

NOTICE: NOT DESIGNATED FOR PUBLICATION. UNDER TEX.R.APP.P. 47.7
UNPUBLISHED OPINIONS MAY NOT BE CITED AS AUTHORITY.

Court of Appeals of Texas, Dallas.

Bill McLaren Jr., Appellant,

v.

Microsoft Corporation, Appellee.

No. 05-97-00824-CV.

May 28, 1999.

On Appeal from the 116th Judicial District Court, Dallas County, Texas, Trial Court
Cause No. 97-00095-F.

Before Justices MORRIS, WHITTINGTON, and ROACH

OPINION

ROACH.

In this case, appellant Bill McLaren, Jr. asks us to recognize a cause of action for invasion of privacy based on his employer's review and dissemination of electronic mail stored in a "personal folders" application on McLaren's office computer. We conclude that McLaren's petition failed to allege facts sufficient to state a cause of action for invasion of privacy. We affirm the trial court's judgment.

Factual Background

McLaren was an employee of Microsoft Corporation. In December 1996, Microsoft suspended McLaren's employment pending an investigation into accusations of sexual harrasment and "inventory questions." McLaren requested access to his electronic mail to disprove the allegations against him. According to McLaren, he was told he could access his e-mail only by requesting it through company officials and telling them the location of a particular message. By memorandum, McLaren requested that no one tamper with his Microsoft office workstation or his e-mail. McLaren's employment was terminated on December 11, 1996.

Following the termination of his employment, McLaren filed suit against the company alleging as his sole cause of action a claim for invasion of privacy. In support of his claim, McLaren alleged that, on information and belief, Microsoft had invaded his privacy by "breaking into" some or all of the personal folders maintained on his office computer and releasing the contents of the folders to third parties. According to McLaren, the personal folders were part of a computer application created by Microsoft in which e-mail messages could be stored. Access to the e-mail system was

obtained through a network password. Access to personal folders could be additionally restricted by a "personal store" password created by the individual user. McLaren created and used a personal store password to restrict access to his personal folders.

McLaren concedes in his petition that it was possible for Microsoft to "decrypt" his personal store password. McLaren alleges, however, that "[b]y allowing [him] to have a personal store password for his personal folders, [McLaren] manifested and [Microsoft] recognized an expectation that the personal folders would be free from intrusion and interference." McLaren characterizes Microsoft's decrypting or otherwise "breaking in" to his personal folders as an intentional, unjustified, and unlawful invasion of privacy.

In response to McLaren's petition, Microsoft filed a special exception, original answer, and affirmative defenses. Microsoft specially excepted to "all Petition allegations that purport to state a cause of action for tortious invasion of privacy arising out of Defendant's alleged 'breaking into' and 'publication of' information contained within electronic-mail folders that were part of an electronic mail system owned and administered by Defendant and made available for Plaintiff's use only in connection with his employment by Defendant." Microsoft contended that "[t]he common law of Texas does not recognize any right of privacy in the contents of electronic mail systems and storage that are provided to employees by the employer as part of the employment relationship." In addition to the special exception, Microsoft filed a supporting memorandum setting forth arguments and authorities for granting the special exception. Based on its contention that McLaren's allegations did not give rise to a cause of action, Microsoft requested that McLaren be required to replead and, if he refused, that his claims be dismissed.

McLaren responded, arguing that Microsoft's special exception relied on facts outside the pleadings and was, therefore, an impermissible "speaking demurrer." The trial court granted Microsoft's special exception and ordered McLaren to replead his petition to eliminate all statements claiming tortious invasion of privacy in connection with the facts currently alleged in the petition. The court further ordered that, if McLaren failed to replead his claims, the case would be dismissed in its entirety. McLaren did not replead his petition and, on April 10, 1997, the trial court signed an order dismissing the case with prejudice. McLaren brings this appeal challenging the trial court's order of dismissal.

