuance and whether delay will seriously disadvantage either party; and 5) the asserted reasons for the continuance. *United States v. Larson*, 760 F.2d 852, 856-57 (8th Cir.1985) (quoting *United States v. Bernhardt*, 642 F.2d 251, 252 (8th Cir.1981)). See *United States v. Ware*, 890 F.2d 1008, 1010 (8th Cir.1989); as quoted in *In re Hopper*, 228 B.R. 216, 219-220 (8th Cir.BAP Ark. 1999). In this situation, the moving party has clearly showed diligence. During discovery all notes and documents were specifically requested. The lack of cooperation of the

opposing party, intentionally withholding the documents in question, sufficiently satisfies the articulated factors and presents compelling reason to issue a continuance. Furthermore, the Appellant/Plaintiff, Tony Magnotta, is the only party that would be prejudiced by a continuance, as there were no counter-claims in this matter. As such, the Appellant admittedly waived any and all prejudice claims by requesting the continuance in the first place. Putting the "shoe on the other foot," the Appellant most certainly risks dismissal of the entire lawsuit if that Plaintiff is found guilty of such deliberate discovery practices.

**II. DISTRICT COURT SHOULD NOT HAVE CONSIDERED THE DEFENDANT'S HEALTH AS A FACTOR FOR PLAINTIFF'S REQUEST FOR CONTINUANCE OF THE TRIAL.**

The health of the Defendant should not play a role in the court's decision to grant a continuance. In *Wolfe*, the court found that the debtor's serious health condition should not play a role in the issuance of a continuance. *In re Wolfe*, 232 B.R. 741, 745 (8th Cir.BAP 1999). It is important to note the distinction in *Wolfe*, the debtor being hospitalized and suffering from serious health concerns. In this situation the defendant is not hospitalized and not suffering from any known serious health

conditions. Thus, one's health conditions, even when very severe, should not play a role in the determination of the necessity of continuance.

Additionally, the Request for Continuance was made on behalf of the Plaintiff, who has the right to waive any prejudice that might result from delaying the trial in this matter. Public Policy supports the Appellant/Plaintiff's request for continuance where Respondent McKinnon blatantly violated the Rules of Discovery.

**III. PLAINTIFFS ARE ENTITLED TO A NEW TRIAL FOR RESPONDENT'S DELIBERATE WITHHOLDING OF DISCOVERY.**

A motion for a new trial gives a district court the opportunity to correct errors without subjecting the parties to the expense and inconvenience associated with an appeal. *Clifford v. Geritom Med, Inc.*, 681 N.W.2d 680 (Minn. 2004). The matter of granting a new trial for misconduct of counsel or prevailing party is governed by no fixed rules but rests almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion. *Wild v. Rarig*, 234 N.W.2d 775 (Minn. 1975); citing, *Brecht v. Town of Bergen*, 235 N.W. 528 (Minn. 1931); see also, *Wolfson v. City of St. Paul*, 535 N.W.2d 384 (Minn. Ct. App. 1995). A clear abuse of discretion has occurred in this

matter, and a New Trial under Minnesota Rule of Civil Procedure 59 is warranted. Minn. R. Civ. Proc 59.01.

The Defendant's intentional withholding of evidence results in grounds for a new trial. Rule 59.01 states, "A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(a) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;

(b) Misconduct of the jury or prevailing party;

(c) Accident or surprise which could not have been prevented by ordinary prudence;

(d) Material evidence newly discovered, which with reasonable diligence could not have been found and produced at the trial;

(e) Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;

(f) Errors of law occurring at the trial, and objected to at the time or, if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion;

(g) The verdict, decision, or report is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.”

Minn. R. Civ. Proc 59.01. In this matter, Appellant Tony Magnotta is initially entitled to a New Trial under subsections (a) and (b), as he was deprived of a fair trial due to the misconduct of Respondent McKinnon.

A party may also move for a new trial based on “[a]ccident or surprise which could not have been prevented by ordinary prudence.”

