Taylor v. McNichols: Expanding the Litigation Privilege

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The litigation privilege is a common law doctrine that states that judges, attorneys, parties and witnesses are immune from civil suits for defamation occurring in the course of judicial proceedings.

The Idaho Supreme Court has recently expanded the litigation privilege which protects attorneys from being sued by current or former adversaries of their clients. The Court has ruled that the litigation privilege protects not only statements which occur during the course of litigation, but conduct as well.

The litigation privilege is a common law doctrine that states that judges, attorneys, parties and witnesses are immune from civil suits for defamation occurring in the course of judicial proceedings.[1] The privilege has deep roots in the common law which date back to medieval England.[2] As adopted by American courts, the litigation privilege has usually applied where communications were pertinent and material to the case.[3]

Typically, the litigation privilege has been used by attorneys to shield themselves from defamation suits arising from comments, questions, or statements made in the course of judicial proceedings. However, more recently, courts have expanded the privilege to include causes of action other than defamation, including negligence, breach of confidentiality, abuse of process, intentional infliction of emotional distress, negligent infliction of emotional distress, invasion of privacy, civil conspiracy, interference with contractual or advantageous business relations and even fraud.[4]


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Taylor v. McNichols

In the recent decision of *Taylor v. McNichols,*[5] the Idaho Supreme Court reviewed the litigation privilege and expanded the scope of its protection to include actions beyond defamation and libel. In *Taylor*, the plaintiff, Reed Taylor, sued two corporations which he had been managing. He also sued his fellow board members of those corporations. Taylor claimed that he was a creditor of the corporations and that the corporations owed him $6 million.[6]

After nearly two years of litigation, Taylor filed a second lawsuit against the attorneys representing the defendants from his first suit. Taylor sued both the attorneys and their respective law firms claiming that the defendant attorneys: (1) aided and abetted in the commission of tortious acts in the underlying case; (2) converted and misappropriated assets of the defendant corporations; (3) violated the Idaho consumer protection act; and (4) committed professional negligence and or breach of fiduciary duties.[7]

The District Court subsequently granted the defendant attorneys' motion to dismiss. Taylor appealed to the Idaho Supreme Court, which affirmed the dismissal of all claims against the attorney respondents.

The Idaho litigation privilege

In a unanimous decision[8] the Idaho Supreme Court first reviewed the litigation privilege across various jurisdictions. The Court quoted with approval from the Texas Court of Appeals which held that "an attorney's conduct, even if frivolous or without merit, is not independently actionable if the conduct is part of the discharge of the lawyer's duties in representing his or her client."[9] The Court further quoted from the Supreme Court of West Virginia which considered the policy considerations behind the litigation privilege including:

> (1) promoting the candid, objective and undistorted disclosure of evidence; (2) placing the burden of testing the evidence upon the litigants during trial; (3) avoiding the chilling effect resulting from the threat of subsequent litigation; (4) reinforcing the finality of judgments; (5) limiting collateral attacks upon judgments; (6) promoting zealous advocacy; (7) discouraging abusive litigation practices; and (8) encouraging settlement.[10]

The Court went on to note that several jurisdictions have found no difference between communications and conduct. The Idaho Supreme Court therefore held that the litigation privilege should extend "to protect attorneys against civil actions which arise as a result of their conduct or communications in the representation of a client, related to a judicial proceeding."[11]

Exceptions to the privilege

The Idaho Supreme Court noted that there are exceptions to the rule. An attorney is not immune from all suits brought by opponents of their clients in a current or former lawsuit.[12] The Idaho Supreme Court noted that the litigation privilege would not apply in instances where the claimant alleges malicious prosecution, fraud, or tortious interference with a third-party's interests "out of a personal desire to harm."[13]

The Court noted that the litigation privilege applies so long as the attorney is acting within the scope of his employment, and not solely for his personal interests.[14] To surmount the privilege a plaintiff would need to plead facts "sufficient to show that the attorney has engaged in independent acts, that is to say acts outside the scope of his representation of his client's interests, or has acted solely for his own interests and not his client's."[15]

