

CASE NO. A05-1523

STATE OF MINNESOTA
IN SUPREME COURT

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

Appellants-Plaintiffs,

vs.

Tracy L. Newgard,

Respondent-Defendant.

RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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STATEMENT OF ISSUE

- I. Whether Respondent 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.

Answer: The record establishes that Newgard's affidavit was material published in the due course of a judicial proceeding, the Boldt Litigation. Newgard is immune from suit and the Court of Appeals' decision should be affirmed.

Apposite authority:

Sloper v. Dodge, 426 N.W.2d 478 (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)

- II. Newgard's affidavit was provided at the express request of Attorney Sean Schiff to address the allegations in the Boldt Litigation, and was related and pertinent to the Boldt claims.

Answer: The record establishes that Newgard's affidavit was drafted at the request of Boldt's attorney Sean Schiff, and that Newgard was given the choice to either provide an affidavit or be deposed on the very same information. The affidavit was not offered into the litigation by Newgard, but rather, by an attorney representing a party in the Boldt Litigation, bound by rules of court and conduct to present information to the court for a proper purpose. The Court of Appeals determination that the affidavit was related to the issue in the Boldt case should be affirmed.

Apposite authority:

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

STATEMENT OF THE CASE

Appellants Mahoney & Hagberg, A Professional Association, n/k/a Mahoney & Emerson, a Professional Association and Mahoney & Emerson, Ld. ("M & H"), sued Respondent Tracy Newgard in October 2004 in connection with an affidavit she executed at the request of Attorney Sean Shiff, counsel for Stephanie Boldt in the Boldt lawsuit, a separate pending lawsuit venued in Hennepin County District Court. Newgard was formerly employed by M & H, and no claims were asserted against her until she completed the affidavit at issue in this case. Attorney Shiff was initially named as a Defendant in the pending matter, but M & H voluntarily dismissed Shiff on February 11, 2005.

In response to the M & H Complaint, Newgard brought a 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. The Order implicitly rejected the application of judicial immunity to the Newgard affidavit.

An appeal to the Minnesota Court of Appeals was filed thereafter by Newgard. On April 11, 2006 the Court of Appeals issued its decision reversing

the Trial Court's decision that no judicial immunity applied to the Newgard affidavit. The Court of Appeals determined in relevant part as follows:

Where a witness makes statements in an affidavit relevant to the issues in a judicial proceeding, the witness is not subject to tort liability for breach of confidences, invasion of privacy, or civil conspiracy, and is absolutely immune from suit for such claims under the doctrine of judicial immunity.

M & H filed a Petition for Review with the Minnesota Supreme Court dated May 11, 2006. The Minnesota Supreme Court accepted review of this matter by Order dated June 20, 2006.

STATEMENT OF FACTS

Professional Administration, LCC (“PAL”), employed Respondent Tracy Newgard as a legal assistant from June 1999 through February 2003. A.86. PAL provided the former law firm of Mahoney & Hagberg, P.A. (“M & H”) with administrative staff. A.92. 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. 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. A.91-A.95. In connection with these claims, Boldt retained Attorney Sean Shiff and initiated litigation (“Boldt Litigation”) against Burns, as well as PAL, M & H, and Attorney Michael Mahoney, formerly a partner in M & H. A.91-A.99.

Attorney Schiff obtained an affidavit from Newgard dated September 10, 2004 for use in the Boldt Litigation. A.86-A.90. The Newgard affidavit was introduced in the Boldt Litigation by Attorney Shiff and thereafter, M & H initiated this lawsuit by Complaint which alleged that the Newgard affidavit contained false statements based upon information Newgard learned as part of confidential communications at M& H. A.78-A.80.

M & H also alleged in its Complaint that Attorney Shiff was repeatedly advised by legal counsel that the information he wanted to introduce in the Boldt Litigation, was privileged and confidential; that Shiff improperly contacted Newgard and persuaded her to provide the information; and that Shiff did so in an attempt to harm M & H. A.80. M & H alleged that Shiff knew or should have known that his actions violated the Minnesota rules of Professional Conduct, including rules 4.2 and 4.4. A. 81. M & H asserted two separate counts against Shiff in its Complaint, including civil conspiracy, and aiding and abetting breaches and violations. M & H voluntarily dismissed Shiff from this lawsuit on February 11, 2005. R.A. 1.

According to the M & H Complaint, the Newgard statements included: 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. Id.

