

Case No. A05-1523

STATE OF MINNESOTA

IN COURT OF APPEALS

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

Respondent.

vs.

Tracy L. Newgard,

Appellant,

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUE

- I. Whether Appellant Newgard is immune from the pending lawsuit pursuant to the doctrine of judicial immunity because Newgard's affidavit qualifies as material published in the due course of a judicial proceeding and is absolutely privileged.

The trial court did not determine whether judicial immunity precludes the present lawsuit against Newgard.

Apposite authority:

Sloper v. Dodge, 426 N.W.2d 4778 (Minn.Ct.App.1988)

Matthis v. Kennedy, 67 N.W.2d 413 (Minn.1954)

Pinto v. International Set, Inc., 650 F.Supp. 306 (D.Minn.1986)

STATEMENT OF THE CASE

Appellant Tracy Newgard was sued by Respondent Mahoney & Hagberg, A Professional Association, n/k/a Mahoney & Emerson, a Professional Association and Mahoney & Emerson, Ld. (M & H), in connection with an affidavit she executed relative to a separate pending lawsuit venued in Hennepin County District Court. Following her execution of that affidavit and its subsequent disclosure in a lawsuit brought on behalf of Stephanie Boldt, Newgard was sued by M & H. Newgard was formerly employed by M & H, and no claims were asserted against her until she completed the affidavit at issue in this case.

Newgard brought her motion for dismissal pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure in October 2004, asserting in relevant part that the suit of M & H was precluded because her affidavit was protected by judicial immunity.

Newgard's Motion for dismissal was heard by Hennepin County District Court Judge Robert A. Blaeser on December 9, 2004. Subsequently, the Court denied her motion to dismiss by Order and Memorandum dated May 25, 2005, which was served on Appellant on May 31, 2005 by facsimile.

In its Order and Memorandum denying Newgard's motion to dismiss, the District Court concluded that the Complaint of M & H contained valid causes of action against Newgard under Minnesota law. Second, the District Court concluded that the claims in the Complaint were supported by the facts alleged in the Complaint and may be further supported by evidence that might be produced upon discovery. Finally, the District Court found that M & H has valid claims for breach of confidences, invasion of privacy, civil

conspiracy, aiding and abetting breaches and violations, and money owed by Newgard.

The Court failed to address the applicability of judicial immunity to the present claims of

M & H against Newgard. Newgard appeals from this Order.

STATEMENT OF FACTS

Professional Administration, LCC (“PAL”), employed Appellant Tracy Newgard as a legal assistant from June 1999 through February 2003. A.15. PAL provided the former law firm of Mahoney & Hagberg, P.A. (“M & H”) with administrative staff. A.11, A.16-A.17. The underpinnings of the present action against Newgard arise from the case Johnson v. City of Minneapolis, 667 N.W.2d 109 (2003), wherein the Minnesota Supreme Court reinstated a large verdict favoring a client of M & H. A.28 Thereafter, a dispute erupted between M & H and PAL relative to whether PAL was to be paid for services rendered from the attorney fees awarded in Johnson. Id.

Stephanie Boldt was a shareholder of PAL, who is alleging that she was forced out of the corporation by a fellow shareholder Margaret Burns. Id. In connection with these claims, Boldt retained Attorney Sean Schiff and initiated litigation against Burns, as well as PAL, M & H, and Attorney Michael Mahoney, formerly a partner in M & H. Id.

Attorney Schiff obtained an affidavit from Newgard for use in the Boldt case. A.27-A.30. The Complaint in the present case was served by M& H in October 2004, and alleged in relevant part that Newgard provided Attorney Schiff confidential, privileged information which was set out in the affidavit of Tracy Newgard dated September 10, 2004. A.1-A.9. The Newgard affidavit was introduced in the Boldt case, and M & H alleged that the Newgard affidavit contains false statements based upon information Newgard learned as part of confidential communications at M& H. A.28.

According to the Complaint, those statements include: specific statements regarding a client’s communication and instructions to set up a series of corporations that

Newgard asserts were used in funneling money through a series of companies to avoid taxes; specific statements about a client's communications regarding credit cards; and a client's specific communication and information regarding issues of ownership interests of that client. A.1-A.9.

The District Court described in relevant part as follows:

Tracey Newgard was employed as a legal secretary at M & H through PAC and Pal. M & H claims that Newgard breached confidences of the law firm when she gave an affidavit in support of Boldt's claim * * *

A.44-A.53. There is no dispute that Newgard provided the affidavit at issue in connection with pending litigation. Id. It is from this decision that Appellant appeals. A.54.

ARGUMENT

A. Standard of Review

A reviewing court is not bound by and need not give deference to a district court's decision on a purely legal issue. Modrow v. JP Foodservice, Inc., 656 N.W.2d 389, 393 (Minn.2003) (citing Frost-Benco Elec. Ass'n v. Minn.Pub. utils. Comm'n, 358 N.W.2d 639, 642 (Minn.1984)).

