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The Twenty-Fifth Annual John Marshall International Moot Court Competition in Information Technology and Privacy Law: Brief for the Petitioner, 24 J. Marshall J. Computer & Info. L. 699 (2006)

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THE TWENTY-FIFTH ANNUAL

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BENCH MEMORANDUM

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IN THE SUPREME COURT OF THE STATE OF MARSHALL

Nick Ross,	)	
Petitioner,	)	
	)	
v.	)	No. 2006-CV-0654
	)	
Jane Jackson,	)	
Respondent.	)	

I. INTRODUCTION

Nick Ross is appealing from an order granting summary judgment in favor of Jane Jackson in Ross's lawsuit based upon a Web page that Jackson created using his name and likeness. Ross alleges that Jackson is liable for, *inter alia,* tortious interference with a prospective economic advantage, defamation, and false light invasion of privacy.

A. PROCEDURAL HISTORY

Ross's original complaint, filed in the Marbury County Circuit Court, alleged interference with prospective economic advantage, intentional infliction of emotional distress, defamation, and four invasion of privacy counts: false light, publication of private facts, intrusion upon seclusion, and appropriation of name or likeness. The court dismissed the counts alleging emotional distress, publication of private facts, intrusion upon seclusion, and appropriation, for failure to state a claim under Rule 12(b)(6) of the Marshall Rules Civil Procedure. Following discovery, Jackson moved for summary judgment on the three remaining counts (interference, defamation, and false light). The circuit court granted the summary judgment motion as to all three counts. Ross appealed to the First District Court of Appeals, which affirmed the circuit court's order. The court of appeals affirmed the summary judgment as to the interference claim on the basis that Jackson could not have known of the specific business relationship with which she allegedly interfered. The court affirmed as to defamation and false light, primarily on the basis that Ross's injuries resulted from unauthorized access to the Web page by third parties, and that Jackson could not be held liable for the consequences of such unauthorized access.

Ross then petitioned for leave to appeal to the Supreme Court of Marshall. The supreme court granted leave to appeal the summary judgment order as to all three counts.

B. BACKGROUND INFORMATION

HoopsPlace.com, the social networking Web site that is the focus of this case, is an interactive network on which users can create their own Web pages and can read and contribute to pages created by other users. The best-known social networking sites are MySpace and Facebook; others include Friendster, Orkut, Xanga, and Yahoo 360°. MySpace has nearly 100 million registered users and ranks among the most-visited sites on the Web.[1] Facebook's 8 million members upload more than 1.5 million photos to the site each day.[2] As the popularity of these sites grows, so does the incidence of problems and abuse. High school and college students often treat their pages as if they were private, posting personal information and inappropriate photographs of themselves and their peers, despite administrators' warnings that such information may be used to their detriment by potential employers, stalkers, and others.[3]

Operators of social networking sites often attempt to target their sites at particular groups of users—for example, Facebook membership is limited to students and other persons affiliated with universities and selected high schools, and personal pages on Facebook are supposed to be accessible only by friends and other people on the user's campus.[4] But targeting and access restrictions are far from perfect, and reports of unexpected and unwanted use of profiles posted on such sites are commonplace.[5] Campus police at the University of Illinois recently were able to identify a student who had fled from an officer after urinating outside a fraternity house by connecting him to another student who had listed him as a friend on Facebook.[6] A Texas teenager has sued MySpace, alleging that she was sexually assaulted by a man she met though the

1. *See* Stefanie Olsen, News.com, *MySpace Blurs Line Between Friends and Flacks*, http://news.com.com/2009-1025_3-6100176.html (July 31, 2006).

2. *See* Thomas K. Arnold, *The MySpace Invaders,* USA Today 4D (Aug. 1, 2006) (available at http://www.usatoday.com/tech/hotsites/2006-07-31-myspace-invaders_x.htm).

3. *See e.g.* Tim Warsinskey, *All Eyes on Student Athletes' Web Pages,* Plain Dealer (Cleveland) (July 30, 2006) (available at http://www.cleveland.com/printer/printer.ssf?/base/sports/115424856961830.xml); Alan Finder, *When a Risqué Online Persona Undermines a Chance for a Job,* N.Y. Times A1 (June 11, 2006) (available at http://www.nytimes.com/2006/06/11/us/11recruit.html?ex=1307678400&en=ddfbe1e3b386090b&ei=5090&partner=rssuserland&emc=rss); Michael Duffy, *A Dad's Encounter with the Vortex of Facebook,* Time 52 (Mar. 27, 2006) (available at http://www.time.com/time/archive/preview/0,10987,1174704,00.html).

4. *See* Finder, *supra* note 3. Facebook has a policy prohibiting employers from mining the site for information about prospective employees. *See also* Derek Kravitz, *In What's Been Called the "Newest Phenomenon" in Recruiting, Employers are Trolling the Web,* Omaha World-Herald 1D (July 23, 2006).

5. *See* Finder, *supra* note 3 (noting that employers can perform background checks by accessing Facebook pages using e-mail addresses of recent graduates or college interns).

6. *See* Jodi S. Cohen, *Cop Snares College Pals in Own Web,* Chi. Trib. 1 (Aug. 3, 2006).

site.[7] Campus newspapers at two Florida universities this summer published compromising photographs of student athletes taken from their Facebook pages.[8] Many universities have responded by discouraging students from posting personal information on social networking sites, prohibiting student-athletes from posting pages on such sites altogether, or imposing content restrictions upon and monitoring athletes' pages.[9]

C. STATEMENT OF FACTS

The parties have stipulated that the court of appeals decision shall serve as the record on appeal. The court of appeals decision[10] sets forth the facts of the case as follows:

Leading up to the 2005 American Basketball League (ABL) draft selection, Appellant Ross was widely viewed as a gifted young basketball player with excellent prospects. Ross had been the star player of his high school basketball team in rural downstate Marshall. He was recruited in 2001 by Mark Jackson, the father of Appellee Jane Jackson and the head coach of Marshall State University's basketball team, the Fighting Hoo-Has. Ross accepted a basketball scholarship from Marshall State and served as the team's starting forward for four years. Mainstream media pundits and bloggers predicted that he would be the first player selected in the ABL draft in June 2005, and would become the highest paid rookie in ABL history, with a prospective annual salary of at least $4 million. In addition, in early 2005 several major corporations approached Ross with endorsement offers. Ross anticipated receiving endorsement income of as much as $10 million per year in addition to his regular player salary.

During Ross's sophomore year at Marshall State (2002-2003), he entered into a romantic relationship with Jane Jackson, a computer science major and freshman at Marshall State. Jane Jackson worked part-time in the university's Athletic Public Relations Department, assisting with advertising sales, marketing, Web site development, and alumni relations. Jackson used her family and other connections to arrange meetings for Ross with media representatives and nonprofit organizations in order to increase his public visibility, and with sports agents who might represent him in the future. Ross and Jackson's relationship continued

7. *See* Claire Osborn, *MySpace Sued in Assault Case,* Austin American-Statesman B1 (June 20, 2006) (available at http://www.statesman.com/news/content/news/stories/local/06/20myspace.html).

8. *See* Andy Staples, *Blogs New Issue for NCAA,* Tampa Trib. C1 (July 26, 2006) (available at http://www.tbo.com/sports/MGBNW2Q03QE.html).

9. *See e.g.* Ryan Loew, *Kent Lifts Ban on Web Site,* Columbus Dispatch 1B (July 4, 2006); Warsinskey, *supra* note 3.

10. R. 3-9. The remainder of the Statement of Facts presented here is set forth verbatim as it appears in the court of appeals decision; the footnotes have been renumbered.

until February of 2005, when Ross broke off the relationship. Several weeks later he began dating Eva Macphereson, a model whom he met during a photo shoot for *Sports Daily*. Jackson was extremely upset by the breakup and publicly announced, "without me and my family, he would be just another hillbilly kid from downstate Marshall. I made him a superstar, and I can make him a has-been."

In April 2005, a Web page bearing Ross's name ("Ross page") was created at HoopsPlace.com, a social networking Web site marketed primarily at college students and sports fans. HoopsPlace.com is an interactive network that includes blogs, user profiles, photos and video clips, discussion groups, and an internal e-mail and chat system. HoopsPlace.com is free for individual users; it collects revenue by accepting commercial advertisements that it places on users' profile pages. HoopsPlace.com profile pages normally are accessible by any Internet user, although the author of a profile page may designate parts of the page as "private," making them accessible only by users approved by the author. Jackson concedes that she posted the Ross page on HoopsPlace.com, uploading the photographs and authoring the textual material. However, she contends that she designated the entire page as "private," accessible only to other registered users who identified themselves as Marshall State students.[11] She states that her intent was to annoy Ross and, at most, to "take him down a notch" within the social structure of the university.

The Ross page contained a number of photographs depicting Ross. There were a few photographs of him playing basketball, with captions identifying the date and the game at which each photograph was taken. Immediately below one of these photographs was a caption, "Watch out ABL—here I come!" Another photograph, captioned "Oops, there it is!" depicted Ross taking a lay-up shot; in the photograph it was apparent that Ross was not wearing an athletic supporter under his basketball shorts.

The remaining photographs on the Ross page appeared to have been taken at parties on or near the Marshall State campus. Beer and other alcoholic beverages were visible in several photographs. Ross himself was not holding a drink in any of them. A water pipe commonly used for smoking marijuana was visible near Ross in one photograph. Another photograph depicted a group of students sitting against a wall, with one of them smoking what appeared to be a marijuana cigarette. Ross was seated next to the student with the cigarette in the photograph, with his

11. It is unclear whether the "private" designation was effective. As noted *infra*, a writer for *Sports News* was able to access the page; the record does not indicate whether this occurred because the HoopSpace.com [sic] access restrictions failed, because the writer falsely claimed to be a Marshall State student when registering with the site, or for some other reason.

eyes closed and his head tilted back; he was wearing a t-shirt with a large marijuana leaf on it. The caption below this photograph read "I'm high on State!" Another photograph depicted a group of male students, including Ross, wearing lipstick and women's undergarments. Yet another depicted Ross wearing a large bandage on his knee, and holding or leaning on a pair of crutches; a caption below this picture read "I can dance on one leg!" (In fact, this photograph was taken at a costume party; Ross had not injured his knee.)

The page also listed Ross's full name, date and place of birth, current address, phone number, high school, astrological sign, height, weight, and other personal information. This information was displayed in the form of responses on a questionnaire, creating the appearance that the answers had been personally provided by Ross rather than merely collected or reported by someone else. Following the questionnaire was a schedule grid that listed the classes in which Ross was enrolled in the spring semester of 2005, with days, times, and locations. The schedule was accurate with one exception; it stated that Ross was enrolled in a course called "Basket Weaving" on Tuesday and Thursday afternoons at 2:00, when in fact the course he was taking at that time was History of Modern American Sports.

The existence and content of the Ross Web page on HoopsPlace.com was discovered and reported by a writer for *Sports News*, which reproduced some of the photographs and textual content from the Web page in its April 25, 2005 issue. Thereafter, numerous tabloid newspapers and other media published articles based primarily upon the *Sports News* report. On ESPN's Web site, for example, a copy of the photograph depicting Ross with a bandage on his knee and crutches was displayed with a big red circle drawn around Ross's knee and a caption reading "Does the ABL get a discount if he only has one good leg?" HoopsPlace.com removed the page promptly upon receiving complaints from Ross and his agent on or about April 30.

There is no evidence presented in the record as to how many individuals viewed the original Ross Web page other than the writer from *Sports News*.[12] However, the parties agree that Ross was the subject of widespread negative media attention beginning in late April 2005, and that the content of the Ross Web page as reported in *Sports News* was the primary reason for this attention. As a result, rumors about Ross spread quickly throughout the sports and entertainment communities.

12. Several Web pages purporting to be copies of the Ross page have been posted on various other Web sites, including BannedSiteMirror.com. The record does not indicate how many of these mirror sites exist or how many individuals have viewed these mirror pages. Archived copies of the Ross page were also available on Google and the Internet Archive, although those copies were subsequently removed following requests by Ross and his agent.

Several ABL recruiters contacted Ross after seeing his photo on ESPN's Web site and told him that they were not only concerned that he did not immediately report the injury and have it properly treated, but that they were not interested in enlisting a young player with perceived knee problems. In late May 2005, upon the motion of one of its members, the ABL Board of Commissioners held a closed-door session to examine various allegations that had been made against Ross. The Board found "probable cause" to believe that Ross had violated the ABL Code of Conduct, and ruled that he would be ineligible for the ABL draft for a two-year period.[13] Ross's prospective endorsement deals quickly evaporated.

Unable to cope with the intense media scandal surrounding Ross, Macphereson left him. Ross was overcome by the loss of his professional career, the public demise of his relationship, and the humiliation caused by the photographs and information posted on HoopsPlace.com that later appeared in *Sports News* and elsewhere. He dropped out of Marshall State in June, two classes short of receiving his degree.

II. ISSUES PRESENTED FOR REVIEW

Three main issues are raised on appeal:

(1) Whether the circuit court erred in granting summary judgment on Ross's claim of tortious interference with a prospective economic advantage.

(2) Whether the court erred in granting summary judgment on Ross's claim of defamation.

(3) Whether the court erred in granting summary judgment on Ross's claim of false light invasion of privacy.

III. ANALYSIS

A. STANDARD OF REVIEW

Summary judgment is a procedural device that enables a court to dispose of part or all of a case prior to trial. In the State of Marshall, summary judgment is governed by Rule 56 of the Marshall Rules of Civil Procedure. Under this rule, summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.[14] The court considers the pleadings, depositions, answers to interrogatories, admissions, and affidavits in assessing whether summary judgment is proper.[15] A genuine issue of ma-

13. The Board's ruling did not specify the provision or provisions of the ABL Code of Conduct violated by Ross. The Code of Conduct appears in its entirety in an Appendix at the end of the court of appeals' opinion.

14. Marshall R. Civ. P. 56(c) (cited at R. 3). Rule 56(c) is similar or identical to the corresponding provision of the federal rules, Fed. R. Civ. P. 56(c).

15. Fed. R. Civ. P. 56(c).

terial fact exists only if "a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented."[16]

An appellate court reviews a grant of summary judgment *de novo,* applying the same standard as the trial court.[17] The reviewing court determines whether a genuine issue of material fact exists by viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable and justifiable inferences in favor of that party.[18] The moving party has the burden of identifying the material facts which are without genuine dispute and support the entry of summary judgment in favor of the moving party.[19] The non-moving party, for its part, must identify which material facts raise genuine issues of dispute.[20] Because the entry of summary judgment "is a drastic means of disposing of litigation,"[21] it should be granted only when the moving party's right to relief is "clear and free from doubt."[22] However, the mere fact that there exists "some alleged factual dispute between the parties"[23] or "some metaphysical doubt as to the material facts"[24] is insufficient to defeat a motion for summary judgment.

B. INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Ross's first claim alleges that Jackson is liable for tortious interference with a prospective economic advantage. Under the applicable Marshall statute, a plaintiff must prove four elements to support such a claim: (1) the existence of a valid business relationship or expectancy; (2) the defendant's knowledge of the plaintiff's relationship or expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening; and (4) damage to the plaintiff resulting from the defendant's interference.[25] Ross's claim presumably is

16. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986).
17. *Delta Sav. Bank v. U.S.,* 265 F.3d 1017, 1021 (9th Cir. 2001).
18. *Anderson,* 477 U.S. at 255.
19. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).
20. *Id.* at 324.
21. *Purtill v. Hess,* 489 N.E.2d 867, 871 (Ill. 1986).
22. *Id.*
23. *Anderson,* 477 U.S. at 247 (emphasis omitted).
24. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986).
25. Marshall Rev. Code § 14.776(d) (cited at R. 7). The Marshall statute codifies the common-law rule adopted by a number of state courts. *See e.g. Anderson v. Vanden Dorpel,* 667 N.E.2d 1296, 1299 (Ill. 1996); *Stoller Fisheries, Inc. v. American Title Ins. Co.,* 258 N.W.2d 336, 340 (Iowa 1977); *Calbom v. Knudtzon,* 396 P.2d 148, 150-51 (Wash. 1964); *see generally* James O. Pearson, Jr., *Liability for Interference with At Will Business Relationship,* 5 A.L.R.4th 9 (1981) (cases cited therein). *See also Restatement (Second) of Torts* § 766B (1979). The *Restatement (Second) of Torts* recognizes a substantially equivalent tort, intentional interference with prospective contractual relation:

based upon his prospect of signing with an ABL team at a salary of $4 million, and possibly also his prospect of signing endorsement offers worth as much as an additional $10 million per year.

The circuit court granted summary judgment against Ross on this claim on the basis that his business expectancy was merely speculative, negating the first element of the tort. As noted above, the court of appeals affirmed on the basis that Jackson could not have known of the specific business relationship with which she allegedly interfered. Specifically, the court held that Ross could not identify with reasonable certainty the party with whom he had a business expectancy at the time of the alleged interference, and therefore Jackson could not have known of the relationship with which she interfered, as required by the second element.

1. *Existence of Relationship or Expectancy*

The first element of the tort is the existence of a valid business relationship or expectancy. The relationship or expectancy need not be intended to culminate in a formal contract;[26] however, an expectancy must be sufficiently strong to be protected from tampering by others,[27] and the extent of outside interference that is permissible increases as the degree of enforceability of a business relationship decreases.[28] Thus, while prospective employment may be protectible, the plaintiff must allege a sufficient factual basis to support an expectancy of future employment, rather than merely a subjective expectancy.[29] The expectancy must be sufficiently imminent[30] and it must be reasonable.[31] For example, "the hope of receiving a job offer" is insufficient.[32] In addition, the interfer-

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One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

(a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or

(b) preventing the other from acquiring or continuing the prospective relation.

26. *Restatement (Second) of Torts* § 766B cmt. c (1979) (stating that restitutionary rights or even voluntary conferring of commercial benefits in recognition of moral obligation may be protectible).

27. *Vanden Dorpel*, 667 N.E.2d at 1300 (Ill. 1996).

28. *Galinski v. Kessler*, 480 N.E.2d 1176, 1182 (Ill. App. 1st Dist. 1985).

29. *Jones v. Sabis Educ. Sys.*, 52 F. Supp. 2d 868, 882 (N.D. Ill. 1999).

30. *Id.*; *see also Intercontinental Parts, Inc. v. Caterpillar, Inc.*, 631 N.E.2d 1258, 1269 (Ill. App. 1st Dist. 1994).

31. *J. Eck & Sons, Inc. v. Reuben H. Donnelley Corp.*, 572 N.E.2d 1090, 1092-93 (Ill. App. 1st Dist. 1991); *see also Crinkley v. Dow Jones & Co.*, 385 N.E.2d 714, 720-21 (Ill. App. 1st Dist. 1978).

32. *Vanden Dorpel*, 667 N.E.2d at 1299.

ence must be directed at a third party.[33] However, the naming of a specific party or entity is not required; it is sufficient if the entity is within an identifiable prospective class of third persons.[34]

The record indicates that Ross had "excellent prospects" and that he was expected to command an annual salary of at least $4 million.[35] Therefore, Ross could argue that his expectancy of receiving a substantial income was reasonably certain even if he did not end up being the first draft pick. Jackson will likely counter that Ross's expectancy is not reasonable and is too remote. The ABL draft was to occur in June of 2005, and any number of circumstances could have occurred prior to the draft that would have thwarted his expectancy. Thus, Jackson will likely argue that Ross's expectancy is tenuous and speculative. Ross was merely a contender among many other aspiring athletes, most of whom ultimately would not rise to the professional ranks. Furthermore, to argue otherwise would be tantamount to arguing that every highly touted athlete or performing artist has a reasonable expectation of succeeding at a higher level. In *Anderson v. Vanden Dorpel,*[36] the Supreme Court of Illinois held that even though the plaintiff was the "leading candidate" for an employment position and that "those who had interviewed her were going to recommend she be hired," the "hope of receiving a job offer" was not a sufficient expectancy.[37]

Ross will likely argue that the lower court erred because providing evidence of an identifiable prospective class of third persons is sufficient to survive summary judgment on this element. The ABL (or the class of all ABL teams) arguably qualifies as an identifiable prospective class. In *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.,*[38] the plaintiff claimed that the defendant had interfered with the plaintiff's economic expectancy of future clients for the plaintiff's repair services. While the plaintiff could not name the particular customers that it predicted would eventually enlist its repair services, the plaintiff adduced evidence that approximately 80% of its retail clients returned for such services.[39] The court found that the plaintiff's enumeration of clients for future services from among the pool of customers who had purchased automobiles from its dealership was sufficient to identify the prospective

33. *Laser Indus. Ltd. v. Eder Instrument Co.*, 573 F. Supp. 987, 994 (N.D. Ill. 1983); *see also Parkway Bank & Trust Co. v. City of Darien,* 357 N.E.2d 211, 214-15 (Ill. App. 2d Dist. 1976).

34. *See Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33, 37 (Ill. App. 2d Dist. 1989); *Crinkley,* 385 N.E.2d at 721-22; *Parkway Bank & Trust Co.*, 357 N.E.2d at 214-15.

35. R. 3-4.

36. 667 N.E.2d 1296 (Ill. 1996).

37. *Id.* at 1299-1300.

38. 546 N.E.2d 33 (Ill. App. 2d Dist. 1989).

39. *Id.* at 37.

third parties with whom it enjoyed a prospective economic advantage.[40] Similarly, in *Crinkley v. Dow Jones & Co.*,[41] the court found that the plaintiff's description of third parties as "manufacturers of medical instrumentation or allied health care products or other products" was sufficiently specific to qualify as "identifiable."[42] Thus, Ross will likely argue that his reference to the ABL rather than to a specific team is sufficient.

Ross also may contend that the mainstream media and blog predictions as well as the endorsement negotiations are evidence of a reasonable expectancy not only for his prospective salary, but also for his anticipated endorsement income of $10 million per year.[43] Jackson likely will respond that Ross did not have an expectancy regarding any prospective endorsements, as the issue of an endorsement is dependent upon whether Ross is actually drafted, as well as upon numerous other variables, including prospective sponsors' evaluations of Ross's marketability. Ross's expectancy in endorsement earnings, therefore, is likely to be more speculative than his expectancy in receiving a high salary as an ABL player. Jackson could also argue that any potential expectation Ross may have had in either regard was or would likely have been lost as a result of his own violations of the ABL Code of Conduct irrespective of her actions.[44]

Even if the ABL is a sufficiently identifiable class and Ross did have a valid expectancy of future earnings, Ross would still be required to prove the other elements of the claim, including intent. If Jackson can show the absence of a genuine issue on any other element, then any error by the circuit court on the first element would be rendered harmless.

