No. 14-18-00001-CV

IN THE COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT
HOUSTON, TEXAS

CARL TOLBERT, NIZZERA KIMBALL, and VIVIAN ROBBINS

VS.

TERISA TAYLOR AND PATHWAY FORENSICS, LLC

APPELLANTS' BRIEF

Trial Court Cause No. 2015-23649
In the 309th District Court
Of Harris County, Texas
Hon. Judge Sheri Y. Dean, Judge Presiding

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Oral Argument Requested

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Sheri Y. Dean	Trial Court Judge

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request oral argument.

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Appellee, Terisa Taylor Defendant in trial court below	"Terisa Taylor"
Appellee, Pathway Forensics, LLC Defendant in trial court below	"Pathway"

The Record on Appeal

This Brief will refer to the record as follows:

Clerk's Record	"CR1:__" (volume number: page)
Reporter's Record	"RR3:___" (volume number, page)

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of a damages lawsuit arising from the illegal interception, use and disclosure of electronic communications. The lawsuit was originally filed in a civil district court but then transferred to the 309th family district court because of a related child custody modification suit. Originally, the lawsuit involved eight plaintiffs and six defendants but some plaintiffs nonsuited and some defendants settled or were dismissed, leaving three plaintiffs (Vivian Rogers, Nizzera Kimball and Carl Tolbert) and two defendants: Pathway Forensics, LLC and Terisa Taylor.

Trial Court

309th District Court of Harris County, Texas, the Honorable Sheri Y. Dean, Presiding.

Proceedings Below

The trial court granted interlocutory summary judgment motions filed by Pathway and Terisa Taylor (CR2:634 and CR1:294). Appellants filed a motion to reconsider the summary judgment granted Terisa Taylor on the grounds her motion did not address claims for injunctive relief (CR1:297). That motion was denied (CR1:320). A cross-action filed by Pathway against Mark Broome (a

defendant the plaintiffs had settled with and nonsuited) was severed and a final judgment entered on October 7, 2017 (CR: 2:693). Motions for new trial were timely filed on October 27 and 30, 2017 (CR:2709,712). A joint notice of appeal was filed on December 27, 2017 (CR2:736).

Trial Court Disposition

Final Judgment signed Sept. 9, 2011. CR 2:693).

ISSUES PRESENTED

Issue No. 1 Did the trial court err when it granted partial summary judgment for Terisa Taylor and later entered a take nothing judgment in favor of Terisa Taylor on the basis of attorney litigation immunity for Taylor's use or disclosure of illegally intercepted electronic communications?

Issue No. 2 Did the trial court err and abuse its discretion when it required Appellants to pay $9,374.50 (primarily for attorney's fees) in advance to Pathway Forensics, LLC before any documents would be produced in response to a request for production?

Issue No. 3 Did the trial court err when it granted partial summary judgment for Pathway Forensics, LLC and later entered a take nothing judgment in favor of Pathway Forensics, LLC?

STATEMENT OF FACTS

Texas and federal statutes make it a crime to intercept, use or disclose electronic communications and those same statutes provide for civil remedies for violations of those laws.[1] This is an appeal of a damages lawsuit filed by Vivian Robbins and some of the people she communicated with via Apple iMessage and e-mail against those who used and/or disclosed her illegally intercepted communications in violation of those statutes.

The damages lawsuit before this court arose, in part, out of a child custody modification lawsuit filed in April 2013 by Mark Broome, against his ex-wife, Vivian Robbins, regarding their daughter.[2] Mark Broome, in the child custody case, was at first represented just by attorney Terisa Taylor and Ms. Robbins was

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[1] Texas Penal Code Sec. 16.02(b); Texas Code of Criminal Procedure Sec. 18.20(16); The Federal Wiretap Act 18 U.S.C. § 2511(a), 18 U.S.C. § 2520 (a),(c),(d).

[2] Terisa Taylor's motion for summary judgment was a motion on the pleadings because it alleged that Plaintiffs' causes of action against Terisa Talyor failed because of the defense of attorney litigation immunity. Faced with such a motion on the pleadings, this court must: (a) assume all allegations and facts in the nonmovant's pleading are true, *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994). The above statement of facts is drawn almost verbatim from Plaintiffs' First Amended Petition filed on January 5, 2016 (CR1:190), which was the live pleading at the time summary judgment was granted for Terisa Taylor.

pro se. A few months after the custody case started, the child visited her aunt, Fiona McInally, a software licensing lawyer in Austin, Texas. Starting on July 18, 2013, the aunt's iPad began to receive text messages and e-mails between Vivian Robbins and the other named plaintiffs in the lawsuit below and at least 27 others. Appellants and their expert witness contended that the child using her mother's Apple ID and password to download a game on the aunt's iPad could not possibly explain how the aunt's iPad started intercepting Ms. Robbins' communications. There is no doubt that the Appellants' confidential and personal communications were appearing on the aunt's iPad without the plaintiffs' knowledge or consent, all in the middle of Vivian Robbins' child custody case with Mark Broome.

The aunt or her husband mailed the iPad to her brother-in-law, Mark Broome, in Houston. Mark Broome then had to intentionally connect his sister-in-law's iPad up to his home WiFi network at least twice so it could start receiving Ms. Robbins' communications again. Mark Broome then shared the text messages and e-mails with his lawyer, Terisa Taylor, and later her co-counsel, Ricardo Ramos.

Vivian Robbins did not know her text messages and e-mails were being intercepted until Terisa Taylor produced 617 pages of her text messages to Ms.

