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2000 John Marshall National Moot Court Competition in Information Technology and Privacy Law: Brief for the Respondent,19 J. Marshall J. Computer & Info. L. 261 (2000)

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2000 MOOT COURT COMPETITION

BENCH MEMORANDUM

WHETHER THE INFORMATION DISSEMINATED BY THE DEFENDANT INVADED THE PLAINTIFF'S PRIVACY AS DEFINED BY THE RESTATEMENT (SECOND) OF TORTS GOVERNING PUBLIC DISCLOSURE OF PRIVATE FACTS AND WHETHER DEFENDANT'S USE OF COOKIE TECHNOLOGY TO GATHER THE INFORMATION DISPLAYED ABOUT THE PLAINTIFF CONSTITUTED AN INVASION OF HER PRIVACY.

by ROBERT S. GURWIN AND NICOLE D. MILOS†

Edna Arbeiter,	)	
	)	
Plaintiff-Appellant,	)	
	)	No. 2000-135
EmployExpert.com,	)	
	)	
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 EmployExpert.com in case number 2000-CV-2365.[1]

In finding for defendant, the lower courts held that information about the plaintiff, displayed in a profile on defendant's Web site, was

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1. *R.* at 2.

not private.[2] Additionally, the courts below held that the use of cookie technology to gather this information was not, in and of itself, an invasion of plaintiff's privacy.[3]

Two issues have been raised on appeal. First, whether the information disseminated by the defendant invaded the plaintiff's privacy as defined by the Restatement (Second) of Torts governing public disclosure of private facts.[4] Applicable law in the State of Marshall mirrors the Restatement (Second) of Torts.[5] In addition, this court must consider, on appeal, whether defendant's use of cookie technology to gather the information displayed about the plaintiff constituted an invasion of her privacy.[6]

II. STATEMENT OF THE CASE

Neither party disputes the following facts. EmployExpert.com is a commercial Web site offering consumers assistance with various employment matters.[7] More specifically, EmployExpert.com answers questions submitted by its users who are searching for jobs and preparing for interviews.[8] In addition, the Web site facilitates the online presentation of its users' resumes.[9] By registering with EmployExpert.com, users submit information to create a "profile."[10] The submitted information is presented as a resume but with personal identifying information, such as the person's name, address, and telephone number, redacted.[11] In addition, EmployExpert.com redacts the locations of its users' past employment and other information that might identify a user.[12] Upon completing the registration process, EmployExpert.com assigns each user profile an ID code number that is used as a reference locator.[13]

EmployExpert.com provides the described services without charge to its users.[14] EmployExpert.com receives its revenue from the firms that place banner advertisements shown as visitors review the directory of completed profiles.[15]

Each user receives an e-mail message summarizing the information

2. *Id.* at 8-9.
3. *Id.* at 9-10.
4. *Id.* at 3.
5. *Id.* at 8.
6. *Id.* at 3.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 3-4.
13. *Id.* at 4.
14. *Id.*
15. *Id.*

provided by the user and containing a unique profile ID code number.[16] The resume profiles are readily available to anyone who visits the Web site, although visitors are asked for their name, e-mail address, and company name before they can view the profiles.[17] The company name and in some instances the user's e-mail address are used by EmployExpert.com to filter its search results in order to prevent an employer from gaining access to its own employees' profiles.[18]

EmployExpert.com gathers its information by asking users to submit information through an interactive Web page application form.[19] The form asks for a user's name, address, telephone and e-mail.[20] It states that this contact information will not be displayed to others so as to protect the privacy of the individual.[21] The page also requests the individual's age, sex, current and past employment information, and information related to the position that the individual is seeking.[22]

At the end of the form is a section labeled "Privacy Preferences."[23] In this section there are two statements, each of which appears next to a check box marked "I agree."[24] The boxes are pre-checked, although the user can uncheck either or both boxes in order to avoid selecting the default responses.[25] The first statement says, "In exchange for the services provided to me by EmployExpert.com, I understand that banner advertisements may appear on the same screen as my profile when it is accessed. I understand that EmployExpert.com may share non-personally identifiable information with third parties in connection with the banner advertisements, and is not responsible for the practices of such parties."[26] The second statement says, "I allow EmployExpert.com to use any additional information, including information gathered by the analysis of cookie technology, to create and add an 'Interests' section to my resume profile. I understand that EmployExpert.com is not responsible for any misunderstanding or inconsistencies provided in this profile."[27]

Edna Arbeiter, an employee of Arbor Shoes, used EmployExpert.com's services to create a resume profile so that she might find another job.[28] She completed the entire application.[29] She did not un-

16. *Id.*
17. *Id.*
18. *Id.* at 4.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 4-5.
23. *Id.* at 5.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 6.

derstand what "cookie technology" was, but felt it was important to include a section in her profile for "Interests," so she did not uncheck either of the selections under "Privacy Preferences."[30] EmployExpert.com sent Arbeiter an e-mail message providing her ID code number and summarizing the information that she had submitted.[31]

Arbeiter's immediate supervisor at Arbor Shoes was Bill Simpson.[32] Shortly after EmployExpert.com posted Arbeiter's profile to its site, Simpson happened to hit on the EmployExpert.com Web site while using his home American Online ("AOL") account and reviewed Arbeiter's profile.[33] This apparently was possible because Simpson was using his personal account on AOL, rather than one provided by Arbor Shoes, and he did not give the company name when he registered with the site.[34]

Although no personal information was visible on the profile page, Simpson believed the profile belonged to Arbeiter because he was familiar with her past employment history and education.[35] On Monday, he called Arbeiter into his office and informed her that because she was obviously looking for another job, she was fired.[36]

After her termination, Edna Arbeiter visited EmployExpert.com to examine her resume profile as it appeared on the site.[37] She saw that EmployExpert.com had added a section entitled "Interests."[38] This section contained information that she did not recognize.[39] In particular, it stated, "This individual is an active and experienced Internet user who spends several hours per day accessing the Web.[40] Among the Web sites frequently visited by this individual are news and information sites, sports sites, employment and finance sites, and weather information sites."[41]

Arbeiter sued EmployExpert.com claiming invasion of privacy since she neither consented to nor specifically gave EmployExpert.com any of the information contained in the section entitled "Interests."[42] She claimed that EmployExpert.com's portrayal of her via the profile had allowed her current employer to identify her, thus resulting in her

29. *Id.*
30. *Id.*
31. *Id.* at 6; *see also* Appendix A.
32. *R.* at 6.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 7.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 7; *see also* Appendix B.
42. *See R.* at 6.

termination.[43]

Arbeiter argued that any person familiar with her history could easily identify her by the information contained in the profile.[44] She now asserts that EmployExpert.com invaded her privacy because it displayed information to which she did not consent and as a result, her employer was able to identify her due to private information displayed in the profile.[45]

III. ISSUES PRESENTED FOR REVIEW

1. Did the court of appeals err in holding that the information disseminated by defendant EmployExpert.com was neither private, nor invaded the plaintiff's privacy as defined by applicable state law analogous to the Restatement (Second) of Torts regarding the public disclosure of private facts; and:
2. Did the court of appeals err in holding that use of cookie technology to gather personal information is not an invasion of privacy?

IV. BACKGROUND

AN OVERVIEW OF COOKIE TECHNOLOGY

1. *The Purpose of Cookie Technology*

Commercial Web sites utilize cookie technology for a number of legitimate business purposes. These range from the ability to personalize information for each user, to identify a customer for online sales and services, or simply for the purposes of tracking popular links and the demographics associated with particular Web sites.[46] In addition, cookies allow computer users to customize the manner in which they view particular Web sites.[47] E-commerce sites often place temporary cookies in order to maintain information about a user's particular visit to the site and allow for operation of the virtual shopping cart that recalls all of the items a user has selected until the point of check out when sales are completed.

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43. *Id.*

44. *Id.*

45. *Id.* at 7-8.

46. Barry D. Bowen, *How Popular Sites Use Cookie Technology: Shopping Baskets Are a Natural Use for Cookies, But We Uncovered Several Surprising Uses Too*, <http://www.netscapeworld.com/netscapeworld/nw-04-1997/nw-04-cookies.html> (last visited Sept. 12, 2000); David Whalen, *The Unofficial Cookie FAQ* <http://www.cookiecentral.com/faq/> (last visited August 30, 2000) (explaining why commercial Web sites utilize cookie technology); Viktor Mayer-Schonberger, *The Internet and Privacy Legislation: Cookies for a Treat?*, Computer Law & Sec. Rep., vol. 14, issue 3, 166 (1998).

47. Bowen, *supra* n. 46, at 2.

Cookies are useful for storing consumers' registration information so that they do not have to enter a login and password on each visit to a particular Web site.[48] Cookies themselves, however, cannot gather data.[49] Rather, cookies are used as tracking devices to assist firms that do gather information about Web users.[50] Data that is collected and mined is usually associated with a value that has been stored within in a user's cookies.[51]

2. *Two Types of Cookies: Temporary and Persistent*

There are two types of cookies: temporary or persistent.[52] Temporary cookies allow a site to spread products and information over multiple pages, or put order entry forms on a separate page.[53] As users select what they want to purchase, the server indexes these selections to a key carried as a cookie by the Web browser.[54] This technology allows for what has commonly become known as the virtual shopping cart. Users may browse through a site, clicking on items they wish to purchase. A temporary cookie keeps a record of all these items until the time of check out when a sale is made for all of the items that were accumulated. However, the temporary cookies that facilitate this process are deleted from the users' hard drives the moment their Web browsers are closed.[55]

In contrast, persistent cookies are stored on the user's file system and provide a convenient location to store user preferences that are likely to be used each time the user visits a particular Web site.[56] These persistent cookies are the mechanism by which a Web site is able to "recognize" a user, greet them by name or even remember their log in I.D. and password information.

3. *How Cookies Work*

Cookies are transported back and forth between the server hosting a particular Web site to the end user's computer as an HTTP header.[57] After a cookie is transmitted via an HTTP header, it is stored on the

48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. Bowen, *supra* n. 46, at 2.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*; *see* also Whalen, *supra n. 46.*
57. Whalen, *supra* n. 46.

A cookie contains 6 parameters that can be passed to it:
1. The name of the cookie,
2. The value of the cookie,
3. The expiration date of the cookie,

user's hard drive within a file allocated for use by the Web browser.[58] Information is quickly and readily available without re-transmission. The browser can retain cookies when a user is not browsing; or, when the computer is shut off since the cookies are stored on the user's hard drive.[59] A cookie alone cannot read the user's hard drive to find out personally identifiable information such as the user's name, address or income.[60] Rather, the only manner in which such information can end up in a cookie is if users themselves provide personally identifiable data to Web sites which, in turn, save that data to a cookie.[61]

4. *Limitations of Cookie Technology*

Web servers cannot set or read cookies that do not belong to their own domain.[62] For example, Amazon.com cannot read cookies from a user's hard drive that were placed by its competitor, Borders.com. Notwithstanding this principle, almost every Web user has received a cookie from "ad.doubleclick.net" at one time or another, without ever having visiting the Doubleclick Web site.[63] Doubleclick and other advertisers have employed a clever means by which to circumvent this limitation on cookie placement that enables Doubleclick to track Web users and serve advertising media content.[64]

Most sites on the Internet do not serve their own advertisements. Rather, they subscribe to a media service such as Doubleclick or 247 Media.[65] When a user hits on a particular Web site, the page is requested and assembled through many HTTP requests by the user's Web browser.[66] First, there is a request for the HTML code for the page itself.

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4. The URL path within which the cookie is valid (pages outside the path cannot read or use the cookie),

5. The domain of the cookie (allows a cookie to be accessible to all the pages of multiple servers; cookies can be assigned to individual machines, or to an entire Internet domain),

6. The need for a secure connection to exist to use the cookie.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Sandeep Junnarkar, *DoubleClick Accused of Unlawful Consumer Data Use, at* <http://news.cnet.com/news/0-1005-200-1534533.html> (last visited Apr. 3, 2000). The lawsuit alleges that DoubleClick employs a sophisticated computer tracking technology, known as cookies, to identify Internet users and collect personal information without their consent as they travel around the web. *Id.*; *see also DoubleClick Privacy Statement* <http://www.doubleclick.Net/us/corporate/privacy/default.asp?_object_1=&> (last visited Apr. 3, 2000); *DoubleClick: The Internet Advertising Solutions Company* <http://www.doubleclick.com> (last visited Apr. 3, 2000).

64. Junnarkar, *supra* n. 63.

65. *Id.*

66. *Id.*

Then, everything else that particular string of code needs is requested, including images, sounds, and plug-ins.[67] Ultimately, what appears on the user's screen as a banner advertisement has been transmitted as an HTTP header, potentially containing cookies.[68] If the user clicks through a banner advertisement out of interest, the media service is able to record the domain name of the destination Web site, thus enabling the media service to develop a profile as to the types of Web sites the user of that particular computer tends to visit.

5. *EmployExpert.com's Cookies*

EmployExpert.com uses persistent cookies in creating profiles of its users. EmployExpert.com stores the information provided by its users and indexes the data to a cookie embedded on the user's hard drive. In addition, EmployExpert.com also subscribes to a media service that places banner advertisements on the pages within EmployExpert.com's Web site, thus providing revenue for EmployExpert.com. The media service transmits these banner advertisements to users of EmployExpert.com's site with HTTP headers that write a cookie to the users' hard drives.

EmployExpert.com uses its own persistent cookie containing a user's unique ID code in addition to information tracked and provided by its third-party media service to create the "Interests" section of its users' profiles.

The recent media coverage of DoubleClick litigation pushes the issue of cookie technology to the forefront of the legal landscape.[69] However, there is no legal precedent directly pertaining to use of cookie technology and privacy. In the early 1970s, the first statutes protecting personal information from unwarranted access were enacted in Europe.[70] While the United States has opted for data protection in very limited and specific areas, the European nations have openly embraced comprehensive data protection acts covering electronic processing of personal information.[71]

In the United States, there are no such comprehensive data acts. With regard to cookie technology, the nature of the information being retrieved or collected determines whether that data falls under an existing regulation. In the United States, Federal protection has been ex-

67. *Id.*

68. *Id.*

69. Bob Tedeschi, *Giving Consumers Access to Personal Data,* N.Y. Times, July 3, 2000, at C6.

70. *See* Mayer-Schonberger, *supra* n. 46.

71. *See* Baker & McKenzie, *Flows of Personal Data Between the U.S. and Europe: Managing the Legal Risk* (ABA Section of Science & Technology Law, 2000 Annual Meeting, NY, NY) (July 8, 2000 at 137).

tended in very limited and specific categories.[72] For example, one of the earliest pieces of legislation regulating data is the Fair Credit Reporting Act, which governs the collection, use and sale of personal data by consumer credit reporting agencies.[73] Subsequently, other laws were enacted to deal with collection and sale of personally identifiable data and mailing lists.[74] One of the most recent pieces of legislation was enacted specifically to protect the personally identifiable information of minors who user the Internet.[75] However, despite the steady progression of Federal privacy legislation, there is yet to be a law that directly pertains to the issue of privacy stemming from data collection through cookie technology. Accordingly, we must turn to legal precedent established through our courts of law.

RIGHT TO PRIVACY

I. Public Disclosure of Private Facts

To be liable for the tortuous public disclosure of private facts, one must give "publicity to a matter concerning the private life of another."[76] In addition, the matter that is publicized must be "highly offensive to a reasonable person" and not of "legitimate concern to the public."[77] In order to properly prove a claim of invasion of privacy through the public disclosure of a private fact, Prosser states that a plaintiff must prove that the defendant made a matter of private life available to the public.[78] Specifically, the plaintiff needs to plead and prove (1) there was a public disclosure; (2) the facts were private; and (3) the disclosure is highly offensive to a reasonable person.[79]

For the first element, courts define public disclosure by examining the number of individuals who were made aware of the private fact.[80] Courts determine the second element, whether facts are private, through either determining their lack of availability in any other public form or

72. *Id.*

73. *See* 15 USCS § 1681a (2000).

74. Baker & McKenzie, *supra* n. 71.

75. *See* 47 USCS § 223 (2000).

76. Restatement (Second) of Torts § 652D (1977).

77. *Id.*

78. *Id.*; *see also* W. Prosser, *Torts* 856 (5th Ed.1984).