2. *Knowledge of Relationship or Expectancy*

In order to be liable for interference with prospective economic advantage the defendant must have had knowledge of the relationship or expectancy.[45] However, a defendant need not have specific details of the prospective business arrangement or relationship in order to sustain a cause of action for this tort.[46] Rather, the plaintiff may show that the defendant had knowledge of facts or information that, upon further reasonable inquiry, would have led the defendant to discover the existence of a relationship or expectancy.[47] Thus, general knowledge of a prospective business arrangement with an identifiable class of third persons

40. *Id.*
41. 385 N.E.2d 714 (Ill. App. 1st Dist. 1978).
42. *Id.* at 721-22.
43. R. 4.
44. R. 6.
45. *Fellhauer v. City of Geneva*, 568 N.E.2d 870, 877-78 (Ill. 1991).
46. *Malatesta v. Leichter*, 542 N.E.2d 768, 780-81 (Ill. App. 1st Dist. 1989).
47. *Id.*

would be sufficient to establish this element. However, the requisite intent for this tort includes both knowledge and purposeful interference.

Ross will likely argue that his expectancy was well known to the general public and especially the Marshall State community, and therefore must have been known to Jackson even if she did not have such knowledge as a result of her relationship with him. Furthermore, Jackson has described Ross as a "superstar,"[48] and she had participated in marketing him to the media and others. It is not clear whether the potential sponsors that approached Ross with endorsement offers did so before Ross terminated his relationship with Jackson in February 2005.

Jackson will likely argue that her participation in arranging a few meetings was solely to "to increase his public visibility, and with sports agents who might represent him in the future,"[49] and that Ross never had an actual expectancy of which she should have been aware. The record does not indicate that Jackson participated in or was privy to any of the discussions connected with those meetings, nor that Ross shared any information resulting from the meetings and contacts with Jackson or anyone else; thus, any estimates regarding Ross's expectancies may be purely speculative. Jackson will also likely contend that it was her savvy endeavors in marketing and advertising that potentially made him a "superstar" rather than Ross's actual endeavors, and therefore she might reasonably have thought he would not be as likely to succeed after he terminated their relationship.

3. *Purposeful Interference*

The plaintiff must show purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening in order to satisfy the third element of the tort. This element encompasses two components, intention and causation.

i. Intention

Interference with a prospective economic advantage is deemed purposeful or intentional when the actor desires to bring about such interference or knows that his or her actions are at least "substantially certain" to result in such interference.[50] In addition, the interference must be improper. Even though an actor may know that interference will result, if the primary purpose of the conduct is legitimate, then the conduct may not be actionable.[51] Alternatively, the actor may raise an affirmative defense of privilege or justification, effectively arguing that

48. R. 4.
49. R. 4.
50. *Restatement (Second) of Torts* § 766B cmt. b (1979).
51. *Id.; see also id.* § 767 (1979).

the conduct should be excused because it was intended to further an interest of equal or greater value than that of the plaintiff.[52]

Jackson may argue that she was not at least "substantially certain" that her actions would affect Ross's prospects. However, she worked in the university's Athletic Public Relations Department and had family and other connections with media representatives, which she previously had used to Ross's benefit, so she will have to argue that she did not believe that anyone outside Marshall State would see or learn of the Web page. Jackson could claim that her primary intention was to play a joke or prank on Ross, or merely to annoy him, and that any other effects of her actions were merely incidental. However, it is unlikely that her interest in playing a joke would be deemed to have equal or greater value than Ross's career prospects (particularly in light of the nature of Jackson's conduct), and in any case such a claim is belied by her previous statement that she could "make him a has-been."[53]

ii. Causation

As part of the burden to prove the requisite intent, the plaintiff must prove that the defendant's actions actually caused an interference with a prospective economic advantage.[54] In *Meyers v. Levy*, the defendant sent his son's high school superintendent and principal a petition calling for the termination of the plaintiff, who was the school's football coach. The plaintiff alleged that the defendant made several defamatory remarks in the petition and the plaintiff was eventually terminated as coach; however, the plaintiff failed to rebut the uncontroverted testimony of the superintendent that the decision to terminate the plaintiff was not induced in any way by the defendant's petition. Thus, the court of appeals affirmed the entry of summary judgment on the interference with a prospective economic advantage claim because there was no evidence to support a finding of causation.[55]

It is unlikely that Jackson will seriously contest causation. Her actions set the entire sequence of events in motion, culminating in severe damage to Ross's career prospects. She could argue that the unexpected act of a third party in obtaining unauthorized access to the HoopsPlace.com page should be deemed to have broken the chain of causation. She might also argue that the decision to disqualify Ross was made based upon the Board of Commissioners' presumably well-informed conclusion

52. *See D 56 v. Berry's Inc.*, 955 F. Supp. 908, 917 (N.D. Ill. 1997); *e.g. Bergfeld v. Stork*, 288 N.E.2d 15, 17 (Ill. App. 5th Dist. 1972) (affirming dismissal where defendant intentionally terminated a lease in order to take advantage of a more lucrative business opportunity, causing plaintiffs to lose a business expectancy).

53. R. 4.

54. *See Meyers v. Levy*, 808 N.E.2d 1139, 1153 (Ill. App. 2d Dist. 2004).

55. *Id.* at 1154.

that Ross had violated the league's Code of Conduct, rather than based upon the Web page that, at least by that time, was likely recognized to be merely a prank.[56]

4. *Damages*

In order to prevail on a claim for intentional interference with prospective economic advantage the plaintiff must prove that actual damage or loss was suffered as a result of the defendant's tortious interference.[57] Even where the defendant's improper conduct caused inconvenience, the plaintiff must show consequential loss or damage to satisfy this element in order to establish a prima facie case.[58] Although a claim of lost profits cannot be entirely speculative, "because lost profits necessarily involve some uncertainty, proof of inferential character is permitted."[59] In *Maletesta v. Leichter,* the plaintiff applied to purchase a General Motors franchise. A General Motors representative contacted the defendant to confirm certain statements the plaintiff made on his application, and the defendant failed to confirm such statements; consequently, the plaintiff's application was denied. In determining the value of the plaintiff's lost profits from the car dealership which he would have been able to purchase but for the defendant's tortious interference, the court permitted certain valuation assumptions, including that the plaintiff would have broken even during the first few years of his business venture and that operating revenues would have been sufficient to cover the costs of the mortgage, holding that "such assumptions do not render the valuation faulty."[60]

Ross will likely argue that he is entitled to the value of the contracts that he would have enjoyed but for Jackson's interference and that he is entitled to make certain assumptions in quantifying and calculating his damages similar to the assumptions the court permitted in *Maletesta.* Indeed, prior to Jackson's posting of the page on HoopsPlace.com, Ross received every indication that he was going to be the first player selected in the June 2005 draft pick; mainstream media and sports pundits printed predictions that Ross would likely earn an annual salary of $4 million.[61] Subsequent to the posting, ABL recruiters abruptly advised Ross that they were not interested in hiring a player with perceived knee

56. *See* R. 6.

57. *Knapp v. McCoy,* 548 F. Supp. 1115, 1118 (N.D. Ill. 1982) (holding that a "sufficient degree of certainty" of the nature and quantity of the loss must be established in order to prove actual damage).

58. *See Downers Grove Volkswagen, Inc.,* 546 N.E.2d at 38.

59. *See Maletesta,* 542 N.E.2d at 784.

60. *Id.*

61. R. 4.

problems.[62] Thus, Ross will argue that his loss of economic expectancy can be quantified into monetary damages in terms of the loss of the value of his ABL contract, as well as the loss of $10 million in endorsement offers. Furthermore, Ross may possess correspondence he exchanged with the corporations interested in his product endorsement, which memorialized the parties' initial negotiations; hence, Ross's damages claim with respect to the endorsement deals may be potentially easier to quantify.

Jackson will likely argue that damages in the immediate case are too speculative. In this regard, every year evinces a slew of projected first round draft picks that later fail to fulfill the exalted predictions of the media. Ascribing certainty to such an inherently unpredictable event is tantamount to suggesting a racehorse injured as a result of another's tort is entitled to damages equal to the winnings of a race in which the horse never even previously competed. Jackson may also argue Ross should have attempted to rectify the misperceptions of the ABL and corporate sponsors created by Jackson's HoopsPlace.com posting and thus, surely failed to mitigate his damages. Similarly, Jackson could argue that, to the extent the ABL indicated it was Ross's violation of the ABL Code of Conduct that dispelled his chances of clenching an ABL contract,[63] Ross has no damages attributable to Jackson's conduct but rather was hoisted by his own petard.

C. DEFAMATION

Ross's second claim alleges that Jackson defamed him in several ways: (1) the Web page that she posted falsely caused Internet users viewing the page to believe that Ross consumed alcoholic beverages and smoked marijuana while enrolled at Marshall State; (2) the Web page falsely attributed various statements to him, including first person statements contained in quotation marks that appeared as captions under photographs on the page, and statements displayed on the page in the form of questionnaire responses; (3) Jackson caused the authorship of the entire Web page to be falsely attributed to him by labeling it with his name, without any obvious indication that it was merely a fan page, parody, satire, or prank, or was otherwise the responsibility of someone other than Ross himself; and (4) Jackson's actions directly and foreseeably led to the publication of false information about him in *Sports News* and other mainstream media, she intended this further publication to occur, and she is thereby liable for the subsequent defamatory publications.

62. R. 6.

63. R. 6.

Marshall courts follow the approach taken by the *Restatement (Second) of Torts* in defamation actions, requiring "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication."[64]

1. *False and Defamatory Statement*

The first requirement for defamation is a statement that is both false and defamatory. Under the *Restatement,* a statement is defamatory "if it tends to cause such harm to the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[65] The defamatory statement must concern the plaintiff, as understood by its recipient, in order to be actionable.[66] A statement that is in the form of an opinion is actionable "only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[67]

Ross has not alleged that the photographs themselves were false, and therefore by themselves they would not be a sufficient basis for a defamation claim. The same is not necessarily true of the captions and other textual material on the Web page, either standing alone or in combination with the photographs. For example, the caption "I'm high on State!" appearing adjacent to a photograph of Ross wearing a t-shirt with a marijuana leaf on it, could reasonably be understood by a viewer to be an admission by Ross (or perhaps an accusation by a third party) that he had smoked marijuana. The statement that Ross was enrolled in a course on "Basket Weaving" was also false, and certainly could be viewed as injurious to his reputation.[68]

Statements of opinion are actionable only if they have an explicit or implicit factual foundation and are therefore "objectively verifiable."[69] There is no wholesale exception for all statements of opinion, but statements that "cannot reasonably be interpreted as stating actual facts" are

64. R. 7 (citing *Restatement (Second) of Torts* § 558 (1977)).

65. *Restatement (Second) of Torts* § 559 (1977).

66. *Id.* § 564.

67. *Id.* § 566.

68. Jackson may argue that "Basket Weaving" is generally understood to refer not to an actual college course, but rather to any easy course that a student athlete might take, and therefore viewers of the Web page would be unlikely to take seriously the reference to "Basket Weaving" on what purported to be a student's class schedule. *See e.g,* William C. Rhoden, *Thompson's Protest over Freshman Rule Is Drawing Some Criticism,* N.Y. Times D28 (Jan. 19, 1989) (quoting Dr. Frederick P. Whiddon, President of the University of South Alabama, on the practice of admitting illiterate athletes to college and placing them in "basket-weaving courses").

69. *Milkovich v. Lorain J. Co.,* 497 U.S. 1, 22 (1990).

protected under the First Amendment.[70] To determine whether an alleged defamatory statement constitutes a protected opinion, a court examines the statement in the context in which it was published, considering all of the words used rather than merely a particular phrase or sentence.[71] In addition, the court considers any cautionary terms used by the person publishing the statement and all of the surrounding circumstances, including the medium by which the statement is disseminated and the audience to which it is published.[72]

Ross will likely argue that the page Jackson posted on HoopsPlace.com caused people to believe that he consumed alcoholic beverages, smoked marijuana, wears women's undergarments, and was defrauding the ABL by concealing an injury. Jackson will likely counter that, in light of the "general tenor of the article,"[73] the Web page should be classified as constitutionally protected opinion rather than as factual statements. Any reasonable person reading the captions- "Watch out ABL—here I come!"; "Oops, there it is!"; "I'm high on State!" and "I can dance on one leg!"- together with the photographs and other material on the page and the context in which it was published, would recognize that the challenged content constituted subjective and humorous commentary concerning Ross rather than objective statements intended to be relied upon as conveying factual information.

Ross has also alleged that Jackson defamed him by causing the authorship of the Web page to be falsely attributed to him, and that Jackson's actions led to the subsequent publication of defamatory information about him in *Sports News* and elsewhere. The false attribution claim is rather tenuous, since Ross's reputational injuries all seem to stem from the content of the Web page (and from subsequent republications) rather than from any false attribution of authorship. Whether the subsequent publications were false and defamatory is not really at issue; the question there is merely whether Jackson can be held vicariously liable for these actions of third parties.[74]

2. *Publication*

As a necessary element of tortious defamation, publication is the intentional or negligent communication of defamatory matter to a third person or persons. A libel published on the Web is similar to one published in traditional mass media, but on a larger scale.[75] Also, as with

70. *Id.* at 19.

71. *Protective Factors, Inc. v. Am. Broad. Cos.*, 2002 U.S. Dist. LEXIS 12399, 2002 WL 1477174 (D. Mass. May 28, 2002).

72. *Id.* at *10, 2002 WL 1477174 at *3.

73. *Milkovich*, 497 U.S. at 21.

74. *See infra* notes 81-83 and accompanying text.

75. *Firth v. State*, 775 N.E.2d 463, 465 (N.Y. 2002)

books and newspapers, publication occurs (and the cause of action accrues) when the defamatory statement is first generally distributed to the public.[76] Accordingly, publication of libelous content on the Internet occurs at the time the defamatory article is posted and accessible by Internet users, regardless of whether there are actual "hits" at that time.[77] Therefore, it is not necessary to establish exactly when and by whom defamatory content was viewed online in order to determine whether a statement has been published.

Ross may argue that he need not prove that any Marshall State student ever actually visited the Ross Web page in order to establish the required "publication to a third party" element of his claim of defamation against Jackson. Because the record is clear that the Ross Web page was at some time published or made available for viewing to, at least, Marshall State students, and that Jackson intended for the Web page to be viewed by those students, the court may presume that the defamatory content was communicated to Marshall State students.

A defendant may be held liable for the negligent publication of a defamatory statement if the defendant's affirmative act creates an unreasonable risk that the defamatory matter would be communicated to a third person.[78] For example, in *Freeman v. Busch Jewelry Co.*,[79] a postal card requesting a married man to call one unknown female at a certain telephone number was libelous as conveying the impression of the addressee's infidelity and was published within libel law, where the addressee's wife was given every opportunity to and actually did read the card. The defendant's negligent method of communication was found to be tantamount to an intentional communication due to the level of risk associated with posting such potentially defamatory matter on a postcard where it is open for all eyes to read, beyond the intended third party.

Ross will likely argue that Jackson's negligent communication of the Web page to the entire Internet community is tantamount to an intentional posting, and therefore she is liable for all injuries he suffered as a result of that negligent posting. Jackson will respond to this claim of negligent publication by arguing that she took reasonable precautions to prevent the Web page from being accessed outside the university by marking it as private. This argument is belied by the fact that archived copies of the Web page were available on Google and the Internet

76. *Strick v. Superior Court,* 192 Cal. Rptr. 314, 317 (App. 2d Dist. 1983).

77. *Firth v. State,* 706 N.Y.S.2d 835, 841 (Ct. Cl. 2000) (analogizing "hits" of a Web site to sales of a printed book or article, and concluding that neither is relevant for purposes of the single publication rule), *aff'd,* 731 N.Y.S.2d 244 (App. Div. 3d Dept. 2001), *aff'd,* 775 N.E.2d 463 (N.Y. 2002).

78. *Restatement (Second) of Torts* § 577 cmt. k (1977).

79. 98 F. Supp. 963 (N.D. Ga. 1951).

Archive,[80] indicating that the access restrictions likely were completely ineffectual.

A defendant is liable for the repetition of a defamatory statement by others if the repetition was authorized or intended by the defendant, or if the defendant had reason to expect it.[81] Under ordinary circumstances, the fact that a news reporting agency coincidently reports on the material originally published by the author does not cause the originator to be liable for republication.[82] However, if there is evidence that the originator provided the news media with the information and that it was reasonably foreseeable that the defamatory matter would be republished, then the defendant will be held liable for the republication and any special damages which follow.[83]

Jackson will likely contend that she intended the Web page to be viewed solely within the university community and could not reasonably have contemplated that it would be accessed by news media outside the university, taken seriously, and subsequently republished as fact. Ross's injuries resulted from the subsequent republication rather than from Jackson's initial publication. However, it was foreseeable that at least some media representatives would republish information from the Web page.

The record reflects that the parties agreed that the publication by *Sports News* caused the most damage to Ross's reputation. Ross may try to argue that Jackson's unprotected and easily accessible posting of the Ross Web page constituted an intentional communication to *Sports News* and any republication by this reporting service was a foreseeable and natural consequence of Jackson's original posting.

Jackson can attempt to avoid liability by arguing that it was a mere coincidence that the *Sports News* reporter found the Web page and subsequently reported on the matter. More than likely, she will also try to avoid liability by claiming that *Sports News* alone is liable for its own publication of libelous material because it knowingly published material that was clearly untrue; that *Sports News* should not have considered information posted on HoopsPlace.com to be a reliable source of information for mass publication; and that she could not reasonably have foreseen that the *Sports News* reporter or anyone else viewing the Web page would consider it to contain credible statements of fact worthy of republication.

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80. R. 5 note 2.

81. *Restatement (Second) of Torts* § 576 (1977).

82. *Davis v. Natl. Broad. Co.*, 320 F. Supp. 1070, 1072 (E.D. La. 1970).

83. *Campo v. Paar*, 239 N.Y.S.2d 494, 498 (App. Div. 1st Dept. 1963); *see also Davis*, 320 F. Supp. at 1072 (noting that the original publisher is liable if the republication is a "natural and probable consequence" of the original publication).

3. *Fault*

The third element of defamation requires that the plaintiff demonstrate "fault amounting at least to negligence" by the defendant.[84] This requirement is satisfied if the defendant knows that the statement is false and defamatory or acts in reckless disregard thereof.[85] In addition, unless the plaintiff is a public figure, in many jurisdictions the fault requirement is met if the defendant merely acts negligently in failing to ascertain the falsity of the matter.[86]

The public or private status of a defamation plaintiff is a factual inquiry that depends heavily upon the individual circumstances of each case. A college athlete does not become a public figure just because of his weekly appearance on the football field and performance before crowds of devoted fans. In close cases, courts tend to classify plaintiffs as limited purpose public figures who are public figures only with respect to a particular public controversy. In *New York Times Co. v. Sullivan,*[87] the Supreme Court held that a public official who is defamed in regard to his conduct, fitness, or role as public official must prove that the defendant had knowledge of the falsity of the communication or acted in reckless disregard of its truth or falsity.[88] A college football player can voluntarily place himself into a public controversy by striving for athletic achievement or recognition.[89]

In this case, it may not matter whether Ross is a public figure (or a limited public figure), because Jackson clearly must have known of the falsity of the material she posted, and she admittedly harbored a malicious desire to "take him down a notch."[90]

4. *Actionability or Harm*

The final element of defamation comprises two alternative requirements: actionability of the statement *per se*, or special harm caused by the publication.[91] A statement which is clearly harmful to one's reputation and defamatory on its face is considered to be actionable *per se* and does not require that the plaintiff plead or prove an actual or special loss.[92] In addition, defamatory statements that are published in written

84. *Restatement (Second) of Torts* § 558 (1977).
85. *Id.* §§ 580A, 580B.
86. *Id.* §§ 580B; *see Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 347 (1974).
87. 376 U.S. 254 (1964).
88. *Id.* at 283-84.
89. *Holt v. Cox Enters.,* 590 F. Supp. 408, 412 (N.D. Ga. 1984).
90. R. 4.
91. *Restatement (Second) of Torts* § 559.
92. *Id.* § 569. For example, harm is presumed for statements that accuse a person of having committed a criminal offense, having engaged in serious sexual misconduct, or having acted in a manner incompatible with the person's trade or profession. *Id.* § 570. How-

or other nontransitory form qualify as libel rather than slander,[93] and the majority of courts consider libel to be actionable *per se*.[94] Statements that do not qualify as actionable *per se* are said to be actionable per quod, requiring the plaintiff to demonstrate the defamatory meaning of the statements and provide evidence of special damages of economic or pecuniary value.[95]

Ross will likely argue that the Web page posted on HoopsPlace.com by Jackson was sufficiently permanent to qualify as libel rather than slander, and that the statements at issue were defamatory on their face—for example, by implying that Ross had engaged in criminal behavior, and perhaps by imputing sexual misconduct and actions incompatible with his studies and athletic pursuits.[96] Jackson could respond that most of the photographs merely depict Ross in close proximity to other students engaging in these behaviors, and that because the photographs themselves depict wholly truthful matters they should not be considered actionable *per se*. She might also assert an innocent interpretation defense, arguing that the Web page could reasonably be viewed as a mere joke, and therefore cannot be actionable *per se*.[97] Even if Ross fails in persuading the court that the statements at issue here were actionable *per se*, however, it is probable that he will be able to demonstrate special harm resulting from the statements, so Jackson is not likely to prevail on the element of actionability or harm.

D. FALSE LIGHT INVASION OF PRIVACY

Ross's final claim is that Jackson is liable for invading his privacy by placing him before the public in a false light. This claim is based upon the same allegations as the defamation claim, along with Ross's allegations that Jackson's actions created the false impressions that Ross had injured his knee; that he wears women's undergarments; and that he had authorized publication of the Web page on HoopsPlace.com.

Under the applicable Marshall statute, one who gives publicity to a matter concerning another that places the other before the public in a

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ever, if a statement is susceptible to two reasonable interpretations, only one of which is defamatory, then it is not actionable *per se*. *Bryson v. News Am. Pubs., Inc.*, 672 N.E.2d 1207, 1215 (Ill. 1996).

93. *Restatement (Second) of Torts* § 568; *see also Restatement (Second) of Torts* § 568(c) (noting that whether a publication constitutes a libel depends upon the area of dissemination and the character and persistence of the publication).

94. *Restatement (Second) of Torts* § 569; *but see Restatement (Second) of Torts* § 569 cmt. B (noting that in a minority of jurisdictions, a libelous publication is considered actionable *per se* "only if its defamatory meaning is apparent on its face and without reference to extrinsic facts").

95. *Restatement (Second) of Torts* § 575 cmt. b.

96. *See supra* note 92.

