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IN THE SUPREME COURT OF THE STATE OF MARSHALL

PHILLIP NEVILSON Petitioner, v. MARSHOOGLE INC., a Marshall Corporation, Respondent.	No. 09-0654

I. INTRODUCTION

Petitioner, Phillip Nevilson, appeals to the Marshall Supreme Court from a decision affirming the granting of summary judgment in favor of Respondent, Marshoogle, Inc., on his claims of intrusion upon seclusion, publication of private facts, and tortious interference with business expectancy claims.

The issues in this case concern whether an individual can state a claim for invasion of privacy against an Internet search engine provider where liability is based on taking a photograph of an individual in his home and the publication of such photograph on a website. The final issue concerns whether the act of publication of the photograph in question constituted a tortious interference with a business expectancy.

A. Procedural History

Phillip Nevilson's five count complaint, filed in August 2008, in the District Court of Marshall, alleged defamation, appropriation of name and likeness, intrusion upon seclusion, publicity given to private life, and tortious interference with a business expectancy. Marshoogle moved to dismiss all counts for failure to state a claim upon which relief could be granted, pursuant to Marshall R. Civ. P. 12(b)(6). The circuit court granted Marshoogle's motion as to the defamation and appropriation of name and likeness counts but denied it as to the three remaining counts.

Following discovery, Marshoogle moved for summary judgment on the three remaining counts. The circuit court granted the motion on all three counts.

Nevilson appealed to the Fourth Circuit Court of Appeals for the State of Marshall, and sought review of the trial court's entry of summary judgment. The Fourth Circuit Court affirmed the circuit court's findings in their entirety.

Nevilson petitioned for leave to appeal to the Supreme Court of the State of Marshall, which granted leave to appeal.

B. Background Information

The parties stipulate that the court of appeals decision shall serve as the record on appeal. The court of appeals decision sets forth the following facts:

Marshoogle, Inc. is a corporation based and operating in the State of Marshall. Marshoogle runs a website that provides free Internet search services to users including citizens of Marshall. The Marshoogle search function includes stock quotes, sports scores, translations, calculations, maps, definitions, and a wide variety of other information. Marshoogle generates most of its revenue from advertisement sales and other media-related services. Throughout the years, Marshoogle has expanded and launched several new features, the most successful of which are an e-mail feature; Marshoogle News including a highly popular "*SportsBlog*" that includes end-user generated content, as well as posts from Marshoogle News' own staff reporters known as "News Beagles;" and "*MarshMaps*" a service that provides online mapping and driving directions. In June 2007, Marshoogle launched yet another new feature for its highly successful mapping and driving directions, the Marshoogle Avenue Perspective ("M.A.P"). Through M.A.P., users can type an address on the "*MarshMaps*" website and view a map of the location. When users click on the M.A.P. link, they can obtain a 360 degree panoramic view of the entire area surrounding the address.

Marshoogle obtains the images that form the panoramic views through the use of M.A.P. mobiles, which are cars with cameras attached on top of adjustable five-foot poles, similar to the one illustrated in Appendix I. There are nine cameras attached to each pole to capture the 360 degree views. Marshoogle employees drive the M.A.P. mobiles down streets in Marshall, and each camera automatically takes digital pictures as the M.A.P. mobile moves along. Once the M.A.P. mobile has completed a route, the individual images are run through a computer program that connects all of the separate images together to create one continuous amalgamated image. Then, the amalgamated image is incorporated into Marshoogle's M.A.P. feature and available on Marshoogle's website. When a user views these combined images through M.A.P., it appears as though the user is driving down the street. Using a keyboard or mouse, the user may adjust the horizontal and vertical viewing direc-

tion to see the entire area. M.A.P. users can also zoom in on each photograph to obtain a close-up view of a building, object, or person captured by Marshoogle's cameras. When it was first launched, M.A.P. covered only central streets in Marshall City, but now it provides 360 degree imagery of most streets in the State of Marshall.

The images available on M.A.P. often show cars, people, and anything else present when the M.A.P. mobiles captured the images. The creation of the panoramic amalgamated images is an entirely automated process. When the M.A.P. feature was first launched, neither the original images, nor the combined panoramic images were in any way edited or altered before being made available to M.A.P. users. However, after receiving complaints about Marshoogle's M.A.P. mobiles taking pictures of houses, businesses, and individuals, Marshoogle decided to modify its practice by introducing blurring technology. This technology automatically blurs the faces of the individuals and car license plates appearing in any of the digital images, prior to these pictures being incorporated into the M.A.P. feature. At the same time, Marshoogle introduced an online process for users to request that a particular photograph be removed from M.A.P. As stated in a press release issued by Marshoogle in January 2008:

> Marshoogle is committed to ensuring the satisfaction of our users. Therefore, we have implemented blurring technology and operational controls including image removal. By completing our online image removal form, users can have photographs of themselves or their property completely removed from M.A.P., even when the images have already been blurred.

No legal action against Marshoogle and M.A.P. was taken prior to this present action. Prior disputes have been settled privately, generally by the removal the image or images in question.

Marshoogle promoted this feature by claiming that its use would benefit tourism, help people in their search for property to rent or buy, and assist users in finding local businesses or meeting points. Marshoogle advertised M.A.P. using such slogans as "*Take a virtual tour of your future neighborhood*" and "*Tour the city as if you were on top of a tourist bus*." As the M.A.P. feature gained popularity in Marshall, users increasingly began to conduct M.A.P. searchers for publicly known addresses of celebrities' homes and addresses of popular celebrity "hot spots" to obtain images of celebrity houses or images of their favorite celebrities captured at the searched location by the M.A.P. mobiles.

Phillip Nevilson is a young athlete who excelled in the sport of diving and is widely viewed as a success story for underprivileged youth. Nevilson grew up in Lower Marshall Township, a low income, blue collar neighborhood, known for its juvenile criminal activity (mostly drug related). Nevilson was discovered in 1998, at the age of thirteen by Coach

Timothy Knight ("Coach Tim"), the director of the prestigious Marshall Athletic Club ("MAC"). MAC is a private athletic club in Upper Marshall Township, renowned for producing some of the most talented swimmers and divers in the state, thanks to MAC's world-class coaching staff. Coach Tim was so impressed by Nevilson's natural talent that he offered to foster Nevilson and personally train him at the MAC for free.

Nevilson excelled under the direction of Coach Tim. He went on to win first or second place in all the athletic competitions in which he participated, culminating in his winning three gold medals in the 2007 Junior World Diving Championships. After this event, Nevilson spent most of his time training and preparing for the Olympic Trials, to be held in Marshall City in July 2008. These trials would determine who would be members of the 2010 Olympic Diving Team. In order to become a member of the Olympic Team, Nevilson needed to place in the top two for each of the events in which he wished to compete. Based on his athletic talent, his performance in the 2007 Junior World Championships and his growing reputation, Nevilson was heralded as the "next big diving star" and a top contender in the 2010 Olympics. Mainstream media and sports news outlets, including "*SportsBlog,*" Marshoogle's popular athletic newsletter and blog, predicted that he would trounce the competition at the trials and be the first to qualify for the 2010 U.S. Olympic Diving Team.

News media coverage of Nevilson's journey to success reflected a general feeling among the people of Marshall that Nevilson represented the true potential of Marshall's youth. Overcoming the obstacles of poverty and taking a different path in life than most children raised in Lower Marshall Township, Nevilson had become widely regarded as a role model, especially to many young people who faced similar challenges.

In January 2008, Nevilson was featured in several promotional publications of Marshall City Against Drugs ("MCAD") campaign with the logo "*Do sports not drugs*." However, not everyone in Marshall agreed with Nevilson's status as role model. When MCAD announced it had retained Nevilson as a spokesman, Marshoogle's *SportsBlog* expressed skepticism, stating that although Nevilson was undeniably a very talented athlete, his role model status was exaggerated.