Robbins' attorney on January 31, 2014 in the child custody case and told Vivian Robbins' attorney that she and her client were in possession of everything Ms. Robbins had communicated to others, including a nude photograph that Ms. Robbins had sent via text message to her boyfriend. Ms. Taylor told Ms. Robbins' attorney that she intended to use the photograph of Ms. Robbins' breasts as demonstrative evidence in the jury trial and she would show the jury a poster size photo of her breasts. Ms. Taylor told the attorney to advise his client to sign an agreed order resolving the custody case and agreeing to supervised visitation only or this evidence would be used against her.

Ms. Robbins refused to sign Ms. Taylor's proposed order. So then, Terisa Taylor on February 5, 2014 filed an unusual pleading entitled "Notice of Intent to Use Demonstrative Evidence" which said that Mark Broome intended to use the following at the time of trial, "Power Point presentation and large photo board." Ms. Taylor, for the previous six months, had used information gleaned from the illegally intercepted communications in several family court hearings and to conduct discovery in the child custody modification case between Vivian Robbins and Mark Broome, prior to Ms. Robbins becoming aware of the interception.

A CD containing data from the aunt's iPad was apparently

inadvertently produced by Terisa Taylor to Vivian Robbins' attorney, Allison Jones, on April 2, 2014 and that data shows that the aunt's iPad e-mail settings had been changed to use Vivian Robbins' personal Comcast email address and password as the setting for incoming e-mails. This is something much more than use of Ms. Robbins' Apple ID and password to download games or even use the Apple Messenger (text message) application. Someone intentionally set the aunt's iPad to capture Vivian Robbins' incoming e-mails as well.

Mr. Broome's Emergency Motion for Turnover of Respondent's Computer/Electronic Devices filed on March 3, 2014 in the child custody case revealed that Mark Broome knew the contents of his ex-wife's e-mails as well as her text messages. His motion stated in part, "Petitioner has come to learn that Respondent, Vivian Leah Robbins, has been reviewing and responding to e-mails and text messages on her cellular phone, ipad and iphone and/or laptop or desktop computer, pertaining to...[activities that could have only been learned from the illegal interception of Ms. Robbins' electronic communications]." Mark Broome in the child custody case filed a pleading entitled "Mark Broome's Brief on Interception of Communications" which states, "We know that Mark Broome ("Mark") obtained a number of communications sent to, or sent by, Vivian Robbins ("Vivian"),(such emails and text messages, collectively, the

"Communications")."

Mark Broome, Fiona McInally and Neal Broome (Fiona McInally's husband) provided sworn affidavits filed by Mark Broome in the child custody lawsuit which confirm that Fiona's iPad received Ms. Robbins' text messages between July 18, 2013 and January 11, 2014. Mr. Broome also filed pleadings which state that he also has e-mails of Ms. Robbins. The affidavits of Fiona McInally and Neal Broome confirm that they disclosed the contents of Ms. Robbins' electronic communications to Mark Broome. Mark Broome clearly disclosed the contents of those intercepted electronic communications to at least his wife, his attorney, Ms. Taylor, and Pathway Forensics. Ms. Taylor used and disclosed the contents of those intercepted electronic communications to the court and in their pleadings in the modification case repeatedly.

Defendant Terisa Taylor's co-counsel in the child custody modification case, Ricardo Ramos, wrote a State Bar CLE article entitled "Operation Information Interception: When It's Legal and When It's Not" (36th Annual Marriage Dissolution Institute April 2013), and his paper said in part:

> *DON'T: Take possession of illegally obtained material. If you have it in your possession, read it or listen to it, you may be committing a crime by using it in the preparation of your case.*

DO: Advise your clients on the law of intercepting email and other forms of communication. The best policy is to advise your clients NOT to access their spouse's email accounts at all, even if they think they have consent to do so.

DON'T: Represent a person who has illegally obtained electronic material. Period. It is not worth the risk.

....

DON'T: If you have illegally obtained discovery in your possession, don't produce it in discovery without the advice of a criminal defense attorney.

Pathway Forensics, LLC, was retained to provide expert witness opinions to Mark Broome in the child custody case. Defendant, Terisa Taylor, or Defendant, Mark Broome, provided Fiona McInally's iPad to Pathway Forensics, LLC for examination.

The trial court granted Terisa Taylor summary judgment based on attorney litigation immunity (CR1:294). Taylor's Amended Motion for Summary Judgment is at CR1:265 and the order granting her motion is at CR1:294. Appellants filed a Motion to Reconsider Granting Terisa Taylor's Amended Motion for Summary Judgment and argued that her motion did not even address

Appellants' claims for injunctive relief. The trial court denied the motion to reconsider. (CR1:320).

Appellants (plaintiffs in the case below) served a request for production on Pathway for documents and data and devices in the damages lawsuit that gives rise to this appeal. The trial court ruled that Appellants could not obtain the items requested unless they first paid Pathway $9,374.50 (CR1:315). The amount the Appellants had to pay Pathway to obtain discovery was based primarily on the amount of attorney's fees Pathway expected to incur. (RR 5:14, 18-19).

The trial court then granted Pathway summary judgment (CR 2:634).

Appellants settled with the other defendants (Mark Broome, Fiona McInally and Neal Broome), who were nonsuited.

Pathway filed a cross-action against Mark Broome, alleging in part that Mark Broome had violated his warranty that the electronic evidence he provided Pathway was obtained lawfully (CR2:645) and that action was severed into a separate suit (CR2:690-1).

SUMMARY OF THE ARGUMENT

A lawyer or a forensic computer expert who violates state and federal law and uses or discloses illegally intercepted electronic communications should be liable for statutory civil damages just like any other person.

The attorney litigation immunity doctrine does not apply to criminal acts and a state common law rule cannot override a federal statute. Other courts have held that attorneys can be civilly liable for using or disclosing illegally intercepted electronic communications. Certainly, an attorney or forensic expert may be enjoined and ordered not to disclose illegally obtained information.