97. *Id.*

false light is subject to liability to the other for invasion of privacy, if the false light in which the other was placed would be highly offensive to a reasonable person, and the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[98]

1. *Action Placing Defendant in False Light*

To satisfy the first element of false light invasion of privacy, the actions of the defendant must place the plaintiff in a false light. This requirement may be met by a defamatory statement (in which case the plaintiff may be able to pursue defamation and false light as alternative theories), or by a statement that causes characteristics, conduct, or beliefs to be falsely attributed to the plaintiff.[99]

Jackson's publication of a photograph of Ross with a bandaged knee and crutches, combined with the caption implying that Ross's knee had been injured, arguably created a false impression regarding Ross's fitness to play basketball. The photograph in which his private parts were exposed, captioned "Oops, there it is!" may have created an impression that he was an exhibitionist or, at the least, that he had authorized the publication of such a photograph. Similarly, the photograph of him wearing lipstick and women's undergarments could have created an impression that he was a cross-dresser. Perhaps most significantly, the photographs depicting Ross in close proximity to students consuming alcohol and marijuana may have created the impression that Ross himself engaged in such conduct.

Jackson can argue that since the photographs were not doctored, their publication alone should not be deemed to place Ross in a false light. The pictures represent a moment in time that did, in fact, occur. Even with the captions, simply associating Ross loosely with the activities depicted in the photographs is not enough to satisfy the first prong of the false light analysis. In *Parks v. LaFace Records*,[100] Rosa Parks alleged that attaching her name to an offensive song was sufficient to trigger a false light claim. The Court of Appeals for the Sixth Circuit rejected her argument, stating that merely having her name attached to

98. Marshall Rev. Code § 14.652 (cited at R. 8); *see also Restatement (Second) of Torts* § 652E (1977) (The Marshall statute tracks and presumably is based upon section 652E.); *Lovgren v. Citizens First Natl. Bank of Princeton,* 534 N.E.2d 987, 990-91 (Ill. 1989) (quoting section 652E); *but see Restatement (Second) of Torts* § 652E caveat (disavowing any position as to whether mere negligence can support a claim for false light invasion of privacy). Because the Marshall statute does not contain any such caveat (as least to the extent that it is set forth in the record), Marshall courts presumably would require actual knowledge or reckless disregard rather than mere negligence.

99. *Restatement (Second) of Torts* § 652E cmt. b.

100. 329 F.3d 437 (6th Cir. 2003).

an offensive song did not state any false facts about her, and thus did not place her in a false light.[101] Jackson could similarly argue that she did not state any false facts about Ross on the Web site, and that any inferences drawn by others were not due to her making a statement of false fact.

2. *Highly Offensive to a Reasonable Person*

Under the second element, the false light impression must be highly offensive to a reasonable person. That requirement is met "when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity"; "minor mistakes in reporting" and "false facts that offend a hypersensitive individual" are insufficient.[102] In *Lovgren v. Citizens First National Bank of Princeton,* the defendants ran advertisements in local newspapers and distributed handbills stating that the plaintiff intended to sell his farm at auction.[103] These false statements made it impossible for the plaintiff to refinance his mortgage, a fact which the court weighed heavily in deciding that the published false facts satisfied the second element of the tort.[104]

Ross would likely argue that the implications that he drinks alcohol and smokes marijuana, has sustained an undisclosed knee injury, and is a cross-dresser are all sufficient, on their own or as a whole, to satisfy the second element of the tort. Not only are these allegations offensive *per se*, but they also contributed to Ross's removal from the ABL draft and the subsequent loss of his prospective endorsement contracts. Because the plaintiff in *Lovgren* suffered from the inability to refinance his mortgage, it seems that the loss suffered by Ross is more than sufficient.[105] Additionally, the fact that information from the Web site was republished by *Sports News* increases the likelihood that others read the offensive content, which would militate towards the second element being determined in favor of Ross.

In response, Jackson could argue that a reasonable person would recognize the Web page as a parody of Ross. The court, in *Rogers v. Grimaldi,*[106] held that the First Amendment protects artistic speech, including parody.[107] The *Rogers* court applied this holding to the plaintiff's false light and right of publicity claims.[108] Since Ross is, to some extent,

101. *Id.* at 461-62.
102. *Lovgren v. Citizens First Natl. Bank of Princeton,* 534 N.E.2d 987, 990 (Ill. 1989).
103. *Id.*
104. *Id.*
105. *Id.*
106. 695 F. Supp. 112 (S.D.N.Y. 1988).
107. *Id.* at 123.
108. *Id.*

a public figure, Jackson could argue that her right to parody him trumps his right to not be presented in a false light. Moreover, she could argue that it is unreasonable for Ross to be offended, since the Web page was intended as humor. His status as a limited public figure makes him newsworthy and thus subject to criticism.

Constitutional considerations impose further constraints on what may be considered highly offensive. A highly offensive disclosure is one that would cause emotional distress or embarrassment to a reasonable person—one that injures the plaintiff's "'human dignity and peace of mind.'"[109] However, the highly offensive standard must be narrowly construed "[i]n order to avoid a head-on collision with First Amendment rights."[110]

The false light invasion tort is designed to protect the individual's peace of mind from not having to appear before the public "in an objectionable false light or false position."[111] The tort of defamation is designed to protect the individual's good reputation.[112] Common to both is the requirement that the publicity in fact be false or at least have the capacity to create a false public impression as to the plaintiff.[113] In a false light invasion claim, the court must decide whether the criticized matter is capable of the meaning assigned to it by plaintiff, and whether that meaning is highly offensive to a reasonable person.[114]

Whether a portrayal qualifies as sufficiently offensive is often a fact-sensitive question, and both Ross and Jackson are likely to rely heavily upon analogies to the facts of precedent cases.[115] Ross will likely argue

109. *Michaels v. Internet Ent. Group, Inc.*, 5 F. Supp. 2d 823, 842 (C.D. Cal. 1998) (determining that a stolen videotape of the plaintiff having sexual intercourse was highly offensive) (quoting 2 J. Thomas McCarthy, *Rights of Publicity & Privacy* § 11.7[A]) (West 1997)).

110. *Machleder v. Diaz*, 801 F.2d 46, 58 (2d Cir. 1986) (finding that the portrayal of a private individual as intemperate and evasive was not highly offensive).

111. *Romaine v. Kallinger*, 537 A.2d 284, 290 (N.J. 1988) (quoting *Restatement (Second) of Torts* § 652E, cmt. b).

112. *Id.*

113. *Id.*

114. *Salek v. Passaic Collegiate Sch.*, 605 A.2d 276, 279 (N.J. Super. Ct. App. Div. 1992).

115. The following decisions found false light portrayals offensive to a reasonable person: *Cantrell v. Forest City Publg. Co.*, 419 U.S. 245, 247-48 (1974) (false portrayal of private individual and her family as destitute exposed them to ridicule and pity); *Time, Inc. v. Hill*, 385 U.S. 374, 378 (1967) (false portrayal of family held hostage, depicting violence and verbal sexual insult); and *Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128 (7th Cir. 1985) (unauthorized use of model's nude photograph in *Hustler Magazine* falsely portrayed her as a lesbian and willing to be associated with the magazine). In these cases, however, false light portrayals were found not to be offensive to a reasonable person: *Salek*, 605 A.2d at 279 (a yearbook photograph implying an ongoing sexual relationship between two teachers); *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289 (S.D. Cal. 1976) (article reporting plaintiff's exploits, including putting out cigarettes in his mouth, diving off stairs to im-

that the 'highly offensive' standard has been met because the page Jackson posted on HoopsPlace.com caused people to believe that he wears women's undergarments, defrauded the ABL by concealing an injury, and committed a criminal offense by smoking marijuana. He has alleged (and presumably could prove) that he has never been charged with possession of marijuana, and the record reflects that the alleged "injury" photo portrayed a costume Ross wore at a party.[116] Jackson will likely counter that Ross failed to establish that the Web page portrayal of him would be considered highly offensive to a reasonable person. Based on the relationship between the pictures and captions—"Watch out ABL—here I come!," "Oops, there it is!," "I'm high on State!," and "I can dance on one leg!"[117]—a reasonable person would not be offended by the publication, but, instead, would discern the tongue-in-cheek nature of the portrayal.

3. *Knowledge of Falsity or Reckless Disregard*

The final element of the false light tort requires that the actor knew of the falsity of the matter and the false light publicity that would result, or acted in reckless disregard thereof. This requirement is virtually identical to the fault requirement for defamation, except that it is even less likely that mere negligence will suffice.[118] As in that claim, it is likely that Ross will have little trouble showing that Jackson had actual knowledge of the falsity of the material and the false light into which it would place Ross, and that Jackson harbored a malicious desire to cause him harm.[119]

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press women, hurting himself in order to qualify for unemployment insurance so as to have time for body surfing, and participating in gang fights and eating insects was not offensive enough to preclude being considered newsworthy).

116. R. 5, 7.

117. R. 4-5.

118. *See supra* note 98.

119. *See supra* notes 84-90 and accompanying text.

BRIEF FOR PETITIONER

No. 2006-CV-0654

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
FALL TERM 2006

NICK ROSS,
Petitioner,
v.
JANE JACKSON,
Respondent.

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEALS FOR
THE STATE OF MARSHALL

BRIEF FOR PETITIONER

Chris Norris
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Attorneys for Petitioner

QUESTIONS PRESENTED

I. Did the court of appeals err in holding that Ross's tortious interference with prospective economic advantage failed, when under the majority view, Ross satisfied the business expectancy element by identifying a class of third parties?

II. Did the court of appeals err in holding that Ross's defamation claim failed, when Ross presented sufficient genuine factual disputes regarding both the defamatory nature and the publication of Jackson's representations?

III. Did the court of appeals err in holding that Ross's false light claim failed, when there was sufficient evidence that Jackson acted with actual malice, and a genuine factual dispute exists as to the offensive nature of Jackson's representations?

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TO THE HONORABLE SUPREME COURT OF THE STATE OF MARSHALL:

Petitioner, NICK ROSS, appellant in the case before the First District Court of Appeals of the State of Marshall, and plaintiff in the Marbury County Circuit Court, respectfully submits this brief.

OPINIONS BELOW

The Marbury County Circuit Court granted summary judgment in favor of Jane Jackson. The First District Court of Appeals affirmed the circuit court's order on all counts, as shown in the record. App. Tab. A.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The applicable constitutional provisions governing this appeal are the First and Fourteenth Amendments of the United States Constitution. U.S. Const. amend. I, XIV.

There are three statutory provisions relevant to this case: (1) § 14.776(d), which prohibits tortious interference with another's prospective economic advantage; and (2) § 14.652, which prohibits placing another in a false light; and (3) Restatement (Second) of Torts § 766B, which prohibits defamation of another.

STATEMENT OF THE CASE

I. Statement of the Facts

A. A Star in the Making

In 2001, the head coach of Marshall State University recruited Nick Ross, a highly touted high school basketball player, to join his team. R. at 3-4. Ross accepted a scholarship at Marshall State and flourished as the team's starting forward between 2001 and 2005. R. at 4. Ross's on-court accolades garnered attention from mainstream media pundits and website bloggers, who predicted that Ross would be the first player selected in the American Basketball League's ("ABL") June 2005 draft. R. at 4. Ross's prospective annual salary in the ABL would be approximately $4 million. R. at 4. In addition to lucrative salary prospects in the ABL, several major corporations approached Ross with endorsement deals. R. at 4. Based on those offers, Ross anticipated supplementing his annual player salary with endorsement income of as much as $10 million per year. R. at 4.

B. The Breakup

During Ross's sophomore year at Marshall State, he began dating the head coach's daughter, Jane Jackson ("Jackson"), who was also a stu-

dent at Marshall. R. at 4. Jane worked part-time at Marshall's Athletic Public Relations Department, where she assisted with advertising sales, marketing, and website development. R. at 4. Jackson used her family and other connections to increase Ross's public visibility with the media and sports agents. R. at 4.

In February 2005, Ross broke off his three-year relationship with Jackson. R. at 4. Jackson was extremely upset over the breakup and publicly announced "without me and my family, he [Ross] would be just another hillbilly kid from downstate Marshall. I made him a superstar, and I can make him a has-been." R. at 4.

C. The "Ross Page"

In April 2005, two months after their breakup, Jackson—without the consent of Ross—created a website on the World Wide Web at hoopsplace.com entitled the "Ross Page." R. at 4. It contained a variety of content related to Ross, including photographs and a personal profile of Ross. R. at 4-5. The photos included scenes of Ross playing basketball and in social settings. R. at 4-5. The profile included Ross's name, date of birth, address, high school, astrological sign, and other personal information. R. at 5. Jackson displayed the profile information in a questionnaire-like format that created the appearance that Ross personally provided the answers. R. at 5.

Jackson stated that she created the "Ross Page" to annoy Ross, and at most "take him down a notch" within the social structure. R. at 4. Jackson posted various photographs depicting students consuming alcohol and smoking marijuana. Ross was in each photograph but was not partaking in either activity. In a separate photo, Ross is shown leaning on a pair of crutches with a large bandage on his knee with a caption that read, "I can dance on one leg." R. at 5. This photograph was in fact taken at a costume party, and Ross had not injured his knee. R. at 5.

D. Word of the "Ross Page" Spreads

Ross contends that she designated the "Ross Page" as "private," and therefore accessible only to students who declared themselves to be Marshall students. R. at 4. But within a month of the website's creation, a writer for the *Sports News* accessed d the site and reproduced its photographs and textual content in its April 25, 2005 issue. R. at 5. Shortly thereafter, numerous tabloid newspapers and other media published articles based on the *Sports News* report. R. at 5. The photos from the "Ross Page" were copied and later appeared on several other websites. For example, ESPN's website obtained a copy of the photograph depicting Ross with a bandage on his knee and a caption reading "Does the ABL get a discount if he only has one good leg?" Although there is no

evidence presented in the record as to how many individuals viewed the original "Ross Page," Jackson agrees that the *Sports News* of republication of the photos subjected Ross to widespread negative media coverage. R. at 5-6.

E. The Fall from Stardom

Ross and his agent demanded that all websites remove any republication of information gleaned from the "Ross Page." However, the damage was already apparent as rumors about Ross quickly spread throughout the sports and entertainment communities. R. at 6. Shortly after Ross's 'injury' photo appeared on ESPN, several ABL recruiters contacted Ross to inform him that they were not interested in enlisting a player with perceived knee problems—even though Ross never actually had a knee injury. R. at 6. In late May 2005, upon the motion of one of its members, the ABL held a closed-door meeting to examine the various allegations that had been made against Ross. R. at 6. The Board found "probable cause" to believe that Ross violated the ABL Code of Conduct—although its did not disclose the specific violative conduct—and ruled that he would be ineligible for the ABL draft for a two-year period. R. at 6. Ross's endorsement deals quickly faded away. R. at 6; fn 2.

II. Nature of the Proceedings

Ross sued Jackson in the Marbury County Circuit Court seeking monetary damages, alleging causes of action in tortious interference with prospective economic advantage, defamation, and false light. R. at 3. Jackson moved for summary judgment. The Marbury Circuit Court granted the motion, disposing of all three claims. R. at 3. The First District Court of Appeals affirmed the summary judgment. R. at 3. Ross respectfully asks this Court to reverse the judgment of the Court of Appeals.

SUMMARY OF THE ARGUMENT

In March 2005, just a few months before the American Basketball League's annual draft, Nick Ross had an undeniably bright future. Mainstream media touted him as the first-overall pick in the ABL draft, and major corporations were throwing multi-million dollar endorsement contracts his way. But in April 2005, Jane Jackson—Ross's jilted ex-girlfriend—eviscerated Ross's bright future by posting information on the World Wide Web that generated a false and disparaging image of Ross. Ross urges this Court to determine that Jackson tortiously crossed the line in her pursuit to, as Jackson put it: "make [Ross] a has-been."

I. TORTIOUS INTERFERENCE

The court of appeals incorrectly held that Jackson's interference with Ross's prospective business relationships was not improper, because it applied an erroneous standard for the first element of tortious interference—valid business expectancy. The court of appeals held that Ross failed to sufficiently identify "the party" with whom he had a valid business expectancy, but numerous courts have recognized that plaintiffs need not identify the specific contractual third party so long as they can identify a "class of prospective third parties." Here, Ross sufficiently identified two "prospective classes" with whom he had an expectancy of forming a contract—the teams that comprise the ABL and several major corporations. Ross can also prove that Jackson was aware of and purposefully interfered with this business expectancy by creating a disparaging website to the detriment of Ross. This Court should therefore reverse the court of appeals summary judgment ruling.

II. DEFAMATION

The court of appeals erred in granting summary judgment in favor of Jackson on Ross's defamation claim, because Ross sufficiently demonstrated that genuine issues of material fact exist regarding both the defamatory nature of her representations and her publication of those statements to third parties. The "Ross Page" contained content that created a false impression that Ross consumed alcohol in public and smoked marijuana. These impressions harmed Ross's reputation both socially and professionally, which creates a genuine factual dispute regarding their defamatory nature. Additionally, Jackson cannot immunize herself from liability by merely designating the "Ross Page" as private, when the record demonstrates that the website was posted on the World Wide Web and numerous third parties gained access to the website. The third party publications that undeniably occurred in this case raise genuine factual disputes regarding both intentional and negligent publication. This Court should therefore reverse the court of appeals summary judgment holding on defamation.

III. FALSE LIGHT

The court of appeals erred in granting Jackson summary judgment on Ross's false light invasion of privacy claim, because Ross sufficiently demonstrated that genuine issues of material fact exist regarding both the offensive nature of Jackson's representations and her actual malice. As a matter of law, the "Ross Page" contains photographs that a reasonable person would find offensive, because they created a major misrepresentation of Ross's fitness—both in terms of health and character—for his career in the ABL.Also, Ross provided sufficient evidence of Jackson's

intimate familiarity with Ross's health and his character, which precludes her from claiming lack of knowledge or reckless disregard for the falsity of the statements she posted on the "Ross Page." This Court should reverse the court of appeals grant of summary judgment because genuine factual disputes remain regarding Ross's false light claim.

ARGUMENT AND AUTHORITIES

I. THE COURT OF APPEALS ERRED IN GRANTING JACKSON SUMMARY JUDGMENT ON ROSS'S TORTIOUS INTERFERENCE CLAIM, BECAUSE IT MISINTERPRETED THE TEST FOR VALID BUSINESS EXPECTANCY AND GENUINE ISSUES OF MATERIAL FACT REMAIN ON ALL FOUR TORTIOUS INTERFERENCE ELEMENTS.

> "Good name in man and woman, dear my lord, Is the immediate jewel of their souls.
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him.
> And makes me poor indeed."
>
> WILLIAM SHAKESPEARE, OTHELLO, ACT III, SCENE 3.

When Jane Jackson ("Jackson") posted disparaging and false information regarding Nick Ross ("Ross") on the World Wide Web entitled the "Ross Page," she not only 'filched' Ross's good name, but she also deprived him of a lucrative career in the American Basketball League ("ABL") and millions of endorsement dollars. To redress the harm Ross suffered from Jackson's interference, Ross seeks relief under Marshall's theory of tortious interference with prospective economic advantage ("tortious interference" or "interference").[1] Under Marshall State law—similar to the Restatements—tortious interference requires proof of the following: (1) the existence of a valid business expectancy; (2) the defendant's knowledge of the plaintiff's relationship or expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening; and (4) damage to the plaintiff resulting from the defendant's interference. Marshall Rev. Code § 14.776(d); *cf.* RESTATEMENT (SECOND) OF TORTS § 776B. The trial court and the court of appeals denied Ross's tortious interference claim because they erroneously applied a narrow view of the first element—valid business expectancy. Therefore, Ross asks this Court to reverse the lower court's summary judgment ruling on the issue of tortious interference and remand this case for further proceedings.

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1. Ross also seeks relief under theories defamation and false light invasion of privacy (R. at 6), which are discussed in the latter sections of this brief.

The standard of review on a motion for summary judgment is *de novo*. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("*Anderson*"). Under Marshall state law, summary judgment is inappropriate if genuine issues of material fact remain in dispute. MARSHALL R. CIV. P. 56(c). A fact is "material" if it might affect the outcome of the case under requisite governing law and "genuine" if the "evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party." *Anderson*, 477 U.S. at 248. Therefore, the nonmovant, Ross, is not required to conclusively resolve genuine material factual disputes in his favor, rather, he is only required to present sufficient evidence supporting the claimed factual dispute so that a reasonable juror could find in his favor. *Id.* In reviewing the evidence, this Court should construe all evidence in the light most favorable to Ross and make all reasonable inferences in his favor. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). As the record shows in this case, Ross has demonstrated sufficient evidence of genuine material factual disputes on each element of tortious interference.

The test in Marshall for tortious interference is nearly identical to the test most other states apply. *See Della Penna v. Toyota Motor Sales, Inc.*, 902 P.2d 740, 747 (1995) ("*Della Penna*") (reviewing multi-state tortious interference laws). Under most states' laws, tortious interference protects a multitude of future contractual relations, including an individual's right to obtain employment free from undue interference. *See* W. Page Keaton, Prosser & Keeton on the Law of Torts 995-1008 (5th ed. 1984) ("Prosser & Keeton on the Law of Torts"). As Dean Keeton notes, "the 'expectancies' thus protected have [included] relations such as the prospect of obtaining employment or employees, or the opportunity of obtaining customers." *Id.* at 1006. Likewise, the Restatement (Second) of Torts ("Restatement") provides that tortious interference with business expectancies includes both interferences with prospective employment and the selling of services. §766B, cmt. c. So long as the prospective contractual relations are for pecuniary gain, tortious interference with business expectancies protects the contractual parties from improper third party interference. *Id.* Tortious interference typically 'draws the line' at interference "characterized by violence, fraud and defamation [that] was tortious in character." Prosser & Keeton (tracing tortious interference's origin) and RESTATEMENT (SECOND) OF TORTS §766B, cmt. b. (historical examples of conduct constituting tortious interference). Likewise, the Supreme Court of California noted in its recent review of tortious interference that most high courts continue to impose liability where A induces or persuades C not to contract with B by means that are either "wrongful," "improper," "illegal," or "independently tortious" in character. *Della Penna*, 902 P.2d at 746-47.

In this case, Jackson 'crossed the line' by defaming Ross and portraying him in a false light, which she knew or should have known would damage his future in the ABL. Jackson's tortious interference deprived Ross of the right to pursue "his calling or occupation free from undue influence and molestation." *Carpet Group, Int'l v. Oriental Rug Importers Ass'n*, 256 F.Supp.2d 249, 283-85 (D.N.J. 2003). The court of appeals, however, incorrectly granted Jackson summary judgment on this issue, because Ross did not "identify with reasonable certainty *the* party with whom he had a reasonable business expectancy." R. at 7 (emphasis added).