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.40. There is no dispute that Newgard provided the affidavit at issue in connection with pending litigation however, a closer look at the affidavit

establishes that Newgard did not identify any client by name, or other identifying information. A. 86-A.90. In paragraph nine of the Affidavit, the description includes a non-specific reference to “another case” being handled by Mahoney. A. 88. That description does not contain any specifically identified client. Id. The only specific parties identified by Newgard, aside from the PAC/PAL owners (which included Stephanie Boldt, Molly Burns, and Gina Miller); and Attorneys Steve Hagberg, Michael Mahoney, and Julianne Emerson; were the part owners of Shamrock Travel Agency and Piney Ridge Resort, Jan and Bill Howard. A. 89. The Howard’s were not identified as clients of M & H as Shamrock and Piney Ridge are identified by Newgard as separate and distinct, non-law firm entities staffed by PAC/PAL. A. 87-A.88.

The Court of Appeals reviewed the Newgard affidavit, and the applicable law and determined in relevant part as follows:

Where a witness makes statements in an affidavit relevant to the issues in a judicial proceeding, the witness is not subject to tort liability for breach of confidences, invasion of privacy, or civil conspiracy, and is absolutely immune from suit for such claims under the doctrine of judicial immunity.

A.1-A.2.

M & H filed a Petition for Review with the Minnesota Supreme Court dated May 11, 2006. R.A. 1- R.A. 7. Newgard submitted an opposition to the Petition for Review dated June 1, 2006. R.A.9- R.A. 14. The Minnesota Supreme Court accepted review of this matter by Order dated June 20, 2006. R.A. 15 -R.A. 16. The Court specifically requested that the parties brief whether, and to what

extent, the statements in respondent's affidavit are related to the allegations in the Boldt Litigation in which it was initially filed.

ARGUMENT

A. Standard of Review

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); Schroder v. St. Louis County, 708 N.W.2d 497, 503 (Minn. 2006).

B. Respondent Newgard is shielded from suit by judicial immunity, because as the Court of Appeals correctly determined, her September 2004 affidavit contained statements relevant to the Boldt Litigation, and therefore she was not subject to tort liability for breach of confidences, invasion of privacy or civil conspiracy.

Judicial immunity is intended to protect the judicial process in Minnesota and therefore extends to participants who are integral in parts of that process including counsel and 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 R.A. 17- R.A. 20); Milavetz, Gallop & Milavetz, P.A. v. Hill,

Unpublished Opinion, 1998 WL 422229 (Minn. Ct. App. 1998) (attached at R.A.21 – R.A. 25)

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 R.A. 26 – R.A. 29), 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 R.A.30 – R.A. 32). 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, Respondent 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 and public policy 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 Boldt Litigation. 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.

Although historically, most claims of judicial immunity in Minnesota involve underlying claims for defamation, the doctrine has been broadly applied, and not limited to those claims labeled as defamation. Jenson v. Olson, 141 N.W.2d 488 (Minn. 1966). Minnesota Courts have definitively stated that the judicial immunity "rule is not to be "scuttled" by pleadings which allege that the

wrongful acts resulted from a conspiracy” rather than from defamation. *Id.* at 490-91; and Zagaros v. Erickson, 558 N.W.2d 516, 523 (Minn.App.1997) review denied (Minn. Apr.17, 1997).

In Zagaros, the Court determined that a cause of action for negligent testimony and defamation are intertwined to the extent that it would be unfair, and probably impossible for a jury to distinguish between the two claims. *Id.* 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 (emphasis added).

Notably, even though Minnesota has not yet applied judicial immunity in the context of other tort claims stemming from their communications, other jurisdictions have considered it, and applied judicial immunity to a range of tortious acts including perjury, intentional infliction of emotional distress, and in some jurisdictions, it applies to all torts. See e.g. Darragh v. Super.Ct., 900 P.2d 1215, 1217-18 (Ariz.Ct.App.1995) (judicial immunity applied against RICO claims for perjured testimony and other claims related to witness trial and deposition testimony); Silberg v. Anderson, 786 P.2d 365, 371 (Ca.1990) (in accordance with California civil code, communications made in judicial proceedings subject to immunity from all torts); Kelley v. Bonney, 606 A.2d 693, 705 n. 15 (Conn. 1992)

(where other tort claims founded upon same conduct as defamation claims, absolute privilege bars recovery on both types of claims); Levin, Middlebrooks, Mabie Thomas, Mayes & Mitchell, P.A. v. U.S. Fire Ins. Co., 639 So.2d 606, 608 (Fla.1994) (judicial immunity applied to “any act occurring during the course of a judicial proceeding, regardless of whether the act involves a defamatory statement or other tortious behavior”); Bird v. W.C.W., 868 S.W.2d 767, 771-72 (Tex.1994) (privilege extended beyond defamation to cover negligent misdiagnosis claim where essence of claim was that witness’ communications in judicial proceeding caused damages); Price v. Armour, 949 P.2d 1251, 1258 (Utah 1997) (privilege extended to claims of libel and intentional interference with business relations).

