

ILLINOIS CT. AFFIRMS PRIVACY VERDICT, BUT CUTS DAMAGES

from The Privacy Times

The Illinois Supreme Court has affirmed an employee's invasion-of-privacy lawsuit against an employer that hired investigators who in turn filched her phone records, but reduced a punitive damages award from \$650,000 to \$65,000. The reduction drew a strong dissent.

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For the first time, the Court joined the vast majority of other jurisdictions in recognizing the tort of intrusion upon seclusion. But it held that Plaintiff Kathleen Lawlor was undeserving of a larger punitive award because she supposedly breached her fiduciary duty to North American.

In dissent, Chief Justice Thomas L. Kilbride said the reduction of punitive damages was not justified because there wasn't sufficient evidence that she ever breached her fiduciary duty.

Kathleen Lawlor was a saleswoman for the North American Corporation of Illinois, but left for Shamrock Companies, Inc., a competitor. Believing she had attempted to direct business to Shamrock while still employed with it, North American directed its longtime corporate attorney, Lewis Greenblatt, to conduct the investigation, and assigned its vice president of operations, Patrick Dolan, to serve as the company contact person.

Greenblatt retained Probe, a private investigation firm which had previously conducted noncompetition investigations. Dolan provided Greenblatt and Albert DiLuigi, Probe's principal, with Lawlor's date of birth, her address, her home and cellular telephone numbers, and her Social Security number. Probe subsequently used this information when it retained another investigative entity, Discover, which impersonated Lawlor to obtain her personal phone records.

Initially, a Cook County jury found against North American and awarded \$65,000 in compensatory damages and \$1.75 million in punitive damages to Lawlor, all on account of the impersonation. The trial judge then found for North American on its fiduciary breach claim against Lawlor and awarded it compensatory damages of \$78,781 and punitive damages of

\$551,467. The trial judge also knocked down the jury award of punitive damages against North American to \$665,000. On appeal, however, an Illinois appellate court reinstated the original \$1.75 million punitive damages award against North American and threw out the trial judge's damages award in favor of North American and against Lawlor.

The Illinois Supreme Court rejected North American's claim that it could not be held vicariously liable for the actions of the contractor/investigators, Probe and Discover. It found they were acting as agents of North American.

While North American professed not to know that the phone logs were obtained by pretexting, it also never bothered to question how they were obtained. It further provided the investigators with information from Lawlor's personnel file that was used in the scheme, and followed up on the phone numbers that were produced by attempting to determine to whom they belonged. This doubtless created the impression that North American was at least tacitly complicit and not just passively involved in the process. The lesson learned is that claiming ignorance sometimes will not work if the degree of "fishiness" and involvement is just too high," wrote Irving M. Geslewitz, an attorney with the firm Much Shelis P.C.

In reducing the punitive award, the majority concluded there was no evidence presented to the jury that North American had an intentional, premeditated scheme to harm Lawlor. Thus, it found, "the phone records were obtained as part of a legitimate investigation into a possible violation of a noncompetition agreement, not out of any animus toward Lawlor, and concerned a private dispute which did not implicate any general public policy."

As in Slovinski, this places North American's conduct on the low end of the scale for punitive damages, far below those cases involving a defendant's deliberate attempt to harm another person," the majority wrote.

Other factors, it continued, were that Lawlor's phone records were only viewed internally by a handful of North American employees. No evidence was presented that the records were distributed outside of the company, or that they were used for any purpose other than to determine if Lawlor had contact with one of North American's customers."

Additionally, the jury's verdict with respect to compensatory damages shows limited harm to Lawlor. She began her employment with Shamrock within months of voluntarily leaving North American after choosing to take a few months off. Lawlor testified that after learning North American had obtained her phone records, she vomited, experienced anxiety, and had periods of sleeplessness. Additionally, she enhanced the security features on her phone and at her home. Therefore, similar to the plaintiff in Slovinski, the evidence showed that she never sought medical or psychological treatment and there was no evidence of any alteration in her normal daily activities or that she missed work," it wrote.

In dissent, Chief Justice Kilbride said the majority wrongly disregarded the damage stemming from the wrongful intrusion upon seclusion.

The record establishes that Lawlor, unlike the plaintiff in Slovinski, presented evidence showing significant steps she took to alter both her lifestyle and that of her family, as well as to enhance their security, after she learned her phone records had been improperly obtained by pretexting. During the summer of 2005, the evidence shows that Lawlor and her neighbors noticed a number of cars not belonging to anyone in the neighborhood parked near her residence, with the occupants watching her home for hours at a time. Subsequently, she found out in October 2005 that, in addition to her residence being placed under surveillance, her home and cell phone records had been repeatedly obtained without her permission by someone who was impersonating her using personal information obtained from North American (pretexting). Lawlor testified that she immediately became hysterical, vomited, and was "[shaken] to the core." She "did not go outside," alerted her parents and neighbors to a possible security threat in the area, "was ill," "nervous" "did not trust anyone." Before discovering the pretexting scheme, she never suffered from feelings of paranoia, nervousness or unusual stress," he wrote.

In response to North American's improper intrusion into her privacy, Lawlor also severely limited her three young children's activities, refusing to allow them to go out to play and requiring them to be with her or her husband "at all times. She curtailed the children's sports activities "because she was afraid for what could happen," he continued.

Even four years after discovering her phone records had been improperly obtained, Lawlor testified to "the stress that this has caused; the strain that it has put on [her] marriage; the nervousness [she feels] with the kids, whether it's a sporting

event that they're at, that I or my husband do not ever leave them at a two-hour practice by themselves, ever. She stated that "because of what has been done to her, she doesn't trust anyone anymore." Notably, the trial judge did not find that her testimony lacked credibility," he wrote.

He said the trial court's, and the majority's decision to reduce punitive damages was based "solely on an unproven assertion that Lawlor unsuccessfully attempted to steer the MapQuest business from North American to one of its competitors, Shamrock, while still working at North American."

"The trial court found that Lawlor actually set in motion the entire course of misconduct alleged by both parties when she breached her fiduciary duty to North American by disclosing allegedly "confidential" sales and profit information to Shamrock. The appellate court, however, reversed "the trial court's judgment in North American's favor on the counterclaim because its determination that Lawlor breached her fiduciary duty was against the manifest weight of the evidence." I note that the majority correctly affirms the appellate court's decision on that issue. Because the trial court relied heavily on its finding that Lawlor breached her fiduciary duty to North American, the appellate court's subsequent determination that the evidence failed to establish any breach substantially undercuts the trial court's justification for its massive reduction in her punitive damages award. At a minimum, the rejection of one of the primary bases for the trial court's huge reduction on remittitur cannot rationally justify an additional 90% reduction," Chief Justice Kilbride concluded (Kathleen Lawlor v. North American Corp. of Illinois: Illinois Supreme Court " No. 112530; Rehearing Denied Jan. 28, 2013.)

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