Discussion

In his first point of error, McLaren contends the trial court erred in granting Microsoft's special exception because it sought relief based on facts outside the petition. A special exception may serve several functions including: (1) questioning the sufficiency in law of the plaintiff's alleged claim; (2) presenting dilatory matters shown on the face of the pleading; and (3) indicating formal defects in the allegations. *Brown v. Hawes*, 764 S.W.2d 855, 856 (Tex.App.-Austin 1989, no writ). Regardless which function the special exception serves, however, it must address only matters shown on the face of the pleadings. *Id.* A special exception that uses facts not appearing in the petition to challenge the plaintiff's right to recover is known as a

"speaking demurrer." *Ragsdale v. Ragsdale*, 520 S.W.2d 839, 843 (Tex.Civ.App.-Fort Worth 1975, no writ). Speaking demurrers are not permitted in Texas. *Id.* The proper course for a defendant that relies on facts outside the petition to demonstrate the plaintiff's inability to recover is to pursue relief through a motion for summary judgment or similar action. *Id.*

McLaren argues that Microsoft's special exception rises to the level of a speaking demurrer. In support of this argument, McLaren points to allegations of fact that do not appear in his petition, but upon which he contends Microsoft relied in seeking to force him to replead. The allegations noted by McLaren are not contained in Microsoft's special exception, but in its memorandum in support of the special exception. The special exception itself states only that McLaren's claim for invasion of privacy is based on Microsoft's alleged access and publication of "information contained within electronic-mail folders that were part of an electronic mail system owned and administered by [Microsoft] and made available for [McLaren's] use only in connection with his employment by Microsoft." After reviewing McLaren's petition, we conclude that the facts stated in Microsoft's special exception accurately reflect the allegations in the petition and are not extrinsic to the pleadings.

*3 To the extent that Microsoft's memorandum in support of its special exception states facts outside the pleadings, there is nothing in our record to indicate that the trial court relied upon or even considered these facts in reaching its decision. Indeed, the trial court's order explicitly states that it "considered *Defendant's Special Exception*, and for good cause shown, the Court has determined that the *special exception* should be granted." (emphasis added). Because Microsoft's special exception does not assert facts outside the scope of the petition and there is no indication that the trial court relied upon extrinsic facts when granting the special exception, we cannot conclude that the trial court erroneously granted a speaking demurrer. We overrule McLaren's first point of error.

In his second point of error, McLaren contends the trial court erred in sustaining the special exception and dismissing the case because, contrary to the ruling otherwise, his petition alleged facts giving rise to a cause of action for invasion of privacy. When the trial court sustains a defendant's special exceptions, it must give the plaintiff an opportunity to amend the pleading. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex.1998); *Nichols v. Jack Eckerd Corp.*, 908 S.W.2d 5, 7 (Tex.App.-Houston [1st Dist.] 1995, no writ). The plaintiff then has two options: either amend the pleading to cure the defect or refuse to amend. *Nichols*, 908 S.W.2d at 7. If, as in this case, the plaintiff refuses to amend, the court may dismiss the case and the plaintiff may test the ruling on appeal. *See id.*

When reviewing the trial court's dismissal of a cause of action on special exceptions, we must accept as true all of the factual allegations set out in the challenged pleading. *See id.* This standard, however, does not apply to the plaintiff's assertions of law. The legal conclusions of the trial court as to whether the plaintiff's petition adequately pleads facts giving rise to a cause of action are subject to a *de novo* review in this Court. *See id.*

In the instant case, the trial court apparently reached the conclusion that, accepting as true all of McLaren's factual allegations, his petition did not allege a cause of action for invasion of privacy. It is this legal conclusion that we now review.

Texas recognizes four distinct torts, any of which constitutes an invasion of privacy:

- (1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs;
- (2) Public disclosure of embarrassing private facts about the plaintiff;
- (3) Publicity which places the plaintiff in a false light in the public eye;
- (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

See Industrial Found. of the S. v. Texas Indus. Accident Bd., 540 S.W.2d 668, 682 (Tex.1976), *cert. denied*, 430 U.S. 931, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977). At issue in this case is whether McLaren's petition states a cause of action under the first recognized tort. There are two elements to this cause of action: (1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, which (2) would be highly offensive to a reasonable person. *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex.1993). When assessing the offensive nature of the invasion, courts further require the intrusion to be unreasonable, unjustified, or unwarranted. *Billings v. Atkinson*, 489 S.W.2d 858, 860 (Tex.1973). This type of invasion of privacy is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones, or spying. *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 6 (Tex.App.-Corpus Christi 1991, no writ).