Appellant asserts that Minnesota courts have somehow implied that defamation is the only claim for which witness immunity is properly granted, and in support of that assertion cites Pinto v. Internationale Set, Inc., 650 F.Supp. 306, (D.Minn. 1986). This assertion is misguided, as the text in Pinto clearly indicates that a claim sounding in defamation cannot avoid the application of immunity simply by being re-labeled. Id. at 309. The Minnesota Court of Appeals echoed this rule in Zagaros by maintaining that judicial immunity cannot be “scuttled” by the re-labeling of a defamation claim. Zagaros, 558 N.W.2d at 523.

Appellant asserts that the Matthis v. Kennedy case prevents the Court from applying judicial immunity in the present case because the application would

amount to an impermissible expansion of the judicial immunity doctrine. See Appellant's Brief at 5. A review of Matthis highlights the inaccuracy of this assertion. In Matthis the Court noted that the absolute privilege of judicial immunity applies to cases "in which the public service or administration of justice requires complete immunity from being called to account for language used." Id. at 417. The limits of communications considered to be privileged by immunity were specifically described in Matthis as well, "[a]ny publication made, whether oral or in writing, must be made 'in office' in the character of judge, juror, witness, litigant, or counsel-in the performance of the public duty or in the exercise of the private right upon which the immunity is based." Id. at 417-418.

The Appellants argue that in the present case, they have alleged a claim "substantially different than defamation." See Appellant's Brief at 5. This assertion is dubious at best in light of Appellant's Complaint which alleges that the Newgard affidavit placed M & H in a "false and **defaming** position." A. 82. (emphasis added). There is no substantive difference between asserting a claim for defamation, and labeling a claim in a different cause of action based upon communication that is purportedly false and defaming.

The Appellant's Complaint asserts claims for breach of confidences, invasion of privacy, and civil conspiracy. All three of those claims arise out of the affidavit of Respondent Newgard, the privileged communication. With respect to the invasion of privacy claim, M & H allege that Newgard's sharing of confidential

information “placed it in a false and defaming position in the public.” The invasion of privacy claim is in essence a defamation claim. The civil conspiracy claim and the breach of confidences claim also solely arise from the affidavit of Newgard containing purportedly defamatory statements. Appellants may not avoid the application of judicial immunity by re-labeling defamation claims to avoid the application of judicial immunity.

The Newgard affidavit was offered in the context of a judicial proceeding and is related and pertinent to that proceeding. All requisite criteria exist for the doctrine of judicial immunity to apply.

C. The Newgard affidavit is related and pertinent to the Boldt Litigation. The statements in the Newgard affidavit were provided at the request of Attorney Shiff specifically to support the claims in the Boldt Litigation.

1. Newgard affidavit qualifies for immunity because it is related and pertinent to the Boldt Litigation.

The test to determine whether a statement is related to the subject matter of the action it is connected with is delineated in the Matthis case. Matthis, 67 N.W.2d at 418 (Minn.1954). The Matthis Court provided the following guidance for this analysis:

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). It is instructive to note that the standard as delineated in Matthis is broad, requiring any doubt to be resolved in favor of relevancy and pertinency. Id. Probably most notably, the Matthis Court concluded that the immunity privilege applies to **anything that may possibly be pertinent**. Id. (emphasis added).

With that framework in mind, it is apparent that the statements in the Newgard affidavit are directly pertinent and related to the Boldt Litigation. The Boldt Amended Complaint provides a detailed background relative to the relationship between PAC and M & H, including the payment of a management fee to PAC pursuant to an Office Support Services Agreement ("OSSA"). A.92.