It is absolute error for a trial court in civil litigation to order the plaintiffs to pay the defendant's attorneys fees in advance before requiring the defendant to produce clearly relevant documents and items.

The traditional summary judgment motion filed by Pathway should not have been granted because it did not negate the causes of action asserted by Appellants against Pathway.

This court should reverse and remand and order that Pathway return the money the trial court ordered Appellants to pay in advance to even obtain discovery.

ARGUMENT & AUTHORITIES

Issue No. 1. The trial court erred when it granted partial summary judgment for Terisa Taylor and later entered a take nothing judgment in favor of Terisa Taylor on the basis of attorney litigation immunity for Taylor's use or disclosure of illegally intercepted electronic communications.

A. Standard of Review

Terisa Taylor's motion for summary judgment was a motion on the pleadings since Terisa Taylor alleged that Appellants' petition did not state a valid cause of action because of the defense of attorney litigation immunity. (CR1:265-285). Faced with such a motion on the pleadings, the court must: (a) assume all allegations and facts in the nonmovant's pleading are true, *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 699 (Tex. 1994) and (b) make all inferences in the nonmovant's pleadings in the light most favorable to the nonmovant. *Natividad*, 875 S.W.2d at 699.

An appellate court reviews a grant of summary judgment de novo. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015).

In *McCrary v. Hightower*, 513 S.W.3d 1, ([14th Dist.] 2016, no pet.), the defendants moved for summary judgment "on the pleadings" based on the theory that the plaintiffs had " pleaded [themselves] out of court" with facts that

affirmatively negated their causes of action and this court held, “The motion was not explicitly characterized as a " no-evidence" motion for summary judgment under Rule 166a(I), and we conclude that it is a " traditional" motion for summary judgment.”

The Texas Supreme Court has summarized the applicable standard of review for a traditional motion for summary judgment in a case involving the attorney litigation immunity defense as follows:

> *We review a grant of summary judgment de novo. A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. " When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." Attorney immunity is an affirmative defense. Therefore, to be entitled to summary judgment, [the defendant attorney] must have proven that there was no genuine issue of material fact as to whether its conduct was protected by the attorney-immunity doctrine and that it was entitled to judgment as a matter of law.*

Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (2015)(citations omitted).

B. Criminal acts are an exception to the Attorney Litigation Immunity Privilege

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.

The Texas Penal Code at Sec. 16.02(b) makes it a second degree felony to intercept, disclose, or use electronic communications.

The civil damages provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 et seq. (the "Wiretap Act" or "Title III") affords a private right of action to "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter[.]" 18 U.S.C. § 2520(a). The Act makes it a crime to intercept, use or disclose electronic communications. 18 U.S.C. § 2511(a),(c),(d).

The conduct of Terisa Taylor alleged by Appellants to be grounds for their statutory damages claims is also criminal. Appellants sued Taylor for conduct that violates the Federal Wiretap Act and Chapter 16 of the Texas Penal Code, both of which make it a criminal offense to disclose or use an illegally intercepted electronic communications. The Texas and federal statutes also create civil tort remedies in addition to the criminal sanctions they impose.

There is a clearly recognized exception to attorney litigation Immunity for criminal acts. *Gaia Envtl., Inc. v. Galbraith*, 451 S.W.3d 398, 404 (Tex. App. - Houston [14th Dist.] 2014, pet. denied). There, the Court stated,"**Criminal conduct can negate attorney immunity.**" (Emphasis added). See also, *Rawhide Mesa-Partners, Ltd. v. Brown McCarroll, L.L.P.*, 344 S.W.3d 56, 60 (Tex. App. - Eastland 2011, no pet.), where the court stated, in discussing attorney litigation immunity, "Texas courts have consistently held that lawyers are liable for fraudulent or **criminal activity**." (Emphasis added).

Almost all of the cases cited by Terisa Taylor in her motion for summary judgment on attorney litigation immunity support the principle that the attorney litigation immunity does not apply to criminal acts. For example, the most recent Texas Supreme Court case decision on attorney litigation immunity, *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477 (Tex. 2015), clarified the reach of the

immunity, but still cited examples of when the immunity would **not** apply, such as an attorney who participates in a fraudulent business scheme with his client or a lawyer who assaults opposing counsel during a trial. *See id.* Because such acts are "entirely foreign to the duties of an attorney" and "not part of the discharge of an attorney's duties in representing a party," they are actionable. *Id.* The commission of a crime is entirely "foreign to the duties of an attorney" and are "not part of an attorney's duties in representing a party."

There is no valid reason why attorneys who be exempt from civil liability for using or disclosing illegally intercepted electronic communications when a teacher, plumber, dentist or janitor would be. See e.g., Restatement (Third) of the Law Governing Lawyers § 56 (2000) (" [A] lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances.").

No case cited by Terisa Taylor in her motion for summary judgment on attorney litigation immunity involved either criminal acts or statutory causes of action[3]. There is no case law at all that the immunity bars statutory causes of

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[3] *Sacks v. Hall*, No. 01-12-00531-CV (Tex. App. - Houston [1st Dist.] 11/20/2014, pet. denied), cited by Taylor to the trial court, is not applicable to the facts of this case because: (1) federal preemption was rejected by the Court of Appeals because HIPAA does not create a private cause of action, and (2) the plaintiff's claim against the lawyers centered on their alleged sharing of the plaintiff's dental records with another lawyer and her summary judgment evidence failed to prove that

action based on attorney litigation immunity. No Texas case on the subject has ever held that the attorney litigation immunity privilege applies to criminal acts.

