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2002 MOOT COURT COMPETITION

BENCH MEMORANDUM

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IN THE SUPREME COURT OF THE STATE OF MARSHALL

ROBERT ALAZORK,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 2002-CV-3024
	)	
HAUL n' RIDE, INC.,	)	
	)	
Defendant-Appellee.	)	

I. INTRODUCTION

This is an appeal by the Plaintiff-Appellant Robert Alazork ("Plaintiff") from the Order of the First District Court of Appeals, affirming the decision of the Potter County Circuit Court granting summary judgment in favor of the Defendant-Appellee Haul n' Ride, Inc. ("Defendant") in case number 2002-CV-3024.[1]

In affirming the Potter County Circuit Court, the First District addressed assignments of error related to three separate causes of action: intrusion upon seclusion, defamation, and deceptive business practices. On the claim of intrusion upon seclusion, the First District held that the Plaintiff had failed to establish any of the requisite elements for the intrusion upon seclusion as defined by the RESTATEMENT (SECOND) OF TORTS (adopted by the State of Marshall).[2] On the issue of defamation, the First District held that the Defendant's statements did not constitute defamation as defined by the RESTATEMENT (SECOND) OF TORTS (adopted by the State of Marshall) and were properly classified as opinions or, at the very least, fair comment.[3] Finally, on the issue of deceptive business practices, the First District found the absence of any disputed material facts and, therefore, employed a strict breach of contract analysis from which it held that the Defendant did not in fact breach the contract.[4] On these bases, the First District affirmed summary judgment in favor of Defendant Haul n' Ride.[5]

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1. R. at 1-2, 10.
2. R. at 7.
3. R. at 8.
4. R. at 9-10.
5. R. at 10.

II. STATEMENT OF THE CASE

The undisputed facts follow. Robert Alazork is a twenty year-old sophomore who attends Capitol College, a private liberal arts college in Capitol City, West Ducoda.[6] He is a U.S. citizen of Zorkesian descent, born and raised in the State of Marshall.[7] He currently is, and at all times relevant to this litigation was, a resident of Smallville, a suburb of Marshall City in the eastern region of the State of Marshall.[8]

A. BABAZORK SCHOLARSHIP

Alazork received a scholarship for academic excellence from the Zorkesian-American Society of Marshall for the 2000-2001 academic year.[9] Applicants were required to submit an essay that described the importance of community involvement in both American and Zorkesian societies. A scholarship committee reviewed the essays and interviewed each of the applicants.[10] After the committee reduced the application pool to three, the remaining applicants met with Tom Babazork, the benefactor who sponsored the yearly scholarship.[11] Babazork then selected the scholarship recipient.[12]

Alazork applied for the scholarship in January 2000, and in May 2000 was told that he had been selected as the recipient for 2000-2001.[13] Babazork presented the award to Alazork at the annual Zorkesian-American Society meeting.[14] In his acceptance speech, Alazork spoke about the importance of excelling in school, serving the community, and honoring one's heritage.[15] Between May and August 2000, Alazork served as a spokesperson for the Zorkesian-American Society, attending a number of meetings and speaking to several community organizations.[16]

B. PLAINTIFF'S CONTACT WITH DEFENDANT

Alazork spent the summer of 2000 living with his parents in Smallville and working as a counselor for a city-sponsored day camp for underprivileged children.[17] He planned to move into an off-campus

6. R. at 2.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. R. at 2.
13. *Id.*
14. *Id.*
15. *Id.*
16. R. at 2-3.
17. *Id.*

apartment one week prior to the start of Capitol College's fall semester (classes began on September 9, 2000).[18]

1. *Phone Conversation*

On August 16, 2000, Alazork called the national toll-free number for Haul n' Ride, a rental truck company, and was automatically connected to the company's Smallville location.[19] Upon connection, he spoke with John Streeter, an employee of Haul n' Ride who acted as the Smallville rental agency manager.[20] Streeter explained that Haul n' Ride offers two types of rentals, local and one-way.[21] He defined locals as being rentals where the truck is used in town and is returned to Defendant's Smallville location.[22] He explained that one-way rentals were rentals in which the truck is taken out of state and returned to a different Haul n' Ride location.[23] The one-way rentals were much more expensive than local rentals.[24] Streeter explained that the one-way move rate was higher because of the cost of maintaining a national network of Haul n' Ride locations and because the company's insurance expenses were much higher for rentals in which a truck was driven in more than one state.[25]

After listening to Streeter's explanations, Alazork reserved a truck for three days as a local move.[26]

2. *Rental Agreement and Disclosure of Personal Information*

When Alazork rented the Haul n' Ride he was asked to volunteer information including his name, current and past addresses, present and former telephone numbers, mobile and work phone, three financial references and three personal references.[27] Alazork complied with the requests and identified Tom Babazork as his financial and personal reference. He told Streeter that he needed the truck to move back to his university for the fall semester.[28] Alazork's rental agreement provided that he would depart with the truck on August 20 and return August 23, 2000.[29]

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18. R. at 3.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. R. at 4; *see also* R. at Ex. B.
28. R. at 4-5.
29. R. at 5.

C. Plaintiff's Use of Defendant's Rental Truck

On August 22, Alazork arrived at Capitol College, which lies approximately thirty miles east of the Marshall state line.[30] He drove to his apartment building located two blocks from campus.[31] He double-parked the truck in front of the apartment building and began unloading his belongings and furniture.[32] The unloading took more time than he had anticipated.[33] He finally finished moving in at 6:00 p.m. on August 23.[34] Alazork decided to park the truck and drive it back to Streeter's Haul n' Ride location early the next morning.[35] However, Capitol City municipal rules dictate that no trucks can be parked on city streets overnight.[36] Therefore, Alazork parked the truck in the convenience store mall parking lot across the street from his apartment.[37] This mall had a convenience store, a cleaner, and an adult bookstore.[38] Alazork attempted to return the Haul n' Ride truck on August 24, 2000, one day later than the rental agreement required.[39] However, the Smallville storefront was closed when he arrived, so he left the keys in the after-hours box and returned to Capitol College.[40]

D. Defendant's Disclosures

On August 23, Streeter received a notice from the Haul n' Ride corporate office alerting him to a possible terrorist threat where a Haul n' Ride truck might be used to carry explosives into Capitol City.[41] Streeter immediately used GPS technology to determine the location of all of his rental trucks that were not presently on his dealership lot.[42]

Most of Haul n' Ride trucks are equipped with global positioning system ("GPS") technology.[43] GPS technology employs a network of satellites and ground stations that continuously transmit data over radio frequencies, along with devices that receive these transmissions and use them to calculate their own location via a method known as triangulation. Some devices that receive GPS transmissions are also capable of

30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. R. at 6.
40. *Id.*
41. R. at 5; *see also* R. at Ex. C.
42. *Id.*
43. R. at 3.

transmitting their location data so that it can be accessed remotely.[44] Location data can be correlated with other data to provide emergency services, navigation or travel information, stolen vehicle tracking, and other services.[45] GPS technology allows Haul n' Ride dealers to track the movement of their trucks and to locate them immediately in case of mechanical malfunction, accident or theft.[46] Each GPS device installed by Haul n' Ride maintains a trip log, recording the precise distance and route that the truck took.[47] The dealer can access this log upon the vehicle's return.[48] These GPS devices are located in the truck's engine compartment.[49] Alazork's truck was equipped with such a device.[50]

In recent years, Haul n' Ride has been the subject of negative publicity regarding the use of its trucks to transport immigrants into the country illegally and to transport illegal weapons and explosives within the country.[51] Several reports have suggested that Haul n' Ride trucks might be used in terrorist acts specifically involving extremist Zorkesians.[52] As a result, Haul n' Ride instituted a corporate "anti-terrorism" policy.[53] Under the policy, all Haul n' Ride dealers are required to request additional personally identifiable information when the renting customer appears suspicious. The policy specifically recommended that dealers scrutinize renters of Zorkesian descent and those customers who do not disclose their intentions upon renting a vehicle.[54]

Upon using the Defendant's GPS system, Streeter discovered that the truck Alazork had rented was located in Capitol City.[55] The GPS system gave him a street address, which he ran through a reverse directory on the Internet and identified as the address for an adult bookstore.[56] Streeter began contacting Alazork's references, and first called Babazork.[57] He informed Babazork that he had received a report of suspected terrorist activity and had learned that Alazork transported the rented truck out of state in violation of the rental agreement.[58] He disclosed to Babazork that he was worried Alazork "might be involved or in

44. R. at 3-4.
45. *Id.*
46. R. at 4.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. R. at 5.
56. *Id.*
57. *Id.*
58. *Id.*

trouble."[59] Streeter also informed Babazork that the truck had been parked at an adult bookstore in Capitol City and gave Babazork the bookstore's street address.[60]

E. Cancellation of Scholarship and Plaintiff's Communications with Babazork

Fearful of the negative publicity the Zorkesian-American Society would receive if it were leaked that the organization's scholarship recipient and spokesperson was associated with terrorist activity, Babazork cancelled Alazork's scholarship. Babazork made no attempt to verify the accuracy of Streeter's comments.[61]

After Alazork had returned the Defendant's truck and arrived back at college, he was informed that his scholarship had been revoked and that he would have to pay the full tuition and room and board for the semester prior to starting classes.[62] When Alazork confronted Babazork about his scholarship situation, Babazork told him, "I received a call from Haul n' Ride. They told me you were suspected of renting a truck for terrorist activity. They also told me that you were parked at the adult bookstore. We, in the Zorkesian-American Society, cannot afford that kind of publicity. If people were to hear that we paid for the education of a suspected terrorist, we would lose all of our members and come under heavy government scrutiny. We cannot accept this kind of risk."[63] Alazork was forced to quit school at Capitol College because he could not afford the tuition and fees.[64] On September 10, 2000, the student-run newspaper, the *Capitol College Gazette,* which is read by nearly all the 1,500 undergraduate students, ran a front-page story about Alazork's scholarship being revoked.[65]

F. Defendant's Explanation to Plaintiff

When Alazork called Haul n' Ride to try and determine what happened, Streeter informed him that because he took the truck across state lines, his credit card had been charged for the one-way rental at $1,900, rather than the local rate of $324 he had originally been quoted.[66]

Robert Alazork filed a three-count lawsuit based on this experience.[67] The Potter County Circuit Court granted Defendant's motion for

59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. R. at 7.
65. *Id.*
66. R. at 6.
67. *Id.*

summary judgment on all counts. The First District Court of Appeals affirmed the Circuit Court decision. This appeal followed.

III. ISSUES PRESENTED FOR REVIEW

Three issues have been raised on appeal which can be restated as: (1) whether the Court of Appeals erred in holding that the Plaintiff failed to established the requisite elements to evidence a theory of intrusion upon seclusion as defined by the RESTATEMENT (SECOND) OF TORTS; (2) whether the Court of Appeals erred in holding that the Defendant's statements to third parties were not defamatory but rather opinions or fair comment; and (3) whether the Court of Appeals erred in applying a strict breach of contract analysis to Plaintiff's claim for deceptive business practices, pursuant to the State of Marshall's Deceptive Business Practices statute, MARSHALL REVISED CODE, 505 MRC 815/2, and holding that the Defendant had no contractual obligation to inform Plaintiff that it employed GPS technology to track its vehicles.

IV. BACKGROUND

The following Background Section is divided into four parts. The first part discusses the GPS technology from which this action arose. The remaining three parts discuss each of the three substantive areas in dispute: intrusion upon seclusion, defamation, and deceptive business practices.

A. GLOBAL POSITIONING SYSTEM TECHNOLOGY

GPS is a satellite based radio-navigation system which permits land, sea and airborne users with GPS receivers to determine their three-dimensional position, velocity, and time twenty-four hours a day, in any weather condition, anywhere in the world. The satellite system is owned and operated by the U.S. Department of Defense for military applications. However, the system includes a frequency accessible to commercial and consumer users with GPS receivers.

1. *The GPS Technology*

The GPS technology consists of three segments: space, control, and user. The GPS space segment utilizes a constellation of twenty-four satellites in six circular orbits approximately 10,000 miles above Earth. These GPS satellites orbit the Earth every twelve hours emitting continuous navigation signals. The distance in space between the satellites enables a minimum of six satellites will be in view to users at any time, anywhere in the world.

The GPS control segment involves the operations of a master control station, five monitor stations, and three ground antennas. The monitor

stations track the navigation signals from the satellites. The master control station processes this information to determine satellite orbits and to update each satellite's navigation message. The master control station uses the ground antennas to transmit the updated information to each satellite.

The GPS user segment consists of the personal receivers, processors and antennas that allow individual operators to receive GPS satellite broadcasts and compute their position, velocity, and time. Each GPS satellite transmits a position and time signal.[68] From this information, anyone with the proper personal GPS technology can identify their exact location anywhere in the world. The personal technology (i.e., a GPS receiver) calculates a user's position on Earth by measuring the distance from the receiver to a group of the GPS satellites in space. Specifically, the receiver measures the time delay for a signal to travel between the receiver and satellites. This delay constitutes the direct measurement of the apparent range to the satellite. The receiver collects measurements simultaneously from three satellites to facilitate its calculation of the three dimensions of position, velocity, and time. This process is commonly referred to as "triangulation." Once calculated, the receiver displays the information in the form of a geographic position using specific longitude and latitude.[69] Some GPS receivers are equipped with display screens that show a map to illustrate location.

2. *Scope of Service*

The advent of GPS has prompted a broad range of military, scientific, industrial, commercial, and consumer applications of the technology. Military applications of GPS include navigation (land, sea, and air) and mapping. Scientists use GPS to measure the movement of the arctic ice sheets, the Earth's tectonic plates, and volcanic activity. Industries such as mining, construction and shipping use GPS for precision mapping data and location information. Airlines and shipping companies use GPS to acquire mapping data. GPS technology has expanded quickly

68. U.S. Navy, *USNO NAVSTAR Global Positioning System, GPS Capabilities, available at* http://tycho.usno.navy. mil/gpsinfo.html#sig (last visited Feb. 17, 2003). The satellites transmit on two L-Band frequencies and provide two levels of service. *Id.* The Standard Positioning Service (SPS) is available to all GPS users on a continuous, worldwide basis with no direct charge. *Id.* SPS provides a positioning accuracy of within 100 meters. *Id.* The Precise Positioning Service (PPS) is intended for the use of the U.S. Dept. of Defense for military and other authorized applications. *Id.* PPS provides a positioning accuracy of within 22 meters. *Id.* The PPS service is protected by cryptography. *Id.*

69. If a fourth satellite can be received, altitude can be figured as well. U.S. Navy, *USNO NAVSTAR Global Positioning System, GPS Time Transfer, available at* http:// tycho.usno.navy.mil/ gpsinfo.html#tt> (last visited Feb. 17, 2003). If the user is moving, the receiver may be able to calculate speed and direction of travel to estimate times of arrival to a specific location. *Id.*

with respect to automobiles. Drivers can use GPS receivers with electronic displays to obtain directional and mapping information.[70]

3. *Present Application*

The uses above primarily involve an individual with a receiver to identify his or her position and that of the vehicle in which the receiver has been installed. However, GPS receivers also have unique identifiers (imagine each cell phone having a unique cell phone number), and often also include storage and transmission capabilities. In certain circumstances, other individuals can use the identifiers to locate a particular receiver if they have the proper information. These tracking abilities facilitate search and rescue operations (i.e., locating black boxes from airplanes, tracking lost hikers), law enforcement efforts to locate stolen vehicles (and other property with GPS receivers), and parental efforts to monitor the driving habits of their of children.[71] In addition to the applications identified above, car and truck rental agencies have begun to use GPS receivers to track vehicles and monitor renters' driving behaviors. This appeal involves such use of GPS technology by the Defendant.

B. Intrusion Upon Seclusion

Currently, there is no precedent either through state courts or under federal legislation regarding GPS technology and one's recourse on the issue of an invasion of privacy – specifically intrusion upon seclusion. To be liable for the tortious intrusion upon seclusion, one must show: (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion must be offensive or objectionable to a reasonable person; (3) the matter on which the intrusion occurs must be private; and (4) the intrusion causes anguish and suffering.[72] Intrusion upon seclusion is a theory that allows for liability when the plaintiff did not consent to the physical intrusion in an area that is legally recognized or the unwarranted sensory intrusion.[73] The fundamental nature of this theory cen-

70. Dan Caterinicchia, *FCC Sets Tech Standards for Cellular 911 Calls, available at* http://www.cnn.com/TECH/ computing/9909/20/fcc.911.idg (last visited Feb. 17, 2003). GPS technology is also being incorporated into cellular phones to implement the U.S. Federal Communications Commission (FCC) required caller location information for 911. *Id.*

71. Topcon Positioning Systems, Inc., *Data Recording, available at* http://www.topconps.com/Company/receiver_requirements.html#Data%20Recording (last visited Feb. 17, 2003). Certain technologies can record GPS information for later review by computer. *See, e.g.,* Jayson Blair, *G.P.S. Aids Investigators at Attack Site, available at* http://www.linkspoint.com/nyt/G_P_S_Aids.html (last visited Feb. 17, 2003).

72. *Miller v. Motorola, Inc.*, 560 N.E. 2d 900, 904 (Ill. 1990). Lack of intimate personal facts or prying into legitimate private activities precluded tort. *Desnick v. ABC, Inc.*, 44 F. 3d 1345, 1353 (7th Cir. 1995).

73. *Shulman v. Group W. Prod.*, 955 P.2d 469, 490 (Cal. 1998).

ters on the idea of seclusion.[74] "To prove actionable intrusion, a plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding . . . or obtained unwanted access to data about, the plaintiff."[75]

Intrusion upon seclusion, one of the four invasion of privacy torts, could be the easiest to apply to the GPS context.[76] It is not required for this type of intrusion to be physical, in that it can also be sensory, as long as an individual's private concerns have been impinged upon.[77] Whether the intrusion on seclusion is highly offensive to a reasonable person, is a paramount deciding factor.[78]

Using this theory, Alazork can argue that the intrusion upon seclusion that he suffered was offensive to a reasonable person. Alazork can state that he was forthright with his dealings with Haul n' Ride, provided the company with all of the background information for the rental agreement, and was late with returning the truck by only the next morning. Alazork can argue that Haul n' Ride did not need to take such drastic measures as contacting his references and alerting them that he may be taking part in terrorist activities, which was purely speculation. Alazork will contend that Haul n' Ride's drastic assumption is highly offensive to himself, a reasonable person, and he should not have lost his scholarship over their careless accusation.

However, a trial court must determine whether this conduct meets the "offensiveness" standard for the intrusion upon seclusion claim.[79] In determining the degree of intrusion, the court needs to evaluate the context, conduct and circumstances surrounding the intrusion.[80] In addition, the court must look at the intruder's motive, the setting, and the expectation of those whose privacy was invaded.

Haul n' Ride may argue that due to the state of high alert the country is under because of recent terrorist bombings, it was not unreasonable in initiating a search for its missing truck. In addition, since Haul n' Ride trucks have been the vehicles used in several of these bombings, the company is extra cautious in keeping track of its vehicles to try and prevent any damaging events. The FBI sent out a notice that that there was a potential terrorist threat and the attackers may use a rental truck in

74. *Id.*

75. *Id.*

76. Aaron Reneger, *Satellite Tracking and the Right to Privacy*, 53 Hastings L.J. 549, 558 (2002).

77. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

78. *Id.*

79. James W. Hilliard, *A Familiar Tort that May Not Exist in Illinois: The Unreasonable Intrusion on Another's Seclusion*, 30 Loy. U. Chi. L.J. 601, 611 (1999).

80. *People for the Ethical Treatment of Animals v. Berosini, Ltd.*, 895 P.2d 1269, 1282 (Nov. 1995) (quoting *Miller v. Nat. Broad. Co.*, 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986)).

Capitol City. Haul n' Ride, in turn, used its GPS technology to track any of its vehicles not accounted for in its rental lot. It found the truck that Alazork rented, which was only to be a local rental, but instead had crossed state lines and was in Capitol City. Not only had Alazork violated his local rental contract terms, but also the vehicle's return was late and it was parked in the lot of an adult bookstore in Capitol City. This set of facts alarmed Haul n' Ride that this could be a possible terrorist positioning the truck for a bombing attempt. Haul n' Ride argues that it acted reasonably and used care in contacting Alazork's volunteer references to inform them to the fact that, based on the recent FBI alert, he may be involved or in trouble.

In the case of *United States v. McIver*, the Ninth Circuit Court of Appeals upheld law enforcement's warrentless placement of a GPS-device on the undercarriage of a suspect's car holding that it was neither a search nor a seizure.[81] The court held that since the undercarriage of a car is part of the exterior, therefore a search was not conducted.[82] Based on a Supreme Court case, *New York v. Class*, the court held that there is no reasonable expectation of privacy to the exterior of a car.[83] Furthermore, since the defendant remained in control and had power over of his vehicle and the GPS-device was only a technical trespass, no seizure occurred.[84]

Alazork may argue that the GPS device was in fact, not on the exterior of the car, but instead in the engine compartment. Also, he could argue that he was prevented from having power and control over his vehicle due to the intrusive tracking of his movements. Therefore, Alazork could argue that it was an unwarranted search and seizure and an unreasonable violation of his privacy in using the vehicle.

In defense, Haul n' Ride can argue that the GPS language is located in the terms and conditions of the rental agreement, that the customer had knowledge that this system exists and it was located in each vehicle. Haul n' Ride may also argue that by completing the standard rental agreement and accepting the terms and conditions contained within the agreement, Alazork consented to any intrusion, thereby negating any claim he raised. Haul n' Ride contends that it has not intruded upon the seclusion of the renter. Alazork had freedom to use the vehicle and it did not initiate the tracking device until the FBI issued the terrorist-bombing alert. In conclusion, if Haul n' Ride can demonstrate that it fully disclosed the presence of GPS technology in its vehicles and that Alazork accepted these terms, it may successfully defeat Alazork's claims.

81. 186 F. 3d 1119, 1126-27 (9th Cir. 1999).

82. *Id.*

83. *New York v. Class*, 475 U.S. 106 (1986).

84. *McIver*, 186 F. 3d at 1127.

C. DEFAMATION

To be liable for defamation, a plaintiff must show that there was: (1) a false and defamatory statement concerning another; (2) the statement was 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.[85]

As to the first element, a statement is defamatory if it tends to "harm 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."[86] Such defamatory statements can be either *per se* or *per quod*. A statement is defamatory *per quod* if the "defamatory character of the statement is not apparent on its face, and extrinsic facts are required to explain its defamatory meaning."[87] Conversely, a statement is defamatory *per se* when the "defamatory character of the statement is apparent on its face; that is, when the words used are so obvious and materially harmful to the plaintiff that injury to his reputation may be presumed."[88] Under the RESTATEMENT (SECOND) OF TORTS and the common law, there are four categories of defamatory *per se* statements: (1) words that impute a criminal offense or moral turpitude;[89] (2) words that impute a loathsome disease;[90] (3) words that ascribe an inability to perform

85. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

86. RESTATEMENT (SECOND) OF TORTS § 559 (1977); *see also Bryson v. News America Pub'ns, Inc.*, 672 N.E.2d 1207, 1214 (Ill. 1996).

87. *Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 206 (Ill. 1992).