Statements like these had no effect on Nevilson's popularity. As Nevilson's popularity grew, so did the endorsement offers. He managed to earn significant income by accepting several endorsement offers from local corporations and businesses, such as the SwimShop, a leading Marshall sports equipment and sportswear retailer. Nevilson appeared on several TV commercials as a result of the endorsements. If he qualified for the 2010 U.S. Olympic Diving Team – as was anticipated by the mainstream media and sport blogs – he was expected to receive a three

million dollar (US) endorsement contract to represent Sunshine AthleticWear, a nationwide sportswear corporation. Sunshine AthleticWear is the most coveted sports endorsement contract in the sports community. In fact, the details of Nevilson's deal with Sunshine AthleticWear had been leaked to the media sometime in early March 2008. On March 25, 2008, after several weeks of speculation in the press, Athena Buck, Sunshine AthleticWear's president, made a public statement admitting that her company had negotiated a three million dollar endorsement deal with Nevilson that was contingent upon his becoming a member of the U.S. Olympic Diving Team. She stated that Sunshine AthleticWear was "behind Nevilson 100 percent and wished him well at the Olympic Trials." Buck's statement was picked up by the national media as well as news outlets throughout the State of Marshall. In addition, several other major corporations informally expressed interest in having Nevilson serve as spokesman for their products.

With his newfound affluence, in October 2007 Nevilson moved from Lower Marshall Township to a two-story house located on the border of Emerald Pools, a community where many of Marshall City's rich and famous reside. Emerald Pools has become a popular tourist attraction because of its famous residents and several companies operate double-decker celebrity bus tours of the area. Even though he resided in an area inundated by tourists and celebrities, Nevilson kept a low profile. He rarely socialized or went out in public, choosing instead to focus on his training. Nevilson protected his house by surrounding it on all sides by a six-foot wooden fence. Signs signaling "Private Property" and "No Trespass" were posted on the fence.

On the evening of April 15, 2008, Nevilson was on the second floor of his home. He was relaxing on his recliner by the window and watching a televised basketball game while sipping some wine and enjoying some fine tobacco. As was his usual ritual, Nevilson enjoyed his tobacco out of his Moroccan hookah, a Middle-Eastern water pipe that can also be used for recreational marijuana use. At the same time Nevilson was enjoying his wine and hookah, a M.A.P. mobile was driving down the streets of the Emerald Pools community photographing images for M.A.P. As the vehicle drove by Nevilson's corner estate it snapped several photographs of the properties on his street, including photographs of Nevilson's residence, and by happenstance, Nevilson sitting in his living room and inhaling from the hookah. The image of Nevilson by his window was small as it was taken from the street some distance away.

Not long after the images of Nevilson were taken by the M.A.P. mobile, these images, along with other images that made up the panoramic amalgamated image of Nevilson's street, were uploaded to M.A.P. by Marshoogle. The images uploaded on the website did not include a blurring of Nevilson's face.

Although it is unclear how many users accessed the M.A.P. image of Nevilson, on April 21, 2008, the following entry appeared on *SportsBlog*:

> If you want to see what Marshall's own 'three million dollar man' does in his spare time, go on M.A.P.

The *SportsBlog* statement was followed by a link to the M.A.P. image of Nevilson on Marshoogle. After this posting, there was a huge increase in traffic to the M.A.P. feature and "*Sports Blog*." Nevilson became aware of the hookah smoking images on M.A.P. and on April 30, 2008, contacted Marshoogle requesting the immediate removal of the images. Marshoogle acknowledged his request and the images in question were removed by May 7, 2008.

There is no evidence in the record as to how many individuals viewed the photographs of Nevilson on M.A.P. other than the reporter who posted the link on *SportsBlog*.

The parties do not dispute that Nevilson became the subject of widespread negative media attention beginning in late April 2008, and that the photographs taken by the M.A.P. mobiles and incorporated into Marshoogle's M.A.P. feature were the primary reason for this attention. As a result, rumors about Nevilson's alleged drug use spread quickly throughout the sports and entertainment communities. Several tabloids and other news outlets published "digitally enhanced" versions of the infamous images with stories related to Nevilson's alleged drug use. For example, the *Marshall Star* published the photograph of Nevilson inhaling from the hookah captioned "Nevilson Has Reached New Highs." In addition, the popular Marshall newspaper, the *Marshall Tribune,* featured the infamous photograph with the caption "Shame on You Nevilson!" on its first page.

Fans and citizens alike expressed their disappointment, and in some cases anger, towards what they claimed was a betrayal of trust by their athletic idol and role model. The Marshall Diving Association initiated a formal investigation into Nevilson's alleged drug use, which could result in his disqualification for the 2010 Olympic Trials. MCAD removed all references of Nevilson from its anti-drug campaign. During this time, numerous paparazzi kept vigil outside Nevilson's home and followed him every time he ventured out of his house.

Nevilson reacted by issuing several press releases and proactively contacting the media. Nevilson made numerous appearances on local television and radio news, sports and talk shows and was given significant "air time" to explain his perhaps unwise, but completely legal use of tobacco. Nevertheless, Nevilson's prospective endorsement deals quickly evaporated. MCAD refused to resume working with Nevilson on its campaign. In private correspondence with the companies involved, Nevilson

was invariably informed that the sponsors did not believe it was in the companies' best interests to have him represent them.

In July 2008, the Olympic Trials were held in Marshall City. Nevilson's performance was well below average and he finished in third place missing his chance to participate in the 2010 Olympics as a member of the U.S. Olympic Diving Team. Because he was unable to secure a position on the team, Nevilson's deal with Sunshine AthleticWear did not go forward. In press releases following the completion of the Olympic Trials, Nevilson attributed his bad performance to the intense media coverage surrounding his alleged drug use and his efforts to clear his name.

In August 2008, Nevilson commenced this litigation against Marshoogle, Inc.

II. ISSUES PRESENTED

There are three issues raised on appeal before the Supreme Court of Marshall:

(1) Whether the circuit court erred in granting summary judgment on Nevilson's claim of intrusion upon seclusion;

(2) Whether the circuit court erred in granting summary judgment on Nevilson's claim of publicity given to private life; and

(3) Whether the circuit court erred in granting summary judgment on Nevilson's claim of tortious interference with business expectancy.

III. ANALYSIS OF ISSUES

A. STANDARD OF REVIEW

Summary judgment allows a court to dispose of part or all of a case prior to trial. In the State of Marshall, summary judgment is governed by Rule 56 of the Marshall Rules of Civil Procedure. Under this rule, summary judgment is proper only if there are no genuine issues of material facts, then the moving party is entitled to a judgment as a matter of law.[1] The court considers the pleadings, depositions, answers to interrogatories, admissions, and affidavits in assessing whether summary judgment is proper.[2] A genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented."[3]

An appellate court reviews a grant of summary judgment *de novo,* applying the same standard as the trial court.[4] The reviewing court determines whether a genuine issue of material fact exists by viewing the

1. Marshall R. Civ. P. 56(c) (R. at 1). Rule 56(c) is similar or identical to the corresponding provision of the federal rules, Fed. R. Civ. P. 56(c).

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

3. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

4. *Delta Sav. Bank v. United States,* 265 F.3d 1017, 1021 (9th Cir. 2001).

evidence in the light most favorable to the non-moving party and drawing all reasonable and justifiable inferences in favor of that party.[5] The moving party has the burden of identifying the material facts that are without genuine dispute and support the entry of summary judgment in favor of the moving party.[6] To survive the motion, the non-moving party must identify which material facts raise genuine issues of dispute.[7] Because the entry of summary judgment "is a drastic means of disposing of litigation,"[8] it should be granted only when the moving party's right to relief is "clear and free from doubt."[9] However, the mere fact that there exists "some alleged factual dispute between the parties"[10] or "some metaphysical doubt as to the material facts"[11] is insufficient to defeat a motion for summary judgment.

