Affirmed in Part, Reversed and Rendered in Part, and Reversed and Remanded, and Majority and Dissenting Opinions filed April 7, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00001-CV

CARL TOLBERT, NIZZERA KIMBALL, AND VIVIAN ROBBINS, Appellants

V.

TERISA TAYLOR AND PATHWAY FORENSICS, LLC, Appellees

On Appeal from the 309th District Court
Harris County, Texas
Trial Court Cause No. 2015-23649

MAJORITY OPINION

The mother alleges that her electronic communications were illegally intercepted, used, and disclosed. The mother and other plaintiffs asserted various claims against the attorney for the mother's ex-husband in a child-custody modification suit and against a forensics company the ex-husband and his attorney hired as an expert in that suit. On appeal, the mother and two others challenge the trial court's orders granting two summary judgment motions in favor of two

defendants, and one of the trial court's discovery orders. We reverse in part, affirm in part, and remand.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2013, Mark Broome filed a child-custody modification proceeding against his ex-wife, appellant/plaintiff Vivian Robbins, regarding custody of their daughter ("Modification Proceeding"). Appellee/defendant Terisa Taylor is an attorney who represented Broome in that proceeding. Robbins and appellants/plaintiffs Carl Tolbert and Nizzera Kimball (collectively the "Robbins Parties") allege that in the summer of 2013 their confidential and personal communications (*i.e.*, texts and emails) began appearing on an iPad owned by Broome's sister-in-law (the "iPad"), without the Robbins Parties' knowledge or consent. After Broome obtained the iPad, Broome shared Robbins's text messages and emails with Taylor by providing her with the iPad.

The Robbins Parties allege that Robbins's text messages and emails are illegally intercepted electronic communications (collectively the "Messages"). Tolbert and Kimball are two of the people with whom Robbins communicated in the Messages. The Messages included a nude photograph of Robbins that she had sent to her boyfriend in a text message.

Broome and/or Taylor allegedly provided the iPad to Pathway Forensics, LLC, a computer forensics company hired by Broome and/or Taylor. Pathway allegedly used and disclosed the Messages and emails to Broome and Taylor. Taylor allegedly used and disclosed the contents of the Messages to the trial court in the Modification Proceeding, in conducting discovery, and in Broome's pleadings in that proceeding.

The Robbins Parties and others filed suit against Taylor, Pathway, and others. The Robbins Parties asserted against Taylor and Pathway (1) civil claims under article 18.20, section 16 of the Code of Criminal Procedure[1] based on the alleged interception, disclosure, or use of the Robbins Parties' electronic communications in violation of Chapter 16 of the Penal Code[2] (the "Texas Wiretap Claims") and (2) civil claims under title 18, sections 2511(a) and 2520 of the United States Code[3] based on the alleged interception, disclosure, or use of the Robbins Parties' electronic communications[4] (the "Federal Wiretap Claims"). The trial court ordered that the Robbins Parties take nothing by their claims against Taylor based on its granting of Taylor's summary judgment motion, in which she asserted attorney immunity.

The trial court signed an order granting the Robbins Parties' motion to compel discovery and ordered Pathway to respond to various requests for production, but only after the Robbins Parties paid Pathway's reasonable costs and attorney's fees associated with producing the requested items. The trial court ordered the Robbins Parties to pay the costs and attorney's fees. The trial court later ruled that the "reasonable cost of production" which the Robbins Parties had to pay to Pathway before obtaining the requested items was $9,374.50, which included payment for a Pathway employee (manager) and the hourly rate of the attorney for Pathway to review the material before producing it. The Robbins Parties paid Pathway this amount.

[1] *See* Tex. Code Crim. Pro. art. 18.20 § 16.

[2] *See* Tex. Penal Code § 16.01, *et seq*.

[3] *See* 18 U.S.C. § 2520.

[4] *See* 18 U.S.C. § 2510, *et seq*.