The lower court's holding implies that Ross is required to demonstrate "the" precise ABL team that would have drafted and employed him. However, the majority approach to tortious interference permits Ross to identify a "*prospective class of third persons* with whom plaintiff had a reasonable expectation of contracting." *Hoffman v. Roberto,* 85 B.R. 406, 416 (W.D. Mich. 1987) (emphasis added) ("*Hoffman*"). Therefore, since the record demonstrates that Ross had a reasonable expectation of employment with a team within the ABL, he established a genuine issue of material fact precluding summary judgment. Furthermore, the evidence supports a prima facie case on the 'knowledge,' 'causation,' and 'damage' elements of tortious interference, which the lower court did not fully address.

A. The court of appeals erred in grounding its decision on an erroneous standard of what constitutes a valid business expectancy.

The court of appeals granted summary judgment on Ross's tortious interference claim based on an incorrect conception of valid business expectancy, stating that Ross did not meet his burden to identify "*the* party with whom" he expected to form a contract. R. at 7 (emphasis added). But under the majority view, a plaintiff may prove tortious interference by "show[ing] interference with specific third parties or *an identifiable prospective class of third persons* with whom the plaintiff had a reasonable expectation of contracting." *Hoffman*, 85 B.R. at 416 (emphasis added); *see also In re Baseball Bat Antitrust Litigation*, 75 F.Supp.2d 1189, 1204 (D. Kan. 1999) ("*Baum*") (holding that plaintiff's identification of several collegiate athletic conferences along with thousands of schools representing the "wooden baseball bat market" sufficiently identified a prospective class of third persons for a tortious interference claim). In other words, the valid business expectancy prong requires evidence of the following: (1) an identifiable prospective third party or class of third parties; and (2) a reasonable expectation of future economic gain from those parties. *Hoffman*, 85 B.R. at 416-17.

Ross met the valid business expectancy prong by establishing a reasonable expectation of economic gain from an identifiable class of prospective third parties comprised of both corporations that offered him endorsement contracts and the teams that make up the ABL,. In addition, Ross has provided sufficient evidence showing that he had a reasonable expectation of future gain from those third parties. Therefore, this Court should reverse the appellate court's holding on Ross's valid business expectancy.

1. Ross has sufficiently identified a prospective class of third-party employers.

Under *Hoffman*, Ross's identification of the teams that comprise the ABL, along with several major corporations that offered him endorsements, meets the valid business expectancy test. 85 B.R. at 416-17. In *Hoffman*, the court precluded summary judgment in a tortious interference matter, because—among other things—the plaintiff satisfied the valid business expectancy prong by identifying an entire industry of future employers with whom he had a reasonable expectancy of obtaining employment. *Id.* at 417.

The plaintiff, Hoffman, a former president of a debtor trucking company, sued his local union for defamation and tortious interference with prospective economic advantage. *Id.* at 408. According to Hoffman, the local union sent allegedly defamatory communications to other union members regarding his recent bankruptcy proceeding, which Hoffman claimed damaged his reputation in the trucking community. *Id.* Hoffman's tortious interference claim rested on evidence that the union's defamatory remarks injured his reputation within the trucking industry, where he planned to obtain future employment as a trucking company manager. *Id.* at 416. Defendants, however, argued that Hoffman did not provide sufficient evidence of a valid business expectancy, because (1) he was over-qualified for a management position, and (2) he failed to identify a "prospective relationship. . .with specific certainty." *Id.* The court disagreed, holding that a reasonable juror could find that Hoffman had a reasonable expectancy of obtaining employment as a manager in the trucking industry, because he had several years of working experience in the industry, and prior to the interference, he had a good reputation in the industry. *Id.* Additionally, the court held that the trucking industry is sufficiently identifiable as a class of prospective third-party employers. *Id.* In sum, the court stated that a "[p]laintiff need not prove the existence of an enforceable contract; it is sufficient to show interference with specific third parties or an identifiable prospective class of third persons with whom plaintiff had a reasonable expectation of contracting." *Id.*

Here, similar to the Hoffman's identification of a prospective class of trucking industry employers, Ross identified *two* classes of prospective third-party employers, the teams comprising the ABL and several major corporations that offered him lucrative endorsement contracts. R. at 4. Even more compelling in this case, the number of corporations offering Ross endorsement contracts and the number of teams making up the ABL is almost certainly smaller and more definite in than the number of companies comprising the trucking industry at large in *Hoffman*.

Unlike the test applied in *Hoffman*, the Marshall court of appeals created a new test for valid business expectancy that requires Ross to "identify *the* party with whom he had a business expectancy." R. at 7. But according to *Hoffman*, Ross can satisfy the business expectancy prong by identifying a specific third party *or* class of third parties with whom he expected to have business relations. 85 B.R. at 417. Therefore, Ross's identification of the teams that comprise the ABL in addition to several major corporations provides jurors with a finite class of employers from which to conclude Ross had a reasonable expectancy of prospective employment.

2. Ross had a reasonable expectation of prospective economic gain.

Under *Baum*, Ross also established a reasonable expectation of prospective economic gain as evidenced by the endorsement offers he received and the media reports touting him as the predicted top overall pick in the ABL draft. R. at 4. In *Baum*, the court precluded dismissal of a wooden bat manufacturer's -Baum's- tortious interference claims against aluminum bat manufacturers on business expectancy grounds, because Baum sufficiently pled a reasonable expectation of selling his bats within the finite market for amateur bats. 75 F.Supp.2d at 1204.

Baum alleged that various aluminum bat manufacturers tortiously interfered with its prospective wooden bat sales by falsely informing various schools that its bats were unsafe compared to aluminum bats. *Id.* at 1193. Those false statements interfered with Baum's reasonable expectancy of selling more wooden bats to little league teams, high schools and colleges worldwide. *Id.* at 1204. Baum based its reasonable expectancies of future sales on objective data regarding price comparisons, in addition to complimentary testimony from various players and coaches that Baum bats are preferable to aluminum bats based on performance, value, reliability and durability. *Id.* The court stated that reasonable expectancy requires more than a mere hope for a future business opportunity or the "innate optimism of a salesman." *Id.* at 1203 (quoting *Schipani v. Ford Motor Co.*, 302 N.W.2d 307, 314 (Mich. Ct. App. 1981) ("*Schipani*").

The court also noted that hope for a future business opportunity does not equate to a guaranteed relationship, because "'anything that is prospective in nature is necessarily uncertain.'" *Id.* at 1204 (quoting *Schipani*, 302 N.W.2d at 314). Finally, the court stated that "a realistic expectation [requires proof of] a business relationship with an identifiable class of third parties." *Id.* (quoting *Liberty Heating & Cooling, Inc. v. Builders Square, Inc.*, 788 F.Supp. 1431, 1451 (E.D. Mich. 1992). The court held that Baum's identification of prospective purchasers, including leagues and schools worldwide, sufficiently identified a class of prospective third parties. *Id.* at 1204. And because Baum's complaint indicated that numerous players and coaches endorsed the use of wooden bats and that Baum enjoyed substantial sales prior to the alleged interference, it had 'more than a mere hope' of greater business or more than the 'innate optimism of a salesman.' *Id.*

In this case, as in *Baum*, the record establishes that Ross had more than a mere hope or optimism of obtaining economic gain from the ABL and several major corporations. Just as the *Baum* court determined that Baum's past sales and reputation in the baseball community established a reasonable expectation of future bat sales, a reasonable juror could conclude that a player with Ross's collegiate statistics and reputation could reasonably expect to gain employment in the ABL, especially where past player comparisons are available. Also, like the supporting testimony from coaches and players endorsing wooden bats in *Baum*, a reasonable juror could infer from the undisputed facts that Ross had a reasonable expectancy of employment in the ABL based on statements from mainstream media pundits and bloggers "that he (Ross) would be the first player selected in the ABL draft. . . and would become the highest paid rookie in ABL history, with a prospective annual salary of at least $4 million." *Id.*

Additionally, similar to the *Baum* plaintiff's prospective business relationships with various schools, Ross had business relationships with several major corporations, which presented Ross with endorsement offers in the ballpark of $10 million. *Id.* A reasonable juror could conclude that Ross had a valid expectancy of obtaining these endorsements prior to Jackson's tortious interference. Finally, it is reasonable to infer that the ABL Board of Commissioners would not have declared Ross ineligible for ABL draft—after Jackson's interference—had the ABL not viewed Ross a likely candidate for employment in the ABL. R. at 6.

The issue here is not whether Ross would have been the first player selected in the draft, the highest paid rookie in ABL history, or the recipient of multi-million dollar endorsements. The issue is whether a reasonable juror, taking all inferences in favor of Ross, could conclude that prior to Jackson's interference Ross had a reasonable expectation of obtaining employment with *a team* in the ABL. The undisputed facts es-

tablish that Ross had a reasonable expectancy of economic gain based on media reports, his impressive basketball resume, and his endorsement offers.

Therefore, this Court should reverse the court of appeals summary judgment ruling, because under *Baum*, a reasonable juror could conclude that Ross identified third parties with whom he had a reasonable expectancy of obtaining advertising endorsements and employment as an ABL player.

B. Ross has compiled an adequate record to satisfy the remaining elements of tortious interference.

The court of appeals held that since Ross could not identify a reasonably certain third-party business expectancy, Jackson could not have knowingly interfered with a business expectancy. The court of appeals based its holding on the erroneous presumption that Ross had to identify a single party with whom he had a business expectancy. Because Ross sufficiently identified a class of prospective third parties, and because the record indicates Jackson knew of Ross's business expectancies, this Court should find that Ross satisfied the second element of tortious interference—knowledge of the business expectancy. In addition, the record provides prima facie evidence that Jackson's intentional interference prevented Ross's expectancies from ripening and damaged him by dismantling his prospective economic gain.

1. Substantial evidence exists that Jackson knew of Ross's business expectancies.

The 'knowledge element' of tortious interference is satisfied by either actual knowledge of the plaintiff's prospective business relations or by knowledge "of facts that would lead a reasonable person to believe that such interest exists." *Kutcher v. Zimmerman*, 957 P.2d 1076, 1088 (Haw. Ct. App. 1998) (quoting Prosser & Keeton on the Law of Torts at 982). The record contains sufficient evidence that Jackson had actual knowledge of Ross's prospective employment in the ABL. Alternatively, the record is replete with "facts that would lead a reasonable person to believe" Ross had a business expectancy interest with the ABL.

Jackson's actual knowledge of Ross's prospective dealings with the ABL appears in print on the "Ross Page." *See* R. at 4. In a caption below a photo of Ross playing basketball, Jackson wrote "Watch out ABL—here I come!" R. at 4. Since Jackson does not dispute that she posted Ross's picture and created the caption, this leads to an obvious inference that Jackson was aware that Ross was an ABL prospect. Additionally, during Jackson's three-year romantic relationship with Ross, Jackson concedes that she used her media connections to increase Ross's public visibility

and to arrange meetings with "sports agents who might represent him in the future." R. at 4. Jackson also implied that her motivation for creating the "Ross Page" was to adversely affect his future prospects in the ABL. *Id.* Jackson stated that: "without me and my family, [Ross] would be just another hillbilly kid from downstate Marshall. I made him a superstar, and I can make him a has-been." *Id.* A reasonable juror, drawing inferences in favor of Ross, could conclude that Jackson would not have created the "Ross Page," unless she thought Ross would prospectively play in the ABL.

Even if this Court determines that Jackson did not have actual knowledge of Ross's ABL prospects, Jackson was at least aware of facts that would necessarily lead a reasonable juror to conclude that Ross was an ABL prospect. According to the record, a reasonable juror could conclude that few individuals *were more aware* of Ross's prospect status than Jackson. Jackson not only dated Ross for three years, but she also helped publicize Ross for the express purpose of increasing his visibility with the ABL. *Id.* Finally, Jackson publicly announced that she "made (Ross) a superstar, and that she could make him a has-been," which indicates Jackson's awareness of Ross's status as an highly publicized ABL prospect. Whether this Court classifies Jackson's knowledge of Ross's business expectancies as actual or constructive, the record fully establishes that Ross satisfied the knowledge element of tortious interference.

2. The record weighs in favor of finding that Jackson's interference was both intentional and that it caused Ross damage.

Although the court of appeals did not reach the third and fourth elements of tortious interference, the record's undisputed facts indicate that Ross provided sufficient prima facie evidence of both the intentional interference and damage elements. Intentional interference may be demonstrated by showing either a defendant's desire to bring about an interference or knowledge that an interference is certain or substantially certain to occur as a result of his action. RESTATEMENT (SECOND) OF TORTS § 766B, cmt. d. When the contractual relations are prospective, the intent must also be improper. *Id.* If the actor's intent is "solely to vent one's ill will," the conduct will be deemed improper. *Id.* A jury may find intentional interference by either direct evidence or evidence of conduct "substantially certain to interfere with the contract or prospective economic relationship." *Savage v. Pac. Gas & Elec. Co.*, 21 Cal.App.4th 434, 449 (1993).

Jackson's intentions were expressly born out of ill will and spite as demonstrated by her undisputed public declaration: "without me and my family, [Ross] would be just another hillbilly kid from downstate Marshall. *I made him a superstar, and I can make him a has-been.*" R. at 4.

(emphasis added). This declaration coupled with Jackson's website is prima facie evidence of Jackson's intent to interfere with Ross's business expectancies. A reasonable juror could also draw inferences of intent and motive from the defamatory remarks on the "Ross Page." For instance, Jackson posted photographs of Ross that insinuated drug use, which she likely knew could jeopardize Ross's ABL expectancies. R. at 5. Additionally, reasonable inferences can be drawn between the timing sequence of the couple's breakup and the acts of interference.[2]

But for Jackson's interference Ross would have fulfilled his business expectancies. Jackson posted numerous disparaging photos, including a photo of Ross in women's clothes as well as a photo implying that he had a knee injury. *Id.* The photo depicting Ross with an implied knee injury truly began the maelstrom of negative attention. *Id.* As Ross's ex-girlfriend of three years, Jackson likely knew that the bandage and crutches depicted in the photo of Ross was a costume for a party. *Id.* Despite her likely knowledge of the inaccuracies presented in the photo, Jackson did not include a disclaimer with the photo. A writer for the *Sports News* then copied the photo from the "Ross Page" and republished the photo on a separate website. This only perpetuated the false impression that Ross was injured, when in reality, he was not. *Id.* Soon thereafter, major media outlets were disseminated the photo to the public raising suspicion that Ross had a previously undisclosed injury. R. at 5-6. Ross then began receiving phone calls from disconcerted ABL recruiters who informed Ross that the perceived injury would likely impair his employability. R. at 6.

Finally, a reasonable juror could infer that the negative press Ross received was solely based on Jackson's website and that this, along with the press, rumors, and accusations led endorsers to withdrawal Ross's offers and the ABL to declare him ineligible. *Id.* Therefore, a reasonable juror could conclude that but for Jackson's interference, Ross would not have lost his expectant endorsements and eligibility to play in the ABL.

II. THE COURT OF APPEALS ERRED IN GRANTING JACKSON SUMMARY JUDGMENT ON ROSS'S DEFAMATION CLAIM, BECAUSE TRIABLE ISSUES OF FACT REMAIN ON EVERY ISSUE OF DEFAMATION.

The State of Marshall follows the Restatement's requirements for proving defamation, and it has consistently followed the Restatement's approach when analyzing such claims. R. at 7. Marshall state law requires proof of the following in a defamation claim: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the

2. Ross and Jackson broke-up in February 2005, and the "Ross Page" appeared just two months later. R. at 4.

publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. R. at 7; RESTATEMENT (SECOND) OF TORTS § 558 (1977).

In this case, the court of appeals erroneously held that anyone who viewed the "Ross Page" would understand its content to be non-defamatory and "parodic" given "Ross's renown" and "the nature of social networking websites in general." R. at 7-8. The court of appeals reasoned that because Jackson's website had restricted access, Jackson could not be held liable for any unauthorized viewings of its material. *Id.* In addition, the court noted that social networking websites are less likely to contain defamatory representations. R. at 8.

In a state that "consistently follow[s] the Restatement (Second) of Torts," (R. at 7) the record on appeal provides clear evidence precluding summary judgment on the issue of defamation. First, under many of the same facts relevant to this Court's tortious interference inquiry, it is apparent that Jackson's statements deterred numerous third parties—including sponsor corporations and the ABL—from dealing with him. R. at 5. Under the Restatements, representations that tend to harm an individual's reputation so as "to deter third persons from associating or dealing with him" are presumptively defamatory. RESTATEMENT (SECOND) OF TORTS § 559. Therefore, the court of appeals erred in holding that Jackson's statements were parodic, i.e. non-defamatory. R. at 7.

Second, the court of appeals erred in holding that Jackson absolved herself of republication liability by designating her website as "private." R. at 7. The record clearly demonstrates that numerous third parties, including the *Sports News* and mirror site publishers, copied information from Jackson's website. R. at 5. Jackson's statements that she intended to make Ross a "has-been," and the relative ease with which others gained access to her website, present genuine factual disputes as to whether Jackson knew or should have known these republications would occur. R. at 4-5. Finally, the court of appeals did not address the issue of fault in this case, but the record provides sufficient evidence that Jackson knowingly or recklessly defamed Ross. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Because genuine factual disputes remain regarding every element of defamation, this Court should reverse the court of appeals holding on defamation and remand for further proceedings.

A. Jackson's website posting falsely insinuated that Ross was involved in disreputable activities that were prejudicial to his prospective occupation, which provides sufficient evidence of the posting's defamatory nature.

Whether a statement is capable of carrying a defamatory meaning is typically the first question for a court. *See, e.g., Dixon v. Ogden Newspa-*

pers, Inc., 416 S.E.2d 237, 241 (W.Va. 1992). Under the Restatements, a statement is defamatory "if it tends so to harm the reputation of another so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS § 559. In this case, the 'defamatory statements' include photos of Ross that imply he consumes alcoholic beverages in public and smokes marijuana; two activities prohibited by the ABL. R. at 5, ABL Code of Conduct, App. Tab C. One photograph on the website depicts Ross with beer and other alcoholic beverages. *Id.* Another photo features Ross standing near a water pipe, which is commonly used in smoking marijuana. *Id.* Underneath another photo, which depicts Ross with his head tilted back and arms outstretched, is a caption that reads: "I'm high on State." *Id.* The caption, in conjunction with the website's design, creates the false impression that Ross made the statement, which also implies that he smokes marijuana

The court of appeals erred in holding that the reasonable reader would not likely take the photos in conjunction with the caption seriously. R. at 7. But falsely attributing statements to Ross that allude to him consuming alcohol and using illicit drugs is defamatory as a matter of law, especially when allegations of alcohol and drug use harm an individual's prospective employment. *See, e.g.*, *Litman*, 739 F.2d at 1561 (defamation that "imputes to the plaintiff a matter which reflects adversely upon him in his occupation has long since been held actionable *per se* in Florida."); *Sadowy v. Sony Corp. of Am.*, 496 F.Supp. 1071, 1077 (S.D.N.Y. 1980) (a statement is defamatory *per se* if it tends to injure an individual's trade or profession); *Miller v. Lear Siegler, Inc.*, 525 F.Supp. 46 (D. Kan. 1981) (applying Kansas law, and holding that statements tending to injure one's profession are defamatory *per se*). Jackson's website representations harmed Ross's prospective occupation in this instance, because the ABL's Code of Conduct specifically forbids both current and prospective players from consuming alcohol in public places where they "may be photographed" and prohibits illegal drug use altogether. App. Tab C. The ABL, based on rumors generated from Jackson's website, decided to ban Ross for a two year period. R. at 5.

The ABL's ban provides sufficient evidence that at least some of Ross's prospective employers took information they saw on the "Ross Page" seriously, and therefore, genuine issues of material fact exist regarding the defamatory nature of Jackson's representations.

1. Jackson's website incorrectly suggested that Ross consumed alcohol in public and smoked marijuana.

Courts following the Restatements have long since established that although libel is generally perpetrated through written communication,

it also encompasses publication of defamatory pictures and photographs. *See, e.g., Peck v. Tribune Co.*, 214 U.S. 185 (1909). Modern tort law has extended libel to include electronic broadcasts as well. Prosser & Keeton, Law of Torts § 112 at 752; *see also* BLACK'S LAW DICTIONARY 927 (7th ed 1999) (defining "electronic broadcast" as libel). Courts assess the meaning of allegedly libelous statements from the perspective of the reasonable reader. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 513 (1991) ("*Masson*"). In the words of Second Restatement of Torts section 56 3, "[t]he meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." The court's role is not to assess whether it believes the language is libelous, "but whether it is reasonably susceptible to such an interpretation." *Kelly v. Schmidberger*, 806 F.2d 44, 46 (2d Cir. 1986). The court "may not. . . interfere with the jury's role by treating as nondefamatory a statement that a reasonable juror may fairly read in context as defamatory." *Sharon v. Time, Inc.*, 575 F.Supp. 1162, 1165 (S.D.N.Y. 1983). Defamatory imputations can be made from innuendo, figure of speech, allusion, or satire. RESTATEMENT (SECOND) OF TORTS § 563, cmt. c. Also, the Restatements provide that assessments of defamatory communications should be taken in context, including "all parts of the communication that are ordinarily heard or read with it." *Id.* Therefore, a photograph that is otherwise factually accurate may nonetheless be actionable where the caption suggest something defamatory and false about the subject of the photograph. *Da Silva v. Time, Inc.*, 908 F.Supp. 184, 186-87 (S.D.N.Y. 1995) ("*Da Silva*").

In *Da Silva*, a woman sued Time magazine for falsely portraying her as a prostitute, and Time moved for summary judgment on "substantial truth" grounds. *Id.* In the publication in question, Time magazine published a photograph of the plaintiff dressed in a "short, tight, multi-strapped dress" with a caption including her first name that read "wanders by a waterfront bar looking for customers." *Id.* at 186. Although the plaintiff admitted that she had formerly worked as a prostitute, she offered evidence that at the time of the photo and publication, she was no longer working as a prostitute. *Id.* She also offered testimony that prior to the publication she had developed a new and more positive reputation in her community, which was now tarnished. *Id.* at 187. The court held that a genuine issue of material fact existed as to whether the photos could have tarnished the plaintiff's new reputation in the community. *Id.*

Similarly, in this case, Jackson damaged Ross's reputation by publishing numerous photographs of Ross in public where alcoholic beverages and marijuana cigarettes were in plain view, insinuating disreputable conduct on his part. R. at 5. Even though Ross was not handling any alcoholic beverages, drugs, or drug paraphernalia in the

photos, an average reader could interpret these photos as evidence that Ross drinks alcohol and smokes marijuana. Worse yet, underneath a photo in which Ross is sitting on a wall next to a person who appears to be smoking marijuana, Jackson falsely attributed the following quote to Ross: "I'm high on State!" *Id.* The average reader, taking all the circumstances surrounding this caption into account, would likely arrive at the false conclusion that Ross either smokes marijuana or is glorifying its use in the quoted caption. Jackson's representations present a genuine issue of material fact as to their defamatory nature. Finally, to the extent that this Court finds the caption ambiguous, the issue remains a fact question for the jury. As the Third Circuit recognized in *Dunn v. Garrett New York Newspapers, Inc.*, if the language at issue is "capable of both a defamatory and non-defamatory meaning, there exists a question of fact for the jury." 833 F.2d 446, 449 (3d Cir. 1987).