88. *Id.* Further distinguishing defamatory *per se* and defamatory *per quod* statements is the type of damages that must be proven. With defamatory *per se* statements, a plaintiff is not required to show special harm. RESTATEMENT (SECOND) OF TORTS § 570 (1977). Under a defamatory *per quod* theory, however, a showing of special harm is required. *Id.*

89. RESTATEMENT (SECOND) OF TORTS § 571 (1977). Under this form of defamation, "one who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability . . . if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude." *Id.* The Restatement defines "moral turpitude" as "inherent baseness or vileness of principle in the human heart . . . in general, shameful wickedness, so extreme a departure from ordinary standards of honesty, good moral, justice or ethics as to be shocking to the moral sense of community." *Id.* at cmt. g. As to the actionability of the words, the defamatory language only needs to impute a criminal offense. *Id.* at cmt. c. However, it is not sufficient to simply allege that the there is a criminal intention or design, without also charging a criminal act. *Id.* A good illustration of this category of defamation is found in *Schnupp v. Smith*, 457 S.E.2d 42 (Va. 1995). In *Schnupp*, the defendant, a police officer, saw the plaintiff stop a company owned van in a high drug area where he witnessed a passenger of the van and a man from the street exchange money and some white rocks. *Id.* at 44. The defendant ordered another police unit to stop the van and search the vehicle. *Id.* The defendant did not participate in the search, which yielded no drugs or paraphernalia. *Id.*

90. RESTATEMENT (SECOND) OF TORTS § 572 (1977).

one's business, trade, or professional duties, including lack of ability;[91] and (4) words that impute serious sexual misconduct.[92]

As to the second element, publication occurs when the defamatory matter is negligently or intentionally communicated to a person other than the person being defamed, i.e. a third party.[93] The communication can be either by spoken word or gesture, in the case of slander, or by printed word for libel.[94] In publishing the defamatory statement, the third party recipient must "understand its defamatory significance."[95] While a defamatory statement must be published, there are occasions where the publication will be either protected under the First Amendment or privileged.[96] The claimed privileges relevant to this case are that the statements were either opinion or they were a "fair comment."[97]

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91. RESTATEMENT (SECOND) OF TORTS § 573 (1977).

92. RESTATEMENT (SECOND) OF TORTS §§ 570, 574 (1977); *see also Kolegas*, 672 N.E.2d at 207.

93. RESTATEMENT (SECOND) OF TORTS § 577 (1977).

94. RESTATEMENT (SECOND) OF TORTS § 577 cmt. a (1977).

95. RESTATEMENT (SECOND) OF TORTS § 577 cmt. c.; *see also* RESTATEMENT (SECOND) OF TORTS § 563 (1977).

96. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990) (regarding First Amendment protection); RESTATEMENT (SECOND) OF TORTS §§ 585-592A (1977) (covering absolute privileges); RESTATEMENT (SECOND) OF TORTS §§ 594-598A (1977) (covering conditional privileges).

97. *See* RESTATEMENT (SECOND) OF TORTS §§ 594, 598 (1997). Two other privileges are also relevant to the facts in the case but are not issues on appeal: protection of publisher's interest and communication to one who may act in the public behalf. *Id.* Under the protection of publisher's interest privilege, a publication will be privileged "if the circumstances induce a correct or reasonable belief that: (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest." RESTATEMENT (SECOND) OF TORTS § 594 (1977). Under this privilege, a publisher can protect "any lawful pecuniary interest," including "land, chattel, and intangible things." *Id.* at cmt. f. In this case, Haul n' Ride was protecting both intangible assets (business reputation) and its property (the truck), and Babazork may have had knowledge of Alazork's location, which could have helped Haul 'n Ride protect its interests. The public interest privilege differs in that statements are privileged "if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true." RESTATEMENT (SECOND) OF TORTS § 598 (1977). The public interest applies whenever "any recognized interest of the public is in danger," such as the prevention of crime and the apprehension of criminals. *Id.* at cmt. Furthermore, this privilege is not limited to publication to public officials or law enforcement officers, but can include publication to private citizens, which, if the statement were true, would give the recipient "a privilege to act for the purpose of preventing a crime or of apprehending a criminal or fugitive from justice." *Id.* at cmt. f. In this case, the statement concerning Alazork being involved in a terrorist plot involved an issue of public concern, however, it is not clear whether the publication to Babazork was allowable as Babazork was not authorized to act.

1. *Statements of Opinion*[98]

Prior to 1990, statements of opinion were assumed to be protected under the First Amendment against claims for defamation.[99] The rationale for this assumption was based on *dicta* in *Gertz v. Robert Welch,*[100] where the majority stated that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscious of judges and juries but on the competition of other ideas."[101] However, in *Milkovich Lorain Journal Co*,[102] the U.S. Supreme Court found that the courts were misapplying *Gertz* and held that there is no special privilege for "opinions" such that a publisher would not be held liable.[103] Instead, the Court determined that only those statements which "cannot reasonably be interpreted as stating actual facts" are protected under the First Amendment."[104] The distinction between whether a statement is an as-

98. RESTATEMENT (SECOND) OF TORTS, §566 cmt. b (1977). The RESTATEMENT (SECOND) OF TORTS and most states' common law distinguished between "pure" opinion and "mixed type" opinions. *Id.* A "pure" opinion was one where the publisher stated the facts that underlie the opinion. *Id.* For example, "I think he is an alcoholic because he has a beer every day" is a pure opinion. *See* RESTATEMENT (SECOND) OF TORTS § 566 illus. 4 (1977). A "mixed type" opinion is where the publisher states an opinion that is "apparently based on facts. . .that have not been stated. RESTATEMENT (SECOND) OF TORTS § 566, cmt. " For example, "I think he is an alcoholic" would be actionable because the basis of the opinion were not disclosed. RESTATEMENT (SECOND) OF TORTS § 566, illus. 3 (1977).

99. *See, e.g., Owen v. Carr*, 497 N.E.2d.1145 (Ill. 1986); *Ollman v. Evans*, 750 F.2d 970 (C.D.A.C.1984).

100. 418 U.S. 323 (1974).

101. *Id.* at 339-340.

102. 497 U.S. 1 (1990).

103. *Id.* at 21. Thus, the use of terms such as "I think" or "in my opinion" would not allow a publisher to escape liability. *Id.* at 18 (citing *Cianci v. New Times Publishing Co.*, F.2d 54, 64 (2d. Cir. 1980)).

104. *Kolegas,* 672 N.E.2d at 208 (citing *Milkovich*, 497 U.S. 1 at 20). As interpreted by other courts, "the question of whether a statement of opinion is actionable as defamation is one of degrees; the vaguer and more generalized the opinion, the more likely the opinion is nonactionable as a matter of law." *Wynne v. Loyola University of Chicago*, 741 N.E.2d 669, 676 (Ill. 2000). For example, in *Sullivan v. Conway*, the defendant stated that the plaintiff, an attorney, was a "very poor lawyer." *Sullivan v. Conway*, 157 F.3d 1092, 1097 (7th Cir. 1998). The court found that this type of statement was not actionable under defamation law because it was not objectionably verifiable because:

> [l]egal representation is attended by a great deal of uncertainty. Excellent lawyers may lose most of their cases because they are hired only in the most difficult ones, while poor lawyers may win cases because they turn away all the ones that would challenge their meager abilities. Many lawyers are good at some things and poor at others . . . so that the evaluation of them will depend on what the evaluator is interested in. It would be unmanageable to ask a court, in order to determine the validity of the defendants' defense of truth, to determine whether 'in fact' Sullivan is a poor lawyer.

Id.

sertion of fact or is opinion is a question of law.[105] In determining whether a statement constitutes an opinion or an assertion of fact:

> [a] court must examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court 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.[106]

2. *Fair Comment Privilege*

"Fair comment" is a common law affirmative defense or privilege to defamation.[107] Originally, the privilege only applied to statements of "pure opinion."[108] However, due to the *dicta* found in the *Gertz* decision whereby statements of "pure opinion" were found not to be actionable by state courts, the privilege was rendered of only historical value.[109] Under the Restatement's approach, only opinions that "impl[y] the allegation of undisclosed defamatory facts as the basis of the opinion" are actionable. However, the Supreme Court in *Milkovich* limited the *Gertz* decision and found that there was no special protection for opinions.[110] The basis for the Court's decision was that it did not need to carve out another protection, such as the "fair comment" privilege.[111] State courts have continued to analyze and apply this privilege.[112]

The purpose of the "fair comment" privilege is to encourage "valuable public debate" in order to advance the discussion of public affairs and public interests.[113] Under this speech-protective privilege, an action for defamation will not lie when the statement: (1) deals with a matter of public concern; (2) is based on true or privileged facts; and (3) represents the actual opinion of the speaker, but is not made for the sole purpose of causing harm.[114] Whether a statement involves a matter of public inter-

105. *Protective Factors Inc. v. Am. Broad. Co., Inc.*, 2002 WL 1477174, at *3 (D. Mass. 2002).

106. *Id.*

107. *Milkovich*, 497 U.S. at 13-14.

108. RESTATEMENT (SECOND) OF TORTS, § 566, cmts. a-b (1977).

109. RESTATEMENT (SECOND) OF TORTS, § 566, cmts. a-c (1977); Lee S. Kreindler, Blanca I. Rodriguez, David Beekman, David C. Cook, 14 N.Y. Prac. New York Law of Torts § 1:48 (July 2002).

110. *Milkovich,* 497 U.S. at 20.

111. *Id.* at 21.

112. *See, e.g., Myers v. The Telegraph*, 773 N.E.2d 192, 2002 (Ill. 2002); *Misek-Falkoff v. McDonald*, 177 F. Supp. 2d 224 (S.D.N.Y. 2001); *Gaylord Entm't Co. v. Thompson*, 958 P.2d 128 (Okla. 1998).

113. *Milkovich*, 497 U.S. at 13.

114. *Id.* at 13-14; *see also Gaylord Entm't Co.*, 958 P.2d 128, 145 n. 62 (Okla. 1998).

est is "determined by [the statement's] content, form and context."[115] Moreover, this privilege applies only to expressions of opinion and not to false statements of facts.[116] Thus, if a statement of opinion "implies a knowledge of facts which may lead to a defamatory conclusion, the implied facts must themselves be true."[117]

Alazork will likely argue that the trial court erred in finding that an opinion can be defamatory as a matter of law. Instead, Alazork will argue that it is objectively possible to determine whether he was a terrorist and this should have been submitted to the jury. For example, evidence that Alazork had no contact with known or suspected terrorists would verify that he was not a terrorist. Other indicia could also be found to verify this point such that the issue should have gone to the jury. As to the "fair comment" privilege, Alazork will likely argue that the comments were made to cause harm to himself, as the true intent of the comments were to recover Haul n' Ride's truck, which is not a matter of public concern.

Haul n' Ride will likely counter that his statement that Alazork "might be involved [in a terrorist plot] or in trouble" cannot be objectively verified and thus was protected by the First Amendment. It will likely point out that when examining the entire statement, that Streeter was using qualifying terms, in particular that Alazork, "*might* be involved." Moreover, as to the "fair comment" privilege, Haul n' Ride will likely argue that the comments dealt with preventing a possible terrorist attack which is a matter of public concern. Furthermore, his opinion was based on true facts such as where the van was located, the ethnicity of Alazork, and that there were reports of terrorist activity, and the statements were not made for the purpose of causing harm to Alazork but to prevent the harm of others.

Finally, Haul n' Ride may attempt to argue that Streeter's statements were privileged in other ways, such as trying protect a sufficiently important interest of Haul n' Ride or that the comments were made in the public's interest. Neither of these arguments should be considered because they were not a part of the Order Granting Leave to Appeal.

D. Deceptive Business Practices

Every state in this country has enacted a deceptive trade practice or consumer protection statute. Although these statutes vary from state to state and may be modeled after federal acts, they all have the same basic purpose: to protect the public from unfair or deceptive acts or practices

115. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (quoting *Connick v. Myers*, 461 U.S. 138 (1983)).

116. Restatement (Second) of Torts § 566 cmt. (1977).

117. *Eisenberg v. Alameda Newspapers, Inc.*, 88 Cal. Rptr. 2d 802 (Cal. 1999).

with respect to the sale of goods or services. The application of these statutes to the service industries produced the mixed results among the states.

The Deceptive Business Practices Act ("DBPA") provides a means for recovery against companies for unfair business practices. Under the DBPA, unfair or deceptive business practices are unlawful. Either the State Attorney General or private individuals may bring a Deceptive Business Practices suit against a business that employs unfair or deceptive practices to enjoin the business from further unfair practices and to recover damages from the business.

1. *The State of Marshall Deceptive Business Practices Act*

Recognizing the importance of protecting the public from exploitation of unfair or deceptive practices, the State of Marshall has enacted the DBPA. The statute provides in pertinent part:

> Unfair deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, in the conduct of any trade or commerce are hereby declared unlawful if, in fact, a reasonable person could be misled, deceived or damaged by said representations.[118]

The DBPA has been liberally interpreted by courts to give effect to the legislative goals behind the enactment.[119] More specifically, the DBPA is a policy that gives consumers broader protection than common law fraud or negligent misrepresentation by prohibiting any "deception, fraud, false material fact, with intent that others rely upon concealment in the conduct of any trade or commerce."[120]

In order to recover under the DBPA, a plaintiff must prove that: (1) a statement by seller; (2) was of an existing or future material fact; (3) that was untrue, without regard to the seller's knowledge or lack thereof of such untruth; (4) made for the purpose of inducing reliance; (5) on which plaintiff relies; and (6) which resulted in damages to the plaintiff.[121] Significantly, the DBPA does not require actual reliance.[122] As elsewhere, the application of this statute to the service industries, rather than manufacturers, has produced mixed results in the State of Marshall.

Most deceptive practices claims involve affirmative misrepresentations. For these claims, courts agree that the DBPA eliminates certain

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118. MARSHALL REVISED CODE, 505 MRC 815/2.
119. *Eshaghi v. Hanley Dawson Cadillac. Co.*, 574 N.E.2d 760, 764 (1991).
120. *Id.*
121. *Malooley v. Alice*, 621 N.E.2d 265, 268 (Ill. App. 3d Dist. 1993).
122. *Id.; see also Siegel v. Levy Org. Dev. Co., Inc.* 607 N.E.2d 194, 194 n. 2 (Ill. 1992).

elements of common law fraud as "many of the elements of common law fraud have been eliminated . . . therefore, this statute affords broader consumer protection than the common-law action of fraud by prohibiting any deception or false promise."[123] In comparing the requisite elements under the DBPA to those of common law fraud, it becomes clear that so long as the alleged deception occurred in a course of conduct involving trade or commerce, facts satisfying a claim for common law fraud will necessarily satisfy a claim under the DBPA.[124] It becomes also clear that that "good or bad faith of the seller is irrelevant, consequently, a plaintiff can recover for even innocent misrepresentations."[125]

a. The Plaintiff Must Establish Reasonable Reliance

In order to establish a cause of action under the DBPA, a plaintiff must prove reliance if he alleges that the defendant concealed or omitted a material fact. Under the Act, if liability is based upon the defendant's "concealment, suppression or omission" of material fact the plaintiff must prove that the defendant acted "with intent that others rely upon the concealment, suppression or omission of such material fact."[126] Circumstantial evidence can be used to prove intent.

For example, in *Elipas Enters., Inc. v. Silverstein*,[127] the court held that plaintiffs' complaint did not state a claim because the plaintiff did not allege reasonable reliance. The court opined that a private person seeking recovery under the Act must establish reasonable reliance.[128] In rendering its decision, the *Elipas* court distinguished *Siegel v. Levy Org. Dev. Co.*[129] on the ground that the Act allows the Attorney General to file enforcement suits without having to prove reasonable reliance.[130] Because the plaintiffs in *Elipas* were private individuals, they were required to prove reasonable reliance in order to state a cause of action.[131]

Similarly in *Martin v. Heingold Commodities, Inc.*, the plaintiffs alleged that that they were defrauded when the defendant misrepresented the nature of a "foreign service fee" in the sale of commodities to the plaintiffs.[132] The Illinois Supreme Court, following federal securities cases, held that plaintiffs were required to prove transaction causation

123. *See generally Ciampi v. Ogden Chrysler Plymouth, Inc.*, 634 N.E.2d 448 (Ill. App. 2d Dist. 1994).
124. *See Siegel*, 607 N.E.2d at 198.
125. *Id.*
126. MARSHALL REVISED CODE, 505 MRC 815/2.
127. 612 N.E.2d 9 (Ill. App. 3d Dist. 1993).
128. *Elipas*, 612 N.E.2d at 12.
129. 607 N.E.2d 194 (Ill. 1992).
130. *Elipas*, 612 N.E.2d at 12.
131. *Id.*
132. 643 N.E.2d 734, 737 (Ill. 1994).

and loss causation.[133] According to the court, "transaction causation" meant that "the investor would not have engaged in the transaction had the other party made truthful statements at the time required."[134] Further, "loss causation" signified that "the investor would not have suffered a loss if the facts were what he believed them to be."[135] In essence, the court viewed this as reasonable reliance.

b. Plaintiff Can Also Allege Material Fact To State A Cause Of Action

Nevertheless, courts do not agree on whether a plaintiff must prove reliance or materiality to recover on a misrepresentation claim. One court recently held that in order to recover under the DBPA, a plaintiff must prove that: (1) a statement by seller; (2) was of an existing or future material fact; (3) that was untrue, without regard to the seller's knowledge or lack thereof of such untruth; (4) made for the purpose of inducing reliance; (5) on which plaintiff relies; and (6) which resulted in damages to the plaintiff.[136]

Alternatively, other cases dispute the reliance requirement. In Illinois, the First Appellate District explained that a plaintiff "need not show actual reliance nor diligence in ascertaining the accuracy of the misstatements."[137] However, the Appellate District Courts remain split in Illinois, as the Second and Third Districts have held that a plaintiff must prove reasonable reliance.[138]

2. *Alazork's Anticipated Argument*

Alazork will first argue that the appellate court erred when it affirmed the summary judgment on the alleged violation of the DBPA. More specifically, Alazork will contend that Haul n' Ride intended to create reliance on his part. Applying these cases to the facts, Alazork will no doubt claim that Haul n' Ride concealed or omitted a material fact by failing to inform him of the additional charges that would be levied if the truck left the State of Marshall. Relying on the holding in *Heingold,*

133. *Id.* at 750.

134. *Id.*; *see also LHLC Corp. v. Cluett, Peadbody & Co.*, 842 F.2d 928, 931 (7th Cir. 1988).

135. *Id.*

136. *Malooley v. Alice*, 621 N.E.2d 265, 268 (Ill. App. 3d Dist. 1993).

137. *Harkala v. Wildwood Realty, Inc.*, 558 N.E.2d 195, 199 (Ill. App. 1st Dist. 1990).

138. *Borcherding v. Anderson Remodeling Co.*, 624 N.E.2d 887, 892 (Ill. App. 2d Dist. 1993), *appeal denied*, 633 N.E.2d 2 (Ill. 1994); *see also Roche v. Fireside Chrysler-Plymouth Mazda, Inc.* 600 N.E.2d 1218, 1227 (Ill. App. 3d Dist. 1992). Ultimately, reasonable reliance is required and will take precedence over materiality. *Bercoon, Weiner, Glick and Brook v. Mfrs. Hanover Trust Co.*, 818 F. Supp. 1152, 1159 (N.D. Ill. 1993); *Ciampi v. Ogden Chrysler Plymouth, Inc.* 634 N.E.2d 448, 460 (Ill. App. 2d Dist. 1994); 815 ILCS §505/2 (1993).

Alazork will argue that he would not have entered into the rental agreement had he know of the additional fees had Haul n' Ride disclosed such facts in the contract. Because the rental agreement was silent as to the use of GPS technology in the tracking of the rental truck, Alazork will argue that he should not have to pay the additional charges for taking the truck across state lines.

Alazork will further argue that the use of the GPS technology was known to Streeter at the time of the rental and the use of such technology was implemented to determine rental charges. Therefore, the use of such technology was a material fact to the contract that was never disclosed to Alazork.

3. *Haul n' Ride's Anticipated Argument*

Haul n' Ride, however, will most likely respond by arguing that summary judgment should be affirmed because Alazork cannot allege reasonable reliance. Relying on *Elipas Enters, Inc. v. Silverstein*,[139] Haul n' Ride will argue that a private person must establish reasonable reliance in order to seek recovery under a deceptive practice action. Haul n' Ride will contend that it was not bound by the rental agreement to notify, and thus reasonable reliance cannot be demonstrated. Because Alazork cannot establish reasonable reliance, Haul n' Ride will further argue that the material facts are not in dispute. Hence, the decision by the Court of Appeals granting summary judgment to Haul n' Ride should be affirmed.

139. 612 N.E.2d 9 (Ill. App. 1st Dist. 1993).

APPENDIX A

MARSHALL REVISED CODE, 505 MRC 815/2:

Unfair deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, in the conduct of any trade or commerce are hereby declared unlawful if, in fact, a reasonable person could be misled, deceived or damaged by said representations.

BRIEF FOR THE PETITIONER

No. 02-CV-3024

IN THE
SUPREME COURT OF MARSHALL
OCTOBER TERM 2002

ROBERT ALAZORK,
Petitioner,

v.

HAUL n' RIDE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
OF MARSHALL

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. WHETHER THE USE OF GPS SATELLITE TECHNOLOGY BY A VEHICLE RENTAL COMPANY TO GATHER PERSONAL INFORMATION ABOUT ITS CUSTOMERS' LOCATION CONSTITUTES AN INVASION OF PRIVACY BY INTRUSION UPON SECLUSION.

II. WHETHER A STATEMENT, PHRASED AS AN OPINION, THAT IMPLIES A FALSE ASSERTION OF CRIMINAL ACTIVITY OR OTHER WRONGDOING, IS PROTECTED OPINION OR FAIR COMMENT.

III. WHETHER THE USE OF GPS SATELLITE TECHNOLOGY BY A VEHICLE RENTAL COMPANY FOR NON-EMERGENCY PURPOSES CONSTITUTES AN UNFAIR DECEPTIVE BUSINESS PRACTICE WHERE THE RENTAL AGREEMENT LIMITS THE SCOPE OF GPS TO EMERGENCY LOCATION SERVICES.

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certify that the following listed parties have an interest in the outcome of this case. These representations are made so that the Justices of this Court may evaluate any possible disqualification or necessary recusal.

ROBERT ALAZORK ..... *Petitioner*

HAUL n' RIDE, INC..... *Respondent*

ATTORNEYS FOR ROBERT ALAZORK
PETITIONER
(Signatures omitted in accordance with section 1020(6) of the Rules for the Twenty-First Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law)

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TO THE HONORABLE SUPREME COURT OF THE STATE OF MARSHALL:

Petitioner, Robert Alazork, respectfully submits this brief in support of his request for reversal of the judgment of the court of appeals below.

OPINIONS BELOW

The opinion and order of the Potter County Circuit Court is unreported. The opinion and order of the First District Court of Appeals of the State of Marshall is also unreported and is set out in the record. (R. at 1-11.)

STATEMENT OF JURISDICTION

The Statement of Jurisdiction is omitted in accordance with Section 1020(2) of the Rules for the Twenty-First Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions: MARSHALL REVISED CODE, 505 MRC 815/2; MARSHALL REVISED CODE, 735 MRC 15/30; MARSHALL REVISED CODE, 735 MRC 15/40.

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Prior to the fall of 2000, twenty year-old Robert Alazork, a United States citizen of Zorkesian descent, was a student at Capitol College recognized for his academic excellence. (R. at 6.) Mr. Alazork served as a spokesperson for the Zorkesian-American Society of Marshall ("Society") and spent the summer of 2000 working with underprivileged children. (R. at 2-3.) When Mr. Alazork arrived at school at the beginning of the 2000 fall semester, he learned that his scholarship had been revoked and that he would have to pay the full tuition and room and board for the semester prior to starting classes. (R. at 6.) Unable to do so, Mr. Alazork was forced to quit college. (R. at 7.) On the second day of classes, September 10, *Capitol College Gazette*, read by nearly all 1500 students, ran a front-page story about his scholarship being revoked. (R. at 7.)

Mr. Alazork contacted his benefactor, Tom Babazork, who sponsored the award on behalf of the Society, about the revocation of his scholarship. (R. at 6.) Babazork informed him that a rental truck company, Haul n' Ride, had informed him that Mr. Alazork was suspected of terrorist activity, and had been spotted at an adult bookstore. (R. at 6.)

Babazork told Mr. Alazork that the Society could not afford such publicity and thus was forced to revoke his scholarship. (R. at 6.)