At least four federal cases have specifically held that attorney litigation immunity does not apply if the attorney violated the Federal Wiretap Act:

The court held in *Nix v. O'Malley*, 160 F.3d 343, 352-53 (6th Cir. 1998), cert. denied, 513 U.S. 929, 115 S.Ct. 320, 130 L.Ed.2d 280 (1994) that an attorney's disclosure of communications intercepted in violations of the Wiretap Act were not protected by attorney immunity. "Ohio and federal wiretap law explicitly permit disclosures in certain instances (pursuant to valid warrants, for example), but their plain language allows no further exceptions."

In *Lewton v. Divingnzzo*, 772 F. Supp. 2d 1046, 1057 (D. Neb. 2011) (where the underlying case was a child custody case) the district judge specifically rejected application of the attorney litigation immunity to shield a lawyer from civil liability. The court ruled, "the court was unable to find any binding authority holding that an attorney who uses a communication intercepted in violation of the federal Wiretap Act is entitled to blanket immunity from Title III liability. The court did find persuasive authority to the contrary."

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allegation. *Sacks v. Hall* was not decided based on federal preemption nor did it hold that the common law principle of attorney litigation immunity applied to statutory causes of action or criminal acts.

Babb v. Eagleton, 616 F. Supp. 2d 1195, 1207 (N.D. Okla. 2007) (the underlying case was also a child custody case) resulted in the rejection of the defendant attorney's use of attorney litigation immunity as a shield against liability for violations of wiretapping act. The court held:

> *Attorney raised the additional argument that Father failed to state a claim against her because any alleged actions of Attorney qualify for a "litigation privilege." Attorney relied primarily on state law cases holding that attorneys cannot be held liable for the tort of defamation when the alleged defamatory statements are made in the course of judicial proceedings.. Attorney also cited one case in which a court extended a "litigation privilege" arising under state defamation law to shield an attorney from liability for violation of the Illinois Eavesdropping Act. Father [who was suing his ex-wife's attorney] contends that a litigation privilege arising under state law cannot serve as a defense to Title III liability.*
>
> *Attorney's assertion of a "litigation privilege" as a defense to Title III liability fails for three reasons. First, Attorney did not cite, and the Court did not locate, any authority holding that an attorney who uses a communication intercepted in violation of Title III is entitled to some type*

of privilege or immunity from Title III liability. Instead, in all cases cited by Attorney, courts applied the litigation privilege as a defense to claims arising solely under state law. Second, Tenth Circuit law seems to forbid applying "state law or policy" as a defense to Title III liability. Finally, courts have allowed Title III claims to proceed against attorneys even when the attorney used the intercepted communication in the course of judicial proceedings. Thus, the Court is unable to hold that Attorney's actions are shielded from the alleged Title III violations based on a "litigation privilege"...

(Citations omitted).

The Court in *Pyankovska v. Abid*, Case No. 2:16-CV-2942 JCM, (D. Nev. November 16, 2017) ruled, "This court agrees with the holding and reasoning of *Babb* [*Babb v. Eagleton*, 616 F. Supp. 2d 1195 (N.D. Okla. 2007)], and will not apply a litigation privilege to absolutely immunize defendant from Title III liability.")

See also *Thompson v. Dulaney*, 838 F.Supp. 1535, 1548 (D.Utah 1993) (allowing Title III claims to go to trial against attorney for use of interceptions in judicial proceedings without discussing "litigation privilege") and *United States v. Wuliger,* 981 F.2d 1497, 1505 & 1507 (6th Cir. 1992) - attorney in a divorce

case was criminally prosecuted for use of intercepted communications.

C. A Texas common law rule cannot override a federal cause of action.

The Federal Wiretap act preempts any Texas common law, including a common law immunity doctrine. Under the Supremacy Clause of the Federal Constitution, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U. S. 663, 369 U. S. 666 (1962).

The United States Supreme Court has held that a state law which immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy. *Martinez v. California*, 444 U. S. 277, 444 U. S. 284 (1980).

The U.S. Sixth Circuit summarized the purposes of the federal Wiretap Act:

Title III has as its dual purpose (1) protecting the privacy of wire and oral

communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized.

[A]lthough Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern.

Fultz v. Gilliam, 942 F.2d 396, 401 (6th Cir.1991) (citations omitted).

Application of the state common law doctrine of attorney litigation immunity would run counter to these purposes of Title III and would clearly thwart the congressional remedy for the illegal interception, use, or disclosure of electronic communications."

D. The Attorney Litigation Immunity Privilege Does Not Apply to Injunctive Relief

Appellants also sued Terisa Taylor for injunctive relief to keep her from disclosing the contents of the illegally intercepted electronic communications (Cr1:196-7). The trial court's grant of summary judgment in favor of Terisa Taylor dismissed all causes of action against her (CR1:294). Appellants argued

to the trial court that the attorney litigation immunity doctrine does not apply to injunctive relief (CR1:297).

There is no case law that says an attorney cannot be enjoined from releasing or using confidential or illegal obtained documents or data and in fact attorneys are enjoined all of the time from doing just that. The common law rule that makes attorneys immune from suit arising out of their work as attorneys has never been applied to injunctive relief. There are thus no reported cases directly on point. However, many cases have held that various other immunity doctrines do not bar requests for injunctive relief.

The United State Supreme Court in *Pulliam v. Allen*, 466 U.S. 522, 540, 104 S.Ct. 1970 1980, 80 L.Ed.2d 565 (1984) held that the doctrine of judicial immunity from damages did not extend to equitable relief under 42 U.S.C. § 1983.

Numerous courts have held that the doctrine of absolute immunity does not protect a prosecutor from injunctive relief. See e.g., *Supreme Court of Va. v. Consumers Union of United States, Inc.,* 446 U.S. 719, 736–37, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980); *Reyna v. City of Weslaco*, 944 S.W.2d 657, 661 (Tex. App. -Corpus Christi 1997, no writ).