B. INTRUSION UPON SECLUSION

i. General

The common law tort of invasion of privacy, as developed by the courts, comprises four distinct wrongs, each of which represents an interference with the individual's right to lead a private life, free from the prying eyes, ears, and publications of others.[12] Thus, four forms of invasion of the right of privacy have become crystallized and held to be actionable:[13] (a) unreasonable intrusion upon the seclusion of another; (b) appropriation of the other's name or likeness; (c) unreasonable publicity given to the other's private life; (d) publicity that unreasonably places the other in a false light before the public.[14]

The form of invasion of privacy by an unreasonable and offensive intrusion upon an individual's seclusion consists solely of an intentional interference with this individual's interest in solitude or seclusion, either as to his person or as to his private affairs or concerns. This intrusion may be into plaintiff's *physical* solitude or seclusion, such by invading his home, or through other means by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, such as wiretapping. Unique to this form of invasion of privacy is that that liability does not depend on the publication of the

5. *Anderson*, 477 U.S. at 255.
6. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
7. *Id.* at 324.
8. *Purtill v. Hess*, 489 N.E.2d 867, 871 (Ill. 1986).
9. *Id.*
10. *Anderson*, 477 U.S. at 247 (emphasis omitted).
11. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).
12. Restatement (Second) of Torts § 652A cmt. b (1977).
13. *Id.* at cmt. c.
14. *Id.*

private information; it is the act of intrusion itself that renders the defendant to liability.

ii. Elements

Nevilson's first claim alleges that Marshoogle committed an invasion of privacy in the form of intrusion upon seclusion. Marshall courts have consistently applied § 652B of the *Restatement (Second) of Torts* (1977), which recognizes that an action lies for intrusion upon seclusion if the plaintiff can show these elements: (1) there was an unauthorized intrusion into another's seclusion; (2) the intrusion was intentional (3) the intrusion was offensive or objectionable to a reasonable person; (4) the matter intruded upon was private.

Some states also include an additional element, that the intrusion causes anguish and suffering.[15] This element may be discussed, but is not necessary for establishing liability under the Restatement.

1. *Unauthorized Intrusion into Nevilson's Seclusion*

The first element of the intrusion upon seclusion tort is an *unauthorized* intrusion upon another's seclusion. The Restatement clarifies that the intrusion need not be of the physical variety; it can also be through use of a camera.[16] Courts following the Restatement have held that "a defendant is subject to liability '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."[17]

Marshoogle will likely argue that the photograph taken by the M.A.P. mobile did not intrude on Nevilson's seclusion. Marshoogle will likely cite *Schiller v. Mitchell*, where the court held that the plaintiffs failed to establish the intrusion and private matter elements in their

15. *Burns v. Masterbrand Cabinets, Inc.*, 874 N.E.2d 72, 77 (Ill. App. Ct. 2007); *Melvin v. Burling*, 49 N.E.2d 1011, 1012 (Ill. App. Ct. 1986).

16. Restatement (Second) of Torts § 652B. Comment b. to § 652B of the Restatement reads:

> [T]he 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. *Id.*

17. *In re Marriage of Tigges*, 758 N.W.2d 824, 829 n. 3 (Iowa 2008) *quoting* Restatement (Second) of Torts §652B.

cause of action for intrusion upon seclusion against the defendants, their neighbors, who videotaped the plaintiffs' property.[18] In so holding, the court noted that the plaintiffs failed to "explain why a passerby on the street or a roofer or a tree trimmer could not see what the camera saw."[19] Similarly, in *McLain v. Boise*, the court held that the plaintiff did not state an invasion of privacy claim where the defendant photographed the plaintiff on his property, even though the defendant trespassed.[20] The court reasoned that the plaintiff was not even aware that he was being under surveillance, and a neighbor or passerby could have seen the plaintiff on his property in the daylight.[21] A similar result occurred in *Wehling v. Columbia Broad. Sys*., the court held that when a video camera filmed the plaintiff's home and nothing more than what was viewable from the public street was shown, the matter filmed was not private.[22] Additionally, in *Swerdlick v. Koch*, the court held that activities occurring in plain view of the public are not entitled to the protection of the privacy torts "merely because they occur on private property in the vicinity of the [plaintiff]'s home." [23]

Based on the above, Marshoogle should point to the fact that Nevilson was sitting in front of his window and would have been clearly visible to any passerby on the street, at the same time the M.A.P. mobile passed by. Indeed, the six-foot tall fence erected outside the home was clearly not tall enough to block the view into the second-floor window from the street, enabling any members of the public to see Nevilson smoking the hookah through his second-story windows. Marshoogle will argue that this is especially true in the present case because of the many double-decker tour buses on which tourists could obtain the same, if not better, view of Nevilson in his living room. Marshoogle will argue that it did not trespass on Nevilson's property to obtain the photograph in question, and Nevilson was not even the target of the photograph.[24]

Nevilson will likely argue that as the Restatement states, and courts in several jurisdictions and have found, non-physical intrusions exist in situations similar to his. An unauthorized "peering into the windows of a private home" has been considered as a prime example of an intrusion upon seclusion.[25] Nevilson may cite *Benitez v. KFC National Manage-*

18. *Schiller v. Mitchell*, 828 N.E.2d 323, 329 (Ill. App. Ct. 2005).

19. *Id.*

20. *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346 (Or. 1975).

21. *Id.*

22. *Wheling v. Columbia Broadcasting System*, 721 F.2d 506, 509 (5th Cir. 1983).

23. *Swerdlick v. Koch*, 721 A.2d 849, 857 (R.I. 1998). The court held that the activity photographed by the defendants was "in full public view . . . albeit it happened in the vicinity of the plaintiff's residence." *Id.*

24. (R. at 4).

25. *Lovgren v. Citizens First Nat. Bank of Princeton*, 534 N.E.2d 987 (Ill. 1989). "When a picture is taken of a plaintiff while he is in the privacy of his home, . . . the taking of the

ment Company, where the court noted that "examples of actionable intrusion upon seclusion would include . . . peering into the windows of a private home,"[26] as well as *Summers v. Bailey*, in which the court considered non-physical intrusion to be analogous to trespass into the plaintiff's home, and extended the tort to include "prying and intrusions into private concerns, such as eavesdropping by microphone and peering into the windows of a home."[27] Similarly, in Louisiana, courts have found intrusion to occur when defendants "took pictures of [plaintiffs]" and "watched [plaintiffs] in their home by peeking through their windows." [28] A necessary component of this form of invasion of privacy consists of intrusion upon plaintiff's solitude or seclusion.[29] Nevilson will point out that a person's private home or property satisfies this requirement.[30]

Consequently, Nevilson will argue that Marshoogle's M.A.P. mobile photographing him, without his consent, while he was in the seclusion of his private home, constitutes an invasion of his privacy.[31] Nevilson surrounded his home on all sides by a six-foot wooden fence and posted "Private Property" and "No Trespass" signs.[32] Nevilson will argue taking such measure indicates that he considered his home to be a place of seclusion and privacy, and that this court should also view Nevilson's home as a protected area of solicitude.

Nevilson should distinguish *Schiller* and the other authority cited by Marshoogle because these cases dealt mainly with the video surveillance of the exterior of the plaintiffs' home, rather than images of the interior.[33] Nevilson will argue that interior portions of the home, such as his second story living room, are much more secluded areas than a residence's driveway or garage, and are considered private by the majority of people. In *Dietemann v. Time, Inc.*, the court found that "[p]laintiff's den

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picture may be considered an intrusion into the plaintiff's privacy just as eavesdropping or looking into his upstairs windows with binoculars are considered an invasion of his privacy." *Id.*; *see also* Restatement (Second) of Torts § 652B cmt. b (1977).

26. *Benitez v. KFC Nat. Mgmt. Co.*, 714 N.E.2d 1002, 1033 (Ill. App. Ct. 1999); *Lovgren*, 534 N.E.2d at 989.

27. *Summers v. Bailey*, 55 F.3d 1564, 1566 (11th Cir. 1995).

28. *Souder v. Pendleton Detectives*, 88 So.2d 716, 718 (La. Ct. App. 1956).

29. Restatement (Second) of Torts § 652B comment b.

30. *Summers*, 55 F.3d at 1567; *Souder*, 88 So.2d at 718; *see* also *In re Marriage of Tigges*, 758 N.W.2d 824, 829 n. 3 (Iowa 2008); *Taus v. Loftus*, 151 P.3d 1185, 1212 (Cal. 2007) (stating that the claim of intrusion upon seclusion "is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place").

31. (R. at 6). *See also* Restatement (Second) of Torts § 652B comment b; *see also Summers*, 55 F.3d at 1567; *Souder*, 88 So.2d at 718; *see also Tigges*, 758 N.W.2d at 829 n. 3; *Taus*, 151 P.3d at 1212 (stating that the claim of intrusion upon seclusion "is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place").