Mr. Alazork, when moving back to school at the end of the summer, rented a truck from Haul n' Ride to move his belongings from his parents' home in Smallville, Marshall, to his off-campus apartment at Capitol College in Capitol City, West Ducoda, which was thirty miles away. (R. at 3.) Initially, Mr. Alazork called Haul n' Ride's national toll-free number to gather information on renting a truck for his move. (R. at 3.) Via the national number, he was automatically connected to Haul n' Ride's Smallville location. (R. at 3.) Mr. Alazork spoke with Haul n' Ride's Smallville rental agency manager, John Streeter. (R. at 3.) Mr. Streeter explained that the company offered two types of rentals, "local" and "one-way." (R. at 3.) He told Mr. Alazork that local rentals involved the truck being returned to the same Haul n' Ride location that it was rented from, whereas one-way rentals allowed the truck to be returned to a different Haul n' Ride location. (R. at 3.) He further explained that one-way rentals were more expensive than local rentals as they necessitated the maintenance of national locations to which the trucks could be returned. (R. at 3.) Mr. Alazork, renting from the Smallville location to which he would eventually return the truck, reserved a truck for a "local" move. (R. at 3.)

Unknown to Mr. Alazork, Haul n' Ride had an anti-terrorism policy which stated that Zorkesian renters were suspicious and recommended that Zorkesian renters be scrutinized more than other customers. (R. at 4.) Because he was Zorkesian and thus automatically a suspected terrorist according to Haul n' Ride's policy, in order to rent a truck Mr. Alazork had to provide his name, current and past addresses, present and former telephone numbers, mobile and work phone, three financial references, and three personal references. (R. at 4.) Mr. Alazork complied with the requests, and listed his benefactor, Tom Babazork, as both a financial and personal reference. (R. at 4.) Mr. Alazork also informed Mr. Streeter that he would be using the truck to move back to his university for the fall semester. (R. at 4-5.)

On August 22, Mr. Alazork arrived at his apartment, approximately two blocks from the Capitol College campus. (R. at 5.) As he did not finish unloading the truck until 6 p.m., Mr. Alazork decided to park the truck overnight and return it to the Smallville Haul n' Ride early the next morning. (R. at 5.) Since he was prohibited by municipal rules from parking on the street overnight, Mr. Alazork parked the truck in a convenience store mall parking lot across the street. (R. at 5.) The mall had a convenience store, a dry-cleaner, and an adult bookstore. (R. at 5.)

Also unknown to Mr. Alazork, his rental truck was equipped with global positioning system technology ("GPS"). (R. at 4.) GPS employs a network of satellites and ground stations that continuously transmit

data over radio frequencies, along with devices that receive these transmissions and use them to calculate their own location via a method known as triangulation. (R. at 3.) It recorded the precise distance and route that each truck took, and enabled Haul n' Ride to determine the exact location of any of its GPS-equipped vehicles at any given time. (R. at 4-5.) The rental agreement stated that GPS might be used for emergency location services; however, no other mention of GPS was made in the rental agreement. (*See* Rental Agreement, Exhibit B.) The GPS device was located in the truck's engine compartment. (R. at 4.) On August 23, Mr. Streeter received a notice from the Haul n' Ride corporate office alerting him to a possible terrorist threat wherein a Haul n' Ride truck might be used to carry explosives into Capitol City. (R. at 5.) Mr. Streeter promptly used GPS to determine the location of all Haul n' Ride's trucks being currently rented. (R. at 5.) Accordingly, Mr. Streeter discovered that Mr. Alazork's truck was in Capitol City. (R. at 5.) He ran the GPS address through a reverse directory on the Internet and identified the address as that of an adult bookstore. (R. at 5.) Learning this, Mr. Streeter began contacting Mr. Alazork's references, and he first called Mr. Alazork's benefactor, Tom Babazork. (R. at 5.)

Mr. Streeter told Babazork that he had learned that Mr. Alazork had taken a Haul n' Ride truck out of Marshall and parked it at an adult bookstore. (R. at 5-6.) He told Babazork about the suspected terrorist activity, and said that he was worried that Mr. Alazork "might be involved or in trouble." (R. at 5-6.) Further, although Babazork made no attempt to verify the accuracy of Mr. Streeter's statements, fearful of the Society being associated with terrorist activity, Babazork cancelled Mr. Alazork's scholarship. (R. at 6.)

After eventually gleaning this information from Babazork, Mr. Alazork contacted Haul n' Ride to try to determine what had happened that would lead Haul n' Ride to tell his benefactor that he was a suspected terrorist and adult-bookstore patron. (R. at 6.) When he spoke with Mr. Streeter, the manager informed him that because he took the truck across state lines, his credit card had been charged for the "one-way" rental at a rate of $1900, rather than the local rate of $324 he had been quoted at the time he rented the truck. (R. at 6.)

II. SUMMARY OF THE PROCEEDINGS

Mr. Alazork sued Haul n' Ride in Potter County Circuit Court, State of Marshall, alleging the following: (1) that Haul n' Ride intruded upon his seclusion by using global positioning technology in its rental vehicles; (2) that Mr. Streeter's comments were defamatory; and (3) that Haul n' Ride violated the Deceptive Business Practice Act. (R. at 7). Neither Alazork nor Haul n' Ride dispute the facts as they are reported in the

record below. (R. at 2.) The Potter County Court granted summary judgment in favor of Haul n' Ride. (R. at 1.)

Mr. Alazork appealed the Potter County decision to the First District Court of Appeals of the State of Marshall. (R. at 1.) The court of appeals held that Mr. Alazork did not meet the elements of the State of Marshall's statute governing claims for intrusion upon seclusion. (R. at 7.) The court held that the use of GPS did not constitute an intrusion upon seclusion. (R. at 7.) According to the court, there was no evidence that the information collected was private. (R. at 7.) Finally, the court found that there was no indication that the use of GPS was highly offensive to a reasonable person. (R. at 7.)

The court also rejected Mr. Alazork's defamation claim, holding that Mr. Streeter's comments were either opinion or fair comment. (R. at 8.) Finally, the court rejected Mr. Alazork's Deceptive Business Practices Act claim. (R. at 9.) The court held that neither the failure to disclose the exorbitant out-of-state charge, nor the failure to disclose use of the GPS technology were material facts such that nondisclosure would constitute a violation of the Deceptive Business Practice Act. (R. at 9.) The court ultimately affirmed the Potter County Circuit Court's award of summary judgment. (R. at 10.) It is from this decision that Mr. Alazork appeals.

SUMMARY OF THE ARGUMENT

I.

Technology should not render privacy law obsolete. The advances in technology have increased dramatically over the past century, yet long-established privacy laws are flexible enough to keep up with technology's encroachment on personal privacy. GPS can save lives and generally be a benefit to society; however, in order for GPS to have a positive societal impact, average consumers must have faith that companies will not use GPS to pry into their private affairs. Therefore, the increase in technology demands an increase in privacy protection.

Haul n' Ride invaded Mr. Alazork's privacy by intruding upon his seclusion when it utilized GPS to pry into his private affairs. Two separate intrusions are present. First, without proper authority, Haul n' Ride's use of GPS to electronically spy on Mr. Alazork constituted an unauthorized intrusion into Mr. Alazork's zone of sensory privacy. Second, an intrusion occurred when Haul n' Ride accessed data from GPS without permission for the purpose of disclosing private and embarrassing facts about Mr. Alazork to others. Technology has distorted the line between what is private and what is public, and Mr. Alazork was not required to have an expectation of complete privacy concerning the location of his rental truck, even though it was in public. Thus, Mr. Alazork rea-

sonably expected that GPS would not be used to pry into his private affairs. Further, the unauthorized use of GPS to pry into Mr. Alazork's personal affairs would be highly offensive to a reasonable person. Therefore, Mr. Alazork has presented genuine issues of material fact with regards to the elements of intrusion upon seclusion, precluding summary judgment.

II.

Defamation law does not allow a speaker to damage a person's reputation without consequence merely because the speaker phrases his comment in the form of opinion. To that end, the First Amendment guarantee of free speech does not provide a *per se* exemption for statements of opinion. Rather, where a statement of opinion implies an assertion of objective fact, that statement will be actionable. Haul n' Ride defamed Mr. Alazork when its agent, Streeter, falsely accused Mr. Alazork of being a terrorist and a frequenter of adult bookstores. Although Streeter phrased his comment in the form of an opinion, his statements implied that Mr. Alazork was indeed a terrorist and a frequenter of adult bookstores. The First Amendment simply does not protect such malicious speech. Further, Haul n' Ride cannot hide behind the fair comment privilege. The fair comment privilege only applies to statements that are incapable of being proven true or false; therefore an accusation of criminal activity falls outside of the scope of the fair comment privilege. Further, a false accusation of criminal conduct cannot be considered a comment for the purpose of the fair comment privilege because such accusations have no redeeming social value. Therefore, neither the First Amendment guarantee of free speech nor the fair comment privilege shield Haul n' Ride from liability for Streeter's defamatory remark. Therefore, summary judgment on the defamation issue was improper.

III.

Further, the failure to fully disclose the various ways that GPS would be used against Mr. Alazork constituted an unfair deceptive business practice. The growth of GPS in rental vehicles has brought with it new and inventive ways to deceive unsuspecting consumers like Mr. Alazork. Mr. Alazork rented his vehicle with the assurance from Haul n' Ride that its rental vehicles would be equipped with GPS in case of an emergency only. Haul n' Ride capitalized on Mr. Alazork's naivety by charging him an exorbitant fee for breaking a minor contractual provision and disclosing personal information recorded by GPS to the Society. Under Marshall's Deceptive Business Practices Act, the omission of a material fact in the conduct of any trade or business constitutes a deceptive unfair practice. Summary judgment was improper because the

question of materiality is a question of fact that should, in all but the most extreme cases, be decided by the trier of fact. Various aspects of the transaction raise serious questions concerning materiality. Haul n' Ride's use of GPS was no more than a hidden charge in the rental agreement, and the failure to disclose its secret pecuniary interest in GPS was material. Haul n' Ride obscured the total amount of the fee and its method of discovery via GPS, thereby materially misrepresenting the actual fee charged to the customer. Haul n' Ride's failure to notify Mr. Alazork that information gathered via GPS would be disclosed the third persons also constitutes a material omission of fact.

ARGUMENT AND AUTHORITIES

I. HAUL N' RIDE'S UNAUTHORIZED USE OF GPS TO UNREASONABLY OBSERVE AND SCRUTINIZE MR. ALAZORK'S PRIVATE AFFAIRS CONSTITUTES AN INVASION OF PRIVACY BY INTRUSION UPON SECLUSION.

Concerned with the blossoming age of technology, Justices Samuel Warren and Louis Brandeis exclaimed in their famous law review article:

> The intensity and complexity of life . . . have rendered necessary some retreat from the world . . . so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon privacy, subjected [man] to mental pain and distress, far greater than could be inflicted by mere bodily injury.

Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 196 (1890). Although written in the nineteenth century, Justices Warren and Brandeis could have been referring to GPS when they warned future generations "numerous mechanical devices threaten to make good the prediction [that] 'what is whispered in the closet shall be proclaimed from the housetops.'" *Id.* at 195. There is no question GPS, when used properly, can be beneficial to society; however, in the absence of any meaningful state or federal legislation restricting its use, GPS threatens to allow meddlesome businesses, like Haul n' Ride, to intrude into the private affairs of the individual. *See* M.J. Zuckerman, *Wireless, with Strings Attached: A Cell Phone Can Make You Stand Out, to Rescuers and Marketers Alike*, USA Today, Feb. 7, 2002, at 1D.

The right to privacy has been described as "the rightful claim of the individual to determine the extent to which he wishes to share of himself with others." Adam Carlyle Breckenridge, *The Right to Privacy* 1 (1970). *Webster's* states information is private if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." *See United States Dep't of Justice v. Reporters Comm. for the Freedom of the Press*, 489 U.S. 749, 763-64 (1989) (quoting

Webster's Third New International Dictionary 1804 (1976)). The Orwellian aspect of GPS provides businesses ubiquitous access to the individual and robs him of the ability to control the flow of private information concerning his location. Such control robs the individual of his dignity and violates his right to privacy.

The State of Marshall recognizes the common-law tort of intrusion upon seclusion as embodied in the RESTATEMENT (SECOND) OF TORTS SECTION 652B (1977). The tort of intrusion upon seclusion is defined as an intentional intrusion, physical or otherwise, upon the solitude or seclusion of another person, or upon his private affairs or concerns. RESTATEMENT (SECOND) OF TORTS § 652B (1977). One is subject to liability to another for invasion of privacy if the intrusion would be highly offensive to a reasonable person. *Id.* As the following sections will illustrate, the plaintiff must first show an unauthorized penetration of a zone of physical or sensory privacy surrounding him. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998). An unwarranted examination of personal data also constitutes an intrusion. *Id.* Next, the plaintiff must have a reasonable expectation of privacy in the place, information, or conversation. *Id.* Last, the plaintiff must show that the intrusion is highly offensive to a reasonable person. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977).

This Court reviews *de novo* the decision of the court of appeals. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). All facts and inferences are taken in the light most favorable to the non-movant, Mr. Alazork, and summary judgment should only be given in the unlikely event that there are no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Therefore, if Mr. Alazork presents more than a scintilla of evidence concerning the material facts in dispute, then summary judgment is improper. *Id.* Further, the burden is on the movant, Haul n' Ride, to prove that there is an absence of evidence to support the non-movant's case. *Celotex*, 477 U.S. at 325. For the reasons set forth below, Mr. Alazork has presented several genuine issues of material fact. Therefore, the court of appeals' decision affirming the summary judgment in favor of Haul n' Ride should be reversed, and the case should be remanded for a trial on the merits.

A. THE USE OF GPS TO PRY INTO THE PERSONAL AFFAIRS OF MR. ALAZORK CONSTITUTES AN INTRUSION UPON SECLUSION.

For an intrusion to be actionable, Mr. Alazork first must show that "the defendant penetrated some zone of physical or sensory privacy . . . or obtained unwanted access to data about the plaintiff." *Shulman*, 955 P.2d at 490. The invasion of privacy can be accomplished by a physical intrusion into a place of seclusion, such as a physical invasion of the

plaintiff's home. *See Med. Lab. Mgmt. v. Am. Broad. Co.*, 30 F. Supp. 2d 1182, 1187 (D. Ariz. 1998). Or an intrusion can occur via the use of one's senses, with or without the use of mechanical aids, to pry into the plaintiff's private affairs, such as when a person uses binoculars to peer into another's home. *Id.* Further, an intrusion can occur where the defendant engages in some form of investigation in order to learn private information about the plaintiff, such as when a person examines another's bank account without authorization. *Id.* In the present case, Mr. Alazork has presented genuine issues of material fact concerning whether Haul n' Ride committed a sensory intrusion into his zone of privacy when it employed GPS to engage in high-tech espionage. Further, Mr. Alazork has presented genuine issues of material fact concerning whether Haul n' Ride committed an actionable intrusion by obtaining unwanted access to information about Mr. Alazork.

1. *The use of GPS constitutes a sensory invasion of Mr. Alazork's zone of privacy.*

GPS is an example of a "mechanical device" that threatens to invade a person's privacy. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890). The types of devices capable of secretly recording and transmitting personal information about a person have dramatically escalated in recent years. *See Shulman*, 955 P.2d at 473. GPS, used improperly, allows a person to exercise a great deal of control over another because of its omnipresence. The control exercised over the person robs him of his dignity and invades his privacy; consequently, the proliferation of GPS necessitates an increase in privacy protection.

As a general rule, the mere observation of a person's public activities is not an intrusion upon seclusion. *See Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1969). However, the general rule does not mean that everything occurring in public is fair game for inquiry. *Id.* Rather, when the sensory observation of a person's activities in public is overzealous, then such an observation can be an actionable intrusion. *See id.* Here, Haul n' Ride's unreasonable use of GPS, which provided ever-present access to private information about Mr. Alazork, amounts to overzealous public observation and is thus actionable.

In *Nader*, a well-known consumer advocate brought an action for invasion of privacy against General Motors ("GM") alleging GM authorized its agents to engage in activities that invaded his privacy. *Id.* at 767. Mr. Nader alleged GM agents followed him into a bank and got sufficiently close "to see the denominations of the bills he was withdrawing from his account." *Id.* at 771. The Court of Appeals of New York acknowledged the general rule that mere observation of the plaintiff in a

public place does not constitute an actionable intrusion upon seclusion. *Id.* However, the court stated, "A person does not automatically make public everything he does merely by being in a public place." *Id.* To that end, the court found that the shadowing of Mr. Nader by GM's agents was more than mere observation. *Id.* The court held overzealous public surveillance is an actionable intrusion. *Id.* The unreasonable proximity to Mr. Nader constituted the overzealous act. *See also Pinkerton Nat'l Detective Agency v. Stevens*, 132 S.E.2d 119, 124 (Ga. Ct. App. 1963) (holding constant public surveillance constitutes an actionable intrusion); *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 687 (Iowa 1987) (stating that public observation can amount to an invasion, particularly when plaintiff requests privacy). Consequently, Mr. Nader's intrusion claim was not insufficient as a matter of law merely because he was in a public location. *Nader*, 225 N.E.2d at 771.

As in the *Nader* case, Haul n' Ride's use of GPS constitutes an overzealous public observation of Mr. Alazork. In *Nader*, the court was concerned with the agent's unreasonable proximity to Mr. Nader. *See id.* GPS provided Haul n' Ride around-the-clock access to Mr. Alazork's location. (R. at 4.) Mr. Alazork was helpless to defend against such monitoring. Haul n' Ride did not properly notify Mr. Alazork of the extent of the use of GPS as evidenced by the rental agreement's description of GPS for emergency location services. (*See* Rental Agreement, Exhibit B.) Mr. Alazork was unaware that the truck was equipped with GPS as the device was concealed in the truck's engine compartment. (R. at 4.) Therefore, Haul n' Ride could surreptitiously monitor Mr. Alazork's location at all times. Because Mr. Alazork could not escape from Haul n' Ride's constant monitoring, his situation is analogous to the GM agents' unreasonable proximity to Mr. Nader. Hence, GPS use, which provides Haul n' Ride with all encompassing access to Mr. Alazork, is the overzealous act that makes the public observation in this case an actionable intrusion. *See E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016 (5th Cir. 1970).

Christopher is a trade secret appropriation case, but the case has privacy implications that are applicable to the case at bar. *Id.* at 1013. The defendants in *Christopher* were photographers hired to take aerial photographs of construction occurring at a plant in Texas owned by duPont. *Id.* The plaintiff alleged the defendants wrongfully obtained photographs that revealed trade secrets owned by duPont and sold them to third parties. *Id.* at 1014. Under Texas law, liability for disclosure of trade secrets attaches if the trade secrets are obtained by "improper means." *Id.* The defendants argued that the photographs were not obtained by improper means because all of the activities occurred in public airspace and the trade secrets were exposed to public viewing via aircraft. *Id.* However, the Fifth Circuit found the photographers used im-

proper means to discover the trade secrets. *Id* at 1016. The court noted it would be unreasonable to require duPont to build an "impenetrable fortress" to guard against such stealthy methods of observation. *Id* at 1016-17. The court stated, "[P]erhaps ordinary fences and roofs must be built to shut out incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available." *Id.* at 1016.

Likewise, this Court should not require Mr. Alazork to guard against the undetectable high-tech espionage engaged in by Haul n' Ride. *See, e.g., Wolfson v. Lewis*, 924 F. Supp. 1413, 1434 (E.D. Pa. 1996) (holding the use of a shotgun microphone to decipher private conservations constitutes an intrusion upon seclusion). Mr. Alazork was only "guilty" of parking his truck in a shopping center parking lot that happened to house an adult bookstore. (R. at 5.) As a consequence of Haul n' Ride's high-tech espionage, Mr. Alazork lost his scholarship and consequently was forced to withdraw from the university. (R. at 6-7.) The interest in individual privacy is just as important as the interest in protecting trade secrets. Therefore, it would be no less unreasonable to require Mr. Alazork to build an "impenetrable fortress" to guard against the undetectable intrusion via GPS. *See Christopher*, 431 F.2d at 1016-17. In the present case, the general rule that public observation of the plaintiff is a non-actionable intrusion should give way because constant GPS surveillance is unreasonable, and Mr. Alazork was helpless to guard against such intrusive monitoring.

2. *The use of GPS to improperly collect and examine private information about Mr. Alazork constitutes an actionable intrusion.*

Not only did the use of GPS constitute a sensory invasion of Mr. Alazork's privacy, but Haul n' Ride's examination of private location information via GPS for improper purposes also constituted an intrusion upon his seclusion. Probing into the private affairs of Mr. Alazork robs him of the right to control the extent to which he wishes to divulge personal information about himself to others. *See* Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1255 (1975) ("[T]he right of privacy is the right to control the flow of information concerning the details of one's individuality."). In such a situation, the examination alone is sufficient to create a claim for intrusion upon seclusion. *See Alexander v. FBI*, 971 F. Supp. 603, 610 (D.D.C. 1997). Publication of the information gathered is not an essential element of an intrusion claim. RESTATEMENT (SECOND) OF TORTS § 652B cmt. b. (1977). Despite the fact that Haul n' Ride did disseminate the wrongfully gathered information, an intrusion upon seclusion occurred the moment Haul

n' Ride utilized GPS to gather embarrassing private facts about Mr. Alazork. *See Alexander*, 971 F. Supp. at 610.

The United States District Court for the District of Columbia recently recognized that a request of FBI files for improper purposes is an intrusion upon seclusion. *Id.* The *Alexander* case arose from what has been popularly called "Filegate." *Id.* at 605. The plaintiffs, former Bush and Reagan administration employees and appointees, sued former First Lady Hillary Clinton and other White House personnel for intrusion upon seclusion. *Id.* The plaintiffs alleged that making improper requests for their Federal Bureau of Investigation ("FBI") files invaded their privacy. *Id.* The defendants argued that no intrusion occurred because the FBI files were largely matters of public record. *Id.* Although the files contained public information, the court found the plaintiffs nonetheless had a privacy interest because the files could also contain embarrassing private information about the plaintiffs. *Id.* at 609. The court found the complaint valid because it alleged that the sole purpose of the defendants' request was to "obtain embarrassing or damaging information on former employees . . . for partisan political purposes." *Id.* Therefore, where the collection of information, regardless of its public nature, is done merely for the purpose of exposing private and potentially embarrassing information about the plaintiff, an intrusion upon seclusion has occurred. *Id.*

Alexander is analogous to the present case because Haul n' Ride's motive for collecting information concerning Mr. Alazork's location was to disclose personal information about him. According to the rental contract, GPS was to be used only for emergency location services. (*See* Rental Agreement, Exhibit B.) Yet, upon learning the allegedly damning information about Mr. Alazork, Streeter did not call a supervisor or any law enforcement authority. (R. at 5.) Instead, he contacted Mr. Alazork's references. (R. at 5.) Streeter first called Mr. Babazork, the sponsor of Mr. Alazork's scholarship, and told him that Mr. Alazork was parked in an adult bookstore and might be involved in terrorist activity. (R. at 5-6.) Had this information been gathered for emergency location services, Streeter would have immediately contacted the proper authorities instead of Mr. Alazork's peers. The dissemination of this information to Mr. Alazork's references is evidence of Haul n' Ride's motive to embarrass Mr. Alazork. Haul n' Ride's motive is further evidenced by its policy of targeting Zorkesians for heightened rental scrutiny. According to Haul n' Ride's policy, renters of Zorkesian descent were automatically suspect. (R. at 4.) As a Zorkesian, Mr. Alazork was, according to Haul n' Ride's policy, a suspected terrorist. (R. at 4.) As such, even after disclosing extensive personal information prior to renting, Mr. Alazork was monitored via GPS and information about his whereabouts was used to embarrass him. Because the collection of information via GPS was solely

to make personal disclosures about Mr. Alazork, then according to *Alexander*, Mr. Alazork has stated a valid cause of action for intrusion upon seclusion. *See* 971 F. Supp. at 610. Therefore, there is a question of fact concerning whether the collection of private information about Mr. Alazork constituted an actionable intrusion upon seclusion. Next, for an intrusion to be actionable, the plaintiff must not consent to the alleged intrusion.

