UIC John Marshall Journal of Information Technology & Privacy Law

Volume 20
Issue 1 *Journal of Computer & Information Law - Fall 2001*

Article 4

Fall 2001

2001 John Marshall National Moot Court Competition in Information Technology and Privacy Law: Bench Memorandum, 20 J. Marshall J. Computer & Info. L. 91 (2001)

Ryan Alexander

Robert S. Gurwin

Dominick Lanzito

Nicole D. Milos

Bridget O'Neill

2001 MOOT COURT COMPETITION

BENCH MEMORANDUM

RYAN ALEXANDER, ROBERT S. GURWIN, DOMINICK LANZITO, NICOLE D. MILOS, & BRIDGET O'NEILL

IN THE SUPREME COURT OF THE STATE OF MARSHALL

Allen Sanders,	)	
Plaintiff-Appellant,	)	
—v—	)	No. 2001-1224
Marshall Manatees, Inc.,	)	
Defendant-Appellee.	)	

I. INTRODUCTION

This is an appeal from the Order of the First District Court of Appeals, affirming the Madison County Circuit Court decision granting summary judgment in favor of Defendant Marshall Manatees in case number 2001-CV-0901.[1]

In finding for the Defendant, the lower courts held that Defendant's actions, which included capturing a digital photograph of the Plaintiff Allen Sanders and placing it on a billboard did not place the Plaintiff in a false light.[2] Additionally, the courts below held that the Defendant did not misappropriate the Plaintiff's likeness for commercial purposes by using digital photography and facial recognition technology to gather,

1. R. at 2.
2. R. at 3.

match and post his image on a billboard.[3]

Two issues have been raised on appeal. First, whether the actions of the Marshall Manatees, Inc. evidence a theory of false light invasion of privacy as defined by the RESTATEMENT (SECOND) OF TORTS governing claims for false light invasion of privacy.[4] Applicable law in the State of Marshall mirrors the RESTATEMENT (SECOND) OF TORTS.[5] In addition, this court must consider, on appeal, whether the Marshall Manatees' actions of comparing the digital photographic images collected at the Marshall Center to their database and ultimately posting the Plaintiff's photo on its billboard constituted an actionable claim for misappropriation.

II. STATEMENT OF THE CASE

Neither party disputes the following facts:

Appellant attended a professional basketball game of the Marshall Manatees on January 23, 2001.[6] On January 23, the Manatees played the Calizona Ducks, a team from the West Coast.[7] Both teams had a good season so the game was nationally televised and sold out.[8] The game took place at the Manatees' Marshall Center stadium in Marshall City.[9] Appellant purchased his ticket online using a credit card one month prior to the game, and received the ticket in the mail about two weeks later.[10] The ticket has a bar code on its face for security and authentication purposes, and a waiver in small type on the back.[11] The waiver states the following:

> This ticket is a revocable license and may be taken and admission refused upon refunding the purchase price appearing hereon. The resale or attempted resale at a price higher than that appearing hereon is grounds for seizure and cancellation without compensation. Holder of this ticket voluntarily assumes all risks and danger incidental to the game or event for which this ticket is issued. Holder agrees by use of this ticket not to transmit or aid in transmitting any description, account, picture or reproduction of the game or event to which this ticket is issued. Breach of the foregoing will automatically terminate this license. Holder grants permission to organization sponsoring the game or event for which this ticket is issued to utilize the holder's image or likeness in connection with any video or other transmission or reproduc-

3. *Id.*
4. RESTATEMENT (SECOND) OF TORTS § 652E (1977).
5. RESTATEMENT (SECOND) OF TORTS (1977).
6. R. at 3.
7. *Id.*
8. *Id.*
9. R. at 3.
10. *Id.*
11. *Id.*

tion of the event for which this ticket relates.[12]

The Marshall Manatees are a privately owned basketball team that supports a variety of charities.[13] One such charity is the Find Lost Kids Foundation ("FLK"), an independent charitable organization with the objective of locating missing and abducted children.[14] To show its support for the Marshall community and charities like FLK, the Manatees started a community service project called "Manatees Care."[15] The project's goals are to raise public awareness of the problem of abducted children, promote FLK's activities, help raise money for FLK, and serve as a public relations vehicle for the Manatees.[16]

The Manatees maintain a Web site at http://www.marshallmanatees.com.[17] Information about the "Manatees Care" project is prominently displayed on the Web site's home page, along with hyperlinks to the Web sites of FLK and other organizations.[18]

FLK maintains an extensive Web site at http://www.findlostkids.org.[19] The site features information about the organization and a number of resources for finding lost and abducted children.[20] One of these resources is a searchable online database of photographs of abducted children and their alleged abductors.[21]

FLK obtains the images and other information used in its database from a variety of sources, including family and friends of the abducted children, public and private schools, law enforcement agencies, children's charities, and religious groups.[22]

The Manatees promote the "Manatees Care" service project and the team's affiliation with FLK in other ways as well.[23] For example, placards in buses and trains as well as billboards containing both the Manatees' and FLK's logos are found throughout Marshall City.[24] In addition, large posters describing the service project are displayed throughout the Marshall Center.[25]

Upon entering the Marshall Center, patrons must insert their tick-

12. R. at 3, 4.
13. R. at 4.
14. *Id.*
15. *Id.*
16. *Id.*
17. R. at 5.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. R. at 5.
23. *Id.*
24. *Id.*
25. *Id.*

ets into an automated turnstile ticket reader.[26] The turnstile allows an individual patron to enter only after reading the bar code on his or her ticket.[27] The ticket information is stored in the Manatees' customer database.[28] While the bar code is being processed, security cameras photograph each patron.[29] This camera provides a clear image of each patron's face.[30] The image is then digitized and stored (along with the ticket's bar code information) in the Manatees' customer database.[31] This database is used for a variety of purposes, including marketing research, in-house security, and internal promotions.[32] In addition, the Manatees license the database to a variety of entities including local law enforcement, national marketing companies, FLK, and other charities.[33]

The Manatees also use the customer database as part of the "Manatees Care" service project.[34] In an effort to help FLK identify and locate abducted children and their abductors, the team regularly runs a comparison between its customer database and FLK's online database.[35] FLK has a cross-licensing agreement that permits its images and files to be compared with those obtained by the Manatees.[36]

The Manatees employ a comparison technology called facial recognition technology.[37] Facial recognition technology is a relatively new form of biometric measurement that was first brought to the public's attention at Super Bowl XXXV.[38] This form of biometrics varies depending on the hardware and the software that is used.[39]

The first step in the process used at the Marshall Center is to take a picture of an individual's face.[40] Next, the system takes that image and converts it into a digital file.[41] The digital photograph is then tagged with approximately eighty measurable reference points, each of which represents a physical feature of the person's face.[42] For example, the points assigned to the individual's face will mark the size of the eyes and

26. R. at 6.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. R. at 6.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. R. at 6.
37. *Id.*
38. R. at 6, 7.
39. R. at 7.
40. *Id.*
41. *Id.*
42. *Id.*

the distance between the centers of the eyes.[43] Although many people may have a similar measurement, the combination of eighty reference points makes every person unique.[44]

After an image of a person's face is captured, converted to a digital file and marked with reference points, the file is then transferred to a database where it can be compared to other digital files.[45] The Marshall Center's system is able to compare tens of thousands of files every minute with extreme accuracy.[46] The computer only has to match fourteen out of the eighty unique reference points to make a positive identification.[47] Similar technology that is used in casinos and by law enforcement agencies is 99.3 % accurate.[48] Essentially, the technology works by comparing individual photographs with other photographs looking for a match. By manipulating the photographs in a digital form on a computer, matching can be done far more quickly and accurately that a human could do through a side-by-side comparison of traditional (paper) photographs.

The technology allows the Marshall Center to compare the entire crowd at any given event with other databases in less time than it would take to complete one quarter of a basketball game.[49]

On January 23, 2001, Sanders was photographed as he entered the Marshall Center, and his image was added to the Manatees' customer database.[50] Approximately one hour later, the patrons' images that had been entered into the customer database that evening were automatically compared to those in FLK's database.[51] Upon processing all of the images, the system indicated a match linking Sanders' digital photo to one of an abductor maintained in FLK's database.[52]

The technician responsible for running the program then visually compared the two images to ensure accuracy.[53] Concluding that both images demonstrated a man of approximately the same height, weight, eye and hair color, the technician notified the Manatees' community service project director of a match.[54] The project director immediately contacted FLK and the Manatees' PR department.[55]

---

43. *Id.*
44. R. at 7.
45. *Id.*
46. *Id.*
47. *Id.*
48. R. at 7, 8.
49. R. at 8.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. R. at 8.
55. *Id.*

Three days later, the Manatees erected a billboard on one of the three major interstate highways that led into Marshall City.[56] The billboard displayed two pictures of Allen Sanders, the image from the Manatees' customer database and the image from the FLK database.[57] The Manatees' mascot separated the two pictures.[58] Above the photo, a statement read, "5200 KIDS WERE ABDUCTED LAST YEAR - HAVE YOU SEEN THIS MAN?"[59] Underneath the photo a statement read, "MARSHALL'S MANATEES CARE ABOUT CHILDREN. IF YOU HAVE ANY INFORMATION ABOUT THIS MAN PLEASE CONTACT US AT 1-844-MMCARE OR VISIT US ON THE WEB AT WWW.MARSHALLMANATEES.COM."[60] In the corner of the billboard a statement read, "SPONSORED BY MANATEES CARE - A COMMUNITY SERVICE PROJECT OF THE MARSHALL MANATEES."[61]

Although Allen Sanders' photo was contained in the FLK's abductors database, he has never been convicted of kidnapping.[62] His picture is in the database because he was married to LeAnna Tuceo, who after losing custody of her kids abducted them from their custodial father.[63]

Sanders had nothing to do with the abduction of Tuceo's children.[64] In the summer of 2000, Sanders and Tuceo planned to take her children on a vacation to Dawson's Water Park in downstate Marshall.[65] However, the day they were to leave on their trip, Sanders had an unexpected work-related emergency.[66] Tuceo left as planned. Sanders was to meet her the following day.[67] However, when Sanders arrived at the hotel, Tuceo was not there.[68] She telephoned him later that day, informing him that she had taken the children out of state without their father's consent or knowledge.[69] Sanders immediately contacted the children's father and explained what happened.[70] Sanders has not spoken to Tuceo since then.[71]

---

56. *Id.*
57. R. at 8, 9.
58. R. at 9.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. R. at 9.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. R. at 9, 10.
70. R. at 10.
71. *Id.*

Nevertheless, after the billboard was posted, Sanders began to receive phone calls and threatening notes from people believing that he was an abductor.[72] Sanders' church group ostracized him and refuses to allow him to participate in its weekly prayer group.[73]

In addition, Sanders owns a prominent advertising agency and many of his clients are no longer returning his calls.[74] Some of them have told him that they refuse to work with a person who abducts children.[75] Due to all of this emotional distress, Sanders is currently seeing a doctor, he cannot sleep at night, and he is deeply emotionally disturbed.[76]

Sanders filed a two-count lawsuit against the Manatees.[77] First, he accused the Manatees of false light invasion of privacy for placing his photo on the billboard, thereby causing others to believe he was a child abductor.[78] His second claim was for invasion of privacy by misappropriation of his likeness for commercial purposes, based upon the manner in which the Manatees used his photograph.[79]

III. ISSUES PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that the Defendant Marshall Manatees' actions did not evidence a claim for false light invasion of privacy as defined by applicable state law analogous to the RESTATEMENT (SECOND) OF TORTS regarding False light Invasion of Privacy; and:

Did the Court of Appeals err in holding that the Defendant Marshall Manatees' actions of comparing the digital images it secured at the Marshall Center to those in the FLK database, and ultimately posting Plaintiff Sanders' image on its billboard did not constitute a misappropriation of the Plaintiff's name or likeness?

IV. BACKGROUND

A. FACIAL RECOGNITION TECHNOLOGY

Facial recognition technology was initially developed for national security by the military, but is currently being utilized in private industry as well as by law enforcement agencies to verify identities of persons seeking drivers' licenses as well as to prevent fraud and loss in the private sector. For example, this new form of biometric technology drew

72. *Id.*
73. *Id.*
74. *Id.*
75. R. at 10.
76. *Id.*
77. *Id.*
78. *Id.*
79. R. at 10, 11.

major headlines this past year when police in Tampa, Florida employed a facial recognition system to scan faces in the crowd at the Super Bowl for suspected criminals including terrorists.[80] Advocates of facial recognition systems promote the fact that this technology is immune to racial bias or preconceived stereotypes.[81] The technology provides very rapid and accurate comparison of live or current images against a database of suspect individuals making it an invaluable tool for security and law enforcement.

B. False Light Invasion of Privacy

In the State of Marshall, one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the other for invasion of his privacy, if:

(a) the false light in which the other was placed would be highly offensive to a reasonable person,[82] and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[83]

As a threshold requirement, there can be no cause under the false light theory for a purely private disclosure – the objectionable matter must be published to the general public.[84] However, it is unlikely that either party will spend much time discussing whether the threshold requirement of "publicity" is met. Sanders will probably simply argue that posting his picture on a billboard is clearly "publicity." The Manatees will likely concede this argument.

It may be helpful to note that this publicity requirement (i.e., publication to the general public) is a key distinction between false light and defamation. To sustain a claim of defamation, the communication of the objectionable matter need only be made to one person other than the plaintiff.[85]

For the next element, the highly offensive standard requires proof that a reasonable person would be seriously offended by the publication.[86] Interpreting this section, courts have held that a highly offensive

80. *See* Thomas E. Weber, *A Primer on Technology That Has the Potential to Help Foil Terrorism,* Wall St. J., Sept. 17, 2001, at B1, *available at* 2001 WL-WSJ 2875602.

81. *See* John D. Woodward, Jr., *And Now, the Good Side of Facial Profiling*, Wash. Post, Feb. 4, 2001 at B04.

82. Marshall Rev. Code § 625E; *see infra* App. A.

83. *Id.*

84. *See, e.g., Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204 (10th Cir. 1985).

85. W. Page Keeton et al, Prosser and Keeton on the Law of Torts 865 (William Prosser et al. eds., 5th ed. & Supp. 1988).

86. *See* Restatement (Second) of Torts § 625E cmt c (1977).

disclosure is one that would cause emotional distress or embarrassment to a reasonable person.

For example, in *Michaels v. Internet Entertainment Group, Inc.*, the court held that a stolen videotape of the plaintiff having sexual intercourse was highly offensive because "[t]he injury . . . is to the plaintiff's human dignity and peace of mind."[87] Similarly, in *Fanelle v. Lojack Corp.*, the court held that a promotional package disseminated by defendant for its automobile theft-recovery system which gave readers the impression that plaintiff was a car thief met the test of being highly offensive to a reasonable person.[88]

However, courts have also held that the highly offensive standard must be narrowly construed "in order to avoid a head-on collision with First Amendment rights" of free speech.[89] For example, in *Salek v. Passaic Collegiate School*, the court held that a picture in a school yearbook of a teacher and student with captions of the student declining the teacher's sexual invitation was held not to be highly offensive as a matter of law.[90] Likewise, in *Faloona v. Hustler Magazine*, the plaintiffs argued that their nude photographs appearing in Hustler insinuated they had actually posed for the magazine thus implying they supported and endorsed the publication.[91] In affirming summary judgment for Hustler, the court reasoned that the plaintiffs' pictures themselves were not offensive, even though the magazine itself is "manifestly offensive."[92]

Sanders may argue that the "highly offensive" standard has been met because the record is clear he was never convicted of kidnapping, nor was he implicated in the abduction of LeAnna Tuceo's children.[93] Accordingly, he will claim the Manatees' billboard erroneously lead viewers to believe he was a child abductor which is highly offensive to a reasonable person, thereby meeting the first prong of the test.

The Marshall Manatees, on the other hand, will likely argue that Sanders has failed to establish the portrayal of him on the billboard was highly offensive. The Manatees can point to the fact that its billboard never made any direct statement or claim that Sanders was a child abductor.[94] Rather, the public service message indicated "5200 KIDS WERE ABDUCTED LAST YEAR - HAVE YOU SEEN THIS MAN?"[95]

87. Michaels v. Internet Entertainment Group, Inc., 5 F. Supp. 823, 842 (C.D. Cal 1998).

88. No. 99-4292, 2000 WL 1801270, at *9 (E.D. Pa., 2000).

89. Machleder v. Diaz, 801 F.2d 46, 58 (2d Cir. 1986).

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

91. Faloona v. Hustler Magazine, 799 F.2d 1000, 1006 (5th Cir. 1986).

92. *Id.* at 1007.

93. R. at 9.

94. *Id.*

95. *Id.*

Since Sanders had a relationship with the missing children and had the last known contact with his then wife LeAnna Tuceo after the abduction, The Manatees can argue it was not highly offensive to inquire about someone who may be able to assist authorities or FLK in the safe return of the missing children.

Turning to the next prong of the test for false light claims in the State of Marshall, a plaintiff must prove the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.[96] Accordingly, Sanders must prove that the Manatees had actual knowledge that he was not a child abductor yet posted his image on the billboard anyway, or, that the Manatees acted with reckless disregard by posting the image without adequately investigating whether he had abducted the Tuceo children. Moreover Sanders must demonstrate that the Manatees reasonably knew that by placing Sanders' picture on the billboard, the people of Marshall City would presume he was, in fact, a child abductor.

In evaluating this test for false light claims, the Supreme Court has held,

> Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and *demonstrates actual malice*.[97]

For example, in *Ashby v. Hustler Magazine, Inc.*, the court determined that the plaintiff failed to meet the burden of proof under the *St. Amant* standard even though the publishing company had printed her nude photos in its magazine.[98] In *Ashby*, the plaintiff consented to privately posing for naked photos that were taken by her roommate.[99] Thereafter, she kept them in her jewelry box.[100] The apartment was sublet while the plaintiff was on Christmas vacation and during that time, the photos were stolen from the apartment.[101] Defendant Hustler received the photos from a third party that mailed them into the magazine with a signed waiver and consent claiming ownership of the photographs.[102] Upon receipt, Hustler telephoned the third party to confirm the information and consent before publishing the pictures.[103] In af-

96. MARSHALL REV. CODE § 625E; *see infra* App. A.
97. St. Amant v. Thompson, 390 U.S. 727, 730–31 (1968) (emphasis added).
98. Ashby v. Hustler Magazine, Inc., 802 F.2d 856, 860 (6th Cir. 1986).
99. *Ashby*, 802 F.2d at 857.
100. *Id.* at 857.
101. *Id.*
102. *Id.*
103. *Id.*

firming summary judgment for Hustler, the court cited the Supreme Court's holding in *St. Amant*, adopting a requirement that the plaintiff demonstrate the defendant magazine had acted with actual malice when it published her photos.[104] Absent such showing of actual malice, the *Ashby* court held that summary judgment was appropriate.[105]

Two additional Supreme Court cases address the requirement of demonstrating actual malice in claims for false light invasion of privacy when the matter concerns matters of *public interest* or concern a *public figure*. In *Time v. Hill*, following its earlier decision in *N.Y. Times v. Sullivan*,[106] the court held that where matters of public interest are at issue, constitutional protections afforded by the First Amendment preclude recovery for false light invasion of privacy, unless there is a showing of *actual malice*.[107] Based on *Hill*, Defendant Marshall Manatees will likely argue that protecting children and stopping child abductions are indeed matters of public interest. It may argue therefore, that the First Amendment protects its publication of Plantiff Sanders' image on the billboard and absent a finding of actual malice, a tougher standard that the "reckless" standard would seem to dictate, Sanders' claim for false light invasion of privacy must fail.

Sanders, on the other hand, will likely rely on a later Supreme Court case, *Gertz v. Robert Welch, Inc.*, which affords individual states the discretion to decide whether to stick with the actual malice requirement of *Sullivan* and *Hill*;[108] or instead, adopt a *negligence standard* of fault in cases where the highly offensive publication concerns falsehoods about a *private citizen*. Specifically, the *Gertz* court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehoods injurious to a private individual."[109] MARSHALL REVISED CODE § 652E contemplates that a court may allow a plaintiff to prevail on a false light claim under a negligence standard since it does not explicitly require that the plaintiff must demonstrate actual malice.[110] However, since this is a case of first impression in the State of Marshall, this Court must determine which standard to apply.

C. MISAPPROPRIATION OF LIKENESS

Controlling law in the State of Marshall provides that: "One who appropriates to his own use or benefit for commercial purposes, the

104. *Id.*
105. *Id.*
106. N.Y. Times v. Sullivan, 376 U.S. 254 (1964).
107. Time v. Hill, 385 U.S. 374, 389–90 (1967).
108. 418 U.S. 323, 347 (1974).
109. *Id.* at 347.
110. MARSHALL REV. CODE § 652E; *see infra* App. A.

name, image or likeness of another is subject to liability to the other for invasion of his privacy."[111] The United States Supreme Court has clearly recognized the right of publicity to protect an economic interest related to a person's public commercial activities. For example, in *Zacchini v. Scripps-Howard Broadcasting Co.*, the Supreme Court reversed judgment for the respondent television station that had broadcast the plaintiff's entire human cannonball act on its newscast despite Zacchini's request that it not do so.[112] The court held that the television station misappropriated the plaintiff's valuable property right because broadcasting the entire event went to the heart of plaintiff's ability to earn a living from his talent.[113] By broadcasting the act on television, the defendant deprived plaintiff of an opportunity to reap the pecuniary benefit of his "own talents and energy, the end result of much time, effort and expense."[114]

Similarly, in *Vanna White v. Samsung Electronics*, the court reversed summary judgment for the defendant on plaintiff's claim that Samsung had misappropriated her rights of publicity when it aired television commercials depicting a robot dressed in a wig, gown and jewelry, purposely selected to resemble plaintiff's hair and dress.[115] Even when the plaintiffs are not big celebrities, however, courts have held that misappropriation has occurred where a plaintiff's likeness has been utilized, without consent, to further the financial gain of another.

