

NO. A05-1523

State of Minnesota
In Supreme Court

Mahoney & Hagberg, A Professional Association, *et al.*,

Appellants-Plaintiffs,

v.

Tracy L. Newgard,

Respondent-Defendant.

APPELLANTS' BRIEF AND APPENDIX

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STATEMENT OF FACTS

Stephanie A. Boldt (“Boldt”) commenced an action against clients of the Appellants and Plaintiffs Mahoney & Hagberg, A Professional Association (“Mahoney & Hagberg, APA”), and Mahoney & Emerson, Ltd. (collectively, “Appellants”). (April 11, 2006 Decision of the Court of Appeals (“April 11, 2006 Decision”) at 3 (A3); Amended Complaint (A91)).¹ Among these clients were Professional Administration Corporation (“PAC”) and Professional Administration, LLC (“PAL”), who, at separate times, provided administrative support to the Appellants. (*Id* at 3-4). Boldt retained attorney Sean A. Shiff (“Shiff”) as counsel. (Complaint, ¶ 11 (A80)). In early September, Shiff contacted Tracy Newgard (“Newgard”), soliciting information regarding the Appellants and their clients. (Complaint at ¶ 14 (A80)). Shiff sought information from Newgard because she worked as a legal assistant at Mahoney & Hagberg, APA. (Complaint at ¶ 7 (A79)). Newgard based her entire affidavit on alleged conversations she had or overheard or tasks she was asked to perform while working in the law offices of Mahoney & Hagberg, APA as a legal assistant. (*see generally*, Affidavit of Tracy Newgard (A86-A90)).

In addition to information about the Appellants and their clients, Shiff requested that Newgard provide information regarding the “character” of one of Mahoney & Hagberg, APA’s attorneys, Michael C. Mahoney. (Complaint at ¶ 14(A80). Newgard provided the information to Shiff, who created an affidavit based upon it. (*Id.*). Newgard

¹ *Boldt v. Mahoney & Hagberg, et. al., Boldt v. Burns, et. al.* (Hennepin County File No.: 04-17027)(collectively “the Boldt actions”) and this action have been consolidated at the trial court level.

then edited some portions of the affidavit and signed it. (*Id.*). The Appellants had no knowledge that Shiff had contacted a former legal assistant and had no opportunity to object. (Complaint ¶14 (A80). Appellants became aware of the affidavit when Shiff filed it as an exhibit to a motion in the *Boldt* action, whereupon the Appellants moved to exclude the affidavit and filed this lawsuit.

Newgard moved to dismiss the Complaint under Rule 12.02, in relevant part based upon the theory that witness immunity precluded a lawsuit against her on the facts alleged. (Defendant's Memorandum of Law in Support of Her Motion for Dismissal and to Stay Discovery ("Newgard Memo") at 2 (A69)). The trial court denied the motion. (Order of the Trial Court (A37). Newgard appealed on the grounds of judicial immunity only. (*see generally*, Appellant's Brief and Appendix ("Newgard Appeal Memo")(A20-A36). The Court of Appeals reversed the trial court on the grounds that 1) judicial immunity should apply to all torts arising from all testimony given in a civil case and 2) the damage to the attorney client privilege is "ameliorated" by the trial court's discretion in sealing its files. (April 11, 2006 Decision at 8 (A8) and 10 (A10)).

This appeal followed.

ARGUMENT

INTRODUCTION

Appellants bring this appeal from a Minnesota Court of Appeals decision reversing the trial court and holding that witness immunity² precludes the Appellants' lawsuit against Defendant and Respondent Tracy Newgard ("Newgard"). Appellants argue that witness immunity does not apply in this case because: 1) witness immunity only applies to claims of defamation; 2) the statements in the affidavit are almost entirely irrelevant to the lawsuit in which it is filed; and 3) witness immunity cannot and should not excuse a breach of the attorney-client privilege.