In addition to the Texas Wiretap Claims and the Federal Wiretap Claims, the Robbins Parties asserted claims against Pathway for negligence, intentional infliction of emotional distress, a civil claim under title 18, section 1030(g) of the United States Code,[5] an invasion of privacy claim based on the alleged public disclosure of private facts, and a civil claim under section 143.001 of the Civil Practice and Remedies Code.[6] Pathway filed a summary judgment asserting various grounds, including the judicial proceedings privilege applicable to an expert witness. The trial court granted Pathway's summary judgment motion, and based on this ruling, ordered that the Robbins Parties take nothing by their claims against Pathway.

After granting the summary judgment, the trial court severed Pathway's claims against Mark Broome and rendered a final judgment from which the Robbins Parties have timely appealed.

II. ISSUES AND ANALYSIS

On appeal, the Robbins Parties assert three issues, challenging (1) the trial court's order granting Taylor's summary judgment motion based on the affirmative defense of attorney-immunity, (2) the trial court's discovery orders requiring the Robbins Parties to pay Pathway costs of responding to the Robbins Parties' requests for production (the "Discovery Orders"), and (3) the trial court's order granting Pathway's summary judgment motion.

[5] *See* 18 U.S.C. § 1030(g).

[6] *See* Tex. Civ. Prac. & Rem. Code § 143.001.

A. Did the trial court err in granting Taylor's summary judgment motion?

1. *Standard of Review*

We review summary judgments *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A plaintiff moving for traditional summary judgment must conclusively establish all essential elements of its claim. *Cullins v. Foster*, 171 S.W.3d 521, 530 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (citing *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986)); *see* Tex. R. Civ. P. 166a(c). Traditional summary judgment for a defendant is proper when it (1) negates at least one element of each of the plaintiff's claims or (2) establishes all elements of an affirmative defense to each claim. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Cullins*, 171 S.W.3d at 530 (citing *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997)); *see* Tex. R. Civ. P. 166a(c).

Once the moving party establishes its right to a traditional summary judgment, the burden shifts to the nonmoving party to present evidence raising a genuine issue of material fact, thereby precluding summary judgment. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam); *see Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 898 (Tex. App.—Houston [14th Dist.] 2013, no pet.). We presume that all facts alleged by the Robbins Parties are true and indulge all reasonable inferences in the light most favorable to the Robbins Parties. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015).

2. *Attorney-Immunity Defense*

Attorney immunity is an affirmative defense that protects attorneys from liability to nonclients. *Cantey Hanger*, 467 S.W.3d at 481 (citing *Sacks v. Zimmerman*, 401 S.W.3d 336, 339–40 (Tex. App.—Houston [14th Dist.] 2013, pet.

denied); *Kruegel v. Murphy*, 126 S.W. 343, 345 (Tex. Civ. App. 1910, writ ref'd)). The purpose of the attorney-immunity defense is to ensure loyal, faithful, and aggressive advocacy to clients. *Cantey Hanger*, 467 S.W.3d at 481. To be entitled to summary judgment, Taylor must prove that there is no genuine issue of material fact as to whether her conduct was protected by attorney immunity and that she is entitled to judgment as a matter of law. *See id.*

The Texas Supreme Court recently affirmed that *Cantey Hanger* controls our analysis of attorney immunity. *Youngkin v. Hines*, 546 S.W.3d 675, 681–82 (Tex. 2018) (citing *Cantey Hanger*, 467 S.W.3d at 481). The *Youngkin* court recognized the breadth of the attorney-immunity doctrine yet made clear that the doctrine is not without limits. *See id*. The *Cantey Hanger* opinion identified the following "nonexhaustive examples that may fall outside the reach of the attorney-immunity defense": participation in a fraudulent business scheme with a client, knowingly helping a client with a fraudulent transfer to avoid paying a judgment, theft of goods or services on a client's behalf, and assaulting opposing counsel during trial. *Id.*; *Cantey Hanger, LLP*, 467 S.W.3d at 482–83. All of these examples appear to refer to either non-litigation conduct or conduct not alleged to be fraudulent; thus, none of these examples appear to include fraudulent conduct while representing a client in litigation. *See Youngkin*, 546 S.W.3d at 682–83; *Cantey Hanger, LLP*, 467 S.W.3d at 482–83. The *Youngkin* court states that these examples are "nonexhaustive," yet, as in *Cantey Hanger*, the supreme court did not articulate a legal standard for determining if conduct is not covered by the attorney-immunity doctrine. *See Youngkin*, 546 S.W.3d at 682–83; *Cantey Hanger, LLP*, 467 S.W.3d at 482–85. After listing the nonexhaustive examples, the *Youngkin* court ends by saying, "[t]hus, while we recognize that some fraudulent conduct, even if done on behalf of a client, may be actionable, [the