In *Downing v. Abercrombie & Fitch*, for example, the Ninth Circuit recently reversed judgment for defendant Abercrombie & Fitch ("A&F") on the claim it had misappropriated the likeness of a group of surfers whose photos it had placed in its A&F Quarterly catalog.[116] The surfers claimed that the use of their images would lead the public to erroneously believe that they endorsed the goods being sold in the catalog and that their images were used by the plaintiff to help further the sale of its goods.[117] In finding there were sufficient genuine issues of material fact to allow the case to proceed to trial, the court pointed out that the defendant not only failed to obtain permission of the surfers, but also printed up and sold T-shirts identical to those worn by the surfers in the photograph.[118]

Applying the misappropriation standard to the instant cause, Sanders will likely argue the Manatees took his photograph and then utilized

111. MARSHALL REV. CODE § 652C; *see infra* App. B.
112. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 563–64 (1977).
113. *Id.*
114. *Id.*
115. Vanna White v. Samsung Elec., 971 F.2d 1395, 1396 (9th Cir. 1992).
116. 265 F.3d 994, 999 (9th Cir. 2001).
117. *Id.* at 1000.
118. *Id.*

his actual image on its billboard without permission. Moreover, Sanders can try to claim that despite its seemingly public interest message, the Manatees billboard was actually a commercial advertisement, thereby establishing the required elements for his misappropriation claim under the Marshall statute.

Sanders' commercial use claim may be based on the fact that the billboard promoting FLK was used as a public relations vehicle for the Manatees.[119] Sanders might argue that if the Manatees were merely promoting FLK for its own sake, there would have been no need to include a team logo on the FLK advertisements.[120] Thus, the claim might be that the Manatees' affiliation with a charity was used to increase the notoriety, visibility and good will of a commercial enterprise.

In sum, Sanders will likely argue that (1) the Manatees used his image (2) without his permission (3) in an identifiable manner (4) in a way that has caused him some damage, and, as required by the State of Marshall statute, (5) for a commercial purpose.

In response, the Manatees will do its best to assert that the billboard was erected as a public service message for its Manatees Care project; and that such use was completely non-commercial in nature. The Manatees will probably argue that the billboard does not propose a commercial transaction, and even if donations result from the billboard, all funds will go to FLK and not the Manatees. Even assuming that Sanders is correct in claiming that his image was used without his permission, in a way in which he can be identified, which caused him injury, absent a commercial purpose on the part of the Manatees, the elements for this cause of action cannot be met.[121]

In addition, the Manatees will likely refer this Court to the express disclaimer contained on the back of Sanders' admission ticket to Marshall arena that stated:

> Holder grants permission to the organization sponsoring the game or event for which this ticket is issued to utilize the holder's image or likeness in connection with any video or other transmission or reproduction of the event for which this ticket relates.[122]

Accordingly, the Manatees may further argue that based on the contract created when Sanders used his ticket to gain admission to Marshall Arena, it had secured the necessary consent to use his photograph on its billboard.

---

119. R. at 4.

120. R. at 5.

121. *See* MARSHALL REV. CODE § 652C; *see infra* App. B.

122. R. at 3–4.

D. Exculpatory Contracts

Although consent is an absolute privilege to an action for invasion of privacy,[123] courts of law do not tend to look favorably upon exculpatory clauses like the one contained on the back of Sanders' admission ticket. For such provisions to be found valid and enforceable, the intention of the parties must be made clear and unequivocal.[124] Like all contracts of adhesion, courts have also insisted that exculpatory clauses be strictly construed *against* the party claiming to be relieved of liability.[125] For example, in *Covert v. South Florida Stadium Corp.*, a plaintiff bought tickets to a game and was injured when a fight broke out among drunken spectators.[126] The waiver on the ticket stated that licensee (plaintiff) would not hold the owner (defendant) responsible for any injury resulting from the intentional negligence or misconduct of the owner's employees.[127] The court held this language to be too ambiguous and therefore unenforceable.[128] Additionally, the plaintiff did not see this contract language until after he had already paid for his ticket.[129]

On the other hand, in *Neinstein v. Los Angeles Dodgers*, a spectator who was struck by a fly ball while attending a game sued the Los Angeles Dodgers in a claim for personal injuries.[130] Affirming summary judgment for the Dodgers, the court held that the spectator impliedly consented to the risk of injury from the batted balls.[131] By voluntarily taking a seat that was clearly unprotected by screening, after being sufficiently warned of the risk from common knowledge of the sport and language provided on the reverse side of the ticket, the court reasoned that the plaintiff consented to the risk and was therefore barred from recovery.[132]

Applying these cases to the facts of the case herein, Sanders will no doubt claim that when strictly construed against the Manatees, the exculpatory clauses on the back of his admission ticket cannot be deemed to constitute his waiver and consent to having his photograph posted on the billboard. Quoting from the court in *Covert*, "such clauses are enforceable only where and to the extent that the intention to be relieved

123. *See* Restatement (Second) of Torts § 652F cmt. b (1977).

124. *See, e.g.*, Hertz Corp. v. David Klein Mfg., Inc., 636 So. 2d 189, 191 (Fla. Dist. Ct. App. 1994).

125. *See* Sunny Isles Marina, Inc. v. Adulami, 706 So. 2d. 920, 922 (Fla. Dist. Ct. App. 1998).

126. 762 So. 2d 938, 939 (2000).

127. *Id.*

128. *Id.* at 940.

129. *Id.*

130. 229 Cal Rptr. 612, 612–13 (Cal. Ct. App. 1986).

131. *Id.* at 616.

132. *Id.*

was made clear and unequivocal in the contract, and the wording must be so clear and understandable that an ordinary and knowledgeable party will know what he is contracting away."[133] Sanders will thus argue it would be impossible for reasonable persons to imagine that by attending a Manatee's game, they were also providing consent to have their images tacked up on a freeway-sized billboard concerning child abduction.

The Manatees, however, can draw the consent not only from the language on Sanders' admission ticket, but also from the circumstances under which his photo was taken. Paramount to any claim for invasion of privacy is the notion that there can be no expectation of privacy when one appears in an openly public place. For example, in *Cox v. Hatch*, the Supreme Court of Utah affirmed dismissal of a lawsuit filed by several postal employees who had posed for pictures with a United States Senator during his election campaign.[134] The photograph later appeared in a political flier causing the employees to be investigated by the Postal Service and their union.[135] In its opinion, the court held, "the conclusion follows that persons who are in public or semi-public places and who are unexpectedly caught within the range of news cameras do not have a privacy interest that can prevail against First Amendment informational interest."[136]

Sanders will likely claim that the Manatees' did not post any signage to notify patrons that their photographs were being taken upon entry to the Marshall Center. Moreover, he can argue that the cameras in question were not news cameras nor was the image taken and posted a "newsworthy item." The Manatees can claim, however, that Sanders voluntarily entered the Manatees' Marshall Center, a public place where television cameras and other imaging equipment are regularly operated in plain open view. Certainly, spectators are frequently caught on camera during the course of a sporting event and their images displayed on an arena's Jumbotron[137] video screen for all to see. Therefore, it will be the Manatees' position that Sanders could not reasonably have expected to be on the premises without some likelihood that his image might be recorded.

E. Distinction Between False Light and Defamation

Finally, it is important to point out the differences between the privacy torts of false light and defamation. These two causes of action are

133. *Covert*, 762 So. 2d at 940.
134. 761 P.2d 556, 557–58, 563 (Utah 1988).
135. *Id.* at 558.
136. *Id.* at 563.
137. Jumbotron is a registered trademark of the Sony Corporation.

frequently confused due to the similarities between the elements for these torts. Several key distinctions must be noted.

First, in a claim for false light, the plaintiff must prove there was publication to the general public. In contrast, a plaintiff claiming defamation needs only to demonstrate that the matter was disseminated at least one other person.

In addition, a false light claim requires that the publicized matter portray the plaintiff in a "highly offensive manner to a reasonable person," whereas a defamation claim is only actionable where the plaintiff can demonstrate that the publication resulted in an exposure to "hatred, contempt, ridicule or obloquy," thereby causing the plaintiff to be "sunned or avoided." Defamation, therefore, requires a much more severe effect.

APPENDIX A

MARSHALL REVISED CODE § 625E

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to the other for invasion of his privacy, if:

the false light in which the other was placed would be highly offensive to a reasonable person, and

the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

APPENDIX B

MARSHALL REVISED CODE § 652C

One who appropriates to his own use or benefit for commercial purposes, the name, image or likeness of another is subject to liability to the other for invasion of his privacy.

BRIEF FOR THE PETITIONER

No. 2001-1224

IN THE
SUPREME COURT OF THE
STATE OF MARSHALL
OCTOBER TERM 2001

ALLEN SANDERS,
Petitioner,

v.

MARSHALL MANATEES, INC.,
Respondent.

ON LEAVE TO APPEAL FROM THE
FIRST DISTRICT COURT OF APPEALS
OF THE STATE OF MARSHALL

BRIEF FOR THE PETITIONER

Gregory Brady
Steven Brooks
Christian Sullivan
NORTHERN ILLINOIS UNIVERSITY
COLLEGE OF LAW
DeKalb, Illinois 60115
(815) 753-1067

Attorneys for Petitioner
ORAL ARGUMENT REQUESTED

QUESTIONS PRESENTED

I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF FALSE LIGHT INVASION OF PRIVACY.

II. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CLAIM OF INVASION OF PRIVACY BY APPROPRIATION OF NAME OR LIKENESS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES CIRCUIT COURT CASES

UNITED STATES DISTRICT COURT CASES

STATE COURT CASES

STATE STATUTES

RESTATEMENT SECTIONS

LAW REVIEW ARTICLES

SECONDARY AUTHORITIES

OTHER AUTHORITIES

OPINIONS AND JUDGMENTS BELOW

The order of the Madison County Circuit Court granting Respondent's Motion for Summary Judgment is unreported.

The opinion and order of the First District Court of Appeals (No. 2001-CV-0901) is likewise unreported but is contained in the Record on Appeal. (R. at 2-14).

STATEMENT OF JURISDICTION

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

STATUTORY PROVISIONS

The following statutory provisions are relevant to the determination of this action: MARSHALL REV. CODE §§ 652 (C) and (E), and are attached in Appendix A.

STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

The Marshall Manatees are a privately owned professional basketball team that operates out of the State of Marshall. (R. at 3-4). As part of its business operations, the Manatees started a community service project geared toward the problem of abducted children called "Manatees Care." (R. at 4). The goal of this project, in part, is to serve as a public relations vehicle for the Manatees by raising public awareness of missing children and raising funds to support charities that provide services in those endeavors. (R. at 4).

One of the beneficiaries of "Manatees Care" is an independent charity named Find Lost Kids Foundation, (hereinafter "FLK"), that assists in locating missing and abducted children. (R. at 4). To assist in its charitable cause, the FLK maintains an extensive Web site that features information about the organization and resources for finding lost and abducted children. (R. at 5). One of these resources is a searchable database of photographs of abducted children and their alleged abductors. (R. at 5). These digital photos are obtained from a variety of sources including family and friends of the missing children, public and private schools, law enforcement agencies, children's charities, and religious groups. (R. at 5).

In an effort to promote the "Manatees Care" project, the Manatees provide many different marketing tools to publicize its affiliation with the FLK. These items include placards in buses and trains, billboards

throughout Marshall City, and posters throughout the Marshall Center, which is where the Manatees play its home games. (R. at 3, 5). Each of the advertisements contains the logos of the Manatees and the FLK. (R. at 5). In addition, the Manatees' home Web site prominently displays information about the "Manatees Care" project and provides hyperlinks to the Web site of FLK. (R. at 5).

Along with the above advertisements, the Marshall Manatees also uses its customer database to assist FLK in locating abducted children and their alleged abductors. (R. at 6). As a patron of a Manatees game enters the Marshall Center, his or her ticket is inserted into an automated turnstile ticket reader, where an imprinted bar code on the ticket is scanned. (R. at 6). While the bar code is being processed, a security camera photographs the patron's face and the photograph, along with the information contained in the bar code, is stored into the Manatees customer service database. (R. at 6). Although the Manatees utilize this database for a variety of internal functions, the Manatees also license the database to external entities such as local law enforcement and national marketing companies. (R. at 6). In addition, the Manatees utilize their customer database as part of the "Manatees Care" service project by running comparisons of the photographs in its customer database against FLK's online database utilizing a comparison technology called facial recognition technology. (R. at 6). This software converts the photograph taken of the patron into a digital file that is then tagged with measurable points of the physical features of the patron's face. (R. at 7). These measuring points are then compared against the digital photographs in the FLK database to find similar measuring points between photographs. (R. at 7). This technology allows the Marshall Manatees to compare the entire crowd at any given event with the FLK database in less time then it would take to complete one quarter of the basketball game. (R. at 8).

On January 23, 2001, Allen Sanders, entered the Marshall Center with a ticket for a Manatees' game that he had purchased online with his credit card one month prior. (R. at 3). The ticket had the imprinted bar code along with language in small type on the back. (R. at 3 – 4). This language stated, in part, that the "[h]older of this ticket voluntarily assumes all risks and danger incidental to the game or event for which this ticked is issued," and that the "[h]older grants permission to organization sponsoring the game or event for which this ticket is issued to utilize the holder's image or likeness in connection with any video or other transmission or reproduction of the event for which this ticket relates." (R. at 4). As Mr. Sanders inserted his ticket into the turnstile, the information from his bar code was scanned and a photograph of his face was taken. (R. at 8). The photograph was then processed through the facial recognition software and a match was made to a photograph in the FLK

database within one hour. (R. at 8). Upon finding the match, the Manatees' community service project director immediately notified the Manatees' Public Relations Department and FLK. (R. at 8).

Although Allan Sanders' photograph was in the FLK database, Mr. Sanders has never been convicted of kidnapping any child. (R. at 9). Unfortunately for Mr. Sanders, he was married to a woman who, unbeknown to him, abducted her children from their custodial father. (R. at 9). Upon learning of his estranged wife's criminal acts, Mr. Sanders immediately contacted the children's father and has not spoken to his wife since. (R. at 10).

However, three days following the game, the Manatees erected a billboard on one of the three major interstate highways leading into Marshall City with the photographs of Mr. Sanders from the FLK database and the Manatees' customer service database separated the Manatees' mascot. (R. at 8-9). Above the photographs of Allan Sanders was a statement that read "5200 KIDS WERE ABDUCTED LAST YEAR – HAVE YOU SEEN THIS MAN?" (R. at 9). Underneath the photographs the words "MARSHALL'S MANATEES CARE ABOUT CHILDREN." (R. at 9). The statement continued by stating that if anyone should see Mr. Sanders they should contact the "Manatees Care" program or visit the Marshall Manatees' Web site. (R. at 9). Finally, in the corner of the billboard, a statement read "SPONSORED BY MANATEES CARE – A COMMUNITY SERVICE PROJECT OF THE MARSHALL MANATEES." (R. at 9).

As a result of being publicly accused as a child abductor, Allan Sanders has received threatening notes, phone calls and has been ostracized by his community. (R. at 10). In addition, as the owner of a prominent advertising agency, he has lost clients who have stated that they refuse to work with a child abductor. (R. at 10). The loss of his reputation and the damage to his business as a result of these false accusations has caused Mr. Sanders deep emotional disturbance and distress.

B. Summary of the Proceedings

Petitioner sued the Marshall Manatees, Inc., in the Madison County Circuit Court, case number MCV-01-1040, for the statutory claims of false light invasion of privacy and the invasion of privacy for appropriation of name and likeness. (R. at 2). The Defendant, Marshall Manatees, Inc., filed a motion for summary judgment on both counts. (R. at 3). The Circuit Court granted the motion on both claims on the grounds that there were no genuine issues as to any material fact, and the Defendant was entitled to a judgment as a matter of law. (R. at 2).

Allen Sanders then appealed the Circuit Court's ruling to the First District Court of Appeals on two separate assignments of error. (R. at 3).

First, Mr. Sanders argued that the Circuit Court erred in granting summary judgment of his claim that the Defendant invaded his privacy by placing him in a false light. (R. at 3). Second, Mr. Sanders argued that the Circuit Court erred in granting summary judgment on his claim that the Defendant misappropriated his likeness for commercial purposes. (R. at 3). The Court of Appeals affirmed the Circuit Court's holding and affirmed summary judgment in favor of the Defendant. (R. at 3).

On the first count of invasion of false light privacy, the Court of Appeals found that the Defendant had no knowledge as to the falsity of the publicized matter. (R. at 11). Additionally, the Court of Appeals did not find any evidence that suggested the Defendant acted in reckless disregard, or "with malice," when it captured Mr. Sanders' photograph, when it compared the photograph with those stored in the Find Lost Kids Foundation database, or when it posted Mr. Sanders' image on the billboard. (R. at 11-12). Finally, the Court declined to find that the message posted by the Defendant on its billboard labeled Mr. Sanders as a child abductor and was not a message that a reasonable person would find highly offensive. (R. at 12). Based upon these findings, the Court of Appeals ruled that Mr. Sanders did not establish the necessary elements for his claim of false light invasion of privacy. (R. at 12).

As to Mr. Sanders' second claim for misappropriation of his likeness, the Court of Appeals found that because Mr. Sanders voluntarily entered the Manatees' Marshall Center, where cameras and other imaging equipment were in plain view, he could not have reasonably expected to be on the premises without the likelihood that his image might be recorded. (R. at 13). Further, the Court rejected Mr. Sanders claim that the Defendant acted without his permission. (R. at 13). The Court of Appeals found that for an exculpatory contract clause to be valid, it must be clear and understandable, and must relate to an interest that a knowledgeable party would know could be contracted away. (R. at 13). The Court further stated that such a contract is to be strictly construed against the drafter and is only enforceable where the intent of the waiver is clear and unambiguous. (R. at 13). However, applying these standards, the Court of Appeals found that the Defendant secured the necessary consent to photograph Mr. Sanders and to utilize his image. (R. at 14). This ruling was based upon the Court's determination that the language in the assumption of risk clause, and the licensing agreement found within the adhesion contract, were clear, understandable and unambiguous. (R. at 14). Based upon these findings, the Court of Appeals held that the Mr. Sanders had consented to the appropriation. (R. at 12).

On August 1, 2001, this Court granted Petitioner's leave to appeal the decision of the First District Court of Appeals, affirming the Madison Court Circuit Court's ruling in favor of the Defendant, on the issues of whether the Circuit Court erred in granting the motion for summary

judgment on Mr. Sanders' claims of false light invasion of privacy and invasion of privacy by appropriation of name or likeness. (R. at 15-16).

SUMMARY OF THE ARGUMENT

I.

The District Court of Appeals erred in granting summary judgment in this case because there are genuine issues of material fact that require resolution at trial. The court was incorrect when it stated that the Manatees' billboard did not label Mr. Sanders as a child abductor. The clear inference from the language on the billboard is that Mr. Sanders was someone the public should report for the crime of kidnapping. Furthermore, the false insinuation that someone is a child abductor would be highly offensive to any reasonable person. The record unequivocally indicates that Mr. Sanders has never been convicted of kidnapping and that he had nothing to do with the incident that relates to the storage of his image in the Find Lost Kids Foundation ("FLK") database. Although the question of what would be highly offensive to a reasonable person is always one for the trier-of-fact to determine, Mr. Sanders has been unjustly denied the opportunity to prove his case before a jury by the lower courts.

The Court of Appeals was also incorrect when it found that there was no evidence in the record that the Marshall Manatees acted in reckless disregard of the truth in capturing Mr. Sanders' photo, comparing it to the FLK database, or posting it on the specially erected billboard. Indeed, there is evidence which supports a finding of recklessness in that the Manatees automatically compared Mr. Sanders' image to the database without the slightest cursory check into the accuracy of the information contained therein. Working closely with the Find Lost Kids Foundation, the Manatees knew that the FLK database contained information reported by family and friends of abducted children on mere suspicion, rather than from law enforcement agencies exclusively. Nonetheless, the Manatees erected a distinctive billboard on one of the three busiest highways in the city that contained the message that the Manatees "care" about abducted children, and implicitly about hunting down Mr. Sanders, whose picture covered the massive billboard. Though the project between the Manatees and FLK is intended to "raise awareness of the problem of child abduction," posting false information is counterproductive to that stated goal. It only serves to invade the privacy of those wrongfully accused, and thus portrays them in a false light before the public.

Although there is certainly precedent that suggests private plaintiffs, like Mr. Sanders, should not have to prove actual malice in order to recover for false light invasion of privacy, the Marshall statute specifi-

cally requires a showing that the defendant acted in reckless disregard of the truth. At the very least, the record demonstrates that there is indeed a genuine issue of material fact as to whether the Manatees acted with reckless disregard concerning Mr. Sanders. The question is therefore one ideally suited for the jury, not for the court to dispose of without justice to Mr. Sanders.

The Manatees rely on the defense of consent, but its argument is misplaced. The standard waiver language on the ticket was far exceeded by posting Mr. Sanders' picture on the billboard. Both the scope of the consent was exceeded by the Manatees' actions, and the extent of the harm to be expected by the invasion of Mr. Sanders' privacy interest. Furthermore, though the Manatees may attempt to rely on the defense of public interest, such a defense is only suited for media defendants, which the Defendant is not. Even if the defense is allowed, Mr. Sanders should be given the opportunity to show actual malice in a trial setting, which he could likely demonstrate based on the egregious behavior of the Marshall Manatees in publicizing the false information about him. The matter should be remanded for adjudication of these material issues in a full and fair jury trial.

