

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' REPLY BRIEF

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INTRODUCTION

Respondent (“Newgard”) advances arguments based upon disingenuous interpretations of what is relevant in the *Boldt* litigation, an out-dated reading of *Briscoe v. LaHue* and a bevy of improper attacks on the procedural history of this litigation, some of which have not been raised before now. The Court should find in favor of Appellants.

ARGUMENT

I. STATEMENTS IN THE NEWGARD AFFIDAVIT ARE NOT RELATED TO THE ALLEGATIONS IN THE *BOLDT* LITIGATION.

Newgard tries to justify an argument for absolute privilege for statements in her affidavit that have no reasonable relationship to the allegations in the *Boldt Litigation*. (Reply at 23).

For example, Newgard argues that statements in her affidavit related to Newgard’s own claim against PAC and PAL for unpaid wages are foundational to her information pertaining to the *Boldt* litigation. (Reply at 25). Newgard’s claim for wages and her dispute with PAC and PAL is not alleged nor is it a claim made by Boldt, which Newgard tacitly admits by not claiming it is relevant to the subject matter. (*Id.*) That dispute is wholly unrelated.

Likewise, Newgard argues her affidavit describes her experiences with Michael C. Mahoney and “undesireable conduct.” (Reply at 26). The affidavit describes what Newgard says she learned in her capacity as a legal assistant in regards to plans and information about business planning of clients of M&H, which she described as trying to not pay so much in taxes. (Newgard Affidavit at ¶ 9 (A88)). This is a clearly privileged

communication, or at a minimum a client confidence. These clients are not connected in any way to the *Boldt Litigation* and no spin or rhetoric could justify a claim that their business plans are related to the allegations in *Boldt*.

Furthermore, Newgard argues that her attack on Gina L. Miller (“Miller”) regarding Shamrock Travel and Piney Ridge resort as well as statements by M&H client William J. Howard are related to the dispute that Miller was an owner of PAL. (Reply at 26). These arguments, too, are disingenuous. First, it is undisputed by Boldt that Miller was an owner of PAL. (Amended Complaint at ¶ 19 (A93)). Second, it is indisputable that Piney Ridge Lodge, a client of M&H, has no connection whatsoever to any allegation in *Boldt*. Newgard admits this by never arguing that Piney Ridge is tied in any way into the *Boldt* case. (Reply at 26). Third, Newgard’s statements about comments made by M&H client, William Howard, with regard to the management of Shamrock cannot possibly have any connection with the *Boldt* action. Shamrock Travel, another M&H client, is not mentioned or described in the *Boldt* case in any manner. Newgard tries to tie these together by saying that these statements relate to the dispute relative to Miller’s involvement in PAL and her ownership status. (Reply at 26). This is sheer sophistry. There is no connection whatsoever between Piney Ridge or Shamrock Travel and the *Boldt* case.

The mere fact that a few statements may possibly be relevant does not provide a basis for the Court to find that all statements in the Newgard affidavit are relevant, especially considering that the vast majority of the statements are irrelevant and breach the attorney-client privilege and violate duties of confidence.

II. NEWGARD'S PROCEDURAL ARGUMENTS ARE INSUFFICIENT.

A. Newgard May Not Claim Reliance On Attorney Shiff.

Newgard's argument that she relied upon attorney Sean A. Shiff is irrelevant. Newgard is trying to focus the Court's displeasure on Mr. Shiff. (Reply at 27). But Newgard is a legal assistant. She cannot claim that she did not understand the potential consequences of providing an affidavit full of information gained in that capacity. Further, Newgard does not provide any legal authority for her supposition that she is not responsible for her own conduct in violating her duty to maintain confidences of clients. The question of Newgard's reliance upon Mr. Shiff may give rise to a cause of action by Newgard against him; it does not relieve her of liability to Appellants.

M&H's decisions to dismiss Mr. Shiff as a defendant without prejudice is also unavailing as a defense. (Reply at 28).

B. A Motion to Quash Is Insufficient.

Newgard naively argues that a motion to quash should wipe the slate clean and all should be well. (Reply at 28). First, Newgard should have respected her duties; no extraordinary action on the part of Appellants should have been necessary. Second, the damage was caused by disclosure of the secrets and confidences in a public filing made without prior notice. It is not possible after the fact to put the genie back in the bottle-the damage was done.

C. M&H Need Not Establish Any Facts to Defeat a Motion to Dismiss.

Newgard also argues that M&H did not establish the facts to establish the attorney-client privilege. (Reply at 28). This defense is premature. The trial court found that the Complaint did state causes of action in denying Newgard's motion to dismiss. The issue that was raised in the appeal to the Court of Appeals was based on that decision and the issue of what evidence may be required to establish the claims beyond a Rule 12 motion is not before this Court.

D. M&H May Properly Bring This Claim.

Newgard also argues that M&H cannot assert claims for its clients for breaches of attorney client privilege. This too, is not an issue before this Court. Furthermore, M&H has asserted on its own behalf the violation of breaches of its confidences as well as those of its clients. Lawyers are recognized as being the protectors of their clients' rights and routinely assert privileges for and on behalf of the clients. It is expected and in fact ethically required.

III. *BRISCOE* AND ITS PROGENY PROVIDE SUPPORT FOR M&H'S CLAIMS.

Newgard cites cases that are unpublished and distinguishable, which the Court should not consider.¹ *See, Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796 (Minn. App.