79. Restatement (Second) of Torts § 652D (1977).

80. *Miller v. Motorola*, 202 Ill.App.3d 976, 560 N.E.2d 900, 148 Ill.Dec. 303 (Ill. App. 1990). Miller was an employee of Motorola. *Id.* Her employer disclosed the fact that she had a mastectomy surgery to her co-workers. *Id.* Miller claimed that this disclosure greatly embarrassed her. *Id.* The court held that the disclosure to a large number of her co-workers was adequate to establish the public element of the privacy law. *Id.* at 903.

their need to be considered part of an individual's personal profile.[81] The courts expanded the third element defining what constitutes "highly offensive" to include those facts that would cause an individual great embarrassment or negative results caused by the disclosure.[82]

Even if all of these elements are met, the court still needs to determine that the use of this information is for a wrongful purpose.[83] In *Shibley,* the court determined that although the sale of subscription lists might amount to the sale of a personality profile, the company intended to use the information to determine the types of advertisements sent to individuals.[84] For this reason the court held that there was no privacy invasion.[85]

The dawn of the exchange of personal information on the Internet has pushed this elemental approach of privacy invasions to its limits. In *U.S. v. Hambreck,* the court held that a customer on the Internet did not have a reasonable expectation of privacy in regards to personal information that they disseminated on the Internet.[86] This has only been broadened by *U.S. v. Simons,* in which the court held that an employee could not expect that his or her information would remain private when they

81. *See Shibley v. Time,* 45 Ohio App.2d 69, 341 N.E.2d 337 (Ohio 1975). The court held that private information can be determined by examining if the information is an appropriation of one's personality. *Id.* at 72. In addition, this definition also includes personal facts that need to be kept private to protect the privacies of life. *Id.*

82. *Baker v. Burlington N., Inc.,* 99 Idaho 688, 587 P.2d 829 (Idaho 1978). The court held that disclosure of an employee's criminal record was sufficiently embarrassing to establish the "highly offensive" element from the Restatement. Id. at 832.

83. *See Dwyer v. Am. Express Co.,* 273 Ill. App. 3d 742, 652 N.E.2d 1351 (Ill. App. 1995). The sale of card holder's names was not considered wrongful because the sale was for advertising purposes. *Id.* at 1354.

84. *See Shibley v. Time,* 341 N.E.2d 337. The court held that the sale of subscription lists was not an invasion of privacy. *Id.* at 338. The court stated that the profiles were only being used to determine what advertisements would be sent to those individuals. *Id.* Therefore, although the subscribers did not consent to the sale of their information it was still allowable because the information was to be used for an unacceptable purpose. *Id.*

85. *Id.*

86. *See State v. Hambreck,* 55 F. Supp.2d 504 (D. Va. 1999). The court held that there is no reasonable expectation of privacy on the Internet when an individual volunteers private information. *Id.* at 508. The court explained that for an individual to have a reasonable expectation of privacy, an Internet company must knowingly display private information to others and the Internet company must obtain the information through means other than disclosure by the individual. *Id.* The plaintiff in this case attempted to persuade the court to apply the *Katz* test. *Id.* at 505. This test is used to determine if the individual had a reasonable expectation of privacy. *Id.* The court did not find this argument persuasive since the element of reasonable expectation of privacy is an objective standard. *Id.* The court held for the Internet company, relying on the rationale that if a person knowingly exposes the public to private information they are not entitled to Fourth Amendment privacy protection. *Id.* at 507.

are utilizing the Internet at the office.[87]

On the other hand, case law states that financial and medical information is always considered private.[88] It is, therefore, commonly accepted that any exchange of this kind of information is an invasion of privacy no matter where the exchange takes place.[89]

Arbeiter may argue that she did not consent to the display of any personally identifiable information in the public domain. When all of the information in her profile is viewed in totality, anyone familiar with Arbeiter could easily piece the information together to identify her as the author. Since Arbeiter did not properly consent to the display of this identifiable information; specifically that which is contained in the section entitled, "Interests," EmployExpert.com may be found liable for tortiously invading her privacy.

EmployExpert.com may argue that because Arbeiter volunteered the information and had knowledge that EmployExpert.com intended to use cookie technology in creating her profile, she cannot properly support a claim for invasion of privacy. EmployExpert.com in no way breached her confidentiality. No personal address, telephone or name was shown and EmployExpert.com may claim that these are the only identifiable elements to the profile. Since this information was never visible in her online profile, there was no invasion of privacy.

II. Cookie Technology and Legal Precedent

There is currently no case precedent directly addressing the issue of an invasion of privacy via the use of cookie technology. As a result, both plaintiff and defendant will have to use strategic creativity when litigating this particular issue. There are several possible theories upon which

87. *See U.S. v. Simmons*, 29 F. Supp. 2d 324 (D. Va. 1998). The court held that when an employee uses a computer that is maintained primarily by the employer for work related efforts, the employee's privacy is not invaded if the employer searches the computer's hard drive. *Id.* at 327. The court maintained that based upon the facts in this case, the employee had no reasonable expectation of privacy when utilizing the Internet at work. *Id. See also Barry v. U.S. Dep't of Justice*, 63 F. Supp. 2d 25 (D. D.C. 1999). A former employee brings a privacy action because the employer published a report critical of the employee. *Id.* at 26. The court held that the employer was not liable for invasion of privacy because the report was available prior to its display on the Internet. *Id.* Because the employer was required to release the report to the media, the court held that there was no invasion or privacy nor improper disclosure of private facts. *Id.* at 28.

88. *See Dwyer v. Am. Express Co.*, 273 Ill. App. 3d 742, 652 N.E.2d 1351 (Ill. App. 1995) (holding that credit card holders lack a claim for intrusion into seclusion when credit card companies rent lists of card holder's names for the purpose of advertising). The court distinguished that any disclosure of financial information would constitute an invasion of the card holders privacy. *Id.*

89. *Id.*

the litigants may rely but the most likely choice is that of intrusion upon seclusion.

The landmark California case of *Shulman v. Group W Prod., Inc.* discussed, in detail, the issue of privacy when gathering personal information through the use of a telecommunication device.[90] In *Shulman*, the defendants filmed the plaintiffs, who had all been injured in a car accident, as they were being extricated from the car during an emergency rescue operation.[91] Intrusion upon seclusion is a theory that allows for liability when there is non-consenting physical intrusion into the home, hospital, or other place the privacy of which is legally recognized, or where there is an unwarranted sensory intrusion such as eavesdropping, wiretapping, and visual or photographic spying.[92] The essence of this theory centers on the idea of seclusion.[93] "To prove actionable intrusion, a plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding . . . or *obtained unwanted access to data about,* the plaintiff."[94]

In the recent case of *McVeigh v. Cohen*, AOL, an Internet service provider, surrendered subscriber information about one of its customers, the plaintiff, to the United States Navy. The Navy believed this data gave it grounds for a court-martial of the plaintiff.[95] Among other things, the data contained in the plaintiff's AOL profile described the plaintiff's interests such as "collecting pics of other young studs" and "boy watching."[96] However, it did not contain the plaintiff's full name, address, or telephone number.[97] The court in *McVeigh* granted the plaintiffs motion for a preliminary injunction, enjoining the Navy from discharging him from service.[98] The court reasoned that the information in the profile did not reflect the service that the plaintiff had provided to the Navy.[99]

Using this theory, Arbeiter can similarly argue that the use of cookie technology in creating her profile constituted an intrusion upon her seclusion. Arbeiter can base her claim on the ground that she had a reasonable expectation of privacy during her surfing activities on the Internet. EmployExpert.com's profiling activities were an unwarranted

90. *Shulman v. Group W Prod.*, 955 P.2d 469, 489 (Cal. 1998).

91. *Id.* at 474, 475.

92. *Id.* at 490.

93. *Id.*

94. *Id.* (Emphasis added).

95. *McVeigh v. Cohen*, 983 F. Supp. 215, 217 (D.D.C. 1998); *see also* Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 Vand. L. Rev. 1607, 1626 (Nov. 1999).

96. *McVeigh*, 983 F. Supp. at 217.

97. *Id.*

98. *Id.* at 221.

99. *Id.*

intrusion upon her zone of privacy. The collection of information which EmployExpert.com placed on its Web site intruded upon Arbeiter's sensory privacy as it gave others unwarranted access to data about her.

In defense, EmployExpert.com can argue that *Shulman* and *McVeigh* do not directly address the issue presented before this court as neither is factually analogous to the case at bar. Both *Shulman* and *McVeigh* address data that is encompassed within the areas traditionally protected by privacy laws.[100] In contrast, the information in Arbeiter's profile is not within the categories of medical, financial, or sexual data. Accordingly, the established privacy laws do not govern the information as disseminated.

EmployExpert.com may also argue that by accepting the terms and conditions posted at its Web site, Arbeiter consented to any intrusion, thereby negating any claim she has raised. It is well accepted that click-through agreements are valid and binding contracts where the vendor remains the master of its offer. In the case of *Caspi v. The Microsoft Network, L.L.C.*, for example, the Superior Court of New Jersey, Appellate Division, upheld the validity of a click-through agreement formed between the plaintiffs and The Microsoft Network ("MSN").[101] The plaintiffs were shown MSN's terms and conditions on the registration screen for defendant's Internet service. Prospective members were required to click "I Agree" or "I Don't Agree" and registration did not occur until users had the opportunity to view and click to accept MSN's terms. Similarly, Arbeiter agreed to the terms and conditions posted at the EmployExpert.com's Web site before she was permitted to utilize its services.

Finally, EmployExpert.com may rely on the fact that a third-party media firm responsible for banner advertisements collected most of Arbeiter's data which is at issue. EmployExpert.com's privacy policy, which is part of the terms and conditions accepted by Arbeiter, specifically disclaims responsibility for the actions of such sites. As the vendor, EmployExpert.com is master of its offer that Arbeiter, in turn, accepted and used to her own peril. Since EmployExpert.com can demonstrate that Arbeiter had knowledge of these terms and conditions before using the Web site's services, EmployExpert.com may successfully defeat Arbeiter's claims.

100. *See Dwyer v. Am. Express Co.*, 652 N.E.2d 1351.

101. *Caspi v. Microsoft Network, L.L.C.*, 323 N.J. Super. 118, 732 A.2d 528 (N.J. 1999).

APPENDIX A

EMPLOYEXPERT.COM PROFILE APPLICATION

You provided the following information in the application that you completed at our Web site. Please return to our site if you wish to make any revisions or corrections to this information. Your profile ID code number is 0992. You will need that number and the password that you selected in order to change this information. Please contact us at webmaster@employexpert.com if you have forgotten your password or if you have any other questions. Thank you for using EmployExpert.com!

CONFIDENTIAL PERSONAL PROFILE

(None of the following information will be made available without your specific authorization.)

NAME: Edna Arbeiter

STREET ADDRESS: 1356 W. Roscoe

CITY: Springfield

STATE: Marshall

ZIP CODE: 60690

PHONE NUMBER: 312-427-2737

E-MAIL ADDRESS: Arbeiter@marshallonline.com

GENERAL PROFILE

(Some or all of the following information will be available to persons who visit our site.)

AGE: 43

SEX: F

GEOGRAPHIC AREA: Midwest

Education:

INSTITUTION: Marshall State University

DEGREE: B.A. DATE: 1979

FIELD/MAJOR: Communications

Current employment:

(This information is vital to assist us in blocking your current employer from viewing your profile. Your current salary will not appear with your profile, but employers who visit our site may search for candidates with current or desired salaries within a particular range.)

COMPANY: Arbor Shoes

CITY: Springfield

STATE: Marshall

DURATION: 1996 to present

TITLE: Regional Sales Manager

SALARY: $45,000

ACCOMPLISHMENTS: Increased sales, doubled representatives' sales, suggested new product ideas.

Previous employment:

(1) COMPANY: LitWare, Inc.

CITY: Humboldt

STATE: Marshall

DURATION: 1979-1987

TITLE: Senior Sales Representative

ACCOMPLISHMENTS: Increased sales revenue, expanded sales teams, suggested and selected new products.

(2) COMPANY: Ferguson and Bardell

CITY: Horner

STATE: Marshall

DURATION: 1987-1996

TITLE: District Sales Manager

ACCOMPLISHMENTS: Increased regional sales, managed 250 sales representatives in 10 states, trained all new recruits.

Position Sought:

DESIRED JOB TITLE: National Sales Manager

DESIRED SALARY: $60,000

OBJECTIVES: Continue working to increase sales with new company and become more involved with the implementation of product ideas.

GEOGRAPHICAL/OTHER RESTRICTIONS: None

PRIVACY PREFERENCES

(You may visit our site at any time to change your preferences, but be aware that limiting the information that may be gathered by or made available through EmployExpert.com may reduce the number of potential employers that view your profile. For more information, please see the Privacy Policy Statement on Web site.)

In exchange for the services provided to me by EmployExpert.com, I understand that banner advertisements may appear on the same screen as my profile when it is accessed. I understand that EmployExpert.com may share non-personally identifiable information with third parties in connection with the banner advertisements and is not responsible for the practices of such parties.

I agree to allow EmployExpert.com to use any additional information, including information gathered by the analysis of cookie technology, to create and add an "Interests" section to my resume profile. I understand that EmployExpert.com is not responsible for any misunderstanding or inconsistencies provided in this profile.

APPENDIX B

Profile No. 0992	
Position Sought	National Sales Manager
Objective	Continue working to increase sales with new company and become more involved with the implementation of product ideas.
Experience	Regional Sales Manager (4 years) • Increased sales, doubled representatives' sales, suggested new product ideas District Sales Manager (9 years) • Increased regional sales, managed 250 sales representatives in 10 states, trained all new recruits Senior Sales Representative (8 years) • Increased sales revenue, expanded sales teams, suggested and selected new products
Education	• B.A., Communications
Interests	This individual is an active and experienced Internet user who spends several hours per day accessing the Web. Among the Web sites frequently visited by this individual are news and information sites, sports sites, employment and finance sites, and weather information sites.

APPENDIX C

EmployExpert.com Privacy Policy Statement

EmployExpert.com is strongly committed to protecting the privacy of all visitors that post personal information on this site. We understand the sensitivity of one who is seeking a job and wants to provide a trustworthy and safe environment. This statement is meant to explain to you, the visitor, the actions we implement to maintain your safety.

All personal information that EmployExpert.com collects is gained on a voluntary basis. The contact information that we collect is necessary so that we can contact particular visitors in regards to their profile. Personal contact information is omitted from profiles created by EmployExpert.com to maintain the privacy of visitors; contact information will be provided to a particular employer only with your specific authorization.

In addition, we do not sell or display personal information to anyone unless required to do so by law or to protect the rights and property of others. This site contains links to other sites as well as banner ads. EmployExpert.com is not responsible for the practices or content of such sites. Therefore, all users should know that when they voluntarily provide personal information, the data can be collected by others.

Our site uses cookie technology to optimize service to our visitors. These cookies allow us to recognize repeat visitors and make our site more productive and personalized. If you configure your Web browser to disable cookies, you may not be able to take advantage of all of the features of EmployExpert.com.

If you have any questions or comments regarding our site, please feel free to contact us at webmaster@employexpert.com.

BRIEF FOR PETITIONER

No. 2000-135

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
OCTOBER TERM 2000

EDNA ARBEITER,

Petitioner,

v.

EMPLOYEXPERT.COM,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT THE USE OF COOKIE TECHNOLOGY TO GATHER PERSONAL INFORMATION IS NOT AN INVASION OF PRIVACY BY INTRUSION UPON SECLUSION?

II. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT INFORMATION DISSEMINATED BY EMPLOY-EXPERT.COM WAS NEITHER PRIVATE, NOR INVADED THE PLAINTIFF'S PRIVACY AS DEFINED BY APPLICABLE STATE LAW ANALOGOUS TO THE RESTATEMENT (SECOND) OF TORTS REGARDING THE PUBLIC DISCLOSURE OF PRIVATE FACTS?

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TO THE HONORABLE SUPREME COURT OF THE STATE OF MARSHALL:

Petitioner, Edna Arbeiter, respectfully submits this brief in support of her request for reversal of the judgment of the court of appeals below.

OPINIONS BELOW

The opinion and order of the Madison County Circuit Court is unreported. The opinion and order of the First District Court of Appeals of the State of Marshall is likewise unreported and is set out in the record. (R. at 2-10.)

STATEMENT OF JURISDICTION

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

RESTATEMENT PROVISIONS INVOLVED

The case involves the Restatement (Second) of Torts § 652B (1977), which has been reproduced in Appendix A. Restatement (Second) of Torts § 652D (1977), set out in Appendix B, is also relevant to the issues set forth in this case.

STATEMENT OF THE CASE

I. SUMMARY OF THE FACTS

Edna Arbeiter, an employee of Arbor Shoes, was terminated by her immediate supervisor, Bill Simpson, because he believed Ms. Arbeiter was seeking another job. (R. at 7.) Mr. Simpson formed this belief based on information he discovered while using the World Wide Web site EmployExpert.com, a site which, unfortunately, Ms. Arbeiter had visited and supplied information about her employment history. The site was apparently designed to offer consumers assistance with various employment matters. (R. at 3.) EmployExpert.com receives its revenue from relationships with firms that place banner advertisements shown to site visitors as they review the directory of completed profiles. (R. at 4.)

When users register with EmployExpert.com, they are asked to submit personal information that is then used to create a "profile." (R. at 3.) To create the profile, EmployExpert.com asks its users to provide their name, address, telephone number, and electronic mail address. Users are also asked to provide information about not only their past employment, but also their present employment, including their current salary.