The United States Supreme Court has long held that Eleventh Amendment

sovereign immunity was not a bar to injunctive relief against a state. See e.g., *Milliken v. Bradley*, 433 U.S. 267, 289-90, 97 S.Ct. 2749, 2761-62, 53 L.Ed.2d 745 (1977); *Edelman v. Jordan*, 415 U.S. 651, 663-64, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974); *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Issue No. 2: Did the trial court err and abuse its discretion when it required Appellants to pay $9,374.50 (primarily for attorney's fees) in advance to Pathway Forensics, LLC before any documents would be produced in response to a request for production?

In the underlying civil damages suit, the plaintiffs (now Appellants) sent a request for production to Pathway Forensics on June 15, 2015 and on July 15, 2015 (CR1:104-116), Pathway objected to every single request and then filed a motion for protection for discovery (CR1:121-127).

A hearing was held on November 13, 2015 on Plaintiffs' Opposed Motion to Compel Discovery and on Pathway's Motion for Protection from Discovery (RR2:1-39). The court, without hearing any testimony, ordered that Pathway had to produce all requested documents and ordered that Appellants had to pay Pathway for its costs incurred in producing the items. The trial court's order was entered on November 19, 2015 (Cr1:186).

Appellants filed a motion to Determine Reasonable Cost of Production after Pathway asked for $9,374.50 for its attorney's fees and employee salaries incurred in reviewing, organizing and producing the requested items (CR1:200). That motion was heard on May 31, 2016 and the trial court ordered Appellants to pay Pathway the requested amount before Pathway had to produce any documents or items (RR5:25-27). The order signed on June 13, 2016 stated:

> *Came on to be heard, Plaintiffs Motion to Determine Reasonable Cost of Production, and after considering the pleadings and argument of counsel, the court finds that the reasonable cost of production for the work done as a result of the Plaintiffs first request for production is $9,374.50 and that Plaintiffs are required to pay the above sum to Pathway before the production of documents.*

(CR1:315).

Appellants filed a petition for writ of mandamus with this court, which was denied (No. 14-16-00591-CV). Appellants paid Pathway $9,374.50 and received the documents and data they had requested in discovery.

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A. The Cost of Production is Borne by the Producing Party

Tex. R. Civ. Proc. 196.6 states:

> *196.6 Expenses of Production. Unless 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.*

There is no case that interprets TRCP 196.6 and the official comment on Rule 196.6 merely says,"The rule clarifies how the expenses of production are to be allocated absent a court order to the contrary."

In general, Texas law does not allow recovery of attorneys' fees unless authorized by statute or contract. *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299 (Tex. 2006). Before a final judgment, the only rule or statute that allows for an award of attorney's fees would be an award of discovery sanctions under Tex. R. Civ. Proc. 215, but even Pathway's lawyer made it clear the award of attorney's fees here was not a sanction (App. H, page 16, lines 11-12). TRCP 196.6 uses the term "expenses" and not "attorney's fees."

Making production of highly relevant documents contingent on the payment of attorney's fees is contrary to the public policy behind the Texas rules on discovery in civil cases. The purpose of discovery is to allow the parties to obtain full knowledge of the issues and facts of the lawsuit before trial. *West v.*

Solito, 563 S.W.2d 240, 243 (Tex. 1978).

There is simply no law or rule that allows a trial court to award attorney's fees incurred in responding to a production request before final trial if sanctions are not involved. The trial court acted without reference to any guiding rules or principles. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex.1990).

B. No "Good Cause" Was Shown

Even if TRCP 196.6 allows an interim award of attorney's fees and employee salaries incurred in producing documents, such an award can only be made upon a showing of "good cause." Here, the trial court ordered that Pathway would be paid in advance for its attorney's fees and even the salaries of its employees who dealt with responding to the production request before Pathway was obligated to produce any items. Those "costs" assessed by the trial court are those that any corporate party would incur in responding to a request for production. In almost every case, a lawyer responding to a production request reviews which items should be produced, which are privileged, which need to be redacted and which are non-responsive to the request. Surely, for the rule to have any meaning, "good cause" must mean something above and beyond what is normally done in almost every civil case.

At the hearing on November 13, 2015, the court stated:

So, just to be clear, first of all, as far as your motion to compel. I'm going to compel them to present that information to you. I'm also going to order that you pay for the cost of whatever it takes to produce that because that's certainly part of the rules.

(RR2:34, lines 8 - 13).

The trial court also said:

I can't be specific, but I'm ordering that whatever it cost, including attorney's fees, Counsel, your client's going to have to pay for it.

(RR2:49, lines 8 - 10).

The trial court and counsel for Relators then had this exchange:

Mr. Enos: The Rules of Civil Procedure clearly say that the cost of copying things for production can -- should be paid by the person asking for the production. You've now also said attorney's fees --

THE COURT: Right.

MR. ENOS: And I just want to clarify one factual thing. The Court didn't appoint Pathway. Pathway was hired by Mr. Broome as his expert. All the Court did was order that these devices be delivered to Pathway.

THE COURT: All right. But, Counsel, I just made it very clear -- I understand what you're saying; and I just made it very clear to him he cannot pass on the cost of that. In other words, what was requested and what was done initially on this cannot be assessed to you. That would not be correct. As far as the order on the motion to compel is concerned, if he has to expended time with his client to make sure that everything has been produced and so forth and the cost, I'm assessing to your client; and I've already told them let's not go crazy here.

(RR2:50, lines 8 - 51, line 4).

At no time did Pathway ever provide evidence that producing the items

requested involved something that does not occur in every complex, civil case. Pathway's employees were expert witnesses for Mark Broome in the child custody modification case. Almost all of the items requested by Appellants in the underlying civil damages case would have been subject to discovery in the child custody case and certainly the Appellants would not have had to pay for that. Moreover, Pathway is in the business of providing evidence and testimony for courts and producing its files is part of its normal course of business.