2. *Jackson's posting falsely attributed self-condemnatory statements to Ross that prejudiced his occupation.*

In addition to creating the false innuendo that Ross consumed alcohol in public and smoked marijuana, Jackson fabricated self-condemnatory statements that she attributed to Ross. R. at 5. As the United States Supreme Court held in *Masson*, a falsely attributed self-condemnatory quote, especially one involving criminal activity, may cause greater injury to a plaintiff's reputation then a critical defamatory remark from someone else. 501 U.S. at 512. The Court went on to note that this is the principle that underlies the rule of evidence permitting the introduction of statements against interest despite their hearsay character, because jurors can assume "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." *Id.* (citing Advisory Committee's Notes on Fed. R. Evid. 804(b)(3)).

In *Masson*, a noted psychoanalyst sued an author for The New Yorker for defamation, because he partially fabricated various statements and falsely attributed them to the plaintiff. *Masson*, 501 U.S. at 499-500. Several specific statements at issue appeared in quotation marks that created the image that they were verbatim remarks from the plaintiff. *Id.* For example, the author represented that Masson referred to himself as an "intellectual gigolo." *Id.* at 522. The Court held that a reasonable juror could interpret the quote to mean that the plaintiff "forsakes intellectual integrity for pecuniary or other gain." *Id.* The Court ultimately denied the author's request for summary judgment, because it determined that the falsity of the quoted statements and their defamatory nature were issues for the jury. *Id.* at 522-25. The Court held that because a reasonable juror could find that the differences in the statements exposed the interviewee to contempt and ridicule, the Court could

not as a matter of law determine whether the statements were defamatory. *Id.* Therefore, because a reasonable juror could interpret some of the statements as capable of a defamatory meaning, their defamatory nature was an issue for the jury. *Id.*

In this case, even worse than the misquotations in *Masson*, Jackson falsely attributed a statement to Ross that insinuated he was a drug user—dealing a far worse blow to Ross's reputation. Instead of misquoting Ross, Jackson completely fabricated the statement "I'm high on State!" on a website that the reasonable reader would interpret Ross created. Additionally, although less severe—but no less fabricated—Jackson posted a class schedule on the "Ross Page" that purported to be a true and accurate schedule of Ross's classes. R. at 5. Like some of the partially accurate quotes in *Masson*, the class schedule was mostly accurate with one exception; Jackson falsely asserted that Ross was enrolled in a "basket weaving" class. *Id.* The reasonable reader might interpret Ross's enrollment in a "basket weaving" at the collegiate level as ridiculous. Under *Masson*, it is jury's role, not the court's, to determine the falsity of these attributions and their defamatory nature.

In light of the genuine factual disputes regarding the falsely attributed quotation and the fabricated class schedule, this Court should reverse the court of appeals holding that the "Ross Page" was incapable of a defamatory meaning.

B. Jackson cannot immunize herself from liability for her website's content by merely designating it as "private," and in this case, genuine issues of material fact remain as to whether Jackson is liable for intentional or negligent publication.

In addition to holding that the "Ross Page" was "parodic" in nature, the court of appeals erred in holding that Ross did not meet the Restatement's "publication" requirements. R. at 6-7. The court of appeals incorrectly concluded that Jackson was not liable for "unauthorized" viewings of her website's content, because she designated her website "private." R. at 7-8. Jackson claims that she only authorized Marshall State students to view the website, however, the record clearly establishes that at least one identified individual who was not Marshall State student accessed the site and that numerous copies of "Ross Page" were posted on other websites. R. at 5, fn. 2.Therefore, genuine issues of material face remain as to whether Jackson's website posting posed an unreasonable risk of third-party viewing.

1. Jackson intentionally designed the "Ross Page" in a manner that allowed for public viewing.

Jackson, who concedes that she was "extremely upset" over her breakup with Ross, proclaimed publicly "[w]ithout me and my family, he would be just another hillbilly kid from downstate Marshall. I made him into a superstar, and I can make him a has-been." R. at 4. Jackson's plan was effective. Within months of creating the "Ross Page," a member of the *Sports News*, in addition to numerous mirror sites, accessed the website and broadcasted its defamatory remarks to their audience. R. at 5. Soon thereafter, content from the "Ross Page" appeared on nationally-syndicated programs, like ESPN. R. at 5. The widespread negative media attention led to rumors and innuendo throughout the sports world that Ross—among other things—smoked marijuana. R. at 5-6. This eventually led the ABL banning Ross for two years. R. at 5. In light of the evidence that Jackson was determined to damage his career, and given the evidence that others were able to access the "Ross Page" without any evidence from Jackson that the host website's security malfunctioned, a genuine issue of material fact exist as to whether Jackson intentionally designed her website to reach third parties other than Marshall State students.

Under the Restatement, intentional publication occurs "when the actor does [a defamatory] act for the purpose of communicating it to a third person or with knowledge that it is substantially certain to be so communicated." RESTATEMENT (SECOND) OF TORTS § 577, cmt. k. In this case, sufficient evidence exist to create a genuine issue of material fact regarding Jackson's intentional publication of defamatory statements. First, a reasonable juror could conclude that the reason Jackson created the "Ross Page" was to further her plan to make him "a has-been" by damaging his reputation and public image. Second, Ross conceded that her intent was to publish the "Ross Page" to the Marshall State student body, which—if accomplished—constitutes intentional publication under the Restatements. R. at 4; RESTATEMENT (SECOND) OF TORTS § 576-77. Even though Ross could not identify any specific Marshall students who viewed the website, a reasonable juror could still conclude that the website was more likely than not reached Marshall students by virtue of the press the website received from its republication on ESPN and the *Sports News*. R. at 5-6. Third, based on evidence that the *Sports News* and various mirror sites accessed the "Ross Page," a genuine issue of material fact exists as to whether Jackson designed her "private" site in a way that allowed easy access to non-student third parties. Finally, some state courts also recognize that where the original publisher intended republication of the defamatory remarks, or knew that republication was a "reasonable and probable" consequence of their actions, then

the original publisher is liable for intentional publication. *See, e.g., Weaver v. Beneficial Fin. Co.*, 98 S.E.2d 687, 692-93 (Va. 1957).

Therefore, the record demonstrates sufficient evidence to create genuine factual disputes regarding Jackson's intentional publication of defamatory material to Marshall State students, the *Sports News*, and ESPN.

2. Alternatively, Jackson should have known that her website posed an unreasonable risk of publication and republication.

"It is not necessary, however, that the communication to a third person be intentional. If a reasonable person would recognize that an act creates an unreasonable risk that the defamatory matter will be communicated to a third person, the conduct becomes a negligent communication. A negligent communication amounts to a publication just as effectively as an intentional communication."

RESTATEMENT (SECOND) OF TORTS § 577, cmt. k. "The publication of a libel or slander is a legal cause of any special harm resulting from its repetition by a third person if . . . the repetition was reasonably to be expected." *Id.* at §576. In the alternative to a finding of intentional publication, sufficient evidence exists to create a genuine factual dispute regarding Jackson's negligent publication to the *Sports News*, ESPN, and various mirror sites. As the record indicates, only minimal measures were taken to prevent non-Marshall students from viewing the "Ross Page." The only firewall was a requirement that viewers declare themselves to be Marshall students. R. at 4. The fact that the *Sports News* and various mirror sites were able to copy information from the "Ross Page," which was purportedly restricted to Marshall State students, creates a genuine factual dispute as to whether Jackson took an unreasonable risk of publication to third parties by posting defamatory material on a national website.

Additionally, the original publisher of defamatory statements "may be liable for republication if the republication is reasonably foreseeable." *Oparaugo v. Watts*, 884 A.2d 63, 73 (D.C. 2005); *See also Elms v. Crane*, 118 Me. 261, 265 (1919) ("[D]efendant is responsible for such repetitions of the libel and such publicity as are fairly within the contemplation of the original publication and are the natural consequences of it."); *Davis v. Starrett*, 97 Me. 568, 576 (1903) ("[I]t is a general principle that everyone is responsible for the natural and necessary consequences of his act. And it well may be that the repetition of a slander may be the natural consequences of the defendant's original publication. . . . we think it may be said with reason in this case that the repetition of the slander by those to whom it was uttered, and after that by others, may be regarded as fairly within the contemplation of the original slander, and a conse-

quence for which the defendant may be held responsible."). In this case, sufficient evidence exists for a jury to infer that Jackson knew or should have known that the "Ross Page" posed an unreasonable risk of republication.

C. Ross provided sufficient evidence that Jackson was at fault.

"[I]ndividual citizens. . . .have an interest in being free from defamation. Those who have been defamed have an important interest in clearing their names. In addition, the state has a legitimate interest in preventing fraud and libel. . . . Freedom of speech has its limits. It does not embrace defamation." *Ashcroft v. Free Speech Coal,* 535 U.S. 234, 245-46 (2002). Although the court of appeals did not address the issue of fault in this case, Ross provided sufficient evidence to support a conclusion that Jackson was at fault for publishing defamatory remarks on the "Ross Page." Under Marshall state law, Ross must prove that Jackson was "at least negligent" in defaming Ross. RESTATEMENT (SECOND) OF TORTS § 558. Jackson, on the other hand, will likely argue that the national media attention surrounding Ross qualifies him as a "public figure," and therefore, her statements concerning Ross are entitled to a First Amendment qualified privilege that requires proof of actual malice. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) ("*Gertz*"). Although Ross has provided sufficient evidence to prevail under either burden of proof—negligence or actual malice—Jackson has not provided sufficient proof that Ross is "public figure," and therefore, the negligence burden should apply.

1. Ross does not qualify as a public figure, and therefore, the New York Times burden is not triggered.

In *New York Times Co. v Sullivan*, 376 US 254 (1964) ("*New York Times*"), the Supreme Court held that the First and Fourteenth Amendments require that a public official must prove "actual malice" in order to prevail in a defamation action, and *Curtis Publishing Co. v. Butts*, extended the rule to reach public figures. 388 U.S. 130 (1967). The Court reasoned that such a standard balances First Amendment rights with a plaintiff's reputation interest. *New York Times,* 376 U.S. at 285. But in *Gertz*, the Court declined to extend the "actual malice" standard beyond public officials and figures. 418 U.S. at 345.

Gertz identified two means by which someone achieves public figure status to fall within the ambit of the First Amendment:

> "For the most part those who attain this status have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures

> have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

418 U.S. at 345. Jackson has failed to offer sufficient proof that Ross meets either of these definitions. Under the 'first' definition of public figure, Jackson has not provided evidence that Ross occupies a position in society of "such pervasive power and influence" to qualify as a public figure "for all purposes." *Id.* Although it is an admittedly closer call under the second definition of public figure—sometimes called "a limited purpose public figure"—Jackson has still failed to prove that Ross has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Id.*

Like the present case, *Gertz* involved a question regarding a limited purpose public figure. *Id.* at 352. In the case, an attorney voluntarily associated himself with a case certain to receive extensive media attention, which the defendant argued qualified him as a public figure. *Id.* The Court held that the attorney was not a public figure despite evidence of his voluntary association, because he took no part in the criminal prosecution, never discussed the litigation with the press, and limited his participation in the civil litigation to his representation of a private client. *Id.* Similarly, in *Wolston v. Reader's Digest Ass'n, Inc.*, the Supreme Court, relying heavily on *Gertz*, held that an admitted Russian spy's nephew was not a public figure merely because he received significant media attention. 443 U.S. 157 (1979). As the Court stated, "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." *Id.* at 167. The Court held that substantial attention from the press does not automatically subject a plaintiff to the *New York Times* burden. *Id.*; *see also Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976) (requiring more than mere newsworthiness for public figure status).

Here, like the plaintiffs in *Gertz* and *Wolston*, Ross did not actively seek out the press or thrust himself into the limelight as an ABL prospect. Even though Ross may have welcomed the attention he received from national publications, there is no evidence in the record that he sought such attention in an active manner. Also, like the plaintiff's media exposure in *Wolston*, just because the media publicly touted Ross as a top ABL prospect does not automatically qualify him as a public figure.

According to both *Gertz* and *Wolston*, Jackson has failed to provide sufficient evidence that Ross is a public figure. Therefore, this Court should not impose the *New York Times* burden on Ross. And the evidence establishes that Jackson was at least negligent in this matter.

2. Even if this Court determines that Ross is a public figure, he has provided sufficient evidence to satisfy the actual malice burden.

Alternatively, if this Court deems Ross a "public figure," the *New York Times* burden would require proof that Jackson acted with actual malice. *See Curtis Publ'g Co.,* 388 U.S. 130. Actual malice is different from common law malice, in that it refers to the defendant's knowledge of falsity or reckless disregard for the truth; common law malice—on the other hand—refers to ill will or spite. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667-68 (1989) (*"Connaughton"*). Evidence of ill will or spite, however, will often support an allegation of actual malice. *See, e.g., Dresbach v. Doubleday & Co.*, 518 F.Supp. 1285, 1292 (D. D.C. 1981) (holding that ill will is some evidence of disregard for the truth). Knowledge of falsity refers to direct knowledge, whereas reckless disregard requires proof of a high degree of awareness of the representation's probable falsity or proof of serious doubts as to its truth. *See, e.g., Lerman v Flynt Distrib. Co.*, 745 F.2d 123 (2nd Cir. NY 1984). In order for a public figure to meet his burden of proving actual malice, he must provide evidence of the defendant's state of mind. *Connaughton*, 491 U.S. at 667-68.Because state of mind is a subjective component, circumstantial evidence is often the only means available to prove it. *See Id.* In the absence of direct evidence, knowledge may be inferred from evidence that defendant failed to argue that representation was true. *Bouldec v. Bailey*, 586 F.Supp. 896 (D. Colo. 1984) (plaintiff proved awareness of falsity where defendant apparently did not argue that the representations were true); *Douglas v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (defendant's failure to allege representation that plaintiff was a lesbian was true allows for inference of reckless disregard for whether statement was false).

In this case, Ross has provided sufficient evidence to establish actual malice, which is supported by substantial evidence of ill will. When Jackson and Ross's romantic relationship ended badly, Jackson admits that she publicly proclaimed: "without me and my family, [Ross] would be just another hillbilly kid from downstate Marshall. I made him a superstar, and I can make him a has-been." R. at 4. This statement weighs in favor of a reasonable juror concluding that Jackson knowingly posted defamatory statements on the "Ross page" out of ill will or spite. As to knowledge of falsity under *Bouldec*, a jury may infer Jackson's knowledge of the "Ross Page's" falsity from the fact that she has never claimed its content was true and accurate. Also, the undisputed facts demonstrate at least one instance of direct evidence that Jackson knew of the website's false contents.

On page four of the record, it is clear that Jackson, as the sole publisher of the "Ross Page," knowingly falsified Ross's class schedule. R. at

4. As proof of reckless disregard, if not knowledge, Ross and Jackson's romantic relationship provides sufficient evidence to create a genuine issue of material fact as to whether Jackson knew of the falsity contained on the "Ross Page," but nonetheless acted with reckless disregard. *Id.* A reasonable jury could conclude that anyone involved in a serious three year romantic relationship would know that Ross never injured his knee, did not consume alcohol in public, and did not smoke marijuana. R. at 4-5. Additionally, as the daughter of a college basketball coach and an individual who marketed Ross to the media and various endorsers to increase his visibility in the ABL (R. at 4), Jackson would have reasonably known that posting photos and falsely attributed quotes glorifying drug and alcohol use would jeopardize Ross's career in the ABL.

Finally, as the *Gertz* Court noted, "[d]eliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because words and punctuation express meaning. And if the alterations of [plaintiff's] words gave a different meaning to the statements, bearing upon their defamatory character, then the device of quotations might well be critical in finding the words actionable. " 418 U.S. at 517. In this case, Jackson fabricated the statement "I'm high on State" and falsely attributed it to Ross. R. at 5. This statement, enclosed as a caption under a photo of Ross wearing a t-shirt with a marijuana leaf on it created a false impression that Ross smoked marijuana, which is strictly prohibited by the ABL. R. at 5; *See* ABL Code of Conduct, App. Tab C. While the photograph by itself would not have likely defamed Ross or jeopardized his ABL career, the fabricated caption clearly created a disparaging innuendo. Therefore, in the words of *Gertz*, the fabricated statement materially altered the photographs meaning, which is evidence of reckless falsification. 418 U.S. at 517.

Therefore, even if this Court places an actual malice burden on Ross, the record demonstrates that Jackson's conduct evidenced actual malice.

D. Under the Restatements, Jackson's statements clearly constitute libel, which does not require proof of special damages.

"One who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication." RESTATEMENT (SECOND) OF TORTS § 569. In this case, Jackson's posting of defamatory photographs and captions on the internet constituted libel, which is actionable irrespective of special harm.

III. THE COURT OF APPEALS ERRED IN GRANTING JACKSON SUMMARY JUDGMENT ON THE ISSUE OF FALSE LIGHT, BECAUSE SUFFICIENT EVIDENCE EXISTS THAT JACKSON POSTED FALSE REPRESENTATIONS ON THE "ROSS PAGE," KNOWINGLY OR IN RECKLESS DISREGARD OF ITS FALSITY AND A REASONABLE PERSON WOULD CONSIDER THE MATERIAL HIGHLY OFFENSIVE.

As the court noted in *Castleberry v. Boeing Co.*, courts treat defamation and false light actions in a similar manner, however, the two torts remain distinct in that defamation actions typically address harm to the reputation, while false light compensates plaintiffs' mental distress related to unwarranted exposure to public view. 880 F.Supp. 1435, 1442 (D. Kan. 1995). False light usually carries the added burden of proving actual malice as well. *Id.*[3]

Under Marshall state law, false light is defined as follows:

> one who "gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if (1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Marshall Rev. Code § 14.652.

In a false light invasion of privacy claim, "[t]he question of whether a message would be highly offensive to a reasonable person is a question for the jury." *Martin v. Mun. Publ'n*, 510 F.Supp. 255, 259 (E.D. Pa. 1981), *accord Strickler v. Nat'l Broad. Co.*, 167 F.Supp. 68, 71 (S.D. Cal. 1958) (applying California law; offensiveness is a question of fact). Some jurisdictions, however, decide the question of whether a statement is capable of portraying someone in a false light as a matter of law. *Fudge v. Penthouse Int'l, Inc.*, 840 F.2d 1012 (1st Cir. 1988). In those instances, a court decides whether a statement "was such a major misrepresentation of his or her character, history, activities, or beliefs that a reasonable person would be expected to take serious offense." *Machleder v. Diaz*, 801 F.2d 46 (2d Cir. 1986); RESTATEMENT (SECOND) OF TORTS § 652E, cmt. c.

In *Dean v. Guard Publishing Co.*, an Oregon appellate court—applying a false light statute similar to Marshall's—reversed the trial court's directed verdict ruling in favor of a newspaper that published photos falsely implying that the plaintiff was a patient in an alcohol rehabilitation facility. 744 P.2d 1296 (Or. Ct. App. 1987) ("*Dean*"). The daily newspaper ran a story on the opening of a local alcohol rehabilitation facility, which included a photo of the plaintiff and two nurses inside the facility's

3. A full analysis of actual malice was previously provided under defamation and is therefore not repeated in this section of the brief.

aversion treatment room. *Id.* The plaintiff was attending an open house presentation, but he alleged that the photo falsely portrayed him as a patient of the facility. *Id.* The court reasoned that reasonable jurors could agree that alcoholism is bad and highly offensive, which would embarrass an individual if falsely imputed. *Id.* at 1298. The court also recognized that jurors could come to the opposite conclusion, but a trial judge's role is not to act as an expert on whether imputed alcoholism is highly offensive as a matter of law. *Id.*

Just as the trial court in *Dean* erred in depriving the fact finder of an opportunity to assess the offensiveness of the defendant's conduct, the lower courts in this matter have deprived the fact finder of an opportunity to determine the offensiveness of the "Ross Page." Here, like the photo in *Dean*, Jackson posted several photos of Ross on her website—and one caption that read "I'm high on State"—that insinuated he smoked marijuana. R. at 4-5. A reasonable jury could conclude that an average reader would be highly offended by seeing a rising ABL player in situations that imply he smokes marijuana.

Additionally, representations that portray an individual in a false and embarrassing light may be actionable even if they are based on true events. *Godbehere v. Phoenix Newspapers, Inc.*, 783 P2d 781 (Ariz. 1989); *McCormack v. Okla. Publ'g Co.*, 613 P.2d 737 (Okla. 1980) (actual truth of the statements is not necessarily the issue; the real issue is false impression portrayed to public). In this case, Jackson posted photographs that contained some underlying truth but created a false impression. First, Jackson posted a photograph of Ross with a bandaged knee without any disclaimer. R. at 5. What Jackson did not reveal to the reader, is that Ross bandaged his knee as part of a costume. R. at 5. A reasonable juror could conclude in this instance that Jackson, who was romantically involved with Ross for three years—possibly including the time period in which the photo was taken—knew that Ross feigned the knee injury as part of his costume. Furthermore, a reasonable juror might conclude that Jackson knew publication of this photo to the media would damage Ross's ABL career, especially given her background as a 'promoter' for Ross and her desire to make Ross into a "has-been." R. at 4. Finally, along the same lines, Jackson published a photo of a group of male students, including Ross, in women's undergarments and lipstick without any disclaimer or indication that the photo was parody. R. at 4. Without a disclaimer, an average reader might interpret that Ross routinely dresses in women's clothes. A reasonable juror could conclude that this would be embarrassing and highly offensive to Ross.

Jackson portrayed Ross in a number of false lights that would be highly offensive to a reasonable person, and therefore, this Court should reverse the court of appeals summary judgment ruling and remand this case for further proceedings.

CONCLUSION

Jane Jackson was fully aware of Nick Ross's talent and future as a player in the ABL. After all, while she was dating Ross she was at the forefront of his promotions. But once Ross broke her heart, she swore revenge and made public statements regarding her intent to "make Ross a has-been." She then knowingly posted false and harmful information on the World Wide Web about Ross. Through her publication of the "Ross Page," Jackson tortiously interfered with Nick Ross's prospective economic advantage, defamed his good name and reputation, and placed him in a false light before the public, all causing him monetary loss and mental distress. Sufficient evidence exists regarding all of these facts. For these reasons, this Court should reverse the First District Court of Appeals holding on summary judgment and allow a trier of fact to consider the evidence.