(R. at 11.) EmployExpert.com tells its users that providing information about their current employment is vital to assist the company in blocking a user's current employer from viewing that user's profile. (R. at 11.) The profile is published on the World Wide Web in resume form, with personal identifying information such as the user's name, address, and phone number redacted. Additionally, EmployExpert.com redacts the locations of its users' past employment and other information that might be used to identify a specific user. (R. at 3-4.)

EmployExpert.com gathers this private information by asking users to submit information through an interactive Web page application form. (R. at 4.) This form explicitly promises users that their contact information will not be displayed to others, so as to protect the privacy of the user. (R. at 4.) EmployExpert.com promises that contact information will be provided to a particular employer only after receiving specific prior authorization from the user. (R. at 14.) As far as other information is concerned, EmployExpert.com boasts in its Privacy Policy Statement ("Privacy Statement") that it is "strongly committed to protecting the privacy of all visitors that post personal information on this site." (R. at 14.)

Despite these assurances, the resume profiles were made available to anyone who visited the Web site and provided their name, e-mail address, and company name. Although this information was to be used by EmployExpert.com to filter its search results in order to prevent an employer from gaining access to its own employees' profiles, EmployExpert.com apparently never verified any of this information before granting visitors access to the stored resume profiles. (R. at 4.)

Shortly after EmployExpert.com published Ms. Arbeiter's profile on the World Wide Web, Mr. Simpson happened to come across the site while "surfing" the Internet. Simpson accessed and reviewed one profile in particular and concluded that it belonged to Ms. Arbeiter because of his familiarity with her past employment and education. (R. at 6.) Mr. Simpson was apparently able to view Ms. Arbeiter's profile because Simpson did not reveal his affiliation with Arbor Shoes when he registered with EmployExpert.com. (R. at 6.) Moreover, Mr. Simpson was using his personal America Online ("AOL") account to access the Internet, not the account provided to him by Arbor Shoes.

EmployExpert.com's Privacy Statement describes what is accurately referred to in the online community as an opt out privacy policy. At the end of the form its users submit is a section labeled "Privacy Preferences." In this section, there are two statements, each of which appears next to a check box entitled "I agree." The boxes have been automatically marked in the affirmative by EmployExpert.com, although the user can uncheck either or both boxes in order to avoid selecting the default responses. (R. at 5.) Although users are told that they may change their preferences, they are warned that "limiting the information that may be

gathered or made available through EmployExpert.com may reduce the number of potential employers that view [the user's] profile." (R. at 12.)

The first statement says that "[i]n exchange for the services provided to me by EmployExpert.com, I understand that banner advertisements may appear on the same screen as my profile when it is accessed. I understand that EmployExpert.com may share non-personally identifiable information with third parties in connection with the banner advertisements, and is not responsible for the practices of such parties." (R. at 5.) This actually means that since EmployExpert.com contains links to banner advertisements, when users voluntarily provide personal information to EmployExpert.com, this information can be collected by *others*. (R. at 14.)

The second statement says, "I allow EmployExpert.com to use any additional information, including information gathered by the analysis of cookie technology, to create and add an 'Interests' section to my resume profile. I understand that EmployExpert.com is not responsible for any misunderstanding or inconsistencies provided in this profile." (R. at 5.) EmployExpert.com states that cookies allow the company to "recognize repeat visitors" and make the site "more productive and personalized." (R. at 14.) Although more sophisticated Internet users may be able to reconfigure their browser software to disable cookie technology, users visiting the EmployExpert.com site are warned that if they disable cookies they may not be able to take advantage of all of the site's features. (R. at 14.)

Ms. Arbeiter completed the entire application. She did not understand the meaning of "cookie technology." Since she felt it was important to provide a prospective employer information about her "Interests," she did not uncheck either of the previously checked Privacy Preference boxes. (R. at 6.) In other words, she failed to opt out of EmployExpert.com's Privacy Policy.

After her termination, Ms. Arbeiter visited EmployExpert.com to examine her resume profile as it appeared on the site. She noticed that EmployExpert.com had indeed added a section entitled "Interests." Ms. Arbeiter discovered, to her surprise, that the section contained information she did not recognize. In particular, the section included a statement that read: "This individual is an active and experienced Internet user who spends several hours per day accessing the Web. Among the Web sites frequently visited by this individual are news and information sites, sports sites, employment and finance sites, and weather information sites." (R. at 7.) By displaying this information, EmployExpert.com invaded Ms. Arbeiter's privacy because it disclosed information that she did not voluntarily provide. As a result, Ms. Arbeiter's employer identified her, and she was ultimately fired. (R. at 8.)

II. SUMMARY OF THE PROCEEDINGS

Edna Arbeiter sued EmployExpert.com in Madison County Circuit Court, State of Marshall, alleging invasion of privacy and claiming damages as a result of EmployExpert.com's public disclosure of private facts and intrusion upon her seclusion. (R. at 8.) Neither party disputes the facts as described in the record below. (R. at 3.) The trial court granted summary judgment in favor of EmployExpert.com in an unreported opinion.

Ms. Arbeiter appealed to the First District Court of Appeals of the State of Marshall. (R. at 2.) The court of appeals held that Ms. Arbeiter did not meet the elements set forth in section 652D of the Restatement (Second) of Torts, recognized by the State of Marshall, concerning the public disclosure of private facts, since Ms. Arbeiter voluntarily furnished the information in a public forum, the Internet, thereby relinquishing her right to any claim of privacy. (R. at 8.) Additionally, the court found the information released was in no way offensive. (R. at 8.) Moreover, the court found that Ms. Arbeiter used EmployExpert.com at her own peril, since the site's privacy policy was clearly posted and available to all individuals who visit the site. (R. at 9.)

The court also rejected Ms. Arbeiter's intrusion upon seclusion claim and refused to expand the zone of privacy, as contemplated by the theory of intrusion upon seclusion, to include Internet "surfing." (R. at 9.) Furthermore, the court stated that EmployExpert.com did not gain unauthorized access to Ms. Arbeiter's private information, and, therefore, no intrusion upon seclusion was committed. The court also noted that the data obtained by EmployExpert.com was not highly sensitive information afforded greater protection under privacy laws as the information was not of a financial, sexual, or medical nature. (R. at 10.) It is from this decision that Ms. Arbeiter appeals.

SUMMARY OF THE ARGUMENT

I.

Although society has leaped forward in recent years due to technological advances, these advances should not circumvent long-established privacy laws. Ms. Arbeiter is an average consumer who is representative of many consumers in today's society who are susceptible to losing privacy rights on the Internet. With the invention of data-collection technology inevitably comes the need to address privacy concerns. Now more than ever is the time to recognize consumers' privacy interests when utilizing online businesses.

The use of cookie technology by EmployExpert.com constituted an invasion of privacy by an intrusion upon the seclusion of Ms. Arbeiter.

Under both the risk analysis and zone of privacy tests, Ms. Arbeiter has established a reasonable expectation of privacy. Ms. Arbeiter had a subjective and objectively reasonable expectation of privacy because she was assured of her privacy, in the solitude of her own home, and was powerless to avoid the intrusion by EmployExpert.com. If this Court does not recognize a reasonable expectation of privacy in activities carried on in the home, especially when addressing nonconsensual tracking by a cookie, then society can expect unreasonable intrusions to become a regular part of daily life. The activities of people in their own homes, especially Internet activities, are private matters. Nonrecognition of this privacy interest will also result in a drastic decline in online business and e-commerce. Furthermore, when a business intrudes into the solitude and seclusion of one's own home, it becomes highly offensive to a reasonable person. At the very least, Ms. Arbeiter has presented sufficient evidence to raise genuine issues of material fact with regard to these elements, precluding summary judgment.

II.

In the event this Court finds that the tracking of Ms. Arbeiter's private Internet activities is not an intrusion upon her seclusion, it should still find that EmployExpert.com invaded her privacy by a public disclosure of private facts. The "Interests" section of the resume profile contained private information about activities Ms. Arbeiter engaged in while in the solitude of her home. Thus, it was a private matter. EmployExpert.com then violated its own privacy policy by allowing Ms. Arbeiter's current employer to access her resume profile. Ms. Arbeiter pled sufficient facts to prove that EmployExpert.com publicized her private facts. With the number of Internet users in society today, one cannot deny that information disclosed on a Web site is highly likely to reach the general public. Furthermore, a reasonable person would find it highly offensive to receive assurances of privacy concerning information such as Ms. Arbeiter's, and subsequently learn that the information has been disclosed to millions of Internet users. Lastly, the information disseminated by EmployExpert.com was of no legitimate concern to the public because it is not specified in the Restatement, not customary for this type of information to be of public concern to the community, and lacked social value. As a result of these facts, Ms. Arbeiter pled substantial evidence showing that the circuit court erred in granting summary judgment with respect to her claim for public disclosure of private facts.

ARGUMENT AND AUTHORITIES

I. EMPLOYEXPERT.COM'S USE OF COOKIE TECHNOLOGY TO GATHER MS. ARBEITER'S PRIVATE INFORMATION WAS AN INTRUSION UPON SECLUSION BECAUSE EMPLOYEXPERT.COM INVADED MS. ARBEITER'S REASONABLE EXPECTATION OF PRIVACY.

"The right of privacy involves the basic right of a person to be let alone in his private affairs." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890). When Justices Warren and Brandeis introduced the right to privacy in 1890, they wisely warned future generations about "numerous mechanical devices [that] threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.'" *Id.* Due to the rapid growth of the Internet and the expansion of technology in general, there are substantial concerns about consumer privacy protection in cyberspace. *Harris Poll: Online Security*, Business Week, Mar. 16, 1998, *at* http://www.businessweek.com/1998/11/b3569107.htm (survey results available only online). In particular, some observers are concerned about Internet businesses intruding into the private affairs of individuals through the use of advanced technology. Erika S. Koster, *Zero Privacy: Personal Data on the Internet*, Computer Law., May 1999, at 7, 9.

In the business world, the Internet is seen as a virtual "Wild West"—a place with few boundaries and even fewer sheriffs policing the territory. Michael S. Yang, *E-Commerce: Reshaping the Landscape of Consumer Privacy*, 33 Md. B.J. 12, 12 (2000). This view has resulted in a growing distrust among consumers and computer users. The source of most consumer distrust is the use of cookie technology by online businesses. Ms. Arbeiter is one of the many consumers who has suffered an invasion of privacy by an online business. EmployExpert.com invaded Ms. Arbeiter's privacy in two distinct ways. First EmployExpert.com intruded into her home electronically and tracked her personal Internet activities. Next, EmployExpert.com disseminated Ms. Arbeiter's personal information without her consent. Nevertheless, the Madison County Circuit Court granted summary judgment to EmployExpert.com on both issues.

In reviewing the decision of the court of appeals, this Court takes a de novo standard of review. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Great caution should be exercised when granting summary judgment because it borders on a denial of due process. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 377 (Mo. 1993). This Court should accept all allegations of the nonmovant as true and determine whether there is a genuine issue of material fact that should

be resolved by a fact finder. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). For the reasons set out below, Ms. Arbeiter has presented substantial evidence to raise several genuine issues of material fact. Therefore, the ruling of the circuit court granting EmployExpert.com's motion for summary judgment should be reversed, and this case remanded for a trial on the merits.

The State of Marshall follows the Restatement (Second) of Torts when analyzing a claim for intrusion upon seclusion. Section 652B states that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977). There need not be any publication by the defendant for liability to exist under this tort. *Id.* cmt. b.

As the following sections explain, courts have interpreted section 652B as protecting information and communications in which the plaintiff has a reasonable expectation of privacy. The initial threshold of whether a plaintiff has a reasonable expectation of privacy can be determined by applying two different tests: risk analysis or zone of privacy. After determining that a reasonable expectation of privacy exists, the courts look to whether there was an unauthorized access by the defendant. Finally, courts must decide if the unauthorized intrusion is highly offensive to a reasonable person. When applying these elements to Ms. Arbeiter's situation, it is evident that EmployExpert.com intruded upon the seclusion of Ms. Arbeiter.

A. Ms. Arbeiter Had A Reasonable Expectation Of Privacy When Using EmployExpert.com's Services Because It Was Reasonable For Her To Expect That Her Private Information Would Not Be Collected Without Her Consent.

When one utilizes a computer-based business such as EmployExpert.com, one does not simultaneously surrender one's right to privacy. Most Internet users reasonably expect privacy on the Internet due to assurances by their service provider that their privacy will be protected. Dorothy Glancy, *United States Privacy on the Internet*, 16 Santa Clara Computer & High Tech. L.J. 357, 364 (2000). The compilation of personal information by Internet-based businesses poses a serious threat to privacy. In *Whalen v. Roe*, the United States Supreme Court stated that "[t]he central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information." 429 U.S. 589, 605 (1977). According to *Whalen*, Ms. Arbeiter had a privacy interest in her personal information and Internet activities. The following

two sections demonstrate that Ms. Arbeiter retained a reasonable expectation of privacy under both the risk analysis approach and the zone of privacy test.

1. *Under the risk analysis approach, Ms. Arbeiter had a reasonable expectation of privacy over the information gathered by EmployExpert.com.*

Some courts have used constitutional analysis to determine whether an individual has a reasonable expectation of privacy over personal information. *Rakas v. Illinois*, 439 U.S. 128, 142-43 (1978). The Fourth Amendment has been applied to privacy cases dealing with intrusions resulting from the electronic collection of personal information about a person. *Id.* at 139-40; *see also United States v. Hambrick*, 55 F. Supp. 2d 504, 506 (W.D. Va. 1999), *aff'd*, No. 99-4793, 2000 WL 1062039 (4th Cir. Aug. 3, 2000). The United States Supreme Court has held that one's capacity to claim the protection of the Fourth Amendment depends on whether the person asserting the claim has a legitimate expectation of privacy in the invaded place. *Katz v. United States*, 389 U.S. 347, 353 (1967). In determining whether an individual has an expectation of privacy the courts have applied both a subjective and objective test. *Id.*

Although the Internet is a nonphysical place that may present difficulties in applying traditional privacy analysis, so long as the risk analysis approach of the Supreme Court remains valid, it should be applied to new and continually evolving technology such as the Internet. *Hambrick*, 55 F. Supp. 2d at 508. As the discussion below illustrates, under the risk analysis approach, it is difficult to deny that Ms. Arbeiter had a reasonable expectation of privacy over the information collected and revealed by EmployExpert.com. Under this analysis, Ms. Arbeiter must first prove that she had a subjective expectation of privacy.

a. *Ms. Arbeiter had a subjective expectation of privacy when using the services of EmployExpert.com because it assured her the information would remain private.*

Ms. Arbeiter did not forfeit her right to the protection of her private information when utilizing the services of EmployExpert.com. Even in the event portions of private information are revealed, this does not extinguish an individual's subjective expectation of privacy. *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888, 890 (Mass. App. Ct. 1999). In *Peckham*, a father sued a newspaper that reported on a paternity suit against him. *Id.* at 890-91. Although the claim by the father was for public disclosure of private facts, the court discussed when a person retains an expectation of privacy after some private facts have been made public. *Id.* at 891-92. The court stated that even though some private

facts have been made public, an individual still retains a right to privacy over the information not yet made public. *Id.* at 891. Furthermore, the court held that whether or not an individual relinquished the right to privacy in the information is a factual question. *Id.* at 891-92. If facts exist showing the plaintiff did not disclose all the private information to the public, there remains a genuine issue of material fact as to whether the individual forfeited the right to privacy. *Id.* at 892. The mere fact that Ms. Arbeiter provided EmployExpert.com with some of her personal information does not give EmployExpert.com the right to further intrude, by using cookie technology to collect information, and then claim that it is not liable for an intrusion.

EmployExpert.com assured Ms. Arbeiter that the information she provided would remain private and could not be accessed by her current employer. (R. at 11.) Ms. Arbeiter did not know EmployExpert.com would track her Internet activity and use it to build the "Interests" section on her profile, and then allow nearly anyone to access the information. (R. at 7.) The standard "consent check box" is not enough to inform consumers about the use of cookie technology. When people encounter an information collection technology such as the cookie, they should be warned about the information collected and how it will be used. Seth Safier, *Between Big Brother and the Bottom Line: Privacy in Cyberspace*, 5 Va. J.L. & Tech. 6, ¶ 113 (Spring 2000), *at* http://www.vjolt.net/vol5/issue2/v5i2a6-Safier.html. Most consumers click on the "accept" box because they have been assured privacy by the company. *Id.* ¶ 116. When Ms. Arbeiter hired EmployExpert.com she expected to receive assistance in locating employment. Clearly, she did not expect EmployExpert.com to place a cookie on her computer that would track her activities and then make them public through its Web site.