The Respondent's theory presents an example of witness immunity gone awry, in which an affiant is permitted to reveal undisputedly confidential information, in a form unchecked by objection, and which is ultimately made a part of the public record. A rule that permits such disclosures would allow persons privy to confidential legal information (including attorneys) to reveal that information in affidavit form for the purpose of avoiding cross-examination or objection, and escaping from liability to their former clients.

² Throughout this dispute, both parties have erroneously referred to 'judicial immunity.' Judicial immunity "protects those who are appointed by the court to perform judicial or quasi-judicial functions." *Zagaros v. Erickson*, 558 N.W.2d 516 (Minn. App. 1997). Witness immunity, the immunity offered trial witnesses, has a distinct set of standards now somewhat muddled by inaccurate and interchangeable use of the witness and judicial immunity terms by courts and attorneys alike. For the purposes of this brief, the immunity asserted by Newgard will be called 'witness immunity.'

I. STANDARD OF REVIEW.

This is an appeal from a motion to dismiss. (Order of the Trial Court at 2 (A38)). When an appellate court reviews cases dismissed for failure to state a claim upon which relief can be granted, the only question before a reviewing court is “whether the complaint sets forth a legally sufficient claim for relief.” *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn.1997). Purely legal questions are reviewed *de novo*. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003); *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 219 (Minn. 1998).

Because this appeal involves a motion to dismiss, it by definition involves only law, and is properly reviewed *de novo*.

II. WITNESS IMMUNITY APPLIES ONLY TO DEFAMATION CASES.

The doctrine of witness immunity in Minnesota has only been applied to defamation cases. The United States Supreme Court made this standard clear in its historic application of witness immunity.

Some American decisions require a showing that the witness’ allegedly defamatory statements were relevant to the judicial proceeding, but once this threshold has been made, the witness has an absolute privilege.

Briscoe v. Lahue, 460 U.S. 325, 103 S. Ct. 1108, 1113 (1983).

Minnesota courts have similarly implied that defamation is the only claim for which witness immunity is properly granted.

In Minnesota, a Plaintiff cannot elude the absolute privilege by re-labeling 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 separate labels for the same tort”...).

Pinto v. Internationale Set, Inc., 650 F.Supp. 309, 309 (D. Minn. 1986)(applying Minnesota witness immunity standards).

Minnesota courts thus examine claims for witness immunity in “non-defamation” cases by examining the similarity of the claim to defamation. The pointed decision of the *Pinto* and *Freier* courts to examine the appropriateness of applying witness immunity through the lens of defamation rather than expanding the number and type of torts to which immunity applies reflects a conservatism in expanding the doctrine of witness immunity. In *Mathis v. Kennedy*, this Court stated:

The absolute privilege is confined within narrow limits, and the courts of this country as a rule have steadily refused to enlarge those limits...

243 Minn. 219, 224, 67 N.W.2d 413, 417 (1954).

Here, the Appellants have alleged a claim substantially different than defamation. Rather than alleging that the information presented by Newgard’s Affidavit harms the reputation or piece of mind of the Appellants, the allegation states that Newgard specifically violated the duty she had to her employer and its clients. The material difference between these duties and a cause of action for defamation is illustrated by the simple fact that an action for defamation requires the statements to be false. The law firm and its clients have a claim for breach of duty regardless of the truth of the statements. In other words, they have a right to secrecy. As argued in greater detail below, the distinction between the duties violated by Newgard and the offense of uttering defamatory statements greatly changes the balance of harms that led to the creation of witness immunity. By rotely applying witness immunity to any alleged tort based upon

any statement made in any judicial setting, the Court of Appeals risks upsetting the balance that past courts sought to implement by applying the principles of witness immunity. The Court of Appeals wrongly extended the application of witness immunity to all tort claims. The April 11, 2006 Order of the Court of Appeals should be reversed.