Minn. R. Civ. P. 59.01(c). A trial court has great discretion in granting a new trial on the basis of surprise. *Lake Superior Center Authority v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458 (Minn. Ct. App. 2006), *review denied*. In this case, Defendant McKinnon admitted to possession of ‘notes’

taken in material conversations with City Officials regarding a material document in this litigation. Ms. McKinnon denies in her testimony that her building was a fire hazard and denies that her building was a threat to public safety prior to being torn down. (Motion for New Trial; *Exhibit B*). She proceeds in her testimony to deny these particular portions of the "Authorization to Raze (Repair) Hazardous Building," which she signed and notarized. (Motion for New Trial; *Exhibits B & C*). This document and Ms. McKinnon's admissions are critical to the litigation of this matter.

Ms. McKinnon's trial day admission that she had notes regarding her conversation with City Officials is extremely material and supports Plaintiffs' Motion for New Trial on surprise that could have been prevented by ordinary prudence. A Motion for Continuance claiming surprise was made immediately after this testimony was made, thus preserving Appellants' right to a New Trial. *State ex rel. Pula v. Beehler*, 364 N.W.2d 860 (Minn. Ct. App. 1985), *review denied*. It should be noted that Ms. McKinnon's first response to why she didn't turn over the notes was that she, "didn't think they were relevant." (Motion for New Trial; *Exhibit B*, p.17:21-22).

The notes withheld by Ms. McKinnon are clearly a material piece of evidence. The Supreme Court defined material evidence as not

“impeaching, cumulative or doubtful.” *Race v. State*, 417 N.W.2d 264, 267 (Minn. 1987). In this case, Ms. McKinnon’s initial statement is not doubtful, but a confident recall of the presence of notes regarding promises made to her when signing the Authorization to Raze (Repair) Hazardous Building. Even after discussing postponement of trial for weeks and Ms. McKinnon’s weak physical condition, Ms. McKinnon said she did not produce the notes because she thought they were not relevant. (Motion for New Trial; *Exhibit B*, p.17:21-22). Not until after the Honorable Judge Chesterman states that Ms. McKinnon “may or may not be able to find them” did the witness express any doubt about where they might be.

As the notes are a material issue, it is clear that specific grounds are present to justify a new trial. To justify a new trial because of newly discovered evidence, proper diligence to discover evidence before trial must be shown, and it must appear that such evidence would probably lead to a different result in a new trial. *Bruno v. Belmonte*, 90 N.W.2d 899 (Minn. 1958). Generally, to constitute “newly discovered evidence” within meaning of the rule authorizing a new trial on ground of newly discovered evidence, the evidence must have been in existence at time of trial but not known to the party at the time. *Swanson v. Williams*, 228 N.W.2d 860 (Minn. 1975). Further, pursuant to Minnesota Statute Rules of Civil Procedure

59.01(d), when material evidence is newly discovered, which with reasonable diligence could not have been found and produced at the trial, a new trial can be granted. A New Trial should have been granted in this matter.

Evidence which could not have been procured by reasonable diligence before trial will warrant a new trial. *Schiro v. Raymond*, 54 N.W.2d 329 (Minn. 1952). Reasonable diligence was present by the Appellant via counsel as all documentation and notes connected with the issue at hand were explicitly requested in discovery and the Respondent failed to produce the notes mentioned on the stand. At this point, no one except the Respondent knows what is contained in her notes with City Officials. McKinnon admitted on the stand that her notes were important enough to contest the hazardous nature of her building. She also admitted that her notes contradict the allegations regarding the safety of her building. As specific grounds are presented and these notes are directly connected with the contract, they are material to the case. Thus, a new trial should be granted.

#### IV. CONCLUSION

A new trial should be granted. Minnesota Statute Rules of Civil Procedure 59.01 clearly states that a new trial should be granted when (a)

irregularity in the proceedings of the court, referee, jury or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived a fair trial; or (b) misconduct of the jury or prevailing party is present. It is clear that the Defendant withheld material evidence depriving the Plaintiff of a fair trial and constituting misconduct on the part of the prevailing party. Thus, under Rule 59.01, a new trial should be granted.

Respectfully submitted,

Dated: 12-3-09



Justin L. Seurer (#336154)  
Schleck & Associates, of  
Counsel

505 Hwy 169 North; Suite 260  
Minneapolis, MN 55441  
(612) 455-6669 phone  
(612) 455-2182 fax