Finally, Ms. Arbeiter's subjective expectation of privacy stems from the fact that the information was taken from the solitude of her own home. The unique quality of the Internet allows users to access vast amounts of information from home. The United States Supreme Court has held that the home is afforded a greater degree of privacy protection than other areas. *Hill v. Colorado*, 120 S. Ct. 2480, 2489 (2000) (stating that "[t]he recognizable privacy interest . . . is far less important when 'strolling through Central Park' than when 'in the confines of one's own home,' or when persons are 'powerless to avoid' [the intrusion]."). Ms. Arbeiter had a subjective expectation of privacy because she was assured of her privacy, in the solitude of her own home, and was powerless to avoid the intrusion by EmployExpert.com. For the above reasons, Ms. Arbeiter raised a genuine issue of material fact as to her subjective expectation of privacy.

b. Ms. Arbeiter's subjective expectation of privacy is objectively reasonable under the circumstances.

The objectively reasonable prong of the Fourth Amendment privacy test is both a value judgment and a determination of how much privacy we should have as a society. *Rakas*, 439 U.S. at 139-40. The devices capable of collecting and disseminating private information have multiplied in ways the average person can hardly imagine. *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 473 (Cal. 1998). These advanced devices necessitate an increase in privacy protections for consumers.

In *Shulman*, two family members were involved in an automobile accident. *Id.* at 474. The intrusion occurred when a rescue crew arrived accompanied by a camera operator from the defendant's television station. *Id.* The camera operator filmed the rescue and recorded the conversations inside the rescue helicopter while en route to the emergency room. *Id.* The defendant later ran a segment on television depicting the accident and airing the recorded conversations. *Id.* The defendant never obtained consent from the plaintiff to record the conversations or film the rescue. *Id.* The California Supreme Court held that the plaintiffs did not have an objectively reasonable expectation of privacy in the camera operator listening to statements with unaided ears, because they could be heard by anyone. *Id.* at 489. However, the court ruled that the plaintiffs did retain an objectively reasonable expectation of privacy in the conversations recorded by microphone at the scene and while en route to the emergency room. *Id.* The California Supreme Court held that it was error for the trial court to grant summary judgment on the claims for intrusion upon seclusion. *Id.* Therefore, an objectively reasonable expectation of privacy exists over any information recorded without the consent of an individual. *Id.* at 491.

Ms. Arbeiter's private Internet activities and interests are analogous to the conversations in *Shulman* because they occurred in the solitude of her own home. A reasonable person would not approve of businesses recording personal activities without first notifying the person and obtaining consent, especially those activities that occur within the home. No law or custom can be found that allows businesses such as EmployExpert.com to access a consumer's private information without consent. *See Hill v. NCAA*, 865 P.2d 633, 655 (Cal. 1994) (stating that customs and practices may create a reasonable expectation of privacy). The extent of Ms. Arbeiter's privacy interest is not independent of the circumstances in which the intrusion occurred. *See id.* One does not open the door to an Internet business to track one's personal Internet activities by merely contracting for Internet services. Without uncontroverted proof that a plaintiff knows personal information or activities are being recorded, a court cannot say as a matter of law that a plaintiff's actual or

subjective expectation of privacy in the information was unreasonable under the circumstances. *Ali v. Douglas Cable Communications*, 929 F. Supp. 1362, 1382 (D. Kan. 1996) (holding that a case must survive summary judgment if there is evidence that the plaintiff was not aware that personal calls would be monitored by the employer). Therefore, a genuine issue of material fact exists as to whether Ms. Arbeiter retained an objectively reasonable expectation over her private Internet activities.

Ms. Arbeiter has presented sufficient evidence that she was unaware that EmployExpert.com would use the cookie to record her Internet activity. In *Ali*, this was enough for the plaintiff's case to survive summary judgment. "A claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Therefore, the circuit court erred in granting summary judgment since a genuine issue of material fact exists as to whether Ms. Arbeiter's subjective expectation of privacy in the information was objectively reasonable under the risk analysis approach. If this Court chooses not to utilize the risk analysis approach, it may utilize the zone of privacy test to determine that Ms. Arbeiter had a reasonable expectation of privacy.

2. *EmployExpert.com violated Ms. Arbeiter's zone of privacy when it gathered her private information.*

An invasion of privacy by intrusion may result from a physical intrusion or some other form of investigation or examination into a person's private affairs. *Frankel v. Warwick Hotel*, 881 F. Supp. 183, 188 (E.D. Pa. 1995) (listing the possible theories upon which a plaintiff may bring this cause of action). "This tort encompasses the physical or sensory penetration of a person's zone of seclusion in an attempt to collect private information concerning that person's affairs." *Id.* The ability to exclude others from an individual's mental process is intrinsic to the human personality. *Kees v. Med. Bd.*, 10 Cal. Rptr. 2d 112, 119 (Ct. App. 1992). When the intrusion invades an individual's mental process, it intrudes upon a protected zone of privacy and becomes actionable. *Id.*

The intrusion by EmployExpert.com was a sensory penetration into Ms. Arbeiter's zone of privacy. EmployExpert.com's intrusion is exactly what the *Frankel* court envisioned when it addressed sensory intrusions—an attempt to collect private information concerning Ms. Arbeiter's affairs. Such a sensory intrusion is just as offensive, if not more so, than an actual physical intrusion. *See Kees*, 10 Cal. Rptr. 2d at 119.

Recently, some jurisdictions have held that an unwarranted sensory intrusion via eavesdropping, wiretapping, and visual or electronic spying is actionable. *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d

1078, 1089 (9th Cir. 1999). In *Alpha*, the secret monitoring of an individual was held actionable because it denied the plaintiff an important aspect of privacy—the right to control the nature and extent of the dissemination of private information. *Id.* The defendant in *Alpha* recorded the plaintiff's statements during a conversation even though the plaintiff had not agreed to the recording. *Id.* The court ruled that the plaintiff could state a claim for invasion of privacy, even if he had no expectation of privacy in the statements because he had not consented to the recording. *Id.*

The intrusion into Ms. Arbeiter's personal information parallels the intrusion in *Alpha*. Ms. Arbeiter was unaware that her Internet activities were being tracked and recorded by EmployExpert.com. (R. at 7.) Ms. Arbeiter was deprived of a fundamental right of privacy—the right to control the dissemination of her private information. Allowing companies to intrude upon an individual's right to control personal information cuts against the most sacred privacy laws. *See Union Pac. R.R. v. Botsford*, 141 U.S. 240, 251 (1891). This right is not a static right. Rather, it is a dynamic right that should be flexible enough to protect against new privacy violations that are the natural product of an ever-changing society of advanced technology. Regardless of whether this Court uses the risk analysis or zone of privacy test, Ms. Arbeiter has established a reasonable expectation of privacy. After establishing a reasonable expectation of privacy, Ms. Arbeiter must present evidence that EmployExpert.com's sensory intrusion was unauthorized.

B. EMPLOYEXPERT.COM USED COOKIE TECHNOLOGY TO OBTAIN UNAUTHORIZED ACCESS INTO THE PRIVATE AFFAIRS OF MS. ARBEITER.

Although the laws protecting the collection of information by private entities are not strict, there are circumstances in which restraint is warranted. *Alpha*, 199 F.3d at 1089. Courts have acknowledged that the method in which information is obtained can have an effect on whether or not the activity is considered an invasion of privacy. *McNally v. Pulitzer Publ'g Co.*, 532 F.2d 69, 79 (8th Cir. 1976). With the increases in technology today, Internet businesses have a greater ability to intrude into consumers' private lives without their consent or knowledge.

Unless a browser's preferences are configured to notify the user that a cookie has been enabled, cookies enter the system unannounced and undetected. James F. Brelsford & Nicole A. Wong, *Online Liability Issues: Defamation, Privacy and Negligent Publishing*, at 707, 742 (PLI Patents, Copyright, Trademarks, and Literary Property Course, Handbook Series No. 520, 1998). Thus, cookies have the ability to collect and store information about a person without approval. Ed Foster, *Can Mix-*

ing Cookies with Online Marketing Be a Recipe for Heartburn?, Infoworld, July 22, 1996, at 54. In general, cookies allow sites to "tag" visitors with unique identifiers so the sites can track the user's activities. Commentators have equated this type of tracking to "a store being able to tatoo a bar code on your forehead, and then laser-scan you every time you come through the doors." Joshua B. Sessler, *Computer Cookie Control: Transaction Generated Information and Privacy Regulation on the Internet*, 5 J.L. & Pol'y 627, 630 (1997). Some commentators refer to the use of cookie technology as the most obvious form of intrusion in cyberspace. Myrna L. Wigod, *Privacy in Public and Private E-Mail and Online Systems*, 19 Pace L. Rev. 95, 107 (1998).

There must be some right to control and protect one's private information from these cookies. The idea of allowing businesses to track the personal activities of their customers offends the notions of privacy addressed by Justices Warren and Brandeis in their 1890 law review article. *See* Warren & Brandeis, *supra*, at 195. The fundamental concern about privacy in cyberspace is the manner in which the systems collect, process, use, and store vast amounts of potentially sensitive, personal information. "One need not think long nor hard regarding the possibilities and implications of new technology to develop Orwellian visions regarding the capacity of the Government and, ever increasingly, the private sector to gather, sort and process massive amounts of information regarding ourselves." Safier, *supra*, at 10.

The collection of Ms. Arbeiter's information by EmployExpert.com was unauthorized for two reasons. First, Ms. Arbeiter did not voluntarily release the information that EmployExpert.com obtained through the use of the cookie technology. (R. at 7.) Second, Ms. Arbeiter was not fully informed as to how the cookie would collect information and what information it would collect. (R. at 6.) She believed that if she did not allow the use of cookie technology by EmployExpert.com then she would not benefit from the services provided by EmployExpert.com. (R. at 12, 14.) These two reasons confirm that the collection of Ms. Arbeiter's personal information by EmployExpert.com was unauthorized.

1. *Although EmployExpert.com's privacy policy states that all information is collected on a voluntary basis, Ms. Arbeiter did not voluntarily offer the information pertaining to her personal interests to EmployExpert.com.*

To maintain a claim for intrusion upon seclusion, a plaintiff must not voluntarily consent to the activity by the defendant. *NCAA*, 865 F.2d at 648. Whether the information in question is provided voluntarily turns on the extent to which the data gathering is known by the individual. *Norman-Bloodshaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1270

(9th Cir. 1998); *see also Dweyer v. Am. Express Co.*, 652 N.E.2d 1351, 1354 (Ill. App. Ct. 1995) (implying that when the gathering of data is somehow disguised from the user, the information is not voluntarily offered).

Companies such as EmployExpert.com use standard language in their attempt to obtain consent from consumers. (R. at 5.) Users usually complete forms disclosing basic information that is required before utilizing a company's services. The average user cannot fully appreciate the extent to which that information is used and the questionable methods employed to collect the information. Wigod, *supra*, at 104.

In *Norman-Bloodshaw*, several employees sued their employer, alleging that nonconsensual testing for sensitive medical information was an invasion of their privacy. 135 F.3d at 1264. The employer informed the employees that they would be required to take an entrance examination that consisted of a series of questions and a blood and urine analysis. *Id.* However, the employer used the blood and urine analysis to test for sensitive medical conditions such as syphilis, sickle cell trait, and pregnancy. *Id.* The employees argued the testing for these sensitive medical conditions was done under the disguise of the routine entrance examination. *Id.* The Ninth Circuit agreed with the plaintiffs and stated that the samples were "qualitatively different from the information provided in their answers to the questions, and [were] highly invasive." *Id.* The employees' consent to the entrance examination does not abolish their right to privacy in other personal matters such as their private medical conditions. *Id.*

The collection by EmployExpert.com is analogous to the situation in *Norman-Bloodshaw* because the collection was disguised from Ms. Arbeiter, and therefore, involuntary. Ms. Arbeiter did not consent to the tracking of her private Internet activities and interests by EmployExpert.com. (R. at 7.) EmployExpert.com utilized an invisible cookie to collect the information. This cookie was disguised from Ms. Arbeiter because once the cookie is enabled, it does not obtain the user's consent before collecting personal information. Peter McGrath, *Knowing You All Too Well*, Newsweek, Mar. 29, 1999, at 48 (addressing the privacy implications that arise once cookies are enabled). The Ninth Circuit implied that if the plaintiff is not aware of the data collection, then it is likely nonconsensual. *See Norman-Bloodshaw*, 135 F.3d at 1270. According to the *Norman-Bloodshaw* analysis, EmployExpert.com collected Ms. Arbeiter's private information without her consent.

In 1971, the Ninth Circuit faced a case with similar facts to Ms. Arbeiter's. In *Dietemann v. Time, Inc.*, the court held that the recordation and transmission of the plaintiff's private information without his consent constituted an invasion of privacy. 449 F.2d 245, 246 (9th Cir. 1971). The defendants in *Dietemann* were two magazine reporters who

recorded and transmitted conversations by the plaintiff and then used the information in a *Time Magazine* article. *Id.* at 246. The reporters used hidden cameras and microphones to obtain the information without the plaintiff's consent. *Id.* In finding an invasion of privacy, the Ninth Circuit reasoned that although there was no physical intrusion, the tort of invasion of privacy by intrusion is applicable when the defendant "intrudes into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be excluded." *Id.* at 248-49.

EmployExpert.com intruded into a sphere in which Ms. Arbeiter could reasonably expect seclusion. The information obtained by the cookie was personal to Ms. Arbeiter and did not serve the purpose of assisting Ms. Arbeiter in locating further employment. Furthermore, Ms. Arbeiter was not fully informed by EmployExpert.com as to what information the cookie would collect. (R. at 5, 14.)

This unauthorized recording of private information is exactly what the *Dietemann* court ruled an invasion of privacy. *Id.* at 246. Ms. Arbeiter was assured that her personal information would remain private when utilizing EmployExpert.com's services. (R. at 4.) Furthermore, EmployExpert.com did not inform Ms. Arbeiter that it would track her private Internet activities. Although aware that EmployExpert.com used cookie technology, Ms. Arbeiter was not informed as to the data collection abilities of the cookie. Therefore, the intrusion by EmployExpert.com was unauthorized.

2. *EmployExpert.com's privacy policy stated that if Ms. Arbeiter did not allow the use of the cookie technology she would not benefit from the services provided by EmployExpert.com.*

Ms. Arbeiter did not have much discretion when it came to her decision on whether to agree to the terms of EmployExpert.com's consent form. Her choices were to consent to the cookie, or not benefit from the services of EmployExpert.com. (R. at 12, 14.) EmployExpert.com uses a method known as the opt out method to obtain consent from its consumers. (*See* R. at 12.) This approach requires the consumer to comply with its methods of obtaining the information. Noncompliance results in the inability of the consumer to benefit from the services provided by EmployExpert.com. *Id.*

The deficiencies in the opt-out system are apparent. The level of consumer education and understanding of technological advances in information vary widely. Safier, *supra*, at 121. Most consumers do not realize that when the cookie is enabled, it tracks all Internet activity and stores information about the user. Increased education is not a likely solution because Internet businesses will always stay one step ahead of

the education, leaving consumers hopelessly facing highly advanced collection technologies. *Id.*

The alternative method is known as the opt in method. Internet businesses refuse to utilize this method because it costs more and results in a greater restriction on the access to information. Fred H. Cate, *Principles of Internet Privacy*, 32 Conn. L. Rev. 877, 894 (2000). The opt-in method requires the consumer to affirmatively consent to the use of cookie technology and other data collectors before they may be enabled. In summary, the opt-in method is not preferred by Internet businesses such as EmployExpert.com because it requires them to obtain permission before gathering personal information about their consumers. *Id.*

Many consumers in today's market have expressed concerns about the opt-out method. One survey found that 83 percent of the participants surveyed on this question said there should be a law requiring an opt-in procedure instead of the opt-out method. *Public Attitudes About the Privacy of Information*, Privacy Rights Clearinghouse (June 1996), *at* http://www.privacyrights.org/ar/invasion.htm. This same survey stated that 74 percent of the public is very concerned about the violation of their privacy rights through the Internet and the use of cookie technology. *Id.* Furthermore, 65 percent of the public stated that they are more concerned about privacy violations than they were five years ago. *Id.*

It is against public policy to allow companies such as EmployExpert.com to employ these methods of data collection without first fully informing consumers as to exactly what information the cookie will gather. The use of cookie technology on innocent and helpless consumers such as Ms. Arbeiter places every American at risk that Internet companies will monitor their private activities. This Court should recognize such practice as deceptive, and an intrusion into the private affairs of consumers.