plaintiff] does not allege any such behavior." *Id*. at 683. Simply put, the *Youngkin* court appears to have concluded that attorney immunity applied because the alleged conduct fell within the scope of the attorney's representation of the client and did not fall within any of the examples listed in the *Cantey Hanger* opinion. *See id*. at 681–83.

3. *Alleged Criminal Conduct*

Under their first issue, the Robbins Parties assert that the trial court erred in granting Taylor's summary judgment motion and rendering a take-nothing judgment in Taylor's favor based on attorney-immunity. Taylor sought a traditional summary judgment based on attorney-immunity and did not rely on any other summary judgment evidence. Therefore, we review the propriety of summary judgment based on the "Plaintiffs' First Amended Original Petition," the Robbins Parties' live pleading when the trial court granted Taylor's summary judgment motion. *See Warwick Towers Council of Co-owners ex rel. St. Paul Fire & Marine Ins. Co. v. Park Warwick, L.P.*, 298 S.W.3d 436, 444 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

The Robbins Parties assert that attorney-immunity does not apply to the conduct alleged in this case—alleged criminal conduct by Taylor in violation of the Texas Wiretap Statute and the Federal Wiretap Statute—because criminal conduct is "foreign to the duties of an attorney."

In Plaintiffs' First Amended Original Petition, the Robbins Parties allege the following facts regarding Taylor's conduct:

- Between July 18, 2013, and January 11, 2014, the sister-in-law of Robbins's ex-husband, Fiona McInally, received on her iPad text and email messages between Robbins and others.

- Plaintiffs' confidential and personal communications were intercepted without the Plaintiffs' knowledge or consent.
- Broome connected to his sister-in-law's iPad and received Robbins's communications.
- Broome shared the messages with his lawyer, Taylor.
- Taylor produced to Robbins's attorney in the Modification Proceeding ("Robbins's Attorney") a compact disc containing data from this iPad showing that the iPad's email settings had been changed to use Robbins's personal email address and password as the "setting for incoming e-mails."
- Robbins did not know that her text messages and emails were being intercepted until Taylor produced 617 pages of the Robbins Parties' text messages to Robbins's Attorney and told the attorney that Taylor and Broome were in possession of everything Robbins had communicated to others, including a nude photograph of Robbins that Robbins had sent to her boyfriend by text message.
- Taylor told Robbins's Attorney that Taylor intended to use the photograph of Robbins's breasts as demonstrative evidence in the jury trial and that Taylor would show the jury a poster-size photo of Robbins's breasts.
- Taylor told Robbins's Attorney to advise Robbins to sign an agreed order resolving the Modification Proceeding and agreeing that the only visitation Robbins would have with her daughter would be supervised visitation, otherwise this evidence would be used against Robbins.
- After Robbins refused to sign Taylor's proposed order, Taylor filed a document in the Modification Proceeding entitled "Notice of Intent to Use Demonstrative Evidence," in which Taylor, on behalf of Broome, stated that Broome intended to use at trial a "Power Point presentation and large photo board."
- During the six months before February 5, 2014, Taylor had used information gleaned from illegally intercepted communications in the Modification Proceeding in several hearings and to conduct discovery.
- Broome disclosed the contents of Robbins's intercepted electronic communications to Taylor, who used and disclosed these contents to the trial court in the Modification Proceeding and in the pleadings in the Modification Proceeding.
- Taylor or Broome provided the iPad to Pathway for examination.

- Broome obtained a court order "through his attorneys' use of illegally intercepted communications on [the iPad]."

