

Affirmed and Memorandum Opinion filed November 16, 2010.



In The

Fourteenth Court of Appeals

NO. 14-09-00695-CV

THANH D. NGUYEN, Appellant

V.

PHU DO NGUYEN, Appellee

**On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2008-37227**

MEMORANDUM OPINION

Appellant brings this appeal from the trial court's granting of a summary judgment in favor of appellee, who asserted the communicative privilege as a bar to appellant's slander and defamation claims. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Thanh D. Nguyen ("Thanh") was engaged in a civil suit against Hong Van Nguyen ("Hong").¹ Appellee, Phu Do Nguyen ("Phu"), an attorney, represented

¹ The trial record brought forth from the underlying suit between Thanh and Hong is incomplete, but it appears appellant was suing Hong for payment of money that he claimed was a loan but Hong claimed was a gift.

Hong during the early part of the lawsuit. During the time Phu represented Hong, Phu filed a counterclaim on Hong's behalf against Thanh. Within the counterclaim was a complaint about harassment while Hong was a student at Thanh's massage school. The complaint included the following allegation:

The night before [Hong's massage therapist] examination, [Thanh] went into [Hong's] hotel room [and] started sexually touching [Hong] on her body. [Thanh] indicated to [Hong] if she does not allow him to have sexual intercourse with him, he would: "inform her husband of her affair with [him], and she would never pass the examination without his connection to the examination board." Without her consent, [Thanh] then forcibly had sexual intercourse with [Hong]. After having intercourse with [Hong], [Thanh] indicated to [Hong] that if she does not keep quiet, he will inform her husband. Feeling [shamed] and shocked, [Hong] did not report this case to the police . . .

At the trial of the case between Thanh and Hong, Hong denied the allegation made in the counterclaim. She stated Thanh had never "forcibly had sexual intercourse" with her. When asked why the statement was included in the counterclaim, Hong stated that she did not speak English well enough to write the counterclaim, so Phu drafted the documents. Hong speculated that it "could have been that I was the one that said it, but he made a mistake in typing it."

Thanh subsequently sued Phu, claiming Phu intentionally filed a perjured and defamatory claim with the court. In particular, Thanh sued Phu claiming libel, libel per se, defamation, defamation per se, negligence and gross negligence. Phu filed a motion for summary judgment in which he asserted the affirmative defense of communicative privilege. The trial court granted Phu's motion for summary judgment. On appeal, Thanh briefed only the causes of actions for slander and defamation ("Defamation Claims"). Consequently, we need only address the Defamation Claims.

DISCUSSION

Under the traditional summary judgment standard of review, a movant has the burden to show there are no genuine issues of material fact, and he is entitled to judgment as a matter of law. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). In determining whether there is a genuine fact issue precluding summary judgment, evidence favorable to the non-movant is taken as true and we make all reasonable inferences in his favor. *Id.* We review the trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A defendant is entitled to summary judgment if the evidence disproves as a matter of law at least one element of each of the plaintiff's causes of action or if it conclusively establishes all elements of an affirmative defense. *Randall's Food Mkts. Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995).

A. Communicative Privilege

We assume under the summary judgment standard that Thanh's allegations are true. *KPMG*, 988 S.W.2d at 748. Thus, we assume Phu knew the statement was perjured as well as defamatory.

The communicative privilege covers "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). The purpose of the communicative privilege is to ensure parties feel free to make full disclosures to tribunals without the fear of retaliatory lawsuits. *Id.* at 917. This privilege is founded on the "theory that the good it accomplishes in protecting the rights of the general public outweighs any wrong or injury which may result to a particular individual." *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 913 (Tex. 1942).

Neither party disputes Phu was acting as an attorney when he filed the counterclaim. Nor does either party argue that the counterclaim is not part of judicial proceedings covered by the communicative privilege. Thus, Phu's actions were protected by the communicative privilege unless an exception applies.

Thanh argues that Phu's actions fall outside the communicative privilege because they are "foreign to the duties of an attorney." He makes the claim that Phu's actions are outside the communicative privilege for two reasons: (1) Phu is alleged to have suborned perjury by submitting to the court a sworn affidavit alleging Thanh required Hong to have "forcible sex"; and (2) "tampered with government documents" by submitting an allegedly false document to the court.

In support of this claim, he brings forth several cases showing all attorney actions are not necessarily covered by the communicative privilege. In particular, attorney fraud or conspiracy to defraud is not protected by the communicative privilege. *See Toles v. Toles*, 113 S.W.3d 899, 911 (Tex. App.—Dallas 2003, no pet.).

Thanh, however, did not allege fraud in his lawsuit; he pled the Defamation Claims. There is extensive case law holding that the communicative privilege bars civil actions for defamation. *Bird v. W.C.W.*, 868 S.W.2d 767, 771 (Tex. 1994) (barring a defamation action for alleging child abuse in a signed affidavit); *James*, 637 S.W.2d at 916 (Tex. 1982) ("Communications in the due course of a judicial proceeding will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made."); *Reagan*, 166 S.W.2d at 912 (preventing a claim for libel or slander under the communicative privilege when a party put forth allegedly false evidence in trial).

Importantly, the communication privilege applies in libel, defamation, and slander cases even if the allegedly false statement was intentionally made. In *Reagan*, an insurance company was accused of knowingly filing a fabricated and forged letter with the Texas Board of Insurance Commissioners. *Id.* at 911. Reagan sued the insurance company for allegedly libelous claims made in the letter. *Id.* at 912. The Texas Supreme

Court decided the issue, stating “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 . . .” *Id.* This principle includes perjured testimony as well. *See Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 132 (Tex. App.—Houston [14th Dist.] 1994, no pet.).

Thus, even if we assume Thanh’s allegations supporting the Defamation Claims are true, the affirmative defense is conclusively proven. The statements in question were made in the course of a judicial proceeding by an attorney. *See James*, 637 S.W.2d at 916-917. Furthermore, the Defamation claims of slander and defamation are barred by the communicative privilege. *Bird*, 868 S.W.2d at 771; *James*, 637 S.W.2d at 916; *Reagan*, 166 S.W.2d at 912. 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. *See Ross*, 892 S.W.2d 119 at 132. Accordingly, Phu has proved his affirmative defense as a matter of law and is entitled to summary judgment in his favor on the Defamation Claims. *See Randall’s*, 891 S.W.2d at 644. We hold the trial court did not err when it granted Phu’s motion for summary judgment. We overrule appellant’s issues on appeal.

CONCLUSION

Having overruled appellant Thanh’s arguments against summary judgment, we affirm the trial court’s judgment.

/s/ John S. Anderson
Justice

Panel consists of Justices Anderson, Frost, and Seymore.