Defamation and Privacy

The following cases cover the period of April 1, 2012 – September 30, 2012.

Michael Morrison

DEFAMATION

Sovereign Immunity
In ***Texas State Board of Nursing v. Pedraza*, No. 13–11–00068–CV. 2012 WL 3792100, (Tex.App.-Corpus Christi, Aug. 31, 2012),** the court noted that, since the Texas Tort Claims Act does not waive sovereign immunity for defamation claims, the Texas State Board of Nursing is immune from Plaintiff's defamation action.

Presumed Damages
In, ***Salinas v. Salinas*, --- S.W.3d ----, 2012 WL 1370869, No. 11-0131 (Tex. April 20, 2012),** the Supreme Court, in reviewing the proof necessary to recover damages for publications that are found to be defamatory per se, wrote, " 'Our law presumes that statements that are defamatory per se injure the victim's reputation and entitle him to recover general damages, including damages for loss of reputation and mental anguish .' *Bentley v. Bunton*, 94 S.W.3d 561, 604 (Tex.2002) (plurality opinion). However, even if some mental anguish can be presumed in cases of defamation per se … the law does not presume any particular amount of damages beyond nominal damages."

Even if reputational injury or mental anguish can be presumed, the determination of the amount of damages is left to the finder of fact. Here, it was error to award $30,000 in mental anguish damages without a damages finding by the jury supporting the award.

Additionally, the court noted in footnote 2 that, "We need not decide whether [Plaintiff] would have been entitled to nominal damages for slander per se if he had requested them. He did not request such an award from the trial court and did not request that the jury be instructed to award at least nominal damages. We note, however, that courts have not resolved this issue in an entirely consistent manner.

PRIVACY

Sovereign Immunity
In, ***Duggan v. Department of the Air Force*, Civil Action No. H–11–2556, 2012 WL 1884144 (S.D.Tex. Houston Division, May 21, 2012)**, Plaintiff, in one claim among many, alleged that the defendants disseminated private health care and mental health records to his military unit to show that he was not medically fit to serve in the military. He specifically alleged that, "Following an altercation with a superior officer, after the event, the plaintiff asserts, his superior officers 'conspired to retaliate against [him] by subjecting him to false charges, unnecessary duty restrictions, malicious prosecution, multiple false AWOL charges, violations of the Privacy Act and numerous counts of reprisal.' "

The court noted that, an exception to the federal waiver of sovereign immunity "under the Federal Tort Claims Act, 28 U.S.C. § 1346, is where the injuries suffered by a soldier occur during or in the course of activity that is incident to military service. *See Feres* 340 U.S. at 146 (overruled on other grounds). An example of activity incident to military service may be an event where a military police officer attempts to arrest a soldier for a violation of federal or military law, whether the soldier is engaged in an assigned

duty or not. Also, the *Feres* doctrine would apply in a circumstance where the solider who seeks damages is the provocateur, assaulting his fellow soldier whom he later claims assaulted him. Hence, conduct that threatens or disrupts the order and command is barred by the *Feres* doctrine even though an assault may occur.

Here, "In light of the facts presented in the plaintiff's complaint, the Court concludes that the plaintiff's alleged damages occurred "incident to service." The facts show that the plaintiff was on active duty at the time of the incident with MSgt. Franks. Moreover, the incident occurred between the plaintiff and MSgt. Franks on the military installation where they were assigned. Any injury suffered by the plaintiff, whether an injury relating to the alleged assault or whether resulting from the investigation and outcome occurred on the military installation. Third, the evidence shows that the plaintiff provoked the incident by spitting in MSgt. Franks' face. Obviously, the alleged assault on the plaintiff was a result of a personal matter between the plaintiff and MSgt. Franks. Hence, the blow thrown by MSgt. Franks was an intentional tort unrelated to his military duties.

Additionally, "The plaintiff's claim that the *Feres* doctrine does not bar his Privacy Act claim also fails. The undisputed facts show that the plaintiff's medical information was released within the military command structure. There is no pleading or suggestion that any release of medical information was released other than according to the rules and regulations of the military."