C. It Is Highly Offensive To A Reasonable Person To Have Private Information Recorded By A Cookie.

The Restatement (Second) of Torts requires that an intrusion be highly offensive to a reasonable person before it becomes actionable. Restatement (Second) of Torts § 652B (1977). The intrusion must be one resulting from conduct to which a reasonable person would strongly object. *Ali*, 929 F. Supp. at 1381. In *Ali*, the court held that the interception of business telephone calls by an employer did not constitute an intrusion upon seclusion because the court did not believe that it is highly offensive to a reasonable person to have an employer intercept and monitor business calls. *Id.* at 1382. However, the court went further to state that a reasonable person could find it highly offensive to have personal calls monitored if the employer did not discourage the use

of business telephones for personal calls and did not inform the employee that personal calls might be recorded. *Id.* The *Ali* court held that the recordation of these telephone calls was an invasion of the privacy of the employees. *Id.*

The circumstances in Ms. Arbeiter's case present a much more offensive intrusion than that addressed in *Ali*. Not only was the information taken personal in nature, it was gathered without her knowledge. This is highly likely to be offensive to a person of ordinary sensibilities. The fact that she is a consumer and not an employee makes the intrusion even more offensive because it seems more intrusive for a business to record activities engaged in by a consumer at home. *See Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 679 (Ct. App. 1986) (stating that the more secluded the setting, the more likely the intrusion is highly offensive to a reasonable person).

A plaintiff may use evidence that less intrusive alternatives of data collection existed to show that the intrusion by the defendant was highly offensive to a reasonable person. *NCAA*, 865 P.2d at 656. EmployExpert.com could have implemented a procedure to inform consumers concerning the extent to which a cookie gathers personal information. Furthermore, EmployExpert.com could have utilized the opt-in method instead of the opt-out method. Failure to implement these protective measures evidences the high degree of offensiveness of EmployExpert.com's intrusion. *Id.*

Additionally, the method of data collection utilized may itself be offensive to a reasonable person. *See McNally*, 532 F.2d at 79. The techniques that EmployExpert.com used were objectionable for two reasons. First, and most importantly, EmployExpert.com provided a vague description of the cookie, in its consent form, to camouflage the cookie's true purpose: the nonconsensual collection of private information. The use of cookie technology to obtain information about a person results in a nonconsensual collection. Wigod, *supra*, at 107. The average user would not understand the capabilities of the cookie after reviewing EmployExpert.com's consent form. Second, EmployExpert.com made empty promises of blocking out current employers to obtain consumers' confidence. (R. at 4, 11.) It is apparent that these promises were not kept. Since the techniques used by EmployExpert.com were disguised from Ms. Arbeiter and, therefore questionable, the collection of her personal information resulted in a highly offensive intrusion *see Tureen v. Equifax*, 571 F.2d 411, 416 (8th Cir. 1978). Moreover, the *Tureen* court recognized, it is important to look at the methods in which the information was collected before ruling that the consumer has no reasonable expectation of privacy in the information. *Id.*

The questionable techniques used by EmployExpert.com raise a genuine issue of material fact as to whether Ms. Arbeiter had a reasonable

expectation of privacy in her personal information. The evidence presented by Ms. Arbeiter raises a genuine issue of material fact as to the offensiveness of EmployExpert.com's intrusion, precluding summary judgment.

II. THE COURT OF APPEALS ERRED WHEN IT FAILED TO RECOGNIZE THAT THE DISSEMINATION OF MS. ARBEITER'S PRIVATE INFORMATION ON EMPLOYEXPERT.COM'S WEB SITE CONSTITUTED A PUBLIC DISCLOSURE OF PRIVATE FACTS.

An individual's right to have personal affairs remain private is one of the oldest, most precious rights known to Americans. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law." *Botsford*, 141 U.S. at 251. These words must not be lost in the rapid growth of technology and the increased transmission of information in society today.

Just as consumers in the retail market do not shed their constitutional rights upon entering the marketplace, Internet users should not lose their right to privacy when they utilize Internet services such as EmployExpert.com. While the Internet offers users a way to avoid the physical world, it also allows Internet-based businesses greater opportunity to intrude into private lives. Yang, *supra*, at 14.

Internet users have soared from 171 million in 1999 to 304 million as of March 2000. Int'l Tech. & Trade Assoc., United States Internet Council, *State of the Internet 2000* (Sept. 1, 2000), *available at* http://usic.wslogic.com/intro.html. The U.S. Internet Council estimates there will be approximately one billion Internet users by 2005. *Id.* A recent poll found that 92 percent of polled Web sites collect personal information from online users. Federal Trade Commission, *Privacy Online: A Report to Congress* (June 1998), *available at* http://www.ftc.gov/reports/privacy3/priv-23a.pdf. "According to the results of a March 1998 *Business Week* survey, consumers not currently using the Internet ranked concerns about the privacy of their personal information and communications as the top reason they have stayed off the Internet." *Id.* Now, more than ever, is the time for consumer privacy protection to be emphasized on the Internet.

While the online consumer market is growing exponentially, there are also strong indications that consumers are wary of participating in a market in which they are concerned about the use of their personal information. In fact, a substantial number of online consumers would rather forego information or services available through the Web than provide a

Web site personal information without a clear understanding of how the site's privacy policies are employed. *Id.* Consumers will continue to distrust e-commerce companies unless greater consumer privacy protections are implemented.

The State of Marshall follows the Restatement (Second) of Torts when analyzing a case in which an individual claims public disclosure of private information. Section 652D states:

> 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 § 652D (1977).

A person invades the privacy of another when he or she publicly discloses private facts about that person, and the disclosure would be highly offensive to a person of ordinary sensibilities. *Sipple v. Chronicle Publ'g Co.*, 201 Cal. Rptr. 665, 667-68 (Ct. App. 1984) (applying section 652D of the Restatement (Second) of Torts).

As the following sections explain, courts have interpreted section 652D as establishing a four-part test. First, a plaintiff must show that the disclosure involved a private matter. Second, the plaintiff must prove that the defendant actually gave publicity to the information. Third, the publicity by the defendant must be found highly offensive to a reasonable person. Lastly, the matter disclosed must be of no legitimate concern to the public.

A. The Information Collected And Disseminated By EmployExpert.com Was Private Information Because It Was Personal And Its Disclosure Had A Profound Effect On Ms. Arbeiter.

In order to pursue a claim for public disclosure of private facts, a plaintiff must first show that the information involved a private matter. Restatement (Second) of Torts § 652D (1977); *Ozer v. Borquez*, 940 P.2d 371, 377 (Colo. 1997). The disclosure by EmployExpert.com contained personal information about Ms. Arbeiter, such as the Internet sites she visited and her personal interests. (R. at 7.) Such personal information is considered a private matter. Restatement (Second) of Torts § 652D cmt. b (1977); *accord City of San Jose v. Superior Court*, 88 Cal. Rptr. 2d 552, 559 (Ct. App. 1999). Whether a public disclosure involves a private matter is a question of fact for the jury. *Doe v. Mills*, 536 N.W.2d 824, 829 (Mich. Ct. App. 1995). Information concerning family, sexual, medical, and other personal information is expressly protected by the courts. *Id.* The information disseminated by EmployExpert.com falls under the

category of "other personal information," because it is sensitive private information that might reveal her identity.

In some instances, the effect of disclosure on the individual can determine whether that person has a privacy interest in the information. *City of San Jose*, 88 Cal. Rptr. 2d at 564. The disclosure of Ms. Arbeiter's private information resulted in the loss of her job. Due to this profound effect, Ms. Arbeiter had a substantial privacy interest in the information. To avoid the profound effects of public disclosures similar to Ms. Arbeiter's, this Court should recognize Ms. Arbeiter's privacy interest in her personal information.

1. *Ms. Arbeiter did not relinquish her reasonable expectation of privacy by relying on EmployExpert.com assurances that her information would remain private.*

Ms. Arbeiter did not waive her right to privacy by providing limited information to EmployExpert.com through its Internet services. Although the Internet is arguably a public forum, Ms. Arbeiter provided her information for the exclusive purpose of the resume profiling database. She did not provide this information with the knowledge that it would be made accessible to her current employer. Legitimate expectations of privacy cannot be eliminated by a sudden announcement that a certain domain is now a public forum. *Smith v. Maryland*, 442 U.S. 735, 740 n.5 (1979).

When a business such as EmployExpert.com states that the information provided by its customers will remain private, a later disclosure of this information to the public is actionable. *Doe v. Univision Television Group, Inc.*, 717 So. 2d 63, 64 (Fla. Dist. Ct. App. 1998). In *Doe*, the plaintiff sued a television station for failing to protect her identity during a broadcast concerning problems with recent plastic surgery. *Id.* The plaintiff agreed to an interview on television under the condition her identity would remain private. *Id.* The television station assured the plaintiff that her identity would remain anonymous during the broadcast. *Id.* However, during the broadcast, the station experienced technical difficulties with the protection device, revealing the plaintiff's identity. *Id.* The defendant argued that the plaintiff had voluntarily agreed to the interview, and therefore, the information was no longer private. *Id.* The court held that summary judgment should not have been granted to the defendant because the plaintiff had stated a viable invasion of privacy claim for public disclosure of private facts. *Id.* at 65. The court's reasoning turned on the fact that the defendant assured the plaintiff that her identity would remain anonymous. *Id.*

Ms. Arbeiter's case presents facts similar to *Doe*. EmployExpert.com assured Ms. Arbeiter that her identity would remain private. In fact,

EmployExpert.com went so far as to expressly promise that a current employer could not access the information. (R. at 4.) The privacy protection system employed by EmployExpert.com failed to protect Ms. Arbeiter, making her personal information accessible to nearly anyone on the Internet, including her current employer, who was then able to identify Ms. Arbeiter. (R. at 7.)

Under the *Doe* analysis, the court must determine if EmployExpert.com's privacy policy left Ms. Arbeiter with an expectation of privacy in her personal information. Since EmployExpert.com's privacy policy stated that her identity would remain anonymous and that current employers could not access her information, it is clear that the resume profiling database was not a public forum. Once Ms. Arbeiter establishes that EmployExpert.com's resume database is not a public forum, it follows that she did not relinquish her right to privacy when providing information to EmployExpert.com.

2. *Limited disclosure of private information does not result in the forfeiture of an individual's privacy interest in the information.*

Although Ms. Arbeiter provided EmployExpert.com with information for her resume profile, this does not render the information public. A limited disclosure of private information does not necessarily mean the information is public and can be disseminated further by the recipient. *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998). In *Michaels*, the court ruled that although a clip of Mr. Michaels having sex had been displayed on the Internet, Mr. Michaels retained his privacy interest in the tape. *Id.* In that decision, the court stated that a limited disclosure of private information does not result in a forfeiture of the individual's privacy interest. *Id.* Rather, an individual retains the right to privacy in private information until it becomes public.

Ms. Arbeiter's limited disclosure to EmployExpert.com did not result in a waiver of her privacy interest in the information. She provided a limited amount of information to EmployExpert.com for the purpose of building a resume profile. Ms. Arbeiter did not intend for the information to be accessible by anyone. Like *Michaels*, the limited disclosure to EmployExpert.com did not result in a publication of the information. Therefore, Ms. Arbeiter did not forfeit her right to privacy in the information disclosed on EmployExpert.com's Web site. After establishing the information disclosed involved a private matter, Ms. Arbeiter must show that EmployExpert.com gave publicity to the information.

B. EMPLOYEXPERT.COM GAVE PUBLICITY TO MS. ARBEITER'S PERSONAL INFORMATION BY ALLOWING NEARLY UNLIMITED ACCESS TO HER PRIVATE INFORMATION.

Once the plaintiff has established a privacy interest in the information, he or she must show that as a result of the disclosure, the private matter is likely to reach the general public. Restatement (Second) of Torts § 652D cmt. a (1977); *Tureen*, 571 F.2d at 419 (applying section 652D of the Restatement (Second) of Torts). Publicity refers to the information becoming public as a result of the defendant's disclosure or communication. *Id.* Publicity can be shown by illustrating that the communication was made to the public at large, or to enough persons that the matter must be regarded as likely to reach the general public. *Id.* When private information is disclosed on the Internet, it is highly likely the information will reach the general public. *ACLU v. Reno*, 929 F. Supp. 824, 831 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997). The Internet is a worldwide communications system that allows tens of millions of people to exchange information. *Id.*

Furthermore, a disclosure to a single person could be actionable publicity if the circumstances are strong enough. *Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990); *accord McSurely v. McClellan*, 753 F.2d 88, 112 (D.C. Cir. 1985). In *Miller*, an employee consulted her employer's company nurse concerning medical surgeries. 560 N.E.2d at 902. The nurse assured her that all medical information would remain confidential. *Id.* Approximately one year later, a co-worker asked her about the surgeries and other subsequent health problems. *Id.* After realizing the information had been disseminated to others, the plaintiff brought suit for public disclosure of private facts. *Id.* The court noted that when a special relationship exists, as it did in *Miller*, the disclosure is just as devastating even though it is made to a small number of people or even a single person. *Id.* at 903.

The privacy protection provided by EmployExpert.com did not adequately protect Ms. Arbeiter. EmployExpert.com allowed almost unlimited access to the information posted on its Web site. It did provide some protection by implementing a system that recognized current employer domain names. The system attempted to screen out employers that used domain names similar to that of their company names. (R. at 6, 11.) However, as evidenced by Ms. Arbeiter's circumstances, these protections were not adequate.

Furthermore, the mere fact that Ms. Arbeiter transmitted information to EmployExpert.com did not result in publicity of the information because she was assured that the information would remain private. Ms. Arbeiter had no intent of publicizing the information. On the contrary, when EmployExpert.com disseminated the information, it became

public. The information retained its private character when Ms. Arbeiter provided it to EmployExpert.com, and, therefore, she had a privacy interest in the information remaining private. Ms. Arbeiter has pled substantial evidence that EmployExpert.com gave publicity to her private information. In addition to proving EmployExpert.com gave publicity to a private matter, Ms. Arbeiter must also present evidence that the publicity would be highly offensive to a reasonable person.

C. The Disclosure Of Ms. Arbeiter's Private Information Is Highly Offensive To A Reasonable Person Due To The Severe Consequences Accompanying The Disclosure.

The strength of an individual's interest in having private information protected from publicity largely depends on the consequences of the disclosure of the information. *City of San Jose*, 88 Cal. Rptr. 2d at 564. Under this analysis, a person who might suffer severe consequences from a disclosure of private information has a very strong interest in the protection of this information. The stronger the interest in protecting the information, the more likely the disclosure is highly offensive to a reasonable person. *Id.* With a substantial portion of the world's population on the Internet, the privacy protections for information on Web sites such as EmployExpert.com are of great concern. *McVeigh v. Cohen*, 983 F. Supp. 215, 221 (D.D.C. 1998) (discussing the importance of protecting Internet users against intrusions and disclosure of their private information).

The term "highly offensive" has been construed to mean a disclosure that might cause emotional distress or embarrassment to a reasonable person. *Brown v. Am. Broad. Co.*, 704 F.2d 1296, 1302 (4th Cir. 1983). The determination of whether a disclosure is highly offensive to a reasonable person is a question of fact and depends on the circumstances of each case. *Ozer v. Borquez*, 940 P.2d 371, 378 (Colo. 1997). In *Ozer*, a law firm discharged an associate due to his sexual orientation. *Id.* at 373-74. Mr. Borquez disclosed his homosexuality to Mr. Ozer, the president of the law firm. *Id.* at 374. Shortly thereafter, Mr. Ozer disclosed the information to the law firm's managing partner, and the managing partner subsequently fired Mr. Borquez. *Id.* The court held that this disclosure was highly offensive to a reasonable person due to the severe consequences that accompanied the disclosure. *Id.* at 378.

The consequences suffered by Ms. Arbeiter were the same as those suffered by Mr. Borquez. Although the content of the information differed, the consequence of the disclosure resulted in the loss of employment in both cases. Reasonable persons would consider it highly offensive to have their private Internet activities publicized, especially if

the publicity resulted in the loss of their job. After presenting evidence that EmployExpert.com's disclosure of private information is highly offensive to a reasonable person, Ms. Arbeiter must also show the information is of no legitimate concern to the public.

D. The Private Information Disseminated By EmployExpert.com Was Not Of Legitimate Concern To The Public Because The Content Of The Disclosure Was Private Information About Ms. Arbeiter With No Social Value.

The right of an individual to keep information private must be balanced with the public's right to disseminate newsworthy information. *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 307 (10th Cir. 1981). However, a person's right to privacy should not be trampled by a society that has become ever more curious about the lives of others. We must not forget the important societal interest of protecting an individual's right to privacy. *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 42 (Cal. 1971). A person's private information that lacks social value or concern to the public should be kept private. *Id.* If this Court were to hold, that as a matter of law, private facts concerning a person's life are of legitimate public interest, almost everyone's private life would be on display. *See Winstead v. Sweeney*, 517 N.W.2d 874, 878 (Mich. Ct. App. 1994) (emphasizing the importance that the information must be of a legitimate public concern to be considered newsworthy).

In determining what is a matter of legitimate public interest, the court should first look to the Restatement (Second) of Torts for guidance. *Id.* at 878-79. Here, the information about Ms. Arbeiter is not expressly mentioned as newsworthy in section 652D. Restatement (Second) of Torts § 652D cmt. d (1977) (identifying matters that are usually found newsworthy); *accord Winstead*, 517 N.W.2d at 878.