II.

The District Court of Appeals also erred when they granted summary judgment for the Defendant Marshall Manatees on Allen Sanders' second claim of invasion of his right of privacy by misappropriation of his likeness. Two genuine issues of material fact still remain to be decided in a full and fair adjudication on the merits of Mr. Sanders' claims. Therefore, summary judgment was an inappropriate remedy in this case.

First, the Defendant intentionally posted two pictures of Mr. Sanders on an advertisement for the purpose of its own financial gain. This advertisement takes the form of a billboard, which the Defendant erected on one of three major interstate highways leading into Marshall City. While the billboard was constructed under the guise of a community service announcement for the "Manatees Care" program, the billboard is in fact designed to attract customer attention to the Manatees' basketball operations. This is evidenced by the use of the Manatees' mascot placed between Mr. Sanders' images, the direction of interested persons to the Manatees' Web site and telephone numbers, and the calculated placement of phrases and pictures on the billboard. Taken together, the evidence suggests that this was done for the commercial benefit of the Defendant.

Second, the Defendant exceeded the scope of the revocable license that Mr. Sanders granted it when he purchased and used a ticket to one of Defendant's sporting events. A waiver, printed in small-print on the

back of Mr. Sanders' ticket, granted Defendant the ability to use Mr. Sanders' image in association with any reproduction or re-broadcast of the basketball game that he attended on January 23, 2001. That evening, as Mr. Sanders entered the confines of the Marshall Center, his picture was captured by the advanced security system installed within the facility. Defendant proceeded to utilize that picture on the billboard it erected just three days later to promote its basketball operations. With this action, the Defendant exceeded the scope of the revocable license because the publication of Mr. Sanders' image was not related to any reproduction or re-broadcast of the Manatees' January 23rd game.

For these reasons, genuine issues of material fact still remain in the action brought by Mr. Sanders against the Defendant Marshall Manatees. Mr. Sanders now asks this Honorable Court for a reversal of the lower court's grant of summary judgment for the Defendant as well as a remand of this case for a trial on the merits.

ARGUMENT

I. THE DISTRICT COURT OF APPEALS ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT ON ALLEN SANDERS' CLAIM OF FALSE LIGHT INVASION OF PRIVACY BECAUSE PUBLICIZING AN INFERENCE THAT MR. SANDERS IS A CHILD ABDUCTOR IS A MESSAGE THAT A REASONABLE PERSON WOULD FIND HIGHLY OFFENSIVE, AND THERE IS EVIDENCE TO SUGGEST THE MARSHALL MANATEES ACTED WITH RECKLESS DISREGARD FOR THE TRUTH IN COMPARING MR. SANDERS' PHOTO TO THOSE STORED IN THE FIND LOST KIDS FOUNDATION DATABASE, WHICH REPRESENT GENUINE ISSUES OF MATERIAL FACT.

This case involves a principle of law, first recognized by Samuel D. Warren and Louis D. Brandeis, that the right to enjoy life, inherent in every American citizen, includes the right to be let alone. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). In their highly influential article, now more than a century old, the two authors proclaimed views as true now as they were then. "Modern enterprise and invention have, through invasions upon [one's] privacy, subjected [anyone injured in this way] to mental pain and distress far greater than could be inflicted by mere bodily injury." Warren & Brandeis, *supra*, at 196. The law protects privacy from the "too enterprising press, the photographer, or the possessor of another modern device for recording." *Id.* at 206. In this case, the Marshall Manatees have been "too enterprising" in its utilization of the database compiled by the Find Lost Kids Foundation ("FLK") and the intrusive technology called "facial recognition technology" which, as used by the Manatees, strips

individuals of their right to be let alone. (R. at 4, 6, 8); *see, e.g.*, Ross Kerber, *Face-Recognition Software Spurs Privacy Fears*, B. Globe, Aug. 20, 2001, at C1; Jonathon King, *Our Sense of Security Shaken After Confronting Terrorism Like Never Before, How Much Freedom Are We Really Willing to Give Up to Feel Safe Again?*, Sun-Sentinel, Sept. 16, 2001, at 4A. As distinct from defamation, which addresses damage to the plaintiff's reputation by contempt and hatred in the estimation of his "fellows," privacy causes of action relate to the estimate of the plaintiff's self and the perception of his own feelings, which would not form an essential element in the defamation action. Warren & Brandeis, *supra*, at 197; *see also* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. Rev. 962, 968 (1964) (explaining that damage to the plaintiff's personal feelings are at the heart of false light cases and privacy actions generally). The right to privacy entitles the individual to decide whether "that which is his shall be given to the public." Warren & Brandeis, *supra*, at 199. No one else has the right to publish an individual's "productions" in any form, without the individual's valid consent. *Id.* Although there is no such thing as a false idea under the First Amendment to the Constitution, neither the intentional lie, nor the careless error materially advances society's interest in uninhibited, open debate on public issues, and thus neither have constitutional value. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

The State of Marshall has affirmatively recognized the right to privacy illustrated in the Warren and Brandeis article, as have many other states, in accordance with the RESTATEMENT (SECOND) OF TORTS. *See* RESTATEMENT (SECOND) OF TORTS § 652A (1977) [hereinafter RESTATEMENT]; *see also* Willam L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 389-407 (1960) (outlining the four recognized torts derived from the right to privacy: intrusion upon seclusion, misappropriation of name or likeness, publicity of private fact, and false light invasion of privacy). The Marshall statute for false light invasion of privacy is found at Marshall Revised Code § 652(E), and the code section for misappropriation of name and likeness is found at § 652(C). Both of these code provisions are applicable to this matter.

The right to privacy is certainly implicated in the facts contained in the record. In this case, the Appellant, Allen Sanders, had a simple desire: to enjoy a professional basketball game in his spare time on the evening of January 23, 2001. (R. at 3). He bought his ticket for the game in advance, and went through the normal procedure of inserting his ticket into a reader and having his picture taken upon entering the Marshall Center. (R. at 6, 8). Mr. Sanders implicitly contemplated such procedures in deciding to attend the game, but what he could not fathom, was that the Marshall Manatees would be employing a new, invasive

technology that allowed it to compare his picture to a database of people labeled as abductors without having been convicted of any crime. (R. at 8-9). Even more incomprehensible for Mr. Sanders, as he sat watching the game, was that his picture was about to be plastered on one of the busiest highways in the city, three days later, below a message that insinuated he was a known child abductor and a wanted criminal. (R. at 9). Based on this conduct therefore, Mr. Sanders contends that the Marshall Manatees violated his right to privacy.

In addition to the right to privacy, the other overriding principle in this case is determining when summary judgment is an appropriate remedy for a party, and whether summary judgment was appropriately granted in this case. The Marshall statute on summary judgment, worded exactly as the Federal Rule of Civil Procedure 56(c), states that the trial court must decide if the evidence demonstrates that there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Marshall R. Civ. P. § 56(c). The reviewing court also applies this test. (R. at 2). In utilizing this rule, the court will allow a motion for summary judgment if the nonmoving party does not produce enough evidence to permit a reasonable trier-of-fact to find for the nonmoving party on any element essential to its claim. *Milton v. Van Dorn Co.*, 961 F.2d 965, 969 (1st Cir. 1992). The party with the burden of proof must produce more than a "scintilla of evidence" on each element essential to its claim, thus affording a jury a non-conjectural basis for concluding that the fact to be inferred is more probable than not. *Malave-Felix v. Volvo Car Corp.*, 946 F.2d 967, 970-71 (1st Cir. 1991); *see also* 11 James Wm. Moore, *Moore's Federal Practice* § 56.11[1][b] (3d ed. 1997). Inferences drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The moving party bears the burden of showing absence of a material fact issue and doubt will be resolved in favor of the nonmoving party. *D.L. Auld Co. v. Chroma Graphics Corp.*, 714 F.2d 1144, 1146 (Fed. Cir. 1983). Summary judgment may not be granted when material issues of fact requiring trial to resolve them are present. *Id.* An issue of fact is "material" if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is "genuine" if the record, taken as a whole, could lead a rational trier-of-fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Moreover, the existence of one genuine issue of material fact is sufficient to preclude summary judgment on all issues. *E.g., Albert v. Brownwell*, 219 F.2d 602, 605 (9th Cir. 1954); *No Oilport! v. Carter*, 520 F. Supp. 334, 372 (W.D. Wash. 1981).

The policy consideration behind the rule is that an improvident grant may deny a party a chance to prove a worthy case. *Auld*, 714 F.2d at 1146. This consideration is particularly relevant in this case, because if the summary judgment decision is upheld, Allen Sanders' injury to his emotional well-being and self-worth will go uncompensated, and the behavior of the Marshall Manatees, causing this injury, will go undeterred. *See generally Prosser and Keeton on the Law of Torts* 4-6 (W. Page Keeton et al. eds., 5th ed. 1984) (explaining the compensation and deterrence principles of tort law). There is no indication in the record that either the Circuit Court or the District Court of Appeals viewed the Defendant's motion for summary judgment in a light most favorable to the Plaintiff. Furthermore, there are genuine issues of material fact as to whether the false light in which Mr. Sanders was placed would be highly offensive to a reasonable person, (R. at 12), whether the Manatees acted with reckless disregard for the truth in failing to check the inaccuracy of the FLK database before erecting the billboard in question, (R. at 11), and whether Mr. Sanders consented to the use of his image on the billboard. (R. at 14). Consequently, the allowance of the motion for summary judgment was improper, and Mr. Sanders therefore respectfully moves this Honorable Court to reverse the decision of the District Court of Appeals and remand for adjudication on the merits of his claim. The standard of review for a motion for summary judgment is de novo. *United States v. Diebold*, 369 U.S. 654, 655 (1962).

A. The Record Shows That Allen Sanders Did Establish The Necessary Elements For His Claim Of False Light Invasion Of Privacy, And Therefore, The Defendant's Motion For Summary Judgment Should Not Have Been Granted By The District Court On This Issue.

The Marshall Revised Code sets out clear requirements that must be met in order to establish a claim for false light invasion of privacy. Marshall Rev. Code § 652(E). To maintain a claim for invasion of privacy on this theory in the State of Marshall, the plaintiff has to show that the defendant has placed a matter concerning the plaintiff before the public in a false light that would be "highly offensive to a reasonable person." *Id.* The plaintiff also has to show that the defendant either had knowledge of the falsity of the information that was placed before the public, or that the defendant acted in "reckless disregard as to the falsity of the publicized matter." *Id.* Contrary to the finding of the Court of Appeals, there is an indication in the record that Allen Sanders did establish the necessary elements for a false light invasion of privacy claim. Specifically, the record indicates that the Marshall Manatees acted in reckless disregard as to the falsity of the information contained in the FLK database in that it failed to make even a preliminary or cursory check of

the accuracy of the information contained in the database before erecting a billboard with the inference that Mr. Sanders is a child abductor. (R. at 8-9). Furthermore, the only rational inference to be drawn from the billboard, that Mr. Sanders is a child abductor, is one that a reasonable person would find highly offensive. *See, e.g., Brown v. Hearst Corp.*, 862 F. Supp. 622, 629 (D. Mass. 1994), *aff'd*, 54 F.3d 21, 23 (1st Cir. 1995) (noting that an insinuation may be as actionable as a direct statement).

1. *The Manatees gave publicity to an insinuation that placed Allen Sanders in a false light by erecting a billboard that erroneously suggested Mr. Sanders was a child abductor.*

The record in this case demonstrates that the Marshall Manatees placed false information about Allen Sanders before the public. *See, e.g., Pruitt v. Chow*, 742 F.2d 1104, 1109 (7th Cir. 1984) (applying Illinois law and recognizing that publication is an essential ingredient of a false light claim). Allen Sanders unsuspectingly entered the Marshall Center on January 23, 2001, to watch a professional basketball game. (R. at 8). He was photographed upon entering the game, and his image was automatically compared to those in FLK's database of abducted children and their alleged abductors. (R. at 5, 8). After discovering a match between one of the persons in the database and Mr. Sanders, the Marshall Manatees erected a billboard on one of the three major interstate highways that lead into Marshall City, with Mr. Sanders' picture plastered to it. (R. at 8-9). Considering that every driver who chooses to enter the city via that interstate highway can see the image of Mr. Sanders and the insinuation attributed to him, sufficient publicity of the information placing Mr. Sanders in a false light is illustrated by the facts in the record. *See* RESTATEMENT, *supra*, § 652D cmt. a (explaining that "publicity" means that the matter is made public by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge).

The record is also replete with evidence that the insinuation of Mr. Sanders as a child abductor is false. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (holding that a statement must be proved false to be actionable). Although Mr. Sanders' photo was contained in the FLK database, he has never been convicted of kidnapping, and he had nothing to do with the abduction of his estranged wife's children. (R. at 9). On the contrary, Mr. Sanders immediately contacted the children's father and informed him of the abduction upon learning of it, and has not spoken to his alienated wife since then. (R. at 9-10).

The falsity of the information is certainly a requirement that must be met in a claim for false light invasion of privacy. *See* RESTATEMENT, *supra*, § 652E cmt. b; 1 George B. Trubow, *Privacy Law and Practice* ¶

1.04[1] (1991) (stating that all false light cases require material falsity in the publicity). The interest protected by the Marshall statute on false light invasion of privacy is in "not being made to appear before the public in an objectionable false light or false position . . . otherwise than [the plaintiff] is." RESTATEMENT, *supra*, § 652E cmt. b. Although the billboard did not "label" Mr. Sanders as a child abductor, as the Court of Appeals noted, (R. at 12), two pictures of Mr. Sanders were prominently displayed below a statement that read: "5200 KIDS WERE ABDUCTED LAST YEAR – HAVE YOU SEEN THIS MAN?" (R. at 9). The inference undoubtedly to be drawn from the billboard, especially considering the public's accusatory response directed at Sanders after its construction, is that Mr. Sanders is, in fact, a child abductor. (R. at 10). Indeed, some of the clients of his advertising agency specifically told him that they "refuse to work with a person who abducts children." (R. at 10). Furthermore, the statement that the "MANATEES CARE ABOUT CHILDREN," and the direction that people who have any information about the Appellant are to contact the Manatees, stalwartly suggests that Mr. Sanders is "wanted" for a crime. (R. at 9).

Contrary to the conclusion reached by the appellate court, it is not necessary that Mr. Sanders be specifically labeled as an abductor in order to establish a claim for false light invasion of privacy. *See Larsen v. Phila. Newspapers, Inc.*, 543 A.2d 1181, 1189 (Pa. Super. Ct. 1988), (explaining that discrete presentation of information in a fashion which renders the publication susceptible to inferences casting one in a false light entitles the grievant to recompense for the wrong committed). The insinuation was strong, considering that after the billboard was erected, Mr. Sanders began to receive phone calls and threatening notes from people believing he was an abductor. (R. at 10). *See generally Leverton v. Curtis Publ'g Co.*, 192 F.2d 974, 977 (3rd Cir. 1951) (holding that a picture originally used with consent for newspaper story invaded plaintiff's privacy when published above the heading "They Ask to be Killed," which incorrectly insinuated that plaintiff was responsible for her injuries). The connection between the false representation of Mr. Sanders and the injury he received is thus extensive. The particular medium chosen by the Manatees is especially insulting in light of Mr. Sanders' chosen occupation as the owner of a prominent advertising agency. (R. at 10). He has suffered both economic and severe emotional injuries as a result of the inference posted on the billboard. (R. at 10). Consequently, the record sufficiently indicates that the billboard publicly displayed false information concerning Mr. Sanders, in accordance with the Marshall statute. Marshall Rev. Code § 652(E).

2. *A false accusation of child abduction would be highly offensive to a reasonable person.*

The Marshall statute requires a plaintiff claiming false light invasion of privacy to prove that the false light in which he or she was placed would be "highly offensive to a reasonable person." Marshall Rev. Code § 652(E). The RESTATEMENT comments are helpful in this context. A comment to § 652E states that a cause of action for false light invasion of privacy occurs only where there is such a "major misrepresentation of [one's] character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position." RESTATEMENT, *supra*, § 652E cmt. c. The record in this case shows that the message concerning Mr. Sanders displayed on the billboard was highly offensive to a reasonable person. Indeed, all the individuals that normally associated with Sanders were so offended by the characterization of him as an abductor that they cut off interaction with him, and Sanders could not function normally because he was so distraught by the accusation. (R. at 10).

The Court of Appeals specifically found that the message contained on the billboard was not one that a reasonable person would find highly offensive. (R. at 12). However, the precise determination of what is highly offensive to a reasonable person is a question for the jury. In *Martin v. Mun. Publ'ns*, 510 F. Supp. 255, 259 (E.D. Pa. 1981), the court considered a false light case in which the plaintiff alleged his picture, published in a magazine, with a caption insinuating the person depicted was a transvestite was highly offensive to a reasonable person within the meaning of the RESTATEMENT. Though the defendant maintained that no reasonable person could interpret the challenged publication as highly offensive, thus entitling the defendant to summary judgment, the court held that the question of whether a message would be highly offensive to a reasonable person is a matter for the jury. *Id.* Consequently, the court determined summary judgment for the defendant on this point was not appropriate. *Id. See also Braun v. Flynt*, 726 F.2d 245, 252-53 (5th Cir. 1984), *reh'g denied*, 731 F.2d 1205 (5th Cir. 1984) (upholding a jury determination of what constituted a message that was highly offensive to a reasonable person, saying it is the "job" of the jury to determine whether a publication is false and offensive within the context of a false light claim); Russell G. Donaldson, Annotation, *False Light Invasion of Privacy – Accusation or Innuendo as to Criminal Acts*, 58 A.L.R.4th 902, 908 (1987) (suggesting that, based on analysis of case-law from each state, it is safe to assume that any reasonable person would be highly offended by a false declaration or insinuation that he or she is a criminal).

The case at bar is analogous to *Martin*, and the law, correctly stated by that case, requires that this issue be determined by a jury. Mr. Sand-

ers actually worked to hamper the child abduction being performed by his estranged wife in this case. (R. at 9-10). Nevertheless, he received threatening responses, loss of clients, and was shunned by people who believed he was a child abductor. (R. at 10). This public reaction evidences the highly offensive nature of the Defendant's implication that Mr. Sanders is a child abductor. Much like the community, a jury of Mr. Sanders' peers would find the false intimation on the billboard highly offensive. Therefore, there is a genuine factual dispute on this issue that requires a trial to resolve competing reasonable factual contentions. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

B. The Manatees Acted With Reckless Disregard As To The Falsity Of The Information Contained In The Find Lost Kids Foundation Database By Failing To Make Any Check Into The Reliability Or Accuracy Of The Information Before Erecting A Billboard With A Message That Erroneously Insinuated That Mr. Sanders Was A Child Abductor.

The Marshall statute requires a plaintiff claiming false light invasion of privacy to show that the defendant acted in "reckless disregard as to the falsity of the publicized matter and the false light in which the other [was] placed." Marshall Rev. Code § 652(E). This requirement stems from the United States Supreme Court decision of *New York Times v. Sullivan*, which held that in a defamation context, a plaintiff who is a public official must prove not only that the publication was false, but that it was made with "actual malice," that is, knowledge of its falsity or with reckless disregard for whether it was false or not. 376 U.S. at 280; *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (acknowledging that the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection). This standard was made specifically applicable to false light causes of action in *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967), where the Court held that the constitutional privilege under the First Amendment, requiring proof of actual malice for public officials applied whether the action was brought for defamation or invasion of privacy. *Id.* at 391; *see also* Trubow, *supra*, ¶ 1.04[6][e]. Although *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974), limited the requirement of *New York Times* to actions brought by public figures or officials, the Restatement specifically reserves consideration of whether private figures could state a claim for false light invasion of privacy by a showing of mere negligence. Restatement, *supra*, § 652E cmt. d.

In *Gertz*, the defendant published an article expressing the views of the John Burch Society, which accused the plaintiff of architecting a Communist "frame-up" of a Chicago policeman in a civil action. 418 U.S.

at 325-26. Although the defendant attempted to invoke the *New York Times* standard as a constitutional privilege to the libel action, the Supreme Court held that states may allow private plaintiffs to impose liability for defamatory falsehoods on a showing of less than reckless disregard for the truth. *See Gertz*, 418 U.S. at 348. Consequently, the trial court was held to have erred in entering judgment for the respondent on the basis of failure to show actual malice. *Id.* at 352. The Court noted that private individuals are more vulnerable to injury, so the state interest in protecting them is greater, and they are more deserving of recovery. *Gertz*, 418 U.S. at 344-45. Thus, the Court refused to extend the *New York Times* privilege to defamation of private individuals.