3. *The mention of GPS in the rental agreement did not vest Haul n' Ride with the authority to pry into Mr. Alazork's private affairs.*

Although Mr. Alazork signed a rental contract consenting to the possible use of GPS for emergency location services, Mr. Alazork did not consent to the use of GPS for any other purpose. (*See* Rental Agreement, Exhibit B.) Consequently, the GPS provision in the rental contract does not absolve Haul n' Ride from liability for intrusion upon seclusion.

For an intrusion to be actionable, the plaintiff must not consent to the challenged activity. *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 648 (Cal. 1994). Consent for one purpose is not consent for all purposes. *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 514 (Ill. App. Ct. 1998). Whether a person voluntarily consents to particular conduct turns on whether the challenged conduct has been fully disclosed to the plaintiff. *Norman-Bloodshaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1270 (9th Cir. 1998). Here, the limited consent to allow the use of GPS for emergency location services did not vest Haul n' Ride with the authority to pry into the private affairs of Mr. Alazork. *See id.*

Ainsworth involved an appropriation of name and likeness claim, and like intrusion upon seclusion, consent to the challenged conduct will defeat the plaintiff's claim. 693 N.E.2d at 513. In *Ainsworth*, a worker consented to being videotaped while installing ceramic tile for purposes of the creation of an instructional video. *Id.* at 511–12. The company making the video represented to the worker that the video would be distributed to customers of the company for instructional purposes only. *Id.* at 512. Later, parts of the instructional video were used to make a television commercial. *Id.* The defendants argued the consent to appear in the instructional video extended to the commercial use of the plaintiff's likeness. *Id.* at 514. However, the court disagreed. *Id.* The court stated the defendant's reasoning "amounts to an assertion that, by consenting to eat apples with dinner, one has also consented to eat oranges. The fact that both of them are fruit does not make them indistinguishable." *Id.* Therefore, the consent for instructional purposes did not amount to consent for purposes of making the commercial. *Id.*

Likewise, Mr. Alazork's consent to allow Haul n' Ride to utilize GPS for emergency location purposes did not amount to consent to gather and

disseminate private information about Mr. Alazork to third persons. The rental agreement specifically states rental cars may be equipped with GPS for "emergency location services." (*See* Rental Agreement, Exhibit B.) Even if the events leading up to the activation of the GPS by the Haul n' Ride employee did amount to an emergency, Mr. Alazork did not authorize Haul n' Ride to gather and disseminate private information to Mr. Babazork. *See Ainsworth*, 693 N.E.2d at 514.

In a similar case, the Ninth Circuit held full disclosure is a necessary element of consent. *Norman-Bloodshaw*, 135 F.3d at 1270. The plaintiffs in that case were new laboratory employees. *Id.* at 1264. They were required to take a federally mandated entrance examination that consisted of completion of detailed medical forms, a medical examination, and blood and urine testing. *Id.* However, the employer used the blood and urine samples to test for sensitive medical conditions including syphilis, sickle cell trait, and pregnancy. *Id.* The plaintiffs subsequently sued the employer for invasion of privacy. *Id.* The employer argued it fully informed the employees of the examination requirements, including the requirement of giving blood and urine samples. *Id.* at 1270. Further, the employer argued the completion of the medical history form, which asked detailed personal questions, placed the employees on notice that blood and urine samples would be used to test for venereal disease, sickle cell trait, and pregnancy. *Id.* However, the court held the blood testing was "qualitatively different" from providing answers to a questionnaire. *Id.* ("[Consenting] to a general medical examination does not abolish one's privacy right not to be tested for intimate, personal matters involving one's health—nor does consenting to blood and urine samples, or filling out a questionnaire.").

Mr. Alazork authorized Haul n' Ride to use GPS for emergency location services only. (*See* Rental Agreement, Exhibit B.) The actual use of GPS by Haul n' Ride to spy on Mr. Alazork is likewise "qualitatively different." The rental contract describes the use of GPS as a service. (*See* Rental Agreement, Exhibit B.) *Black's Law Dictionary* defines service as "[t]he act of doing something useful for a person or company for a fee." *Black's Law Dictionary* 1372 (7th ed. 1999). The word service leads a renter to believe GPS would be put to use for the benefit of the renter. In reality, GPS was used against Mr. Alazork to pry into his private affairs. Therefore, a genuine issue of fact exists concerning whether the contractual provision absolves Haul n' Ride from liability for an unauthorized intrusion upon seclusion. Next, Mr. Alazork must show he had a reasonable expectation of privacy concerning his location.

B. Mr. Alazork had a Reasonable Expectation That GPS Would Not Be Used to Pry into His Personal Affairs.

An intrusion upon seclusion is proven only if "the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source." *Shulman*, 955 P.2d at 490. The recent onslaught of sensory enhancement technology, like GPS, obscures the distinction between what is public and what is private. Because of advancements in technology, "privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic." *Sanders v. Am. Broad. Cos.*, 978 P.2d 67, 72 (Cal. 1999). Therefore, that "the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Id.* The antiquated common-law notion that a man's home is his castle should be updated if it is going to have any application in today's technological age. Therefore, this Court should recognize, in certain circumstances, a person has an objectively reasonable expectation of privacy in information concerning his location, even in public.

Several Fourth Amendment cases illustrate the role sensory enhancement technology continues to play in defining society's expectation of privacy. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001) ("It would be foolish to contend that the degree of privacy secured to citizens . . . has been entirely unaffected by the advance of technology. . . . The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."). Like intrusion upon seclusion, a person's capacity to claim the protection of the Fourth Amendment depends on whether the person has a reasonable expectation of privacy. *Katz v. United States*, 389 U.S. 347, 353 (1967). In *Kyllo*, the Supreme Court expanded the realm of personal privacy by holding the use of a thermal imaging device to determine the amount of heat emanating from inside a home violated the Fourth Amendment's prohibition of unreasonable search and seizures. 533 U.S. at 34. Furthermore, in *Katz*, the Court found that placing a recording device on a public telephone booth violated the Fourth Amendment because the defendant had a reasonable expectation that his conversation would remain private, despite the fact that he was in public. 389 U.S. at 353.

While the Ninth Circuit has found the Fourth Amendment is not violated when officers place GPS on a car to track its location, its reasoning is flawed because it places too much emphasis on the public location of the car and not enough emphasis on the person. *See United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999). The court held the defendant did not have a reasonable expectation in the undercarriage of his car. However, the court missed the point because "the Fourth Amendment protects people, not places." *Katz*, 389 U.S. at 352 (noting that whether a

phone booth is a constitutionally protected area is irrelevant for purposes of the Fourth Amendment). Rather, the proper focus should be on the individual's privacy rights in relation to the technology. Once this approach is taken, it becomes evident Mr. Alazork had a reasonable expectation that certain information concerning his location would remain private.

Mr. Alazork's situation is similar to the situation faced by the plaintiffs in *Shulman*, 955 P.2d at 474. In *Shulman*, vehicle accident victims sued a television producer for intrusion upon seclusion after the producer filmed various aspects of the victims' rescue. *Id.* A cameraman filmed the extrication from the car and the flight back to the hospital in a medical helicopter. *Id.* Only one of the accident victims was transported to the hospital via helicopter. *Id.* A flight crew nurse wore a microphone that recorded that plaintiff's conversations with the nurse and others in the helicopter. *Id.* The defendant argued the plaintiffs lacked a complete expectation of privacy because the accident occurred on a public thoroughfare. *Id.* at 490-93. Further, the defendant asserted the plaintiff in the helicopter lacked an expectation of privacy in the life-flight helicopter because many people were present and overheard the conversations between the nurse and the plaintiff. *Id.* The court agreed with the defendant's assertion that observation on a public roadway is not an actionable invasion of privacy. *Id.* As to the plaintiff whose conversation was recorded in the helicopter, the court nevertheless held that her expectation of privacy, although not absolute, was reasonable. *Id.* Even though various people were present and overheard her conversation, the plaintiff possessed a reasonable expectation that a recording microphone would not be used to document her conversations en route to the hospital. *Id. Shulman* focused on the use of the technology to define the expectation of privacy. Concerning the microphone, the court stated, "by placing a microphone on [the nurse's] person, amplifying what she said and heard, defendants may have listened in on conversations the parties could reasonably have expected to be private." *Id.* According to the court, the secret monitoring of the plaintiff's conversations with the microphone denied the plaintiff an important aspect of privacy: the right to control the flow of such information to third persons. *Id.* Therefore, despite lacking an expectation of complete privacy, the plaintiff's expectation of privacy was reasonable. *Id.*

Just as the *Shulman* plaintiff lacked an expectation of complete privacy concerning her conversation, Mr. Alazork lacked an expectation of complete privacy regarding his location. However, the lack of absolute privacy is not dispositive. *See, e.g., Sanders*, 978 P.2d at 77 (holding television reporter who gained employment at a company and secretly videotaped conversations with co-workers committed an intrusion upon seclusion despite the fact that other co-workers could overhear the con-

versation); *Stessman*, 416 N.W.2d at 687 (stating plaintiff had a reasonable expectation of privacy in a crowded restaurant despite it being open to the public). While Mr. Alazork's truck was parked in a public location, he nevertheless had a reasonable expectation that his movements were not being electronically monitored via satellite. Once his travel routes were recorded, Mr. Alazork no longer had control of the flow of information concerning his whereabouts. Therefore, the inquiry does not end merely because Mr. Alazork's truck was in a public location; rather, the pertinent question is whether, despite being in public, he reasonably believed he had control over information concerning his location. *See* Richard C. Balough, *Global Positioning System and the Internet: A Combination with Privacy Risks*, 15 Chi. B. Ass'n Rec. 28, 32 (2001).

Even though Mr. Alazork lacked a complete expectation of privacy with respect to his location, the secret recording of Mr. Alazork's location via GPS deprived him of the ability to control the flow of information to others. As a result, Mr. Alazork lost his scholarship, suffered humiliation, and experienced mental distress. Therefore, there is a genuine issue of fact concerning whether Mr. Alazork reasonably expected that Haul n' Ride would not utilize GPS to track his every move and disclose embarrassing, private information concerning his location to others. Last, the intrusion was highly offensive to a reasonable person.

C. Surreptitious Utilization of GPS is Highly Offensive to a Reasonable Person.

The Restatement (Second) of Torts requires an intrusion to be highly offensive to a reasonable person. Restatement (Second) of Torts § 652B (1977). Whether conduct will be highly offensive to a reasonable person is "largely a matter of social conventions and expectations." J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 5.10(A)(1)(1993). Courts take into account several factors to determine if conduct is highly offensive to a reasonable person, including: "the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded." *People for the Ethical Treatment of Animals v. Berosini*, 895 P.2d 1269, 1282 (Nev. 1995). Mr. Alazork placed a tremendous amount of trust in Haul n' Ride when he allowed it to use GPS for emergency location services. Haul n' Ride betrayed this trust by wrongfully prying into Mr. Alazork's private affairs. The circumstances as a whole indicate that the intrusion would be highly offensive to a reasonable person.

Evidence of an improper motive indicates that an intrusion would be highly offensive to a reasonable person. *See id.* By exceeding the scope of the rental agreement and using the information collected from GPS for

non-emergency purposes, Haul n' Ride showed that its motives were improper. In *Shulman*, the court noted that collection of information for "socially unprotected reasons" makes an intrusion highly offensive to a reasonable person. 955 P.2d at 493-94. Humiliation, embarrassment, and harassment are examples of socially unprotected motivations. *See Alexander*, 971 F. Supp. at 610 (holding collection and examination of FBI files for purpose of causing shame, outrage, or public humiliation is an intrusion upon seclusion). Here, Haul n' Ride's intent was solely to embarrass and harass Mr. Alazork. Evidence of Haul n' Ride's motive lies in its racially discriminatory treatment of Zorkesians. Zorkesians were required to comply with more demanding rental requirements than persons of non-Zorkesian descent. (R. at 4.) Haul n' Ride also disclosed to the Society that Mr. Alazork was parked at an adult bookstore. (R. at 6.) This information bore no relation to the alleged terrorist attack. This disclosure evinces Haul n' Ride's wrongful intent. Upon learning of the alleged terrorist attack, Streeter, a Haul n' Ride manager, did not immediately contact the authorities; rather, he initially contacted Mr. Alazork's peers at the Society. Haul n' Ride's conduct alone raises a question of fact concerning whether the intrusion would have been highly offensive to a reasonable person.

Not only does Haul n' Ride's conduct raise a question of fact, but the mere use of GPS to engage in high-tech espionage raises an additional fact question concerning the highly offensive element. Using sensory enhancement technology to collect information is sufficient to raise a fact question concerning the offensiveness element. *Wolfson*, 924 F. Supp. at 1434. For example, the use of a shotgun microphone to record the plaintiff's conversations could be highly offensive to a reasonable person. *Id.* A shotgun microphone allowed the defendants in *Wolfson* to eavesdrop on the plaintiffs' conversations from far away. *Id.* at 1424. The shotgun microphone made the plaintiffs virtual prisoners in their home; thus, the court found the use of the device presented a genuine issue of fact concerning the offensiveness element. *Id.* at 1434. Similarly, in *Shulman*, the California Supreme Court stated the mere use of the microphone by a nurse to record private conversations with a patient could be highly offensive to a reasonable person. 955 P.2d at 494. Like a microphone, GPS is a powerful sensory enhancement device that provided Haul n' Ride with constant access to Mr. Alazork's location. Standing alone, Haul n' Ride's use of GPS to collect private location information about Mr. Alazork is sufficient to raise a question of fact concerning the highly offensive element.

Finally, in addition to Haul n' Ride's conduct and use of GPS, Haul n' Ride's betrayal of customer trust also raises a factual issue concerning the offensiveness element. A trust relationship between the intruder and the victim can make an intrusion highly offensive to a reasonable person.

For example, in *Norman-Bloodshaw,* the newly hired employees placed a great deal of trust in their employer when they consented to blood testing. 135 F.3d at 1270. However, the employer's breach of that trust, by testing for syphilis, sickle cell trait and pregnancy without authorization, constituted a significant invasion of privacy. *See id.* Because the employees trusted the employer with their blood samples, the court found the violation of that trust by improper testing constituted a significant invasion of privacy. *Id.* Implicit in the court's holding is that a relationship of trust between the parties is evidence that the intrusion would have been highly offensive to a reasonable person. *See id.* Like the employees in *Norman-Bloodshaw*, Mr. Alazork trusted Haul n' Ride to use GPS for his benefit in case of an emergency. Using information gathered by GPS to subject Mr. Alazork to ridicule in the eyes of his peers represents a major breach of the trust Mr. Alazork placed in Haul n' Ride; therefore, the intrusion would have been highly offensive to a reasonable person.

The gravaman of a claim for intrusion upon seclusion is the injury to the feelings of the plaintiff and the mental distress caused thereby. *Reed v. Real Detective Publ'g Co.*, 162 P.2d 133, 139 (Ariz. 1945). If the plaintiff establishes the elements of an intrusion, substantial damages for mental damages may be recovered. *Id.* Mr. Alazork was damaged emotionally because of Haul n' Ride's intrusion into his private affairs. The exact amount of the damage award is a question within the province of the trier of fact. *Meyer v. Ricklick*, 409 P.2d 280, 281-82 (Ariz. 1965). Therefore, the court of appeals also erred when it disposed of the case on the issue of damages. For the above stated reasons, Mr. Alazork has presented genuine issues of material fact concerning the tort of intrusion upon seclusion, and this Court should reverse the court of appeals and remand to the trial court for a trial on the merits.

II. DEFAMATION LAW PROVIDES NO PROTECTION FROM LIABILITY FOR STATEMENTS, COUCHED IN THE FORM OF OPINION, THAT WRONGFULLY IMPLY SPECIFIC CRIMINAL ACTIVITY OR OTHER WRONGFUL CONDUCT.

The distinction between fact and opinion in defamation law was designed to accommodate "between protection of valuable interests in reputation and the provision of sufficient breathing space for critical and sometimes caustic free expression." 1 Rodney A. Smolla, *Law of Defamation* § 6:1 (2d ed. 2002). However, there is no distinction between opinion and fact under the First Amendment's protection of free speech. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). In *Gertz v. Robert Welch, Inc.*, Justice Powell, in judicial dictum, stated, "[u]nder the First Amendment there is no such thing as a false idea. However pernicious

an opinion may seem, we depend for its correction not on conscience of judges and juries but on competition of other ideas." 418 U.S. 323, 339-40 (1974). This statement became "the opening salvo in all arguments for protection from defamation actions on the ground of opinion." *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 61 (2d Cir. 1980). However, clarifying its position in *Gertz*, the Supreme Court in *Milkovich* held no *per se* protection of opinion exists under the First Amendment. 497 U.S. at 17. The Court stated, "[t]hus we do not think . . . *Gertz* was intended to create a wholesale defamation exemption from anything that might be labeled 'opinion.'" *Id.* According to the Court, such a wholesale exemption would "ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact." *Id.* Opinion privilege would be too strong if it protected the speaker from liability merely because he qualified his statement as an opinion. *Id.* at 18. Therefore, where an assertion, no matter how it is phrased, is provable as false, then such statements are actionable. *Id.* at 19. In *Milkovich*, the Court held an author's opinion that a high school wrestling coach committed perjury at a hearing was actionable because the opinion reasonably implied that the coach had in fact committed perjury. *Id.* Applying *Milkovich* to the present case, the dispositive question is whether a reasonable fact finder could imply from Streeter's statements an assertion that Mr. Alazork was a terrorist or a frequenter of adult bookstores. Streeter's accusation of criminal activity diminished Mr. Alazork's reputation in the community, causing him to lose his academic scholarship. Without a scholarship, Mr. Alazork was forced to withdraw from the university. (R. at 7.) Defamation law mandates such vitriolic speech not be protected simply because it was phrased in the form of an opinion.

A. No Constitutional Protection is Afforded to Statements of Opinion that Imply False Accusations of Criminal Activity.

A charge of criminal behavior necessarily involves a statement of opinion unless made by an observer of the crime. *Cianci*, 639 F.2d at 64. Allowing a speaker to escape liability for accusations of criminal activity merely by couching his accusation in the form of an opinion would allow a person to damage another's reputation without recourse, thereby undermining the very purpose of defamation law. *Id.* Hence, opinions that can reasonably be understood as accusations of specific criminal activity or other wrongful conduct are defamatory, regardless of how the statement is phrased. *Id.*

The present case is factually similar to *Cianci*. In *Cianci*, an article in "New Times" magazine implicated Vincent "Buddy" Cianci, Mayor of Providence, Rhode Island, as the perpetrator of a rape of a woman at

gunpoint. *Id.* at 56. The headline read in bold type "BUDDY WE HARDLY KNEW YA." *Id.* The article went on to describe the alleged rape, stating Mayor Cianci had failed three lie detector tests, while the victim had passed a lie detector test. *Id.* The article stated Mayor Cianci bought his way out of a possible felony conviction with a $3000 settlement with the alleged victim. *Id.* at 58. The article also commented that the victim had capitalized on her experience. *Id.* The Second Circuit found the statements could reasonably be understood as a false statement of fact, namely that Mayor Cianci had in fact raped the alleged victim at gunpoint. *Id.* at 60. Discussing the distinction between fact and opinion, the court noted that specific accusations of criminal activity, even in the form of opinion, are not constitutionally protected. *Id.* at 63. The Court stated "It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words, 'I think.'" *Id.* at 64. Therefore, the court held that a jury could find that the false accusations of criminal activity by the magazine were defamatory. *Id.*

Other courts are in accord with *Cianci*. In *Catalano v. Pechous*, 419 N.E.2d 350, 359 (Ill. 1980), the Illinois Supreme Court held "[a]ccusations of criminal activity, even if in the form of opinion, are not constitutionally protected." *See also Silsdorf v. Levine*, 449 N.E.2d 716, 721 (N.Y. 1983) (holding statements in open letter concerning mayor of Village Beach, New York, were actionable, as a reasonable inference could be made that the mayor was involved in criminal behavior). In *Catalano*, the city clerk of the city of Berwyn, Illinois, concerned over the city council's award of a contract for garbage collections, uttered, "[t]wo hundred forty pieces of silver changed handsthirty for each alderman." 419 N.E.2d at 353. The city clerk went on to opine that something was "smelly" about the contract besides the garbage, and that if it was ever discovered how the contract was approved, there would be empty chairs on the city council. *Id.* The court held the allusion to Judas' betrayal of Christ was intended to implicate the council members in specific acts of wrongdoing in the contract. *Id.* at 355-56. Therefore, the court found the allusion defamatory. Additionally, the constitutional protection of rhetorical hyperbole does not protect Streeter's statements to Mr. Babazork. *See Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 15 (1970) (holding defendant's statement that the plaintiff was "blackmailing" the city was constitutionally protected free speech because no one would have considered the defendant's statement to be an actual charge of criminal blackmail). The case at bar is distinguishable because Streeter was not hurling epithets or hyperbole when he implicated Mr. Alazork. His statements were intended to imply Mr. Alazork was in fact a terrorist and a frequenter of adult bookstores; therefore the statements are actionable. *Cianci*, 639 F.2d at 64.

Streeter's comments were designed to strike a blow to Mr. Alazork's reputation. Streeter contacted Mr. Babazork after Mr. Alazork failed to return the rental truck on the due date specified in the rental agreement. (R. at 5.) Streeter informed Mr. Babazork that Haul n' Ride received a report of possible terrorist activity in Capital City. (R. at 5.) Streeter told Mr. Babazork that because he had taken the rental truck out of Marshall and into Capital City, he thought Mr. Alazork might be involved in the reported terrorist plot. (R. at 5.) Streeter also informed Mr. Babazork that the truck was located at an adult bookstore. (R. at 6.) Based on these statements, a reasonable finder of fact could imply an assertion from Streeter's statements that Mr. Alazork was a terrorist or a frequenter of adult bookstores. In fact, the Society believed the statements to be an accusation of specific wrongful conduct, as evidenced by its canceling of Mr. Alazork's scholarship. (R. at 6.) These statements damaged Mr. Alazork's reputation, eliminated his scholarship, and ended his college career. The constitution does not protect such pejorative speech; therefore, the court of appeals erred when it held the statements were mere opinions.

B. The Fair Comment Privilege Does Not Protect False Accusations of Criminal Activity.

The court of appeals also erred when it held that Streeter's statements were protected by the fair comment privilege. The fair comment privilege sprung from the early common-law rule that statements of opinion, even if incapable of being disproven, were actionable if the statement tended to be injurious to reputation. *See* Restatement (Second) of Torts § 566 cmt. a (1977). To protect against this harsh rule, courts began to recognize that "valuable discourse might be furthered by intuitive, evaluative statements that could not be proved either true or false by the rigorous deductive reasoning of the judicial process." *See* 1 Rodney A. Smolla, *Law of Defamation* § 6:4 (2d ed. 2002). Under the fair comment privilege, legal immunity is afforded for honest expressions of opinion on matters of public concern, where the statement is based on true or privileged facts, regardless of whether the statement was expressly stated or implied from an expression of opinion. *See Milkovich*, 497 U.S. at 14. However, the fair comment privilege has no application to an assertion of criminal activity, despite the fact that the assertion was worded as an opinion. *Cianci*, 639 F.2d at 66. Because Streeter comments were nothing more than a false accusation of criminal activity, the defendant cannot claim the protection of the fair comment defense.

First, the fair comment privilege is inapplicable to the case at bar because it only applies to statements that are incapable of being proven true or false. *See Milkovich,* 497 U.S. at 14. According to the codification

of the fair comment privilege found in the RESTATEMENT (SECOND) OF TORTS § 566 (1977), an opinion was not actionable if the speaker disclosed the background facts, however unreasonable, forming the basis for his opinion. Today, opinions can support a defamation action only when the opinion conveys false representations of facts. *Milkovich*, 497 U.S. at 17. Thus, the disclosure of factual background may indicate whether a statement constituted a direct charge of criminal activity or a constitutionally protected statement incapable of objective verifiability. *Cianci*, 639 F.2d at 66. However, the mere disclosure of such facts does not insulate the speaker from liability for opinions that imply specific criminal activity because such a statement is capable of being verified. *Id.*; *see also* W. Page Keeton, *Defamation and Freedom of the Press*, 54 Tex. L. Rev. 1221, 1254 (1976) ("any charge of specific misconduct . . . should be treated as a statement of fact regardless of whether the publisher conveys his deductive opinion alone or with the information to support it"). Because the fair comment privilege is only applicable if the statement is incapable of verifiability, Streeter's false accusation of criminal activity, a verifiable statement, cannot be protected. *Cianci*, 639 F.2d at 66.