32. (R. at 6).

33. *Schiller*, 828 N.E.2d at 329.

was a sphere from which he could reasonably expect to exclude eavesdropping newsman."[34] Consequently, Nevilson may argue that although taking pictures in public or of public things is lawful, Nevilson's living room is a sphere in which he could expect to be free from the eyes and cameras of a third party such as Marshoogle. Pedestrians or tourists may have been able to glance at a certain point in time into Nevilson's second floor room, but that "does not automatically mean that he . . . can legally be forced to be subject to being seen by everyone."[35] Therefore, Marshoogle's M.A.P. mobile photograph was analogous to peering into the window of his private home, and was an actionable intrusion upon his seclusion.

2. *Intentional Intrusion*

The second element of the intrusion upon seclusion tort requires a plaintiff to show that the defendant intended to intrude.[36] Intent is generally shown if "the actor desires to cause the consequences of his act, or he believes that the consequences are substantially certain to result from it."[37]

Marshoogle will likely argue that there is no evidence in the Record that Marshoogle intentionally intruded upon Nevilson's seclusion. Marshoogle could point to *O'Donnell v. United States*, where the court concluded that "[a] person commits an intentional intrusion only if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act."[38] Marshoogle will also argue that, under well-established case law, the tort of intrusion upon seclusion must be, at a minimum, an intentional act of trickery or through the use of sensory enhancements.[39] For instance, in *Webb v. CBS*, the Northern District of Illinois found that intrusion had taken place and focused on the means employed by the CBS reporter and cameraman to look into the backyard of the plaintiff's private home that was surrounded by a seven-foot fence.[40]

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34. *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971).

35. *Sanders v. Am. Broad. Co., Inc.*, 978 P.2d 67, 72 (Cal. 1999).

36. Restatement (Second) of Torts § 652B (1977).

37. Restatement (Second) of Torts § 8A (1965).

38. *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989); *see also Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621 (3d Cir. 1992).

39. *See e.g.*, *Beckstrom v. Direct Merch.'s Credit Card Bank*, No. Civ-04-1351, 2005 WL 1869107, at *4 (D. Minn. Aug. 5, 2005) (stating "[i]ntrusion upon seclusion is an intentional tort"); *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 378 (Utah Ct. App. 1997) (explaining intrusion must be both intentional and substantial); *Leang v. Jersey City Bd. of Educ.*, 969 A.2d 1097, 1115 (N.J. 2009) (holding that a defendant is liable for intrusion upon seclusion only when the intrusion is intentional).

40. *Webb v. CBS*, No. 08-C-6241, 2009 WL 1285836 (N.D. Ill. May 7, 2009).

To distinguish the cases above, Marshoogle will argue it did not engage in intentional and deliberate actions to capture information that would otherwise not be visible to the naked eye. Quite the contrary, Marshoogle's M.A.P. mobile was engaged in the lawful activity of photographing and recording public streets, and took pictures of areas and objects that any member of the public was free to observe.[41] Capturing Nevilson smoking his hookah was merely the unintentional and incidental consequence of the lawful activity of recording public streets and taking pictures to enhance the MarshMap feature. Photographing Nevilson was not within the scope of the M.A.P. mobile, nor could or should Marshoogle have known that the M.A.P. mobile's photographic lens would capture Nevilson in an allegedly embarrassing position. Therefore, since Marshoogle did not possess the requisite intent, Nevilson's intrusion claim must fail.

Nevilson will likely counter-argue that intent does not require malice, but rather that the person act with willingness, and that "he believes that the consequences are substantially certain to result from it."[42] Nevilson will also argue that use of cameras for allegedly innocent and unrelated purposes have been found to constitute intentional intrusion upon a person's seclusion.[43] In *Acuff v. IBP*, the defendant had installed a camera on its premises in order to catch a thief, but the camera also recorded private medical examinations and treatments.[44] The court still found that a jury could reasonably conclude that IBP had acted intentionally, partially because the company continued operating the camera and recording private events even after learning that medical treatments were being performed in that location.[45] Moreover, in *Snakenberg v. Hartford* Casualty Ins. Co., Inc., a defendant's action is deemed intentional "if it is done willingly" and "the actor knows or ought to know [the] result will follow from his conduct, whatever his desire may be as to that result."[46]

Nevilson will argue that much like the defendants in *Acuff* and *Snakenberg*, Marshoogle willingly employed the M.A.P. mobiles and their technologically advanced cameras to capture images of the entire Marshall City. Furthermore, the record clearly indicates that Mar-

41. (R. at 7).

42. Restatement (Second) of Torts § 8A (1965).

43. *Acuff v. IBP, Inc*., 77 F. Supp. 2d 914 (C.D. Ill. 1999).

44. *Id.* at 918-22.

45. *Id.* at 923.

46. *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 5 (S.C. App. 1989). In *Snakenberg* the defendant intentionally videotaped a space where females were changing and captured images of them. *Id.* at 4. The court stated that "if the videotaping was an act of volition and the resulting exposure of the girls was the expected or natural consequence of that act, intent has been proved." *Id.* at 8.

shoogle knew that the photographs taken by the M.A.P. mobiles did capture private instances, as proved by the receipt of numerous complaints. This knowledge is further evidenced by Marshoogle's use of a blurring function in the M.A.P. feature to distort images of faces and license plates, and the implementation of the online photo-removal procedure.[47] These actions clearly demonstrate that Marshoogle was fully aware that the "expected or natural consequence"[48] of photographing the streets was the capturing of private images, evidencing that Marshoogle acted intentionally in capturing the images of Nevilson inside his home.

3. *Offensive or Objectionable to a Reasonable Person*

The third element of the tort requires the plaintiff to show the intrusion was offensive or objectionable to a reasonable person.[49] The Restatement requires any intrusion to be highly offensive to the ordinary reasonable person, as the result of conduct to which the reasonable person would strongly object."[50] Courts following the Restatement's view require "some type of highly offensive prying into the physical boundaries or affairs of another person."[51]

Marshoogle will likely argue that several cases interpreting the Restatement's definition of intrusion upon seclusion apply a balancing test for determining whether an intrusion rises to the level of highly offensive. For instance in *Hill v. National Collegiate Athletic Ass'n*, the California Supreme Court adopted a factor-based standard for determining the offensiveness of an invasion under §652B of the Restatement that examines: (1) the degree of the intrusion; (2) the context, conduct, and circumstances surrounding the intrusion; (3) the intruder's motives and objectives; (4) the setting into which the intruder invades; and (5) the expectations of those whose privacy is invaded.[52]

Consequently, Marshoogle will argue that the intrusion, if any, was

47. (R. at 4-5).

48. *Snakenberg*, 383 S.E.2d at 86.

49. *Melvin*, 490 N.E.2d at 1012.

50. *Schiller v. Mitchell*, 828 N.E.2d 323, 328 (Ill. App. Ct. 2005); *Schmidt v. Ameritech Ill.*, 768 N.E.2d 303, 312 (Ill. App. Ct. 1st Dist. 2002); Restatement (Second) of Torts § 652B, cmt. d (1977). "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." *Id.*

51. *Lovgren*, 534 N.E. 2d at 989.