Based on the precedent of *Gertz*, a state court could constitutionally hold that private individuals, like the Appellant in this case, need not show actual malice in order to recover for invasion of privacy. Likewise, although a matter of public concern is implicated in the subject of child abduction, because the Marshall Manatees are not "media defendants," the constitutional privilege requiring a plaintiff to show actual malice is not triggered. *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981); *Vassiliades v. Garfinckel's*, 492 A.2d 580, 589 n.2 (D.C. 1985) (explaining that First Amendment protection requiring actual malice is generally limited to publication by the media). Notwithstanding that child abduction is a public concern, the false insinuation that Allen Sanders is a known child abductor is not. (R. at 9). Furthermore, any privilege resulting from public interest is defeated in this case because there is no public interest in false accusations, only in reliable reporting of criminal activity. *See* Trubow, *supra*, ¶ 1.04[6][c]. Balancing the interests at issue illustrate that, while Mr. Sanders was significantly injured by the false depiction on the billboard, allowing Mr. Sanders to recover by showing less than actual malice would not damage the public interest in obtaining and discussing truthful, reliable information concerning child abduction. *See* 62A Am. Jur. 2d *Privacy* § 185 (1990) (explaining that the truth may be spoken, written, or printed about matters in which the public has a legitimate interest). Thus, this Honorable Court should follow *Gertz*, and hold that Mr. Sanders need not show actual malice in order to be compensated for his injuries on a false light invasion of privacy theory.

Following the lead of the Supreme Court in the *Gertz* case, some states allow recovery for plaintiffs on a false light theory, without showing reckless disregard for the falsity of the matter publicized. *See, e.g.*, *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 89 (W. Va. 1983) (concluding that the existing inconsistency between *Hill* and *Gertz* will eventually be resolved in favor of *Gertz*, and therefore applying a negligence standard to private plaintiff false light claims); Donaldson, *supra*, § 39[a]. Indeed, Professor Trubow has lamented that "to require *New*

York Times 'malice' in all false light actions, even though a private party defamation plaintiff may proceed on mere negligence, makes no sense, and hopefully the Supreme Court will apply the 'Constitutional Privilege' uniformly to all 'publication torts.'" Trubow, *supra*, ¶ 1.04[6][e].

The State of Marshall, however, has specifically required that a plaintiff show reckless disregard for the truth on the part of the defendant in making out a false light case. Marshall Rev. Code § 652(E). The Court of Appeals granted summary judgment, in part, because it found that there was "no evidence to suggest the Manatees acted in reckless disregard . . . when it captured [Sander's] photo, when it compared the photo with those stored in the FLK database, or when it ultimately posted Appellant's image on its billboard." (R. at 11-12). The court was incorrect in its finding, however, because there is evidence in the record that indicates the Manatees acted recklessly in posting the false insinuation about Mr. Sanders. (R. at 8-9). For example, the Manatees refused, for three full days, to inquire into the accuracy of the information in the FLK database before it went to the expense of posting the false message, undoubtedly aware of the potential harm of such a false accusation. (R. at 8). Therefore, there is a contested, genuine dispute on this issue that must be resolved in a trial on the merits. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Various courts have interpreted the reckless disregard language of *New York Times*. The United States Supreme Court has stated that the defendant must have had a "high degree of awareness of probable falsity," or in fact "entertained serious doubts as to the truth of [the] publication," in order to satisfy the actual malice standard. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also Colbert v. World Publ'g Co.*, 747 P.2d 286, 291 (Okla. 1987). Likewise, the Court has said that "actual malice" is found where there is "a showing of highly unreasonable conduct," that constitutes an "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155-58 (1967). Where there is a dispute over the existence of actual malice, however, the inferences from the testimony on this point are peculiarly those for the jury, so that summary judgment is inappropriate. *See Lorentz v. Westinghouse Elec. Corp.*, 472 F. Supp. 946, 953 (W.D. Pa. 1979).

In *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 668 (1989), the Court considered the definition of actual malice in the context of a defamation case and acknowledged that the term is confusing, but held that a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence. *See also St. Amant*, 390 U.S. at 732 (identifying that circumstantial evidence that would likely support a finding of actual malice when the story is so inherently improbable that only a reckless man would have put it in circulation). To remedy

problems with application of the actual malice standard, the Court suggested that the trial judge instruct the jury "in plain English," at appropriate times during the course of the trial. *Connaughton*, 491 U.S. at 667 n.7. The Court determined that the question of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law, although reviewing judges have a "constitutional duty" to exercise independent judgment and determine whether the record establishes actual malice with convincing clarity. *Id.* at 659, 685. Specifically, the Court held that the record supported the jury's finding of actual malice where the defendant failed to interview the one key witness that could prove the falsity of the defendant's published information concerning a candidate for judicial office. *Id.* at 682-83. Although the failure to investigate, generally, before publishing is not sufficient to establish reckless disregard, in a case involving the reporting of a third party's allegations, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Id.* at 688 (quoting *St. Amant*, 390 U.S. at 732). The reviewing court must examine for itself the statements in issue and the circumstances under which they were made, to see if actual malice exists. *Id.* The *Connaughton* Court concluded that although failure to investigate will not alone support a finding of actual malice, "purposeful avoidance of the truth is in a different category." *Id.* at 692.

Similarly, in *Curtis Publishing*, the Supreme Court considered whether failing to take the most "elementary" precautions to check the veracity of the source used to publish a story about an alleged conspiracy to "fix" a college football game amounted to reckless disregard for the truth. 388 U.S. at 135-39. The Court held that reckless disregard for the truth was shown, in that the publisher failed to take even the simplest and most obvious steps to investigate the allegations. *Id.* at 156-58. The writer assigned to the story was not a football expert, and no attempt was made to check the story with someone knowledgeable in the sport. *Id.* at 158.

The facts in this case are analogous to *Curtis Publishing*, and there is evidence of actual malice for similar reasons. The Marshall Manatees automatically compared Mr. Sanders' image to the images in FLK's database without any check to see that the people listed in the database had actually been abductors. (R. at 8). The Manatees could have easily discovered, had it desired, that the information in the FLK database comes from "family and friends" of abducted children, "children's charities," and "religious groups," rather than from law enforcement agencies exclusively. (R. at 5). Consequently, one could end up in the FLK database on mere suspicion, without objective corroboration of any kind, or, as in Mr. Sanders' case, merely because he unknowingly associated with someone who abducted children. (R. at 9-10). Mr. Sanders contends

that these facts constitute reckless disregard for the truth. The insinuation on the billboard was that Mr. Sanders was already determined to be a child abductor, when in fact, no such criminal charges had ever been brought against him. (R. at 9). Saying that "5200 KIDS WERE ABDUCTED LAST YEAR," (R. at 9), before asking if the public had seen this man, essentially amounts to a conviction without ever being charged. *See* Prosser, *supra*, at 399 (noting that a prime example of a false light case involves the publication of the plaintiff's picture in a "rogues gallery" of convicted criminals, when he has not in fact been convicted of any crime). Moreover, the avoidance of the truth in this case was actually counterproductive to the stated goal of raising "public awareness of the problem of abducted children," because publicizing false accusations only serves to stir public anxiety, and results in the condemnation of innocent people like Allen Sanders. (R. at 4).

Justice in this case requires that Mr. Sanders have an opportunity to develop a full record before a jury prior to appellate review. The appellate court made its determination that actual malice was lacking without a sufficiently developed record before it, which would have enabled it to make a correct legal determination as to whether actual malice was indeed shown by clear and convincing evidence. *See Rafferty v. Hartford Courant Co.*, 416 A.2d 1215, 1221 (Conn. Super. Ct. 1980) (noting that summary judgment is ill adapted to cases of a complex nature, or those involving important public issues, which often need the full exploration of trial for just resolution). Furthermore, the Court in *Connaughton* suggested that common law malice or "ill will" in a general sense was not enough to demonstrate actual malice, and that they are two recognized and distinct concepts. 491 U.S. at 667 n.7. However, it is unclear from the record whether the Court of Appeals was referring to common law malice or the actual malice standard of *New York Times*, when it said there was no indication from the record that the Manatees acted with "malice." (R. at 11). A more specific finding, based on a genuinely developed record, is needed before the Appellant is forever barred from attempting to prove his case. Indeed, a reviewing 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. *See, e.g., Info. Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). There are factual disputes as to each element of Appellant's cause of action, which must be developed fully at trial, before a reviewing court can make a proper determination as to the adequacy of the evidence adduced in this case.

C. The Manatees Exceeded The Scope Of The Consent Contained In The Waiver On Mr. Sanders' Ticket By Utilizing His Image For Purposes Unconnected To The Event For Which The Ticket Related.

While it is true that a valid consent to the publication in an invasion of privacy claim will defeat the cause of action, RESTATEMENT, *supra*, § 892A, it is also true that "contractual waivers, like other contracts of adhesion, are to be strictly construed against the drafter." (R. at 13). They are enforceable only to the extent that "the intent of the waiver is clear and unambiguous." (R. at 13). Section 892A, applicable to all tort claims, states explicitly that "[i]f the actor exceeds the consent, it is not effective for the excess." RESTATEMENT, *supra*, § 892A(4); *see also Donahue v. Warner Bros. Pictures*, 194 F.2d 6, 13 (10th Cir. 1952) (noting that the right to privacy may be waived for one purpose, and still asserted for another). The RESTATEMENT also states that, "[i]n order to be effective, the consent must be to the particular conduct of the actor, or to substantially the same conduct," meaning that, for example, consent to fighting with fists does not amount to consent to fighting with loaded guns. RESTATEMENT, *supra*, § 892A(2) cmt. c; *see also* 2 J. Thomas McCarthy, *The Rights of Publicity and Privacy* §§ 10:27, 10:35 (2d ed. 2000) (noting that consent for a particular use cannot be stretched to include consent for different uses, and use by a licensee outside the scope of a license or consent can constitute invasion of privacy or breach of the license contract).

The question of consent to the particular conduct of the defendant is one of degree, which should be resolved by a trier-of-fact. *See, e.g.*, *Univ. of Colo. v. Derdeyn*, 863 P.2d 929, 964 (Colo. 1993). For example, the court in *McCabe v. Village Voice, Inc.* held that although the plaintiff consented to be photographed for a picture to be published in a book, that consent was exceeded when the picture was published in the newspaper. 550 F. Supp. 525, 529 (D.C. Pa. 1982). Furthermore, even if some form of consent is found in this case, public policy prohibits exempting a party from tort liability for harm caused intentionally or recklessly, as Mr. Sanders contends the Manatees acted in this case. *See* RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981). Just resolution of these issues can only be accomplished in a trial setting.

The waiver on the back of Mr. Sanders' ticket stated that the holder granted permission to the Manatees to "utilize the holder's image or likeness in connection with any video or other transmission or reproduction of the *event* for which this ticket relates." (R. at 4) (emphasis added). It is conceded that the waiver is valid for reproduction of Mr. Sanders' image, but only for the "event" contemplated in the waiver: the basketball game that Mr. Sanders attended on January 23, 2001. (R. at 3). The extent of the privilege is determined by the terms of the consent. RESTATEMENT,

supra, § 583 cmt. d. Mr. Sanders desired only to enjoy a well-played, professional basketball game when he used the ticket to gain admission to the game on January 23, 2001. (*R.* at 3). What he did not contemplate, however, was that just three days after the game, his image would be used by the Manatees to suggest, incorrectly, that he was a wanted criminal, by placing his picture on a billboard next to a message about child abduction. (R. at 8-9). Thus, the conduct consented to was not the particular behavior of placing his picture on a billboard next to an offensive accusation. Nor can it be said that utilizing Mr. Sanders' picture, as the Manatees did, constitutes substantially the same conduct as transmission of his picture in relation to the basketball game the night of January 23rd. *See* RESTATEMENT, *supra*, § 892A(2)(b).

Consent to any publication of matter that invades privacy creates an absolute privilege, only so long as the publication does not exceed the scope of the privilege. *Id.* §§ 652F, 892A(4). If the person consenting to the conduct of another is induced by a substantial mistake as to the extent of the harm to be expected from it, due to the other's misrepresentation, the consent is not effective as to the unexpected invasion or harm. RESTATEMENT, *supra*, § 892B(2). The language on the ticket in this case shows that the purpose for which Mr. Sanders' image was used unquestionably exceeded any consent granted by the waiver, both as to the conduct resulting from the waiver and to the extent of the unexpected harm. Mr. Sanders contends that his consent was induced by a substantial mistake as to the extent of the harm to be expected from utilization of his image, based on the "event" language, which would reasonably lead one to think that video or photographic reproduction of the game is all that was contemplated by the waiver. (R. at 4). Likewise, the assumption of the risk clause cannot be stretched to validly release the Manatees from liability for conduct completely unrelated to the basketball game, three days removed from the event, when the ticket says that the holder "voluntarily assumes all risks and danger incidental to the *game* or *event* for which this ticket is issued." (R. at 4) (emphasis added). Therefore, although the District Court of Appeals was correct when it found that "Appellant could not reasonably have expected to be on the premises without some likelihood that his image might be recorded," it was incorrect in finding that "Appellant should have understood that . . . Appellee had secured his express permission to disseminate any images of him it had captured." (R. at 13-14). The particular use the Manatees made of Mr. Sanders' picture was simply too far removed from the "event" to be covered by the waiver clause on the back of the ticket. The waiver should have said that the holder granted permission to utilize the holder's image or likeness not only for "any video or other transmission or reproduction of the event," but also for comparison with a database containing names and images of possible child abductors. (R. at 4). Of course, fans

might think twice about attending a Manatees game if they happened to see truthful language of that sort on the back of the ticket.

The record in this case indicates that there are genuine issues of material fact with respect to three issues. First, whether the insinuation that one is a child abductor would be highly offensive to a reasonable person. Second, whether the Manatees acted in reckless disregard of the truth in placing false information concerning Mr. Sanders on the billboard in question. Lastly, whether the waiver contained on the ticket constituted a valid consent for the particular purpose for which Mr. Sanders' image was used. Based upon the above, summary judgment was improper, and Appellant respectfully requests that this Honorable Court remand for a trial on the merits.

II. THE DISTRICT COURT OF APPEALS ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT MARSHALL MANATEES ON MR. SANDERS' CLAIM OF INVASION OF PRIVACY BY APPROPRIATION OF NAME OR LIKENESS BECAUSE THE EVIDENCE SUGGESTS THAT THE DEFENDANT USED MR. SANDERS' IMAGE FOR ITS OWN FINANCIAL GAIN AND IT EXCEEDED THE PERMISSION GRANTED BY MR. SANDERS IN THE USE OF HIS IMAGE OR LIKENESS.

The appropriation of name or likeness branch of the privacy torts was first considered in the United States in 1902. *See Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). Just three years later, the Georgia Supreme Court officially recognized this right to privacy in the case of *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905). That court boldly stated:

> So thoroughly satisfied are we that the law recognizes within proper limits, as a legal right, the right to privacy, and that the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing[ly] the profits and gains of the advertiser, is an invasion of this right, that we venture to predict that the day will come that the American bar will marvel that a contrary view was ever entertained by judges of eminence and ability.

Pavesich, 50 S.E. at 80-81. Today, almost one hundred years after those words were penned, one would be hard-pressed to say that the aforethought of that wise opinion has not rang true. Our American judicial system now readily accepts the appropriation of name or likeness branch of the right to privacy. *See* RESTATEMENT, *supra*, § 652C. In this state, that tort can be found in § 652(C) of the Marshall Revised Code.

In the case before this Honorable Court, the evidence demonstrates that genuine issues of material fact still remain. Thus, the Marshall lower courts erred in granting summary judgment for Defendant Marshall Manatees on Allen Sanders' claim of misappropriation of name or

likeness. The record on appeal supports a genuine question as to whether the Defendant used the image of Allen Sanders for the purpose of its own financial gain in violation of Marshall Revised Code § 652(C). Also, a question as to whether Allen Sanders consented to the use of his image or likeness on a billboard erected by the Defendant arises from the evidence preserved in the record.

In reviewing a grant for summary judgment, this Honorable Court should apply the test utilized by the lower courts: "the evidence must demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Marshall R. Civ. P. § 56 (c). Also, on review, the evidence should be construed in the light most favorable to the nonmovant. *Hunter v. Bryant*, 502 U.S. 224, 233 (1991). As the United States Supreme Court has emphasized, a disputed fact is "material" if it must inevitably be resolved and the resolution will determine the outcome of the case, while a dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, "[i]f, after reviewing the pleadings and evidentiary material before the trial court, the reviewing court determines that a material issue of fact exists or that summary judgment was based on an erroneous interpretation of the law, then reversal is warranted." *Ainsworth v. Century Supply Co.*, 693 N.E.2d 510, 514 (Ill. App. Ct. 1998).

A. Summary Judgment Was Inappropriately Granted Because There Remains A Genuine Issue Of Material Fact As To Whether The Defendant Used Mr. Sanders' Likeness For Its Own Commercial Purposes When It Placed His Image On A Large Billboard That Advertised Its Products And Services.

The question of whether Defendant utilized Mr. Sanders' image for its own commercial purposes presents a genuine issue of material fact that warrants reversal of the lower court's award of summary judgment for the Defendant, and remand of this case for a full and fair trial. The Marshall Revised Code, which is particularly similar to the appropriation of name or likeness branch of the privacy doctrine set forth in the Restatement (Second) of Torts, provides: "[o]ne who appropriates to his own use or benefit *for commercial purposes*, the name, image or likeness of another is subject to the other for invasion of his privacy." Marshall Rev. Code § 652(C) (emphasis added). With the addition of the "for commercial purposes" language, the Marshall Legislature invariably intended to focus this privacy tort on the protection of one's name or likeness from unauthorized financial gain by another. This intention is clear because "commercial use of some aspect of a person's identity without

permission is in effect an involuntary placing of a person on exhibition for someone else's financial benefit." McCarthy, *supra*, § 5:61. Accordingly, the Tenth Circuit has determined that statutes with this additional language "should be given a liberal rather than a narrow construction . . . which would tend to proscribe achievement of the desired legislative objective." *Donahue v. Warner Bros. Pictures, Inc.*, 194 F.2d 6, 11 (10th Cir. 1952).

In this instance, the Defendant prominently displayed two separate pictures of Allen Sanders for its own financial gain and in violation of § 652(C) of the Marshall revised statute. On January 26, 2001, the Defendant erected a billboard on one of only three major interstate highways leading into Marshall City. (R. at 8). This enormous advertisement features the Manatee's mascot sandwiched between two images of Allen Sanders. (R. at 9). Also, a statement which reads "5200 KIDS WERE ABDUCTED LAST YEAR – HAVE YOU SEEN THIS MAN?" is sprawled across the top of the billboard. (R. at 9). Furthermore, it states: "MARSHALL'S MANATEES CARE ABOUT CHILDREN. IF YOU HAVE ANY INFORMATION ABOUT THIS MAN PLEASE CONTACT US AT 1-844-MMCARE OR VISIT US AT WWW.MARSHALLMANATEES.COM." (R. at 9). Lastly, in one corner of this announcement the phrase, "SPONSORED BY MANATEES CARE – A COMMUNITY SERVICE PROJECT BY THE MARSHALL MANATEES," is displayed. (R. at 9).

Putting Allen Sanders on exhibition is exactly what the Defendant has done here, and it has undoubtedly done this for a commercial benefit. As the Ninth Circuit has recognized "[o]ne of the primary purposes of advertising is to motivate a decision to purchase a particular product or service. The first step toward selling a product or service is to attract the consumers' attention." *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 693 (9th Cir. 1998). To accomplish its goal of attracting customers, the Defendant decided to spend its money and time erecting a new billboard, instead of using one that already existed. It was erected along one of Marshall City's interstate highways–a high traffic area where not only the citizens of Marshall City see it, but interstate travelers as well. Drivers passing by, looking up, recognize Defendant's mascot in the middle of this advertisement. In this context, the billboard looks more like an attention-grabbing marketing tool, than a public service announcement.

The Supreme Court of Virginia focused on similar evidence in finding that the plaintiff's name was used for advertising purposes in a defendant's flyer. *Town & Country Prop. Inc. v. Riggins*, 457 S.E.2d 356, 362 (Va. 1995). The placement of the defendant's logo, plaintiff's name, and telephone numbers on the document, "as well as the wide distribution of the publication to a targeted audience," were all factors upon which the court based its opinion. *Id.* Similarly, Defendant Marshall Manatees purposely placed its mascot between two pictures of Mr. Sand-

ers, with the team's telephone number and Web site address directly below these images. Furthermore, all of this information was displayed as a large presentation for many to see from a far distance away. Analogous to *Town & Country Properties*, the Defendant's use of Mr. Sanders' image was for advertising purposes instead of purely informational purposes.

Additionally, the billboard never mentions the Find Lost Kids Foundation (FLK), the organization that works in conjunction with the Manatees in furthering the community service aspects of the Defendant's "Manatees Care" project. Instead, the Defendant's name is featured, and interested parties are directed to the Defendant's Web site at WWW.MARSHALLMANATEES.COM. (R. at 9). When this address is entered into any Web browser, the first sight shown is the phrase "GO 'TEES!" in over-sized lettering and highlighted with the colors orange, yellow, navy blue and sky blue.

In contrast, visiting WWW.FINDLOSTKIDS.COM leads to a noticeably less elaborate display. Here, the organization's name and address are listed in plain black-and-white. The reason for this distinction should not be overlooked. FLK is "an independent charitable organization with the objective of locating missing and abducted children." (R. at 4) This organization's Web site is purely informational as it "features information about the organization and a number of resources for finding lost and abducted children." (R. at 5).

The Defendant's leading objective is to make money, and the team makes money by selling tickets to its sporting events and selling team merchandise. As opposed to the FLK Web site, the Manatee's site is an extension of this attempt to accumulate more revenue. While it does display information about the "Manatees Care" program as well as links to FLK and other organizations, the Web site's main purpose is to draw attention to the Manatees team. Like so many other sites for professional sports franchises, it can be assumed that the Manatees' Web site also hosts information about the team's roster, statistics, schedule, and, most importantly, ticket sales. *See e.g.*, Chicago Bulls Official Web site, *at* http://www.nba.com/bulls/ (last visited Sept. 22, 2001). This information is wrapped in a colorful display designed to appeal to the eyes of customers. Thus, the Manatee's Web site itself is functional as another marketing tool to which people's attentions are drawn by the use of the billboard at issue here.