Second, the fair comment privilege is inapplicable to the case at bar because Streeter's accusation that Mr. Alazork was a terrorist cannot be considered a comment. Under the fair comment privilege, to be a comment, the statement had to relate to a matter of public concern. *Id.* The policy prompting the development of the fair comment privilege was to balance the need for public discourse against the need to redress injury for defamatory speech. *Id.* A false accusation of specific criminal activity is not worthy of the protection afforded to vigorous public discourse under the fair comment privilege because false accusations of criminal activity have no social utility. *Id.* Therefore, such expressions do not fall within the scope of the fair comment privilege. *Id.* (holding accusation of criminal activity is antithetical to the usual sort of evaluative judgment with which the fair comment privilege has traditionally been concerned). Further, the fair comment privilege does not extend to expressions made with malice, which means ill will or spite. *See id.* Here, Streeter immediately phoned Mr. Babazork, informing him that Mr. Alazork might be engaged in a terrorist plot. (R. at 5.) A person acting without malice would have phoned the authorities first. Therefore, Streeter's knee-jerk call to Mr. Babazork raises a question of fact concerning malice, precluding summary judgment.

False accusations of criminal activity are never protected opinion or fair comment. Because Streeter's comments alleged Mr. Alazork was a terrorist, they were not protected opinion or fair comment, and were thus defamatory. Therefore, the court of appeals erred when it held otherwise. Last, Haul n' Ride's unauthorized use of GPS constituted an unfair deceptive business practice.

III. HAUL N' RIDE'S SECRET USE OF GPS TO FINE UNSUSPECTING RENTERS AN UNCONSCIONABLE FEE FOR TRAVELING BEYOND THE MARSHALL STATE LINE CONSTITUTES AN UNFAIR AND DECEPTIVE PRACTICE.

All fifty states have adopted statutes designed to give private consumers a statutory cause of action against unscrupulous businesses that engage in deceptive or unfair business practices. Dee Pridgen, *Consumer Protection and the Law*, § 3:1 (2000). The ability of citizens to pursue a private cause of action helps states regulate business activity in the state. *Id.* Deceptive trade practice statutes provide consumers with a statutory cause of action that is not as difficult to pursue as similar state common-law causes of action. *See, e.g., Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) ("[a] primary purpose of the enactment of the [statute] was to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common-law fraud or breach of warranty suit."). Therefore, these statutes lessen the unequal bargaining power of the consumer by giving the consumer an advantage in court. *See Kugler v. Romain*, 279 A.2d 640, 648 (N.J. 1971). Deceptive Trade Practices statutes employ sweeping language to enjoin a number of harmful business practices in whatever context the practice might arise. *See Schnall v. Hertz Corp.*, 93 Cal. Rptr. 2d 439, 446 (Ct. App. 2000). And when a scheme violates "the fundamental rules of honesty and fair dealing, a court . . . is not impotent to frustrate its consummation because the scheme is an original one." *Am. Philatelic Soc'y v. Clairbourne*, 46 P.2d 135, 140 (Cal. 1935).

The use of GPS in rental cars to assess costly fines on unsuspecting customers is an emerging scheme in the vehicle rental industry. *See* Jane Engle, *Car Rental Companies May Be Watching You; Lawsuits Claiming Invasion of Privacy Say Renters Are Tracked with GPS Devices*, Orlando Sentinel, Aug. 18, 2002, at L5. For example, several persons in Arizona have filed lawsuits seeking to prevent rental companies from tracking customers in order to assess fees for going out of state. *See id.* Recently, the Consumer Protection Commissioner of Connecticut ordered a rental car company to cease and desist its practice of using GPS to assess exorbitant fines for going over a designated speed limit. Press Release, State of Connecticut Dep't of Consumer Protection, *Consumers Protection Orders ACME Rental to Stop Charging Consumers for Speeding and to Return Fess to Customer* (Feb. 20, 2002), *available at* http://www.state.ct.us/dcp/PressReleases/ ACME.2.htm. According to the commissioner's order, the rental company must clearly and conspicuously disclose the use of GPS for the purpose of tracking the rented vehicle's speed, disclose the fee to be assessed for going over the set speed limit, and set a fee that is reasonably related to the expected damage to the

vehicle. *Id.* Haul n' Ride employed the same type of scheme when it fined Mr. Alazork for traveling beyond the borders of the State of Marshall.

In order for consumers to reap the substantial benefits GPS has to offer, rental companies must be trusted to use the technology for the benefit of the consumer. Using GPS to assess unconscionable and hidden fines for minor breaches of a rental agreement threatens the continued viability of GPS. While Marshall's legislature has yet to address the problem with any meaningful legislation limiting rental companies' use of GPS, this Court can curb this growing problem via the Marshall Deceptive Business Practices Act.

Marshall's Deceptive Business Practices Act provides:

> Unfair deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, in the conduct of any trade or commerce are hereby declared unlawful if, in fact, a reasonable person could be misled, deceived or damaged by said misrepresentations.

MARSHALL REVISED CODE, 505 MRC 815/2. Under Marshall's Deceptive Business Practice Act, an omission or misrepresentation of fact is actionable only if the fact was material to the transaction such that a reasonable person could be misled, deceived, or damaged by its omission or misrepresentation. In affirming summary judgment in favor of Haul n' Ride, the court of appeals found the failure to inform Mr. Alazork was not an unfair deceptive business practice because the use of GPS in the rental truck was not material. (R. at 9-10.) However, Marshall's Deceptive Business Practices Act does not provide a definition for materiality. As the following sections illustrate, a fact is material if an average or reasonable consumer would consider the fact important in making its decision, and where there is an objective standard, the determination should be left to the jury except in rare cases. *Green v. H & R Block*, 735 A.2d 1039, 1059 (Md. 1999). In the present case, the rental agreement failed to disclose Haul n' Ride's pecuniary interest in GPS. Mr. Alazork was not warned of the exorbitant fee for crossing the state line, nor was he warned that embarrassing information about his location would be disclosed to third persons. All of these facts are material because they would be important to an average consumers in their rental decision; therefore, summary judgment in favor of Haul n' Ride on Mr. Alazork's Deceptive Business Practices claim was improper.

A. Whether a Fact is Material Requires a Delicate Assessment of the Importance of that Fact to an Average Consumer and Should Be Decided by the Trier of Fact.

The court of appeals erred when it ruled on the materiality of the use of GPS as a matter of law because the question of materiality, unless the fact is obviously not important to a consumer, is within the province of the jury to determine. *Id.* A fact is material if the average consumer would find the information important in determining its course of action, and whether an omission of fact is material under this standard should be a question for the jury. *Id.* For example, the Court of Appeals of Maryland stated "whether an omission would be important to a significant number of unsophisticated consumers is a question of fact for the jury." *Id.* Further, the question should be taken from the fact finder and decided as a matter of law only if the "fact do not allow for a reasonable inference of materiality or immateriality." *Id.* Therefore, the threshold to establish a fact question concerning materiality is minimal under the objective standard. *See id.*

The issue of materiality arises in a number of other areas of law and will be helpful in this Court's determination of materiality under Marshall's Deceptive Business Practices statute. According to the Restatement (Second) of Torts § 538 (1977), which governs the fraudulent misrepresentation tort, a fact is material if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." In explaining the reasonable man standard, the Restatement provides:

> As in all cases in which the conduct of the reasonable man is the standard, the question of whether a reasonable man would have regarded the fact misrepresented to be important in determining his course of action is a matter for the judgment of the jury subject to control of the court. The court may withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.

Restatement (Second) of Torts § 538 cmt. e. (1977). The Restatement (Second) of Contracts takes an objective approach when determining whether a contractual misrepresentation is material. Restatement (Second) of Contracts § 162 (1981) ("[a] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent."). The determination of whether the defendant acted with reasonable care ordinarily precludes summary judgment in negligence cases. *See* 10 Charles Alan Wright et al, *Federal Practice and Procedure* § 2729 (1998). Further, the Federal Trade Commission, which governs deceptive and unfair trade practices affecting interstate commerce, utilizes an objective approach to materiality. *See, e.g., Am. Home Prods. v. FTC*, 98 F.T.C. 136, 368 (1981), *aff'd* 695 F.2d 681 (3d Cir.

1982) (holding a claim is material if it is likely to affect consumer behavior).

In *Basic, Inc. v. Levinson*, the United States Supreme Court was asked to provide a definition of materiality under Section 10b of the Securities and Exchange Act of 1934 and the Securities and Exchange Commission's ("SEC") Rule 10b-5 promulgated thereunder. *See* 485 U.S. 224, 227 (1988). The relevant portion of Rule 10b-5 states "[I]t shall be unlawful for any person . . . [t]o make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statement made . . . not misleading . . . in connection with the sale or purchase of any security." 17 C.F.R. § 240.10b-5 (1987). According to the Court, a fact is material if there is a substantial likelihood that a reasonable investor would find the disclosure of the omitted fact important in the total mix of all of the information available. *Basic*, 485 U.S. at 232. The Supreme Court applied the same definition in determining materiality under SEC Rule 14a-9 as defined by 17 C.F.R. 240.14a-9 (1975). *See TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 445 (1976) ("The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor.").

The Supreme Court's analysis of whether summary judgment is appropriate where a question of materiality exists is particularly helpful to the case at bar. *Id.* at 450. According to the Court, the underlying facts, which are often undisputed, are only the starting point for the determination of materiality. *Id.* Rather, a determination of materiality entails a "delicate assessment" of the inferences a reasonable investor would draw from the underlying facts and the importance of the inferences to a reasonable investor. *Id.* Therefore, the determination of materiality is for the trier of fact, and this decision should only be decided as a matter of law if "it is so obviously important to an investor, that reasonable minds cannot differ on the question of materiality." *Id.* (quoting *Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970)).

This court should adopt the objective test of materiality. The objective standard furthers the goal of deceptive business practices statutes to provide relief to the average consumer from unscrupulous business practices, but provides enough flexibility for businesses to operate. *See Basic,* 485 U.S at 231. The objective standard insures not every trivial omission of fact in a transaction will be a violation of the statute, but it allows the finder of fact to determine the importance of a particular fact to an average consumer. *Id.* Next, the objective approach is consistent with the great weight of authority that has dealt with the issue of materiality. Further, Marshall's Deceptive Business Practices Act seems to mandate that an objective standard be observed. The statute instructs that a practice is not unlawful unless "a reasonable person could be misled,

deceived or damaged by said misrepresentation." MARSHALL REVISED CODE, 505 MRC 815/2.

Applying the objective standard of materiality to the present case, summary judgment is improper unless it is so obvious that the average consumer would find the failure to disclose the various ways GPS would be employed unimportant. *See Green*, 735 A.2d at 1059. As the following sections illustrate, it is not obvious that the disclosure of all of the various ways GPS would be used against the renter would be unimportant to the average consumer. Therefore, the court should remand the case for a trial on the merits.

B. HAUL N' RIDE'S FAILURE TO DISCLOSE ITS SECRET PECUNIARY INTEREST IN GPS CONSTITUTES A MATERIAL OMISSION.

Haul n' Ride's failure to disclose its pecuniary interest in GPS is material. *See Green*, 735 A.2d at 1058. In *Green*, customers of H & R Block, a tax preparation service company, filed a class action lawsuit alleging a violation of the Maryland's Consumer Protection Act. *Id.* at 1043. Maryland's Consumer Protection Act is similar to Marshall's Deceptive Business Practices Act. *See id.* at 1058. The business practice in dispute involved H & R Block's rapid refund program. *Id.* at 1043. As part of the rapid refund program, H & R Block acted as a loan facilitator of a Refund Anticipation Loan ("RAL") between its customers and a third party bank. *Id.* at 1044. The cost of the RAL is described as a "finance charge" in the loan materials. *Id.* at 1045. The annual percentage rate corresponding to the finance charge ranged from 25% to 500% depending on the amount of the refund and the amount of finance charge to a particular customer. *Id.* at 1044. However, the RAL material did not disclose the methods in which H & R Block stood to benefit from the RAL program. *Id.* at 1045. First, H & R Block received a "license fee" from the third party bank for each loan customer referred by H & R Block to the bank. *Id.* Second, H & R Block secretly arranged to purchase about one half of all of the RAL's from the bank. *Id.* Third, H & R Block received 15% of the check-cashing fee for each RAL check cashed at Sears, Roebuck, & Company ("Sears"). *Id.* H & R Block has many locations inside Sears and encouraged its customers to cash the RAL checks at Sears. *Id.* The plaintiffs' claims turned on whether H & R Block's failure to disclose the numerous ways it benefited under the RAL was a material fact. *Id.* The circuit court granted summary judgment in favor of H & R Block. *Id.* at 1058. On writ of certiorari, the Court of Appeals reversed holding that a genuine issue of fact concerning the materiality of H & R Block's failure to disclose its interest in the RAL prohibited summary judgment in favor of the bank. *Id.* at 1058. According to the court, a reasonable inference could be drawn that an average consumer may consider "important the

knowledge that the 'finance' cost of the loan is in inflated by virtue of the various ways H & R Block stands to benefit." *Id.* at 1059.

Haul n' Ride's embrace of GPS to penalize renters is an undisclosed pecuniary interest much like H & R Block's secret interest in the RAL Program. Haul n' Ride's rental agreement is silent as to the use of GPS in assessing fees. (*See* Rental Agreement, Exhibit B.) Rather, the rental agreement lulls the customer into a sense of security concerning the use of GPS. The loan agreement affirmatively states "[t]he truck may be equipped with global positioning satellite (GPS) and/or cellular phone technology for emergency location services." (*See* Rental Agreement, Exhibit B.) Two aspects of this contractual provision suggest an omission of fact concerning the use of GPS to assess a fee. The word "may" suggests an ambivalence concerning GPS. The record is unclear concerning how many Haul n' Ride vehicles are actually equipped with GPS; however, the word "may" does not provide the consumer with sufficient notice that GPS would be placed in the vehicle. Further, Haul n' Ride placed the GPS device in the truck's engine compartment so that the consumer would not know if the truck was equipped with GPS. (R. at 4.) Next, the rental agreement confines the use of GPS to "emergency location services." However, assessing a fee for a minor contractual infraction can hardly be considered a service to the average customer. Because the rental agreement did not provide the average consumer with notice of the secret benefit Haul n' Ride stood to gain via GPS, there is an omission of fact in the rental agreement. *See Green*, 735 A.2d at 1059 ("the evidence also permits a fact finder to conclude that the characterization of the cost of the loan as a 'finance charge' without further disclosure misleads consumers who would consider it an important factor in determining whether to pursue the loan through H & R Block"). Therefore, the omission is material because an average consumer may reasonably want to know the various ways Haul n' Ride stood to benefit under the rental agreement. *Id.* Next, Haul n' Ride's misrepresentation concerning the minimum fee imposed is material.

C. Haul n' Ride's Failure to Disclose the Total Fee Imposed for Taking the Rental Vehicle Across the Marshall State Line Constitutes a Material Misrepresentation.

The average consumer would consider the total fee imposed for violation of the rental agreement important in deciding whether to take the vehicle across the state line. *See MacMillan, Inc.*, 96 F.T.C. 208, 303-04 (1980). In *MacMillan*, LaSalle Extension University failed to disclose to its students the number of lesson assignments to be submitted in a course. *Id.* Students needed to know this information because their tuition obligation was calculated on the number of lesson assignments to be

submitted. *Id.* Therefore, the failure to disclose this information was material because the average student would consider the total tuition obligation important in deciding whether to take the course. *Id.*

Here, the rental agreement stated the renter would be charged a fee for taking the vehicle out of state, and the minimum fee was $100. (*See* Rental Agreement, Exhibit B.) Yet, Mr. Alazork was charged a fee in excess of $1500. (R. at 6.) Like *MacMillan*, a full disclosure concerning the fee is necessary in determining a renter's obligation for taking the vehicle across the state line. Had an average consumer known the fee, it is reasonable to assume that he or she would not have ventured past the borders of the state.

The fact that the fee was avoidable should not prevent Mr. Alazork from pursuing his deceptive business practices claim. The present case is analogous to the facts in *Schnall*. In that case, customers of Hertz brought a cause of action alleging the fuel service charge imposed under Hertz's rental agreement violated California's unfair competition law, which is analogous to Marshall's Deceptive Business Practices Act. *Id.* Under the rental agreement, the renter could choose to return the vehicle with a full tank of gas and avoid the fuel service charge imposed by Hertz, or the renter could allow Hertz to refuel the vehicle at the applicable rate specified in the rental agreement. *Id.* However, the rate specified in the rental agreement was not at all clear to the consumer. The rental agreement used confusing formulas and needlessly complex language relating to the application of the rates under the rental agreement. *Id.* at 454. Hertz argued that the service charge was avoidable because the renter could bring the vehicle back with a full tank of gas. *Id.* However, the court disagreed. *Id.* According to the court, "[t]he failure . . . to make it clear . . . that an avoidable charge . . . is considerably higher than the retail rate for an item or service . . . would doubtless encourage . . . customers to incur a fuel service charge they could and would otherwise avoid." Therefore, the plaintiffs' stated a claim under the unfair competition law for concealing the fuel service charge. *Id.*

The fuel service charge in *Hertz* is similar to the fee imposed by Haul n' Ride. The customer could avoid the fee by simply not traveling beyond the borders of the state; however, the rental agreement does not provide the consumer with sufficient notice that the applicable fee will not bear any similarity to Haul n' Ride's actual cost incurred when the vehicle goes beyond the borders of the state. The rental agreement stated a minimum fee, but it did not provide any definition of the method at which Haul n' Ride calculated the fee or the total fee imposed. (*See* Rental Agreement, Exhibit B.) The failure to describe the method by which Haul n' Ride will assess a fee coupled with the confusing language concerning the use of GPS for "emergency location services", has a tendency to mislead the consumer both as to the total fee and the method of as-

sessing the fee. In the present case, the fee imposed by Haul n' Ride exceeded $1500, yet Mr. Alazork only traveled thirty miles past Marshall's border. (R. at 5.) Had Mr. Alazork known of the total amount of the fee, or at the very least, the method of assessing the fee via GPS, he would not have taken the rental truck beyond the Marshall state line. Because an average consumer would consider this information important, the misrepresentation concerning the minimum fee is material. Last, the failure to warn Mr. Alazork that his private location information would be disclosed to third persons was a material omission.

D. Haul n' Ride's Failure to Disclose that Private Information Recorded by GPS Would Be Revealed to Third Persons Constitutes a Material Omission.

GPS poses a significant risk to an individual's right to privacy. *See* Richard C. Balough, *Global Positioning System and the Internet: A Combination with Privacy Risks*, 15 Chi. B. Ass'n Rec. 28, 32 (2001). Because GPS provided Haul n' Ride with a wealth of information concerning Mr. Alazork's location, Haul n' Ride had enveloping and instant access to sensitive and private information concerning Mr. Alazork's location. However, Haul n' Ride divulged this private information to Mr. Alazork's peers thereby inflicting emotional and pecuniary damage. Because an average consumer would want to know that location information gathered via GPS would be disclosed to third persons, the failure to disclose this information constituted a material omission in the rental agreement. *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351 (Ill. App. Ct. 1995).

In *Dwyer*, American Express cardholders sued American Express alleging the practice of releasing personal information to other merchants constituted a violation of the Illinois Consumer Fraud Act. *Id* at 1356. American Express, as part of a joint marketing agreement and sales program, compiled information about its cardholders spending habits and then categorized and ranked the cardholders into six tiers based on their spending habits. *Id.* at 1353. Then American Express rented this information to third party merchants. *Id.* In analyzing the materiality requirement under the Illinois Consumer Protection Act, the court stated, "it is highly possible that some customers would have refrained from using the American Express Card if they had known that defendants were analyzing their spending habits." *Id.* at 1357. Therefore, the plaintiffs sufficiently alleged the undisclosed practice was material. *Id.* Similarly, the undisclosed practice of divulging personal information about Mr. Alazork is material. Haul n' Ride contacted Mr. Babazork and told him that Mr. Alazork might be involved in terrorist activity and also that he was parked at an adult bookstore. (R. at 5.) It is reasonable that an average consumer would not rent from Haul n' Ride had the person

known that private information would be disclosed to third persons. *See Dywer*, 652 N.E.2d at 1357. Therefore, the failure to inform the customer about the invasive use of GPS is material. For the above reasons, Mr. Alazork has presented genuine issues of material fact concerning his deceptive business practices claim.

CONCLUSION

George Orwell was right. In *1984*'s fictitious state, Oceania, the "Thought Police" utilized powerful technology to monitor everyone's thoughts and actions, and the scrutiny was inescapable. George Orwell, *1984* 4 (1949). Orwell wrote, "You had to live—did live, from habit that became instinct—in the assumption that every sound you made was overheard and, except in darkness, every movement scrutinized." *Id.* Today's technology is even more powerful than perhaps Orwell would expect, yet Mr. Alazork should not have to sit idly by while businesses like Haul n' Ride use technology, like GPS, to take advantage of him.

First, Mr. Alazork has affirmatively established genuine issues of fact on all of the elements of his intrusion upon seclusion claim. Haul n' Ride intruded upon Mr. Alazork's seclusion when it utilized GPS, powerful sensory enhancement technology, to pry into his private affairs. The information gathered via GPS was highly personal, and Haul n' Ride should not be allowed to rely on outdated case law that does not take into account the vast impact technology has had on privacy law. *See, e.g.*, *Kyllo*, 533 U.S. at 33-34 ("It would be foolish to contend that the degree of privacy secured to citizens . . . has been entirely unaffected by the advance of technology."). Therefore, despite being in a public location, Haul n' Ride's use of GPS constituted a significant invasion of his privacy.

Second, Streeter's statements accusing Mr. Alazork of being a terrorist and a frequenter of adult bookstores was neither a protected opinion nor fair comment. Outright charges of illegal conduct, if false, are defamatory, even if the speaker phrases his comment in the form of opinion. *See Cianci*, 639 F.2d at 64. Any other rule would allow Streeter to inflict serious damage on Mr. Alazork's reputation without recourse.

Last, Mr. Alazork, an average consumer, was deceived by Haul n' Ride's material omission of fact concerning the various ways it intended to use GPS against Mr. Alazork. The use of GPS to trick renters out of their hard earned money and disclose private information about them is a new scheme in the rental industry; however, it is exactly this type of scheme Marshall's Deceptive Business Practices Act is intended to prevent. For deceptive trade practices statutes are "intentionally framed in . . . broad, sweeping language . . . to enable judicial tribunals to deal with the innumerable 'new schemes which the fertility of man's invention would contrive.'" *Schnall*, 93 Cal. Rptr. 2d at 446. Materiality is a

question of fact under Marshall's Deceptive Business Practices Act and it was wrong for the court of appeals to rule on the issue as a matter of law. The use of GPS raises questions of fact concerning materiality because it is obvious that reasonable consumers would find the use of GPS for non-emergency purposes important in their rental decision. Therefore, summary judgment was improper on the deceptive business practices claim.

For the reasons set forth above, the decision of the First District Court of Appeals should be reversed and the case remanded to the Potter County Circuit Court for a trial on the merits.

Respectfully submitted,

ATTORNEYS FOR PETITIONER

BRIEF FOR THE RESPONDENT

No. 02-CV-3024

IN THE
SUPREME COURT OF MARSHALL
OCTOBER TERM 2002

ROBERT ALAZORK,
Petitioner,

v.

HAUL n' RIDE, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS
OF MARSHALL

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT THE USE OF GLOBAL POSITIONING SYSTEM TECHNOLOGY IN RENTAL VEHICLES WAS NOT AN INTRUSION UPON SECLUSION AS A MATTER OF LAW?

II. WHETHER THE COURT OF APPEALS CORRECTLY FOUND THAT HAUL N' RIDE'S STATEMENTS REGARDING ALAZORK WERE OPINION AND/OR FAIR COMMENT?

III. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT HAUL N' RIDE DID NOT VIOLATE THE DECEPTIVE BUSINESS PRACTICES ACT?

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TO THE SUPREME COURT OF MARSHALL:

Respondent, Haul n' Ride, Inc. ("Haul n' Ride"), Appellee in Cause No. 02-CV-3024 before the First District Court of Appeals for the State of Marshall (and Defendant before the trial court), respectfully submits this brief in response to the brief filed by the Petitioner, Robert Alazork ("Alazork"), Plaintiff-Appellant below, and requests this Honorable Court affirm the judgment of the Court of Appeals.

OPINION BELOW

The Potter County Circuit Court granted summary judgment in favor of Haul n' Ride. The First District Court of Appeals of the State of Marshall affirmed the circuit court's order granting summary judgment as shown in the record.

STATUTORY AND RESTATEMENT PROVISIONS INVOLVED

The State of Marshall enacted an intrusion upon seclusion statute, section 735 MRC 15/40, that follows the RESTATEMENT (SECOND) OF TORTS section 652B. The State of Marshall also enacted a defamation statute, section 735 MRC 15/30, that follows the RESTATEMENT (SECOND) OF TORTS section 558. The relevant provisions of the RESTATEMENT (SECOND) OF TORTS sections 652B and 558 are provided in Appendices A and B, respectively. The State of Marshall enacted a Deceptive Business Practices statute, section 505 MRC 815/2, the relevant provisions of which are provided in Appendix C.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Haul n' Ride, Inc. ("Haul n' Ride") provides nationwide rental truck services. (R. at 3.) Recently, Haul n' Ride has received negative publicity focusing on possible illicit uses of Haul n' Ride rental trucks. (R. at 4.) Specific reports suggest individuals used Haul n' Ride rental trucks to smuggle illegal immigrants, weapons, and explosives into the country. *Id.* Furthermore, Zorkesian terrorists possibly used Haul n' Ride's trucks in their terrorist activities. *Id.* Consequently, Haul n' Ride instituted an "anti-terrorism" policy, in which local dealers must request certain additional information from customers appearing suspicious. *Id.* Under the new policy, dealers must obtain the additional information from individuals seeking rentals of three or more days, out of state rentals, rentals to individuals under twenty-five years old, rentals to individuals appearing to be of Zorkesian descent, or individuals who otherwise appear to present a potential liability risk. (R. at Ex. A.)

In addition to the safeguards discussed above, Haul n' Ride equips most of its rental trucks with global positioning system ("GPS") technology. (R. at 3.) GPS technology uses a network of satellites and corresponding ground stations to transmit data. *Id.* A device in the rental truck's engine compartment receives the transmitted data and uses the data to determine the location of the vehicle. (R. at 3-4.) Because Haul n' Ride may access the rental truck locations from remote distances, Haul n' Ride is able to utilize the GPS collected data in various ways, including: emergency location services, navigation or travel information, and finding stolen rental vehicles. (R. at 4.) Furthermore, the GPS technology maintains a trip log which records the precise distance and route the rental truck traveled. *Id.* All customers renting Haul n' Ride vehicles sign standard rental agreements which include a notice that "[t]he truck may be equipped with global positioning satellite (GPS) and/or cellular phone technology for emergency location services." (R. at Ex. B.)

Robert Alazork ("Alazork") is a twenty year-old college student of Zorkesian descent attending Capitol College in Capitol City, West Ducoda. (R. at 2.) Although Alazork attends college out of state in West Ducoda, he established his residence in Smallville, Marshall. *Id.* In the summer of 2000, Alazork contacted Haul n' Ride's national toll-free telephone number to assist him in his move into an off-campus apartment at Capitol College. (R. at 3.) He was connected with a local Haul n' Ride rental agency in Smallville. (R. at 3.) Haul n' Ride manager, John Streeter, spoke with Alazork and described the two rental options that Haul n' Ride offers. *Id.* First, Alazork could purchase a "one-way" rental if the truck would be taken out of state and returned to a different Haul n' Ride location. *Id.* This option requires a higher rental rate in order to cover the cost of maintaining a national network of Haul n' Ride locations and the increased insurance expenses associated with driving the trucks in multiple states. *Id.* The rental agreement further explained that a truck leaving the state incurs the one-way rental rate. (R. at Ex. B.) The second and less expensive option, the "local" rental, may be purchased if the truck is used in town and is returned to the Smallville Haul n' Ride location. (R. at 3.) Although Alazork would be attending Capitol College, and therefore would be taking the rental truck into the neighboring state of West Ducoda, Alazork nevertheless reserved a rental truck for three days under the "local" rental option. *Id.*

Alazork provided the requested information in the rental agreement including his name, addresses, telephone numbers, and financial and personal references. (R. at 4.) Alazork listed Tom Babazork, the sponsor of an annual scholarship program instituted by the Zorkesian-American Society, as his personal and financial reference. (R. at 2, 4.) Mr. Babazork recently presented Alazork with an academic scholarship for the 2000-2001 academic year. (R. at 2.) According to Alazork's rental

agreement, Alazork would depart with the rental truck on August 20, 2000, and return the truck to the Smallville Haul n' Ride location on August 23, 2000. (R. at 5.)

Not only did Alazork violate the terms of the local rental agreement by driving the truck beyond Marshall state lines, Alazork failed to return the rental vehicle on August 23, 2000. (R. at 5, 6.) Meanwhile, on August 23, 2000, Mr. Streeter received a notice from the Haul n' Ride corporate office stating that the Federal Bureau of Investigation ("FBI") had alerted the company to terrorist threats potentially involving a rental truck destined for Capitol City. (R. at 5; R. at Ex. C.) The notice from corporate headquarters requested that Mr. Streeter immediately locate any trucks within a thirty (30) mile radius of Capitol City and report those trucks to Haul n' Ride security officials. (R. at Ex. C.)

In an attempt to comply with the corporate request and avoid an emergency or crisis, Mr. Streeter immediately employed the GPS technology to locate all of his rental vehicles. (R. at 5.) Mr. Streeter learned that the truck Alazork rented was in Capitol City in the neighboring state of West Ducoda. *Id.* Using a reverse directory on the Internet and the GPS location data, Mr. Streeter learned that Alazork parked the truck in front of an adult bookstore. *Id.* Consequently, Mr. Streeter began contacting Alazork's references listed in the rental agreement, including Mr. Babazork. *Id.* Mr. Streeter also charged Alazork's credit card for the significantly higher "one-way" rental rate rather than the "local" rental rate, as per the rental agreement terms, because Alazork took the truck beyond Marshall state lines. (R. at 6.)

Upon contacting Mr. Babazork, Mr. Streeter informed him that Haul n' Ride had received a report of suspected terrorist activity, and that Alazork was currently in violation of his rental agreement for taking a truck out of state. (R. at 5.) As a result, Mr. Streeter was concerned that Alazork "might be involved or in trouble." (R. at 5-6.) Mr. Streeter also provided Mr. Babazork with the current location of the rental truck.

Mr. Babazork and Alazork's personal relationship may be reasonably characterized as more than mere acquaintances. In order to obtain the scholarship presented to him by Mr. Babazork and the Zorkesian-American Society, Alazork submitted an essay describing the importance of community involvement in American and Zorkesian societies. (R. at 2.) Mr. Babazork personally interviewed the final applicants, including Alazork, and after being presented with the scholarship, Alazork spoke to the Zorkesian-American Society on the importance of excelling in school, serving the community, and honoring one's heritage. *Id.* Furthermore, Alazork subsequently attended a number of the Zorkesian-American Society meetings. (R. at 3.) However, despite having significant knowledge of Alazork's character, Babazork cancelled Alazork's scholarship after speaking with Mr. Streeter. (R. at 6.) Mr. Babazork

made no attempt to verify the accuracy of Mr. Streeter's opinion that Alazork may be involved or in trouble. *Id.*

II. Statement of the Proceedings

Alazork sued Haul n' Ride in the Potter County Circuit Court seeking monetary damages, and he alleged causes of action in intrusion upon seclusion, defamation, and violations of the Deceptive Business Practices statute. (R. at 7, 8.) Neither party disputes the facts set forth in the record below. (R. at 2.) Haul n' Ride moved for summary judgment, and the Potter County Circuit Court granted Haul n' Ride's motion for summary judgment on all three of Alazork's claims. (R. at 1-2.)

The First District Court of Appeals affirmed the circuit court's grant of summary judgment in favor of Haul n' Ride. The court of appeals determined that Alazork failed to establish an issue of material fact regarding intrusion upon seclusion in holding that the act of using GPS technology was neither objectionable nor offensive which caused any anguish or suffering. (R. at 7.) Also, Haul n' Ride's summary judgment was proper as to defamation, because Haul n' Ride's statements were properly classified as opinions or fair comments. (R. at 8.) Finally, the court of appeals held that Haul n' Ride was not bound by the rental agreement to notify Alazork of the use of GPS technology to track the truck's location, therefore, summary judgment on the deceptive business practices issue was also proper. (R. at 10.)

SUMMARY OF ARGUMENT

I.

On *de novo* review, this Court should affirm the decision of the First District Court of Appeals which affirmed the grant of summary judgment in favor of Haul n' Ride on Alazork's claims for intrusion upon seclusion, defamation, and deceptive business practices. A summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Therefore, when a reasonable jury could not return a verdict for the nonmoving party, summary judgment is proper. Applying the law of intrusion upon seclusion to the undisputed facts of this case, Haul n' Ride did not commit an intrusion upon Alazork's seclusion. Only when a defendant believes he lacks permission to commit the intrusive act, does an intrusion occur. However, Alazork granted Haul n' Ride permission to use GPS technology by signing the rental agreement which contained a provision allowing for such use. Alazork's consent to the use of GPS technology negates any inference that Haul n' Ride lacked the required permission to use the GPS technology, and no intrusion occurred.

Furthermore, a claim for intrusion upon seclusion cannot survive unless the intrusive act may be considered offensive or objectionable to a reasonable person. After considering the context, conduct, and circumstances giving rise to Alazork's claim, as well as the motives and objectives behind Haul n' Ride's use of the GPS technology, this Court must determine that any degree of intrusiveness was insubstantial. In order to assert an expectation of privacy, Alazork must have conducted himself in a manner consistent with an actual expectation of privacy. Alazork drove a commercial vehicle and parked it in a public venue which diminished any expectation of privacy Alazork may have possessed. Additionally, any degree of intrusion was slight because GPS technology involves the non-invasive use of satellites to pinpoint the location of Haul n' Ride's trucks which do not interfere with the purposes for which Alazork rented the truck. Alazork's own conduct evidences no expectation of privacy, and the degree of intrusiveness of GPS technology is slight. Consequently, a reasonable person cannot find Haul n' Ride's use of GPS technology offensive or objectionable.

Finally, Haul n' Ride's use of GPS technology did not cause the injury claimed by Alazork. The damages alleged by Alazork resulted from Mr. Babazork's reinterpretation and misuse of the information he received from Haul n' Ride, not the use of GPS technology. Because Alazork's claim for intrusion upon seclusion fails in all of its essential elements, a reasonable jury could render only one conclusion. Thus, summary judgment in favor of Haul n' Ride was properly granted.

II.

Haul n' Ride cannot be subject to defamation liability based upon its comments to Mr. Babazork because the law provides the affirmative defense of opinion or fair comment. Although opinions are protected speech, false statements of fact are not afforded similar protection. The statements made by Haul n' Ride, however, are statements of opinion. The common usage and meaning of the language used by Haul n' Ride are so loosely defined that the expression may be subject to various interpretations, a clear indication of opinion. Furthermore, the statements are incapable of being objectively verified as true or false because the statement that Alazork "might be involved or in trouble" lacks any precision as to its meaning, yet another indication of opinion. Finally, the immediate context of Haul n' Ride's expression as well as the broader social context of the statement indicate that the statements are opinion. The immediate context of the statement indicates that Haul n' Ride disclosed the underlying facts upon which it founded its opinion that Alazork "might be involved or in trouble." When the underlying facts upon which an individual bases his opinion are fully disclosed, the expression enjoys the protected status of opinion. Finally, the broader so-

cial context reveals that Haul n' Ride was simply upholding its duty to society by staying vigilant in combating terrorism. After receiving notice of possible terrorist activities, Haul n' Ride promptly and vigilantly acted in order to thwart possible death and destruction.

Finally, Haul n' Ride's statements also fall squarely within the affirmative defense of fair comment. The fair comment privilege extends to statements of opinion on matters of public concern so long as the critic's opinion was his own, and he did not make the comment for purposes of causing harm to the object of the comment. Undoubtedly, the public concern for terrorism has grown recently; however, the impact of terrorism on America was no less critical in years past. Because Haul n' Ride's comments fit within the fair comment defense, Alazork shouldered the burden of establishing that Haul n' Ride's statements were made for the sole purpose of defaming him. The record indicates, however, that Haul n' Ride had received notice from the Federal Bureau of Investigation that their trucks might be involved in terrorist activities. Because Alazork failed to establish that Haul n' Ride made the statements for the sole purpose of defaming him, and the statements could otherwise be characterized as protected opinion, the Circuit Court's grant of summary judgment if favor of Haul n' Ride was proper as to Alazork's defamation claim.

III.

Alazork's final claim against Haul n' Ride alleged violations of the Marshall Deceptive Business Practices statute. This statute prohibits the omission or concealment of material facts. However, the use of GPS technology was not essential to the transaction between Haul n' Ride and Alazork. In renting the truck to move back to college, Alazork failed to inquire into the availability of GPS technology in Haul n' Ride rental trucks. Furthermore, after signing the rental agreement, Alazork showed no further interest in the agreement provision that informed him of the availability of GPS technology. The fact that Haul n' Ride disclosed the use of GPS technology in the rental agreement defeats any claim of omission or concealment; however, should this Court hold that the information was not fully disclosed, the omission or concealment cannot be considered a material fact since the information was not essential to the underlying transaction.

Moreover, Haul n' Ride fully disclosed the price difference and circumstances which distinguish local rental from one-way rental plans. Had Alazork simply read the terms of the agreement to which he was bound, he would have learned that he would be subject to the one-way rental rate. However, despite being told of the rental arrangements and having the rental agreement terms available, Alazork chose the local

rental plan. After being found in violation of the rental terms, Alazork now attempts to avoid the increased rental rate by alleging an omission or concealment by Haul n' Ride. However, after applying the law to the undisputed facts, a reasonable jury could render but one conclusion in favor of Haul n' Ride; therefore, the circuit court properly granted summary judgment in favor Haul n' Ride.

Haul n' Ride recognizes that Alazork's situation is lamentable. However, any loss suffered by Alazork resulted from Mr. Babazork's independent actions, and not as a result of Haul n' Ride's statements or use of GPS technology. Haul n' Ride should not be punished for its attempt to strike a blow against terrorism. Consequently, the Circuit Court properly granted summary judgment for Haul n' Ride on all three of Alazork's claims.

ARGUMENT

The Marshall Supreme Court should affirm the First District Court of Appeals which affirmed the Potter County Circuit Court's grant of summary judgment in favor of Haul n' Ride. The court of appeals and the circuit court properly held Haul n' Ride not liable for the statutory claims of intrusion upon seclusion, defamation, and deceptive business practices. Under Marshall Rule 56, summary judgment is appropriate when no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law. Marshall R. Civ. P. 56(c). Rule 56 mandates summary judgment when the party carrying the burden of proof at trial fails to make a showing sufficient to establish the existence of an essential element. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Additionally, "[a] party is entitled to summary judgment 'if, under the governing law, there can be but one reasonable conclusion as to the verdict.'" *Church v. Gen. Motors Corp.*, 33 F.3d 805, 807 (7th Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Because the various commercial and private uses clearly benefit society, the court of appeals properly affirmed the circuit court's grant of summary judgment in favor of Haul n' Ride.

GPS technology employs approximately twenty-four satellites that send out radio signals to a receiver in order to establish location. Aaron Reneger, *Satellite Tracking and the Right to Privacy*, 53 Hastings L.J. 549, 550 (2002). GPS technology serves many vital functions within today's society. In fact, former President Clinton ordered that the selective availability of GPS be discontinued in order to make GPS more responsive to civil and commercial users worldwide. Office of Science and Technology, *President Clinton: Improving the Civilian Global Positioning System (GPS)* (Sept. 14, 2002), *at* http://www.ostp.gov/html/0053_4.html. For example, uses of GPS include air, road, rail, and marine navigation,

precision agriculture and mining, oil exploration, environmental research and management, telecommunications, electronic data transfer, construction, recreation, and emergency response. *Id.*

Furthermore, some school districts may use GPS to track public busing systems. Kevin Duffy, *Satellites Watch as School Buses Travel the Roads; County Installs Tracking System*, Atlanta J. & Const., Aug. 29, 2002, at 3JI. In Clayton County, Georgia, fifty new buses were equipped with GPS so a frustrated parent calling the school system may receive a precise answer to her question, "Where's my child's bus?" *Id.* The school system is apparently attempting to avoid incidents such as the one that occurred last January in Pennsylvania when an armed man took thirteen children hostage on a 160 mile trip along the eastern seaboard. *Id.* Frantic parents worried about their children's location as helicopters searched for the hijacked bus. *Id.* Also, several years ago in Clayton County, a child suffered a seizure on the bus, and the driver was not able to determine whether it would be quicker to return the child home or to continue to the school for assistance. With the use of GPS technology, both buses in the above situations could have been immediately located and assistance rendered.

Other applications of GPS technology include tracking individuals on probation. Zachary R. Dowdy, *Using Higher Tech to Monitor Offenders*, Newsday, Aug. 28, 2002, at A39. Now, high-tech bracelets allow probation officers to keep tighter reins on high-risk individuals such as sex offenders. *Id.* GPS allows for real-time tracking of the probationers to see exactly where they are going, including places they are not allowed to be, such as schools. *Id.* Also, parents may be able to track the movements of their children with GPS bracelets. Christine Jackman, *Bracelet to Track Kids by Satellite*, Sunday Mail (QLD), Aug. 25, 2002, at 3. The bracelets may be set to sound an alarm when a child wanders beyond certain boundaries. *Id.* When a child in missing, kidnapped, or injured, a parent can simply logon to an Internet site that displays the location of their child. *Id.*

GPS technology will become an integral part of society within the next few years. In fact, in 2000, the market for GPS applications was expected to double by 2003, increasing from $8 billion to over $16 billion. Office of Science and Technology, *supra*. Society recognizes the instant benefits of GPS technology, rather than considering it a threat to its individual liberties. Despite such general acceptance, Alazork claims Haul n' Ride committed an intrusion upon seclusion, defamation, and deceptive business practices. However, the circuit court properly granted summary judgment in favor of Haul n' Ride.

I. NO INTRUSION UPON SECLUSION ARISES FROM THE USE OF GPS TECHNOLOGY TO TRACK THE LOCATION OF RENTAL TRUCKS BECAUSE ALAZORK ESTABLISHED NONE OF THE ELEMENTS OF INTRUSION UPON SECLUSION.

The Court of Appeals affirmed the Circuit Court's grant of summary judgment for Haul n' Ride on Alazork's intrusion upon seclusion claim. The claim is based on the Marshall statute which follows the RESTATEMENT (SECOND) provision and requires proof of the following four elements:

1) an unauthorized intrusion or prying into the plaintiff's seclusion;
2) the intrusion must be offensive or objectionable to a reasonable person;
3) the matter on which the intrusion occurs must be private, and
4) the intrusion causes anguish and suffering.

MARSHALL REVISED CODE § 735 MRC 15/40. Examining the four elements of intrusion under the undisputed facts shows that the use of the GPS technology in its rental trucks does not intrude upon seclusion.

A. THE USE OF GPS TECHNOLOGY IN RENTAL VEHICLES DOES NOT AMOUNT TO AN INTRUSION WHEN THE ACTOR BELIEVES HE RECEIVED THE NECESSARY LEGAL OR PERSONAL PERMISSION TO COMMIT AN OTHERWISE INTRUSIVE ACT.

One of the most fundamental freedoms on which our country has grounded its roots is a person's right to privacy, or to be let alone. Like all great and fundamental freedoms, however, the right to privacy is not absolute. In pursuing a claim for an invasion of privacy, one must proceed within the confines of the appropriate statute. Under the Marshall intrusion upon seclusion statute which mirrors the corresponding Restatement provision, Alazork must first establish that Haul n' Ride committed an intrusion. *See* RESTATEMENT (SECOND) OF TORTS § 652B. However, because Haul n' Ride believed it obtained the proper permission from Alazork to use the GPS technology, no intrusion occurred.

An intrusion, for invasion of privacy purposes, occurs when an actor "believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 876 (8th Cir. 2000) (citing *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3rd Cir. 1989)). For example, the Eighth Circuit Court of Appeals in *Fletcher* held that the defendant intruded. *Fletcher,* 220 F.3d at 876. In *Fletcher*, when the plaintiff developed a work-related injury, her manager requested that she fill out a worker's compensation form. *Id.* at 873-74. However, she did not seek worker compensation benefits. *Id.* at 874 n.1. The manager then used the worker compensation form to obtain the plaintiff's injury

information from her doctor. *Id.* at 874. In finding that an intrusion occurred, the court of appeals recognized that the grocery store manager used a worker's compensation form to deviously obtain information about the plaintiff's injury, although the plaintiff never sought worker's compensation benefits. *Id.* at 876.

The present facts bear no resemblance to those presented before the court in *Fletcher* because Haul n' Ride obtained the necessary legal or personal permission to use the GPS technology. Haul n' Ride and Alazork entered into a rental agreement that set forth various terms, including the dates the rental truck would depart from the Haul n' Ride office and when Alazork would return the truck. (R. at 5.) Among the eleven express terms listed in the agreement was a statement acknowledging that the truck may be equipped with GPS technology. The agreement further stated that Haul n' Ride may use the GPS technology to locate the vehicle in emergency situations such as mechanical malfunctions, accident, or theft. (R. at 4; R. at Ex. B.) Alazork expressly agreed to all terms and conditions listed within the rental contract when he entered into the agreement and signed it. *Id.*

When a person provides legal or personal permission to commit an intrusive act, no intrusion occurs. *Fletcher*, 220 F.3d at 876. Essentially, Alazork's legal commitment under the terms of the rental contract amounted to permission or consent to Haul n' Ride's use of the GPS technology. At least one state has inferred that consent to search negates any possible intrusion. *See Wal-Mart Stores, Inc. v. Lee*, 74 S.W.3d 634 (Ark. 2002). The Arkansas Supreme Court in *Lee* addressed a situation in which an employee agreed to a search for stolen property by his employer. *Id.* at 645. Although no dispute existed that the employee consented to a search, disagreement as to the scope of the search prevented the court from ruling in favor the defendant employer. *Id.* at 647.

However, no similar dispute as to the scope of the search exists between Haul n' Ride and Alazork in the present case. Because Alazork signed the agreement, he expressly agreed to all rental terms and conditions including the use of GPS technology to locate the vehicle in emergency situations. The common meaning and understanding of the term "emergency" may be stated as "a situation, often dangerous, which arises suddenly and calls for prompt action." New Webster's Dictionary and Thesaurus of the English Language (School, Home & Office ed. 1995). Emergency situations include obtaining location information of a rental truck in order to thwart potential terrorist activities.

Because Alazork voluntarily solicited the services of Haul n' Ride and entered into a rental agreement, he consented to the use of GPS technology to locate the rental truck in any emergency situation. Emergency situations often occur under the most remote and unforeseeable circumstances. Obviously, GPS technology provides location information

when mechanical failure occurs or when a traffic accident arises. However, GPS technology can also assist law enforcement in finding children abducted by kidnappers. Simply because the emergency situation involved in the present case did not involve foreseeable circumstances such as a car accident or vehicle malfunction does not lessen its status as an emergency. Because Haul n' Ride obtained the necessary legal and personal permission to use the GPS technology in its rental vehicle, no intrusion occurred.

B. Haul n' Ride's Use of GPS Technology in Rental Vehicles Cannot Be Considered Offensive or Objectionable After Giving Consideration to Factors Indicating Offensive or Objectionable Conduct.