The Amended Complaint outlines the relationship between Boldt, and her father, M & H partner Steven Hagberg, Esq.; as well as the relationship between Burns, and her father, M & H partner Michael Mahoney, Esq. Id. The Amended Complaint outlines the details surrounding the formation of PAC, the details of the employment relationship between PAC staff, and M & H. Id. The Amended Complaint details the dissolution of PAC and the formation of PAL. A.93. The Amended Complaint describes M & H's involvement in the drafting of corporate

records, and the relationship of Burns, Boldt and Gina Miller in PAL and describes the details of the inner workings of PAL. Id. The Amended Complaint sets out the dispute over the \$9,000,000 verdict rendered in favor of M & H's clients in Johnson v. the City of Minneapolis and Siegel v. The City of Minneapolis. A.94.

Notably, the Amended Complaint alleges that Mahoney aided Burns and Miller in their attempt to "squeeze" Boldt from PAC and PAL. A.94. In connection with that allegation, Boldt alleges that Mahoney aided in the preparation of revised corporate records for PAL purporting to exclude Boldt as an owner of Pal, and transferring 100% of PAL to Burns and Miller. A.94-A.95. Boldt asserts numerous allegations against Burns outlining that Burns falsely stated that Boldt had abandoned PAC; that Burns had pretended to act on behalf of PAC and threatened to cancel Boldt's shares of stocks in PAC; and that Burns had instituted a weekly meeting on behalf of PAC, but unilaterally cancelled the meeting with no notice to Boldt, among other allegations. A. 95.

The Amended Complaint asserts that Burns' wrongful conduct as outlined by Boldt, was at the direction of or in concert with Mahoney. A. 95. More importantly, the Amended Complaint alleges that Mahoney "has a history of engaging in unlawful and unethical conduct that is similar to the conduct complained of [in the Amended Complaint]." Id.

Boldt asserted nine separate counts in her Amended Complaint which included:

1. Declaratory Relief
2. Breach of Contract
3. Breach of Fiduciary Duty
4. Promissory Estoppel
5. Equitable Relief under Minn. Stat. § 302A.751 (PAC)
6. Equitable Relief under Minn. Stat. § 302A.751 (PAL)
7. Unjust Enrichment
8. Accounting (PAC)
9. Accounting (PAL)

A.95 – A.99.

In light of the assertions in the Complaint, it is apparent that the statements set out in the Newgard affidavit are closely related to the Boldt Litigation. The statements meet the threshold requirement to be “possibly pertinent.” The Newgard affidavit sets out the fact that Newgard was a former employee of PAC/PAL from June 1999 to February 2003; sets out her understanding of the ownership of PAC; and sets out her understanding of the change from PAC to PAL. A. 86 ¶¶ 1-4. These statements directly relate to the dispute over ownership of PAC/PAL and the surrounding details.

The Newgard affidavit describes the circumstances of her employment with PAL; she describes her dispute over unpaid wages; and she describes the tasks she was assigned while working with PAC/PAL, along with who she worked with specifically at M & H. A. 87 ¶¶ 5-7. These statements directly relate to the foundation of Newgard’s information pertaining to the dispute in the Boldt Litigation.

The Newgard affidavit described Newgard’s understanding of the agreement between M & H and PAC/PAL relative to payment of funds received

by the law firm. A.88 ¶8. This statement directly relates to the dispute in Boldt over monies owed to Boldt as an owner of PAC and whether she was entitled to monies as an owner of PAL.

Paragraph nine of the Newgard affidavit describes her experience and observation of Mahoney, and undesirable conduct. A. 88 ¶ 9. The described conduct directly relates to the allegations in the Amended Complaint asserting both that the conduct of Burns was wrongful and at the direction of Mahoney; and that Mahoney has a history of unlawful and unethical conduct. A.95.

Paragraphs ten and eleven of the Newgard affidavit set out information relative to Miller. A.89 ¶¶ 10-11. Specifically, the assertion that Mahoney had advised Miller to transfer some personal debt to Shamrock Travel Agency; that two of the part-owners of Shamrock were displeased with the way Shamrock and Piney Ridge resort were managed; and that they had no knowledge that Miller was managing those entities. Id. These statements relate directly to the dispute asserted by Boldt relative to Miller's involvement in PAL, and her ownership status in PAL. A.95.

The Newgard affidavit contains eleven paragraphs, each that provide relevant and related information to the Boldt Litigation. Pursuant to Matthis, a statement need only be "somewhat pertinent" to meet the threshold requirements for judicial immunity. Without question the statements contained in the Newgard affidavit are related and pertinent to the Boldt Litigation as described.