Additionally, in Plaintiffs' First Amended Original Petition, the Robbins Parties further pled the following:

> **Cause of Action**
>
> 22. Texas Code of Criminal Procedure Sec. 18.20(16) states, "A person whose wire, oral or electronic communication is intercepted, disclosed or used in violation of this article or in violation of Chapter 16, Penal Code, has a civil cause of action against any person who intercepts, discloses or uses or solicits another person to intercept, disclose or use the communication and is entitled to recover actual damages not less than liquidated damages of $100 per day for each day of violation or $1,000, whichever is higher, punitive damages and attorney's fees and litigation costs.
>
> 23. Defendants intercepted, disclosed or used the electronic communications of Plaintiffs in violation of Chapter 16, Penal Code . . . .
>
> **Cause of Action: Federal Statute**
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> 24. The Federal Wiretap Act imposes liability on anyone who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication." 18 U.S.C. § 2511(a). The Act defines "intercept" to mean "the aural or other acquisition of the contents of any wire, electronic, or oral communications through the use of any electronic, mechanical, or other device." *Id*. at § 2510(4) . . . .
>
> 25. Defendants intercepted, disclosed or intentionally used the electronic communications of Plaintiffs.

"Texas follows a 'fair notice' standard for pleading, which looks to whether the opposing party can ascertain from the pleading the nature and basic issues of the controversy and what testimony will be relevant." *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896 (Tex. 2000). Our procedural rules merely require that the pleadings provide fair notice of the claim and the relief sought such that the opposing party can prepare a defense. *In re Lipsky*, 460 S.W.3d 579, 590

(Tex. 2015) (orig. proceeding) (citing Tex. R. Civ. P. 45 & 47).[7] A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases her claim. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 346 (Tex. 2011). "Even the omission of an element is not fatal if the cause of action may be reasonably inferred from what is specifically stated." *Lipsky*, 460 S.W.3d at 590 (internal quotations omitted). Under this standard, courts assess whether an opposing party can ascertain from the pleading the nature of the controversy, its basic issues, and the type of evidence that might be relevant. *Low v. Henry*, 221 S.W.3d 609, 612 (Tex. 2007).

In this case, Taylor did not specially except to this pleading; thus, she cannot complain that Plaintiffs' First Amended Original Petition lacks specificity. "When a party fails to specially except, courts should construe the pleadings liberally in favor of the pleader." *Auld*, 34 S.W.3d at 897 (citing *Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993)). "An opposing party should use special exceptions to identify defects in a pleading so that they may be cured, if possible, by amendment." *See id.* (citing *Cameron v. Univ. of Houston*, 598 S.W.2d 344, 345 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.)).

Taylor, instead, filed a traditional summary judgment relying solely on the affirmative defense of attorney-immunity. Taylor neither contested the facts pled nor did she provide any evidence or affidavits in support of her motion for summary judgment. Presuming that all facts alleged by the Robbins Parties are

[7] Rule 45 states a pleading shall "consist of a statement in plain and concise language of the plaintiff's cause of action . . . . That an allegation be evidentiary or be of legal conclusion shall not be ground for objection when fair notice to the opponent is given by the allegations as a whole . . . ." Rule 47 requires that a pleading contain "a short statement of the cause of action sufficient to give fair notice of the claim involved" for a claim for relief and "a demand for judgment for all the other relief to which the party deems himself entitled." Tex. R. Civ. P. 47(a), (c).

true and indulging all reasonable inferences in the light most favorable to the Robbins Parties, the Robbins Parties allege sufficient facts demonstrating alleged criminal conduct by Taylor in violation of the Texas Wiretap Statute and the Federal Wiretap Statute. Neither *Youngkin* nor *Cantey Hanger* involved alleged criminal conduct by an attorney. *See Youngkin*, 546 S.W.3d at 681–83; *Cantey Hanger, LLP*, 467 S.W.3d at 481–85. And, the Texas Supreme Court did not extend attorney-immunity to criminal conduct in either case. *Id*.

A criminal violation of either statute would be "foreign to the duties of an attorney" and thus precludes application of attorney-immunity. We conclude the trial court erred in granting Taylor's motion for summary judgment based on the affirmative defense of attorney-immunity.

We sustain Taylor's first issue.