The Defendant may attempt to mask its marketing tools behind the altruistic "Manatees Care" program, but the real driving force here is big business, not philanthropy. If the Defendant was so concerned about locating and apprehending this person it thought was a child abductor, it had the resources to do this without even creating the injurious billboard. Through the use of its elaborate security system, the Defendant

could have identified Mr. Sanders' ticket by the bar code affixed to its face, (R. at 3), because that ticket information is systematically stored in the Defendant's customer database. (R. at 6). Defendant could have scoured its database for the information associated with Mr. Sanders' ticket, then cross-referenced this information with the credit card used to purchase the ticket. Typically, credit cards are associated with the name, address, and telephone number of the card's holder. After acquiring this information, the Defendant could have informed the authorities of its suspicions. Instead, it decided to publish Mr. Sanders' image under the guise of its community service program – "Manatees Care." (R. at 9).

In fact, one of the stated purposes behind the "Manatees Care" program is to provide a public relations vehicle for the Defendant, which is evident by the Defendant's use of the program in its advertising. (R. at 4). The program is promoted through placards in buses and trains, on billboards containing both the Manatees' and FLK's logos, and posters displayed throughout the Marshall Center. (R. at 5).

Nevertheless, in this case, the Defendant erected a new billboard that did not display the logos of the Manatees and FLK. Instead, only the mascot of the Manatees is depicted. Furthermore, in just one corner of this monstrous billboard are the words "Manatees Care" visible. (R. at 9). With a quick glance, which is all that drivers on a highway usually can afford, one only notices three large images – the Marshall Manatees' mascot, and two large pictures of Allen Sanders. (R. at 9). The writing in the corner is lost in this fleeting moment.

The Defendant may also attempt to argue that the use of Mr. Sanders' image was incidental to the purpose of the billboard. The rationale behind this incidental use doctrine is that an incidental use has no commercial value. *Schifano v. Greene County Greyhound Park, Inc.*, 624 So. 2d 178, 181 (Ala. 1993). "Whether the incidental use doctrine is applicable is determined by the role that the use plays with respect to the entire publication." *Pooley v. Nat'l Hole-In-One Ass'n*, 89 F. Supp. 2d 1108, 1112 (D. Ariz. 2000). As stated by the *Pooley* court:

> A number of factors are relevant in this regard: (1) whether the use has a unique quality or value that would result in commercial profit to the defendant; (2) whether the use contributes something of significance; (3) the relationship between the reference to the plaintiff and the purpose and subject of the work; and (4) the duration, prominence or repetition of the name or likeness relative to the rest of the publication.
>
> *Id.*

In this instance, the only person's picture used by Defendant is that of Allen Sanders. The Defendant specifically used Mr. Sanders' image because it believed that he was a child abductor and it decided to capitalize on the fact that a face listed in the FLK database walked into its stadium one day. As such, the Manatees' used Mr. Sanders' image "with-

out [his] consent to advertise [Defendant's] product . . . to add luster to the name of the corporation or for some other business purpose." *Martinez v. Democratic-Herald Publ'g Co.*, 669 P.2d 818, 820 (Or. 1983). The Defendant was advertising itself as a community-conscious organization that deserves the support of the public through sales in tickets and merchandise. The inclusion of Mr. Sanders' image on the billboard "was deliberate, not incidental, and integral to the advertisement." *Ainsworth*, 693 N.E.2d at 513. Consequently, the community service intention behind the billboard is actually incidental to the Defendant's motive of financial gain in this case.

As a result of the unauthorized use of Mr. Sanders' pictures on the Defendant's billboard, Mr. Sanders suffered substantial injury to his personal dignity and self-esteem with resulting mental distress damages, which coincide with the typical damages suffered by victims of misappropriation of likeness. *See* McCarthy, *supra*, §§ 5:58, 5:63. Specifically, he began to receive threatening phone calls and notes from members of his community who believe he is a child abductor. (R. at 10). His church group "ostracized" him and will no longer accept him in its weekly prayer sessions. (R. at 10). Additionally, his business and financial livelihood are now in jeopardy, as his clients are refusing to return his calls; some even stating that "they refuse to work with a person who abducts children." (R. at 10). As a result, Mr. Sanders is now seeking professional assistance in dealing with his inability to sleep and the deep emotional distress that he is currently experiencing. (R. at 10).

Based on the evidence preserved in the record and the arguments made above, this Honorable Court should find that a genuine issue of material fact exists as to Mr. Sanders' claim of invasion of privacy by misappropriation of name or likeness. Allen Sanders has a "right to be free from commercial exploitation." Harold R. Gordon, *Right of Property in Name, Likeness, Personalty and History*, 55 Nw. U. L. Rev. 553, 555 (1960). Although the "law will presume that damages exist for every infringement of a right," *Ainsworth*, 693 N.E.2d at 514, Mr. Sanders should have the opportunity for a full and fair adjudication to determine whether his claims warrant recovery for the injuries he has already sustained. Hence, Mr. Sanders asks this Honorable Court for a reversal of the Court of Appeals affirmation of summary judgment, as well as a remand of this case for a trial on the merits.

B. Summary Judgment Was Inappropriately Granted Because A Genuine Issue Of Material Fact Remains As To Whether Mr. Sanders' Likeness Was Used By The Defendant Without His Consent When It Erected A Billboard Displaying An Image Of Mr. Sanders That Was Captured At One Of The Defendant's Basketball Games.

The question whether Defendant exceeded the scope of the adhesion contract on the reverse side of Mr. Sanders' ticket presents a genuine issue of material fact which warrants a reversal of the lower courts' grant of summary judgment for the Defendant and remand of this case for trial. By purchasing and using a ticket to the January 23, 2001, Marshall Manatees' game, Allen Sanders granted the Defendant a "revocable license" to "utilize [Mr. Sanders'] image or likeness in connection with any video or other transmission or reproduction *of the event* for which this ticket relates," and assumed the risk for "all dangers incidental *to the game or event* for which this ticket is used. (R. at 4) (emphasis added). However, Defendant Marshall Manatees exceeded the scope of this contract when it used Mr. Sanders' likeness in promoting its basketball operations and programs on a prominent billboard leading into Marshall City.

The Eighth Circuit has recognized that it is the function of the courts to enforce such a contract as made. *See Cepeda v. Swift & Co.*, 415 F.2d 1205, 1207 (8th Cir. 1969). However, as the Marshall courts recognize, a waiver like the one pronounced on the back of Mr. Sanders' ticket, also known as an adhesion contract, must contain the following elements to be valid: "[t]he clause must be clear and understandable, and must relate to an interest that a knowledgeable party would know could be contracted away." (R. at 13). Moreover, contractual waivers will be enforced only where the intent of the waiver is also clear and unambiguous. (R. at 13). Furthermore, "the Marshall courts accept the majority view that contractual waivers, like other contracts of adhesion, are to be strictly construed against the drafter." (R. at 13).

Mr. Sanders never had an opportunity to negotiate the terms of the adhesion contract thrust upon him in purchasing and utilizing the Manatees' ticket. He purchased his ticket online using a credit card one month prior to the game. (R. at 3). His online purchase never provided him a chance to speak with a representative of the Defendant to avoid licensing the use of his image or likeness. (R. at 3). Furthermore, he may not have even known about the waiver because the ticket arrived in his mailbox two weeks after its purchase. (R. at 3). Additionally, when Mr. Sanders finally received his ticket, the waiver could only be found on the reverse side and in small print. (R. at 4). Like so many other spectator sports, Mr. Sanders was thus forced into accepting the terms of an un-

noticeable contract on a take-it-or-leave-it basis in order to attend the game. This represents an enormous inequality of bargaining power between the two parties, especially since demand to attend the game was relatively high, in light of the fact that this was a nationally televised, sold out sporting event, and both teams were having remarkable success during the 2000-2001 regular season. (R. at 3).

Nevertheless, the language of the adhesion contract on the reverse side of Mr. Sanders' ticket is clear and, thus, controls in this instance. Based on this principle, a defendant's immunity from a claim for invasion of privacy is no broader than the consent executed to him. *See Dzurenko v. Jordache, Inc.*, 451 N.E.2d 477, 478 (N.Y. 1983); *see also Shields v. Gross*, 448 N.E.2d 108, 110 (N.Y. 1983). Mr. Sanders did not sign a general release or otherwise give broad consent for the use of his image or likeness. Instead, he gave a narrow, restricted consent that only extends to the use of his image in connection with the transmission or reproduction of that night's game between the Manatees and the Ducks of Calizona.

The Circuit Court recognized that Mr. Sanders "voluntarily entered the Manatees' Marshall Center, a public place where television cameras and other imaging equipment are regularly operated in plain open view." (R. at 13). This finding led to court to conclude that Mr. Sanders could not reasonably have expected to be on the premises without some likelihood that his image might be recorded." (R. at 13). This contention is not in dispute.

Mr. Sanders, along with the other spectators to this sporting event, should reasonably expect to have his/their image(s) captured and used in conjunction with the transmission or reproduction of this game, since it was nationally televised. (R. at 3). During professional basketball games, it is common for television crews or closed circuit stadium cameras to scan the crowd and display images of the individuals in attendance on the "Jumbo-Tron" projection screen within the stadium, or during the broadcast of the game. Additionally, it should be expected that these same images would be displayed in association with any rebroadcast of the event, such as the "Classic Sports" replays seen on the cable channel ESPN Classic. *See, e.g.*, ESPN Classic Television Listings, *at* http://espn.go.com/classic/ (last visited Sept. 25, 2001). Also, it is reasonable that such large sports facilities and stadiums would have advanced security systems in place that would monitor and record the activities of the audience to maintain order during the event.

However, the intrusiveness of this video surveillance is new to the public and neither Mr. Sanders nor the other spectators could have reasonably believed that when they entered the sporting event, their photograph would have been taken, stored in the Manatees database and analyzed for possible a possible criminal background. Nor could these

patrons have suspected that their photograph was going to be stored and sold by the Defendant to other external marketing sources and to law enforcement agencies. (R. at 6); *see* George B. Trubow, *Protecting Informational Privacy in the Information Society*, 10 N. Ill. U. L. Rev. 521, 538 (1990) (stating that a compelling argument can be made that a collection of personal information sold as a dossier or profile violates the tort of appropriation of name or likeness for commercial purposes).

The implementation of this type of technology is so intrusive to the privacy rights of individuals that the American Bar Association has recommended that a pre-surveillance notice be given when the government utilizes such a technology, so that potential subjects to the continuing surveillance can be given the option to avoid it. ABA Standards for Criminal Justice Electronic Surveillance, Section B: Technologically–Assisted Physical Surveillance Std. 2-9.1(d)(v)(A) (1999). In this case, the Defendant has acted in a quasi-governmental role by actively searching for criminal abductors and by selling its database to law enforcement officials.

Even though a party consents to use of his image, his right to privacy is still violated where the limitation of his consent is exceeded. *See King v. Allied Vision, Ltd.*, 807 F. Supp. 300, 306 (S.D.N.Y. 1992), *rev'd on other grounds*, 976 F.2d 824 (2d Cir. 1992) (holding that even though an individual consented to the limited use of his name, the New York privacy statute was violated where the limitation was exceeded). In the instant case, the Defendant went beyond the scope of the license granted by Mr. Sanders. In interpreting the waiver, the court should look at the language of the document to consider the manifested meaning of the words, rather than a privately held intent by one of the parties. *See Donoghue v. IBC USA (Publ'ns) Inc.*, 70 F.3d 206, 212 (1st Cir. 1995). Clearly, the manifested meaning of the language on the back of the ticket limits the use of Mr. Sanders' image. The license provides: "[h]older grants permission to organization sponsoring the game or event for which this ticket is issued to utilize holder's image or likeness in connection with any video or other transmission or reproduction of the event for which this ticket relates." (R. at 4). First, the language of the contract stresses video transmissions. Instead, the Defendant used Mr. Sanders' photo—taken while he entered the stadium on the evening of January 23, 2001 - on a billboard leading into Marshall City. (R. at 9). Second, the transmission or reproduction has to be related to that particular basketball game between the Manatees and the Ducks according to the terms of the waiver. (R. at 4). Yet, Mr. Sanders' picture was prominently displayed in an advertisement for the team in association with its community service project – Manatee's Care. (R. at 9).

Although Mr. Sanders consented to the use of his image or likeness, based on the waiver language, it does not give the Defendant a "carte

blanche" right to make use of his image or likeness as the Defendant wishes. *See* 62A Am. Jur. 2d *Privacy* § 183 (1990). There is only a miniscule connection between the use of his image and the game, considering that Mr. Sanders was photographed while entering the stadium on the date of the game. As the court in *Ainsworth* noted, such logic leads to the absurd assertion that, "by consenting to eat apples with dinner, one has also consented to eat oranges. The fact that they are both fruit does not make them indistinguishable." *Ainsworth*, 693 N.E.2d at 514. The waiver that Mr. Sanders granted extends to the Defendant the right to invade his privacy, but "only to the extent legitimately necessary and proper in dealing with the matter which gave rise to the waiver." *Donahue*, 194 F.2d at 13. When Defendant Marshall Manatees placed Mr. Sanders' pictures on its billboard, it exceeded the scope of the waiver, and, therefore, Defendant breached the terms of the adhesion contract found on the back of Mr. Sanders' ticket.

Similar to the situation in this case, the North Carolina Court of Appeals overturned a summary judgment ruling on a misappropriation of name or likeness claim. *Barr v. S. Bell Tel. and Tel. Co.*, 185 S.E.2d 714, 717 (N.C. 1972). The court found that the "evidence would justify, although not compel, the jury to find that the [d]efendant had gone beyond the scope of [p]laintiff's consent and thereby had invaded [p]laintiff's right of privacy." *Id.* Consequently, that court granted a reversal of the summary judgment for the defendant. *Id.* Here, the evidence justifies a similar result.

In addition to the finding of consent in the revocable license, the District Court of Appeals also noted that the back of Mr. Sanders' ticket "contained standard assumption of risk clauses" that authorized the Defendant to utilize his image or likeness and to "disseminate any images of him it had captured." (R. at 14). Although exculpatory contracts are not automatically void and unenforceable, the law does not favor them because they allow conduct below the acceptable standard of care applicable to the activity. *Richards v. Richards*, 513 N.W.2d 118, 121 (Wis. 1994). For an exculpatory waiver to be valid, the waiver must clearly, unambiguously and unmistakably inform the party of what is being waived. *Yauger v. Skiing Enter., Inc.*, 557 N.W.2d 60, 63 (Wis. 1996).

The lower courts' reasoning that Mr. Sanders assumed the risk of the Defendant's actions is flawed in several respects. For example, the assumption of risk clause applies only to "risks and danger incidental to the game or event for which this ticket is issued." (R. at 4). The broad language states that Sanders "assumes all risks and danger incidental to the game or event," but it does not relieve the Defendant of its negligent actions because the language of the waiver did not clearly, unambiguously, and unmistakably express that Mr. Sanders was waiving such a claim. *See Yauger*, 557 N.W.2d at 63 (finding that the assumption of all

risk "inherent [to the] risks of skiing" did not inform a skier that he was waiving all claims against the defendant due to the defendant's negligent acts, where the term "negligence" did not appear in the waiver). As such, an exculpatory contract is void against public policy if it is so broad "that it would absolve [the defendant] from any injury to the [plaintiff] for any reason." *Richards*, 513 N.W.2d at 121 (quoting *Coll. Mobile Home Park & Sales v. Hoffman*, 241 N.W.2d 174, 178 (Wis. 1976)). If it was the Defendant's intention to convey that its negligent actions were being waived from liability, such language should have been included in the contract.

The evidence preserved in the record and the arguments made above indicate that genuine issues of material fact exist in this case. Thus, Mr. Sanders asks this Honorable Court to reverse the lower courts' grant of summary judgment for the Defendant and remand this case to the trial level so that a trier-of-fact can determine whether the claims brought by Mr. Sanders warrant a recovery of damages for the injuries he has sustained.

CONCLUSION

The Marshall lower courts erred when they awarded summary judgment to the Defendant Marshall Manatees on Allen Sanders' claims of false light invasion of privacy and invasion of privacy by appropriation of name or likeness. Genuine issues of material fact associated with these claims still remain to be determined in a full and fair adjudication. The Defendant publicized an inference that Mr. Sanders was a child abductor that a reasonable person would find highly offensive. There is evidence to suggest that the Marshall Manatees acted with reckless disregard for the truth when it compared Mr. Sanders' image to the FLK database and made an exhibition of his picture on its billboard. The evidence also suggests that the publication of Mr. Sanders' image on a billboard was done for the Defendant's own commercial purposes. Lastly, Defendant exceeded the scope of the revocable license that Mr. Sanders granted to it by using his image or likeness on its billboard. Based on the arguments made herein, Allen Sanders now asks this Honorable Court for a reversal of lower courts' award of summary judgment for the Defendant, as well as a remand of this case to the trial court for a full and fair adjudication on the merits of Mr. Sanders' claims.

Respectfully submitted,

_____

Attorneys for Allen Sanders

APPENDIX A

RELEVANT STATUTORY PROVISIONS

MARSHALL REV. CODE § 652(E)

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if:

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

MARSHALL REV. CODE § 652(E)

One who appropriates to his own use or benefit for commercial purposes, the name, image or likeness of another is subject to liability to the other for invasion of his privacy.

APPENDIX B

RELEVANT RESTATEMENT PROVISIONS

RESTATEMENT (SECOND) OF TORTS § 652A

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interest of the other.

(2) The right of privacy is invaded by

(a) unreasonable intrusion upon the seclusion of another as stated in § 652B; or

(b) appropriation of the other's name or likeness, as stated in § 652C; or

(c) unreasonable publicity given to the other's private life, as stated in § 652D; or

(d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

RESTATEMENT (SECOND) OF TORTS § 652C

One who appropriates to his own use or benefit the name or likeness or another is subject to liability to the other for invasion of his privacy.

RESTATEMENT (SECOND) OF TORTS § 652D

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

RESTATEMENT (SECOND) OF TORTS § 652E

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

RESTATEMENT (SECOND) OF TORTS § 892A

(1) One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.

(2) To be effective, consent must be

(a) by one who has the capacity to consent or by a person empowered to consent for him, and

(b) to the particular conduct, or to substantially the same conduct.

(3) Conditional consent or consent restricted as to time, area or in other respects is effective only within the limits of the condition or restriction.

(4) If the actor exceeds the consent, it is not effective for the excess.

(5) Upon termination of consent its effectiveness is terminated, except as it may have become irrevocable by contract or otherwise, or except as its terms may include, expressly or by implication, a privilege to continue to act.

APPENDIX C

RELEVANT AMERICAN BAR ASSOCIATION STANDARDS

ABA STANDARDS FOR CRIMINAL JUSTICE ELECTRONIC SURVEILLANCE 3RD, SECTION B: TECHNOLOGICALLY-ASSISTED PHYSICAL SURVEILLANCE, STD. 2-9.1(D)

Officers conducting regulated technologically-assisted physical surveillance should be governed by the following considerations:

(i) The subjects of the surveillance should not be selected in an arbitrary or discriminatory manner.

(ii) The scope of the surveillance should be limited to its authorized objectives and be terminated when those objectives are achieved.

(iii) When a particular surveillance device makes use of more than one regulated technology and the technologies are governed by differing rules, the more restrictive rules should apply.

(iv) The particular surveillance technique should be capable of doing what it purports to do and be used solely for that purpose by officers trained in its use.

(v) Notice of the surveillance should be given when appropriate.

(A) Pre-surveillance notice should be given by the appropriate authority when deterrence is the primary objective of the surveillance (as with some types of checkpoints) or when

those potentially subject to the surveillance should be given the option of avoiding it.

(B) When a court order has authorized the surveillance, post-surveillance notice should be given by the appropriate authority to those listed in the order, but can be delayed for good cause shown. Post-surveillance notice to the principal target(s) of the surveillance may also be appropriate for other surveillance requiring probable cause.

(vi) Disclosure and use by law enforcement officers of information obtained by the surveillance should be permitted only for designated lawful purposes.

(vii) Protocols should be developed for the maintenance and disposition of surveillance records not required to be maintained by law.

BRIEF FOR RESPONDENT

No. 2001-1224

IN THE
SUPREME COURT OF THE
STATE OF MARSHALL
OCTOBER TERM 2001

ALLEN SANDERS,
Petitioner,
v.
MARSHALL MANATEES, INC.,
Respondent.

On Writ of Certiorari to the
First District Court of Appeals,
of the State of Marshall

BRIEF FOR RESPONDENT

Courtney Scantlin
Mekisha Walker
Warren Clint Wills
Team # 1

South Texas College of Law
1303 San Jacinto Street
Houston, Texas 77002
(713) 659-8040
Attorneys for Respondent

No. 2001-1224

IN THE
SUPREME COURT OF THE
STATE OF MARSHALL
OCTOBER TERM 2001

ALLEN SANDERS,
Petitioner,

v.

MARSHALL MANATEES, INC.,
Respondent.

On Writ of Certiorari to the
First District Court of Appeals,
of the State of Marshall

BRIEF FOR RESPONDENT

Team # 1

Attorneys for Respondent

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT BY HOLDING PETITIONER FAILED TO ESTABLISH A PRIMA FACIE CASE FOR FALSE LIGHT INVASION OF PRIVACY?