2. Newgard could justifiably rely on Attorney Sean Shiff who requested the Affidavit, because Shiff was bound by the both rules of court and conduct to present documents that were both pertinent and presented for a proper purpose.

Newgard provided the affidavit at issue to Attorney Sean Shiff at his request. Newgard was told that if she did not provide an affidavit, she would be subpoenaed to testify on that same information. Attorney Shiff, a licensed attorney, is an Officer of the Court, and bound by Rule 11.02 of the Minnesota Rules of Civil Procedure, that requires Shiff to certify that information submitted to the Court is not being presented for any improper purpose. Further, Minn.R.Civ.P. 11.02, subd. (c) requires that an attorney filing a document certifies that the allegations or factual contentions have evidentiary support, or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Additionally, Attorney Shiff is bound by Minn.R.Prof. Conduct 3.1 which provides in relevant part:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous which includes a good faith argument for an extension, modification, or reversal of existing law.

It is within this framework that Attorney Shiff initiated the lawsuit in the Boldt Litigation. A.91-A.99. Also with these restrictions in mind, Shiff solicited and obtained the Newgard affidavit. The Newgard affidavit contains statements that relate directly to the allegations in the Boldt Litigation. In fact, Attorney Shiff

was a named Defendant in the present matter, with one count for civil conspiracy and the second for aiding and abetting breaches and violations.

Appellant's M & H voluntarily dismissed Attorney Shiff from this matter in February 2005. R.A. 1. The claims against Newgard persist, in all likelihood to intimidate and ultimately silence an instrumental witness in the Boldt Litigation. It is apparent that Newgard reasonably relied on Attorney Shiff in providing an affidavit. It was reasonable for her to rely on Shiff's expertise as an attorney, and his obligations to comply with controlling rules of court and conduct when she supplied the affidavit.

M & H argues that the Newgard affidavit "abridges the attorney client privilege." See Appellant's Brief at 9. Yet, Appellant does not explain why it is that a motion to quash the affidavit made to the trial court in the Boldt Litigation would not have sufficed to vindicate that privilege.

A cursory review of the Appellant's argument set out on pages 9-12 of their Brief does not provide any insight into how Newgard violated the attorney client privilege. In order to establish that information is protected attorney client privilege, M & H must establish both a professional attorney-client relationship between an attorney and client, and a confidential communication seeking or providing legal advice made pursuant to the relationship. Minn. Stat. § 595.02, subd. 1 (b).

A party who claims a privilege has a burden to present facts establishing the privilege. State v. Anderson, 78 N.W.2d 320 (Minn. 1956). Finally, because

Minnesota's attorney-client privilege operates to exclude potentially truthful evidence, it must be narrowly construed. Kobluk v. University of Minnesota, 574 N.W.2d 436 (Minn. 1998).

M & H asserts that the attorney-client privilege applies, but does not establish facts to show that it applies in the present case. M & H has not provided the Court with sufficient information to establish that the attorney-client privilege has any bearing on the present case.

The privilege must be construed narrowly, and should not be applied in the present case when there is no factual basis to conclude that the attorney-client privilege is implicated in any fashion. More to the point, if any purported confidences were actionable, they would not be actionable by M & H, but rather by a client. No such claim has been raised by a client in the present matter, and the Court has another basis upon which to determine no violation of the attorney-client privilege exists in the present case.

CONCLUSION

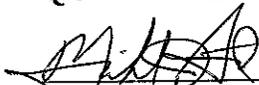
The Court of Appeals correctly determined that any claims against Newgard arising out of her Affidavit in the Boldt Litigation were barred by the doctrine of judicial immunity.

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 and the material was expressly related and pertinent to the judicial proceeding.

The doctrine of attorney-client privilege is not implicated in the present matter as no clients have raised a violation of this privilege in any pending legal matters, and the essential elements of the attorney-client privilege have not been asserted or established.

The Court should uphold the application of judicial immunity to the claims against Newgard which all arise out of the execution of her affidavit for use in the Boldt Litigation.

Dated: 08-16-06

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CASE NO. A05-1523

STATE OF MINNESOTA
IN SUPREME COURT

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

Appellants-Plaintiffs,

vs.

Tracy L. Newgard,

Respondent-Defendant.

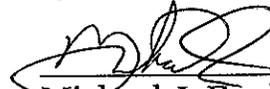
CERTIFICATION OF BRIEF LENGTH

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 5,706 words. This brief was prepared using Microsoft Word 2000.

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Dated: 08-16-06

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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).