The question of whether either statutory or common law immunity applies is one of law which the Court of appeals reviews de novo. Davis v. Hennepin County, 559 N.W.2d 117, 120 (Minn.App.1997) review denied (Minn.May 20, 1997). A district court's denial of an immunity defense is immediately appealable as of right. Gleason v. Metro. Council Transit Operations, 563 N.W.2d 309, 314 (Minn.App.1997), aff'd in part and remanded 582 N.W.2d 216, 221 (Minn.1998).

B. Appellant Newgard is shielded from suit by judicial immunity, and the District Court erred when it did not apply immunity to the claims stemming from the September 2004 Affidavit.

Judicial immunity is intended to protect the judicial process in Minnesota and therefore extends to participants in the legal process, including witnesses. Sloper v. Dodge, 426 N.W.2d 478, 479 (Minn.Ct.App. 1988). Material published in the due course of a judicial proceeding is absolutely privileged. See, Matthis v. Kennedy, 67 N.W.2d 413) (defamatory matter published in the due course of a judicial proceeding is absolutely privileged and will not support a civil action for defamation although made maliciously and with knowledge of its falsehood and extends to the protection of the judge, the jury,

the parties, counsel and witnesses); see, also Plack v. Stempel, Unpublished Opinion, 2000 WL 890456 (Minn. Ct. App. 2000) (attached hereto at A.57); Milavetz, Gallop & Milavetz, P.A. v. Hill, Unpublished Opinion, 1998 WL 422229 (Minn. Ct. App. 1998) (attached at A.61)

The Minnesota Supreme Court addressed the application of judicial immunity in the context of a communication made during the course of a judicial action in Matthis v. Kennedy, 67 N.W.2d 413 (Minn.1954). In that case, a defamation action for an alleged slander was instituted after a newly appointed guardian/defendant in a probate matter called the former guardian/plaintiff who claimed to be the common law wife of the incompetent, an adulteress during open court. Id. at 415. The District Court found that the defendant guardian was entitled to summary judgment on the grounds that he was absolutely privileged to speak the words in issue. Id. at 416.

The Supreme Court confirmed in Matthis that “[t]here is no difference of degree between the privilege of counsel and that of parties and witnesses for they are all phases of the same immunity.” Id. at 417. Further, the Court stated, “[t]he rule is that all counsel are absolutely privileged in respect of any statements, oral or written, made in judicial proceedings and pertinent thereto.” Id. Therefore, it follows that all witnesses are absolutely privileged in respect of any statements, oral or written, made in judicial proceedings and pertinent thereto.

The Matthis Court also confirmed that in determining whether matters spoken in the conduct of an action or contained in the pleadings are privileged, the test is

Does it have reference and relation to the subject matter of the action and is it connected therewith? In other words, does it have reference to or relation to or connection with the case before the court? If that relationship or connection exists, there is no liability for the utterance even if defamatory under the circumstances. Whenever the question of relevancy and pertinency of matters alleged in pleadings, or words uttered in the conduct of a judicial proceedings, is being inquired into, all doubt should be, under the prevailing rule, resolved in favor of relevancy and pertinency. And this is so not merely in the technical meaning of those words but in the broader approach which involves the inquiry in a judicial proceeding. The all-important question is: Does it have reference to and relation to the subject matter of the action? It seems clear from the texts and the authorities that the privilege embraces anything that may possibly be pertinent.

Id. at 418 (citations omitted).

The Court definitively found that the most important question to determining whether a communication is protected by judicial immunity is whether the statement has reference and relation to the subject matter of the action. Id. at 419. In adopting this test, the Court quoted Sacks v. Stecker, 60 F.2d 73, 75 (2nd Cir.):

By an almost unbroken line of authority in this country and England, a party who files a pleading or affidavit in a judicial proceeding has absolute immunity, though his statements are defamatory and malicious, if they relate to the subject of inquiry.

Id. In Elfstrom v. Knox, Unpublished, 2000 WL 53409, * 3 (Minn. Ct. App. 2000)

(attached hereto as A.65), the Court explained that:

* * * [C]ontroversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. * * * Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.

Id. citing and quoting Briscoe v. Lahue, 460 U.S. 325 at 333-35, 103 S.Ct. at 1114-15

(citations omitted).

Absolute immunity extends to "every proceeding of a judicial nature if the hearing is before a competent court or before a tribunal or officer clothed with judicial or even quasi-judicial powers." Woolley v. Panek, Unpublished, 2004 WL 1445244 *1, (Minn.Ct.App.2004) (attached hereto at A.69). The Court in Woolley also confirmed the applicability of immunity to witnesses and parties, and not simply to attorneys. Id.

The Court of Appeals described the broad application of the doctrine of judicial witness immunity stating that it "grants total immunity to participants in judicial proceeding[s] for false and defamatory statements regardless of the nature or intent of the speaker." Zagaros v. Erickson, 558 N.W.2d 516, 523 (Minn.App.1997) citing Johnson v. Dirkswager, 315 N.W.2d 215, 220 (Minn.1982). The policy behind the rules relating to judicial immunity and the broad application of the rules, is to specifically encourage full disclosure in court proceedings so the truth may be determined. Koelln v. Nexus Residential Treatment Facility, 494 N.W.2d 914, 920 (Minn.App.1993).