Respectfully submitted,

_____

Counsel for Respondent

BRIEF FOR THE RESPONDENT

No. 2006-CV-0654

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
FALL TERM 2006

NICK ROSS,
Petitioner,
v.
JANE JACKSON,
Respondent.

ON APPEAL FROM THE
FIRST DISTRICT COURT OF APPEALS FOR
THE STATE OF MARSHALL

BRIEF FOR RESPONDENT

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ISSUES PRESENTED

I. Whether the Court of Appeals properly held that Jackson could not have interfered with any alleged business relationship because Petitioner failed to identify with reasonable certainty any party with which he had a business expectancy.

II. Whether the Court of Appeals properly held that Jackson's private web page did not defame Petitioner because Jackson could not be liable for a *Sports News* writer subsequently publishing the page's genuine photographs and humorous information.

III. Whether the Court of Appeals properly held that Jackson's private web page did not portray Petitioner in a false light nor invade his privacy.

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TO THE SUPREME COURT OF THE STATE OF MARSHALL:

Respondent, Jane Jackson, respectfully submits this brief in support of her request to uphold the judgment of the court below.

OPINION BELOW

The opinion and order of the Marbury County Circuit Court is unreported. The opinion of the First District Court of Appeals of the State of Marshall is unreported and is set forth in the record. (R. at 3.)

STATUTORY PROVISIONS

This case involves the following statutory provisions: Marshall Revised Code § 14.776(d) and Marshall Revised Code § 14.652.

STATEMENT OF THE CASE

I. Statement of Facts

Respondent Jane Jackson ("Jackson") was a freshman at Marshall State University when Petitioner Nick Ross ("Petitioner"), a sophomore basketball player, began a romantic relationship with her. (R. at 4.) As his girlfriend, Jackson supported Petitioner's goal of becoming the highest paid rookie in American Basketball League ("ABL") history. (R. at 4.) Jackson used her family and professional connections to arrange meetings between Petitioner and media representatives and sports agents. (R. at 4.) Several major but unidentified corporations approached Petitioner with prospective endorsement offers, but Jackson did not have any involvement with these business dealings. (R. at 4.)

In February of 2005, Petitioner ended his relationship with Jackson to date a model he met during a photo shoot. (R. at 4.) The break-up devastated Jackson. (R. at 4.) As an outlet for her feelings, in April 2005 Jackson created a private web page on HoopsPlace.com, a social networking website marketed to college students and sports fans. (R. at 4.) Jackson designated her web page as private, accessible only to other Marshall State students who were registered users of HoopsPlace.com. (R. at 4.)

Jackson's private web page contained photographs depicting Petitioner in several humorous situations. (R. at 4.) Comical and lighthearted captions accompanied many of the photographs on Jackson's private web page. (R. at 5.) Some photographs depicted Petitioner playing basketball, including a photograph of him neglecting to wear an athletic supporter with a caption below that read "Oops, there it is!" (R. at 4-5.) Petitioner also could be seen in several photographs that were taken at parties on or near the Marshall State campus. One photograph showed Petitioner surrounded by others consuming alcoholic beverages, but Peti-

tioner was not drinking in any photograph. Another photograph showed Petitioner wearing lipstick and women's undergarments with a group of male students. Yet another photograph depicted Petitioner wearing a bandage on his knee and holding a pair of crutches with a caption below this picture that read "I can dance on one leg!" (R. at 5.) Petitioner was at a costume party and had not actually injured his knee. (R. at 5.) Jackson's web page also listed certain information about Petitioner in a questionnaire format. (R. at 5.)Jackson was extremely upset that Petitioner broke off their relationship. (R. at 4.) However, her only intent in creating her private web page with genuine photographs and humorous information concerning Petitioner was to "take him down a notch" within the university's social structure. (R. at 4.)

A short time after Jackson created her private web page, a *Sports News* writer circumvented Jackson's privacy settings, accessed her web page, and published several of the photographs and textual content in the publication's April 25, 2005 issue. (R. at 5.) Other media groups published articles about and reproduced photographs of Petitioner based on the *Sports News* report. (R. at 5.) ESPN's website, for example, displayed a copy of the photograph depicting Petitioner with a bandaged knee and crutches, with a big red circle drawn around his knee and a caption asking, "Does the ABL get a discount if he only has one good leg?" (R. at 5.) No such reference to "one good leg" was ever written by Jackson. Only after seeing this photo on ESPN did several ABL recruiters contact Petitioner and tell him that they were not only concerned that he did not immediately report the injury and have it properly treated, but that they were not interested in enlisting a young player with perceived knee problems. (R. at 6.)

After receiving widespread negative media attention, Petitioner and his agent complained to HoopsPlace.com, which removed the web page on or about April 30. (R. at 5.) Petitioner and his agent also successfully petitioned for removal of copies of the web page from Google and the Internet Archive. (R. at 5.) In May 2005, the ABL Board of Commissioners ruled Petitioner ineligible for the draft for two years because he violated the ABL Code of Conduct. (R. at 6.)

II. Preliminary Statement

In July 2005, Petitioner filed a lawsuit against Jackson in the Marbury County Circuit Court claiming: (1) interference with prospective economic advantage, (2) intentional infliction of emotional distress, (3) defamation, and multiple allegations of invasion of privacy: (4) false light, (5) publication of private facts, (6) intrusion upon seclusion, and (7) appropriation of name or likeness. (R. at 3, 6.) Jackson filed a motion to dismiss all seven counts of Petitioner's complaint for failure to state a

claim upon which relief could be granted, pursuant to Marshall R. Civ. P. 12(b)(6). (R. at 6.) The circuit court granted Jackson's motion as to four of the seven counts: infliction of emotional distress, publication of private facts, intrusion upon seclusion, and appropriation of name or likeness. (R. at 6.) The circuit court ruling left three of Petitioner's claims intact: interference with prospective economic advantage, defamation, and false light by invasion of privacy. (R. at 6.) Following discovery, Jackson filed a motion for summary judgment on the three remaining counts. (R. at 6.) The trial court held, pursuant to Marshall R. Civ. P. 56(c), that the evidence demonstrated that there was no genuine issue as to any material fact and, as the moving party, Jackson was entitled to a judgment as a matter of law on the counts of interference, defamation, and false light. (R. at 3, 6).

Petitioner subsequently petitioned the First District Court of Appeals for review of the circuit court order granting summary judgment. (R. at 3, 6.) Presiding Judge A.L. Reyes reviewed the case *de novo* and utilized the same test applied by the trial court: the evidence needed to demonstrate that there was no genuine issue as to any material fact and the moving party was entitled to a judgment as a matter of law. (R. at 3.) The Court of Appeals affirmed the trial court's order granting summary judgment in favor of Jackson. (R. at 3.) The lower court upheld summary judgment on the interference claim because Petitioner could not identify the party with whom he allegedly had a business expectancy, and therefore Jackson could not have had the requisite knowledge of the relationship. (R. at 7.) The Court of Appeals reiterated the trial court's reasons for granting summary judgment as to Petitioner's claims of defamation and false light: Jackson's only affirmative act was posting material on a page of a social networking website that she had designated as "private," with access only permitted to other Marshall State students. (R. at 7-8.) The lower court held that Jackson could not be held liable for unauthorized access to the web page by any third party. (R. at 8.) Although the appeals court could not determine if any Marshall State students viewed the web page, the court found that the content of the page was not likely to be taken seriously by any Marshall State student who saw it. (R. at 8.)

On July 14, 2006, this Court granted Petitioner leave to appeal the decision of the Court of Appeals that affirmed the Marbury County Circuit Court's grant of summary judgment.

SUMMARY OF THE ARGUMENT

The Court of Appeals properly affirmed the trial court's grant of summary judgment on all three causes of action because Petitioner failed

to show any genuine issue of material fact, even when the evidence is construed in the light most favorable to him.

I.

Petitioner in this case fails to establish the tort of interference with prospective economic advantage. First, no valid business relationship or expectancy existed between Petitioner and several unidentified corporations. Second, Jackson did not know of any business relationship or expectancy between Petitioner and the unidentified corporations. Third, Jackson did not engage in purposeful and unjustified interference that prevented Petitioner's business interest from ripening into a valid business relationship. Fourth, Petitioner suffered no damages. Additionally, Jackson has a fundamental and unassailable First Amendment right to express her emotions on a private online forum. This constitutional right simply cannot be compromised.

II.

Petitioner cannot adduce enough evidence to sustain his claim against Jackson for defamation. First, the genuine photographs and humorous statements concerning Petitioner posted by Jackson on her private web page cannot be shown to be defamatory and are reasonably susceptible to an innocent construction when taken into context. Second, Petitioner is a public figure and must prove by clear and convincing evidence that Jackson acted with actual malice in creating her web page. Third, Petitioner cannot show that Jackson's posting of photos and statements caused special damage to his reputation. Fourth, Jackson had a reasonable expectation of privacy when she created her web page and allowing Petitioner's defamation claim to continue would have a chilling effect on one's right to free expression on the Internet.

III.

Jackson cannot be liable for false light invasion of privacy. Jackson's private web page did not publicize any of Petitioner's private matters because it was not substantially certain that the web page's content would become widespread public knowledge. Jackson's web page also did not portray Petitioner in a false light that was highly offensive to a reasonable person, because the photos in fact were actual portrayals of Petitioner and a reasonable person could not take seriously the humorous information. Lastly, Jackson's creation of her private web page does not constitute knowledge of or reckless disregard as to the falsity of the web page's content.

For these reasons, this Court should affirm the ruling of the Court of Appeals and grant summary judgment for Jackson because no genuine issues of material fact exist as to any of Petitioner's three causes of action.

ARGUMENT

The United States Supreme Court has simplistically defined the right to privacy as "the right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissent). The right to privacy is "a profoundly important concern in contemporary society—important and easily overridden in our rush for gossip, entertainment, and profit." Anthony Lewis, *The Right To Be Let Alone*, Journalism and the Debate Over Privacy 61 (Craig L. LaMay ed., 2003). Legal protection for an Internet user's privacy is likely to depend on whether she reasonably expects privacy when she accesses the Internet. *See* Dorothy Glancy, *Symposium on Internet Privacy: At the Intersection of Visible and Invisible Worlds: United States Privacy Law and the Internet*, 16 Santa Clara Computer & High Tech. L.J. 357, 363 (2000). A person would be reluctant to access the Internet if she could not reasonably expect some degree of privacy in her online activities. *Id.* The ability to complain and speak one's mind is "clearly at the heart of the right of free expression," and "a number of websites now exist purely to allow users to let off steam." Diane Rowland, *Griping, Bitching and Speaking Your Mind: Defamation and Free Expression on the Internet*, 110 Penn. St. L. Rev. 519, 521 (2006). "Instead of private papers in a drawer, most of us now confide private thoughts to a computer." Lewis, *supra*, at 62.

Summary judgment is appropriate when the evidence in the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Marshall R. Civ. P. 56(c); *see Celotex v. Catrett*, 477 U.S. 317, 322 (1986). To defeat a motion for summary judgment, the nonmoving party must "make a sufficient showing on [all] essential element[s] of [his] case with respect to which [he] has the burden of proof." *Celotex*, 477 U.S. at 323. Petitioner is the nonmoving party in this case. This Court reviews de novo the decision of the Court of Appeals. *See Elder v. Holloway*, 510 U.S. 510, 516 (1994). A mere scintilla of evidence in support of Petitioner's claims is insufficient to withstand a motion for summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). A grant of summary judgment is proper in this case because there are no genuine issues of material fact as to any of Petitioner's three causes of action.

I. JACKSON DID NOT INTERFERE WITH ANY ALLEGED PROSPECTIVE ECONOMIC ADVANTAGE OF PETITIONER.

A plaintiff must prove four elements to establish tortious interference with prospective economic advantage: (1) the existence of a valid business relationship or expectancy; (2) the defendant's knowledge of the plaintiff's relationship or expectancy; (3) purposeful and unjustified interference by the defendant that prevented the plaintiff's valid expec-

tancy from ripening into a valid business relationship; and (4) damage to the plaintiff resulting from the defendant's interference. Marshall Rev. Code § 14.776(d); *Fredrick v. Simmons Airlines Inc.*, 144 F.3d 500, 502 (7th Cir. 1998) (using Illinois statute similar to Marshall statute); *Fellhauer v. City of Geneva*, 568 N.E.2d 870, 878 (Ill. 1991). Furthermore, a defendant cannot be held liable for interference with prospective economic advantage merely for providing truthful information that unintentionally causes the loss of plaintiff's prospective advantage. *George A. Fuller Co. v. Chi. Coll. of Osteopathic Med.*, 719 F.2d 1326, 1332 (7th Cir. 1983). In that situation, the First Amendment to the United States Constitution protects a defendant's right to free speech. *Blatty v. New York Times Co.*, 728 P.2d 1177, 1184 (Cal. 1986). Because no cases exist that discuss Marshall's treatment of interference with prospective economic advantage, the Court should follow the case law of other jurisdictions that have enacted statutes similar to Marshall's own.

Petitioner in this case cannot establish the tort of interference with prospective economic advantage. First, no valid business relationship or expectancy existed between Petitioner and the unidentified corporations. Second, Jackson did not know of any business relationship or expectancy between Petitioner and these corporations. Third, Jackson did not engage in purposeful and unjustified interference preventing Petitioner's business interest from ripening into a valid business relationship. Fourth, Petitioner suffered no damages. Additionally, critical First Amendment rights will be compromised if this Court allows Petitioner's claim to proceed. Jackson has a fundamental First Amendment right to vent her emotions in a private online forum.

A. Petitioner's Mere Contacts with Unidentified Corporations Are Too Tenuous to Constitute a Valid Business Relationship or Expectancy.

Interference with prospective economic advantage requires the existence of a valid business relationship or expectancy. *Texaco, Inc. v. Pennzoil*, 729 S.W.2d 768, 769 (Tex. Ct. App. 1987). A valid business relationship or expectancy must be sufficiently capable of acceptance. *Delphi Indus., Inc. v. Stroh Brewery Co.*, 945 F.2d 215, 217 (7th Cir. 1991).

Courts have generally held tenuous business dealings as insufficient to constitute a valid business relationship or expectancy in two situations. First, mere hope for economic profit is insufficient. *Texaco*, 729 S.W.2d at 769. For example, competitors in sporting events ordinarily have an inadequate expectancy to establish this tort because the outcome in most sporting events is too speculative. *Youst v. Longo*, 729 P.2d 728, 733-34 (Cal. 1987). In *Youst,* the California Supreme Court held

that competitors in a horse-racing context lacked the predictability to establish a sufficient business relationship or expectancy. *Id.* at 735.

Second, failure to allege any reasonable expectation of a business relationship does not amount to a valid business relationship or expectancy. *Fredrick*, 144 F.3d at 503. In *Fredrick,* the plaintiff was an airline pilot whose employment had been terminated; his "wish" to continue working, when he did not claim "that he had been offered a job by any other airline, or even that he had interviewed or applied for such jobs," failed to meet the standard of a valid business relationship or expectancy. *Id.* at 502. The mere hope of receiving a job offer is not sufficient to establish this central element of interference with prospective economic advantage. *Id.* at 503. The Illinois Supreme Court affirmed this principle in *Anderson v. Vanden Dorpel*, 667 N.E.2d 1296, 1299 (Ill. 1996). The *Anderson* plaintiff alleged she was the "leading candidate" for a position and that she received assurances that she was being seriously considered for the job and that they would recommend her to be hired. *Id.* at 1299-1300. Such puffery was insufficient to amount to a valid business relationship or expectancy. *Id.* at 1299.

In this case, Petitioner's minimal contacts with several unidentified corporations are too speculative to constitute a valid business relationship or expectancy. As in *Texaco*, Petitioner's mere hope for economic profit is insufficient. Also, similar to the horseracing context in *Youst*, whether Petitioner will be drafted into the ABL, and whether Petitioner will be drafted as a first-round pick, are purely conjectural suppositions. Betting on the entire ABL drafting process is similar to betting on the outcome of a sporting event or a horse race with an uncertain outcome.

Furthermore, under *Fredrick*, Petitioner's failure to allege any reasonable expectation of a business relationship damages his claim of possessing a valid business relationship or expectancy. Like the pilot in *Fredrick*, Petitioner has not claimed he was presented with any concrete offers or sponsorship deals; Petitioner only anticipated receiving endorsement income "of as much as $10 million," which was speculative at best. (R. at 4.) As in *Fredrick* and *Anderson*, Petitioner possessed only a hope of receiving a job offer, which is insufficient to form a valid business relationship or expectancy. Petitioner's ethereal connections with unidentified corporations are an *even less* credible basis for claiming a valid business expectancy or relationship than was the case in *Anderson*, where others led the plaintiff to believe she was the leading candidate for the job. Thus, whatever connection Petitioner allegedly established with the unidentified corporations does not amount to a valid business relationship or expectancy.

Furthermore, to establish a valid business relationship or expectancy, Petitioner must identify specific third parties with whom he expected to enter into such business relationships. *Schuler v. Abbott Labs.*,

639 N.E.2d. 144, 147 (Ill. App. Ct. 1993). A plaintiff may also point to an identifiable "class" of third parties with whom he had a business relationship or expectancy, rather than a single third party. *River Park, Inc. v. City of Highland Park*, 667 N.E.2d 499, 507 (Ill. App. Ct. 1996). In the case at bar, Petitioner fails to identify either a single third party or point to an identifiable "class" of third parties with whom he had a business relationship or expectancy. The record vaguely indicates that "some corporations" approached Petitioner with "endorsement offers" in early 2005, but Petitioner has failed to identify specifically any of the corporations that approached him with these offers. (R. at 4.) Petitioner thus cannot establish a valid business relationship or expectancy.

B. Even if a Business Relationship or Expectancy Actually Existed, Jackson Had No Knowledge of Petitioner's Business Relationship or Expectancy with Any of the Unidentified Corporations.

The defendant must have knowledge of the business relationship or expectancy in order to be held liable for interference with prospective economic advantage. *Laser Indus., Ltd. v. Eder Instrument Co.*, 573 F. Supp. 987, 993 (N.D. Ill. 1983); Restatement (Second) Torts § 766 cmt. i (1977). Courts generally require that the defendant possess knowledge of facts or circumstances that would lead a reasonable person to believe in the existence of a valid business relationship or expectancy. *Malatesta v. Leichter*, 542 N.E.2d 768, 777-78 (Ill. App. Ct. 1989).

In this case, Jackson had no knowledge of any business relationship or expectancy between Petitioner and several unidentified corporations, assuming such a relationship even existed in the first place. Under *Malatesta*, Jackson did not possess knowledge of facts or circumstances that would lead a reasonable person to believe in the existence of a valid business relationship or expectancy. Petitioner broke up with Jackson in February 2005, which is approximately the time when the unidentified corporations approached him with endorsement offers. (R. at 4.) Thus, Jackson simply was not privy to any information that would reasonably lead her to believe a valid business relationship or expectancy existed.

Moreover, although Jackson used her family and professional connections to arrange meetings for Petitioner with the media, nonprofit organizations, and sports agents, he fails to state that Jackson knew of any specific business dealings between himself and any unidentified corporations. (R. at 4.) Thus, under *Malatesta*, Jackson did not reasonably possess knowledge of Petitioner's alleged business relationships because she was only involved in the public relations and media aspects, and not business aspects, of Petitioner's basketball career. (R. at 4.) Hence, Peti-

tioner cannot establish that Jackson had knowledge of his business dealings.

C. Jackson's Posting of Genuine Photographs and Humorous Information on Her Private Web Page Does Not Constitute Purposeful Interference That Prevented Petitioner's Alleged Business Expectancy from Ripening.

To establish interference with prospective economic advantage, the plaintiff must prove (1) purposeful and unjustified interference by the defendant that (2) prevented the plaintiff's legitimate expectancy from ripening into a valid business relationship. *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 767 (2d Cir. 1995); *Ray Dancer, Inc., v. DMC Corp.*, 594 N.E.2d 1344, 1350 (Ill. App. Ct. 1992); Restatement (Second) of Torts § 766 cmt. j (1977).

1. Jackson Did Not Engage in Any Purposeful or Unjustified Interference Because Her Conduct Was Not Intentional.

To engage in purposeful and unjustified interference, the defendant must intend to interfere with the business relationship or expectancy. *Gruen Indus., Inc. v. Biller*, 608 F.2d 274, 282 (7th Cir. 1979). The defendant's intent must generally be improper, or aimed towards an improper purpose. *Malatesta*, 542 N.E.2d at 777-78. According to the Restatement (Second) of Torts, "If the conduct is independently wrongful . . . then the interference is [essentially] improper. [I]f the means used by the actor are innocent or less blameworthy . . . the interference is [not] improper." Restatement (Second) of Torts § 767 (1977). The Seventh Circuit requires a showing of legal or implied malice, which is defined as a purposeful intent to interfere without justification. *Delloma v. Consolidation Coal Co.*, 996 F.2d 168, 171 (7th Cir. 1993).

To establish malice, the plaintiff must prove that he was harmed by the defendant's independently tortious or unlawful conduct. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001). The *Wal-Mart* court defined "independently tortious" to mean conduct that would violate some other recognized duty. *Id.* Moreover, the plaintiff seeking to prove the tort of interference with prospective economic advantage must prove "that the defendant's conduct was wrongful by some legal measure other than the fact of interference itself." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 950 (Cal. 2003) (quoting *Della Penna v. Toyota Motor Sales, U.S.A., Inc.*, 902 P.2d 740, 751 (Cal. 1995)). An act is independently wrongful if it is unlawful, that is, if it is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Id.* at 951. Malice is formed *only* if the plaintiff alleges that a defendant interfered with the plaintiff's prospective busi-

ness advantage through fraud, deliberate violence, oppression, or willfulness. *Schuler*, 639 N.E.2d at 148. Here, Jackson simply did not engage in purposeful or unjustified interference. Under *Malatesta*, Jackson lacked any improper intent and never acted with an improper purpose. Jackson simply vented her emotions after her break-up on a private online forum, never foreseeing that her private expression would have an effect on any alleged business relationships Petitioner had developed.

Furthermore, because she lacked any purposeful intent to interfere without justification, Jackson's desire to express her emotions on a private online forum lacks any legal or implied malice. Jackson's online actions are completely devoid of any intent to interfere, and were simply innocuous attempts to vent her thoughts on a private web page. Although Jackson did mention she wanted "to take [Petitioner] down a notch" in the social structure of the university, these words merely expressed her emotional state after Petitioner broke up with her. (R. at 4.)