Next, the court should look to the customs and conventions of the community for guidance. *Peckham v. Boston Herald, Inc.*, 719 N.E.2d 888, 893 (Mass. App. Ct. 1999). It is customary in most communities for the public to have an interest in criminal matters, police action, and other enforcement of the criminal laws. *Williams v. KCMO Broad. Div. Meredith Corp.*, 472 S.W.2d 1, 4 (Mo. Ct. App. 1971). However, the court must draw the line when the information disclosed is that which the public is not entitled. *Peckham*, 719 N.E.2d at 893. A person's private Internet activity is of no concern to the public. The courts have never held that the public has an interest in an individual's choice of magazine subscription, and Internet activities, in some respects, are no different than reading through magazines or catalogs. Without these protections,

we can expect a society that routinely invades other citizens' private lives for no legitimate purpose. *Id.*

This Court should also determine the amount of social value in the information disseminated. *Capra v. Thoroughbred Racing Ass'n of N. Am.*, 787 F.2d 463, 464 (9th Cir. 1986) (stating that information with a high social utility is more likely to be found newsworthy). The information concerned personal data about Ms. Arbeiter and did not interest the public in any way. Furthermore, the information does not improve society in any way. Therefore, the social utility in Ms. Arbeiter's private activities is minimal.

The last factor the court addresses is the extent to which Ms. Arbeiter subjected herself into the public domain. *Associated Press v. Walker*, 388 U.S. 130, 154-55 (1967). Ms. Arbeiter did not intend to publicize her identity or her private Internet activities when she hired EmployExpert.com. EmployExpert.com assured Ms. Arbeiter that her information would remain private, and in no way did Ms. Arbeiter intend to subject herself into the public spotlight.

Not only is Ms. Arbeiter's information not specified as newsworthy in section 652D of the Restatement (Second) of Torts, once the additional factors used by courts are applied to the information, there is only one reasonable conclusion—the information is not of legitimate concern to the public. However, in the event this Court finds that reasonable minds could differ concerning its newsworthiness, then the question should be submitted to a jury. *Winstead*, 517 N.W.2d at 879. Both of the outcomes discussed above result in the issue of newsworthiness surviving a summary judgment motion. Since the evidence above raises genuine issues of material fact as to whether Ms. Arbeiter's private facts were disclosed to the public, summary judgment is improper. Accordingly, the decision of the court of appeals should be reversed.

CONCLUSION

Ms. Arbeiter has affirmatively established a reasonable expectation of privacy in her personal information and Internet activities under the risk analysis approach and the zone of privacy test. She engaged in the Internet activities in the privacy of her own home, and retained a reasonable expectation of privacy in doing so. The collection and dissemination of Ms. Arbeiter's personal information by cookie technology is highly offensive to a reasonable person since the intrusion occurred by recording information without her informed consent. Furthermore, the dissemination was highly offensive because of the severe consequences that accompanied the disclosure. Ms. Arbeiter's private Internet activities contained no social value, and were, therefore, of no legitimate concern to the public.

No matter how the information is obtained, the subsequent publicity of a private matter creates liability under section 652D of the Restatement (Second) of Torts. Therefore, even if the court finds that Ms. Arbeiter consented or voluntarily offered the private information to EmployExpert.com, this does not relieve EmployExpert.com from liability for the public disclosure of her private information. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1127 (9th Cir. 1975) (stating that a public disclosure of private facts is actionable even if the information was provided voluntarily by the plaintiff).

The goal of privacy law is to harmonize individual rights with community and social interests. *Barber v. Time, Inc.*, 159 S.W.2d 291, 295-96 (Mo. 1942). One cannot dispute that all individuals give up some privacy by becoming a member of society. However, individuals should not be forced to surrender personal information to ensure the satisfaction of society's interest in the free flow of information. If a person's expectation of privacy becomes obsolete when engaging in business, we can expect to see a decline in the number of Americans willing to interact in the marketplace. If Americans do not feel a sense of privacy and protection, they will become hesitant to utilize the Internet and its endless benefits. With all of the advantages the Internet has provided in this day and age, it would be a tragedy to allow the invasion of users' privacy to deter people from doing business on the Internet. Therefore, if this privacy interest is not recognized, it will deter consumers such as Ms. Arbeiter from using the Internet, and one of the greatest technological advances of our time will become obsolete.

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

Respectfully submitted,

_____

Attorneys for Petitioner

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APPENDIX A

RESTATEMENT (SECOND) OF TORTS § 652B

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

APPENDIX B

RESTATEMENT (SECOND) OF TORTS § 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.

BRIEF FOR RESPONDENT

No. 2000-135

IN THE SUPREME COURT OF THE STATE OF MARSHALL

EDNA ARBEITER,

Petitioner,

v.

EMPLOYEXPERT.COM,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. WHETHER SUMMARY JUDGMENT IN FAVOR OF EMPLOYEXPERT.COM IS APPROPRIATE ON PETITIONER'S CLAIM OF PUBLIC DISCLOSURE OF PRIVATE FACTS WHEN EMPLOYEXPERT.COM DISSEMINATED NON-IDENTIFYING INFORMATION THAT PETITIONER PROVIDED TO EMPLOYEXPERT.COM TO BE A PART OF HER ONLINE RESUME.

II. WHETHER SUMMARY JUDGMENT IN FAVOR OF EMPLOYEXPERT.COM IS APPROPRIATE ON PETITIONER'S CLAIM OF INTRUSION UPON SECLUSION WHEN PETITIONER CONSENTED TO EMPLOYEXPERT.COM USING COOKIE TECHNOLOGY TO GENERATE AN INTERESTS SECTION ON PETITIONER'S RESUME.

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I. OPINIONS AND JUDGMENT BELOW

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

The opinion of the First District Court of Appeals of the State of Marshall affirming the Circuit Court's decision is contained in the Record on Appeal. (R. 1-16).

II. STATEMENT OF JURISDICTION

A formal statement of jurisdiction is omitted pursuant to §1020(2) of the Rules for the Nineteenth Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

III. STATEMENT OF THE CASE

A. SUMMARY OF THE FACTS

EmployExpert.com (EmployExpert) is a commercial Web site that provides users with assistance searching for jobs and preparing for interviews. (R. 3). Users register with the Web site and submit information to create a profile from which an online resume is generated. (R. 3). EmployExpert provides its employment services free of charge and instead receives revenues from banner advertisements that can be seen when visitors access the profile directory. (R. 4).

Users submit their information by entering it on an interactive Web page application. (R. 4). Users are asked for their name, address, telephone number, e-mail, age, sex, current and past employment, and desired position. (R. 4-5). EmployExpert redacts personal identifying information from the resume, such as name, address, and telephone number. (R. 3). Also, within employment histories, other information such as locations are deleted in order to protect users' identities. (R. 3-4). Users receive an ID code number after registering in order to refer to their own information. (R. 4).

The application form contains a section entitled "Privacy Preferences," which provides two statements with pre-checked boxes that can be unchecked by users. (R. 5). The first statement conveys the understanding that banner advertisements appear when visitors access profiles, and that EmployExpert may share information that is non-identifying in connection with the advertisements and is not responsible for practices of other parties. (R. 5). The second statement gives EmployExpert consent to use cookie technology to generate an "Interests" section for users' resumes and also states that EmployExpert is not responsible for any inconsistencies or misunderstandings that occur in this process. (R. 5).

EmployExpert provides access to anyone visiting the Web site after requesting the name, e-mail address, and company name of each visitor before permitting access to the resume profiles. (R. 4). These measures are taken, so that EmployExpert may filter the profiles to prevent employer access to their current employees' profiles. (R. 4).

Edna Arbeiter (Petitioner) decided to use EmployExpert's services in order to find a new job and created a resume profile after completing the entire application. (R. 6). Because she wanted an Interests section on her resume, she did not uncheck either box in the Privacy Preferences section, even though she did not understand cookie technology. (R. 6). After applying, Petitioner received her ID number and a summary of her information. (R. 6, 11-12). None of her personal information was viewable on her profile. (R. 6).

Petitioner's supervisor at her current job, Bill Simpson (Simpson), accessed Petitioner's profile because he did not enter his company name and was using his personal e-mail account. (R. 6). Simpson believed he saw Petitioner's profile because he knew Petitioner's employment and education history. (R. 6). Simpson fired the Petitioner because she was looking for another job. (R. 7). After losing her job, Petitioner accessed her profile and did not recognize the information in the Interests section. (R. 7).

B. SUMMARY OF THE PROCEEDINGS

Petitioner sued EmployExpert in Marshall state court for invasion of privacy for alleged public disclosure of private facts and intrusion upon seclusion. (R. 3). Petitioner argued that her privacy was invaded because she did not provide or consent to the information that appeared in the Interests section. (R. 7). She also alleged that people that know her could identify her based on the employment and education information displayed on her profile. (R. 7). The Madison County Circuit Court granted summary judgment in favor of EmployExpert on both issues. (R. 2).

The First District Court of Appeals of the State of Marshall affirmed the trial court's decision and the grant of summary judgment for EmployExpert. (R. 2). The State of Marshall recognizes both the public disclosure of private facts tort and the intrusion upon seclusion tort set out in the RESTATEMENT (SECOND) OF TORTS §§ 652B, 652D (1977). (R. 8, 9). The Court of Appeals held that Petitioner did not meet the elements required to find liability for public disclosure of private facts. (R. 8). Petitioner knew that the information she provided to EmployExpert would be made public and she relinquished her right to privacy by volunteering her information in a public forum. (R. 8). Also, EmployExpert clearly

disclaimed responsibility for actions resulting to users of its site, therefore Petitioner used the site to her own peril. (R. 9).

The court of appeals also held that use of cookie technology was not an invasion of Petitioner's privacy. (R. 10). The court refused to expand the zone of privacy to include an individual's "net surfing." (R. 9). EmployExpert did not gain unwanted access to Petitioner's information and the employment information obtained was not highly personal, as is financial, sexual, or medical information. (R. 10).

On July 28, 2000, this Court granted Petitioner's leave to appeal the decision of the First District Court of Appeals affirming the Madison County Circuit Court's grant of summary judgment in favor of EmployExpert on both claims of invasion of privacy. (R. 15-16).

SUMMARY OF THE ARGUMENT

I.

On de novo review, this Court should affirm the summary judgment granted by the First District Court of Appeals because EmployExpert did not invade Petitioner's privacy by publicly disclosing private facts. EmployExpert disseminated employment and educational history information that Petitioner provided to the Web site to be used as part of her online resume, to assist her in finding a job.

Petitioner cannot state a cause of action because she cannot prove the information she provided was private, publicized, offensive to a reasonable person, and not of legitimate public concern. The information was not private because Petitioner consented to the information being used, she provided it in a public forum, the information actually displayed was non-identifying, and the actual recipient already knew the displayed information. EmployExpert did not publicize the provided information because resume profiles can only be accessed through a login procedure and the viewing audience is limited to hiring employers.

Further, summary judgment is appropriate because Petitioner's employment and educational information cannot be seen as information that is offensive to a reasonable person. If this information was offensive, Petitioner would not have included it among the information she decided to include in her resume. Finally, the displayed information is of legitimate concern to the hiring public who must know this information in order to hire experienced employees.

II.

EmployExpert did not invade Petitioner's privacy under the tort of intrusion upon seclusion by the use of cookie technology. Petitioner does not have a privacy claim because net surfing is not protected within the

zone of privacy. The zone of privacy was intended to protect the right to make certain decisions and the right to information privacy. Petitioner's interests in net surfing cannot rationally be equated to the right to make fundamental decisions concerning procreation, marriage, and child-rearing. Moreover, Petitioner did not have an information privacy right in her net surfing activity because the information found in the Interests section of her resume revealed non-personal information. Further, net surfing is not a protected activity because it was done in a public forum. Activities performed in the public do not warrant privacy protection.

Even if this Court found that Petitioner has a privacy interest in surfing the Internet, Petitioner's claim must fail because she cannot establish that EmployExpert intruded into her solitude and that the intrusion was highly offensive. There was no intrusion into Petitioner's solitude because EmployExpert did not gain access to Petitioner's net surfing activity by unlawful means and Petitioner was aware that her net surfing activity was being monitored. Further, a reasonable person would not find EmployExpert's activities highly offensive because the Petitioner could have deactivated the cookies at any time.

Additionally, if this Court finds that Petitioner alleged facts sufficient to maintain a valid cause of action for intrusion upon seclusion, summary judgment should be entered against the Petitioner because she consented to have EmployExpert monitor the Internet sites she visited. By failing to uncheck the "I agree" icon, Petitioner agreed to EmployExpert's privacy policy. Furthermore, because Petitioner consented to have EmployExpert monitor her net surfing activity, she had no reasonable expectation of privacy.

Therefore, this Court should affirm the First District Court of Appeals' grant of summary judgment in favor of Respondent and dismiss her invasion of privacy claims.

ARGUMENT

The Supreme Court of the State of Marshall should affirm the decision of the First District Court of Appeals, affirming the grant of summary judgment in favor of EmployExpert by the Madison County Circuit Court. Both the Court of Appeals and the Circuit Court properly found that EmployExpert is not liable for the tort of invasion of privacy.

Pursuant to MARSHALL RULE OF CIVIL PROCEDURE 56(c), a party is entitled to judgment as a matter of law if the evidence demonstrates the absence of any genuine issue of material fact. MARSHALL R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There are no issues of material fact for trial because the Petitioner cannot prove the required elements of either the public disclosure of private facts tort or

the intrusion upon seclusion tort. Accordingly, the First District Court of Appeals' decision should be affirmed.

I. THE COURT OF APPEALS CORRECTLY HELD THAT EMPLOYEXPERT DID NOT INVADE PETITIONER'S PRIVACY BY DISSEMINATING THE INFORMATION SHE PROVIDED TO THE WEB SITE.

EmployExpert did not invade Petitioner's privacy by disseminating the personal employment information the Petitioner provided to the Web site. The State of Marshall recognizes the tort of invasion of privacy by publicly disclosing private facts as set forth in the RESTATEMENT (SECOND) OF TORTS § 652D (1997) ("Restatement"). (R. 8). Petitioner must prove four elements to hold EmployExpert liable for publicly disclosing private facts, which include: the information was private, made public, highly offensive to a reasonable person, and not of legitimate concern to the public. *Id.* Because Petitioner cannot prove all four of the required elements of the tort, there are no facts that create a genuine issue of material fact to overcome summary judgment, and this Court should affirm the decision of the court of appeals.

A. EMPLOYEXPERT DISSEMINATED NON-IDENTIFYING INFORMATION THAT PETITIONER VOLUNTARILY PROVIDED TO THE WEB SITE.

Petitioner cannot prove that EmployExpert disseminated private information because the information was purposely disclosed by the Petitioner over the Internet and all identifying information was redacted. In order to prove liability for public disclosure of private facts, Petitioner must show that the released information actually was private. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

1. *The information was disclosed by Petitioner in a public forum.*

EmployExpert did not invade Petitioner's privacy because it merely disseminated the information Petitioner provided on the Internet. An individual cannot claim that information is private when he or she leaves that information "open to the public eye." *Id.* The right to privacy is not absolute and can be limited by the express or implied consent of the individual. *Midwest Glass Co. v. Stanford Dev. Co.*, 339 N.E.2d 274, 277 (Ill. App. Ct. 1975). Petitioner gave her authorization to release her employment information to prospective employers (R. 6, 9) and therefore, the information cannot be private.

Additionally, Petitioner disclosed her information in a public forum, the Internet, making the employment information a public rather than private fact. Information that is obvious because the disclosure is done

in the open is considered a public fact. *Chisholm v. Foothill Capital Corp.*, 3 F. Supp. 2d 925, 940-41 (N.D. Ill. 1998); *see also Haynes v. Alfred A. Knopf, Inc.*, No. 91-C-8143, 1993 U.S. Dist. LEXIS 2880 at **13, 15 (N.D. Ill. 1993) (finding the fact the plaintiff was a heavy drinker was a public fact because his drinking was open and notorious), *aff'd*, 8 F.3d 1222 (7th Cir. 1993).

In *Chisholm*, the plaintiff claimed invasion of privacy when a fellow employee told potential clients that there was an "overlap" between an employee's marriage and the same employee's relationship with the plaintiff. 3 F. Supp. 2d at 939. The court found that there was no invasion because the plaintiff's relationship and the employee's date of divorce were both public facts. *Id.* at 941. The court reasoned that the relationship became a public fact because the plaintiff told others about the affair, the two appeared in public as a couple, and they moved in together. *Id.* at 940. The divorce was a public fact because it was a matter of public record. *Id.* at 941. Because both facts were open to the public, the plaintiff could not establish that the "overlap" comment was a private fact. *Id.*

Similarly, in the instant case, Petitioner created public facts out of her employment history information by offering it for public viewing on the Internet. The Supreme Court has recognized the Internet as a unique medium that allows unlimited communication and access to vast amounts of information. *See Reno v. ACLU*, 521 U.S. 844, 850 (1997). Petitioner offered her employment history information for the purpose of allowing potential employers to access her personal information on the Internet. Petitioner cannot claim this information was private when she had knowledge that the information would be accessible to viewers of her profile.

