
No. 2007 – CV - 315

IN THE

SUPREME COURT OF THE STATE OF MARSHALL

OCTOBER TERM 2007

RON BAYLOR,

Plaintiff / Appellant,

v.

CONDEVEL INC.,

Defendant / Appellee

On Restatement (Second) of Torts

Court of Appeals

Of the State of Marshall

BRIEF FOR PLAINTIFF / APPELLANT

TO THE SUPREME COURT OF THE STATE OF MARSHALL:

Plaintiff / Appellant Ron Baylor, Appellant in Case No. 2006 – CV – 0326 before the Fourth Circuit Court of Appeals of the State of Marshall respectfully submits this brief pursuant to the Order dated 24th July 2007 granting Leave to Appeal by the Supreme Court of the State of Marshall. The Plaintiff / Appellant Ron Baylor, requests this Honorable Court to reverse the judgment of the Fourth Circuit Court of Appeals of the State of Marshall, affirming the Grant County District Courts grant of summary judgment in favor of the Defendant / Appellee ConDevel, Inc.

The Plaintiff / Appellant Ron Baylor, requests this Honorable Court to hold that the tort present in the Restatement (Second) of Torts, of intrusion upon seclusion is applicable in the instant case and the Fourth Circuit Court of Appeals has erred in affirming the summary judgment of the Grant County District Court and has also erred in holding that Appellee ConDevel was exempt from the notification provision of the Marshall Data Protection Act, 17 Marshall Code § 105 (2006).

OPINION BELOW

The Grant County District Court granted summary judgment in favor of the Defendant / Appellee ConDevel inspite of the presence of “material facts” that indicate that the tort of invasion of privacy – intrusion upon seclusion was committed and there was a breach of the notification statute. The Fourth Circuit Court of Appeals of the State of Marshall affirmed the District Courts Order granting the summary judgment.

CONSTITUTIONAL, STATUTORY AND RESTATEMENT PROVISIONS

The Constitutional, Statutory and Restatement Provisions relevant to the instant case include the following: American Constitution envisaging the Right to Privacy under the First Amendment, Fourth Amendment, Fifth Amendment, Ninth Amendment and Fourteenth Amendment provided in Appendix A; Federal R. Civ. P. Rule 56 (c) provided in Appendix B; Restatement (Second) of Torts § 652B provided in Appendix C; Marshall Data Protection Act, 17 Marshall Code § 105 (2006), 17 Marshall Code § 105 (d) and § 105 (g) provided in Appendix D.

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

Defendant / Appellee ConDevel, Inc. (hereinafter referred to as “ConDevel”) has been a leader in the business of real estate and development in the State of Marshall for years. However, in the last few years it has lost some of its market share to foreign competitors and this resulted in large budget cuts and lay-offs of several employees. The technology department was particularly hard-hit by these lay-offs. However this did not affect ConDevel’s “VIP Program” which provides perks such as membership to exclusive VIP Lounges and other such privileges to high ranked executives of the company.

Plaintiff / Appellant Ron Baylor (hereinafter referred to as “Baylor”), is an executive Vice - President of ConDevel. He has worked up the ranks of the company from a sales associate to his current position. As he is responsible for the operations, sales and human resource departments he has access to all employees electronic personnel files which contain sensitive information such as their social security numbers, driver’s license numbers, etc.

Steve Nesbit (hereinafter referred to as “Nesbit”) is a fresh graduate who is ambitious, and a tech savvy sales associate at ConDevel. He has a basic understanding of security exploits and has dabbled with basic hacks. He wants to climb the ladder of success fast and has often been heard to say jokingly, “I wonder if there is another way to enjoy the good life reserved to the executives.”

Due to the shortage of staff ConDevel’s computer system had not been upgraded for over two years. ConDevel had a Computer Usage Policy which stated *inter alia*,

“employees are responsible for safeguarding all equipment and software provided by the company.” However, they were not given any guidance as to what seemed to constitute appropriate safeguard measures. Nesbit was aware of the fact that ConDevel’s technology infrastructure and minimal security was not worthy of a company its size. He warned his supervisors about it and in an email to one of them he stated that “ConDevel was a data-breach waiting to happen.” However, he was constantly told to mind his own business.

Frustrated by this response from his supervisors Nesbit decided to expose to the upper management the technological vulnerability of ConDevel. Using information about hacking and spyware that he had obtained from a site on the internet, he designed a “keylogger program.” This keylogger program can be installed on the target computer unnoticed. The keylogger then records keystrokes made on the target computer, stores them in a plain text file and e-mails this file to Nesbit everyday at mid-night. At the time he devised the keylogger program he was undecided as to which company computer he would install it on. He kept the program on a USB thumb-drive and carried it with him at all times.