52. *Hill v. Nat. Collegiate Athletic Ass'n*., 865 P.2d 633, 648 (Cal. 1994); *see e.g. Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 625 (3d Cir. 1992) (stating "whether an alleged invasion of privacy is substantial and highly offensive to the reasonable person necessitates the use of a balancing test."); *Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298, 303 (D. Del. 1999) (same); *Med. Lab. Mgmt. Consultants v. Am. Broad. Co.,* 30 F. Supp. 2d 1182, 1189 (D. Ariz. 1998) (same); *Wolfson v. Lewis*, 924 F. Supp. 1413, 1421 (E.D. Pa. 1996) (same).

minimal.[53] Marshoogle should point to *Boring v. Google*, where the court held in a factually similar case that no one "other than the most exquisitely sensitive -would suffer shame or humiliation" as a result of Google's street view car taking photos of the plaintiff's residence.[54] Marshoogle will compare this photo of Nevilson's home to the photo in *Boring*, and argue that a reasonable person would not find it highly offensive to be seen smoking tobacco and drinking a glass of wine. On the other hand, the context, conduct, and circumstances of the alleged intrusion were innocuous and legitimate.[55] The Marshoogle M.A.P. mobile was on the mission of cataloging the streets, an accepted and regular practice in the State of Marshall, in order to enhance the M.A.P. feature, and had no intention to disturb or harass Nevilson.[56]

More importantly, Marshoogle should argue that the activities viewed through Nevilson's window are the type ordinarily viewed by neighbors, and tolerated as ordinary disclosures of everyday life that is of casual interest to others in the community.[57] Marshoogle will likely reiterate its arguments under the "unauthorized intrusion" and "intentional intrusion" elements, and claim that Nevilson cannot establish that a reasonable person would take offense at being photographed when Nevilson places himself in plain view of the public.[58] In support of its argument, it could also cite to *Mark v. King Broad. Co.*,[59] which held that invasion of privacy torts do not apply to claims pertaining to events readily viewable by the general public.[60]

Nevilson will likely reiterate his arguments under Restatements B(i)(1)&(2) and argue that any reasonable person would find it highly offensive for an Internet search engine, such as Marshoogle or any individual, to take a photo of that person on the second floor of their private residence. Nevilson will likely cite *Webb v. CBS Broadcasting Inc.*, where the court held that a cameraman using a telephoto lens to video-

53. *Stien*, 944 P.2d at 379. The appellate court found that the degree of intrusion was minimal, thus failing to establish the tort of intrusion upon seclusion. *Id.*

54. *Boring v. Google, Inc*., 598 F. Supp. 2d 695, 700 (W.D. Pa. 2009).

55. *Wilcher*, 60 F. Supp. 2d at 304 (holding that the context, conduct, and circumstances surrounding a drug testing policy where firefighters were forced to provide urine samples—in front of collection monitors—did not rise to the level of implicating the tort of intrusion upon seclusion).

56. (R. at 4).

57. Restatement (Second) of Torts § 652D cmt. c.

58. Restatement (Second) of Torts § 652B cmt. c (1977). There is no liability for observing a plaintiff "or even taking his photograph while he is walking on the public highway. . . and his appearance is public and open to the public eye." *Id.*

59. *Mark v. King Broad. Co*., 618 P.2d 512, 519 (Wash Ct. App. 1980).

60. *Id.* This case involved an action brought by a pharmacist against a television station after it broadcast footage taken of him inside his pharmacy from a camera located outside the pharmacy as the plaintiff remained visible to the public through a glass window. *Id.* at 519.

tape the plaintiffs and their children in their bathing suits in a private backyard pool was found to be highly offensive to a reasonable person.[61] Nevilson should analogize *Webb* on the facts, and point out that he was not just within his private property, as the plaintiffs were in *Webb*, but inside his home on the second floor. Nevilson arguably expected more privacy *inside* his home.

Nevilson will likely also draw the court's attention to the invasive nature of the technologically advanced equipment with the capabilities of zoom in and focus on the details of his home, distinguishing this technology from the haphazard gaze of the naked eye. Nevilson could cite *Kyllo v. United States*, in which the United States Supreme Court stated that "[t]he question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy . . . [and] the rule we adopt must take account of more sophisticated systems that are already in use or in development."[62] Much like the thermal imaging in *Kyllo*, Nevilson will argue that the use of technologically advanced equipment such as megapixel, multi-function cameras, to snap continuous photos, recording and later rendering available on the Internet, everything, including private moments, in their path, is highly intrusive and offensive. Marshoogle's digital 360 degree photographs and zoom function have damaged Nevilson's "anonymity, intrude[d] upon his most intimate activities, and expose[d] his most personal characteristics to [the] public gaze."[63] Thus, Nevilson will argue that a reasonable person would certainly find the intrusion upon his activities inside his home to be highly offensive, and be seriously aggrieved by it. [64] At a minimum, Nevilson should argue that the level of offensiveness presents an issue of material fact rendering summary judgment inappropriate.

4. *Private Matter*

The fourth requirement for intrusion upon seclusion requires that the matter intruded upon must be private. The privacy of the matter is a threshold issue, because without private facts, the other three elements of the tort are irrelevant.[65] The plaintiff must establish that he or she "attempted to keep private facts private."[66] Further, it makes no difference "whether the observation of openly displayed facts is accomplished

61. *Webb*, 2009 WL 1285836, at *3.

62. *Kyllo v. United States*, 533 U.S. 27, 34-36 (2001). Although this case involved a search and seizure claim it could be possible to analogize on the reasoning used by the Court.

63. *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34, 37 (1971).

64. *See* Restatement (Second) of Torts § 652B cmt. b (1977).

65. *Busse v. Motorola, Inc.*, 813 N.E. 2d 1013, 1017 (Ill. App. Ct. 2004).

66. *Acosta v. Scott Labor LLC*, 377 F. Supp. 2d 647, 650 (N.D. Ill. 2005).

by video camera or the naked eye."[67]

Marshoogle would argue that these were not private facts, and Nevilson made no attempt to conceal them. Reiterating its arguments above, it will likely point to *Schiller*, where the court denied the claim that defendants intruded upon a private matter by videotaping the plaintiffs' property, noting that the plaintiffs failed to "explain why a passerby on the street or a roofer or a tree trimmer could not see what the camera saw."[68] It will also cite again to *Mark v. King Broad. Co*.[69] and *Swerdlick v. Koch*, where the court held that filming the plaintiff's home business did not constitute an invasion of his physical solitude or seclusion.[70] In *Swerdlick*, the court stated that the activity photographed including trucks entering and leaving plaintiff's driveway and activity around his residence, was "in full public view, albeit it happened in the vicinity of the residence" [71] and held that activities occurring in plain view of the public are not entitled to the protection of the privacy torts "merely because they occur on private property in the vicinity of the actor's home."[72]

Consequently, Marshoogle will point out that Nevilson was sitting in an area where there was an unobstructed view from the street. Marshoogle's cameras captured his image from a lawful vantage point on a public street, by cameras mounted on the M.A.P. mobile car no taller than the buses that carry tourists past Nevilson's home every day.[73] It could also argue that Nevilson failed to take any steps to ensure his privacy, such as closing blinds or curtains, thereby allowing anyone, either at street level or on a bus, to observe his activities through the window. Thus, Nevilson's activities were open to the public eye, and are not private facts.[74]

Nevilson should counter this argument by distinguishing the above cited cases on the facts. As stated above, in these cases, the defendants' recording equipment only captured images of the external area of the plaintiffs' home.[75] Here, Marshoogle's M.A.P. mobile cameras not only captured the exterior of his home, but also Nevilson's activities on the second floor *inside* his home. Nevilson will argue that the fact that he is inside his home alone suggests that the photo captures private facts, be-

67. *Id.*

68. *Schiller*, 828 N.E.2d 323, 329.

69. *Mark*, 618 P.2d at 512.

70. *Swerdlick v. Koch*, 721 A.2d 849, 857 (R.I. 1998).

71. *Id.*

72. *Id.* at 858.

73. (R. at 6-10).

74. *Wehling*, 721 F.2d at 509; *Schiller*, 828 N.E.2d at 329; *Swerdlick*, 721 A.2d at 857; *Mark*, 618 P.2d at 519-20.

75. *Id.*

cause most details of life in the home are considered private.[76] Nevilson will again find support for this argument in *Webb v. CBS Broadcasting Inc.*, to demonstrate his conviction that he was engaged in a private act while smoking.[77] Here, Nevilson can analogize *Webb* on the facts, because, unlike plaintiffs in *Webb*, he was *inside* his home.