The record contains absolutely no evidence that could possibly be "good cause" under TRCP 196.6

It was clear error for the trial court to require Appellants to pay Pathway's attorneys fees incurred in replying to the request for production.

Issue No. 3. Did the trial court err when it granted partial summary judgment for Pathway Forensics, LLC and later entered a take nothing judgment in favor of Pathway Forensics, LLC?

Pathway filed a traditional summary judgment motion (CR1:323) based on absolute or qualified immunity because it was working as an expert witness in the underlying child custody case (See Pathway Motion at page 6, CR1:328). Pathway also made specific arguments why it was entitled to summary judgment against each of the causes of action Appellants were asserting at the time against Pathway in their Second Amended Original Petition (CR 1:303). It was error for the trial court to have granted Pathway summary judgment on any of the reasons it included in its summary judgment motion.

A. Pathway should not have been granted summary judgment as to any cause of action based on the witness immunity doctrine.

1. The witness immunity rule does not apply to the causes of actions asserted against Pathway

The witness immunity rule in all of the cases cited by Pathway to the trial court was used to defeat claims against witnesses for defamation, malpractice in their work as an expert and providing false testimony. The witness immunity rule has never been applied in any reported case to defeat the statutory cases causes

of action asserted by Plaintiffs (violation of the federal and Texas Wiretap laws, Sec. 18.20(16) of the Texas Rules of Criminal Procedure, and 18 U.S.C. Sec. 2520). Those statutes do provide defenses but do not include any defense for a person simply because they are serving as an expert witness. A court cannot write words into a statute, see *McIntyre v. Ramirez,* 109 S.W.3d 741, 748 (Tex.2003) ("The judiciary's task is to interpret legislation as it is written"), and these laws do not except expert witnesses from their reach.

None of the cases cited by Pathway in its motion for summary judgment apply witness immunity to statutory causes of action. See the discussion above regarding attorney litigation immunity.

2. The common law rule of witness immunity is preempted by Federal law

The common law rule of witness immunity is a state rule made by its courts and state law is preempted by federal law. A state common law immunity cannot be used to defeat a federal statutory cause of action because of the Constitution's supremacy clause. Under the Supremacy Clause, any state law that conflicts with a federal law is preempted. *Gibbons v. Ogden*, 22 U.S. 1 (1824). See discussion above regarding attorney litigation immunity and the federal Wiretap Act.

3. The common law rule of witness immunity is being abolished around the world and it should be abolished in this case if it is held to bar Plaintiffs' claims.

Pathway raises the common law rule that expert witnesses are immune from suit for their testimony in court and work related to their testimony, a principle which American and Texas courts accepted based on British common law. Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9. COLUM. L. REV. 463 (1909); see e.g. *Runge v. Franklin*, 10 S.W. 721, 724 (Tex. 1889).

The rule Pathway relies was borrowed by U.S. and Texas courts from British common law. However, Britain no longer follows that rule except in defamation cases. *Jones v Kaney* [2011] UKSC 13 is a 2011 decision of the Supreme Court of the United Kingdom which abolished the immunity for expert witnesses and allowed them to be sued for professional negligence. The Court noted that the immunity of expert witnesses has a long history which dates back over 400 years (citing a case from 1585). The Justice writing for the majority analyzed the various reasons for the immunity and concluded:

> *For these reason I conclude that no justification has been shown for continuing to hold expert witnesses immune from suit in relation to the evidence they give in court or for the views they express in anticipation of*

court proceedings.

....It follows that I consider that the immunity from suit for breach of duty that expert witnesses have enjoyed in relation to their participation in legal proceedings should be abolished. I emphasize that this conclusion does not extend to the absolute privilege that they enjoy in respect of claims in defamation.

4. Public Policy Actually Should Favor Making Forensic Experts Liable Under These Circumstances

This case involves what surely must be an unusual set of facts. A teenager knows her mother's Apple ID and password and mysteriously her aunt's iPad start receiving her mother's texts which the aunt, uncle, father and his lawyers keep secret for seven months in the middle of a child custody case between the father and mother. The aunt's iPad is delivered to forensic experts with no court order or en camera inspection or even notice to the mother. The public interest would actually be protected if the expert were held civilly liable for violating federal and state criminal laws on the disclosure of illegally intercepted electronic communications. The public would wants illegally intercepted text messages not to be disclosed or used and liability in this specific case would serve that purpose.

Computer forensic experts already have to be very careful when they handle phone and computers and they are all taught of applicable state and federal laws. Making experts properly handle electronic evidence would not serve any of the public interests articulated by the courts which have adopted witness immunity.

B. Pathway should not have been granted summary judgment based on its other grounds specific to each cause of action asserted by Appellants.

In addition to witness immunity, Pathway made other arguments why each cause of action asserted by Appellants against Pathway should fall to its traditional summary judgment motion.

1. Tex. Code of Crim. Proc. Sec.18.20(16) and Federal Wiretap Act, 18 U.S.C. 2520

Pathway in its summary judgment motion, in addition to witness immunity, argued that it was not liable on the federal and state statutory causes of action because it acted pursuant to a court order. (CR1:333-4). Actually, Pathway's own summary judgment evidence proved that was simply not true. The court in the child custody case never issued any order regarding Fiona McInally's iPad. Thus, Pathway cannot use the defense of a good faith reliance on a court order as to Fiona's iPad. The court order that was attached as Exhibit B to Pathway's

summary judgment motion (CR1:381-2) was signed on March 12, 2014 as to Vivian Robbins' devices only and says in pertinent part:

It is therefore ORDERED that:

2. *Respondent [Vivian Robbins] to immediately turnover her I-Phone/cell-phone, I-Pad, Laptop and/or home computer to Pathway Forensics at 14404 Walters Road #630, Houston, TX 77014 713-401-3380 Tel. 713-513-5050 Fax ~~Petitioner's counsel of record, Terisa Taylor, 917 Franklin Street, Suite 510, Houston, Texas 77002.~~*

3. *Petitioner's expert, by order of this court, properly and non-invasively create back-up images of all drives and media in the custody and control of Respondent via his I-Phone/cell-phone, I-Pad, Laptop and/or home computer, that may contain electronic data relevant to the issues in this matter, except any attorney-client privilege matters.*

See Pathway Summary Judgment Motion Exhibit B (CR381-2).