2. *The information was non-identifying.*

Petitioner cannot claim that the disseminated information was private because only non-identifying information could be viewed on Petitioner's profile. The right to privacy requires the use of the personality, name, or likeness of the individual claiming the violation. *Branson v. Fawcett Publications*, 124 F. Supp. 429, 432 (E.D. Ill. 1954). In *Branson*, the district court found that a driver's privacy was not invaded when a picture of his automobile after a racing accident was published in a magazine. *Id.* No likeness of the plaintiff was shown and no identifying marks of the car appeared in the picture. *Id.* The court found that there was no invasion because the plaintiff was not specifically identified and it was only through independent knowledge that a person could discover that the picture was of the plaintiff. *Id.*

In the instant case, EmployExpert only disseminated the position sought by Petitioner; Petitioner's objective; the titles, descriptions, and length of time of her past jobs; and her degree. (R. 13) Petitioner was never specifically identified by name, home address, sex, age, or even job locations. It was only through her supervisor's independent knowledge of the specifics of her employment history and education that Simpson could identify the profile as Petitioner's. (R. 6). Even though people that are familiar with Petitioner's employment background could deduce that the disseminated information belongs to her, this does not transform the information from public to private. Ultimately, the only information EmployExpert is responsible for disseminating is the non-identifying information the Petitioner gave consent to have displayed to potential employers.

3. *The information disseminated was known by the actual receiver.*

EmployExpert did not invade Petitioner's privacy because it disseminated information that was already known by the actual receiver, Simpson. Facts are not considered to be private if they are disclosed to people who already know them. *Nobles v. Cartwright*, 659 N.E.2d 1064, 1074 n.16 (Ind. Ct. App. 1995) (citing RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a, b (1977)); *see also Ledbetter v. Ross*, 725 N.E.2d 120, 123 (Ind. Ct. App. 2000).

In *Ledbetter*, the plaintiff failed to state a cause of action for public disclosure of private facts because she only asserted that the facts were disclosed to her. 725 N.E.2d at 123. The plaintiff argued that a telephone call she received from a social worker invaded her privacy when the caller disclosed to the plaintiff her own medical information. *Id.* at 122. The court held there was no liability because the plaintiff already knew the information the caller gave to her. *Id.* at 123.

Similarly, in the instant case, the information about Petitioner that Simpson accessed through EmployExpert was already known to him. (R. 6). Otherwise, he would not have been able to deduce that the profile he viewed belonged to Petitioner. When EmployExpert disseminated information to Simpson that he already knew, there was only disclosure of public facts. Therefore, Petitioner cannot reasonably assert that her employment and educational information that was viewable on her profile was private.

B. EMPLOYEXPERT DID NOT GIVE PUBLICITY TO PETITIONER'S INFORMATION BECAUSE PROFILE ACCESS WAS LIMITED TO SPECIFIC USERS.

Even if this Court finds that the personal information disseminated by EmployExpert was private, EmployExpert cannot be liable for pub-

licly disclosing those private facts because profile access was limited to specific users. To prove liability, the Petitioner must show that EmployExpert communicated a private matter 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." RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (1977); *see also Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990).

In *Miller*, the Illinois court recognized the "special relationship" exception to the disclosure to the public at large requirement. 560 N.E.2d at 903. The policy behind the exception is that when a certain relationship exists between the plaintiff and the smaller group, the disclosure of private information to the group can be just as devastating as when it is disclosed to the larger public. *Id.* Fellow employees, family, club members, and church members have been considered to be groups that permit the special relationship exception to apply. *Id.* However, the Illinois courts have found that the exception does not apply when the recipient of the information has a "natural and proper interest" in the information. *Roehrborn v. Lambert*, 660 N.E.2d 180, 182 (Ill. App. Ct. 1995) (quoting *Midwest*, 339 N.E.2d at 278); *see also Doe v. TCF Bank Illinois, FSB*, 707 N.E.2d 220, 222 (Ill. App. Ct. 1999).

In the instant case, Petitioner's information was only disseminated to a limited group of people because the profiles could only be accessed through a login procedure. (R. 4). Petitioner cannot claim that her employment information was publicized to the extent that the information became public knowledge. Petitioner cannot even reasonably claim that she has a special relationship with the intended recipients of her information because the profiles were accessed by potential employers, people Petitioner doesn't even know.

Petitioner's actual claim is that her privacy was invaded because EmployExpert disseminated her employment information to her current supervisor. Although Petitioner can receive the special relationship exception based on the disclosure of private matters to a person's co-workers, Simpson has a proper interest in her employment history. Any employer has the required natural interest in the qualifications of his or her employees to be permitted recipients of even private information.

C. INFORMATION VIEWED ON THE WEB SITE IS NOT HIGHLY OFFENSIVE TO A REASONABLE PERSON.

To prove liability, Petitioner must also show that the disseminated information was highly offensive to a reasonable person. RESTATEMENT (SECOND) OF TORTS § 652D (1977). There is only an invasion of privacy when publicity is given to information that a reasonable person would be justified in feeling seriously aggrieved by the publicity. *Id.* at cmt. c.

Whether the dissemination rises to the level of highly offensive is a question of law for the court to decide, taking into consideration "the context, conduct, and circumstances surrounding the" disclosure. *See Chisholm*, 3 F. Supp. at 941 (quoting *Green v. Chi. Tribune Co.*, 675 N.E.2d 249, 254 (Ill. App. Ct. 1996)).

In the instant case, the context, conduct, and circumstances surrounding the disclosure all support the conclusion that the dissemination of Petitioner's employment history is not highly offensive. The context in which the information was disclosed was that of a prospective hiring situation, which is the reason Petitioner provided the information to EmployExpert. EmployExpert complied with its own privacy policies and redacted all identifying information. (R. 3, 13). Petitioner is only "offended" because Simpson figured out that she was looking for another job. If Petitioner believes that any of her employment history or college information is too personal to be released, she should not have included it in her resume. Once Petitioner decided that each piece of listed information was relevant and could help her find new employment, she had no basis to be "seriously aggrieved" when employers actually viewed this information.

D. THE INFORMATION AVAILABLE ON THE WEB SITE IS OF LEGITIMATE CONCERN TO THE HIRING PUBLIC.

Petitioner must prove that the disseminated information is not of legitimate public concern. "[T]he public has a proper interest in learning about many matters." RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977). The Supreme Court has recognized that individuals have an interest in avoiding the disclosure of personal matters. *Whalen v. Roe*, 429 U.S. 589, 599 (1977). However, the public's interest in disclosure is often balanced against an individual's privacy interest. *See Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576, 580 (5th Cir. 1987).

In *Klein*, a teacher claimed her privacy was invaded when the school district was required to disclose her college transcript to fulfill an open records act request. *Id.* at 577 (citing Texas Open Records Act, TEX. REV. CIV. STAT. art. 6252-17a (Vernon Supp. 1986)). The court found that there was no invasion because the balancing favored the public having full and complete information about school teachers, especially given the lack of competency prevalent in the state at the time. *Id.* at 581. Even though the statute included a provision that exempted from disclosure any personnel files that would constitute an unwarranted invasion of privacy, the court found that the college transcript did not rise to that level. *Id.*

Similarly, in the instant case, the hiring public's interest is higher than an individual's privacy interest in employment history information.

An employer needs to be adequately informed of a prospective employee's experience and skills before even considering whether or not to hire that individual. Petitioner included her employment and educational history in order to convey to hiring employers her extensive sales management experience. (R. 11-13). If Petitioner did not believe that employers would be interested in employment or educational information, she would not have included it as a part of her online resume. Therefore, EmployExpert did not violate Petitioner's privacy because it disseminated information of legitimate concern to the employing public.

EmployExpert clearly did not invade Petitioner's right to privacy. EmployExpert merely disseminated Petitioner's non-identifying information that she provided on the Internet by making it available to employers searching for employees. Furthermore, EmployExpert limited the profile viewing audience by using a login policy in efforts to protect user privacy. The viewed information was not highly offensive to a reasonable person because if the employment and educational information that Petitioner knew would be available to an Internet audience was so private, she would not have included it on her resume. Finally, employment and educational histories are of legitimate public concern because employers must know this information before they are able to hire qualified and competent employees.

Summary judgment is appropriate because as a matter of law, Petitioner is unable to prove the elements required to show public disclosure of private facts. Therefore, this Court should affirm the grant of summary judgment affirmed by the First District Court of Appeals in favor of EmployExpert.

II. THE COURT OF APPEALS CORRECTLY HELD THAT EMPLOYEXPERT DID NOT INVADE PETITIONER'S PRIVACY BY USING COOKIE TECHNOLOGY TO TRACK HER NET SURFING ACTIVITY.

This Court should find that EmployExpert did not invade Petitioner's privacy by using cookie technology[1] to track her net surfing activity[2] on the Internet. The State of Marshall recognizes the tort of invasion of privacy by intrusion upon seclusion as set forth in the Re-

1. EmployExpert used cookie technology (cookies) to monitor the Internet sites that Petitioner visited. Cookies are small pieces of a text file placed on the user's computer hard drive. *See Internet Cookies*, Charles Kessler & Assoc., *at* http://net-market.com/cookie.htm (last modified Mar. 18, 1997). A Web site server may use cookies to track what Web sites the user visited and how often the Web sites were visited. *See The Unofficial Cookie FAQ*, Cookie Central, *at* http://www.Cookiescentral.com/faq (last visited Sept. 10, 2000).

2. Net surfing refers to a user's navigation from one site to the next on the Internet by either clicking a computer mouse on a sites' links or typing in the address of the known site. *See Reno v. ACLU*, 521 U.S. 844, 852 (1997).

statement § 652B. (R. 9). To hold EmployExpert liable for intrusion upon seclusion, Petitioner must prove that she has a privacy interest in surfing the Internet, there was an intrusion into her seclusion or solitude, and the intrusion was highly offensive to a reasonable person. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977). Because Petitioner cannot prove all the elements of the intrusion upon seclusion tort and it is highly unlikely that Petitioner will be able to produce additional facts that would create a genuine issue of material fact for trial, the Court should affirm the decision of the Court of Appeals by holding that EmployExpert did not invade Petitioner's privacy.

A. EMPLOYEXPERT DID NOT INVADE PETITIONER'S PRIVACY BECAUSE SHE DOES NOT HAVE A PRIVACY INTEREST IN HER NET SURFING ACTIVITY.

Petitioner cannot prove that EmployExpert invaded her privacy under the tort of intrusion upon seclusion by tracking the sites she visited on the Internet since Petitioner does not have a privacy interest in her net surfing activity. There is no law or regulation that recognizes net surfing activity as a private interest that warrants protection. *See generally* Debra A. Valentine, *Privacy on the Internet: The Evolving Legal Landscape*, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 401, 404–405 (2000). To have a valid cause of action, Petitioner must prove that her net surfing activity was private. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977).

1. *Petitioner's net surfing activity is not included in the protected zone of privacy established by the Supreme Court.*

EmployExpert did not invade Petitioner's privacy because Petitioner's net surfing activity does not fall within the zone of privacy. The Supreme Court has interpreted the Bill of Rights to protect the "right of personal privacy, or [ ] guarantee [that] certain areas or zones of privacy [do] exist under the Constitution." *Roe v. Wade*, 410 U.S. 113, 152 (1973). The zone of privacy protects two separate personal interests: (1) the right to make fundamental decisions, and (2) the right to avoid disclosure of personal matters. *See* Valentine, *supra*, at 403–04. Petitioner's net surfing activity does not fall into either of the two personal interest categories protected within the zone of privacy. Therefore, this Court should affirm the court of appeal's order granting summary judgment.

In a string of cases, the Supreme Court recognized that an individual has the right to make certain fundamental decisions without intrusion. For example, the Supreme Court recognized that an individual has a privacy interest in making decisions regarding procreation. *See Roe*,

410 U.S. at 153; *see also Eisenstadt v. Baird*, 405 U.S. 438, 444 (1972); *see also Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). Additionally, the right to decide who to marry is also a fundamental decision. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967). Furthermore, individuals have privacy interests in educating and rearing their children. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–535 (1925).

Unlike the category of interests our forefathers sought to protect in the Bill of Rights and the Constitution, Petitioner's net surfing activity is not a fundamental interest that is at the core of our existence as independent beings. As noted by the Supreme Court, the zone of privacy was intended to safeguard fundamental constitutional interests such as marriage, procreation, contraception, and child-rearing. In fact, the Supreme Court noted that only rights or interests that are "deeply rooted in this Nation's history and tradition" should be protected in the zone of privacy. *See Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). Petitioner's net surfing activity is not deeply rooted in American tradition. Petitioner cannot reasonably equate her right to surf the net to an individual's right to make life altering decisions.

In addition to protecting fundamental constitutional rights, the zone of privacy also protects private information from being disclosed. *See Whalen*, 429 U.S. at 602-03. In *Whalen*, the Supreme Court first addressed the right of information privacy which allows individuals to keep certain matters private because of the stigma and harassment that would come with public knowledge. *Id.* Lower courts have adopted the Supreme Court's holding. For example, in *Tarrant County Hosp. Dist. v. Hughes*, the court noted that the positive HIV test result of a blood donor should be kept private so the donor could avoid public stigma. 734 S.W.2d 675, 679 (Tex. Ct. App. 1987).

Even though the Supreme Court extended the zone of privacy to include the right of information privacy, Petitioner's net surfing activity still would not be protected since it revealed non-personal information. Although Simpson was able to identify her, he did not recognize her profile solely on the information found in the Interests section. The Supreme Court intended the right of information privacy to protect humiliating information from being disclosed to the public. *See Whalen*, 429 U.S. at 602-03. The information revealed in the Interests section of Petitioner's electronic resume would not cause her any humiliation or embarrassment. (R. app. B). Therefore, the zone of privacy does not extend to cover Petitioner's net surfing activity.

Petitioner fails to realize that some activities we perform have no privacy rights attached to them. For instance, by tracking a person's credit card purchases, one can determine not only the person's buying habits, but also their name, address, and telephone number. This infor-

mation can be sold to companies who target credit card owners with catalogs and other advertisements that can be lawfully sold. *See Dwyer v. Am. Express*, 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995). In contrast, EmployExpert only collected non-personal information that could not solely identify Petitioner. (R. app. B). EmployExpert only disclosed the type of sites Petitioner visited but did not disclose what Petitioner did on those sites. If courts have found that an individual has no privacy right in their name and address, then this Court should find that Petitioner has no privacy rights in the information generated from net surfing because it is even less identifying than names and addresses.

Petitioner is asking this Court to expand the zone of privacy. The Supreme Court refused to extend the zone of privacy to encompass the right to commit suicide. If the Supreme Court failed to extend the zone of privacy to include such a personal event as suicide, then this Court should not extend the zone of privacy to encompass the non-personal activity of net surfing. *See Washington*, 521 U.S. at 728. A contrary holding would abrogate the purpose behind the zone of privacy doctrine; which is to protect fundamental and personal rights.

2. *Petitioner's net surfing activity is not private because the activity was performed in a public forum.*

Petitioner's net surfing activity is not private because it was performed on the Internet, which is open to the public. The Internet has emerged as the "information superhighway" of the future and it is used as a forum to exchange ideas and thoughts. *See Morantz, Inc. v. Hang & Shine Ultrasonics, Inc.*, 79 F. Supp. 2d 537, 539 (E.D. Pa. 1999). On the Internet, "any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox." *Reno*, 521 U.S. at 870. As with any traditional public forum, an individual has no privacy interests in activities conducted in public. *See Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 770–71 (N.Y. 1970).

Because the Internet is a public forum, Petitioner's net surfing activity is not private. Petitioner's movement on the Internet is analogous to our movements in life. Each day we leave behind a trail of where we've been. A casual observer can identify who we speak to, what newspaper we read, and what books we buy because these activities are done in public. *See generally* Daniel P. Dern, *Footprints and Fingerprints in Cyberspace: The Trail You Leave Behind*, Online Inc., *at* http://www.onlineinc.com/onlinemag/JulOL97/Dern7.html (last visited Sept. 10, 2000). There is no protection for these activities because they can be observed by the general public. *See Nader*, 255 N.E.2d at 770–71.

Interestingly, "there [is no] liability for observing [a person or] taking his photograph while he is walking on the public highway." RESTATE-

MENT (SECOND) OF TORTS § 652B cmt. c (1977). Likewise, the Internet is the public highway of the future. Therefore, EmployExpert should not be liable for intrusion upon seclusion since it only observed the path Petitioner followed while on the Internet. These observations are similar to the general observations an individual would make in public.

B. EMPLOYEXPERT DID NOT INTRUDE UPON PETITIONER'S SECLUSION BECAUSE EMPLOYEXPERT DID NOT ILLEGALLY OR SECRETLY MONITOR PETITIONER'S NET SURFING ACTIVITY.