II. WHETHER THE TRIAL COURT CORRECTLY GRANTED SUMMARY JUDGMENT BY HOLDING PETITIONER FAILED TO ESTABLISH A PRIMA FACE CASE FOR INVASION OF PRIVACY BYMISAPPROPRIATION OF NAME OR LIKENESS?

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.

ALLEN SANDERS, Petitioner

MARSHALL MANATEES, INC., Respondent

_____

_____

_____

ATTORNEYS FOR RESPONDENT
MARSHALL MANATEES, INC.
(Signatures omitted in accordance with section 1020(6) of the Rules for the Twentieth Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

UNITED STATES COURT OF APPEALS CASES:

UNITED STATES DISTRICT COURT CASES:

STATE COURT CASES:

UNITED STATES CONSTITUTION:

STATE STATUTES:

RULES:

RESTATEMENTS:

LAW REVIEWS AND JOURNALS:

SECONDARY AUTHORITIES:

No. 2001-1224

IN THE
SUPREME COURT OF THE
STATE OF MARSHALL
OCTOBER TERM 2001

ALLEN SANDERS,
Petitioner,

v.

MARSHALL MANATEES, INC.,
Respondent.

On Writ of Certiorari to the
First District Court of Appeals,
of the State of Marshall

BRIEF FOR RESPONDENT

TO THE SUPREME COURT OF THE STATE OF MARSHALL:

Respondent, Marshall Manatees, Inc., respectfully submits this brief in support of its request that this Court affirm the judgment of the court of appeals.

OPINION BELOW

The Madison County Circuit Court granted summary judgment in favor of the Respondent in case number MCV-01-1040. The First Court of Appeals of the State of Marshall affirmed the circuit court's order granting summary judgment in case number 2001-CV-0901.

STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted in accordance with section 1020(2) of the rule for the Twentieth Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

CONSTITUTIONAL AND RESTATEMENT PROVISIONS INVOLVED

The First Amendment is the relevant constitutional provision necessary in the determination of this action and is set for in Appendix A. The relevant provisions of the Restatement (Second) of Torts §§ 652C, and 652E (1977), are set forth in Appendices B and C, respectively.

STATEMENT OF THE CASE

I. Summary of the Facts

The Marshall Manatees are a privately owned basketball team, who support a variety of charities. (R. at 4.) The Find Lost Kids Foundation ("FLK") is a charity the Marshall Manatees support. (R. at 4.) FLK is an independent charitable organization dedicated to finding missing and abducted children. (R. at 4.) FLK maintains a web site at www.findlostkids.org, which contains a searchable online database of photographs of abducted children and their alleged abductors. (R. at 5.) FLK compiles the data contained in its database from a variety of sources, including family and friends of the abducted children, public and private schools, law enforcement agencies, children's charities and religious groups. (R. at 5.)

In support of FLK, the Marshall Manatees started "Manatees Care," a community service project. (R. at 4.) This community service project is designed to raise public awareness about the problems and concerns surrounding abducted children, to promote FLK's activities, and help raise money for FLK. (R. at 4.)

In an effort to fully support FLK's crusade of finding lost and abducted children, the Manatees also provide FLK with access to database information derived from the use of facial recognition technology. (R. at 6-7.) Facial recognition technology is a relatively new form of biometrics that is used in casinos and by law enforcement agencies and has proven to be 99.3 percent accurate. (R. at 6-8.) The Manatees use of facial rec-

ognition technology begins when patrons enter Marshal Center, where the Manatees play their home basketball games. (R. at 6.)

Marshall Center patrons insert tickets into an automated turnstile ticket reader, which allows entrance after verifying the authenticity of the ticket. (R. at 6.) While the ticket reader is processing the bar code on the ticket, security cameras photograph each patron. (R. at 6.) This photograph is then digitized and stored in the Manatees' customer database, along with the bar code information. (R. at 6.) After an individual's picture is converted to a digital file, it is tagged with approximately eighty measurable reference points, the combination of which makes all persons unique. (R. at 7.) The Manatees use the database information for marketing research, in-house security, and internal promotions. (R. at 6.) The Manatees also license the database to various entities including, local law enforcement, national marketing companies, FLK and other charities. (R. at 6.) In an effort to assist FLK in identifying and locating abducted children and their abductors, the Manatees regularly compare their customer database with FLK's database. (R. at 6.) Marshall Center's system is capable of comparing the digital files with extreme accuracy. (R. at 7.)

The Marshall Manatees are having a good year. (R. at 3.) The team is playing well and receiving national attention. (R. at 3.) The Manatees game against the Calizona Ducks was not an exception. (R. at 3.) The January 23, 2001 game sold out and was televised nationally. (R. at 3.) In preparation for this, Petitioner bought his ticket one month before the game. (R. at 3.) Petitioner's ticket contained a waiver regarding the use of his image. (R. at 4.) The pertinent language on the back of Petitioner's ticket is as follows:

> This ticket is a revocable license and may be taken and admission refused upon refunding the purchase price appearing hereon. The resale or attempted resale at a price higher than that appearing hereon is grounds for seizure and cancellation without compensation. Holder of this ticket voluntarily assumes all risks and danger incidental to the game or event for which this ticket is issued. Holder agrees by use of this ticket not to transmit or aid in transmitting any description, account picture or reproduction of the game or event to which this ticket is issued. Breach of the foregoing will automatically terminate this license. *Holder grants permission to the organization sponsoring the game or event for which this ticket is issued to utilize the holder's image or likeness in connection with any video or other transmission or reproduction of the event for which this ticket relates.*

(R. at 4.) (emphasis added).

After receiving the ticket and waiver in the mail, Petitioner was photographed on January 23, 2001 as he entered Marshall Center and his image was added to the Manatees' customer database. (R. at 8.) When the database was compared to FLK's database, the system indicated a

match linking Petitioner's photograph to a separate picture in FLK's database. (R. at 8.) The technician responsible for running the program then visually compared the two images to ensure accuracy. (R. at 8.) Concluding both images were the same individual, the technician notified the Manatees' community service project director of the match. (R. at 8.) The project director then contacted FLK and Manatees' public relations department. (R. at 8.)

Three days later, the Manatees erected a billboard with Petitioner's picture from both databases. (R. at 8-9.) Above the images, a statement read, "5200 kids were abducted last year – have you seen this man?" (R. at 9.) A statement underneath the images read, "Marshall Manatees care about children. If you have any information about this man, please contact us at 1-844-mmcare or visit us on the web at www.marshallmanatees.com." (R. at 9.) A statement in the corner of the billboard read, "sponsored by manatees care – a community service project of the Marshall Manatees." (R. at 9.) The Petitioner's image was in the FLK database because his former wife abducted her children from a previous marriage while she was still married to the Petitioner. (R. at 9.) Petitioner filed a two-count lawsuit asserting false light invasion of privacy, which allegedly caused others to believe he was a child abductor. (R. at 10.) Petitioner also alleged invasion of privacy by misappropriation of his likeness for commercial purposes. (R. at 9-10.)

II. Summary of the Proceedings

Petitioner sued the Manatees in the Madison County Circuit Court, State of Marshall, alleging a violation of the Petitioner's privacy. (R. at 9.) Neither party disputes the facts set forth in the record below. (R. at 3.) The circuit court granted the Manatees' motion for summary judgment, holding that, as a matter of law, Petitioner failed to prove: (1) false light invasion of privacy; and (2) invasion of privacy by misappropriation of name and likeness. (R. at 11-14.)

The First District Court of Appeals affirmed the circuit court's granting of summary judgment because the Petitioner failed to satisfy the elements on either alleged ground of recovery. (R. at 12, 14.) The court held there was no indication that the Marshall Manatees acted with knowledge as to the falsity of the publicized matter. (R. at 11.) Nor was there evidence to suggest the Manatees acted with reckless disregard or malice by comparing or posting the Petitioner's photograph. (R. at 11-12.) The appellate court also held that the text on the billboard did not label the Petitioner as a child abductor, and declined to hold that a reasonable person would find the message highly offensive. (R. at 12.)

The appellate court also rejected Petitioner's claim that the Manatees invaded his privacy through misappropriation of his name and like-

ness. (R. at 12.) For the Petitioner to prevail on his misappropriation claim, he must not only demonstrate his name or likeness was used without his consent, but also that such use was for commercial purposes. (R. at 12-13.) The court reasoned that because the Petitioner voluntarily entered Marshall Center where cameras operated in plain view, Petitioner could not reasonably expect to be on the premises without some likelihood that his image might be recorded. (R. at 13.) The court rejected the Petitioner's assertion that the Manatees used Petitioner's image for its own commercial purpose because of the express waiver on the back of the ticket. (R. at 13.) The court found that the Manatees secured the necessary consent to photograph the Petitioner and to use his image. (R. at 14.) The court based this holding on the waiver on the Petitioner's ticket. (R. at 14.)

SUMMARY OF THE ARGUMENT

I.

Advances in technology fuel a progressive society. Changes in our technology represent more than mere symbols of status or electronic ease. Rather, technology has become a cornerstone of American living and prosperity. Specifically, with the advent of biometrics and facial recognition technology, society may look forward to safe and accurate alternatives for gathering information, reaching individual security and investigating criminal and terrorist acts.

Supporting advances in technology, the Marshall Manatees represent more than a professional basketball team; they embody the spirit of philanthropy by utilizing biometric technology in order to find lost and abducted children. In its quest to aid in the search for lost children, the Manatees did not invade the privacy of the Petitioner by placing him in a false light. The lower court was correct in granting summary judgment for the Manatees because Petitioner could not establish that the publication of his picture on a Find Lost Kids billboard was highly offensive under a reasonable person standard, nor could he prove that the Manatees had knowledge of any falsity regarding the billboard or that they acted in reckless disregard as to the falsity of the publicized matter. Plaintiff cannot establish a genuine issue of material fact in order to pursue his invasion of privacy claim. The billboard which featured a picture of the Petitioner, taken from a database, and that inquired as to his whereabouts in regard to a child abduction, could not be highly offensive to a reasonable person. When weighed against the social importance of returning lost and abducted children to their homes, Petitioner cannot maintain that his alleged privacy interest is tantamount. The Manatees carefully compared the picture of Petitioner against his photo taken by the facial recognition technology, featured at the Mana-

tee Stadium, before releasing the picture on to the billboard. Therefore, Petitioner cannot establish the facts needed to prove reckless disregard or actual malice on the part of the Manatees.

II.

Should this Court find that Petitioner did in fact have a false light invasion of privacy claim against the Manatees, it should still find that the lower court was correct in granting summary judgment against the Petitioner because he could not establish a prima facie case for commercial appropriation of name or likeness. The Manatees did not use the Petitioner's name or likeness for commercial purposes. Petitioner consented to enter a public stadium in which cameras were ordinarily operated in plain view of the spectators. After the Petitioner's picture was taken and placed on the Find Lost Kids billboard, the photo still had absolutely no commercial value, nor was it of any commercial importance to the Manatees. The Manatees sought only to gain information on a child abduction in which the Petitioner was directly linked. Using the Petitioner's likeness in order to learn facts on matters of public concern did not constitute a commercial misappropriation of Petitioner's likeness. Because Petitioner could not present any genuine issue of material fact regarding the elements of commercial misappropriation, his claim simply cannot survive.

ARGUMENT AND AUTHORITIES

Facial recognition technology was initially developed for national security by the military, but is currently being utilized in the private industry as well as by law enforcement agencies to verify identities of persons seeking a driver's license and preventing fraud and loss in the private sector.[1] Christopher S. Milligan, Note, *Facial Recognition Technology, Video Surveillance, and Privacy*, 9 S. Cal. Interdisc. L.J. 295, 296, 306 (1999). Facial recognition technology can also be used to "identify known sexual predators that are lurking in a school area." Charles Piller, Josh Meyer, and Tom Gorman, *Police Taking look at Facial Scans Picking Criminals out of Crowds a Privacy Concern*, CHI. TRIB., Mar. 19,

1. Some commentators recognize how beneficial this technology can be, in light of the recent tragic events in New York and Washington, D.C. *See e.g.*, Thomas E. Weber, *A Primer on Technology that Has the Potential to help Foil Terrorism*, WALL ST. J., Sept. 17, 2001, at B1, *available at* 2001 WL-WSJ 2875602 ("Some advocate using this approach to scan airport lobbies and check passengers' images against databases of suspected terrorists"); Laura Johannes, William Bulkeley and Barbara Carton, *Aftermath of Terror: New Technologies to Greet Air Travelers as Security Measures Become Tighter*, Wall St. J., Sept. 13, 2001, at A12, *available at* 2001 WL-WSJ 2875420 ("At least one of the hijackers was on a FBI list of potential terrorists and could have been stored in a database, alerting authorities when he tried to board the plane").

2001, at B3, *available at* 2001 WL 4053239. People are easily susceptible to prejudices and preconceived notions, but this technology does not focus on a person's race and does not recognize other stereotypes. John D. Woodward, *And Now, the Good Side of Facial Profiling*, WASH. POST, Feb. 4, 2001, at B04. Facial recognition technology is no different than positioning officers on street corners with mug shot books. Roy Bragg, *Show Your Face in Public; Smile, You're on the Candid Bad Guy Camera*, SAN ANTONIO EXPRESS-NEWS, Aug. 19, 2001, at 1K, *available at* 2001 WL 24772883.

As society inevitably evolves to meet a demanding present and future, so must technology. The advent of advances in technology will essentially affect innumerable social, moral and privacy issues. Courts should embrace this evolutionary process under its current conceptions of factual analysis and summary judgment standards.

Summary judgment is appropriate where no genuine issue of material fact exists so that the movant is entitled to judgment as a matter of law. MARSHALL. R. CIV. P. 56(C). The court determines whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The court must enter summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The nonmoving party may not rest upon mere allegations or denials, but must set forth specific facts showing a genuine issue for trial. *Id.* at 324.

The burden of proof usually rests with the moving party; however, "speedy resolution of defamation and invasion of privacy cases is desirable" in instances where the First Amendment is implicated – summary judgment is a *favored* remedy. *Aisenson v. Am. Broad. Co.*, 269 Cal. Rptr. 379, 382 (Cal. App. 1990) (emphasis in original). Review of a lower courts grant of summary judgment is de novo. *Celotex*, 477 U.S. at 322. "As a practical matter, the burden of proving falsity has been shifted to the plaintiff." *Goodrich v. Waterbury Republican-American Inc.*, 448 A.2d 1317, 1322 n.6 (Conn. 1982).

I. PETITIONER CANNOT ESTABLISH A PRIMA FACIE CASE FOR FALSE LIGHT INVASION OF PRIVACY OR TO PROVE ACTUAL MALICE

A. FEDERAL CONSTITUTIONAL LAW AND MARSHALL STATE LAW MANDATE THE APPLICATION OF A RECKLESS DISREGARD STANDARD FOR ALL FALSE LIGHT INVASION OF PRIVACY CASES

1. *The First Amendment requires the reckless disregard standard for false light invasion of privacy actions*

a. The Reckless disregard standard set forth in *Time v. Hill* controls false light causes of action

In *New York Times v. Sullivan*, the United States Supreme Court recognized a First Amendment qualified privilege for a false and defamatory statement made by a defendant regarding a public official in a libel action. 376 U.S. 254, 256 (1964) (requiring the actor have knowledge or act with reckless disregard for the truth). The Court reasoned that such a standard balanced free speech rights and the plaintiff's reputation interests. *Id.* The United States Supreme Court extended this actual malice requirement in *Time v. Hill,* holding that where matters of public interest are at issue, constitutional protections afforded by the First Amendment preclude recovery for false light invasion of privacy, unless there is actual malice. *Time v. Hill*, 385 U.S. 374, 389-90 (1967).

In *Time*, the Supreme Court was confronted with the issue of when a state may allow an action for false light invasion of privacy resulting from the false reporting of matters of public interest. *Id.* at 379. In requiring the plaintiff to prove actual malice, the Court did not blindly apply the standard from *New York Times v. Sullivan*, rather it reached this conclusion "upon careful consideration" of a false light action involving private individuals. *Id.* at 390. The Court held that recovery under the New York Statute was viable if the defendant acted "with knowledge or its falsity or in reckless disregard for the truth." *Id.* at 389-90. The Supreme Court recognized the similarities and the distinctions between false light and defamation. *Id.* at 385 n.9.

Several years later, the Court held that states may adopt any standard of liability in a defamation action, "so long as they do not impose liability without fault." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).[2] The *Gertz* Court also suggested actual malice might be required

2. Action for false light invasion of privacy should be carefully distinguished from defamation, as it is a "distinct theory of recovery entitled to separate consideration and analysis." *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W. Va. 1984); *see also*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 117 at 864 (5th ed. 1984). Unlike Marshall, where the legislature has determined false light is a viable cause

for a statement, which was not facially defamatory, but only defamatory by innuendo or implication. *Cox v. Hatch*, 761 P.2d 556, 559 n.2. (1975).

Following the *Gertz* decision, the Supreme Court again was faced with a false light invasion of privacy action in *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974). There, the Supreme Court held that liability could only exist if the newspaper had published the article with actual malice. *Id.* at 251. This decision reaffirmed the Court's holding in *Time*, and acknowledged its holding in *Gertz*, but specifically avoided the opportunity to clarify whether a state could apply a more relaxed standard in a false light privacy case involving a private figure. *Id.* at 250-51.

A majority of jurisdictions follow *Time*, rather than the less stringent requirement of *Gertz*. *Colbert*, 747 P.2d at 291 (collecting cases requiring actual malice be shown); *Yancey v. Hamilton*, 786 S.W.2d 854, 860 (Ky. 1990) (refusing to allow any standard other than actual malice in false light cases involving private individuals and matters of public interest based on "speculation about the high court's parting ways with established precedent"). Courts adopting a *Gertz* standard in false light cases discount the common law and fail to recognize that the Constitution may require actual malice. Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 Case W. Res. L. Rev. 885, 913 (1991).

The Arkansas Supreme Court properly applied *Time* to false light actions and *Gertz* to defamations actions. *Dodrill v. Arkansas Democrat Co.*, 590 S.W.2d 840, 845 (Ark. 1979). In *Dodrill*, an attorney sued for libel and false light invasion of privacy when a Little Rock newspaper published an article entitled "Suspended LR Lawyer Fails Bar Examination." 590 S.W.2d 840, 841 (Ark. 1979). Although the plaintiff's name

---

of action and requires a showing of reckless disregard, a few other jurisdictions have refused to even recognize the cause of action concluding that it overlaps with defamation. *See e.g., Cain v. Hearst Corp.*, 878 S.W.2d 577, 583 (Tex. 1994) (declining to restrict speech any further than existing state tort law already has). However, the fundamental conceptual basis supporting the right to privacy is intrinsically different from the right to be free from defamation. Bryan R. Lasswell, *In Defense of False Light: Why False Light Must Remain a Viable Cause of Action*, 34 S. TEX. L. REV. 149, 171 (1993). An action for invasion of privacy is designed to protect a person's interest in being let alone. *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317, 1327-28 (Conn. 1982). An action for invasion of privacy seeks damages for "mental distress from having been exposed to public view, although injury to reputation may be an element bearing upon such damages." *Time*, 385 U.S. 374, 384 n.9. Conversely, defamation "deals only with the injury done to the individual in his external relations to the community, by lowering him in the estimation of his fellows." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 197 (1890). Therefore, without a cause of action for false light invasion of privacy, plaintiffs are unable to establish that a defamation claim would have no remedy. Nathan E. Ray, *Let There Be False Light: Resisting the Growing Trend Against an Important Tort*, 84 Minn. L. Rev. 713, 715 (2000).

was not on the list of names provided by the Secretary of the Board of Bar Examiners, the plaintiff had in fact passed the bar. *Id.* at 842. In reviewing the plaintiff's libel claim, the court discussed the *Gertz* holding at length. *Id.* at 843-45. However, the court affirmed summary judgment for the defendant as to the plaintiff's false light claim, because it did not apply *Gertz*. *Id.* at 844-46. The court held that the *Time v. Hill* rule mandates that a plaintiff must prove actual malice and that this is the law irrespective to subsequent Supreme Court decisions. *Id.* at 845. The Arkansas court further noted that in *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974), the Supreme Court "consciously abstained" from determining how *Gertz* affects, but that it was the court's duty to abide by *Time v. Hill* until it is overruled by the Supreme Court. *Id.* at 845 n.9.

In *Brewer v. Rogers*, a high school football coach sued a school superintendent, a news reporter, and a television station alleging false light invasion of privacy. 439 S.E.2d 77, 77 (Ga. App. 1993). An investigation of grade changes for a football player resulted in the broadcast of an interview with the School Superintendent Shuler. *Id.* at 78. The coverage featured Brewer as being involved in the alleged grade changes and named no one else. *Id.* Shuler then relayed that Brewer, fifteen years earlier, had been charged with commercial gambling and felony possession of marijuana, but that these records were sealed pursuant to his plea agreement. *Id.* The appellate court affirmed summary judgment for all defendants despite newspaper article's insinuation that he was guilty of grade alterations, because there was no viable cause of action for false light invasion of privacy in absence of actual malice. *Id.* at 83.