In his petition and on appeal, McLaren contends the fact that the e-mail messages were stored under a private password with Microsoft's consent gave rise to "a legitimate expectation of privacy in the contents of the files." As support for his position, McLaren relies on *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632 (Tex.App.-Houston [1st Dist.] 1984), *writ ref'd n.r.e.*, 686 S.W.2d 593 (1985). In *Trotti*, the court considered the privacy interest of an employee in a locker provided by the employer to store personal effects during work hours. The court began its analysis by recognizing that the locker was the employer's property and, when unlocked, was subject to legitimate, reasonable searches by the employer. The court further reasoned:

This would also be true where the employee used a lock provided by [the employer], because in retaining the lock's combination or master key, it could be inferred that [the employer] manifested an interest both in maintaining control over the locker and in conducting legitimate, reasonable searches."

Trotti, 677 S.W.2d at 637. But, the court concluded, when, as in *Trotti*, an employee buys and uses his own lock on the locker, with the employer's knowledge, the fact finder is justified in concluding that the "employee manifested, and the employer recognized, an expectation that the locker and its contents would be free from intrusion and interference."

McLaren urges that the locker in *Trotti* is akin to the e-mail messages in this case, "only the technology is different." We disagree. First, the locker in *Trotti* was provided to the employee for the specific purpose of storing *personal* belongings, not work items. In contrast, McLaren's workstation was provided to him by Microsoft so that he could perform the functions of his job. In connection with that purpose and as alleged in McLaren's petition, part of his workstation included a company-owned computer that gave McLaren the ability to send and receive e-mail messages. Thus, contrary to his argument on appeal, the e-mail messages contained on the company computer were not McLaren's personal property, but were merely an inherent part of the office environment.

Further, the nature of a locker and an e-mail storage system are different. The locker in *Trotti* was a discrete, physical place where the employee, separate and apart from other employees, could store her tangible, personal belongings. The storage system for e-mail messages is not so discrete. As asserted by McLaren in his petition, e-mail was delivered to the server-based "inbox" and was stored there to read. **[FN1]** McLaren could leave his e-mail on the server or he could move the message to a different location. According to McLaren, his practice was to store his e-mail messages in "personal folders." Even so, any e-mail messages stored in McLaren's personal folders were first transmitted over the network and were at some point accessible by a third-party. **[FN2]** Given these circumstances, we cannot conclude that McLaren, even by creating a personal password, manifested--and Microsoft recognized--a reasonable expectation of privacy in the contents of the e-mail messages such that Microsoft was precluded from reviewing the messages.

FN1. E-mail messages are by definition "stored in a routing computer." See *Bohach v. City of Reno*, 932 F.Supp. 1232, 1234 (D.Nev.1996). "[T]he central computer routing the messages stores the transmission in unencrypted plain text files, available to the service provider whether that be a third-party common carrier or the employer itself." *Id.* at 1234-35 n. 2.

FN2. McLaren also cites *Dawson v. State*, 868 S.W.2d 363 (Tex.App.-Dallas 1993, pet. ref'd), which is a criminal case addressing the propriety of a search of a locked locker of a topless dancer. As in *Trotti*, the employer provided the locker. The employee had the only key to the lock. The employer ordered the employee to open the locker and, in the presence of the police, searched a purse inside the locker and found drugs. This Court concluded that the employee's expectation of privacy was reasonable and further concluded that the State had not established otherwise. Any distinction in the instant case with respect to *Trotti* would equally apply to *Dawson*.

Even if we were to conclude that McLaren alleged facts in his petition which, if found to be true, would establish some reasonable expectation of privacy in the contents of his e-mail messages sent over the company e-mail system, our result would be the same. We would nevertheless conclude that, from the facts alleged in the petition, a reasonable

person would not consider Microsoft's interception of these communications to be a highly offensive invasion. As set forth in McLaren's petition, at the time Microsoft accessed his e-mail messages, McLaren was on suspension pending an investigation into accusations of sexual harassment and "inventory questions" and had notified Microsoft that some of the e-mails were relevant to the investigation. Accordingly, the company's interest in preventing inappropriate and unprofessional comments, or even illegal activity, over its e-mail system would outweigh McLaren's claimed privacy interest in those communications. *See Smyth v. Pillsbury Co.*, 914 F.Supp. 97, 101 (E.D.Pa.1996). We overrule the second point of error.

We affirm the trial court's judgment.

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