B. Did the trial court err in granting Pathway's summary judgment motion?

In their third issue, the Robbins Parties assert that the trial court erred in granting summary judgment for Pathway.

Plaintiffs' Second Amended Original Petition sets forth the following causes of action against Pathway, asserting violation of: Texas and Federal wiretap statutes; negligence, gross negligence; intentional infliction of emotional distress ("IIED"); federal statute prohibiting computer fraud and abuse; publication of private facts; Texas statute prohibiting harmful access by computer; and civil conspiracy.

1. Pathway's defense of absolute immunity as to all claims

Pathway maintains it has a statutorily defined complete defense to all the Robbins Parties' claims. Pathway asserts that it is immune from liability under the judicial proceedings privilege. Pathway argues, "Plaintiffs have failed to advise the court that actions taken pursuant to a court order are a full and complete defense to actions brought under these statutes." According to Pathway, it was hired as an expert in a judicial proceeding and acted pursuant to the authority of a court order.

The Robbins Parties maintain that immunity afforded by the judicial-proceedings privilege does not apply to claims under the state or federal wiretap statutes. The Robbins Parties correctly note that Pathway does not cite any case in which a court applies this immunity to a claim under a wiretap statute. Moreover, the record reflects that on February 24, 2014, Broome and his attorney, Taylor, hired Pathway to provide expert assistance and expert witness testimony pertaining to the information that was discovered on the iPad. Pathway received the iPad on March 3, 2014 and extracted data and produced electronic copies of its contents. It was not until March 12, 2014, that the trial court signed an Order on Emergency Motion for Turnover of Respondent's Computer/Electronic Devices, Emergency Request for Inspection of Respondent's Computer Electronic Devices, and Request for Ex Parte Injunction. Thus, Pathway extracted information and produced copies prior to a hearing or an order in any judicial proceeding. As such, judicial proceeding immunity does not preclude the Robbins' Parties causes of action.

Moreover, the March 12 order did not mention or address the iPad and did not order Pathway or authorize Pathway to disclose the contents of the devices to anyone. Additionally, there is no summary judgment evidence that Robbins voluntarily gave her Apple ID and password to her daughter for the purpose of

setting up the iPad to intercept electronic communications of Robbins. To the contrary, Robbins' unsworn declaration attached as Exhibit B to Plaintiffs' Amended Response to Pathway's Motion for Summary Judgment states that she never gave anyone permission to use her Apple ID and password to set up any device to receive her iMessages. At a bare minimum, the Robbins Parties established genuine issues of material fact prohibiting summary judgment.

2. Pathway's additional bases for summary judgment

In addition to absolute immunity, Pathway sets forth several other grounds, arguing that summary judgment was properly granted.

a. State and federal wiretap statutes

i. Pursuant to court order

Like its judicial proceeding argument, Pathway asserts that it cannot be held liable under the state and federal wiretap acts because it was acting pursuant to a court order. As set forth, *supra*, the record reflects that Pathway received the iPad, extracted data, and produced electronic copies of its contents prior to any judicial proceeding or court order. Additionally, after a court order was signed, Pathway's disclosures exceeded the scope of the order. As such, summary judgment was inappropriate on Pathway's defense of acting pursuant to court order.

ii. Failed to receive contemporaneous communications

Pathway next argues that the Robbins Parties did not allege a *prima facie* case under either the state or federal wiretap law because they allege the communications at issue were not contemporaneously intercepted as a matter of law. The Robbins Parties assert that Pathway is being sued for *using and disclosing* illegally intercepted electronic communications. Pathway concedes that it used and disclosed to Broome's attorney the electronic communications which the Robbins Parties maintain were illegally intercepted. A genuine issue of

material fact exists as to whether Pathway violated the state and federal wiretap laws. *See* Tex. Code Crim. Proc. art. 18.20(16); 18 U.S.C. § 2511(a).

b. Negligence and gross negligence

Next, Pathway argues it was entitled to summary judgment on the claims of negligence and gross negligence. To prevail on a common law negligence claim, a plaintiff must be able to prove three elements: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately caused by the breach. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). The threshold inquiry in a negligence case is duty. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). A plaintiff must prove the existence and violation of a duty owed by the defendant. *Id*. If there is no duty, liability for negligence cannot exist. *Thapar v. Zezulka*, 994 S.W.2d 635, 637 (Tex. 1999).