In addition, Jackson never engaged in any independently tortious conduct. According to *Wal-Mart* and *Korea Supply*, Jackson's failure to perform an independently actionable tort or engage in fraud, deliberate violence, oppression, or willfulness is sufficient reason to conclude that her behavior was harmless expression lacking malice. Her statements that she wanted to "take [Petitioner] down a notch," and that she could "make him a has-been," expressed her broken heart. These words are not independently actionable torts. Jackson never engaged in any purposeful or unjustified interference aimed at disrupting Petitioner's business relationships.

2. Any Alleged Interference by Jackson Did Not Prevent Petitioner's Expectancy from Ripening into a Valid Business Relationship.

The defendant's purposeful or unjustified interference also must actually prevent the plaintiff's legitimate expectancy from ripening into a valid business relationship. *Sullivan's Wholesale Drug Co., Inc. v. Faryl's Pharmacy, Inc.*, 573 N.E.2d 1370, 1374-75 (Ill. App. Ct. 1991). A direct causal link is required: "but for" the wrongful interference of the defendant, the business relationship or expectancy would have been formed. *Thorne v. Elmore*, 398 N.E.2d 837, 730-48 (Ill. App. Ct. 1979). Petitioner also has the burden of proving that Jackson established this causal link. *Augustine v. Trucco*, 268 P.2d 780, 791 (Cal. 1954).

Applying *Thorne*'s "but for" test, no causal link exists here between Jackson's alleged interference and Petitioner's alleged loss of economic advantage because Jackson never interfered with his potential ABL career. Even assuming that she did, Petitioner cannot prove that Jackson's expressions on her private web page caused the unidentified corporations to withdraw their endorsement offers. If any party is to

blame, it is ESPN and *Sports News*. A direct causal link exists between the loss of Petitioner's ABL prospects and endorsement offers and the publication by ESPN and *Sports News* of content from Jackson's web page with their own editorial comments. Furthermore, another causal link exists between Petitioner's own actions—allowing himself to be photographed in these embarrassing situations—and the withdrawal of his speculative endorsement offers. It is Petitioner's own fault that he lost the endorsement deals because he let himself be photographed in situations that violated the ABL Code of Conduct. (R. at 9.) Pursuant to *Augustine*, Petitioner fails to meet his burden of proving that Jackson formed the causal link that led to his damages. Thus, Jackson's posting of genuine photographs and humorous information on her private web page is not purposeful interference that prevented Petitioner's alleged business expectancy from ripening.

D. Jackson's Private Web Page Did Not Cause Any Damage to Petitioner.

To establish the tort of interference with prospective economic advantage, the plaintiff must prove that he suffered damages as a result of the defendant's interference. *Triple R Indus., Inc. v. Century Lubricating Oils, Inc.*, 912 F.2d 234, 238 (8th Cir. 1990). The plaintiff must also demonstrate that the defendant's conduct caused the damages. *Spurlock v. Ely*, 707 P.2d 188, 190 (Wyo. 1985). Most importantly, the plaintiff must prove damages, such as loss of future profits, with "reasonable certainty." *UST Corp. v. Gen. Road Trucking Corp.*, 783 A.2d 931, 941-42 (R.I. 2001); Restatement (Second) of Torts § 774A cmt. c (1977).

Jackson caused no damage to Petitioner's prospective economic advantage. Following *Spurlock*, Petitioner cannot establish a causal link between his alleged damages and Jackson's creation of her web page. Even if Jackson engaged in interference, damages still did not occur because, under *UST Corp*, Petitioner's alleged damages cannot be proven with any reasonable certainty. The predictions that Petitioner would have been "the first player selected for the ABL draft," "the highest paid rookie in ABL history," and the recipient of income "as much as $10 million per year" in addition to his main salary are simply too speculative. (R. at 4.) Petitioner cannot suffer damages by losing profits he did not even have in the first place. Losing "nothing" cannot even reasonably be defined as "damages." Thus, Petitioner's alleged damages—namely the disappearance of ABL draft success, bloated salary figures, and at-best speculative endorsement offers—fail to meet the "reasonable certainty" standard for proving damages.

E. Jackson's Expression on Her Private Web Page Is Protected Free Speech and She May Raise a Valid First Amendment Defense.

Jackson has a fundamental First Amendment right to vent her emotions on a private online forum. She designated her web page as "private" in the first place and thus she never intended her private expression to prevent any hypothetical or speculative business expectancy from ripening. Jackson is simply a frustrated and heartbroken student who wished to express her emotions on a private online forum after Petitioner dumped her for a model. The First Amendment right to freedom of expression is one of the most fundamental rights provided in the United States Constitution. Free speech is a fundamental constitutional right; this right is more valuable than the remote risk that any speech *may* impede a speculative business relationship. Limiting future online expressions would unduly chill speech, and citizens would be too wary to exercise their fundamental free speech rights for fear of interfering with any nebulous business relationship. Allowing Petitioner's tort claim to proceed would truly erode this inviolable First Amendment right to express freely one's emotions—to express whatever one wishes to express.

The defendant does not tortiously interfere with prospective economic advantage when he merely provides truthful information or engages in speech resulting in damage to the plaintiff. *George A. Fuller Co.,* 719 F.2d at 1332; *see also* Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine,* 48 U. Chi. L. Rev. 61, 74-75 (1982). In *Blatty v. New York Times Co.*, the plaintiff author in a suit for intentional interference with prospective economic advantage and defamation sought to recover from the defendant publisher for failing to include plaintiff's book on a best-seller list. 728 P.2d at 1184. The plaintiff's interference claims must "satisfy the requirements of the First Amendment" because those claims had as "their gravamen the alleged injurious falsehood of a statement." *Id.* at 1184-85. Although the *Blatty* court allowed the defendant to raise a First Amendment defense to the interference claims because the best-seller list did not refer to plaintiff directly or by implication, the California Supreme Court also held that a plaintiff in a claim for interference *and* defamation must prove the falsehood of a communication that allegedly harmed the plaintiff's prospective economic advantage. *Id.* at 1185 n.2.

Here, as in *Blatty,* Jackson is engaging in speech protected by the First Amendment. Her expression on her private web page included genuine, truthful photographs of Petitioner, and she thus can raise a First Amendment defense to Petitioner's claim of interference with prospective economic advantage. Jackson's constitutional right to express her

emotions on her private web page trumps any nebulous possibility that her protected speech could somehow interfere with Petitioner's at-best speculative business relationships. A balance always is weighed in favor of free expression. Jackson respectfully requests that this Court affirm the Court of Appeals' holding that Jackson never interfered with Petitioner's prospective economic advantage.

II. JACKSON DID NOT DEFAME PETITIONER BY POSTING GENUINE PHOTOGRAPHS AND HUMOROUS INFORMATION CONCERNING HIM ON HER PRIVATE WEB PAGE.

Marshall state courts have consistently followed the Restatement (Second) of Torts in deciding whether a defendant is liable for defamation. (R. at 7.) However, this Court should look to other jurisdictions that also adopt the Restatement because no cases from Marshall are reported. Liability for defamation requires (1) the existence of a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm to the plaintiff caused by the statement's publication. Restatement (Second) of Torts § 558 (1977). A statement is defamatory if it tends to harm the reputation of the plaintiff so as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement (Second) of Torts § 559 (1977). To prove defamation, the plaintiff must show that the statement would tend to prejudice him in the eyes of a substantial and respectable minority of the community and that the defendant made the statement in a manner allowing one to assume that the statement will reach the community. *Kolegas v. Hegel Broad. Corp.*, 607 N.E.2d 201, 206 (Ill. 1992) (adopts the Restatement's definition of defamation); Restatement (Second) of Torts § 559 cmt. e (1977).

Petitioner's claim implicates the First Amendment to the United States Constitution because the tort of defamation inherently involves speech. The Supreme Court has held that under the First Amendment there is no such thing as a false idea, and no matter how "pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). However, "no constitutional value" exists "in false statements of fact" because "[n]either the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues." Id. (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (internal quotations omitted). Nonetheless, the First Amendment requires that

courts offer some protection to falsehood in order to protect speech of importance to society. Id. at 341.

The Supreme Court has narrowed the holding in *Gertz*, ruling that there is no separate First Amendment privilege for statements of opinion and that a false assertion of fact can be defamatory even if couched in terms of an opinion. *Milkovich v. Lorain Journal Co*, 497 U.S. 1, 18 (1990). Under *Milkovich*, the First Amendment offers protection to an allegedly defamatory statement if the statement cannot be "reasonably interpreted as stating actual facts." 497 U.S. at 20 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988)). This standard ensures that public debate will not suffer for lack of "imaginative expression" or "rhetorical hyperbole" which has "traditionally added much to the discourse of our Nation." Id. The First Amendment protects Jackson's right to post private—and even public—complaints about Petitioner on her private web page, even if irresponsible members of the mainstream media republish her thoughts as fact to a wider audience and the publication allegedly harms Petitioner's basketball career.

Petitioner cannot adduce enough evidence to sustain his claim against Jackson for defamation. First, the genuine photographs and captions concerning Petitioner posted by Jackson on her private web page are reasonably susceptible to an innocent construction and cannot be shown to be defamatory. Second, Petitioner is a public figure and must prove by clear and convincing evidence that Jackson acted with actual malice, or a reckless disregard for the truth, when she created her web page. Third, the mere posting of photographs and captions on a private web page did not cause special damage to Petitioner's reputation. Fourth, Jackson had a reasonable expectation of privacy when she created her web page and allowing Petitioner's claim of defamation to continue would chill the right to freedom of expression on the Internet.

A. The Contents of Jackson's Private Web Page Were Not False and Defamatory to Petitioner and Are Reasonably Susceptible to an Innocent Construction when Taken into Context.

Like the State of Marshall, Illinois courts generally follow the Restatement (Second) of Torts in deciding if a defendant is liable for defamation. To establish defamation under Illinois law, the plaintiff must plead sufficient facts to show that the defendant made a false statement concerning him and that the defendant caused an unprivileged publication to a third party, which resulted in damage to the plaintiff. *Krasinski v. United Parcel Serv., Inc.*, 530 N.E.2d 468, 471 (Ill. 1988) (citing generally Restatement (Second) of Torts § 558 (1977)). Statements are considered defamatory per se if the defamatory character of the statement is apparent on its face, or when the words are so obviously and

materially harmful to the plaintiff that injury to his reputation may be presumed, whereas statements are considered defamatory per quod if the statement's defamatory character is not apparent on its face, and the plaintiff must plead extrinsic facts to prove a defamatory meaning. *Kolegas*, 607 N.E.2d at 206. Petitioner in this case cannot adduce enough evidence to sustain a claim of either defamation per se or defamation per quod.

Illinois courts have recognized four categories of statements that are defamatory per se: (1) words that impute the commission of a criminal offense; (2) words that impute infection with a loathsome communicable disease; (3) words that impute an inability to perform or want of integrity in the discharge of duties of office or employment; and (4) words that prejudice a plaintiff, or impute lack of ability, in his or her trade, profession, or business. *Republic Tobacco Co. v. N. Atl. Trading Co., Inc.*, 381 F.3d 717, 726 (7th Cir. 2004) (applying Illinois state law). Illinois courts also allow a fifth category of defamatory per se statements: words that impute adultery or fornication. *Bryson v. News Am. Publ'ns, Inc.*, 672 N.E.2d 1207, 1215 (Ill. 1996).

At issue in the case at bar are three of the five categories of statements: words that impute commission of a crime; words that impute an inability to perform in the discharge of duties of office or employment; and words that prejudice a plaintiff, or impute lack of ability, in his trade or profession. Petitioner alleges that Jackson's creation of her private HoopsPlace.com web page directly and foreseeably led to the publication of false information about him in Sports News and other mainstream media; that Jackson intended this further publication to occur; and that she is liable for the subsequent defamatory publications. (R. at 7.) Petitioner alleges that by placing certain phrases in quotes underneath photographs, Jackson caused Internet users viewing the private web page to believe falsely that Petitioner consumed alcohol and smoked marijuana while enrolled at Marshall State. (R. at 7.) One caption reads "I'm high on State!" beneath a picture of Petitioner wearing a t-shirt with a marijuana leaf on it, sitting next to another student holding what appears to be a marijuana cigarette. (R. at 5.) In a case distinguishable from the one at bar, the Illinois Supreme Court held that the statements of defendant disc jockey and his co-host "were defamatory per se because they impute[d] that plaintiff committed criminal conduct." *Van Horne v. Muller*, 705 N.E.2d 898, 903 (Ill. 1998). The defendants made the statements during a live broadcast, presenting them as real news. 705 N.E.2d at 902. Unlike Van Horne, however, none of the photos showed Petitioner actually drinking alcohol or smoking marijuana. Neither the photos nor the captions thus stated as fact that he committed any crime.

Even if the Court finds that Jackson's decision to post photographs on her web page was defamatory, summary judgment still ought to be

granted on Petitioner's defamation claim because the captions accompanying the photographs are susceptible to an innocent construction. The Illinois Supreme Court, which like Marshall follows the Restatement (Second) of Torts, has stated that even if a statement falls into a recognized category of words that are actionable per se, a statement will not be found actionable per se if it is reasonably capable of an innocent construction. *Bryson*, 672 N.W.2d at 1215. The innocent construction rule requires courts to consider a statement in context, giving the words and their implications a natural and obvious meaning. Id. Only reasonable innocent constructions remove an allegedly defamatory statement from the per se category, and the court should decide as a matter of law whether a statement is reasonably susceptible to an innocent interpretation. *Kolegas*, 607 N.E.2d at 206-07. Petitioner cannot prove that any of the statements—even coupled with the photos—are defamatory per se.

The word "high" is capable of an innocent construction, especially when coupled with the word "on." The word "high" means as "filled with or expressing great joy or excitement." Merriam Webster's Collegiate Dictionary 546 (10th ed. 1999). Although "high" *can* mean "intoxicated," as in "excited or stupefied by or as if by a drug," "high on" is defined as "enthusiastically in favor or support of." *Id.* (emphasis added). The caption may be ironic because Petitioner is wearing a marijuana leaf t-shirt, but the statement in context is reasonably susceptible to the meaning that Petitioner was enthusiastically in support of Marshall State. The statement "I'm high on State!" and accompanying photograph thus cannot be defamatory by their very nature.

Petitioner alleges that the photo depicting him using crutches and dancing on one leg is actionable as defamation *per se* because the image and caption impute that he is incapable of performing in his chosen profession of basketball. However, the phrase "I can dance on one leg!" also is susceptible to an innocent construction, even in the context of a photo showing the Petitioner using crutches. When the tenor of the web page is taken as a whole, the caption "I can dance on one leg!" is simply an attempt at humor. The caption does not read, "Even a bum knee won't stop me from being the highest-paid rookie!" Nothing on the web page claims Petitioner could not actually play basketball, in college or professionally. Defamation did not result from Jackson's creation of a private web page to vent about her break-up with Petitioner, but rather from the decision of a *Sports News* writer to publish the page's content without verifying its accuracy. ESPN—not Jackson—caused damage to Petitioner by circling his knee in the photo and asking readers, "Does the ABL get a discount if he only has one good leg?" (R. at 5.)

In a defamation case, the court must determine whether the challenged statement is "capable of bearing a particular meaning" and whether "that meaning is defamatory." Restatement (Second) of Torts

§ 614(i) (1977). Although pictures may be worth 1,000 words, Petitioner does not claim that the photographs were altered or fabricated, nor does Petitioner deny being present at the events pictured. The events as depicted in the photos actually occurred and Petitioner was present at all of them. Petitioner's claim that Jackson's private web page was defamatory rests on the first-person nature of captions beneath the photos that also seemingly attributed the web page's creation to Petitioner. (R. at 7.) Petitioner does not and cannot claim that the photographs are untrue. However, the burden of proving a statement false and defamatory rests squarely on the shoulders of the plaintiff, and a defendant is absolved if the substance of the allegedly defamatory statement is proved to be true, despite slight inaccuracies in the details. *Masson v. New Yorker Magazine*, 501 U.S. 496, 516-17 (1991); *see also* Restatement (Second) of Torts § 581A (1977). This Court must consider the "truth or falsity of allegedly defamatory speech if it is properly to balance the individual interest 'in vindicating a reputation that is wrongly sullied' against the community's interest in free speech." *Tavoulareas v. Piro*, 817 F.2d 762, 783 (D.C. Cir. 1987). Implicit in the defense of truth is the idea that the allegedly defamatory statement as it stands must make the plaintiff significantly worse off than a completely or literally truthful publication would have. *Pope v. The Chronicle Publ'g Co.*, 95 F.3d 607, 613 (7th Cir. 1996) (applying Illinois law). Petitioner's case fails because he cannot prove that a completely or literally truthful publication of photos on Jackson's web page would not have cost him his ABL career or caused his speculative endorsements deals to dry up.

Petitioner contends that he lost eligibility to join an ABL team and several endorsement offers from unidentified corporations because these photographs became public. (R. at 4, 6.) The ABL commissioners found probable cause that Petitioner violated the ABL Code of Conduct solely based on reports in Sports News and the appearance of a photo from Jackson's web page on the website of ESPN. (R. at 5-6.) However, Petitioner adduces no evidence that the commissioners arrived at their conclusion as a result of viewing Jackson's private web page. The Code of Conduct requires that prospective players "adhere to ABL guidelines concerning proper attire," "never act in any way that may bring disrepute or disgrace to ABL teams, other players, the ABL, or professional basketball," "not possess or use illegal drugs or performance enhancing substances prohibited by law or ABL rules," and "not consume alcohol in a setting where such consumption may be photographed or viewed by the public." (R. at 9.) Petitioner cannot prove that Jackson's act of posting the photos on her web page amounted to defamation if the substance of the photographs is true. Petitioner allowed himself to be photographed in the presence of alcohol and paraphernalia related to illegal drugs, violating the spirit if not the letter of the Code of Conduct. Another photo-

graph shows Petitioner taking a lay-up shot and was taken from an angle revealing that Petitioner was not wearing an athletic support underneath his uniform. (R. at 4-5.) The caption below this photo reads, "Oops, there it is!" (R. at 4-5.) Although the Code does not specify what is or is not proper attire, Petitioner cannot deny that he wore women's undergarments and failed to wear an athletic support underneath his uniform—two more possible violations. Defamation cannot arise from the fact that these Code violations became known to the news media—and, as a result, to ABL commissioners—because Jackson created a private web page to vent her anger about Petitioner dumping her for a model.

To survive a motion for summary judgment, Petitioner must prove that the web page itself is reasonably capable of sustaining a defamatory meaning. *Knievel v. ESPN*, 393 F.3d 1068, 1073 (9th Cir. 2005). This Court should make the determination of whether the web page is capable of sustaining a defamatory meaning by interpreting that statement from the standpoint of an average reader, judging the statement not in isolation, but within the context in which it is made. *Id.* at 1074. In *Knievel*, ESPN published a photo of daredevil athlete Evel Knievel, who was being escorted by an unnamed young woman and Knievel's wife to an awards gala, on its extreme sports website. *Id.* at 1071. The photo's caption read, "Evel Knievel proves that you're never too old to be a pimp." *Id.* In the context of other photos and "sophomoric slang" on the website—including an image of a man sporting sunglasses with the caption beneath stating, "Ben Hinkley rocks the shades so the ladies can't see him scoping"—the Ninth Circuit ruled that the photo and caption were not susceptible to a defamatory meaning because the term "pimp" was not intended and could not be interpreted as a criminal accusation. *Id.* at 1074, 1079. The court noted that, ironically, calling Knievel a "pimp" likely was meant as a compliment. *Id.* at 1074.

The case at bar is analogous to *Knievel*. Though very unlikely, the photos and captions on Jackson's private HoopsPlace.com web page possibly could be considered defamatory in isolation. In the broad context of the web page, however, the photos and captions are nothing more than a joke to the page's intended audience—other Marshall State students. In examining an allegedly defamatory statement, the Court should adopt the three-pronged analysis of *Knievel*:

First, we look at the statement in its broad context, which includes the general tenor of the entire work, the subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false.

393 F.3d at 1075 (citing *Underwager v. Channel 9 Austl.*, 69 F.3d 361, 366 (9th Cir. 1995)). The general tenor of Jackson's private web page is one of satire. Jackson made an honest effort to prevent anyone, other than Marshall State students, from accessing the web page. (R. at 4.) HoopsPlace.com is a social networking website marketed primarily to college students and sports fans. (R. at 4.) Marshall State students likely to view the web page would be unlikely to take seriously the contents of Jackson's web page, or even view the page as Petitioner's creation, especially due to the listing of "Basket Weaving" as a course at Marshall State. The web page also used figurative and hyperbolic language, such as "I'm high on State!" and "I can dance on one leg!" Marshall State students—who were Jackson's intended audience—viewing the web page would be unlikely to believe these statements were true. The fact that Petitioner played basketball for the Marshall State team would suggest that Marshall students knew Petitioner never injured his knee. False attribution of statements to a person may be defamatory because quotation marks around a passage indicate to a reader that the passage reproduces the speaker's words verbatim. *Masson*, 501 U.S. at 511. However, if no Marshall State student could reasonably believe that captions beneath the photos were true, then the web page cannot sustain a defamatory meaning. It is not relevant *Sports News* and ESPN's website republished the content of Jackson's web page because they were not the intended or reasonably expected viewers of the web page. Even if republishing the web page's content to a wider audience were relevant, *Sports News* and ESPN were irresponsible to believe the web page was a reliable source of information. For the foregoing reasons, Jackson's web page was not false and defamatory to Petitioner.

B. Petitioner's Status as a Star Basketball Player Makes Him a Public Figure and Thus He Must Prove by Clear and Convincing Evidence that Jackson Acted with Actual Malice when Creating Her Private Web Page.

The Supreme Court has held that when a plaintiff in a defamation suit is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, or with knowledge that the statement was false or with reckless disregard as to the statement's truth or falsity. *New York Times Co.*, 376 U.S. at 279-80; Restatement (Second) of Torts § 580A (1977). Petitioner in this case is a public figure and the content of Jackson's web page relates to his eligibility to play in the ABL. Petitioner thus must prove by clear and convincing evidence that Jackson created her web page knowing and wanting the content she published online to destroy Petitioner's opportunities to play professional basketball and earn endorsement deals. To establish reckless disregard, a pub-

lic figure must prove that the defendant "entertained serious doubts as to the truth of his publication." *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 420 (Tex. 2000) (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

The Supreme Court also has held that "where the factual dispute concerns actual malice . . . the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson*, 477 U.S. at 255-56. In the case at bar, Petitioner offers no evidence that Jackson acted with actual malice in creating her private web page. Jackson could not have entertained serious doubts about the truth of the photographs on her web page because the depictions of Petitioner in the photograph actually occurred. The photographs were "true" even if Petitioner never uttered the captions beneath the photos.