¹ *Plack v. Stempel*, 2000 WL 890456, *2 (Minn.App.2000) unpublished (Reply at 12). *But see*, Judge Foley's dissent and his note that because the statements were outside the case there was no privilege and his recognition that this Court should revisit the doctrine of privilege and set out limitations. *Plack* at 5. *Milavetz, Gallop & Milavetz, P.A. v. Hill*, 1998 WL 422229, *3 (Minn.App.1998) unpublished (Reply at 12). *Elfstrom v. Knox*, 2000 WL 53409, *3 (Minn.App.2000) unpublished (Reply at 14). *Woolley v. Panek*, 2004 WL 1445244, *2 (Minn.App.2004) unpublished (Reply at 14).

1993)(unpublished opinions are not precedential). Furthermore, Newgard's reliance on *Briscoe v. LaHue*, 460 U.S. 325 (1983) is misplaced and misleading. (Reply at 15 *et seq.*) *Briscoe* has limited application and the courts have begun to retreat from the suggestion that any statement offered by a witness is entitled to immunity.

First, *Briscoe* holds that a police officer who appears and testifies in court is not subject to immunity for defamation or related claims under §1983 from such testimony. (*Id.* at 342). The Court did not ignore the fact that the defendants were police officers acting in their official capacity in testifying. (*Id.*) The *Briscoe* Court focused squarely on the fact that the officers were before a court when they gave their suspect testimony and the aspects of judicial supervision were considered by the Court. (*Id.*) Here, we have no actual live appearance before a court, a judge, an arbitration panel or any other person sitting in authority. Appellants had no opportunity to object to these disclosures. Rather, we have an *ex parte* affidavit from a partisan and biased former legal assistant whose rancor toward her former employer is apparent in her statements. There is no judicial oversight. There is no risk of taking the stand and being cross examined. None of the public policy reasons are present to justify a privilege, even a qualified one. No justification can be offered to suggest that in balancing the competing privileges of confidences and secrets of clients that the cowardly act of signing a secret and private affidavit can outweigh the destruction of the oldest of our common law privileges, *i.e.*, the attorney-client privilege.

Since *Briscoe*, numerous courts have cut-back and more narrowly defined the meaning and intent of the Court to require and provide that the privilege is only available when actually testifying and acts prior to the judicial process are not absolutely privileged. Furthermore, the courts will look to the capacity in which the person offered testimony, *e.g.*, in office or as complaining witness. *See, Jean v. Collins*, 107 F.3d 1111, 1117 -1118 (4th Cir. 1997); *State ex rel. Oklahoma Bar Ass'n v. Dobbs*, 94 P.3d 31, 47 (Okla.2004); *Limone v. U.S.*, 271 F.Supp.2d 345, 367 (D.Mass.2003); *Vakilian v. Shaw*, 335 F.3d 509, 516 (6th Cir. 2003); *Keko v. Hingle*, 318 F.3d 639, 642 (5th Cir. 2003); *Politi v. Tyler*, 170 Vt. 428, 434, 751 A.2d 788, 793 (Vt.2000); *Wynn v. Earin*, 131 Wash.App. 28, 39-40, 125 P.3d 236,242 (Wash.App. Div. 3, 2005).

Absolute immunity is a “blunt instrument” that should be wielded only in defense of a compelling public interest. *See, Wynn, supra*. The public policy justification here is completely lacking or certainly less compelling when compared with the preservation of confidences and secrets. As the Court in *Wynn* stated, “Consultations with confidential advisors should not require a warning that anything disclosed will be available to potential litigation adversaries and may be used against the client in court.” (*Id.* at 39-40, 242).

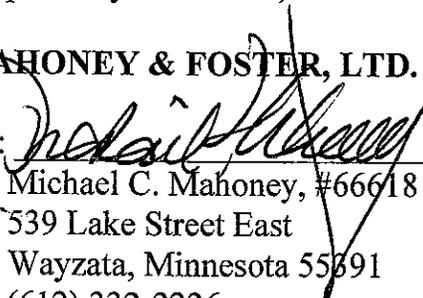
CONCLUSION

The Court should reverse the Court of Appeals and hold that absolute immunity only presumptively bars claims for defamation claims for witnesses who appear before a court, tribunal or officer and give testimony subject to judicial oversight and that claims for breach of confidence, invasion of privacy and civil conspiracy are not barred in this

case where counsel secured an *ex parte* affidavit that clearly raised questions of confidences and privileges.

Respectfully Submitted,

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Dated: August 28, 2006

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STATE OF MINNESOTA
IN SUPREME COURT

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A Professional Association, and
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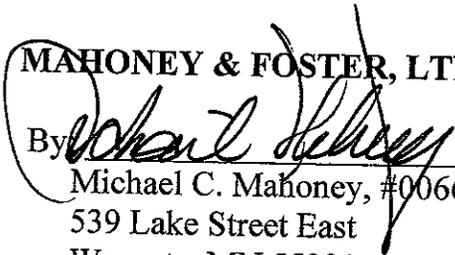
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**CERTIFICATE OF
BRIEF LENGTH**

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 1,637 words, and the font size is 13 point. This brief was prepared using Microsoft Word 2002 software.

Dated: August 28, 2006

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