Pathway maintains that it, as an adversary's expert witness, owed no duty to the Robbins Parties. Through the declaration of Vivian Robbins and the transcript of a recorded conversation, the Robbins Parties contend that a representative of Pathway promised Vivian Robbins that her data would not be turned over. According to the Robbins Parties, this conversation created a duty for which Pathway would be liable for negligence. The Robbins Parties, however, provide no authority for this assertion. As such, summary judgment on the negligence claim was proper.

c. Intentional infliction of emotional distress

Pathway asserts that summary judgment was proper as to intentional infliction of emotional distress.

The elements of intentional infliction of emotional distress are: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and

outrageous; (3) the actions of the defendant caused the plaintiff to suffer emotional distress; and (4) the emotional distress was severe. *Hersch v. Tatum*, 526 S.W.3d 462, 468 (Tex. 2017); *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993). Because the issue of distress is dispositive, we do not address the outrageousness of Pathway's conduct or whether it was intentional or reckless.

Emotional distress includes all highly unpleasant mental reactions, such as fright, humiliation, embarrassment, anger, and worry. *Behringer v. Behringer*, 884 S.W.2d 839, 844 (Tex. App.—Fort Worth 1994, writ denied). For a plaintiff to recover, the distress must be so severe that no reasonable person should be expected to endure it. *Id*. (citation omitted). The plaintiff must prove that she suffered more than mere worry, anxiety, vexation, embarrassment, or anger. *Regan v. Lee*, 879 S.W.2d 133, 136 (Tex. App.—Houston [14th Dist.] 1994, no writ). Feelings of anger, depression, and humiliation are insufficient evidence of severe distress. *Id*. at 136–37. The Supreme Court has "set a high standard for extreme and outrageous conduct, holding that this element is only satisfied if the conduct is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Hersh*, 526 S.W.3d at 468.

Pathway maintains that it relied on representations made by Mark Broome on February 24, 2014, that the electronic media or evidence sent to Pathway for examination or duplication was lawfully obtained, as set forth in its engagement letter with Broome. Pathway also asserts that it relied on compliance with the court's order. According to Pathway, its conduct did not exceed all possible bounds of decency, nor was its conduct utterly intolerable in a civilized community. We agree. Summary judgment was proper on this issue.

d. Computer fraud and abuse

Pathway contends that it cannot be liable for a violation of the federal Computer Fraud and Abuse Act ("CFAA") because the statute does not apply to a private computer.

The CFAA prohibits, *inter alia*, unauthorized access to a "protected computer" for the purposes of obtaining information, causing damage, or perpetrating fraud. 18 U.S.C. § 1030(a)(2), (a)(4), (a)(5). Although the CFAA is a criminal statute, subsection (g) provides a private right of action when one of five factors is present. *See* 18 U.S.C. § 1030(g).[8]

Contrary to Pathway's allegation, the statute defines "protected activity" to include:

> which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States.

18 U.S.C. § 1030(e)(2)(B). The Robbins Parties maintain, and Pathway does not dispute, that the iPad was connected to the internet and used in interstate communication. Summary judgment on this ground was inappropriate.

e. Public disclosure of private facts

Pathway argues that summary judgment was appropriate because the facts regarding Vivian Robbins and those she communicated with *via* Apple iMessage are matters of legitimate public concern and were never published to anyone.

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[8] Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief. A civil action for a violation of this section may be brought only if the conduct involves one of the factors set forth in subclauses (I), (II), (III), (IV), or (V) of subsection (c)(4)(A)(i). *See* 18 U.S.C. § 1030(g).