The broad application of this doctrine is clear in that judicial immunity has extended to protect trial testimony that has been determined to be perjurious. Thomas v. Hungerford, 23 F.3d 1450 (8th Cir.1994). The Courts have even insulated parties from liability when the Court found that they had made "arguably false statements" in an affidavit provided by a witness in state court. Thomason v. SCAN Volunteer Services, Inc., 85 F.3d 1365, 1373 (8th Cir.1996).

In Pinto v. Internationale Set, Inc., 650 F.Supp. 306 (D.Minn.1986) the Court confirmed that a "publication made in any judicial proceeding is absolutely privileged." Id. at 308. Moreover, the Court explained that the privileged nature of judicial

proceedings extends to steps taken before trial as well as statements that occur during the trial. Id. at 309. The Pinto case involved a letter written in anticipation of litigation by the defendant's attorney that sought to dissuade the plaintiffs from continuing with actions described as alleged unfair competition and conspiracy. Id. at 307, 309.

The Court concluded that the defendant was protected from plaintiffs' suit alleging intentional interference with contractual and business relations based upon the privilege of the letter. Id. at 309. In reaching that conclusion, the Court adopted the rationale of California courts, i.e. "the privilege applies to any type of injury resulting from publications within the protected proceeding...however labeled and whatever the theory of liability." Id. citing and quoting Rosenthal v. Irell & Manella, 135 Cal.App.3d 121, 185 Cal.Rptr. 92 (1982).

Finally, the importance of the judicial immunity doctrine cannot be cast aside in light of the clear objectives set out by the U.S. Supreme Court:

* * *The ability of courts, under carefully developed procedures, to separate truth from falsity, and the importance of accurately resolving factual disputes in criminal and civil cases are such that those involved in judicial proceedings should be given every encouragement to make a full disclosure of all pertinent information within their knowledge.

Briscoe, 460 U.S. at 333-35, 103 S.Ct. at 1114-15.

In the present case, Appellant Newgard was sued by M & H following her execution of an affidavit, which was subsequently offered into a lawsuit initiated by Stephanie Boldt. The affidavit of Newgard is protected by judicial immunity because the law is clear that any communications, oral or written, made in the due course of a judicial proceeding, including her affidavit, are protected from civil action.

The Matthis Court specifically found that an affidavit was protected by judicial immunity, among other communications. It is clear from the case law governing judicial immunity that the policy underpinnings relating to judicial immunity that aspire to allow the truth or falsity of a matter to be discovered, and to accurately resolve factual disputes, apply with full force to the matters at hand. Specifically, to penalize a party for offering an affidavit in the due course of a legal proceeding would be in direct contravention to controlling case law in Minnesota.

As outlined above, both the Minnesota Supreme Court, in cases such as Matthis v. Kennedy, and the Federal District Court and Federal Circuit Court of Appeals have definitively upheld the application of judicial immunity in analogous cases.

Newgard's affidavit qualifies for judicial immunity. There is no question that the affidavit was related to a dispute already placed into suit, i.e. the Stephanie Boldt lawsuit. There also is no question that the affidavit was legally relevant to that proceeding and that it had reference and relation to the subject matter of the action. Newgard, a former employee of PAC/PAL was solicited to provide an affidavit addressing the dispute in Boldt. Newgard is simply a witness to a case. The lawsuit initiated against Newgard is based solely on the tangential matter of her affidavit, offered in a different lawsuit, and should be precluded by a straightforward application of judicial immunity.

Finally, there is no merit to the argument that judicial immunity is applicable only in the case of defamation. The cases addressing judicial immunity have continually described a broad application of judicial immunity. Specifically, judicial immunity applies to material published in the due course of judicial proceeding. The fact that

judicial immunity has been extended to also cover material deemed or alleged to be defamatory does not provide a limitation on the doctrine such that only defamatory material published in the due course of a judicial proceeding is protected.

The doctrine has been broadly applied, and not limited to instances of defamation, therefore, its application to the present matter is clear and unambiguous. This is readily observed in Thomas v. Hungerford wherein the Court applied judicial immunity to claims against police officers pursuant to the Civil Rights Act. 23 F.3d 145 (8th Cir.1994). This is also confirmed by the clear language of the Court in Pinto stating, “the privilege applies to **any type of injury** resulting from publications within the proceeding...however labeled and **whatever the theory of liability.**” Pinto, 650 F.Supp at 309. The present cause of action against Newgard is precluded pursuant to the doctrine of judicial immunity.

CONCLUSION

The Trial Court erred in its decision to not apply judicial immunity to the affidavit of Newgard, thereby precluding the present lawsuit. The doctrine of judicial immunity unquestionably applies to the Newgard affidavit in that it was material published in the due course of a judicial proceeding. The Court should apply judicial immunity to the claims against Newgard which all arise out of the execution of her affidavit for use in the Boldt matter venued in Hennepin County.

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Dated: 09-01-05

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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).