Even if this Court finds that Petitioner has a privacy interest in her net surfing activity, EmployExpert cannot be liable for intrusion upon seclusion because there was no intrusion into Petitioner's solitude. The intrusion element of this tort is satisfied when the actor "believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989). EmployExpert did not employ illegal or questionable means to monitor Petitioner's net surfing activity. In fact, Petitioner voluntarily agreed to have EmployExpert track her Internet usage. (R. app. A). To assert a valid claim for intrusion upon seclusion, Petitioner must establish that EmployExpert intentionally used cookie technology for the purpose of interfering with her solitude. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977). Petitioner's claim should fail because EmployExpert used cookie technology, with the Petitioner's permission, to gain limited information about Petitioner's use of the Internet. (R. app. B).

An intrusive action must be conducted in a deceptive or secretive manner. *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. b (1977). A valid claim for intrusion upon seclusion existed when an individual used a forged court order to gain access to another's bank records. *Id.* Similarly, the Tenth Circuit Court of Appeals stated that the defendant's intrusion must go beyond the limits of decency for liability to accrue to the defendant. *See Mares v. Conagra Poultry Co.*, 971 F.2d 492, 496–97 (10th Cir. 1992). Likewise, a Missouri appellate court found that a valid intrusion upon seclusion claim existed because the defendant obtained plaintiff's telephone bill by deception. *See Corcoran v. Southwestern Bell Tel. Co.*, 572 S.W.2d 212, 215 (Mo. Ct. App. 1978). The defendant opened a sealed enveloped addressed to the plaintiff and read the contents. *Id.* The court determined that the evidence was sufficient for the jury to find that the defendant intruded into plaintiff's solitude. *Id.*

Additionally, an intrusion claim is valid when the defendant obtained information illegally. *See Estate of Berthiaume v. Pratt*, 365 A.2d 792, 796 (Me. 1976). In *Berthiaume*, the defendant entered the plaintiff's hospital room and took the patient's photograph over his objections. *Id.*

at 793. The court reasoned that because the defendant did not lawfully enter the plaintiff's hospital room, a jury could conclude that there was an intrusion. *Id.* At 796.

Moreover, plaintiffs have a valid invasion of privacy claim when a defendant secretly intrudes into the plaintiffs' solitude. *See Hester v. Barnett*, 723 S.W.2d 544, 562 (Mo. Ct. App. 1987). A pastor gained admittance into plaintiffs' home under the guise of counseling them. *Id.* He later disclosed confidential information obtained from plaintiffs during those counseling sessions. *Id.* at 563. The court concluded that there were sufficient facts in the pleadings for a jury to decide that defendant intruded into plaintiffs' solitude. *Id.* At 563–64; *see also Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1964)(holding that a landlord intruded into his tenants' privacy by illegally installing and concealing listening and recording devices in his tenants' bedroom).

On the other hand, courts have granted motions to dismiss in actions were there were no facts sufficient for the jury to find that there was an intrusion into plaintiff's solitude. *See Dwyer*, 652 N.E.2d at 1356. In *Dwyer*, cardholders brought an invasion of privacy claim against American Express because it categorized each card holder's spending behavior and then rented this information along with the card holder's name and address to merchants. *Id.* at 1353. The merchants then targeted advertisements to the card holders. *Id.* The court held that there was not an intrusion into the card holder's privacy because the plaintiff voluntarily used the cards and American Express rented the information it compiled from its own records. *Id.* at 1356; *see also Shibley v. Times, Inc.*, 341 N.E.2d 337, 339–40 (Ohio Ct. App. 1975) (holding that a magazine publisher does not violate a subscriber's right of privacy by selling and renting a subscriber's name and address to direct mail advertisers since the publisher gathered the information from its records).

In the instant case, EmployExpert did not intentionally intrude into Petitioner's solitude. As opposed to the actions of the defendants in *Corcoran*, *Berthiaume*, and *Hester*, EmployExpert did not use secret or illegal actions to gain information from Petitioner. EmployExpert disclosed that cookie technology would be used to collect information to create the Interests section of her electronic resume and Petitioner voluntarily submitted her resume to EmployExpert. Additionally, EmployExpert did not have deceptive motives to use cookie technology because the information was not going to be used for their benefit.

C. EMPLOYEXPERT'S USE OF COOKIE TECHNOLOGY WAS NOT HIGHLY OFFENSIVE BECAUSE PETITIONER WAS AWARE THAT COOKIE TECHNOLOGY WAS BEING USED AND SHE COULD HAVE DEACTIVATED THE COOKIE TECHNOLOGY AT ANY TIME.

Petitioner must also prove that EmployExpert's use of Internet technology to gather the information found in the Interests section of her electronic resume was highly offensive to a reasonable person. In determining the offensiveness of the intrusion, this Court should consider the degree of the intrusion, and the context, conduct, and circumstances surrounding the intrusion. *Miller v. NBC*, 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986); *see also Hill v. NCAA*, 865 P.2d 633, 648 (Cal. 1994). Additionally, an objective standard is used to determine whether the means of intrusion would be highly offensive to a reasonable person. *See Frye v. IBP, Inc.*, 15 F. Supp. 2d 1032, 1042 (D. Kan. 1998).

"[S]ome intrusions into one's private sphere are inevitable . . . in an industrial and densely populated society [and] the law does not seek to proscribe [these intrusions] even if it were possible to do so." *Nader*, 255 N.E.2d at 768. Plaintiff must provide sufficient evidence to show that as a result of the intrusion, a reasonable person would be outraged and humiliated or experience mental suffering as a result of the intrusion. An objective standard is used to determine whether an intrusion is highly offensive. *NBC*, 232 Cal. Rptr. at 680. In *NBC*, the court found that it was possible for a jury to conclude that taking footage of a dying man "at a time of vulnerability and confusion [was] 'highly offensive' conduct." *Id.* At 679.

The court's holding in *NBC* is in accordance with the Restatement. RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (1977). Comment d states that the tort of intrusion upon seclusion is committed when the intrusion was so substantial as to offend a reasonable person. *Id.* To be highly offensive behavior, a person's actions must be more than an inconvenient nuisance. *See id.*

In the instant case, a reasonable person considering the content of the information revealed in the Interests section of Petitioner's resume and the circumstances surrounding EmployExpert's obtaining the information would not find EmployExpert's actions highly offensive. Petitioner did not allege that she suffered emotional distress or anguish over the display of the information. Moreover, if Petitioner was outraged by the use of cookie technology, then at any time, she could have stopped EmployExpert from using cookies to analyze her net surfing activity by changing her privacy preference. (R. app. A).

Additionally, Restatement § 652B seeks to prevent relief for the allegations that Petitioner asserts. The Restatement uses an objective stan-

dard to determine if the intrusion was highly offensive. *Id.* This Court should not grant relief to Petitioner because she has a sensitive disposition and is easily offended. A reasonable person would not be offended by the use of cookie technology if they are aware of its use and could deactivate the cookies at anytime.

D. PETITIONER CANNOT MAINTAIN A VALID CLAIM FOR INTRUSION UPON SECLUSION BECAUSE PETITIONER CONSENTED TO EMPLOYEXPERT'S USE OF COOKIE TECHNOLOGY TO MONITOR THE SITES SHE VISITED.

Even if this Court finds that Petitioner alleged facts sufficient for a valid invasion of privacy claim under the tort of intrusion upon seclusion, summary judgment should be entered against the Petitioner because she consented to EmployExpert's monitoring of her net surfing activity. Because intrusion upon seclusion is an intentional tort, Petitioner's consent is an absolute defense. *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 756 (N.D. Cal. 1993). Petitioner consented by clicking onto an icon marked "I agree" to allow EmployExpert to use cookie technology to add information to the Interests section of her resume. (R. app. A). Additionally, by consenting to have EmployExpert monitor her net surfing activity, Petitioner had no reasonable expectation of privacy.

1. *Petitioner consented to EmployExpert monitoring her net surfing activity.*

Courts have upheld Internet agreements entered into by clicking the "I agree" button next to the relevant terms. *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528, 531 (N.J. Super. Ct. App. Div. 1999). A perspective subscriber had a valid membership agreement with Microsoft Network and the agreement was enforceable because the subscriber clicked "I agree" next to the terms of the membership agreement. *Id.* at 530; *see also CompuServ, Inc. v. Patterson*, 89 F.3d 1257, 1260, 65 (6th Cir. 1996)(holding that a software distributor assented to the terms of the agreement by typing "I agree" at various points of the electronic contract); *Hotmail Corp. v. Van$ Money Pie, Inc.*, No. C98-20064, 1998 U.S. Dist. LEXIS 10729 *17 (N.D. Cal. Apr. 16, 1998)(holding that Hotmail could enforce an agreement that curtailed spam e-mailing because the user clicked his acceptance of the terms). Likewise, this Court should hold that there was a valid agreement between Petitioner and EmployExpert because Petitioner consented to the use of cookie technology by leaving both boxes checked next to the "I agree" icon.

Additionally, this Court should not waive Petitioner's consent on the basis of Petitioner's assertion that she did not understand the term cookie technology. Petitioner is a sophisticated Internet user and should

not be able to plead ignorance of her knowledge when it is convenient for her to do so. Petitioner spends several hours per day navigating her way through the Internet to find information about the weather, sports, and other topics of interest. (R. app. B). With a few mouse clicks, Petitioner could easily have determined what cookies are and what information they collect. *See generally Cookie*, Webopedia, at <http://webopedia.internet.com/TERM/c/cookie.html> (last modified Mar. 18, 1997) (providing links to various information sites on cookies); *see also Internet Cookies*, Charles Kessler & Assoc., *at* http://net-market.com/cookie.htm (last visited Sept. 6, 2000).

There are several cases that stand for the proposition that a plaintiff cannot assert a valid claim for the tort of intrusion upon seclusion if consent was given to perform the intrusive activity. *See Doe v. Dyer-Goode*, 566 A.2d 889, 891–92 (Pa. 1989); *see also Curtright v. Ray*, No. 90-2034-V, 1991 U.S. Dist. LEXIS 12429, at *19-20 (D. Kan. 1991). Similarly, this Court should affirm the grant of summary judgment in favor of EmployExpert because the Petitioner consented to the use of cookie technology.

2. *Petitioner had no reasonable expectation of privacy.*

Since Petitioner consented to have her net surfing activity monitored, Petitioner had no reasonable expectation of privacy. "[E]ven extraordinary offensive conduct may not be redressed via the tort of intrusion upon seclusion unless a plaintiff demonstrates a legitimate expectation of privacy." *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 878 (8th Cir. 2000) (citing *Moffett v. Gene B. Glick Co.*, 621 F. Supp. 244 (N.D. Ind. 1985)). The Fourth Circuit Court of Appeals dismissed an employee's claim for intrusion upon seclusion because he had no reasonable expectation of privacy since he was aware that his employer had a policy of monitoring the Internet sites he visited. *United States v. Simons*, 206 F.3d 392, 399 (4th Cir. 2000). Moreover, a federal district court held that the plaintiff did not have a reasonable expectation of privacy because he was aware that the conversation was being recorded and other persons could overhear his conversation. *Kemp v. Block*, 607 F. Supp. 1262, 1264 (D. Nev. 1985). Similarly this Court should find that Petitioner had no reasonable expectation of privacy because Petitioner was aware that her net surfing activity was being monitored by EmployExpert and consented to the monitoring.

Petitioner cannot prove all the elements of the intrusion upon seclusion tort and it is highly unlikely that Petitioner will be able to produce additional facts to create a genuine issue of material fact for trial. Petitioner has no privacy interest in her net surfing activity because net surfing is not protected within the zone of privacy and the activity was

performed in a forum that is open to the public. Even if this Court finds that Petitioner alleged sufficient facts to maintain a valid intrusion upon seclusion action, EmployExpert has a complete defense to Petitioner's claim because she consented to the monitoring of her surfing activity. Therefore, this Court should affirm the court of appeals by holding that EmployExpert did not invade Petitioner's privacy.

CONCLUSION

For the foregoing reasons, Respondent, EmployExpert.com, respectfully requests that this Court affirm the First District Court of Appeals' grant of summary judgment on both invasion of privacy issues.

Respectfully submitted,

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Counsel for Respondent

APPENDICES

APPENDIX A [photocopy of record pages 11-12]

APPENDIX B [photocopy of record pages 13]

APPENDIX C [photocopy of record pages 14]

APPENDIX D

RESTATEMENT (SECOND) TORTS § 652D (1977)

PUBLICITY GIVEN TO PRIVATE LIFE

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.

Comment:

a. *Publicity.* The form of invasion of the right of privacy covered in this Section depends upon publicity given to the private life of the individual. "Publicity," as it is used in this Section, differs from "publication," as that term is used in § 577 in connection with liability for defamation. "Publication," in that sense, is a word of art, which includes any communication by the defendant to a third person. "Publicity," on the other hand, 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 difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public.

Thus it is not an invasion of the right of privacy, within the rule stated in this Section, to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication.

b. *Private life.* The rule stated in this Section applies only to publicity given to matters concerning the private, as distinguished from the public, life of the individual. There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public. Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth, the fact of his marriage, his military record, the fact that he is admitted to the practice of medicine or is licensed to drive a taxicab, or the pleadings that he has filed in a lawsuit. On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so.

Similarly, there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus, he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant's newspaper. Nor is his privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public. On the other hand, when a photograph is taken without the plaintiff's consent in a private place, or one already made is stolen from his home, the plaintiff's appearance that is made public when the picture appears in a newspaper is still a private matter, and his privacy is invaded.

Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget. When these intimate details of his life are spread before the public gaze in a manner highly offensive to the ordinary reasonable man, there is an actionable invasion of his privacy, unless the matter is one of legitimate public interest.

c. *Highly offensive publicity.* The rule stated in this Section gives protection only against unreasonable publicity of a kind highly offensive to the ordinary reasonable man. The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens. Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. Thus he must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken his ankle, is not sufficient to give him a cause of action under the rule stated in this Section. It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises.

d. *Matter of legitimate public concern.* When the matter to which publicity is given is true, it is not enough that the publicity would be highly offensive to a reasonable person. The common law has long recog-

nized that the public has a proper interest in learning about many matters. When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.

This has now become a rule not just of the common law of torts, but of the Federal Constitution as well. In the case of *Cox Broadcasting Co. v. Cohn* (1975) 420 U.S. 469, the Supreme Court indicated that an action for invasion of privacy cannot be maintained when the subject-matter of the publicity is a matter of "legitimate concern to the public." The Court held specifically that the "States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection." Other language indicates that this position applies to public records in general.

It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech. To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course control. In the absence of additional holdings of the Supreme Court, the succeeding Comments are based on decisions at common law.

APPENDIX E

RESTATEMENT (SECOND) TORTS § 652B (1977)

INTRUSION UPON SECLUSION

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

Comment:

a. The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

b. The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home. It may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires. It may be by some other form of investigation or examination into his private concerns, as by opening his private and personal mail, searching his safe or his wallet, examining his private bank account, or compelling him by a forged court order to permit an inspection of his personal documents. The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph or information outlined.

Illustrations:

1. A, a woman, is sick in a hospital with a rare disease that arouses public curiosity. B, a newspaper reporter, calls her on the telephone and asks for an interview, but she refuses to see him. B then goes to the hospital, enters A's room and over her objection takes her photograph. B has invaded A's privacy.

2. A, a private detective seeking evidence for use in a lawsuit, rents a room in a house adjoining B's residence, and for two weeks looks into the windows of B's upstairs bedroom through a telescope taking intimate pictures with a telescopic lens. A has invaded B's privacy.

3. The same facts as in Illustration 2, except that A taps B's telephone wires and installs a recording device to make a record of B's conversations. A has invaded B's privacy.

4. A is seeking evidence for use in a civil action he is bringing against B. He goes to the bank in which B has his personal account, exhibits a forged court order, and demands to be allowed to examine the

bank's records of the account. The bank submits to the order and permits him to do so. A has invaded B's privacy.

5. A, a professional photographer, seeking to promote his business, telephones B, a lady of social prominence, every day for a month, insisting that she come to his studio and be photographed. The calls are made at meal times, late at night and at other inconvenient times, and A ignores B's requests to desist. A has invaded B's privacy.

c. The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.

Illustrations:

6. A is drunk on the public street. B takes his photograph in that condition. B has not invaded A's privacy.

7. A, a young woman, attends a "Fun House," a public place of amusement where various tricks are played upon visitors. While she is there a concealed jet of compressed air blows her skirts over her head, and reveals her underwear. B takes a photograph of her in that position. B has invaded A's privacy.

d. There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object. Thus there is no liability for knocking at the plaintiff's door, or calling him to the telephone on one occasion or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded.

Illustration:

8. A, a landlord, calls upon B, his tenant, at nine o'clock on Sunday morning, to demand payment of the rent, although he knows that B is not ready to pay it and that B objects to such a visit on Sunday. B is seriously annoyed. This is not an invasion of B's privacy.