This order by its own terms did not apply to Fiona McInally's iPad.

It should be noted that the court struck out the provision that Vivian Robbins' electronic devices would be delivered to Terisa Taylor and instead

wrote in that they were to be delivered to Pathway Forensics.

This order only authorized Pathway to make a copy of the electronic devices of Vivian Robbins and did not authorize the release of the data to anyone. It certainly did not mention, require or authorize the sharing of the electronic data on Fiona McInally's iPad.

Once Pathway had custody of Vivian Robbins' electronic data, it was not free to share that data with anyone absent agreement or further court order. Pathway was being sued for "using or disclosing" illegally intercepted electronic communications (not for intercepting them). At a minimum there is a genuine issue of material fact as to whether Pathway's actions were authorized by this court order.

Pathway also argued in its summary judgment motion at pages 13 - 20 (CR1:335-340) that Pathway did not contemporaneously intercept the electronic communications and therefore could not be liable under the Texas or federal statute. Not only was there no summary judgment evidence of that fact, the argument is simply and totally not relevant. Appellants did not sue Pathway for intercepting their electronic communications. Pathway was sued for using or disclosing those communications which someone else had intercepted. That clearly falls within both statutes. Pathway did not offer any summary judgment

evidence that proved that when Vivian Robbins sent a message via iMessage to her mother, Nizzera Kimball, for example, that it did not appear on the aunt's iPad contemporaneously. Thus, the summary judgment evidence did not negate that element of the cause of action.

The unsworn declaration of Vivian Robbins provided by Appellants in their response to the summary judgment motion at a minimum raised a genuine issue of material act whether her communications were contemporaneously intercepted. (CR2: 604).

2. Negligence and Gross Negligence

Pathway in its summary judgment motion at page 20 merely concluded, "There was no evidence Pathway acted with negligence or gross negligence when it shared copies of Plaintiff Vivian Robbins' electronic devices without a court order..." (CR1:342). Pathway did not file a "no evidence" summary judgment, which would have required Appellants to submit evidence supporting their cause of action. Pathway had to provide competent summary judgment evidence to disprove the cause of action and it failed to do so. The declaration of Vivian Robbins attached to Appellant's summary judgment response (and the attached transcript of a legally recorded conversation with a Pathway employee)

established that when Ms. Robbins turned her electronic devices over to Pathway as ordered by the court that she was promised her data would not be turned over to Mr. Broome without her agreement or further court order. (CR2:600, 602, 610-632).

3. Intentional Infliction of Mental Distress

Pathway's summary judgment motion at pages 24 - 25 make the conclusory statement that Pathway's actions did not "exceed all possible bounds of decency, nor was its conduct utterly intolerable in a civilized community" (CR1:347-8), but there was no summary judgement evidence to support that assertion. Again, Pathway did not file a "no evidence" summary judgment, which would have required Appellants to submit evidence supporting their cause of action. Pathway had to provide competent summary judgment evidence to disprove the cause of action and it failed to do so.

4. Federal Computer Fraud and Abuse Act, 18 U.S.C. 1030(g)

Pathway's summary judgment motion relied solely on the assertion that Fiona McInally's iPad was not a government computer (CR2:343-345). The 1986 Computer Fraud and Abuse Act,18 U.S.C. 1030(g), applies as noted by

Pathway only to government computers, computers of banks and to "protected computers." Pathway in its motion quoted part, but not all, of the statute and failed to provide a key definition. “Protected computers” are defined under section 18 U.S.C. § 1030(e)(2) to mean a computer:

(e) As used in this section—

(1) the term “computer” means an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device;

(2) the term “protected computer” means a computer—

(A) exclusively for the use of a financial institution or the United States Government, or, in the case of a computer not exclusively for such use, used by or for a financial institution or the United States Government and the conduct constituting the offense affects that use by or for the financial institution or the Government; or

> ***(B) 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;***

A computer connected to the Internet is involved in interstate commerce. *US v. Trotter*, 478 F.3d 918, 921 (8th Cir. 2007)(private computer owned by the Salvation Army was connected to the Internet and thus was used in or affected interstate commerce). There is no question that Fiona McInally's iPad was connected to the Internet. There certainly was no summary judgment evidence that her iPad was not connected to the Internet.

5. Publication of Private Facts

Pathway's summary judgment motion at pages 28 - 29 (CR1:350-1) argued that the facts regarding Vivian Robbins and those she communicated with via Apple iMessage were matters of legitimate public concern." There was no summary judgment evidence to support that conclusion and the cases cited by Pathway to the trial court have absolutely no bearing on private electronic

messages between private citizens who are not public officials.

6. Harmful Access to Computer, Tex. Civ. Pract. & Rem. Code Sec. 143.001 because of violation of Texas Penal Code Sec. 33.02.

Pathway argued in its motion that Vivian Robbins had given her daughter her effective consent to see her electronic communications by sharing her Apple ID and password (CR1:347-8). There was no summary judgment evidence that proved that assertion. The unsworn declaration of Vivian Robbins attached to the Appellants' response to the summary judgment motion at a minimum established a genuine issue of material fact on whether Ms. Robbins ever gave her daughter her consent to allow her electronic communications to be intercepted (CR2:600-605).