III. THE NEWGARD AFFIDAVIT OFFERS IRRELEVANT TESTIMONY.

The Newgard Affidavit presents testimony that bears no relation to claims or defenses in the action in which it is filed. A witness giving testimony in a judicial proceeding is only protected by witness immunity to the extent that the testimony “reference[s] and relat[es] to the subject matter of the action and it is connected therewith.” *Matthis v. Kennedy*, 243 Minn. 219, 225, 67 N.W.2d 413, 418 (1954); *see also Zagaros v. Erickson*, 558 N.W.2d 516 (Minn. App. 1997). Witness immunity does not apply to statements bearing no relation to the subject matter. *Id.* Since the *Matthis* decision, discovery rules have focused on whether information is relevant to “claims or defenses of any party.” Minn. R. Civ. P. 26.02.³

The Court of Appeals correctly recognized that for witness immunity to apply, it must first be established that the statements at issue must have some relation to or connection with a claim or defense in the case. (April 11, 2006 Decision at 6 (A6)(citing *Matthis*)). The Court of Appeals erred when it found facts other than those in Appellants’ Complaint. For purposes of reviewing this Rule 12 motion to dismiss, the Appellants’

³ “The Amendment to Rule 26.02 is simple but potentially quite important. This rule is amended to conform to Fed. R. Civ. P. 26(b)...the change in scope of discovery, to limit it to actual claims and defenses raised in the pleading, has worked quite well...” Advisory Committee Comment, 2006 Amendment, Minn. R. Civ. P. 26.02.

allegations (which include the irrelevance of Newgard's statements) must be taken as true. Furthermore, the Court of Appeals never examined the statements in the Newgard Affidavit or compared them with the claims in the case in which they are submitted. Before examining the statements in the affidavit, it is necessary to briefly examine the causes of action in *Boldt v. Burns, et. al.*⁴

A. THE CLAIMS IN *BOLDT V. BURNS*.

The Court of Appeals implicitly made the finding that the statements in the Newgard Affidavit were relevant to the claims in *Boldt v. Burns*. However, the Court's description of the claims and defenses in that case do not support its finding. The Court of Appeals described the *Boldt v. Burns* litigation as follows:

After PAC was inadvertently dissolved in 2000 for failure to register as a corporation, the same parties formed PAL, although they dispute the ownership interests in PAL.

April 11, 2006 Decision at 3 (A3).

Boldt alleges that she became an owner, and remained so after she left the employ of PAL. (Amended Complaint, *Boldt v. Burns, et. al.* ("Amended Complaint") at ¶¶17-22. Some time after Boldt left the employ of PAL, the Appellants received a large contingency fee from two companion cases. (Amended Complaint at ¶ 32 (A94)). Boldt initiated the action in which the Newgard affidavit appears to recover money which Boldt claims that Margaret Burns (part owner of PAC and PAL), PAC and PAL owe to Boldt. (April 11, 2006 Decision at 3 (A3)). The relevant issues in the case are Boldt's ownership

⁴ The relevance of the Newgard Affidavit should be examined only by its relevance at the time it was signed. The Newgard Affidavit was made and filed in the *Boldt v. Burns* matter, before Boldt commenced her action against Mahoney & Hagberg, APA.

of PAL (Amended Complaint at ¶¶ 18-19 (A93)) and whether or not a contract existed between PAL and the Appellants that would require the Appellants to pay a fixed portion of the fees to PAL. (Amended Complaint at ¶ 32 (A94)).

B. THE MAJORITY OF STATEMENTS IN THE NEWGARD AFFIDAVIT ARE IRRELEVANT TO CLAIMS AND DEFENSES IN *BOLDT V. BURNS*.

The vast majority of the statements provided by Newgard in her affidavit are not relevant to the claims or defenses presented in *Boldt v. Burns*. In order to qualify for witness immunity, the testimony must “reference and relate to the subject matter of the action and is it connected therewith.” *Mathis v. Kennedy*, 243 Minn. 219, 225, 67 N.W.2d 413, 418 (1954). Witness immunity does not apply to statements bearing no relation to the claims or defenses. *Id.*