Court Orders

In, ***In re M.*, ___S.W.3d ___, No. 09–12–00179–CV., 2012 WL 1808236 (Tex.App.-Beaumont, May 17, 2012),** M. sought mandamus relief from temporary orders in a suit affecting the parent child relationship. After a hearing, the trial court entered temporary orders that, among other things, authorized forensic examination of two cellular phones (those of M. and of A.) that had been admitted into evidence during the hearing. M. contends the phones were illegally seized.

M. voluntarily tendered the phone to opposing counsel during cross-examination for the limited purpose of reading an exchange of text messages between M. and A. when opposing counsel marked and offered the phones into evidence. When opposing counsel began reading text exchanges between M. and other persons from M.'s phone, M. objected. Following the hearing, the trial court retained the phones in evidence and authorized counsel for W. to select an expert to perform a forensic examination of the data contained within the devices even though the relevant data had been read into the record during the emergency hearing.

The court of appeals held that the trial court improperly granted opposing counsel's oral motion for a forensic examination of the cellular phones, referencing "Rule 196.4 which provides that, '[t]o obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data....' Tex.R. Civ. P. 196.4. A party from whom discovery is sought is entitled to protection from an unreasonable invasion of personal, constitutional, or property rights. Tex.R. Civ. P. 192.6. After a proper discovery request is submitted in writing, the responding party may assert objections and privileges by withholding the privileged information and producing a privilege log. Tex.R. Civ. P. 193.3(a).

"Because the cellular phones were admitted into evidence without having first been produced through the normal discovery procedures or through a subpoena duces tecum, M. never had an opportunity to object to the scope of such discovery request or assert privileges that would prevent the opposing party from freely perusing the information contained on the devices.

"Guiding precedent requires strict compliance first with the rules of discovery to choose the least intrusive means of retrieval and direct access to another party's electronic storage devices is discouraged. The trial court must address a party's objections and privilege, privacy, and confidentiality concerns by providing a mechanism through which the party may withhold from discovery any information that is privileged or confidential and instead provide a privilege log of non-exempt communications. *Id.*, *see also* Tex.R. Civ. P. 193.3(a), (b), (c). Because the trial court ordered intrusive discovery of the cellular phones for use in future hearings without first having the parties comply with Rule 196 and without providing an adequate mechanism for the assertion of objections and privileges concerning data that had not been published in the previous hearing, we hold that the trial court abused its discretion."

FOIA Request for Individual Medical Records

In ***Fidelis Diagnostic, Inc. v. SafeGuard Services, LLC, et al.*, No. 4:10–CV–00638, 2012 WL 3043066 (E.D.Tex. Sherman Division, June 28, 2012),** Defendant, a "zone program integrity contractor", notified Plaintiff, a certified Medicare Part B provider, that operates as an Independent Diagnostic Testing Facility, that Defendant's review of the records revealed that Medicare had overpaid Plaintiff by $1,279,324.37 because Plaintiff failed to establish the medical necessity of tests performed. Plaintiff filed a FOIA request to obtain the individual beneficiaries' medical records at issue but only 1,079 pages were released while 1,228 pages were withheld.

Against Plaintiff's demand, "Defendants assert that the Private Beneficiary Medical Records were withheld under Exemptions 6 and 7(C). Exemption 6 provides that an agency need not disclose "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The purpose of the exemption is to protect "individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *U.S. Dep't of State v. Washington Post Co.*, 456 U.S. 595, 599, 102 S.Ct. 1957, 72 L.Ed.2d 358 (1982). The Fifth Circuit identified a two-part test in evaluating whether Exemption 6 applies. First, the Court must determine whether the information requested is included within the type of material covered by the exemption. *Sherman v. U.S. Dep't of Army*, 244 F.3d 357, 361 (5th Cir.2001). Second, if the information requested does include such personal information, the Court "must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy." "This determination, in turn, depends on a balancing of the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny."

The court's analysis led it to conclude that the individual beneficiaries' possessed a substantial privacy interest that outweighed any public interest asserted by Plaintiff and that the private beneficiary medical records were properly withheld.