Even assuming Haul n' Ride's use of GPS technology amounted to an intrusion, the alleged intrusion did not rise to a level that would be offensive or objectionable to a reasonable person. Under the Marshall intrusion upon seclusion statute, the defendant's activity must amount to conduct that would be offensive to a reasonable person.

When the undisputed material facts demonstrate no reasonable expectation of privacy or an insubstantial impact on a person's privacy interest, the question of invasion may be determined as a matter of law. *Deteresa v. Am. Broad. Cos., Inc.*, 121 F.3d 460, 465 (9th Cir. 1997) (citation omitted). Courts address certain factors in determining the offensiveness of a person's conduct, such as:

1) the degree of the intrusion;
2) the context, conduct, and circumstances surrounding the intrusion;
3) the intruder's motives and objectives;
4) the setting into which the intruder intrudes; and
5) the expectations of those whose privacy is invaded.

Id. An important theme arising in the discussion of these factors in the *Deteresa* opinion focused upon the fact that the alleged intrusion occurred in public view. *Id.* at 466.

1. *The degree of any intrusion is minimal when considered within the context, conduct, and circumstances.*

During the infamous O.J. Simpson murder controversy, American Broadcasting Companies ("ABC") approached Deteresa for a television interview regarding her knowledge of Mr. Simpson. *Id.* at 462. She declined the interview but later learned that her initial encounter with ABC had been recorded. *Id.* at 463. ABC later broadcast a short clip of the videotape. *Id.* In finding that no substantial intrusion of Deteresa's

privacy occurred, the court of appeals emphasized that Deteresa was videotaped in public view by a camera person in a public place. *Id.* at 466. The camera person operated the video recording device from across the street, and because the camera crew did not encroach on her property, any intrusion upon Deteresa's privacy was *de minimis*. *Id.*

Similarly, any intrusion upon Alazork's privacy was also insubstantial. First, Alazork was not operating his own personal vehicle; rather, he rented a commercial vehicle from Haul n' Ride. The United States Supreme Court has held that an individual's expectation of privacy in commercial property is less than the expectation of privacy in an individual's home. *Minnesota v. Carter*, 525 U.S. 83, 90 (1998). Therefore, Alazork's privacy expectations should be less than if he had been operating his own personal vehicle. Second, Alazork had notice of the potential use of GPS technology under the terms of the rental agreement. Finally, and perhaps most importantly, Alazork drove the vehicle to his college and parked it in a convenience store parking lot. (R. at 5.) Alazork made absolutely no attempt to conceal his identity or otherwise protect his privacy. In fact, he parked in a public venue which was open to and accessible by any passerby. Such undisputed facts negate any impact on Alazork's privacy expectations.

Additionally, GPS technology causes little or no intrusion. In fact, GPS technology involves no physical intrusion; instead, it utilizes a system of satellites to pinpoint location within one hundred feet. *See* Aaron Reneger, *Satellite Tracking and the Right to Privacy*, 53 Hastings L.J. 549, 550 (2002). While GPS technology was originally developed by the United States military to navigate submarines and guide missiles, many current commercial applications of the technology exist. *Id.* Now, GPS receivers can be embedded in cellular telephones, watches, and laptop computers. *Id.*; *see also* Richard C. Balough, *Global Positioning System and the Internet: A Combination with Privacy Risks*, 15 Chi. B. Assn. Rec. 28, 29 (Oct. 2001). Because the use of GPS technology is rapidly becoming a widely accepted commercial application, and no physical intrusion arises from its use, the degree of intrusion upon Alazork's privacy expectations is minimal.

2. *Haul n' Ride possessed legitimate motives and objectives, and Alazork's privacy expectations were diminished.*

Haul n' Ride's motives and objectives in performing the intrusive acts must also be examined. In other words, this Court should consider the purpose of the intrusion and whether the thing being intruded upon is entitled to privacy. *I.C.U. Investigations, Inc. v. Jones*, 780 So. 2d 685, 689 (Ala. 2000). Furthermore, the overall context of the alleged intrusion should be examined including the circumstances under which the

alleged intrusion occurred. *Bauer v. Ford Motor Credit Co.*, 149 F. Supp. 2d 1106, 1110-11 (D. Minn. 2001). In *I.C.U. Investigations*, Jones suffered from a work-related injury and sought workers' compensation benefits. 780 So. 2d at 687. Jones's employer hired an investigative company to watch Jones's daily activities. *Id.* While parked on the shoulder of one of two roads near Jones's mobile home, investigators videotaped Jones urinating in his front yard on several occasions. *Id.* Jones filed suit alleging invasion of privacy. *Id.* at 688.

The Alabama Supreme Court noted that because the extent of Jones's injuries presented an issue in his workers' compensation claims, he should have expected a reasonable investigation regarding his physical capacity. *Id.* at 689. Concluding that the purpose of the investigation was legitimate, the court turned to the issue of whether the investigation was objectionable or offensive. *Id.* Because Jones was watched and taped in his front yard, exposed to public view, the investigators intrusion was not wrongful. *Id.* The front yard was located such that Jones could be viewed from either of two public roads, and the investigators never entered or taped activities occurring within the home. *Id.* A reasonable person could not find the intrusion objectionable or offensive. *Id.*

Similarly, Haul n' Ride possessed legitimate purposes and motives for collecting the location information of their truck. Virtually every aspect of American society has changed in light of recent events. Foreign entities and extremist American factions catapulted the issue of terrorist activities into forefront of American media by their acts. After tragic bombings at home and abroad, Americans have become much more aware of the havoc that may be reaped on our great nation. Because Haul n' Ride was informed that its trucks might be used by those seeking such death and destruction, Haul n' Ride was familiar with the potential for future terrorist activities even before the rest of the country became keenly aware of the actuality on September 11, 2001. In its attempt to combat such activities, Haul n' Ride contacted Mr. Streeter after receiving notice from the FBI of potential terrorist activities in the region. Mr. Streeter's use of GPS technology, under the circumstances, to locate its rental trucks must be considered legitimate. Furthermore, Alazork's actions of parking the vehicle in full public view diminished his privacy expectations[1] just as Mr. Jones's expectations of privacy were diminished in *I.C.U. Investigations*. Consequently, any intrusion by Haul n' Ride cannot be considered wrongful, offensive, or objectionable.

1. Alazork's diminished expectation of privacy is further discussed in Section I(c), *infra*.

3. *The location in which Haul n' Ride placed the GPS receiver further negates the intrusiveness of GPS technology.*

Finally, the setting into which Haul n' Ride intruded provides additional grounds that Haul n' Ride's acts were not offensive or objectionable. Haul n' Ride places the GPS receivers inside the trucks' engine compartments. Such placement neither invades any part of the vehicle which Alazork could use for private matters, nor does the receiver interfere with Alazork's ability to use the vehicle for moving purposes. Thus, taking into account the various factors indicating offensive or objectionable conduct, Haul n' Ride's use of the GPS technology did not rise to the level of intrusion that a reasonable person would find offensive.

C. ALAZORK'S CONDUCT EVIDENCED NO EXPECTATION OF PRIVACY.

The legitimate expectation of privacy represents the touchstone of privacy law in America. *See, e.g.*, *Fletcher*, 220 F.3d at 877; *see also Katz v. United States*, 389 U.S. 347, 360 (1967) (holding that the touchstone of Fourth Amendment analysis is whether an individual maintains a "constitutionally protected reasonable expectation of privacy."). A plaintiff asserting such a claim "must have conducted himself or herself in a manner consistent with an actual expectation of privacy." *Id.* (quoting *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 648 (Cal. 1994)). In other words, a person's behavior may give rise to an inference that he retains no privacy expectations in some aspects of his affairs. *Id.* Even Samuel D. Warren and Louis Brandeis acknowledged this principle in their famous article which founded the common law's recognition of an individual's right to privacy. *See* Samuel D. Warren, and Louis Brandeis, *The Right to Privacy*, 4 Harv. L Rev. 193 (1890). Warren and Brandeis avowed that "the individual is entitled to decide whether that which is his shall be given to the public. . . . The right is lost only when the author himself communicates his production to the public,—in other words, publishes it." *Id.* at 199-200. Some of the most often litigated privacy expectation issues arise in the criminal context because the United States Constitution provides stringent protections for individuals against unreasonable searches and seizures. U.S. CONST. AMEND. IV. Due to these heightened privacy protections, principles set forth in criminal cases are helpful in examining Alazork's expectation of privacy.

1. *Privacy expectations are lessened when in public places.*

The Ninth Circuit Court of Appeals has limited a person's privacy expectations when he is in public places. *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999). In *McIver*, law enforcement officers, suspecting McIver of cultivating marijuana plants in a national park, placed video and still cameras in areas of the park where the plants were grow-

ing. *Id.* at 1122. After the defendant's vehicles were photographed in the area, officers placed a magnetized tracking device (similar in principle to GPS technology) on the undercarriage of McIver's vehicle. *Id.* at 1123. McIver was later indicted for possession of marijuana with intent to deliver. *Id.* at 1124.

On appeal, McIver asserted that the use of an unmanned camera constituted an unreasonable search. *Id.* at 1125. However, the court of appeals rejected this contention, recognizing that "nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them." *Id.* (citations omitted). Observation of the marijuana site with unmanned cameras did not violate the constitution simply because the more cost-effective "mechanical eye" was utilized by law enforcement. *Id.*; *see also Hudspeth v. Arkansas*, No. CR 01-1222, 2002 WL 1339891, at *4 (Ark. June 20, 2002) (holding that use of photographic equipment does not violate the Fourth Amendment as long as the information obtained could have been lawfully observed by a law enforcement officer). Similarly, GPS technology reveals no more than what could be observed by the naked eye.

Instead of spending significant amounts of time and money on hiring an individual to physically locate and view the placement of Alazork's rental truck, Haul n' Ride employed a more cost-effective and efficient means of gathering the same information. The undisputed facts establish that Alazork parked the truck in a parking lot, open to the view of any passerby, thereby defeating any expectation of privacy Alazork may have in his location information. Such reasoning falls within the holding of the Ninth Circuit in *McIver*. 186 F.3d at 1125-26 (holding that "[i]llegal activities conducted on government land open to the public which may be viewed by any passing visitor or law enforcement officer are not protected by the Fourth Amendment because there can be no reasonable expectation of privacy under such circumstances."). Of course, the court did recognize that even in public places, some expectation of privacy may exist in some circumstances such as in hotel rooms, a cabin, or an enclosed tent. *Id.* at 1126. However, just as McIver made no attempt to conceal his activities from public view, Alazork made no attempt to conceal the location of the rental truck. Thus, no reasonable expectation of privacy existed.

2. *Use of GPS technology does not require a search warrant under the heightened protection of criminal cases.*

Recently, a Washington state court addressed the use of GPS technology and privacy expectation issues. *See Washington v. Jackson*, 46 P.3d 257 (Wash. Ct. App. 2002). In *Jackson*, law enforcement officers

sought and received a warrant to attach a GPS device on a murder suspect's vehicle in an attempt to find the victim's body. *Id.* at 261. Using the information collected from the GPS, investigators located the victim's body and other incriminating evidence used to convict the defendant. *Id.* at 261-62. On appeal, the Washington appellate court held that probable cause for the arrest warrants securing the use of the GPS was ultimately unnecessary. *Id.* at 269. A fundamental pillar of privacy law states that "what is voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person's private affairs." *Id.* (citations omitted). Applying this fundamental law, the court held that monitoring the defendant's public travels with a GPS device may be "reasonably viewed as merely sense augmenting, revealing open-view information of what might easily be seen from a lawful vantage point without such aids." *Id.* (citations omitted). Similarly, because the information was collected with GPS technology, Alazork can assert no expectation of privacy in his location information as the same information could have easily and lawfully been obtained with the naked eye in open-view.

D. The Use of GPS Technology Did Not Cause Alazork's Anguish or Suffering.

Generally, establishing causation requires sufficient facts that a defendant's conduct substantially caused the injury claimed by the plaintiff. *Tompkins v. Cyr*, 202 F.3d 770, 782 (5th Cir. 2000). Alazork's alleged damages resulted from Mr. Streeter's statements to Mr. Babazork, and not from the use of GPS technology. The record indicates that Alazork lost his scholarship due to Mr. Babazork's conversation with Mr. Streeter. (R. at 6.) Because Alazork failed to establish that the damages he suffered resulted from the use of GPS technology, Marshall Rule 56 mandates that Haul n' Ride receive judgment as a matter of law.

Applying the law relating to intrusion upon seclusion to the evidence, Haul n' Ride committed no intrusion upon the private affairs of Alazork. Furthermore, no aspect of the alleged intrusion can be classified as offensive or objectionable to a reasonable person. Applying the law to the undisputed facts, the only reasonable conclusion is that Haul n' Ride committed no intrusion upon Alazork's seclusion. Thus, the Potter County Circuit Court properly granted Haul n' Ride's motion for summary judgment on this claim.

II. HAUL N' RIDE'S STATEMENTS WERE PROPERLY CHARACTERIZED AS OPINION OR FAIR COMMENT WHICH PROVIDE AN AFFIRMATIVE DEFENSE TO DEFAMATION CLAIMS.

Alazork's second claim alleges that Haul n' Ride defamed him by their statements to Mr. Babazork. However, because the law affords an affirmative defense of opinion or fair comment, the First District Court of Appeals properly held that Haul n' Ride's statements regarding Alazork were not subject to defamation liability. Specifically, Haul n' Ride's statements to Mr. Babazork amounted to expressions that Mr. Streeter was concerned that Alazork "might be involved or in trouble," referred to Haul n' Rides' notice of possible terrorist activities, and indicated that Alazork was parked at an adult bookstore. Because Mr. Streeter's statements fall within the definition of protected opinion and fair comment, the Potter County Circuit Court appropriately rendered summary judgment in favor of Haul n' Ride.

A. HAUL N' RIDE'S REFERRAL TO POSSIBLE TERRORIST THREATS AND STATEMENT THAT ALAZORK "MIGHT BE INVOLVED OR IN TROUBLE" ARE EXPRESSIONS OF OPINION NOT SUBJECT TO DEFAMATION LIABILITY.

The exception of opinion in defamation law is largely rooted in the United States Supreme Court decision in *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974). In *Gertz*, the Supreme Court unambiguously stated that "[u]nder the First Amendment there is no such thing as a false idea." *Id.* at 339. Conversely, however, "there is no constitutional value in false statements of fact." *Id.* at 340. Consequently, courts across the nation have struggled with the often confusing distinction between fact and opinion.

The RESTATEMENT (SECOND) OF TORTS section 566 describes the application of defamation law and opinions as the following:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable *only* if it implies the allegation of *undisclosed defamatory facts* as the basis for the opinion.

RESTATEMENT (SECOND) OF TORTS § 566 (1976) (emphasis added). Building on the Restatement rule, two types of opinions exist: pure opinions and mixed opinions. RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1976). A pure opinion exists when the defendant states the facts on which his opinion is based. *Id.* An opinion based upon disclosed or assumed non-defamatory facts is insufficient to establish liability for defamation. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1976). On the other hand, a mixed opinion is an opinion apparently based on facts not

stated or assumed to exist. RESTATEMENT (SECOND) OF TORTS § 566 cmt. b (1976). Consequently, a mixed opinion gives rise to an inference that undisclosed facts form the basis of the defendant's opinion. *Id.* When the inference of undisclosed facts arises, liability for defamation may exist. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1976).

Focusing on the Supreme Court's statements in *Gertz*, several Courts of Appeals have further developed and explained the distinction between statements of fact and opinion, and the liability attached to each. Recognizing that *Gertz* left many questions unanswered as to the distinction between fact and opinion statements, the District of Columbia Court of Appeals examined various approaches to clarify the distinction. *Ollman v. Evans*, 750 F.2d 970, 977 (D.C. Cir. 1984). Adopting a totality of the circumstances approach, the court addressed four factors in determining whether an opinion may be reasonably characterized as making factual assertions. *Id.* at 979. The four factors utilized by the court of appeals may be summarized as follows:

1) the common usage or meaning of the specific language;
2) the statements verifiability as being objectively true or false;
3) the full context of the statement; and
4) the broader context or setting in which the statement appears.

Id.

1. *The common usage and meaning of the language used indicates that the statements are opinion.*

As an example of the first factor, the common usage and meaning of the words, the court used the classic example of an accusation of a crime. *Id.* at 980. Obviously, such a statement may be "laden with factual content," however, statements that are "loosely definable or variously interpretable" cannot support an action for defamation. *Id.* In the present case, the context of Mr. Streeter's words closely resemble the "loosely definable or variously interpretable" comment. The common usage of the words Mr. Streeter used, "might be involved or in trouble," cannot be interpreted as a direct accusation of a crime. Rather, the terms "might be involved or in trouble" may be interpreted in many different contexts.

When situations arise such that the plain meaning of the words may be interpreted differently, some states invoke the common law "innocent construction" rule. For example, in Illinois, if a statement may be innocently interpreted, it should be so interpreted. *Mittleman v. Witous*, 552 N.E.2d 973, 979 (Ill. 1990). Consequently, every innocent inference should be made in favor of Haul n' Ride.

2. *Haul n' Ride's statements are incapable of being objectively verified as true or false, thus indicating an opinion.*

Secondly, the court of appeals in *Ollman* held that the court should consider the verifiability of the statement. 750 F.2d at 981. "[A] reader cannot rationally view an unverifiable statement as conveying actual facts." *Id.* Mr. Streeter's statement that Alazork "might be involved or in trouble" cannot be objectively verified as true or false. When the uttered statement connotes varying interpretations, the lack of precision makes the statement incapable of being proven true or false. *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) (stating that the term "scam" may mean different things to different people, consequently the assertion that "X is a scam" is incapable of being proven true or false). "[T]he trier of fact may improperly tend to render a decision based upon the approval or disapproval of the contents of the statement, its author, or its subject." *Ollman*, 750 F.2d at 981. Therefore, the circuit court correctly rendered summary judgment because unverifiable statements of opinion should be made as a matter of law. *Id.* This lack of verifiability of the statement must also be considered in light of the third factor: the context in which the statement occurs.

3. *The immediate context of the expression suggests that the statement is an opinion.*

The degree of factual content arising from a statement of opinion depends upon the context of the statement taken as a whole. *Ollman*, 750 F.2d at 982. For example, in *McCabe*, *supra*, the plaintiff operated time share condominiums. 814 F.2d at 840. After an encounter with one of the plaintiff's salespersons, the defendant published an article that labeled the plaintiff's operation a "scam." *Id.* Addressing the statement in context, the court noted that the defendant "extensively and accurately described his encounter with the resort salespeople, thereby disclosing the basis for his assertion that it was a scam." *Id.* at 843. As previously stated, a pure opinion based upon disclosed facts cannot satisfy an action for defamation. RESTATEMENT (SECOND) OF TORTS § 566 cmt. c (1976).

Similarly, Mr. Streeter extensively and accurately disclosed the underlying facts upon which he based his opinion that Alazork "may be involved or in trouble." Mr. Streeter unambiguously informed Mr. Babazork that he had received a report of suspected terrorist activity. Mr. Babazork was also informed that Alazork violated the rental agreement by taking the truck out of the state. Because these underlying nondefamatory facts were disclosed to Mr. Babazork, Mr. Streeter's opinion that Alazork "might be involved or in trouble" amounts to protected opinion no matter how derogatory the opinion may have been. RESTATEMENT

(SECOND) OF TORTS § 566 cmt. c (1976) ("A simple expression of opinion based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, *no matter how unjustified and unreasonable the opinion may be or how derogatory it is.*") (emphasis added). Thus, just as the term "scam" in *McCabe* could not reasonably be considered defamation, Mr. Streeter's statement to Mr. Babazork, considered in the context of the disclosed facts, cannot be sufficient to uphold an action in defamation.

4. *The broader social context of the statement supports a holding that the statement is an opinion.*

Finally, when determining whether a statement should be characterized as opinion or fact, courts must consider the broader social context into which the statement fits. *Ollman*, 750 F.2d at 983. Clearly, the social context and setting in which the statement was made has broad implications. Haul n' Ride was aware of the broad implications and took proactive measures to address them. Recently, Americans generally have become aware of the same implications because of terrorist activity. America and other free nations have fallen under attack at the hands of terrorist organizations, both domestically and abroad. In order to secure our own safety, freedom, and values, Americans must join together in combating these acts. While soldiers are literally fighting to uphold the pillars of America's foundation, each and every citizen soldier must stay ever vigilant and aware in order to prevent terrorist acts against the innocent. Mr. Streeter was simply upholding his duty.

The recent publicity negatively implicating Haul n' Ride rental trucks in illegal activities has forced the company to be on high alert. After the FBI alerted Haul n' Ride to possible terrorist activities potentially involving the use one of its rental trucks, the company immediately contacted its rental managers in an attempt to impede disaster. Mr. Streeter fulfilled his duty in tracking down all of the rental trucks in his command, and when Alazork's truck fit the description of the FBI's lead, Mr. Streeter contacted Alazork's references. Hypothetically, had the FBI's tip proved true, and Alazork was involved, Mr. Streeter would be hailed as a hero for preventing imminent death and destruction. Fortunately, Alazork was not involved and the FBI's tip proved to be unfounded. Rather than being rewarded for prompt action and vigilant awareness, Haul n' Ride faces a lawsuit for upholding its duty to America.

In speaking with Mr. Babazork, Mr. Streeter did not state, implicitly or explicitly, that Alazork was a terrorist. By holding that Mr. Streeter's statements somehow implied derogatory or defamatory facts concerning Alazork's character, this Court would be encouraging self-censorship of

the citizens of Marshall. This self-censorship impedes America's objectives in its war on terrorism. Consequently, taking into consideration both the immediate context of the statement made and the overall social context of the situation, Mr. Streeter's statement cannot be characterized as anything other than non-actionable pure opinion.

B. Additionally, Haul n' Ride is not Subject to Defamation Liability Because Fair Comment is an Affirmative Defense.

Early common law did not distinguish between fact and opinion when imposing liability for defamation. *Bentley v. Bunton*, No. 00-0139, 2001 WL 1946127, at *12 (Tex. Aug. 29, 2002). However, courts incorporated the affirmative defense of fair comment to "afford[ ]legal immunity for the honest expression of opinion on matters of legitimate public interest." *Id.* (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13 (1990)). This form of privileged communication extended to expressions of opinion on matters of public concern if the critic's opinion was his own and he did not make the comment for purposes of causing harm to the object of the comment. *See* Restatement (Second) of Torts § 566 cmt. a (1976); *see also Milkovich*, 497 U.S. at 13-14. Furthermore, the fair comment privilege extended only to opinions of the "pure" type as discussed above. *Milkovich*, 497 U.S. at 13-14. In sum, the fair comment privilege "afforded legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact." *Id.* at 13. The fair comment privilege strikes the balance between the need for public debate and the need to redress injury to citizens "wrought by invidious or irresponsible speech." *Id.* at 14. While the Supreme Court's opinion in *Gertz* has largely made the fair comment principle inapplicable, some states still apply the fair comment privilege in one form or another. *See Scheidler v. Nat'l Org. for Women, Inc.*, 739 F. Supp. 1210, 1215 (N.D. Ill. 1990). In such cases, the plaintiff assumes the burden of proving that the defendant published the statements "solely for the purpose of defaming him and not for the purpose of informing the public." *Id.*

Taking into account the burden Alazork carried to overcome the fair comment privilege, the court of appeals correctly upheld the circuit court's grant of summary judgment in favor of Haul n' Ride. As stated above, the grave impact terrorist attacks have had upon the United States has been felt by all American citizens. As has been the case for many years, reporting and investigating possible terrorist activities continues to remain at the forefront of public debate. While the duty to report and investigate terrorist activities has become more critical in light of recent events, it was no less important in years past. Consequently, Alazork carried the burden of proving that Mr. Streeter published the

statement that Alazork "might be involved or in trouble" for the sole purpose of defaming his good name.