A plaintiff alleging public disclosure of private facts must show: that (1) publicity was given to matters concerning his private life; (2) the publication of such matter would be highly offensive to a reasonable person of ordinary sensibilities; and (3) the matter publicized is not of legitimate public concern. *Robinson v. Brannon*, 313 S.W.3d 860, 868 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

In its summary judgment motion, Pathway contended that "the items in Pathway's report, which relate to the private matters of Vivian Robbins data was never published to anyone." According to Pathway, it "merely turned over its expert work product to its client, Mark Broome's attorney." Pathway further argues that "the subject matter of the data, namely the commission of crimes and prosecutions resulting therefrom are events of legitimate concern to the public and are therefore non-actionable." Turning over the Robbins Parties' private communications to Taylor constitutes publication by Pathway. With respect to Pathway's contention that the data involves matters of public concern, aside from its own, self-serving statement, Pathway provides no information from which to base the statement. As such, summary judgment was improper on this basis.

f. Harmful access by computer

Pathway claims that summary judgment was proper on the Robbins Parties' claim under the Harmful Access By Computer Act ("HACA")[9] because Vivian Robbins consented to her daughter's use of her Apple ID password and that her daughter was using it on her aunt's iPad. Pathway further argues that there is no evidence in the record that suggests Pathway intentionally or knowingly accessed a

[9] "A person who is injured or whose property has been injured as a result of a violation under Chapter 33, Penal Code, has a civil cause of action if the conduct constituting the violation was committed knowingly or intentionally." Tex. Civ. Prac. & Rem. Code § 143.001(a).

computer belonging to any of the Robbins Parties with the intent to gain information obtained therein.

Section 143 of the Texas Civil Practices & Remedies Code creates a civil cause of action for violations as follows:

> A person who is injured or whose property has been injured as a result of a violation under Chapter 33, Penal Code, has a civil cause of action if the conduct constituting the violation was committed knowingly or intentionally.

Tex. Civ. Prac. & Rem. Code § 143.001(a). Section 33.02 of the Texas Penal Code provides:

> A person commits an offense if the person knowingly accesses a computer, computer network, or computer system without the effective consent of the owner.

Tex. Penal Code § 33.02(a). The word "knowingly" is defined by the Texas Penal Code § 6.03(b) as:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Tex. Penal Code § 6.03(b). And "effective consent" is defined in Texas Penal Code § 33.01(12) as:

> "Effective consent" includes consent by a person legally authorized to act for the owner. Consent is not effective if:
>
> (A) induced by deception, as defined by Section 31.01, or induced by coercion;
>
> (B) given by a person the actor knows is not legally authorized to act for the owner;

> (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions;
>
> (D) given solely to detect the commission of an offense; or
>
> (E) used for a purpose other than that for which the consent was given.

Tex. Penal Code § 33.01(12). Here, there is no summary judgment evidence that anyone had the effective consent of Vivian Robbins to access her Apple account. Rather, the Unsworn Declaration of Vivian Robbins rebuts any allegation to the contrary:

> I had in the past allowed [my daughter] to use my Apple ID and password to download apps (games). I never gave [my daughter] my consent to use my Apple ID to allow any device to intercept and receive my text messages (something [my daughter] did not know how to do and which she adamantly denies she did on her aunt Fiona's iPad).

There are genuine issues of material fact that arise as to the issue of consent. Additionally, fact issues exist as to whether Pathway knowingly accessed the illegally intercepted communications for the purpose of obtaining information to give to Broome and Taylor.

g. Civil conspiracy

Pathway contends that summary judgment was proper because the Robbins Parties fail to set forth evidence that two or more people had a meeting of the minds to accomplish any unlawful objective because there was no unlawful objective or overt act. According to Pathway, the only reliable evidence is that Robbins' daughter typed her mother's password into her aunt's iPad on or before July 18, 2013.

The elements of civil conspiracy are that (1) two or more persons, (2) with an object to be accomplished, (3) with the meeting of minds on the object or course

of action, (4) commit one or more unlawful or overt acts, (5) and causes damage or injury. *Operation Rescue–Nat'l v. Planned Parenthood*, 975 S.W.2d 546, 553 (Tex. 1998).