Eight of the eleven paragraphs in the Newgard Affidavit are irrelevant.⁵ More specifically, paragraph 5 deals with Newgard’s dismissal from her employment; paragraph 6 relates to Newgard’s Complaint for unpaid wages; paragraph 7 establishes that Newgard was a legal assistant at Mahoney & Hagberg, APA; paragraph 9 of the affidavit details Newgard’s alleged conversations with a lawyer at Mahoney & Hagberg, APA regarding the formation of corporate entities; paragraph 10 describes an alleged transfer of debt between two law firm clients not parties in the *Boldt v. Burns* litigation; paragraph 11 describes the alleged mis-management of two law firm clients not

⁵ In its Order of June 20, 2006 granting review, the Court directed the parties to address whether, and to what extent the statements in Newgard’s Affidavit are relevant to the allegations in the *Boldt* case in which it was initially filed. Paragraphs 1 and 4 are foundational in nature and are therefore not relevant to the allegations in the *Boldt* case. Paragraphs 2, 3 and 8 are arguably relevant.

mentioned in the *Boldt* case. (Newgard Affidavit (A86-A90)). None of the preceding paragraphs bear any relationship to claims or defenses in *Boldt v. Burns*.

The Newgard Affidavit, in fact, reads more like an attack on the Appellants and their clients than Newgard's understanding of who owned PAL and what, if anything, PAL contracted for with the Appellants. As such, the irrelevant portions of the Newgard Affidavit are not protected by witness immunity. These irrelevant statements are thus a proper basis for a claim against Newgard for any cause of action.⁶ The April 11, 2006 Order of the Court of Appeals should be reversed because the Newgard Affidavit contains information entirely irrelevant to the case in which it is filed.

IV. THE NEWGARD AFFIDAVIT IMPERMISSIBLY ABRIDGES THE ATTORNEY CLIENT PRIVILEGE.

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).

⁶ The fact that the minority of Newgard's Affidavit is arguably relevant should not shield Newgard from liability for irrelevant statements. A holding that any relevant statement subjects all statements to witness immunity encourages witnesses and attorneys to engage in defamation or breach of confidences and avoid liability by including in the slanderous statements a single relevant statement.

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 18th 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. (emphasis supplied).

The duty of all employees of an attorney to protect the confidences is set forth in statute:

An attorney cannot, without the consent of the attorney's client, be examined as to any communication made by the client to the attorney or the attorney's advice given thereon in the course of professional duty; nor can any employee of the attorney be examined as to the communication or advice, without the client's consent.

Minn. Stat. § 595.02(b).

This statute charges law firm employees with the duty of preserving client confidences and indicates that Minnesota lawmakers understood that guarantees of procedural fairness depended not only upon a client's ability to converse freely with their attorney, but also to disclose the contents of those discussions to other members of the law

firm working on the client's behalf. The allegations in the Complaint in this matter clearly outline how Newgard and the Newgard Affidavit violated this duty. Newgard raises the defense of witness immunity and, with it, the fundamental concern of the courts for truth. However, in this case, the truth seeking purpose of the courts comes into conflict with another solemn principle; the procedural fairness guaranteed by the right of clients to converse freely with their counsel within the confines of a protected law firm.

While not precedential, the Minnesota Federal District Court's holding in *Arnold v. Cargill, Inc.*, 2004 WL 2203410 (D. Minn. 2004),⁷ is instructive and persuasive on the subject of balancing the interests of truth-seeking with the interests of procedural fairness. In *Arnold*, the Court was faced with a former employee ("Douglas") of Cargill who during his tenure worked with Cargill's in-house and outside representation, and who provided a party suing Cargill with confidential information and documents. *Id* at *1. As in the case at bar, Douglas was solicited by counsel opposing Cargill ("S&L") to aid in the case against his former employer. *Id* at *1-2. The District Court held that "[a]t least some of the information possessed by Douglas was privileged and/or confidential to Cargill." *Id* at 7. The Court held that S&L had a duty to inform Douglas that he could not disclose privileged communications. *Id*. It further held that "[t]here can be no question that S&L's discussions and exchanges of information with Douglas did impermissibly intrude upon privileged matters" and "[a]t a minimum, S&L's behavior recklessly disregarded the risks associated

⁷ In accordance with Minn. Stat. § 480A.08, the text of this case is provided in the appendix (A).

with playing fast and loose with the rules protecting against disclosure of privileged and confidential material.” *Id* at 9, 10.