Here, the lower courts properly applied the actual malice standard, just as the courts in *Dodrill* and *Brewer*. (R. at 11.) Reckless disregard is the proper standard, that is until the Supreme Court holds otherwise. The *Gertz* Court could have specifically stated that its decision applied to false light actions as well as defamation actions. However, that is not the case. Moreover, the Supreme Court in deciding *Cantrell*, a false light case, could have overruled *Time* and applied a *Gertz* standard. "Whether *Gertz* will be used to modify *Time, Inc. v. Hill* is only speculation;" actual malice is required until the Supreme Court overrules *Time*. *McCall v. Courier-Journal and Louisville Times Co.*, 623 S.W.2d 882, 888 (Ky. 1981).

b. Freedom of speech should not be limited based upon sources and classifications; rather all speakers should find protection under the umbrella of First Amendment rights

The United States Supreme Court had held that the value of speech is not contingent on its source. *First Nat'l Bank of Boston v. Bellotti*, 435

U.S. 765, 777, (1978). Distinguishing in the level of protection afforded speakers is inconsistent with the First Amendment principle that the inherent value of speech is not dependant on the identity of its source. *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 472 U.S. 749, 781 (1985) (Brennan, J., dissenting) (citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, (1978)); *In re IBP Confidential Business Documents Litigation v. Iowa Beef Processors, Inc.*, 797 F.2d 632, 642 (8th Cir. 1986).

In *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, the United States Supreme Court reviewed the Vermont Supreme Court's holding that nonmedia defendants did not deserve the same First Amendment protections as media defendants. 472 U.S. 749, 752 (1985). However, the United States Supreme Court's decision did not even give mention to the media/nonmedia issue, which was the basis of the lower court's holding, and instead the Court rested its decision on the nature of the speech, not the identity of the defendant. *Id.* at 751-63. The majority opinion failed to address any such distinction, but five justices explicitly rejected any media/nonmedia classification. *Id.* at 772-73, 784-86. Justice White stated that the First Amendment affords no more protection to the press than it does to others who exercise their free speech rights. *Id.* at 773 (White, J., concurring). Justice Brennan's dissent, joined by Justices Marshall, Blackmun, and Stevens, explicitly rejected any media/nonmedia distinction, because of the difficulty in determining what constitutes a media entity. *Id.* at 781-82 (Brennan, J., dissenting). First Amendment publications are intended to inform the public; the identity of the source is irrelevant. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).

In defamation law, the actual malice standard applies to both media and nonmedia defendants. *Wampler v. Higgins*, 752 N.E.2d 962, 972 (Ohio 2001); *Miller v. Nestande*, 237 Cal. Rptr. 359, 363 (1987). In *Wampler*, the Ohio Supreme Court was presented with this very dilemma and concluded there should be no distinction between media and nonmedia defendants. *Wampler*, 752 N.E.2d at 273. In that case, the plaintiff argued that a private citizen should not enjoy the same First Amendment protection as the media because of the Constitution's reference to "freedom of the press." *Id.* at 972-73. The Ohio Supreme Court rejected this narrow interpretation, refusing to endorse any distinction between media and nonmedia defendants that would differentiate in the amount of constitutional protection afforded any defendant. *Id.*

The plain language of the First Amendment provides no justification for "according greater protection to the media than to private parties." *Anderson v. Low Rent Housing Comm'n of Muscatine*, 403 N.W.2d 239, 247 (Iowa 1981) (holding the New York Times actual malice standard of clear and convincing evidence applies equally to media and nonmedia

defendants); *see*, U.S. CONST. amend. I. Regardless of status, all persons in our society should be afforded the same constitutional protections. Note, *Mediaocracy and Mistrust: Extending New York Times Defamation Protection to Nonmedia Defendants*, 95 Harv. L. Rev. 1876, 1885 (1982).

This case presents the same dilemma Justice Brennan discussed in attempting to determine what constitutes a media entity. *Dun & Bradstreet*, 472 U.S. at 781-82 (Brennan, J., dissenting) ("[I]t makes no sense to give the most protection to those publishers who reach the most readers and therefore pollute the channels of communication with the most misinformation and do the most damage to private reputation"). The First Amendment protects all speakers, delegating equal rights to all. *Wampler*, 752 N.E.2d at 973.

The Marshall Manatees deserve protection without regard to classification beneath the umbrella of First Amendment rights in order to express its interests in the search for lost children. Therefore, this court should find that the Marshall Manatees are entitled to the same protection as any other defendant, media or not.

2. *The Marshall State Statute mandates a standard of reckless disregard*

a. The Marshall state statute must be literally interpreted

Marshall's revised code section 652E defines and sets the boundaries for a false light invasion of privacy cause of action. Marshall Revised Code § 652E. If the language of a statute is clear and unambiguous, the court must literally interpret the statute, giving a plain and ordinary meaning to the words of the statute. *Swerdlick v. Koch*, 721 A.2d 849, 857 (R.I. 1998) (finding no viable cause of action for invasion of privacy where the "conduct and activity at issue [did] not fit within the language of the privacy statute"). Construing a statute with identical language, the Nebraska Supreme Court concluded that because the plain language of the statue required the plaintiff to show the actor had knowledge or acted with reckless disregard as to the falsity of the publicized matter, any claim unable to meet this standard must be dismissed. *Schonewis v. Dando*, 435 N.W.2d 666, 670. "Balancing the competing policy concerns underlying tort recovery for invasion of privacy is best left to the legislature." *Howell v. New York Post Co., Inc.*, 612 N.E.2d 699, 703 (N.Y. 1993) (holding that there is not common law privacy because the state statutory right to privacy governs); *Zindo v. Louisiana Pacific Corp.*, 440 N.W.2d 548, 556 (Wis. 1989) (holding same); *Falwell v. Penthouse International, LTD.*, 521 F. Supp. 1204, 1206-07 (W.D. Vir. 1981) (holding same).

The state of Marshall requires proof of knowledge or a "reckless disregard as to the falsity" of the publicized matter, which is the same test

required by the United States Supreme Court in *Time v. Hill.* 385 U.S. 372 at 389-90 (1967). Under that standard, a plaintiff could not recover for false light invasion of privacy where erroneous statements were negligently made. *Id.* at 388. (holding a "negligence standard would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait.")

The Marshall legislature has already determined a cause of action for false light invasion of privacy will exist in this state, and requiring the reckless disregard standard pursuant to the statute, will sufficiently protect free speech rights. Because the plain language of the Marshall statute commingled with policy concerns were given proper consideration by the lower courts, a grant of summary judgment is the only proper outcome for this case.

b. Time's Reckless Disregard Standard sufficiently protects free speech rights

Where the publicized matter is of public concern, a private plaintiff must show actual malice to recover in a false light invasion of privacy action. Relieving the plaintiff from having to prove actual malice allows the plaintiff to bring a defamation action without requiring proof of damage to his or her reputation. *Pfannenstiel v. Osborne Publ'g Co.*, 939 F. Supp. 1497, 1503 (D. Kan. 1996) (noting that allowing a deviation from the actual malice standard established by *Time* would create a negligence cause of action for hurt feelings).

Courts have expressed concern that the false light invasion of privacy actions could potentially compromise First Amendment protection by "sidestepping the safeguards which restrain the reach of traditional public defamation litigation." *Arrington v. New York Times Co.*, 449 N.Y.S.2d 941, 945 (N.Y. Ct. App. 1982); *see* John W. Wade, *Defamation and the Right to Privacy*, 15 Vand. L. Rev. 1093, 1121 (1962). Requiring the reckless disregard standard of *Time* sufficiently protects free speech rights. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 589 (Tex. 1994) (Hightower, J., dissenting) (citing Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 Case W. Res. L. Rev. 885, 906 (1991)).

Sound public policy supports the reckless disregard standard as an integral part of an invasion of privacy claim. To allow Petitioner to assert his claim without proof of actual malice would create an "open season" on privacy causes of action in which they would only need to prove a hint of negligence. Altering the actual malice standard would defeat goals of judicial economy and efficiency.

B. SUMMARY JUDGMENT IS PROPER BECAUSE PETITIONER FAILED TO ESTABLISH A PRIMA FACIE CASE, AND THE PUBLICATION INVOLVED A SUBSTANTIAL PUBLIC INTEREST

1. *Petitioner cannot establish a prima facie case for false light invasion of privacy*

Summary judgment is mandatory because the Petitioner failed to establish a prima facie case for false light invasion of privacy. *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So. 2d 77, 80 (Miss. 1986) (holding summary judgment proper as a matter of law where the plaintiff fails to prove any element of false light invasion of privacy). The State of Marshall has enacted a statute governing causes of action for false light invasion of privacy. The applicable section provides:

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

Marshall Revised Code § 652E (emphasis added). The elements of an action for false light invasion of privacy are:

> (a) placing another in a false light;
>
> (b) which would be highly offensive to a reasonable person; and
>
> (c) that the actor had knowledge or acted in reckless disregard as to the falsity of the publicized matter.

Schonewis v. Dando, 435 N.W.2d 666, 669-70 (Neb. 1989) (interpreting state statute with language identical to Marshall Revised Code § 652E).Petitioner has not raised a genuine issue of material fact on any element of false light invasion of privacy and therefore summary judgment is proper as a matter of law.

a. *Seeking the Petitioner's whereabouts concerning a child abduction did not place him in a false light*

Proving falsity of the publicized matter is fundamental to a claim of false light invasion of privacy. *Schonewis*, 435 N.W.2d at 670. For a matter to be considered publicized, there must be such widespread publicity to so many people that the matter must be substantially certain to become public knowledge. *Id.* (citing *Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204, 1206 (10th Cir. 1985)). Photographs that place a person in a false light, but that are fair and accurate representations cannot form the basis for a false light invasion of privacy case, unless the picture is so

highly offensive that it surpasses the limits of decency. *Aisenson v. Am. Broad. Co.*, 269 Cal. Rptr. 379, 387 (Cal. App. 1990) (citing *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 253 (1974)). The false light that the plaintiff is alleging must be "clear and unmistakable from the words themselves and not the product of innuendo, speculation or conjecture." *Prescott v. Bay St. Louis Newspapers, Inc.*, 497 So.2d 77, 81 (Miss. 1986) (quoting *Ferguson v. Watkins*, 448 So.2d 271, 275 (Miss. 1984)).

Initial determination of whether photographs portrayed the Petitioner in a false light is a question of law exclusively for the court. *Faloona v. Hustler Magazine*, 799 F.2d 1000, 1006 (5th Cir. 1986). As a threshold issue, the court must determine whether a statement is capable of casting the plaintiff in a false light. *Fudge v. Penthouse*, 840 F.2d 1012 (1st Cir. 1988); *Wadman v. State*, 510 N.W.2d 426, 429 (Neb. App. 1993). In *Wadman*, the plaintiff sued the state of Nebraska for false light invasion of privacy. *Id.* The state legislature formed a committee to investigate allegations of child abuse. *Id.* at 428. The victims, during a videotaped statement, implicated the plaintiff as well as other prominent men as having been part of the physical and sexual abuse. *Id.* at 428-429. Until the committee could determine whether the accusations were sufficient to warrant grand jury investigation, all the investigation records were sealed. *Id.* at 429. Despite sequestration of the records, a former state senator mailed newsletters revealing the accusations to constituents and local reporters. *Id.* The appellate court affirmed the trial court's dismissal of the plaintiff's suit for false light because the publicized matter could not be fairly characterized as false. *Id.* at 432. This publicity could have been highly offensive, but the plaintiff could not establish a viable cause of action because it was not inaccurate to state he had been accused of committing abuse. *Id.*

Like in *Wadman*, summary judgment is proper in this case. The publicized matter in this case cannot be fairly characterized as false because the Petitioner has a relationship with the missing children. The Petitioner was married to Le Anna Tuceo, an identified child abductor, and he did have the last known contact with his former wife after the abduction. (R. at 9.) The billboard does not say the Petitioner is a child abductor. (R. at 9.) Seeking the Petitioner's whereabouts for information regarding the abduction did not place him in a false light given his close connection to the abduction. Petitioner's allegation of false light must fails because it is the product of innuendo, not false light, and was not "clear and unmistakable from the words themselves." *Prescott*, 497 So. 2d at 81. Any argument by the Petitioner that the billboard placed him in a false light by inferring he was a child abductor is insufficient to establish actual malice even if this "inference were tantamount to a falsehood." *Berry v. Nat'l Broad.*, 480 F.2d 428, 433 (8th Cir. 1973) (reversing with instruction to dismiss where plaintiff argued that a tele-

vised report suggested, by reason of certain omissions, that he was improperly acquitted and hence cast him in a false light).

The Manatees simply cannot be held responsible for speculation or conjecture stemming from the contents of the billboard. The Petitioner has no summary judgment proof that raises a fact question on any element of false light. Therefore, summary judgment is proper as a matter of law and this court should affirm the lower courts' grant of summary judgment.

b. A billboard addressing issues of public interest is not highly offensive to a reasonable person

The highly offensive standard requires proof that a reasonable person would be seriously offended by the publication. RESTATEMENT (SECOND) OF TORTS § 652E cmt. c. A highly offensive disclosure is one that would cause emotional distress or embarrassment to a reasonable person; "the injury therefore [is] to the plaintiff's human dignity and peace of mind." *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 823, 842 (C.D. Cal. 1998) (holding that a stolen videotape of plaintiff having sexual intercourse was highly offensive). However, the highly offensive standard must be narrowly construed "[i]n order to avoid a head-on collision with First Amendment rights." *Machleder v. Diaz*, 801 F.2d 46, 58 (2nd Cir. 1986). This court may determine as a matter of law whether the publication is capable of conveying an offensive meaning or innuendo that would be highly offensive to a reasonable person. *Id.*; *Salek v. Passaic Collegiate Sch.*, 605 A.2d 276, 279 (N.J. Super Ct. App. Div. 1992) (holding that a picture in yearbook of teacher and student with captions depicted the student declining the teachers sexual invitation was not highly offensive as a matter of law and summary judgment was proper).

The facts of the present case do not rise to the level required to satisfy the "highly offensive to a reasonable person" element of a false light cause of action. For example, in *Faloona*, the plaintiffs argued that their nude photographs appearing in *Hustler* insinuated that they had actually posed for *Hustler* and that they supported and endorsed the publication. *Faloona v. Hustler Magazine*, 799 F.2d 1000, 1006 (5th Cir. 1986). The Fifth Circuit affirmed summary judgment, reasoning that the fact that plaintiff's pictures were published in *Hustler* was not offensive, even though the publication itself is "manifestly offensive." *Id.* at 1007.

Because the Petitioner's photograph was taken in public, the publication of the photograph would not be highly offensive to a reasonable person. *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 925, 939 (Mass. Ct. App. 1979); *Schifano v. Green County Greyhound Park Inc.*, 624 So.2d 178, 182 (Ala. 1993) (holding summary judgment was proper where photograph taken in public, at a race park, could not be considered highly

offensive to a reasonable person). In *Cefalu*, the court affirmed summary judgment in a false light action where the plaintiff's photograph was published in a false context. *Cefalu*, 391 N.E.2d at 939. In that case, the plaintiff accompanied a friend to the unemployment office who did not speak English. *Id.* at 937. While waiting in line, his picture was taken and was later featured in two newspaper articles discussing unemployment. *Id.* at 936. The first article was entitled "A costly paradox: unemployment is high, but jobs go begging." *Id.* The second article was a feature story on unemployment entitled "Jobless line up for their checks at Division of Employment Security office." *Id.* at 937. The court reasoned that publication of a photograph taken in public could not meet the highly offensive standard because the appearing "in a public place necessarily involves doffing the cloak of privacy." *Id.* at 939. The court also observed that the Restatement (Second) of Torts distinguishes between a picture taken in private, which would be an invasion of privacy, and a picture taken in a public area, which is not an invasion of privacy. *Id.*

Here, the Petitioner's photograph was taken in a public place, where cameras operated in plain view. (R. at 13.) Just as in *Cefalu*, where the court held that the plaintiff could not meet the highly offensive standard because appearing "in public necessarily involves doffing the cloak of privacy," summary judgment is proper in this case because Petitioner has no proof that satisfies the highly offensive standard required by Marshall Statute.

c. The Marshall Manatees' concern for lost children does not establish proof of reckless disregard

To recover for false light invasion of privacy, a plaintiff must prove that the "actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter *and* the false light in which the other would be placed." *Machleder*, 801 F.2d at 53 (citing RESTATEMENT (SECOND) OF TORTS § 652E (1977)) (emphasis added). For purposes of the First Amendment, failure to investigate will not establish bad faith. *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968). Rather, the evidence must show that the defendant "in fact entertained serious doubts as to the truth of his publication." *Id.* at 731. To guarantee truthful publications regarding public affairs, the First Amendment must "protect some erroneous publications as well as true ones." *Id.* at 732.

To prove reckless disregard, the plaintiff must show with "convincing clarity" that the defendant possessed a "high degree of awareness of probable falsity or in fact entertained serious doubts as to the truth of the publication." *Colbert v. World Publ'g Co.*, 747 P.2d 286, 291 (Okla. 1987) (refusing to adopt a standard that would impose liability for accidental or negligent injury). The reckless disregard requirement acts as a

filter, weeding out those suits based on mere hurt feelings while preserving those suits where the conduct "has clearly exceeded tolerable bounds of social deportment." *Id.* (quoting *Munley v. ISC Fin. House Inc.*, 584 P.2d 1336, 1338-39 n.10 (Okla. 1978)). The actual malice standard applies regardless of plaintiff's status as a private individual or a public figure. *Yancey v. Hamilton*, 786 S.W.2d 854, 860 (Ky. 1990); *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 991 (Ill. 1989) (holding a distinction between private and public figures unnecessary in false light cases).

In *O'Brien*, a newspaper article documented a meeting where parents sought an investigation into teachers engaging in sexual misconduct with high school students. *O'Brien v. Williamson Daily News*, 735 F. Supp. 218, 222 (E.D. Ky. 1990), *aff'd*, 931 F.2d 893 (6th Cir. 1991). According to the article, the principal confirmed that he received a complaint from a 17-year old female against the plaintiff. *Id.* at 224. However, the principal claimed to have never made that statement. *Id.* Several newspapers ran articles essentially duplicating the original. *Id.* at 221. The teacher sued claiming that the articles falsely implied he had engaged in sexual misconduct. *Id.* at 222. In granting summary judgment for the defendants who republished the article, the court noted the newspapers that republished the article were not obligated to investigate the allegation because nothing in the original article indicated the story was not an accurate account of a public meeting. *Id.* at 225. The court further supported summary judgment by reasoning that simply republishing the original story "*necessarily precludes* a finding of malice." *Id.* (emphasis added).

Similarly, the Manatees only republished the information it received from the FLK database. When the comparison of the Marshall Manatees database was run against the FLK database, the system indicated a match that linked Petitioner's image to the image of a man who possibly had information regarding the kidnapping. (R. at 8.) The FLK database indicated the Petitioner possibly had knowledge of the events surrounding a child abduction and the Manatees were not obligated to verify the accuracy of this information. The Manatees merely republished information that was already published in the FLK database and therefore such republication cannot establish actual malice. *See O'Brien*, 735 F. Supp. at 222.

Even if the publishing of Petitioner's photograph on the billboard had been contextually erroneous, summary judgment was still correct. *Colbert*, 747 P.2d at 292. In *Colbert*, a private plaintiff sued a newspaper after it erroneously associated the plaintiff's picture with an article regarding a psychotic murderer. *Id.* at 287. Years earlier, the plaintiff's sister mailed his picture to the newspaper with information regarding his graduation from law school. *Id.* at 287. The newspaper erroneously

included plaintiff's picture with an article discussing the death of a person who had been convicted of a gruesome murder and was reportedly mentally ill. *Id.* at 287-288. In response to the plaintiff's suit, the newspaper asserted the plaintiff could not recover for false light invasion of privacy absent a showing of actual malice. *Id.* The Oklahoma Supreme Court agreed with the newspaper and dismissed the case because the plaintiff failed to prove actual malice. *Id.*

The Manatees did not randomly choose a photograph from its database to use on its public service billboard. The Petitioner's photograph was selected after the system indicated a match between the Petitioner's image in the Manatees' database with an image in the FLK database, indicating he was an abductor or possibly associated with a child abduction. (R. at 8.) In order to ensure accuracy, a technician visually compared the images. (R. at 8.) Both photographs showed a man of approximately the same height, weight, eye and hair color. (R. at 8.) The undisputed fact that the Manatees so thoroughly scrutinized the photographs precludes any assertion of actual malice because they did not act with knowledge of falsity or in reckless disregard.

2. *Child abductions is a matter of profound social importance and public concern*

When balanced against of matters of public interest, the right to privacy must give way, to guarantee the 'uninhibited, robust and wide-open' discussion of legitimate public issues." *Goodrich v. Waterbury Republican-Am., Inc.*, 448 A.2d 1317, 1331-32 (Conn. 1982) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978) (holding investigations into criminal activity are matters of public concern). Summary judgment is proper based on public interest grounds, even where a false context has been established. *Quezada v. The Daily News*, 501 N.Y.S.2d 971, 975 (N.Y. App. Div. 1986); *Bytner v. Capital Newspapers*, 492 N.E.2d 1228, 1228 (N.Y. 1986) (holding the trial court erred in refusing to grant summary judgment because the publication was newsworthy, despite an erroneous caption accompanying a photograph).

Because matters related to child abduction is one of public concern, summary judgment was proper in this case. *Partington v. Buliosi*, 56 F.3d 1147, 1152 (9th Cir. 1995). In the murder prosecution of two defendants, one defendant was acquitted, but the other defendant was convicted. *Id.* at 1149. The attorney who represented the acquitted defendant wrote a book about the trial, which implied that the attorney who had represented the convicted defendant had not read court transcripts relevant to the defense and criticized him for failing to call a particular witness. *Id.* at 1150. The attorney sued claiming the statements

put him in a false light by implying he was incompetent and that he had failed to provide an adequate defense for his client. *Id.* at 1151. The court affirmed summary judgment, holding that even if those statements created a false implication, they were protected by the First Amendment because the murder trial was a matter of public concern. *Id.* at 1152.