As set forth above, the unsworn declaration of Vivian Robbins controverts the voluntariness of the consent because she never gave her daughter her consent to use her Apple ID to allow any device to intercept and receive her text messages and, the declaration further provides, that the daughter did not know how to make this connection and she denied having done so on her aunt's iPad. At a minimum, there is a genuine issue of material fact as to whether Pathway, Broome, and Taylor violated the state and federal laws on the illegal inception of her electronic communications. Hence, summary judgment was improper.

h. Punitive damages

Pathway argues that the Robbins Parties have no evidence of fraud, malice, or gross negligence and, thus, cannot recover punitive damages. The standard for recovery of exemplary damages is set forth in Section 41.003 of the Texas Civil Practice & Remedies Code:

> (a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:
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> (1) fraud;
>
> (2) malice; or
>
> (3) gross negligence.

Tex. Civ. Prac. & Rem. Code § 41.003. Here, the Robbins Parties failed to produce evidence of fraud, malice, or gross negligence. Thus, summary judgment was proper.

In sum, the Robbins Parties' third issue is sustained in part (*i.e.*, summary judgment improper on state and federal wiretap claims, CFAA claim, public disclosure of private facts claim, HACA claim, and civil conspiracy) and overruled in part (*i.e.*, summary judgment proper on negligence and gross negligence claims, IIED claim, and punitive damages).

C. Did the trial court err in requiring the Robbins Parties to pay Pathway the expense of producing items in response to their requests for production?

In their second issue, the Robbins Parties assert that the trial court abused its discretion by ordering them, without a showing of good cause, to pay Pathway $9,374.50 before Pathway produced any items in response to the Robbins Parties' requests for production.

1. *Standard of Review*

We review discovery orders for an abuse of discretion. A trial court abuses its discretion when it acts arbitrarily or unreasonably, or without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). "The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred." *Id*. at 242. However, a trial court has no discretion in determining what the law is or in applying the law to the facts. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig. proceeding).

2. *Rule 196.6 Expense of Production*

Rule 196.6 provides that "[u]nless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and

the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party." Tex. R. Civ. P. 196.6.

The Robbins Parties served requests for production on Pathway, to which Pathway objected. The Robbins Parties filed a motion to compel discovery, and Pathway moved for protection from this discovery. Pathway also asked the trial court to order the Robbins Parties to pay its reasonable costs and attorney's fees, including the cost of employee and attorney time in reviewing the material responsive to the request for production. After a hearing, the trial court signed an order in which it granted the Robbins Parties' motion to compel discovery, denied Pathway's motion for protection, and granted Pathway's request that the Robbins Parties pay reasonable costs and attorney's fees associated with producing the requested items. The trial court ordered that, upon the Robbins Parties' payment of Pathway's costs and attorney's fees associated with producing the requested items, Pathway should produce the items requested in the Robbins Parties' requests for production.

After the Robbins Parties disputed the amount the Robbins Parties had to pay, they filed a motion to determine the reasonable cost of production. After a hearing, the trial court signed an order finding that "that the reasonable cost of production for the work done as a result of [the Robbins Parties'] first request for production is $9,374.50 and that [the Robbins Parties] are required to pay the above sum to Pathway before the production of documents." The Robbins Parties paid Pathway this amount and received the documents and data requested. The Robbins Parties point out that part of the $9,374.50 is for payment of attorney's fees for Pathway's counsel.

3. *No "Good Cause" Shown*

In their motion to reconsider, the Robbins Parties objected to the lack of good cause to support the trial court's order requiring the Robbins Parties to pay costs. Because neither the record nor the trial court's orders demonstrate a showing of good cause for the requesting party to pay the responding parties' costs and attorney's fees, we conclude the trial court abused its discretion in issuing the Discovery Orders. *See* Tex. R. Civ. P. 196.6.

We sustain the Robbins Parties' second issue.

III. CONCLUSION

The Robbins Parties have shown that the trial court erred in granting Taylor summary judgment and in part, Pathway's summary judgment motions. Additionally, the Robbins Parties have shown that the trial court abused its discretion by ordering, without a finding of good cause, the Robbins Parties, rather than Pathway, to pay the expense of producing items responsive to production requests. We affirm in part, reverse and render in part, and reverse and remand the case for proceedings consistent with this opinion.

/s/ Margaret "Meg" Poissant
Justice

Panel consists of Chief Justice Frost and Justices Bourliot and Poissant. (Frost, C.J., dissenting).