Arnold does not deal directly with witness immunity. But its holding that the attorney-client privilege, and the pursuit of procedural fairness, trumps the interest of courts in finding the truth at all costs is instructive and helpful. In holding that courts have wide discretion to fashion relief in such instances, Judge Frank also makes a strong argument that evidence gained through breach of confidence has no place in a system that so values procedural fairness. The decision of the Court of Appeals in this case runs counter to the holding of *Arnold*, and suggests instead that our oldest privilege should be abandoned in favor of an improperly gained affidavit.

Affording those who breach the attorney-client privilege the shield of witness immunity in the context presented here sets a most ominous and chilling precedent. In a trial or deposition setting, opposing counsel may object to questions that might breach client confidentiality and instruct the witness not to answer. These checks may be adequate to guard against disclosure of privileged information, and thus justify cloaking a witness with immunity if they disclose confidential information at the instruction of a judge. In this case, however, there were no procedural safeguards.⁸ Holding that this method of disclosing client

⁸ The right to cross-examination is one of the most important procedural safeguards in our system. *Gutz v. Honeywell, Inc.* 399 N.W.2d 557 (Minn. 1987); *see also, Watkins v. Sowders*, 449 U.S. 341, 349; 101 S. Ct. 654, 659 (1981) (“Yet, under our adversary system of justice, cross-examination has always been considered a most effective way to ascertain truth”). She may never be called to stand to testify but yet her affidavit, uncontested and replete with breaches of confidence, is a matter of public record. In this case, sealing the record is of no consequence, the information has been disclosed and damage done.

confidences is acceptable and protected by the doctrine of witness immunity, a doctrine meant to aid the Court in seeking truth, harms both procedural fairness and truth-finding. Rather, it would allow attorneys and other law firm personnel to eviscerate the attorney-client privilege by voluntarily signing affidavits that detail matters confidential to the client. Surely whatever advantage is gained by the courts in seeking truth by allowing legal professionals to act in such a fashion is far overshadowed by the damage wrought upon clients and their feeling of security in speaking in confidence to an attorney that is so instrumental to proper representation and procedural fairness. The April 11, 2006 Decision of the Court of Appeals clearly errs with respect to this balance. As such, this Court should make clear for future legal practitioners and their clients that witness immunity shall work in harmony with, rather than undermine, other fundamental doctrines that ensure fairness and truth in our courts. The April 11, 2006 Decision of the Court of Appeals should be reversed.

This Court should adopt a rule making clear that witness immunity cannot be used as a defense when a defendant divulged information gained from a privileged relationship (for example, doctor-patient or lawyer-client) in a setting where there is no opportunity for judicial oversight or objections by counsel.

CONCLUSION

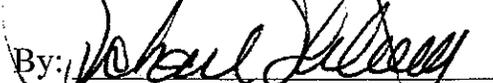
The April 11, 2006 Decision misstates current law and sets a dangerous precedent that threatens the efficacy of the attorney-client privilege. This Court should reverse, and hold that 1) witness immunity applies only to causes that sound in defamation; 2) witness immunity only applies to statements relevant to the claims and defenses found in the

pleadings; and, 3) that witness immunity does not apply to statements that reveal privileged information in uncontestable court filings.

Respectfully submitted,

Dated: July 20, 2006

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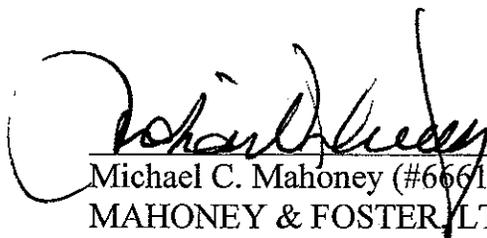
A05-1523

Tracy L. Newgard,

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional font. The length of this brief is 1379 words. This brief was prepared using Microsoft Word 2000.

Dated: July 20, 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).