Furthermore, the Supreme Court has placed a greater burden on public figure plaintiffs in a defamation suit because "public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Milkovich*, 497 U.S. at 16 (citing *Gertz*, 418 U.S. at 345). The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. *Gertz*, 418 U.S. at 344. Public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. *Id.* Petitioner in this case proved by his own actions that he falls under the public figure definition established by *Gertz* and *Milkovich*. After the article appeared in *Sports News*, Petitioner and his agent promptly complained to HoopsPlace.com, which removed Jackson's web page on or about April 30. (R. at 5.) Petitioner and his agent also successfully petitioned for removal of copies of the web page from Google and the Internet Archive. (R. at 5.) These actions would not be within the power or ability of a private citizen unwillingly tossed into the media spotlight through the publication of completely untrue statements. Only a public figure could use his connections and representatives to remove this web page from further public view.

Petitioner contends that the web page as a whole amounts to defamation because Jackson omitted any reference to the fact that Petitioner did not authorize the page's creation. Although it is unlikely the page's intended audience would believe Petitioner even authored the page, a defendant's "omission may be so glaring and may result in such a gross distortion [of the facts] that by itself it constitutes some evidence of actual malice." *Huckabee*, 19 S.W.3d at 426. However, Jackson lacked any

awareness that omitting the fact that Petitioner did not authorize the web page would create a substantially false impression of him because the events in the photos actually occurred and he was present at all of them. If the contents of the web page are substantially true, then Jackson could not have created her web page with actual malice.

C. Jackson's Mere Posting of Genuine Photographs and Humorous Information on Her Web Page Did Not Cause Special Damage to Petitioner's Reputation.

Central to Petitioner's claim is that Jackson's private web page was the proximate cause of both the ABL commissioners declaring Petitioner ineligible and the alleged loss of Petitioner's speculative endorsement deals. However, the ABL did not declare Petitioner ineligible, and others did not break off negotiations with him, until seeing ESPN and *Sports News* publish the content of Jackson's private web page with added editorial commentary. (R. at 6.) Petitioner cannot show that Jackson's private web page directly or indirectly caused damage.

To recover for defamation Petitioner must establish that publication of an allegedly defamatory statement caused special damage to his reputation. Restatement (Second) of Torts § 558 (1977). The damages alleged by Petitioner did not occur until a *Sports News* reporter and ESPN irresponsibly republished the content of Jackson's private web page without verifying its accuracy. Publication of defamatory matter is any act by which the defamatory matter is intentionally or negligently communicated to a third person. Restatement (Second) of Torts § 577 cmt. a (1977). Jackson never intentionally or negligently communicated her web page to a third person because a *Sports News* reporter had to circumvent Jackson's privacy settings to gain access to her web page. (R. at 4, 5.) Petitioner thus fails to meet his burden of proving that Jackson intentionally or negligently caused her private web page to be revealed to a third person. Rather, the embarrassing photos of Petitioner were published to a wider audience—and thus to multiple third persons—by *Sports News* and ESPN, not Jackson.

D. Jackson Had a Reasonable Expectation of Privacy when She Created Her Web Page and Allowing Petitioner's Defamation Claim to Succeed Would Chill Free Expression on the Internet.

To prove defamation, Petitioner must show that Jackson's creation of her private web page was unprivileged, or without his authorization or approval. Jackson admits that she created the web page to, at most, "take him down a notch" within the social structure of Marshall State.

(R. at 4.) She never intended for the web page to affect Petitioner's professional career.

The privilege Jackson enjoyed to create the web page arises from the First Amendment to the United States Constitution, which protects freedom of expression. Jackson's private web page arguably is no different than a diary kept by a college student upset about her boyfriend dumping her to date a model. The only difference: Jackson expressed her private thoughts about Petitioner online. As stated above, "the context in which statements are made is an important factor in determining meaning in defamation cases." Rowland, 110 Penn. St. L. Rev. at 538. In cases involving Internet publication, "context . . . should also include a consideration of the mode of publication." *Id.* Jackson reasonably believed that her web page expressing private opinions about Petitioner would remain shielded from public eyes. The Supreme Court has held that "imaginative expression" and "rhetorical hyperbole" deserves First Amendment protection because such statements cannot be "reasonably interpreted as stating actual facts." *Milkovich*, 497 U.S. at 20. Permitting Petitioner's claim to continue would stifle the freedom of expression on the Internet by making any word or image—even harmless ones—actionable. For the foregoing reasons, Petitioner has not offered sufficient evidence to establish a defamation claim.

III. JACKSON'S POSTING OF GENUINE PHOTOGRAPHS AND HUMOROUS INFORMATION ON HER PRIVATE WEB PAGE DID NOT INVADE PETITIONER'S PRIVACY BECAUSE THE WEB PAGE DID NOT PORTRAY HIM IN A FALSE LIGHT.

Under Marshall state law, a defendant who gives publicity to a matter concerning a plaintiff that places that person before the public in a false light is subject to liability for invasion of privacy, if (1) the false light in which the plaintiff was portrayed would be highly offensive to a reasonable person, and (2) the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be portrayed. Marshall Revised Code § 14.652. The Marshall state statute governing false light invasion of privacy mirrors the Restatement (Second) of Torts. *See* Restatement (Second) of Torts § 652E (1977). Because there is no case law on point that discusses Marshall's treatment of false light, it is necessary to obtain guidance from the case law of other jurisdictions.

The tort of false light invasion of privacy protects an individual's interest in not being forced to appear before the public in an objectionable false light or false position. Restatement (Second) of Torts § 652E (1977). Petitioner alleges that Jackson's posting of photographs, captions, and statements in a questionnaire format on her private web page

invaded his privacy by creating the false impression that Petitioner injured his knee, wore women's undergarments, and authorized publication of these facts on HoopsPlace.com. (R. at 8.) Petitioner reiterates his defamation claims, namely that Jackson's personal and private web page caused Marshall State students who viewed the page to believe he consumed alcoholic beverages, smoked marijuana, and actually said various humorous statements attributed to him. (R. at 7-8.) Petitioner fails to establish a false light claim because Jackson's creation of her private web page did not publicize any of Petitioner's private matters, did not portray him in a false light highly offensive to a reasonable person, and did not reflect any knowledge or reckless disregard as to the falsity of the web page's content and the alleged false light in which Petitioner would be placed.

A. Petitioner's False Light Claim Must Fail Because Jackson's Private Web Page Did Not Publicize Any of Petitioner's Private Matters.

According to the Restatement (Second) of Torts, which courts recognizing the claim of false light have almost universally adopted, publicity refers to communication of a matter to the public at large, or to so many persons that it must be regarded as "substantially certain to become one of public knowledge." *Moore v. Big Picture Co.*, 828 F.2d 270, 274 (5th Cir. 1987); Restatement (Second) of Torts § 652D (1977). In *Moore*, the Fifth Circuit considered whether statements about a film company employee were sufficiently publicized to find the film company liable for false light. 828 F.2d at 274. Because only one or two people heard the statement about the employee, the Court held that the element of publicity had not been met. *Id.* Similarly, in *Polin v. Dun & Bradstreet, Inc.*, the Tenth Circuit denied plaintiffs' false light claim against the defendant credit-reporting agency and affirmed the district court's decision to grant the defendant's summary judgment on the ground that the plaintiffs could not prove the element of publicity. 768 F.2d 1204, 1207 (10th Cir. 1985). Publicity was lacking because the plaintiffs only showed that the defendant sent their credit reports to seventeen people. *Id.* at 1206.

Moreover, in *La Mon v. City of Westport*, the Washington Court of Appeals rejected the plaintiffs' argument that, under the circumstances of their case, the publicity element could be inferred. 723 P.2d 470, 472 (Wash. Ct. App. 1986). The court held that the defendant city council's act of placing in the public library materials relating to a lawsuit involving the plaintiffs was not an actionable basis for a false light claim because the file was only accessible to the public through the librarian or her staff, the plaintiffs failed to identify any third party who read the file, and it was "highly unlikely" that anyone actually did read the file. *Id.* The inference of publicity was weak because the defendant did not

place the allegedly objectionable material on a library rack where the public could access it easily. 723 P.2d at 473. Although publicity cannot be inferred when it is highly unlikely that anyone viewed the matter, courts have held that statements in circulating newspapers can generate sufficient publicity for a false light claim. *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 990 (Ill. 1989) (holding that an ad in a circulating newspaper that falsely stated the plaintiff was selling his farm at a public auction met the publicity requirement of a false light claim); *see also Villalovos v. Sundance Assocs.*, No. 01–C8468, 2003 U.S. Dist. Lexis 387, at *6 (N.D. Ill. Jan. 10, 2003) (ruling that "[p]ublication in a magazine or newspaper is a quintessential method for placing people before the public").

Here, each of Petitioner's false light allegations fails because Jackson's private web page on HoopsPlace.com did not publicize any of Petitioner's private matters. Jackson labeled her personal web page "private" so that only other registered users who identified themselves as Marshall State students could access the page. (R. at 4.) Furthermore, HoopsPlace.com was marketed primarily to college students and sports fans—not to the general public. (R. at 4.) Pursuant to *Moore* and *Polin*, it was not substantially certain that the web page and any of its contents would become widespread public knowledge. The mere possibility that Marshall State students registered on HoopsPlace.com potentially could log in and view Jackson's web page, without any proof that anyone actually did so, does not constitute substantial certainty that the web page became widespread public knowledge as a result of Jackson's actions. Under *La Mon*, no inference of publicity exists here because Petitioner failed to produce any evidence as to how many individuals actually viewed Jackson's private web page. (R. at 5.) Aside from the *Sports News* writer, there is no proof that any other person accessed Jackson's web page and viewed its contents. (R. at 5.) Furthermore, a statement in a newspaper is clearly distinguishable from the personal, private web page in this case. A circulating publication is more likely to reach a widespread public audience, whereas, by its nature, a private web page is much more limited. Publicity is lacking for each of Petitioner's allegations, and therefore his false light claim fails.

B. Genuine Photographs and Humorous Information Concerning Petitioner on Jackson's Private Web Page Did Not Portray Petitioner in a False Light that Is Highly Offensive to a Reasonable Person.

In addition to proving publicity, Petitioner must demonstrate that Jackson's posting of genuine photographs and humorous information on her private web page placed Petitioner in (1) a false light that is (2) highly offensive to a reasonable person. Marshall Revised Code § 14.652.

1. The Content of Jackson's Private Web Page Did Not Falsely Portray Petitioner Because the Photos Reflect Petitioner's Own Conduct and the Web Page's Text and Format Merely Satirize Petitioner's Celebrity.

To sustain a false light claim, the portrayal of the plaintiff must be "substantially false." *Machleder v. Diaz*, 801 F.2d 46, 49 (2d Cir. 1986). The plaintiff also must identify the particular statements that are false and that invade his privacy. *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So. 2d 77, 81 (Miss. 1986). In *Machleder*, the plaintiff alleged that the defendant news station broadcast a public report that portrayed him in a false light and invaded his privacy. 801 F.2d at 48. The plaintiff, who owned a company that used hazardous chemicals, was the focus of an investigative report on the dumping of chemicals. *Id.* at 49. During the report, the plaintiff "became agitated," ordered the camera to be removed, and later requested that the defendant refrain from broadcasting the report. *Id.* at 50. The Second Circuit rejected the plaintiff's false light claim because he could not prove falsity, stating that "[a]ny portrayal of plaintiff as intemperate and evasive could not be false since it was based on his own conduct which was accurately captured by the cameras." *Id.* at 57. Similarly, in *Pope*, the Seventh Circuit held that the defendant publisher never portrayed the plaintiff in a false light because articles reporting criticism of the plaintiff's building projects were "substantially true." 95 F.3d at 616.

As in *Machleder* and *Pope*, Petitioner's false light claim fails because the web page's portrayal of him was substantially true. The photographs reflect Petitioner's own conduct. Moreover, under *Prescott*, Petitioner fails to produce any evidence to support his claims that the events depicted in the photos were indeed false. Petitioner alleges that Jackson's private web page created the impression that he injured his knee, yet Petitioner was in fact wearing a large bandage on his knee and leaning on a pair of crutches in one photograph. (R. at 5.) Likewise, in another photograph, Petitioner actually wore, and allowed himself to be photographed wearing, lipstick and women's undergarments. (R. at 5.) The events depicted in the photographs in fact occurred, and Petitioner was present at all of them. Jackson never altered the photos to create a false impression of Petitioner. Furthermore, nothing on the web page implies that Petitioner's poses captured on camera constitute his everyday behaviors and habits. Several photos show Petitioner surrounded by alcoholic beverages and wearing a t-shirt with a marijuana leaf on it while seated next to a student smoking what looks like a marijuana cigarette. (R. at 5.) Any inference about Petitioner's use of alcohol and drugs does not arise from Jackson's posting of these photos on her private web page. The fact that the photos of Petitioner would not have been posted on a

web page for the *Sports News* writer to access but for Jackson's involvement does not make the photographs false.

Photographs that fairly and accurately depict an individual are not actionable under false light invasion of privacy, even if the photographs place the person in a less than flattering light, unless they "surpass the limits of decency by being highly offensive to persons of ordinary sensibilities." *Aisenson v. Am. Broad. Co.*, 220 Cal. App. 3d 146, 161 (Cal. Ct. App. 1990). As set forth above, the photos on Jackson's private web page are accurate depictions of Petitioner. The photos merely depict typical social events on any college campus and do not come close to surpassing the limits of decency. Thus, pursuant to *Aisenson*, Jackson is not responsible if genuine photographs place Petitioner in a less than flattering light. Moreover, failure to include additional facts that might have cast an individual in a more favorable or balanced light does not constitute falsity. *Machleder*, 801 F.2d at 55. Under *Machleder*, Jackson's choice to refrain from placing a disclaimer on her personal web page, which would have explicitly put Petitioner in a more favorable light, is not actionable under the false light tort.

Courts have held that truthful statements and context may leave a false impression and thus could be actionable as false light. *Prescott*, 497 So. 2d. at 80. However, an action for false light fails when the statement sued upon cannot be reasonably viewed as a factual claim and is "nothing more than a joke or a spoof." *Stien & Bauman v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 380 (Utah Ct. App. 1997). In *Stien*, the plaintiff alleged that a video presented at a company party, which was edited so employees appeared to be answering the question "What's sex like with your partner?" invaded her privacy by portraying her in a false light. *Id.* at 376. The court held that the false light claim failed because plaintiff could not show that the videotaped statements could have been understood by a reasonable person to be "something other than a joke or a spoof." *Id.* at 380. The partygoers who viewed the video did not develop a false impression of the plaintiff because they "had to know it was a spoof, devoid of any real or purported factual material." *Id.* Similarly, in *Dworkin v. Hustler Magazine, Inc.*, the court rejected the plaintiff's false light claim because the defendant's cartoon drawing "could not be reasonably understood as describing actual facts" about the plaintiff. 668 F. Supp. 1408, 1420 (C.D. Cal. 1987) (citing *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982)); *see also Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1019 (1st Cir. 1988) (in the context of a magazine, photos and text could not reasonably imply the plaintiff's consent or endorsement).

Captions accompanying photographs are not actionable under false light if they are "clearly understood as being parody, satire, humor, or fantasy." *Salek v. Passaic Collegiate Sch.*, 605 A.2d 276, 278 (N.J. Super.

Ct. App. Div. 1992). In *Salek*, the court held that the photos and captions in a yearbook, when taken into context, did not create a false impression of the plaintiff. *Id.* at 278-79. When determining whether a statement can be the basis of a false light claim, courts "must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published." *Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980).

Because Petitioner cannot show that the photos on Jackson's private web page are false, Petitioner's claim essentially rests on the idea that he never uttered the statements contained in the captions nor personally provided the information contained in the questionnaire and class schedule. However, under *Dworkin* and *Fudge*, no reasonable person could understand the web page's textual content to describe actual facts, private or otherwise, about Petitioner. As in *Stien*, the captions, questionnaire, and class schedule do not falsely portray Petitioner since any viewer would recognize the humorous tone of the web page. Following *Salek* and *Information Control*, this Court should consider the context of the allegedly false matter, the medium by which it is disseminated, and the audience to which it is aimed. Given the humorous tone of Jackson's private web page, the nature of social networking websites such as HoopsPlace.com, and the audience of college students to which Jackson's web page is addressed, the non-photographic material on the web page cannot be understood to be anything other than a joke or spoof. A reasonable Marshall State student viewer of the web page could not take seriously the phrases "I'm high on State!" and "I can dance on one leg!" and would understand that the questionnaire's assertion that Petitioner was enrolled in a Basket Weaving course was a joke. Moreover, no student would think that Petitioner, a star basketball player, would create a web page containing photographs depicting him wearing women's undergarments and makeup, posing with crutches and a bandage on his knee, and surrounded by alcohol and marijuana paraphernalia. The format of and captions on Jackson's private web page, together with the photographs, made it clear that the web page was merely a spoof of Petitioner.

2. The Photographs, Textual Content, and Format of Jackson's Private Web Page Did Not Portray Petitioner in a False Light that Is Highly Offensive to a Reasonable Person.

Even if the web page depicted Petitioner in a false light, Petitioner's false light claim fails because the material posted was not highly offensive to a reasonable person. A false light claim requires that the plaintiff show that the defendant misrepresented his character, history, activities or beliefs in such a way that the plaintiff, as a reasonable person, would be justified in the eyes of the community in feeling seriously offended

and aggrieved by the publicity. Restatement (Second) of Torts § 652E (1977). Courts have narrowly construed the "highly offensive" standard to "avoid a head-on collision with First Amendment rights." *Machleder*, 801 F.2d at 58. The cases in which courts have recognized portrayals that are highly offensive to a reasonable person involve egregious invasions of privacy. *Id. See, e.g.*, *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 248 (1974) (finding that false light in publisher's portrayal of individual and her family as living in poverty exposed them to pity and ridicule); *Time, Inc. v. Hill*, 385 U.S. 374, 378 (1967) (holding that falsely portraying a family held hostage, including depicting violence and verbal sexual insult, constituted false light); *Villalovos*, 2003 U.S. Dist. LEXIS 387, at *7-8 (holding that the advertisement at issue was "offensive," "lewd," and "derogatory" and thus met the highly offensive standard for false light because it imputed plaintiff with a "desire to commit adultery and to be used and abused as a sex object").

A portrayal of an individual does not meet the "highly offensive" threshold if the individual willingly allowed himself to be portrayed in the allegedly false light. *Collier v. Murphy*, No. 02–C2121, 2003 U.S. Dist. LEXIS 4821, at *11 (N.D. Ill. Mar. 23, 2003). Here, as set forth above, Petitioner allowed himself to be photographed surrounded by marijuana and alcohol, wearing lipstick and women's undergarments, and with a bandage on one knee. (R. at 5.) Any impressions created by the photographs of Petitioner, false or otherwise, do not rise to the level of "highly offensive." In contrast to *Cantrell*, *Time*, and *Villalovos*, the depiction of Petitioner on Jackson's private web page was not all egregious. The private web page, at most, depicts Petitioner as a typical, fun-loving college student.

Petitioner alleges that Jackson's web page falsely implied that he created or authorized her private web page. Thus, the issue is whether the false light in which Petitioner was allegedly portrayed is highly offensive to a reasonable person. The issue is *not* whether Jackson's actions are highly offensive. The act of creating or authorizing the web page was not by itself any more offensive than any of the content contained therein. A reasonable person would not be offended *per se* by the everyday act of creating or authorizing this web page. Thus, if a reasonable person were to take any offense to Petitioner's creation or authorization of Jackson's web page, the offense must stem from the content of her web page. Nevertheless, as set forth previously, Jackson has shown that none of Petitioner's false light allegations dealing with the specific content of the web page would be highly offensive to a reasonable person. Therefore, the false light in which Petitioner alleges he was portrayed—specifically, the false impression that he created or authorized the web page—was not highly offensive to a reasonable person, and hence Petitioner's false light claim fails.

C. Jackson's Private Web Page Is an Outlet for Creative and Humorous Expression, and Therefore Her Postings on Her Web Page Did Not Constitute Actual Malice.

To prove the final element of a false light claim, the plaintiff must demonstrate that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. Marshall Revised Code § 14.652; *see also Dworkin*, 668 F. Supp. at 1418 (citing *New York Times Co.*, 376 U.S. at 279-80). Mere negligence is insufficient to establish the level of fault under a false light invasion of privacy claim. *Zeran v. Diamond Broad.*, 203 F.3d 714, 720 (10th Cir. 2000). As with his defamation claim, Petitioner fails to prove with "convincing clarity" that Jackson created her web page with "actual malice"—that is, that she posted the false content "intentionally or with reckless disregard as to whether it was false." *Howard v. Antilla*, 294 F.3d 244, 249 (1st Cir. 2002).

Here, Petitioner cannot demonstrate that Jackson created her private web page with knowledge or with reckless disregard as to the falsity of the web page's content. As mentioned above, the photographs on Jackson's web page are not an actionable basis for a false light claim because the photographs depict actual events and are not capable of putting Petitioner in a false light in the first place. Because the element of falsity has not been established, under *Howard*, the standard of reckless disregard or knowledge as to the falsity of the material on Jackson's web page does not even apply. Regarding the textual content of Jackson's web page, specifically the questionnaire and the captions accompanying the photographs, the standard also does not apply because the web page was a creative and humorous outlet for Jackson to express her emotions.

Petitioner fails to establish any element of false light, much less all of the elements that are required for an actionable invasion of privacy claim. It was not substantially certain that Jackson's private web page or any of its content would become widespread public knowledge.The photographs of Petitioner were substantially true and therefore not actionable on a false light claim. As to the non-photographic material, no reasonable person would view the captions and questionnaire format of the web page as fact, so Petitioner cannot establish the element of falsity. Furthermore, there is nothing highly offensive about the content of Jackson's web page or its format. Finally, Jackson's actions do not constitute actual malice. Therefore, there is no genuine issue of material fact in Petitioner's false light claim, and this Court should affirm the Court of Appeals' decision and grant summary judgment in favor of Jackson.

CONCLUSION

Jackson did not interfere with Petitioner's prospective economic advantage because no valid business expectancy existed between Petitioner and the unidentified corporations, and even if such expectancy existed, Jackson had no knowledge of it. Jackson also did not defame Petitioner by posting genuine photographs and humorous information on her private web page. The content of Jackson's web page is reasonably susceptible to an innocent construction, and Petitioner, as a public figure, cannot show that Jackson acted with actual malice in creating her web page. Finally, Jackson did not invade Petitioner's privacy by portraying him in a false light because the genuine photographs and the humorous information concerning Petitioner could not be taken seriously by any reasonable viewers of the web page. Permitting Petitioner's causes of action to succeed would chill and erode Jackson's fundamental right to freedom of expression on the Internet. Expression in an online forum deserves just as much—if not more—protection by the First Amendment to the United States Constitution. For the foregoing reasons, Jackson respectfully requests that this Court affirm the decision of the Court of Appeals.

Respectfully Submitted,

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Attorneys for Respondant