The right to recover for invasion of privacy is restricted in situations that involve matters of public interest. *Wilson v. Thruman*, 445 S.E.2d 811, 814 (Ga. Ct. App. 1994). In *Wilson*, the plaintiff was a law enforcement officer accused by a suspect of sodomy. *Id.* at 812. The plaintiff sued the officers heading the investigation and the city for malicious prosecution and invasion of privacy arguing that the information released to the media, including his photograph placed him in a false light. *Id.* The court affirmed summary judgment, holding that the publication related to a matter of public interest and it could not constitute an invasion of privacy. *Id.* at 814.

Similar to *Parington* and *Wilson*, the Manatees' publication does not constitute an invasion of privacy because it involves a matter of public interest. The primary goal of FLK is to promote public awareness of abducted and missing children. (R. at 5.) To achieve this goal, FLK maintains an extensive web site featuring information about the organization and a number of resources for finding lost and abducted children. (R. at 5.)

Petitioner's questionable claim of false light invasion of privacy is not sufficient to outweigh the public's interest in finding lost children. Simply because Petitioner thought some people assumed he was an abductor, (R. at 10.) he cannot reasonably assert his alleged injuries take priority over matters of such social importance and public concern. Because of the profound public interest matters at issue in this case, Petitioner's claim for invasion of privacy cannot survive summary judgment. Therefore, this Court should affirm the lower courts' grant of summary judgment.

II. PETITIONER CANNOT ESTABLISH THE ELEMENTS FOR COMMERICAL MISAPPROPRIATION OF NAME OR LIKENESS

A. PETITIONER CANNOT PROVE THE MANATEES INVADED HIS PRIVACY THROUGH MISAPPROPRIATION OF HIS NAME OR LIKENESS

Marshall's statute governing causes of action for misappropriation of name and likeness provides:

> One who appropriates to his own use or benefit for commercial purposes, the name, image or likeness of another is subject to liability to the other for invasion of his privacy.

MARSHALL REVISED CODE § 652C; *Faber v. Condecor, Inc.*, 477 A.2d 1289, 1286 (N.J. Super App. Div. 1984) (holding a viable cause of action for misappropriation exists where the defendant published the plaintiff's photograph solely for trade purposes).

The United States Supreme Court has recognized a right of publicity action in *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977), but facts in that case are distinguishable from this case. There, the plaintiff sued when the local media broadcast his human cannonball act on the evening news. *Id.* at 564. The Court found that the television station misappropriated the plaintiff's valuable property right because broadcasting the entire event went to the heart of Zacchini's ability to earn a living from his skills. *Id.* The Court reasoned that the plaintiff charged admission to his act, which was a product of his "own talents and energy, the end result of much time, effort and expense." *Id.* *Zacchini* stands for the premise that the right of publicity protects an economic interest related to a person's public commercial activities.

Zacchini is unlike this case because there is no misappropriation of a property right. Petitioner was not paid to attend the Manatees game on January 32, 2001. Likewise, no one else at the basketball game was paying to see the Petitioner at the game. Additionally, the Manatees reproduction of Petitioner's picture, did not deprive him of any economic benefit. Thus, Petitioner has failed to provide evidence that raises a fact question on the likeness element. Therefore, summary judgment is proper as a matter of law.

1. *The use of Petitioner's photograph was not for commercial purposes*

The Petitioner cannot object merely because his photograph was publicized. *Nelson v. Times*, 373 A.2d 1221, 1224 (Me. 1977) (citing RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977)). Only when the publicity is for the purpose of appropriating commercial value to the Marshall Manatees could the Petitioner claim his right of privacy had been invaded. *Id.* (relying on RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977)). Here, the Marshall Manatees received absolutely no commercial use or benefit from the display of Petitioner's photograph. Stated more simply, "the appropriation must benefit the tortfeasor." *Id*; *Tellado v. Time-Life Books, Inc.*, 643 F. Supp. 904, 909 (D. N.J. 1986) ("a misappropriation claim for a public event will stand *only* if the plaintiff's likeness is used for *predominantly* commercial purposes" and the publication is "without a redeeming public interest, news or historical value") (emphasis added).

The Petitioner's claim for misappropriation also fails because his photograph was taken in public and used to illustrate a newsworthy issue. *Neff v. Time*, 406 F. Supp. 858, 859 (W.D. Penn. 1976); *Fogel v.*

Forbes. Inc., 500 F. Supp. 1081, 1083 (E.D. Penn. 1980) (holding that a photograph taken in public used to illustrate a newsworthy article is not an appropriation). In *Neff*, a photographer with Sports Illustrated took a picture of the plaintiff at a football game with the front zipper of his pants completely open, and without his knowledge or consent published the revealing picture with an article entitled "a sexual deviate." *Neff*, 406 F. Supp. at 859. The plaintiff argued that this unauthorized publication invaded his right to privacy by subjecting him to public ridicule and contempt, diminished his reputation among his family, friends, and business associates, and caused him severe mental and emotional distress. *Id.*

The court conceded that "[w]ithout doubt the magazine deliberately exhibited [the plaintiff] in an embarrassing manner," but granted summary judgment for the defendant despite this concession. *Id.* at 860. The court held that the fact that the plaintiff's picture was published in a magazine, which is nationally distributed for profit, does not constitute a misappropriation of his likeness. *Id.* at 861. Section 652C of the Restatement (Second) of Torts was not applicable because the plaintiff's picture was taken in a public place for a newsworthy article, and therefore the defendant was entitled to First Amendment protection and summary judgment. *Id.*

In another case, in *Faloona*, the Fifth Circuit held that mere publication of the Petitioner's photograph in a commercial forum, such as a newspaper or a magazine, would not create a cause of action for misappropriation of name or likeness. *Faloona v. Hustler Magazine*, 607 F. Supp. 1341, 1360 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 652C, cmt. d (1977)). But rather, the defendant must have capitalized on the plaintiff's likeness with the intent of selling more magazines or newspapers and the public must be able to identify the plaintiff. *Id.* In *Faloona*, the plaintiffs' sued after their nude photographs appeared in *Hustler*, claiming that *Hustler* had misappropriated their likenesses for commercial advantage. *Id.* at 1359-60. In dismissing the plaintiffs' "baseless" claim, the court found that the plaintiffs failed to meet either requirement for liability. *Id.* at 1360. The court reasoned that *Hustler* did not publish the photographs with the intent of selling more magazines. *Id.* And further that the plaintiffs were not identified by name or otherwise. *Id.*

In *Grimsley*, Lois Grimsley's doctors told her that her stomach pains were merely a urinary tract infection and hemorrhoids. *Grimsley v. Guccione*, 703 F. Supp. 903, 905 (M. D. Ala. 1988). However, less the forty-eight hours later, Grimsley gave birth to a baby boy on the floor of her bedroom, and neither Grimsley, nor her doctors, knew she was pregnant. *Id.* A local reporter interviewed Grimsley and photographed her with her son and the newspaper subsequently ran the story with the caption

"Birth of a Hemorrhoid." *Id.* The Associated Press later picked up the story and it appeared in other newspapers. *Id.* However, when a synopsis of the article appeared in *Penthouse* Magazine, the offended plaintiff brought a suit for false light, misappropriation, and intentional infliction of emotional distress. *Id.* Penthouse moved for summary judgment claiming the newsworthy publication was constitutionally protected. *Id.* at 906-06.

The court noted there was no evidence suggesting Penthouse had appropriated Grimsley's name or likeness for a commercial benefit or other advantage and granted summary judgment. *Id.* a 911. The court reasoned that Penthouse had not used the article to advertise any magazine contents or to increase sales. *Id.* Moreover, there was no evidence that the inclusion of the article gave rise to any increased sales of *Penthouse* magazines. *Id.*

Just as in *Faloona* and *Grimsley*, where there was no evidence that the defendant capitalized on the plaintiff's likeness with the intent of selling more magazines, summary judgment is proper here also because there is no evidence in the record that the Marshall Manatees capitalized on the Petitioner's likeness with the intent of selling more tickets. The "Manatees Care" service project, designed to raise public awareness of the problem of abducted children, includes the use of the customer database. (R. at 4, 6.) Many teams endorse and support charities and any announcement regarding such an affiliation is considered advocacy for that charity, rather than an advertisement.

Similarly, the Manatees' billboard was not an advertisement of any kind, but rather a public service announcement supporting a specific charity. Moreover, the text appearing on the billboard only made reference to abducted children and the Manatees Care service project; no references were made regarding ticket sales or any other potential benefits of the team. (R. at 8, 9.) And much like in *Neff*, the content produced in this situation is entitled to First Amendment protection. Society places immense importance on information regarding the whereabouts of lost and abducted children. This immense importance requires that newsworthy information able to be freely disseminated. The Manatees' actions should be granted First Amendment protection because of great public interest and concern. Petitioner's mere assertion that the Manatees tortuously invaded his right to privacy is insufficient to satisfy the rigor of misappropriation standards.

2. *Petitioner cannot reasonably assert that his likeness has any value*

To state a viable cause of action for invasion of privacy by appropriation, the defendant must have appropriated the plaintiff's "reputation, prestige, social or commercial standing public interest or other values of

the plaintiff's name or likeness." *Restatement (Second) of Torts* § 652C cmt. c. (1977). But "[u]ntil the value of the name has in some way been appropriated, there is no tort." *Id.* The plaintiff's name or likeness must have some intrinsic value that if appropriated would allow a defendant to seize a commercial profit. *Schifano v. Green County Greyhound Park Inc.*, 624 So.2d 178, 181 (Ala. 1993); *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13 (S. D. Ohio 1983) (granting summary judgment where the plaintiffs' likeness did not have any value that could be appropriated by someone else).

In *Schifano*, a picture of the plaintiffs taken at the race park appeared in the race park's advertising brochure. *Schifano*, 624 So.2d at 179. In granting summary judgment, the court reasoned that when there was no unique value in the plaintiff's likeness, a person could not protest to his name or image being shown to the public because both were already open to public observation. *Id.* at 181 (citing RESTATEMENT (SECOND) OF TORTS § 652C cmt. d.).

Even if the Manatees used the Petitioner's photograph for their benefit, the Petitioner's claim still fails because there is no evidence that his image has any value. *Vassiliades v. Garfinckel's*, 492 A.2d 580, 592 (D.C. 1985). In *Vassiliades*, the plaintiff sued her surgeon for invasion of privacy by misappropriation. *Id.* at 584. The plaintiff, who retired from her position at the U.S. Department of Health and Human Services, decided she would undergo a facelift in an effort to remove some of her wrinkles. *Id.* at 585. Prior to the surgery, the surgeon took pictures of the plaintiff. *Id.* He explained the pictures were part of his routine practice, as a protective measure should a patient claim after surgery that there was no improvement. *Id.* Several months after the surgery, the surgeon participated in a television broadcast special entitled, "Creams versus Plastic Surgery." *Id.* During this televised presentation, the surgeon showed the plaintiff's "before" and "after" pictures. *Id.* The plaintiff learned of the program through friends and was devastated, she became extremely depressed, and refused to go into public. *Id.* at 586. The court affirmed the trial court's directed verdict as to the plaintiff's misappropriation claim. The court reasoned that although the surgeon used the photographs for his benefit, the plaintiff failed to show there was any value in her likeness; thus there could be no commercial misappropriation. *Id.* at 592.

Further, intrinsic value of name or likeness cannot be established by showing that the defendant benefited in some way by using the plaintiff's name or likeness when the benefit would have been the same as using a number of any other likenesses. *Cox v. Hatch*, 761 P.2d 556, 565 (Utah 1988). Therefore, it follows that even if the Petitioner's likeness did have some value that was appropriated, his claim still fails because

this benefit would have been the same using any of the other patrons' photographs.

Plaintiff cannot maintain that there is any reasonable commercial value in the use of his likeness. The Petitioner here has presented no evidence that his likeness was unique or had any value that the Manatees could have appropriated. Petitioner is not famous. His face is not widely recognized. Moreover, his name was not included on the billboard. (R. at 9.) Further, the record shows no evidence that the Manatees sought to take advantage of the Petitioner's likeness with an intent for commercial gain. For these reasons, *Schifano*, *Vassiliades*, and *Cox* show that Petitioner is barred from recovery for misappropriation and summary judgment is proper as a matter of law.

3. *Petitioner shared a direct relationship to the actual child abduction in this case*

Petitioner was not involved in the abduction of the children, but he was directly related to such a situation because his former wife at did in fact abduct her children from a previous marriage. (R. at 9.) Similarly, in *Finger*, a magazine published a photograph of the plaintiffs and their six children without their consent. *Finger v. Omni Publs. Int'l.*, 566 N.E.2d 141, 142 (N.Y. 1990). The photograph accompanied an article discussing caffeine-enhanced fertility. *Id.* The caption underneath this photograph read: "Want a big family? Maybe your sperm needs a cup of Java in the morning. Tests reveal that caffeine-spritzed sperm swim faster, which may increase the chances for *in vitro* fertilization." *Id.* 142-43. The article did not mention the plaintiffs' names or otherwise indicate that the couple used caffeine or that their children were conceived through *in vitro* fertilization. *Id.* The plaintiffs conceded that the subject matter or the article discussing *in vitro* fertilization and how caffeine enhances sperm speed velocity falls under the "newsworthiness exception." *Id.* at 144. Rather those plaintiffs argued that the photograph had no relationship to the article, making the defendant liable for commercial appropriation. *Id.*

Despite the lack of consent, the court affirmed the trial court's dismissal of plaintiffs' suit. *Id.* The court explained that a picture illustrating an article regarding a matter of public interest is not considered used for advertising or trade purposes unless it had no real relationship to the article or unless it was an advertisement in disguise. *Id.* Additionally, the court reasoned that the newsworthiness exception should be applied liberally. *Id.* Essentially, the court held that plaintiffs had enough connection with the content of the article because they did have a large family and the article was not an article in disguise. *Id.*; *Howell v. New York Post Co., Inc.*, 612 N.E.2d 699, 704 (N.Y. 1993) (holding plaintiff had no

viable cause of action for misappropriation because she could not prove that her picture "bore no real relationship to the article).

This case is analogous to *Finger*. Just like the plaintiff in *Finger*, Petitioner cannot claim his picture had no relationship with an abduction. In fact, Petitioner has a distinct connection because of his former wife kidnapping her children from a previous marriage while they were still married. (R. at 10.) Petitioner was even aware of the abduction before the children's father. (R. at 10.) A relationship exists between the Petitioner's picture and an actual kidnapping. The Manatees' received no benefit from the Petitioner's picture, which was reproduced because it was a matter of public interest and in the interest of charity. Therefore because Petitioner fails to satisfy this requirement, Petitioner has no claim as a matter of law.

B. Petitioner Consented to Having his Picture Taken and Used by the Manatees

Notwithstanding Petitioner's failure to state a claim for misappropriation, summary judgment was still proper because the Petitioner consented to the Manatees taking and using of his photograph. *See Easter Seal Soc'y for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enters., Inc.*, 530 So.2d 643, 649 (La. Ct. App. 1988) ("[c]onsent, or lack thereof, is not an element of liability; liability is determined first, consent is a defense"). Consent is an absolute privilege to an action for invasion of privacy. Restatement (Second) of Torts § 652F cmt. b (1977).

In *Cox v. Hatch*, several postal employees posed for pictures with a United States senator during his reelection campaign. *Cox v. Hatch*, 761 P.2d 556, 558 (Utah 1988). One of these pictures was included on a political flier entitled "Senator Orrin Hatch Labor Letter," distributed by the Senator's "Union Members for Hatch Committee." *Id.* at 558. The text did not specifically refer to the plaintiffs; however, they alleged the photograph implied that they endorsed the Senator and his reelection campaign. *Id.* As a result of the publication's implication, the plaintiffs were investigated by their employer and the union. *Id.*

The Supreme Court of Utah affirmed the dismissal of the plaintiffs' suit reasoning that the interest of protecting personal identity from exploitation is minimal when a person allows their picture to be taken in a public place. *Id.* at 563. Publication of a photograph under those circumstances does not create a cause of action for invasion of privacy because when that minor privacy interest succumbs when counterbalanced against the "overriding importance . . . of maintaining the free flow of public information." *Id.* The court held "the conclusion follows that persons who are in public or semi-public places and who are unexpectedly caught within the range of news cameras do not have a privacy interest

that can prevail against the First Amendment informational interest." *Id.*

In *Neinstein v. Los Angeles Dodgers*, a spectator who was struck by a ball at a professional baseball game sued the Los Angeles Dodgers for her personal injuries. *Neinstein v. Los Angeles Dodgers*, 229 Cal. Rptr. 612 (Cal. Ct. App. 1986). In affirming summary judgment, the court held that the spectator impliedly consented to risk of injury from the batted balls. *Id.* at 616 The court reasoned that the spectator consented by voluntarily electing to sit in a seat which was clearly unprotected by any form of screening, after being sufficiently warned of the risk by common knowledge of the nature of the sport, and by warning provided on the back of the ticket. *Id.* .

Like *Hatch* and *Neinstein*, the Petitioner consented to his picture being taken by attending a nationally televised basketball game, and therefore should have expected cameras and other imaging equipment would be operating in plain view. (R. at 13.) As a matter of law, Petitioner's consent bars his misappropriation claim. (R. at 13.) Moreover, Petitioner's privacy interest cannot prevail against a First Amendment information interest. Petitioner's picture was taken after he voluntarily put himself in a public arena in full view of cameras. (R. at 13.) *Hatch* and *Neinstein* clearly hold that, under these circumstances, the Manatees' publication of Petitioner's picture will not create a cause of action for invasion of privacy. *Hatch*, 761 P.2d at 563; *Neinstein*, 226 Cal. Rptr. at 616.

C. The Adhesion Contract Featured on the Back of Petitioner's Ticket is Enforceable

Alternatively, even if this Court finds that the Petitioner presented evidence sufficient to survive summary judgment and that the Petitioner did not consent, summary judgment was still proper for the separate and independent reason that the lower courts were correct in enforcing the waiver on the back of the Petitioner's ticket. The Petitioner waived his right to privacy with the acceptance of the language.

Clauses similar to the one on Petitioners ticket are routinely upheld. *Carnival Cruse Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991); *Valente v. Rhode Island Lottery Commission*, 544 A.2d 586, 590 (R.I. 1988) (holding clause on the back of lottery ticket a valid condition of the contract, because "[i]t was clear and unambiguous"). In *Carnival Cruse Lines, Inc. v. Shute*, the Supreme Court resolved a situation involving an adhesion contract analogous to the issue facing this Court. 499 U.S. 585, 589 (1991).

In that case, a Washington couple ordered tickets for a seven-day cruise through a travel agent. *Id.* at 587. Carnival mailed the tickets to

the couple's home in Washington. *Id.* In small print, each ticket advised "Subject to conditions of contract on last pages Important! Please read contract on last pages 1, 2, 3." *Id.* The terms and conditions followed in subsequent pages that accompanied the ticket and provided in relevant part:

> 3. (a) The acceptance of this ticket by the persons or persons named here on as passengers shall be deemed to be an acceptance by each of them of all the terms and conditions of this Passage Contract Ticket.
>
> . . .
>
> 8. It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country.

Id. at 587-88. Because the Shutes were not aware of these provisions until receipt of the ticket in the mail, they were forced to either accept the forum selection clause or forfeit the amount they already paid for the ticket. *Id.*

During the cruise, Ms. Shute was injured when she slipped and fell on the deck. *Id.* at 588. The Shutes filed suit in a United States District Court in Washington, asserting Ms. Shutes' injures were due to the negligence of Carnival Cruise Lines and it employees. *Id.* The district court enforced the contractual waiver on the back of the ticket and granted summary judgment for the cruise line. *Id.* The ninth circuit reversed summary judgment, refusing to enforce the fine print clause on the reverse of the ticket because the forum clause was not freely bargained for and enforcement would be manifestly unfair. *Id.* at 589. The court reasoned that evidence in the record indicated the couple was not capable physically or financially of pursuing the action in Florida and enforcement of the clause would therefore deprive them of their day in court. *Id.* The United States Supreme Court reversed, even though there was no evidence of consent or notice of the clause. *Id.* at 589.

Although whether the Petitioner actually read the waiver in the two weeks after he received the ticket is not apparent from the record, but as a matter of law, it makes no difference. *Shute*, 499 U.S. at 589. The waiver on the Petitioner's ticket is similar to the clause in *Shute* in that both clauses are clear, unambiguous, adhesive and binding. The Supreme Court has clearly held that such an adhesive contract is binding, and therefore Petitioner is not entitled to recovery as a matter of law. Lack of notice, consent, or even a day in court will not save the Petitioner from this binding contract. As a matter of law, the agreement in binding and Petitioner has no viable cause of action.

CONCLUSION

For the reasons set for above, this court should affirm the lower courts' grant of summary judgment in favor of Respondent, the Marshall Manatees.

Respectfully submitted,

_____

Attorneys for the Respondents

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief for respondents was mailed by email and certified mail, return receipt requested, to all counsel of record on this the 27th day of September, 2001.

_____

Attorneys for the Respondents

APPENDIX TABLE OF CONTENTS

APPENDIX A:

CONSTITUTIONAL PROVISION
U.S. CONST. AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a redress of grievances.

APPENDIX B

RESTATEMENT (SECOND) OF TORTS § 652C (1977)

Invasion of privacy by Misappropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

APPENDIX C

RESTATEMENT (SECOND) OF TORTS § 652E (1977)

One who gives publicity to a matter concerning another that places the other before he public in a false light is subject to liability to the other for invasion of his privacy, if

(a) the false light in which the other was placed would be highly offensive to a reasonable person, and

(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.