However, the record on appeal clearly establishes that Mr. Streeter had no intent to defame Alazork. Haul n' Ride's security director received a report of possible terrorist activities from the FBI. When the security director passed this information on to the local Haul n' Ride rental agencies, he directed the managers to locate all of their trucks immediately. Acting pursuant to this notice, Mr. Streeter located Alazork's rental truck which fit the description and raised Mr. Streeter's suspicions. Mr. Streeter's statements to Mr. Babazork cannot be characterized as an attempt to defame Alazork because Mr. Streeter intended to prevent terrorist activity. Therefore, the Potter County Circuit Court appropriately granted summary judgment in favor of Haul n' Ride because Mr. Streeter's comments fell within the bounds of the fair comment privilege.

C. Haul n' Ride's Statement that Alazork Parked in Front of an Adult Bookstore is True, and Therefore, not Subject to Liability for Defamation.

Alazork failed to sufficiently meet the falsity element of a defamation action regarding Mr. Streeter's statement that Alazork parked the vehicle at an adult bookstore. To prove defamation, Alazork must have established that Haul n' Ride made a false and defamatory statement. It is not enough that the alleged statement is defamatory; rather "the statement must also be false or carry a false implication." *Schoff v. York County*, 761 A.2d 869, 871 (Me. 2000); *see also Fitzgerald v. Tucker*, 737 So. 2d 706, 716 (La. 1999). No liability exists for a true statement unless the statement is incomplete. *Schoff* 761, A.2d at 871; *see also Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995) ("In suits brought by private individuals, truth is an affirmative defense to slander."). In fact, the United States Supreme Court has noted that "in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975). For example, in *Schoff*, a local newspaper published a story stating that Schoff went to the jail to deliver sneakers to her son, and jail officials found hacksaw blades concealed within the insoles. 761 A.2d at 870. Schoff filed a defamation action alleging that the statements implied that she attempted to break her son out of jail. *Id.* at 871. The court held that no material facts were omitted and the statements did not carry with them a false implication, thus recognizing the general rule that true statements do not carry defamation liability. *Id.* at 872. Only when omitted statements would "dispel the defamatory

sting" does a true statement of fact give rise to a claim for defamation. *Id.*

Despite the fact that parking in front of an adult bookstore is considered by some defamatory to Alazork's character, the fact is nevertheless true. Mr. Streeter informed Mr. Babazork of the true fact without implying any further factual connotations. No matter how unappealing this fact may be no defamatory liability exists. Because the affirmative defenses of opinion and fair comment apply, the circuit court properly granted summary judgment in favor of Haul n' Ride.

III. NO VIOLATION OF THE DECEPTIVE BUSINESS PRACTICES ACT EXISTS BECAUSE HAUL N' RIDE COMMITTED NO DECEPTIVE ACT OR PRACTICE WITH AN INTENT THAT ALAZORK RELY UPON HAUL N' RIDE'S ACTS OR OMISSIONS.

Alazork's final claim against Haul n' Ride asserts a violation of the Marshall Deceptive Business Practices Act. However, the use of GPS technology was not a material fact, and Haul n' Ride fully disclosed the various rental rates; thus, the Circuit Court properly granted summary judgment in favor of Haul n' Ride. The Marshall Deceptive Business Practices Act provides:

> Unfair deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact, in the conduct of any trade or commerce are hereby declared unlawful if, in fact, a reasonable person could be misled, deceived or damaged by said representations.

MARSHALL REVISED CODE § 505 MRC 815/2. Establishing a violation under the Deceptive Business Practices Act requires proof of 1) a deceptive act or practice concerning a material fact, 2) a defendant's intent that the plaintiff rely upon the deceptive act or practice, and 3) the deceptive act occurring in the course of conduct involving trade or commerce. *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 938 (7th Cir. 2001); *Celex Group, Inc. v. Executive Gallery, Inc.*, 877 F. Supp. 1114, 1128 (N.D. Ill. 1995); *Connick v. Suzuki Motor Co.*, 675 N.E.2d 584, 593 (Ill. 1997). Although the Deceptive Business Practices Act should be construed liberally, courts should not use the statute to "transform nondeceptive and nonfraudulent omissions into actionable affirmations." *Mackinac v. Arcadia Nat'l Life Ins. Co.*, 648 N.E.2d 237, 240 (Ill. App. Ct. 1995) (citations omitted).

A. DISCLOSURE OF GPS TECHNOLOGY WAS NOT ESSENTIAL TO THE RENTAL TRUCK TRANSACTION, AND HAUL N' RIDE FULLY DISCLOSED THE PRICE DIFFERENCES BETWEEN ONE-WAY AND LOCAL RENTALS.

1. *Haul n' Ride had no duty to disclose the use of GPS technology because it was not essential to renting.*

The Deceptive Business Practices Act prohibits the "misrepresentation or the concealment, suppression or omission of any material fact" in trade or commerce. MARSHALL REVISED CODE § 505 MRC 815/2. A material fact consists of information in which "a buyer would have acted differently knowing the information, or . . . concerns the type of information upon which a buyer would be expected to rely in making a decision whether to purchase." *Cozzi Iron & Metal, Inc. v. U.S. Office Equip., Inc.*, 250 F.3d 570, 576 (7th Cir. 2001); *see also Connick*, 675 N.E.2d at 595. Stated another way, "the fact 'must be essential to the transaction between the parties.'" *Cozzi*, 250 F.3d at 576 (quoting *Ryan v. Wersi Elec. GmbH & Co.*, 59 F.3d 52, 54 (7th Cir. 1995)).

In *Ryan*, the plaintiff alleged that the defendant fraudulently induced him to purchase stock in one of the defendant's subsidiary companies. *Ryan*, 59 F.3d at 53. The district court granted summary judgment against the plaintiff because he failed to establish that the alleged misrepresentations were material. *Id.* According to the plaintiff, the defendant promised to grant him exclusive distributorship rights upon the purchase of the stock. *Id.* at 54. However, none of the plaintiff's agreements contained such a promise. *Id.* The Seventh Circuit held that if the plaintiff had considered exclusive distributorship an essential element of the transaction, he would have insisted upon the inclusion of such a provision in the agreement. *Id.*

The Seventh Circuit contrasted the *Ryan* decision with the facts set forth in *Cozzi*. *Cozzi* involved a lease agreement for photocopier equipment. 250 F.3d at 573. The plaintiff alleged that the defendant informed him that, although the leases required monthly payments for a minimum number of copies, he would only be accountable for the actual number of copies made. *Id.* Contrasting the alleged misrepresentation with *Ryan*, the court of appeals stated, "[m]ost importantly, the provision in *Ryan* was collateral to the purchase of the company's stock. Here, by contrast, the alleged misrepresentations go to the very heart of the contract—the amount that Cozzi was required to pay U.S. Office for use of the photocopiers." *Id.* at 576 (internal citations omitted).

Under the guidance of the Seventh Circuit decisions, the use of GPS technology cannot be considered an essential element in the transaction between Haul n' Ride and Alazork. The record indicates that Alazork needed a rental truck in order to move back to college for the fall semester. (R. at 3.) Nothing in the record indicates that Alazork considered

the use of GPS technology in the rental trucks as essential to his decision to rent the vehicle because he never inquired into the use of GPS technology in the trucks. Just as the exclusive distributorship rights involved in *Ryan* proved to be immaterial, any of Haul n' Ride's omissions regarding the potential uses of GPS technology are also immaterial.

However, assuming the use of GPS technology rises to the level of a material fact, this Court should find that no omission occurred. In *Bober v. Glaxo Wellcome*, buyers of the pharmaceutical drugs Zantac 75 and Zantac 150 filed an action against the drug manufacturer alleging that the manufacturer provided false and misleading information on the substitutability of the two drugs. 246 F.3d at 936. The drug manufacturer provided both a hotline telephone number as well as an Internet Web site to provide information on the drugs. *Id.* at 937. In holding that the manufacturer committed no violation of the deceptive business practices statute, the court stated "that examining the statements at issue, together and in the context of the other information available to Zantac users, eliminates any possibility of deception with regard to substitutability." *Id.* at 940. Similarly, Haul n' Ride noted in its rental agreement that its rental trucks may be equipped with GPS technology, and Haul n' Ride may use this technology for emergency location services. Although the term emergency may be broad, no question arises that the circumstances of the present case involved an emergency circumstance.

2. *Haul n' Ride fully disclosed the price differences between local and one-way rentals.*

Failing to disclose information can be deceptive under a consumer unfair trade practices act only if, under the circumstances, a duty to disclose the information exists. *Kenney v. Healey Ford-Lincoln-Mercury, Inc.*, 730 A.2d 115, 117 (Conn. App. Ct. 1999). Various circumstances of a transaction may give rise to a duty to disclose material information. *Mackinac*, 648 N.E.2d at 240. For example, such a duty arises in fiduciary relationships such as an agency relationship. *Id.* Other times, a duty to speak occurs when one party specifically inquires as to a material matter involved in the transaction. *See Brandywine Volkswagen, Ltd. v. Delaware*, 312 A.2d 632, 634 (Del. 1973) (noting that when a buyer specifically asked a used car salesman about a car's mileage, a duty arose to disclose the facts relevant to the buyer's inquiry); *see also Mitchell v. Skubiak*, 618 N.E.2d 1013, 1018 (Ill. App. Ct. 1993) (addressing a buyer's discovery of defects after purchasing a home the court stated, "[u]pon plaintiffs' inquiring about the source of [cracks found in the master bedroom's wall and ceiling], a duty to speak arose on behalf of the defendants."). However, Alazork raises no argument that a fiduciary duty

exists between him and Haul n' Ride, and Alazork failed to inquire as to any specifics of the local or one-way rental arrangements.

In determining whether a seller has a duty to disclose, an additional factor to consider is whether an omission could be discoverable through the buyer's exercise of ordinary prudence. *Randels v. Best Real Estate, Inc.*, 612 N.E.2d 984, 988 (Ill. App. Ct. 1993). In *Randels*, the seller sold a residence without disclosing to the buyer that a city ordinance required the owner of the residence to connect the property's waste water system to the municipal sewer system. *Id.* at 986. The appellate court stated:

> the key question is whether a defendant's misrepresentations or omissions were discoverable through the exercise of ordinary prudence by the plaintiff, and a finding of liability is made when the defendant misrepresents or omits facts of which he possesses almost exclusive knowledge the truth or falsity of which is not readily ascertainable by the plaintiff.

Id. at 988 (emphasis added). Because the city ordinance was a matter of public knowledge, the seller committed no violation of the Consumer Fraud Act. *Id.* Additionally, the court noted that the buyers made few, if any, inquiries about the property. *Id.* at 989. Had the buyers made a simple review of the ordinances prior to purchasing the home, they would have been placed on notice of the hookup requirements. *Id.* at 988-89.

Although the present circumstances involved no city ordinance or other applicable law, the same principle applies. Alazork learned of the two types of rentals available, one-way and local when he contacted Haul n' Ride. Mr. Streeter told Alazork that one-way rental rates were higher "because of the cost of maintaining a national network of Haul n' Ride locations and because *the company's insurance expenses were higher for rentals in which a truck was driven in more than one state.*" (R. at 3) (emphasis added). Although Mr. Streeter stated that one-way rentals involved taking the truck out of state and returning it to a different Haul n' Ride location, the rental agreement entered into by Alazork expressly stated, "The truck leaving the State of Marshall will be charged the one-way rental fee." (R. at Ex. B.) The rental agreement unequivocally states that, under Alazork's circumstances, Alazork would be subject to the one-way rental fee. Thus, Haul n' Ride made full disclosure of the rental arrangements to Alazork. Like the buyers in *Randels*, Alazork would have been placed on notice if he had simply read the binding terms of the contract. Furthermore, like the buyers in *Randels*, Alazork made no inquiry about his particular circumstances. Rather, Alazork chose not to inquire in an attempt to avoid the increased one-way rental charges. Having been caught in violation of the clear terms of the contract, Alazork now attempts to shift the blame to Haul n' Ride.

B. No Evidence Exists that Haul n' Ride had the Requisite Intent under the Deceptive Business Practices Act because Haul n' Ride had No Exclusive Knowledge or Notice that Further Disclosure of the Contract Terms was Necessary.

In order to establish a claim under the Deceptive Business Practices Act, Alazork must establish intent on the part of Haul n' Ride. Marshall Revised Code § 505 MRC 815/2. Intent may be established by circumstantial evidence. *Celex Group, Inc.*, 877 F. Supp. at 1131. In order to establish intent, a defendant must be placed on notice that it may be committing a deceptive act.

For example, in *Celex*, the plaintiff and defendant entered into a relationship by which the parties would buy and sell each other's products. *Celex Group, Inc.*, 877 F. Supp. at 1119. On several occasions, the defendant purchased advertising space in the plaintiff's magazine issued on various airline flights. *Id.* The plaintiff claimed that the defendant granted exclusive marketing rights to sell the defendant's products in its magazines. *Id.* at 1120. However, the defendant did not disclose to plaintiff that it had entered into an agreement with another in-flight magazine. *Id.* at 1127. On its erroneous belief that it retained exclusive rights, the plaintiff placed orders for defendant's products totaling approximately $700,000. *Id.* Addressing the element of intent in the plaintiff's deceptive business practices claim, the court found circumstantial evidence that the defendant was well aware of the plaintiff's reliance on airline advertising to promote its products. *Id.* at 1131. Because of notice, a reasonable factfinder could infer that the defendant concealed its agreement with another in-flight magazine because such disclosure would undermine the ongoing negotiations with the plaintiff concerning the $700,000 in products. *Id.*

Notice to a defendant of his deceptive act was also used to establish the element of intent in *Totz v. Cont'l Du Page Acura*, 602 N.E.2d 1374 (Ill. App. Ct. 1992). In *Totz*, the plaintiff purchased a used automobile from the defendant. *Id.* at 1377. The defendant referred to the vehicle as "the cream of the crop" and even placed a sticker on the windshield stating that the car had undergone a 26-point inspection. *Id.* at 1376. However, the defendant failed to notify the plaintiff that the vehicle sustained extensive damage in the past. *Id.* at 1377. In finding the element of intent, the court held that ample evidence existed that some of defendant's employees knew of the damage the vehicle had previously sustained. *Id.* at 1382. The evidence established that the vehicle underwent an inspection by the defendant's mechanic, and the defendant placed a sticker on the vehicle acknowledging that an inspection occurred. *Id.* Based on this circumstantial evidence, the defendant had constructive notice that the car sustained prior damages. *Id.* Because

an individual is presumed to have intended the consequences of his actions, it may be inferred that the defendant's failure to disclose such information to the plaintiff amounted to a deliberate attempt to induce the plaintiff into purchasing the car. *Id.*

Conversely, when evidence of a defendant's exclusive knowledge of particular facts, or notice, does not appear in the record, the element of intent fails. In *Mackinac*, the plaintiff purchased an automobile from defendant, and as part of the transaction, the plaintiff bought a credit life and disability insurance policy. 648 N.E.2d at 238. However, the defendant failed to give the plaintiff a copy of her policy at the time of purchase. *Id.* Later, the plaintiff submitted a claim under the policy after being deemed disabled due to diabetes retinopathy, a diabetes-related eye disorder. *Id.* at 239. The insurance provider denied the claim based on an exclusion for claims arising from a condition diagnosed prior to the commencement of the policy. *Id.* The plaintiff filed suit alleging the defendant failed to inform her of the policy's "good health" requirement at the time of contracting. *Id.* Rejecting the plaintiff's claims, the court of appeals held that the defendant's failure to disclose the information was not calculated to induce the plaintiff's reliance. *Id.* at 240. Not only did the defendant not have knowledge of the defendant's diabetic condition, the defendant had no reason to suspect the condition restriction in the policy would be of any consequence to the plaintiff. *Id.* The court stated, "[w]ithout such knowledge, defendants could not have affirmatively intended that plaintiff rely upon their alleged failure [sic] disclose the exclusion." *Id.* Based upon the above cases, the element requiring intent that a plaintiff rely upon a deceptive act requires a showing that the defendant possessed exclusive knowledge, or was placed on notice that disclosure of such information was necessary.

The record clearly indicates Haul n' Ride possessed no such knowledge or notice. Alazork contacted Haul n' Ride seeking to rent a truck to move back to college. However, Alazork made no statements as to the location of the college that he attended. Mr. Streeter proceeded to disclose the rental fees which included a one-way or local rental fee. Mr. Streeter described both fees and explained that the increased cost of the one-way rental fee is due in part to the fact that "the company's insurance expenses were much higher for rentals in which a truck was driven in more than one state." (R. at 3.) He also told Alazork that local rentals involve the truck's use "in town." (R. at 3.) Mr. Streeter also presented Alazork with the rental agreement which stated, "[t]he truck leaving the State of Marshall will be charged the one-way rental fee." (R. at Ex. B.) Mr. Streeter had no notice of Alazork's circumstances which would require further disclosure or discussion of the rental arrangements. In fact, after Mr. Streeter disclosed information regarding the one-way rental fee and the fact that a truck leaving the State of Marshall fits

within the one-way rental, Alazork was left with the decision as to what arrangement to purchase. Alazork, clearly intending to avoid the increased cost, chose the local rental arrangement. After violating the terms of the agreement, an individual attempting to surreptitiously avoid such costs should not be able to later assert the seller's omission.

Furthermore, Mr. Streeter had no notice that further disclosure of the GPS technology was necessary under the circumstances. The rental agreement plainly stated that "[t]he truck may be equipped with global positioning satellite (GPS) and/or cellular phone technology for emergency location services." (R. at Ex. B.) Alazork neither inquired as to the availability or uses of the GPS technology in the trucks, nor did Alazork request further explanation after entering into the rental agreement. Absent Haul n' Ride's knowledge that Alazork needed additional information regarding rental fees or the GPS technology, Alazork cannot maintain that Haul n' Ride omitted material facts with an intent that Alazork rely upon the omission.

C. HAUL N' RIDE COMMITTED NO DECEPTIVE ACT OR PRACTICE UNDER THE FEDERAL TRADE COMMISSION GUIDELINES.

When addressing a claim under a deceptive business practices act, courts should give deference to the considerations and "interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act." *Robinson v. Toyota Motor Credit Corp.*, No. 90242, 2002 WL 1038728, at *8 (Ill. May 23, 2002). The Federal Trade Commission ("FTC") considers certain factors in determining unfairness, including: 1) whether the practice offends public policy; 2) whether the practice is immoral, unethical, oppressive, or unscrupulous; and 3) whether it causes substantial injury to consumers. *Id.* (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)). Examination of the FTC factors reveals no deceptive act or practice.

1. *Haul n' Ride's use of GPS technology and price differences do not violate public policy because neither injure the public or make competition unfair.*

In order to find that a defendant's conduct is unfair or deceptive, a court need not find satisfaction of all three criteria. *Id.* at *8 (citations omitted). "A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Id.* However, Alazork failed to establish any evidence that the use of GPS technology or the price differences between local and one-way rentals violate public policy.

A violation of public policy involves an injury to the public, and it is in the public interest to prevent the use of unfair methods of competition. *See Spiegel, Inc. v. FTC*, 540 F.2d 287, 295 n.10 (7th Cir. 1976) (citations omitted). Not only has Alazork failed to establish that Haul n' Ride's use of GPS technology violates public policy, the use of GPS technology proves to be a significant benefit to society.

Among the many benefits of GPS technology are uses of GPS in navigation, precision agriculture and mining, mineral exploration and environmental research, telecommunications, electronic data transfer, construction, recreation, and emergency response. *See* Office of Science and Technology, *supra*. As previously indicated, school districts have advantageously used GPS technology in their buses. Emergency medical services are able to better serve their communities with increased response time provided by the use of GPS technology. Finally, in the future, parents will be able to better monitor their children's location through the use of GPS bracelets.

The facts of this case provide an excellent example of the benefits that GPS contributes to society. Hypothetically, had the Federal Bureau of Investigation's tip to Haul n' Ride proved true and Alazork had, in fact, rented the truck with the intention of committing a terrorist act, countless lives could have been saved. The use of GPS technology allowed Haul n' Ride to immediately locate the vehicle without disclosing Alazork's personal information. Law enforcement could dispatch personnel to Alazork's location, possibly preventing extensive human casualties and property damage. Rather than be considered a threat to individual privacy, GPS technology should be welcomed as a valuable asset to combat terror and assist individuals in their daily lives.

Turning to the practice of charging a heightened fee for vehicles traveling beyond state lines, a valid reason for such a practice exists, and this reason was directly communicated to Alazork. When a seller charges unconscionable fees in return for little or no service, he violates public policy. *See Illinois ex rel. Fahner v. Hedrich*, 438 N.E.2d 924, 929 (Ill. App. Ct. 1982) (describing where a significant fee was charged to mobile home owners wishing to sell their homes if the home was not moved from the park after the sale). Rental agencies provide needed services for individuals who wish to move residences, businesses, or other personal and commercial property. However, without national networks such services would be essentially limited to local services, thus causing significant inconvenience for many individuals and businesses wishing to move property longer distances. Mr. Streeter explained that the cost of maintaining Haul n' Ride's national network required an increased fee for those traveling across state lines. Furthermore, the increased cost does not depend solely on returning vehicles to remote locations, rather Haul n' Ride's insurance expenses increase when consumers travel

across state lines. Rather than absorb the added costs, Haul n' Ride appropriately shares this expense with customers traveling across state lines.

2. *Haul n' Ride's conduct is not deceptive because it is not immoral, unethical, oppressive, or unscrupulous conduct and does not cause substantial injury.*

The final factors for this Court to consider in determining the unfairness or deceptiveness of Haul n' Ride's business practices involve consideration of whether the practice is immoral, unethical, oppressive, or unscrupulous, and whether the practice causes substantial injury to consumers. Both the use of GPS technology and the price differential between one-way and local rentals by Haul n' Ride can be analogized to the facts in *Robinson*, *supra*, where the defendant's conduct did not violate a state claim under a statute strikingly similar to Marshall's Deceptive Business Practices Act.

In *Robinson*, the plaintiffs leased automobiles from the defendant. *Robinson*, 2002 WL 1038728, at *1. The plaintiffs' claims under the statute alleged that the defendant's default penalties under the leases constituted an unfair business practice because the lease required both an excess mileage penalty and payment for excess wear and tear. *Id.* at *9. The Illinois Supreme Court disagreed, holding that there existed a "total absence of the type of oppressiveness and lack of meaningful choice necessary to establish unfairness," because the plaintiffs could have leased a vehicle elsewhere. *Id.* Furthermore, the penalty provisions were clearly set forth in the lease. *Id.* Consequently, the defendant's conduct was neither unfair nor deceptive.

Similarly, Haul n' Ride's conduct fails to amount to oppressive behavior or cause substantial injury to consumers. The increased rates for traveling beyond Marshall state lines are not any more unfair than the penalty provisions in the *Robinson* leases. Haul n' Ride disclosed the difference between local and one-way rentals, both orally and in the provisions in the rental contract. Furthermore, the rental agreement provided for use of the GPS technology in emergency situations. The record fails to indicate that Alazork was coerced into signing the rental contract or that he lacked reasonable alternatives in the marketplace. Consequently, under the FTC guidelines, Haul n' Ride committed no deceptive or unfair practice in violation of the Marshall Deceptive Business Practices statute.

CONCLUSION

For the reasons set for above, Haul n' Ride respectfully requests that this Court affirm the decision of the First District Court of Appeals in favor of Respondent, Haul n' Ride.

Respectfully submitted,

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Counsel for Respondent

APPENDIX TABLE OF CONTENTS

APPENDIX A:
RESTATEMENT (SECOND) OF TORTS (1976)
SECTION 652B

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

APPENDIX B:
RESTATEMENT (SECOND) OF TORTS (1976)
SECTION 558

To create liability for defamation there must be:

(a) a false and defamatory statement concerning another;
(b) an unprivileged publication to a third party;
(c) fault amounting to at least negligence on the part of the publisher; and
(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

APPENDIX C:
MARSHALL REVISED CODE (WEST 2002)
SECTION 505 MRC 815/2

Unfair deceptive acts or practices, including but not limited to the use or employment of any deception fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with the intent that others rely upon the concealment, suppression or omission of such material fact, in the conduct of any trade or commerce are hereby declared unlawful if, in fact, a reasonable person could be misled, deceived or damaged by said representations.