Defamation and Privacy

The following cases cover the period of October 1, 2010 – April 1, 2011.

Michael Morrison

DEFAMATION

Absolute Privilege:

In, ***Nguyen v. Nguyen*, No. 14-09-00695-CV. 2010 WL 4618351 (Tex.App.-Hous. (14 Dist. Nov. 16, 2010)) [**Not Reported in S.W.3d], Phu Nguyen (Phu), an attorney who represented Hong Nguyen (Hong) in a civil action against Thanh Nguyen (Thanh) filed a counterclaim alleging that Thanh had forcible and nonconsensual intercourse with Hong, an allegation that Hong disclaimed at trial saying that since her English was poor Phu drafted the documents.

In Thanh's subsequent suit for defamation, Phu was granted summary judgment based upon the affirmative defense of communicative or judicial privilege which applies to "any statement made by the judge, jurors, counsel, parties or witnesses, and attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits, and any other pleadings or other papers in the case." *James v. Brown*, 637 S.W.2d 914, 916-917 (Tex.1982)

"Any communication ... uttered or published in the due course of a judicial proceeding is absolutely privileged and cannot constitute the basis of a civil action in damages for slander or libel. The falsity of the statement or the malice of the utterer is immaterial..." *Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909, 913 (Tex.1942)

The court of appeals reasoned that, "Even if we assume Phu knowingly submitted a false affidavit to the court in Hong's counterclaim, and thus submitted written perjured testimony to the court, the communicative privilege protects him from a defamation action" and accordingly, affirmed the summary judgment.

PRIVACY

Public Records:

In, **Texas Comptroller of Public Accounts v. Attorney General of Texas and the Dallas Morning News, Ltd., -- S.W.3rd ---, 54 Tex. Sup. Ct. J. 245 (2010)**, the majority, relying in part on concerns about identity theft, held that state employees' privacy interests substantially outweigh "the negligible public interest" in disclosing employee birth dates and that any disclosure would constitute a clearly unwarranted invasion of personal privacy, making this information exempt from disclosure under TEX. GOV'T CODE § 552.102.

In a lengthy dissenting and concurring opinion, Justice Wainwright, joined by Justice Johnson, noted that the legislature has not expressly excepted birth dates from disclosure as it did for Social Security numbers, for example. He wrote that, "Our task in this case is not to decide if we think these birth dates should be confidential but to determine whether the Legislature excepted this information from disclosure under section 552.101 of the PIA. I would hold that it did not."

Personnel Files:
In, **Broughton v. Livingston ISD, No. 9:08-CV-175, 2010 WL 4453763 (E.D.Tex.)**, the plaintiff filed suit against LISD for disclosing information concerning the circumstances of his departure contained in his personal file to a subsequent employer. At LISD, Broughton was recommended for termination of employment following an investigation into claims of misconduct. He offered not to seek renewal of his contract if put on paid leave for the remainder of the school year and requested "favorable references from the district and assurance that materials of 'a derogative nature' would not be placed in his personnel file. He was given paid leave but informed that 'a memorandum outlining the findings of LISD's investigation would be included in [his] personnel file, access to which was 'explained in the Board policies.' "

Upon receiving this information during a background check, the Fort Bend ISD terminated Broughton for representing on his employment application "that he had never been asked to resign a teaching position, had never resigned in lieu of termination, and had never been suspended from any position."

While allegations of sexually explicit or other improper conduct with students are the type of information that is protected, the district court held that, "[T]eachers' legitimate expectation of privacy is diminished by their participation in a heavily regulated industry and by the nature of their job."

Concluding that, "If LISD had information, substantiated or not, that Broughton had engaged in inappropriate activity, the state's interest in that information, and in ensuring the suitability of its teachers, outweighed Broughton's privacy interest," the court entered a summary judgment against Broughton on his privacy claim.

Summary Judgment Evidence:
In, ***Harris ex rel. Harris v. Pontotoc County School Dist.*, 635 F.3d 685 (5th Cir. 2011),** the Court upheld a summary judgment against a defamation claim because the plaintiff's summary judgment evidence was wholly "based either on hearsay or on statements made directly to him." Neither is adequate as, hearsay evidence that would be inadmissible at trial cannot be used to create a genuine issue of material fact to avoid summary judgment and defamation requires publication to some third person, not just to the claimant.