Further, Nevilson will likely argue that he indeed took affirmative steps to ensure his privacy such as raising a six-foot fence and posting the "Private Property" sign, showing that he expects to be in a private place at his home, particularly inside his home. Nevilson will argue that like the plaintiff in *Digirolamo v. D.P. Anderson & Ass'n Inc.*, a case in which the plaintiff alleged an invasion of privacy because she was videotaped and photographed with a telescopic lens from a public street, "[t]he mere fact that [these devices] are powerful and becoming increasingly common does not mean that, as a society, we must reasonably expect to be watched through them when we are inside our homes unless we pull our drapes or close our shutters."[78] Nevilson could also point out that in *Kyllo*, the U.S. Supreme Court recognized that "in the home, . . . all details are intimate details, because the entire area is held safe from prying government eyes."[79] Additionally, even if Nevilson were visible to some passers-by, such as tourists on the double-decker bus, this does not signify that he waived his privacy toward the public at large. To this effect, Nevilson might point to *Huskey v. National Broadcasting Company, Inc.*, where the court found that even prison inmates had some reasonable expectation of privacy, noting, that:

> [the plaintiff's] visibility to some people does not strip him of the right to remain secluded from others. Persons are exposed to [some people], but that does not mean they have opened the door to . . . cameras" and "the mere fact a person can be seen by others does not mean that person cannot legally be secluded.[80]

Nevilson will argue that if an inmate has an expectation of privacy in prison, certainly he has an expectation of privacy in his own home, whether or not he may be seen by some.

Nevilson should again point to *Benitez*[81] and *Lovgren*,[82] where both courts noted that peering into the home of another person was an example of intrusion and this is exactly what the M.A.P. mobile did to Nevilson. Therefore, Nevilson should argue that what happens inside of the

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

77. *Webb*, 2009 WL 1285836 at *3.

78. *Digirolamo v. D.P. Anderson & Assoc.*, No. Civ.A. 97-3623, 1999 WL 345592, at *1 (Mass. Super. Ct. May 26, 1999).

79. *Kyllo*, 533 U.S. at 373.

80. *Huskey v. NBC*, 632 F. Supp. 2d 1282, 1287-88 (N.D. Ill. 1986).

81. *Supra*, note 25.

82. *Supra,* note 26.

home is inherently private and the M.A.P. mobile's photos of the actions inside his home were private matters. Thus, Nevilson should argue that the matter here was private, and at a minimum the issue of its privacy is a material issue of fact that should defeat summary judgment.

5. *Anguish or Suffering*

The element requiring a plaintiff to demonstrate that the intrusion caused anguish and suffering is not required by the *Restatement (Second) of Torts*. In fact, the *Restatement* requires only the above four elements to hold a defendant liable for intrusion upon seclusion. Some states however, do include this additional requirement, i.e. that the intrusion must cause anguish and suffering.[83] Thus, the parties may discuss this element as an additional but not necessary element because the State of Marshall follows the *Restatement (Second) of Torts.*

The anguish and suffering of the alleged victim must be a result of the intrusion itself and it is not presumed.[84] For example, this element looks to the discomfort caused when someone enters a person's bedroom, opens his or her mail, or makes repeated and unwanted telephone calls.[85] A plaintiff can establish anguish or suffering by establishing actual injury such as "a loss of reputation and integrity in the community."[86] For example, in *Schmidt*, evidence that the plaintiff was infuriated and emotionally upset because her former employer had broken the trust she placed with the company was sufficient to support a finding of anguish and suffering even though the plaintiff never sought medical or psychological assistance.[87]

Nevilson will likely argue that the intrusion by the M.A.P. mobile caused damage to his reputation in the community. He should highlight the fact that prior to the intrusion he was highly respected in the community and expected to receive a high value endorsement deal upon qualifying for the 2010 Olympics.[88] As a result of the intrusion, however, Nevilson lost the endorsement deal. Further, Nevilson should point to the mental anguish he suffered as a result of the intrusion which affected his performance in the Olympic Trials. Rather than focusing on training for the Olympic Trials, Nevilson spent his time handling all of the media attention and trying to clear his name. As a result, he failed to qualify for the 2010 Olympics.[89]

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83. *Schmidt*, 768 N.E.2d at 316.
84. *Id.*
85. *Thomas v. Pearl,* 998 F.2d 447, 452 (7th Cir. 1993).
86. *Schmidt*, 768 N.E.2d at 316.
87. *Id.*
88. (R. at 5).
89. (R. at 7).

Marshoogle will likely argue that the intrusion did not cause Nevilson anguish or suffering. Rather, Marshoogle will point to the fact that any injury Nevilson suffered was a result of the link on *SportsBlog* and the subsequent negative media attention Nevilson received. Marshoogle should argue that this type of injury cannot be the basis of an intrusion claim because there can be no liability for intrusion upon seclusion where the harm comes from the publication, rather than the actual intrusion.[90] Thus, Marshoogle cannot be liable because the alleged damage to Nevilson's reputation came not from the M.A.P. mobile's alleged intrusion, rather it came from the posting on *SportsBlog* and subsequent publication of the photo by various media outlets.[91]

C. PUBLICATION OF PRIVATE FACTS

i. General

An invasion of privacy may also be committed when "unreasonable publicity [is] given to another's private life."[92] This kind of invasion of privacy is committed by publishing private and otherwise not widely known facts about an individual, the publication of which would be offensive to a reasonable person. Liability attaches even if the information publicized is true. Such a claim can only be successful, however, if the facts in question are not legitimately newsworthy.

ii. Elements

Marshall law requires that a plaintiff claiming publication of private facts prove: (1) publication of a matter; (2) publication of a matter concerning the private life of another; (3) that the matter publicized would be highly offensive to a reasonable person; and (4) that the matter is not of legitimate concern to the public.[93]

1. *Publicity Given to the Disclosure of Nevilson's Private Facts*

Marshoogle has conceded that the posting of Nevilson's photograph on its websites constituted publication.[94] Therefore, no analysis of this

90. *See Webb*, 2009 WL 1285836, at *4 (stating that plaintiffs' claim for intrusion upon seclusion would have failed if they had only alleged harm from the publication rather than the videotaping as well); Restatement (Second) of Torts § 652B cmt. b (1977); *Barker v. Manti Telephone Co*., 2009 WL 47110, at *4 (D. Utah Jan. 6, 2009) (stating "it is that affirmative physical intrusion, eavesdropping, investigation, examination or prying that constitutes the tort, not any subsequent sharing of the information learned in an intrusion. . . the dissemination of what is learned in an intrusion by a passive recipient of the information is not itself an intrusion upon seclusion").

91. (R. at 6).

92. Restatement (Second) of Torts § 652D cmt B (1977).

93. (R. at 10); Marshall Rev. Code § 762(b).

94. (R. at 11).

element is necessary.

2. *Private Facts of Nevilson's life*

The second element of publication of private facts requires that the facts made public were private, not public. As mentioned above under the intrusion section, matters that are already public or open to the public eye will not subject a defendant to liability for further publicizing them.[95] While a plaintiff cannot claim his privacy is invaded when his picture is taken on the street, he can complain when a photo is taken without his consent in a private place and later published.[96] Not every action a person takes is private, but most details of life in the home are considered private.[97] When these kinds of details are publicized in a manner that is highly offensive to a reasonable person without a legitimate public interest, there has been an invasion of privacy.[98]

Marshoogle will make the same arguments under the intrusion claim, that the publication did not involve any private facts about Nevilson's life because his activities were open to any passersby on the street. In addition it could also point to *Showler v. Harper's Magazine Foundation*,[99] in which the court held that because the family disclosed the funeral scene to the public eye, the open casket did not constitute a private fact whose disclosure could create liability.[100] Marshoogle will argue that Nevilson opened his habits to the public by smoking his hookah in front of a second-story window of his home.[101] In addition, Nevilson accepted his celebrity and attracted additional public interest by purchasing a home located in a celebrity "studded" neighborhood known to attract curious tourists aboard double-decker buses.[102]

Nevilson will also reiterate his arguments under the intrusion claim stating that the facts publicized by Marshoogle were in fact private. He will emphasize that even if he were visible to some it does not equate to a waiver of privacy to all. Nevilson will likely point again to *Sanders*[103] and *Huskey,*[104] claiming that if "a reasonable expectation of privacy has

95. Restatement (Second) of Torts § 652D cmt. B (1977).
96. *Id.*
97. *Id.*
98. *Id.*
99. *Showler v. Harper's Magazine Found.*, 222 F. App'x 755, 764 (10th Cir. 2007). In this case the plaintiffs were family members of a fallen National Guardsman. *Id.* at 759. They sued a magazine publisher for printing photographs of the deceased during his open-casket funeral after they had specifically requested no photography of the dead body. *Id. See also* Restatement (Second) of Torts § 652D cmt. b (1977).
100. *Showler*, 222 F. App'x at 764.
101. (R. at 6).
102. (R. at 6).
103. *Sanders*, 978 P.2d at 67.
104. *Huskey*, 632 F. Supp. at 1288.

been found in semi-public places, such as hospital rooms, private parties and the like,"[105] individuals must be afforded privacy in their residence even if they declined or forgot to draw the blinds. Nevilson will also argue that like in *Huskey*, just because some passers-by may have been capable of viewing him, this does not automatically deprive him of the right to remain secluded from others, especially technologically advanced cameras.[106] At a minimum this constitutes an issue of fact better left for a jury to decide.