7. Civil Conspiracy

Pathway did not provide any summary judgment evidence which negated this cause of action. Pathway's motion states, "There was no 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." (CR1:349). Pathway did not file a "no evidence" summary judgment motion. Pathway had the burden to

provide summary judgment evidence that conclusively negated one element of the cause of action and no summary judgment evidence presented by Pathway did so.

8. Request for Injunctive Relief

The request for injunctive relief made by Appellants in their Second Amended Original Petition (their live pleading at the time Pathway moved for summary judgment) (CR:1:311) was never addressed or mentioned in Pathway's Motion for Summary Judgment. It was therefore error for the trial court to grant Pathway summary judgment as to Appellants' claim for injunctive relief.

Conclusion

Attorneys and forensic experts who violate the federal and state statutes criminalizing the use and disclosure of illegally intercepted electronic communications should face civil liability like any other citizen. The goal of justice in our courts is actually furthered if lawyers and witnesses must carefully avoid use of illegal evidence like everyone else.

REQUEST FOR RELIEF

Appellants request that this Court of Appeals reverse the trial court and remand the claims against Terisa Taylor and Pathway Forensics, LLC to the trial court for further proceedings. Appellants request that the award of $9,374.50 to Pathway Forensics, LLC be reversed and that the funds be ordered returned to Appellants upon remand.

Appellants pray for recovery of costs and all other relief to which they are entitled.

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CERTIFICATE OF SERVICE

A copy of this notice is being filed with the appellate clerk in accordance with rule 25.l (e) of the Texas Rules of Civil Procedure. I certify that a true copy of this Brief was served in accordance with rule 9.5 of the Texas Rules of Appellate Procedure on each party or the attorney for such party indicated below by the method noted on May 4, 2018.

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CERTIFICATION

I certify that this filing complies with the word count and font size limitations as provided by Rule 9 of the Texas Rules of Appellate Procedure and that there are 8,703 words.

/S/ Greg B. Enos
Attorney for Appellees

Appendix: Final Judgment entered October 7, 2017

THIS DOCUMENT CONTAINS SENSITIVE DATA

Ver. 4 - 9/28/17

NO. 2015 - 23649

BRANDI MARTIN, INDIVIDUALLY AND AS NEXT FRIEND OF BLAKE MARTIN, A MINOR, TRACY ROGERS, GINA SALWAY GAYLE BUZZELLI; CARL TOLBERT; NIZZERA KIMBALL; and VIVIAN ROBBINS, Plaintiffs	*	IN THE DISTRICT COURT OF
VS.	*	HARRIS COUNTY, TEXAS
TERISA TAYLOR, MARK BROOME, NEAL BROOME, CONNIE BROOME, FIONA MCINALLY AND PATHWAY FORENSICS, LLC	*	309TH JUDICIAL DISTRICT

FINAL JUDGMENT

The Court finds that Plaintiffs, Brandi Martin, Individually and as Next Friend of Blake Martin, a minor, Tracy Rogers, Gina Salway, and Gayle Buzzelli nonsuited their claims as to all defendants.

The court finds that Plaintiff, Vivian Robbins, nonsuited with prejudice all of her claims against Defendants Neal Broome, Connie Broome and Fiona McInally but Vivian Robbins did not dismiss her claims against Defendants, Terisa Taylor and Pathway Forensics, LLC. ~~Vivian Robbins stipulates by her signature below that she did not sue Mark Broome in this case (No. 2015-23649).~~ Mark Broome

The Court finds that Plaintiffs, Carl Tolbert and Nizzera Kimball, nonsuited with prejudice all of their claims against Defendants Neal Broome, Connie Broome, Fiona McInally and Mark Broome pursuant to settlements between the parties. The Court finds that Plaintiffs, Carl Tolbert and Nizzera Kimball, did not dismiss their claims against Defendants, Terisa Taylor and Pathway Forensics, LLC.

The Court granted the motions for summary judgment filed by Defendant, Terisa Taylor as to all plaintiffs. It is therefore ORDERED that all Plaintiffs take nothing against Defendant, Terisa Taylor.

The Court granted the motion for summary judgment filed by Defendant, Pathway Forensics, LLC as to all plaintiffs. It is therefore ORDERED that all Plaintiffs take nothing against Defendant, Pathway Forensics, LLC.

~~The court finds that the cross-claim filed by Defendant, Pathway Forensics, LLC against Defendant, Mark Broome, was not timely filed and was filed at a time when Mark Broome was no longer a party, as he had been nonsuited by Plaintiffs prior to the filing of~~

1

~~the cross-claim. It is therefore ORDERED that the cross-claim filed by Defendant, Pathway Forensics, LLC against Defendant, Mark Broome is dismissed.~~

This judgment shall serve as a full and final and mutual release of any and all claims Plaintiffs, Carl Tolbert and Nizzera Kimball, have asserted or could have asserted against Mark Broome or which Mark Broome has asserted or could have asserted against any plaintiff.

Defendant, Pathway Forensics, LLC's Motion for leave to file cross claim against Mark Broome and to sever is granted.

It is further ORDERED that costs of court shall be taxed against Plaintiffs, Vivian Robbins, Carl Tolbert and Nizzera Kimball.

This is a final judgment which resolves all claims and counter-claims, All relief sought by any party is denied.

asserted or which could have been asserted between the parties.

Signed on _____, 2017.

Signed:
10/7/2017
JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

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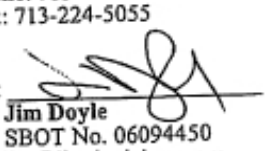
By: 
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