Timing

In *Taylor*, the Idaho Supreme Court also addressed the timing issue in regard to a lawsuit against opposing counsel. The *Taylor* Court noted that the suit against the respondent attorneys had been initiated even before the underlying action had been resolved or decided.[16] The Court looked at timelines for filing actions related to legal malpractice and malicious prosecution and noted that neither can be brought until the underlying case is concluded and damages are incurred.[17] The *Taylor* Court found that in addition to being barred by the litigation privilege, the claims made against the defendant attorneys were not ripe for litigation as the underlying case had not been finished prior to the filing of the claims against the attorneys.[18] The

Idaho Supreme Court therefore held that a cause of action against a party opponent's attorney may not be brought prior to the conclusion of the underlying litigation.[19]

Expanded privilege and professional conduct

The *Taylor* decision buttresses the ethical responsibilities of an Idaho lawyer. A lawyer is required to zealously advocate on behalf of his client.[20] A lawyer should not be worried about being sued for the motions she files, the allegations she makes, or the questions she asks in a deposition or at trial.

A lawyer should also not have to second guess the actions he takes on behalf of a client wondering whether he will be sued in tort by the adverse party. A lawyer who assists a client to break a contract, to dissolve a legal relationship, or avoid a contractual relationship, should not be liable where the actions are not wrongful and advance the client's objectives.[21] The *Taylor* decision secures a lawyer's professional responsibility to "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."[22]

The expanded litigation privilege protects lawyers and ensures that they can carry out their ethical responsibilities on behalf of their clients without fear of retaliatory lawsuits.

About the Author

Lance J. Schuster *is a shareholder at Beard St. Clair Gaffney PA and is the firm's litigation team leader. He graduated with his B.A. and M.A. from Brigham Young University and his J.D. from the University of Idaho (1996). His practice focuses on real estate and construction litigation.*

Endnotes

[1] *Carpenter v. Grimes Pass Placer Mining Co.,* 19 Idaho 384, 114 P. 42 (1911).

[2] *E.g.*, *Cutler v. Dixon*, 76 Eng. Rep. 886, 887-88 (K.B.1585) (holding that allowing action for words spoken in "course of justice" would hinder litigation for "those who have just cause for complaint"); *Buckley v. Wood*, 76 Eng. Rep. 888, 889 (K.B.1591) (finding that "no action lies" for defamation even if words were false when spoken in "course of justice"); *Hodgson v. Scarlett*, 171 Eng. Rep. 362, 363 (C.P.1817) ("It is necessary to the due administration of justice; that counsel should be protected in the execution of their duty in Court; and that observations made in the due discharge of that duty should not be deemed actionable.").

[3] *Carpenter*, 19 Idaho 384, 114 P. 42.

[4] T. Leigh Anenson, *Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers*, 31 Pepp. L. Rev. 915, 927-928 (2004).

[5] No. 36130, No. 36131, 2010 Ida. LEXIS 161 (Idaho Sept. 3, 2010).

[6] *Id.* at *3.

[7] *Taylor*, 2010 Ida. LEXIS 161 at *4.

[8] Justice Hosack, Pro tem, wrote a short specially concurring opinion.

[9] *Taylor*, 2010 Ida. LEXIS 161 at *28 (quoting *Alpert v. Crain, Caton & James, P.C.*, 178 S.W.3d 398 (Tex App. 2005)).

[10] *Id.* at *29 (quoting *Clark v. Druckman*, 624 S.E.2d 864, 870 (W. Va. 2005) (citations omitted)).

[11] *Id.* at *32.

[12] *Id.*

[13] *Id.* at *37.

[14] *Id.* at *38.

[15] *Id.* at *40.

[16] *Id.* at *44.

[17] *Id.* at *45-46.

[18] *Id.* at *68.

[19] *Id.* at *46.

[20] Idaho Rules of Prof'l Conduct 1.3[1].

[21] Restatement (Third) of the Law Governing Lawyers § 57(3) (2000).

[22] Idaho Rules of Prof'l Conduct 1.3[1].