3. *Offensive Nature of Marshoogle's Publication*

The third element of publication of private facts requires that the private facts publicized be highly offensive to a reasonable person. Privacy is viewed relative to customs of time, place, and community.[107]

Marshoogle will argue that the publication of ordinary activities is not any more offensive to a reasonable person than the mere observation is an intrusion upon seclusion. As noted in the *Restatement (Second) of Torts*, "[c]omplete privacy does not exist in this world except in a desert," and anyone not living in a desert is subject to ordinary disclosures of everyday life.[108] A person "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."[109] A publication is highly offensive only when a reasonable person would be "seriously aggrieved" by it.[110] Marshoogle will claim that Nevilson failed to establish the offensiveness prong since he cannot demonstrate that the defendant should have realized its conduct would offend persons of ordinary sensibilities, and not merely the supersensitive.[111] Marshoogle will argue that it is highly unlikely that a reasonable person in the state of Marshall would be offended or aggrieved by Marshoogle's lawful activity of mapping and cataloguing public streets,[112] a fact that is further evidenced by the immense popularity of this online feature.[113]

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105. *Sanders*, 978 P.2d at 67.

106. *Huskey*, 632 F.Supp. at 1288 (stating "[the plaintiff's] visibility to some people does not strip him of the right to remain secluded from others. Persons are exposed to [some]. . . but that does not mean they have opened the door to . . . cameras").

107. Restatement (Second) of Torts § 652D cmt. c (1977).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Bitsie v. Walston*, 515 P.2d 659, 661 (N.M. Ct. App. 1973). Essentially, the disclosure must be of a variety where it would objectively cause shame or humiliation to a reasonable person. *See also Claspill v. Craig*, 586 S.W.2d 458, 461 (Mo. Ct. App. 1979).

112. *Boring*, 598 F. Supp. 2d at 700.

113. (R. at 4).

Nevilson will once again reiterate his arguments under the intrusion claim stressing that one of the most fundamental aspects of privacy is that "the heart of our liberty is choosing which parts of our lives will become public and which parts we hold close."[114] Nevilson should also point to the *Restatement* to argue that "[e]very individual has. . .activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself. . .[including] most details of a man's life in his home."[115] In addition, this method of publication is further offensive because the technology involved allows for enhancement, reproduction and manipulation, as evidenced by the posting of Nevilson's photograph on Marshoogle's *SportsBlog* captioned with implications of illegal drug use. Therefore, Nevilson will argue that capturing and publishing images of him engaging in a private activity within the walls of his home would be highly offensive to a reasonable person.[116] At least, especially considering the novel questions posed by the technology involved and the nature of the world-wide and instantaneous publication over the Internet, the determination of offensiveness to a reasonable person should be resolved by a jury and not through a motion for summary judgment.[117]

4. *Newsworthiness*

The fourth element of the tort of publication of private facts requires that the matter not be of legitimate public concern.[118]

Marshoogle will likely argue that even if the facts published are found to be private, it is still not liable because publication of private facts is permissible when those facts pertain to matters of legitimate public concern.[119] Matters of legitimate public concern involve societal

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114. 62A Am. Jur. 2d *Privacy* §1 (2009); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) (commenting that "the individual is entitled to decide whether that which is his shall be given to the public.").

115. Restatement (Second) of Torts §652D cmt. b (1977).

116. Restatement (Second) of Torts §652D cmt. c (1977). "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." *Id.*

117. *See Miller v. Motorola, Inc.*, 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (holding that the court "cannot say as a matter of law that the disclosure of [a mastectomy to co-workers] . . . would not be highly offensive to the reasonable person."); S*ee Vassiliades v. Garfinckel's et al*, 492 A.2d 580, 588 (D.C. Cir. 1985) (finding that the question of whether a publication was highly offensive to a reasonable person is a determination of fact for the jury); *see also Gill v. Hearst Pub. Co.*, 253 P.2d 441, 446 (Cal. 1953) (Carter, J., dissenting) (stating that the question of whether the depiction would seriously offend a person of ordinary sensibilities is a question for the trier of fact).

118. Marshall Revised Code 762(b); Restatement (Second) of Torts § 652D, cmt. d (1977); S*ee Cox Broad. Co v. Cohn*, 420 U.S. 469 (1975).

119. *Cox*, 420 U.S. at 469; Restatement (Second) of Torts § 652D cmt. d (1977).

safety, health, morals, and welfare.[120] In *Cox Broad. Co. v. Cohn*, the U.S. Supreme Court held that "[t]he commission of a crime . . . [is] without question [an] event[ ] of legitimate concern to the public."[121] Courts consider several factors in determining whether or not a matter is considered newsworthy including: (1) the social value of the facts published; (2) the depth of the . . . intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily acceded to a position of public notoriety.[122] Only when (1) disclosure does not provide the public with information to which it is entitled, or (2) when disclosure becomes "a morbid and sensational prying into private lives for its own sake,"[123] does the privacy interest outweigh the public interest in information. Marshoogle will also argue that those who voluntarily place themselves in the public eye, such as celebrities or, in this present case, pro athletes, have a diminished expectation of privacy.[124] Neither condition applies to this case.

Marshoogle will likely argue the publication of images of Nevilson smoking from a hookah was not "a morbid and sensational prying into private lives for its own sake." Unlike the defendants in *Green v. Chicago Tribune Co.,*[125] Marshoogle obtained the photograph of Nevilson from a public road; the M.A.P. mobile did not intentionally and purposefully set out to spy on Nevilson but captured the infamous photographs "by happenstance," incidentally to its mission of mapping the neighborhood of the Emerald Pools.[126] Marshhogle will also argue that the re-

120. *Green v. Chi. Tribune Co.*, 675 N.E.2d 249 (Ill. App. Ct. 1996).

121. *Cox*, 420 U.S. 469.

122. *Id.*; *see also Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969). "[W]hen the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned." *Id.*; *see also Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001) (stating "no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know").

123. Restatement (second) of Torts § 652D cmt. h (1977); *see also Boston Herald, Inc. v. Sharpe*, 737 N.E.2d 859, 872-73 (Mass. 2000) (stating "[w]hen the subject matter of publicity is of legitimate public concern . . . there is no invasion of privacy").

124. 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 5:77 (2d ed. 2005). The Restatement distinguishes between the "Voluntary Public Figure" that chooses to attract public attention, and the "Involuntary Public Figure," who does not seek attention, but nonetheless become a "legitimate subject of public interest." Restatement (Second) of Torts § 652D, cmt. e-f (1977). The former group is characterized by actors, prize fighters, and public officers, while the latter is comprised of victims and perpetrators of catastrophes and crimes. *Id.*

125. *Green*, 675 N.E.2d at 256. In *Green*, newspaper reporters photographed a minor undergoing critical heart massage to resuscitate him following an ultimately fatal gunshot wound. *Id.* at 251. The reporters prevented the boy's mother from entering his hospital room, and after she refused to give a statement, they listened to what she first said to her son upon seeing his body. *Id.* The newspaper published the unauthorized photo and statement in a front-page article. *Id.*

126. (R. at 7).

cord establishes, as a matter of law, that the photographs published of Nevilson were of a legitimate public concern. Nevilson enjoyed a "growing reputation" and he had willingly assumed the status of a role-model, and anti-drug spokesperson "featured in several promotional publications of Marshall City Against Drugs campaign."[127] Further, the fact that Nevilson was likely to represent the State of Marshall and the U.S. in the Olympics weighs heavily in favor of a finding that these images were of legitimate public concern. Marshoogle will argue that the public has a legitimate interest in drug and other criminal activities rendering the reasonable speculation that Nevilson used illegal drugs a matter for public disclosure. In the case of a successful athlete and role model for the Marshall youth, even legal activity such as smoking tobacco is of public interest since it is rather inappropriate considering Nevilson's status. Thus, it cannot be disputed that Nevilson was a public figure and as such, Nevilson inherently had a reduced expectation of privacy.[128] In addition, his expectation of privacy was even further reduced because he voluntarily moved to a neighborhood that was a "popular tourist attraction," frequented by "double-decker celebrity bus tours."[129] Consequently, because Nevilson had willingly assumed the role of an anti-drug spokesperson and role-model and had received national media attention, the publicized matters were in fact newsworthy[130] and summary judgment in favor of Marshoogle was proper.