On or about 25th April, 2005, Nesbit was on his way back from the restroom when he passed Baylor’s office and overheard Baylor saying on the telephone that he would be leaving for a meeting “right now.” Nesbit saw Baylor leave his office in a hurry. Realizing that nobody was around, Nesbit stepped into Baylor’s office to look around. He realized that Baylor’s computer was left on so he seized the occasion and installed the keylogger program on Baylor’s computer. The following day he began to receive e-mails from the keylogger program on his private e-mail address. The e-mails contained records of every keystroke Baylor had entered through the keyboard onto his computer. The keystroke information helped Nesbit obtain Baylor’s login and

passwords which were used to access company files including the human resources database that contained the employees' electronic personnel files. He realized that he had personally identifiable information of every employee including Baylor. He also had access to the benefit system and the "VIP Program" files that are used for setting up memberships at various prestigious clubs in the State of Marshall.

Nesbit immediately became fascinated with the opportunities offered to the executives and had a change of heart. He decided against informing the management about the inadequate security measures and began to use the information for his own benefit. He downloaded the human resources database files to his home computer.

On examining Baylor's file he realized that Baylor had not availed of membership of many of the exclusive clubs available to him under his executive package. Nesbit then issued several credentials on Baylor's name but had them delivered to him. This included the membership to the prestigious Marshall League Club and several other establishments. He began frequenting the Marshall League Club and on one such occasion became seriously intoxicated and got into a fight with a prominent member of the club. Nesbit was physically removed from the premises by the security and his membership was suspended. After the incident Nesbit tried to maintain a low profile but he was unaware of the fact that the most prominent establishments in the State of Marshall maintained a common "blacklist."

Ron Baylor did not suspect that his personal information was being misused until one day when he tried to take some of his friends to play golf at Shady Links – a private Golf Course and was informed that his membership was revoked due to his behavior at the Marshall League Club. Baylor was embarrassed and perplexed as he was not a member of the club and had not been there in years.

However Baylor was convinced that someone had been posing as him and using his VIP privileges only after the second embarrassing incident. This time he and his family were denied access to an upscale restaurant and the reason given to him was his inappropriate behavior at the Marshall League Club. The Manager also shouted at him saying, “We do not want drunks and trouble makers in our restaurants.”

Baylor reviewed the human resources database and was shocked to see that several membership cards had been issued and authorized by Baylor himself. He concluded that there was some sort of corporate security breach that had occurred, so he informed the appropriate managers and took the help of a few technological experts at ConDevel. A complete scan of his hard drive revealed that a keylogger program had been surreptitiously installed on his computer. Further analysis revealed the external e-mail address that was being used to receive files and it was eventually traced to Nesbit.

When Nesbit was confronted by the corporate management he explained that he had installed the keylogger program as a part of his plan to expose the technological vulnerabilities of ConDevel. Nesbit was fired. However the management believed that no “true” data breach had occurred as even though Nesbit had access to all employee personnel files, no one outside the company accessed the files. Moreover the management was concerned that the news of the incident could harm the reputation of the company. The Chief Operating Officer in a voice mail message to the director of the technology support staff asked him to pretend as if the incident had not occurred in order to prevent a scandal or a lawsuit.

Following this incident ConDevel tightened its technological security. The management did not inform anyone about the incident and refused to divulge the details of the investigation to Baylor and even refused to help him rebuild his good will.

B. SUMMARY OF THE PROCEEDINGS

Plaintiff / Appellant Ron Baylor filed a complaint in the Grant County District Court (trial Court) against Defendant / Appellee ConDevel, Inc. on two grounds.

Firstly, the Plaintiff / Appellant Ron Baylor alleged a violation of the tort of invasion of privacy - intrusion upon seclusion.

Secondly, the Plaintiff / Appellant alleged that the Defendant / Appellee failed to notify him of a personal data security breach which is a violation of the Marshall Data Protection Act, 17 Marshall Code § 105 (2006).

ConDevel moved for a summary judgment on both the abovementioned grounds. The trial Court granted summary judgment in favor of ConDevel finding that there was no violation of the notification statute and that the State of Marshall does not recognize the tort of intrusion upon seclusion.

In reviewing the grant of summary judgment, the Fourth Circuit Court of Appeals of the State of Marshall applied the same test as utilized by the trial court. It thereby affirmed the order granting summary judgment.

The Plaintiff / Defendant now appeals in the Supreme Court of the State of Marshall against the Circuit Court's decision, of affirming the decision of the Grant County District Court's grant of summary judgment in favor of ConDevel.

The Plaintiff / Defendant hereby seeks to reinstate the claims of intrusion upon seclusion and violation of the notification statute.