Nevilson will likely counter-argue that unlike the defendant in *Cox*, who publicized information obtained from publicly available sources,[131] Marshoogle obtained the photographs by invading Nevilson's privacy. Furthermore, Nevilson will argue that the activity captured by the lens of the M.A.P. mobile does not qualify as newsworthy. The court, in *Shulman*, held that "[n]ewsworthiness depends upon the logical relationship or nexus between the event that brought the plaintiff into the public eye and the particular facts disclosed, so long as the facts are not intrusive in great disproportion to their relevance."[132] Here, the photographs portrayed Nevilson within his home engaging in private and lawful acts, thus, they cannot constitute newsworthy information. Courts have imposed limitations as to the nature of the public's interest in certain af-

127. (R. at 5-6).

128. *See James v. Gannett Co.*, 353 N.E.2d 834, 876 (N.Y. 1976). "The category of public figures . . . include[s], without doubt . . . performers such as professional athletes." *Id.*

129. (R. at 6).

130. *Michaels v. Internet Entm't Group, Inc.*, No. CV-98-0583, 1998 WL 882848, at *7 (C.D. Cal. Sept. 11, 1998); *Shulman v. Group W. Prods. Inc.*, 955 P.2d 469, 479 (Cal. 1998) (holding that "the lack of newsworthiness is an element of the private facts tort," making newsworthiness a complete bar to common law liability).

131. *Cox*, 420 U.S. 469.

132. *Shulman*, 955 P.2d at 478-79.

fairs, finding that even if there is a legitimate public interest, some matters should simply be outside the scope of the public realm.[133] In addition, even if "the dissemination of truthful, newsworthy material is not actionable as a publication of private facts,"[134] Marshoogle's publication on *SportsBlog* implied that Nevilson used illegal drugs. These statements were untrue as evidenced by the record.[135] Therefore, because this publication was false, Marshoogle cannot claim that Nevilson's private facts were newsworthy. Moreover, Nevilson will argue that weblogs such as *SportsBlog,* "are not held to the same journalistic standards that regulate the mainstream media."[136] Therefore, because Marshoogle is not considered a member of the press, the images cannot be of a legitimate concern to the public.

Additionally, Nevilson will argue that, even if as a public figure, he "cannot complain when he is given publicity that he sought, even though it may be unfavorable to him" the publication in *SportsBlog* had absolutely nothing to do with his public persona. Unlike in *O'Brien v. Pabst Sales Co.*,[137] in which the court held that a public figure has no right of privacy as to public activities, Nevilson's published photograph is a public disclosure of the private life of a person, a photograph obtained unlawfully, without his consent or knowledge, while he sat in the privacy of his living room. Moreover, Nevilson will point to *Gallela v. Onassis*, in which the court held that even a highly popular former first lady of the U.S. maintains privacy rights despite her fame.[138] Also, the court in *Virgil v. Time, Inc.*, pointed out that, although one, through "some activity, vocational or avocational," can as a matter of law be said to attract legitimate public interest" limitations must be imposed to prevent "expos[ing] everyone's private life to public view."[139] Therefore, Nevislon will argue that because smoking in his living room does not pertain to Nevilson's status as a public figure, the Court of Appeals erred in finding

133. *See Vassiliades*, 192 A.2d at 589 (stating that '[c]ertain private facts about a person should never be publicized, even if the facts concern matters which are, or relate to persons who are, of legitimate public interest."); *see also Gilbert v. Med. Econs. Co*., 665 F.2d 305, 308 (10th Cir. 1981) (finding that "[b]ecause each member of our society at some time engages in an activity that fairly could be characterized as a matter of legitimate public concern, to permit that activity to open the door to the exposure of any truthful secret about that person would render meaningless the tort of public disclosure of private facts").

134. *Shulman*, 955 P.2d at 478-81.

135. (R. at 7-8).

136. *Doe v. Cahill*, 884 A.2d 451, 467 (Del. 2005) (referencing "the normally (and inherently) unreliable nature of assertions posted in chat rooms and on blogs.").

137. *O'Brien v. Pabst Sales Co.*, 124 F.2d 167 (5th Cir. 1941), *cert. denied*, 351 U.S. 823 (1942).

138. *Gallela v. Onassis*, 487 F.2d 986 (2d Cir. 1973).

139. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975). *See also Garner v. Triangle Publ'n, Inc.*, 97 F. Supp. 546, 549 (D.C.N.Y. 1951) (determining that "being a public figure ipso facto does not automatically destroy in total a person's right of privacy").

that Nevilson's expectation of privacy regarding that activity was diminished as a result of his celebrity. At least, Nevilson has raised genuine issues of material fact with respect to each element of his public disclosure of private facts claim.

D. TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY

i. General

Tortious interference with business expectancy occurs when a person intentionally damages the plaintiff's contractual or other business relationships. Tortious interference with business expectancy takes place when the defendant acts to prevent the plaintiff from successfully establishing business relationships. The relations protected against by this form of intentional interference include any prospective contractual, or other, relations if the potential contract would be of pecuniary value to the plaintiff. [140] In brief, this tort occurs when the defendant's conduct intentionally causes the plaintiff not to enter into a business relationship with a third party that otherwise would probably have occurred.

ii. Elements

Nevilson's final claim alleges that Marshoogle is liable for tortious interference with business expectancy. Under the applicable Marshall Code, a plaintiff must establish: "(1) a reasonable expectancy of entering into a valid business relationship; (2) the defendant's knowledge of the expectancy; (3) the defendant's purposeful interference that prevents the realization of the business expectancy; and (4) damages resulting from the interference."[141]

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140. *See also* Restatement (Second) of Torts § 766B.

141. Marshall Rev. Code § 762(b); *See also* (R. at 12). This Code adopts the rule applied in a number of cases. *See e.g. Lusher v. Becker Bros, Inc*., 509 N.E.2d 444 (Ill. App. Ct. 1987); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, 546 N.E.2d 33 (Ill. App. Ct. 1989). This tort is virtually identical to the tort of intentional interference with prospective economic advantage. In *Anderson v. Vanden Dorpel*, the Illinois Supreme Court determined that for a plaintiff to state a cause of action for intentional interference with prospective economic advantage, such "plaintiff must allege (1) a reasonable expectancy of entering into a valid business relationship, (2) the defendant's knowledge of the expectancy, (3) an intentional and unjustified interference by the defendant that induced or caused a breach or termination of the expectancy, and (4) damage to the plaintiff resulting from the defendant's interference." *Anderson v. Vanded Dorpel*, 667 N.E.2d 1296, 1299 (Ill. 1996). By analogy, cases presenting the tort of intentional interference with prospective economic advantage may be used in the Court's consideration of the current issue before the Court, namely tortious interference with business expectancy.

1. *Reasonable Expectancy of Relationship*

The first element of the tort is a reasonable expectancy of a valid business relationship. There need not be an enforceable contract between two parties; rather, the tort is actionable if there is an interference with a reasonable expectation of a business relationship.[142] Thus, prospective employment may be protected if a sufficient factual basis is established.[143] However, the mere hope of receiving a job offer is not sufficient to constitute a reasonable business expectancy.[144] Furthermore, the facts must show that the interference caused by the defendant must be towards some third party and not the plaintiff.[145] The plaintiff must show he had a reasonable business expectancy with a specific third party "or an identifiable prospective class of third persons."[146] However, there need not be contact between the defendant and the third party.[147]

Nevilson had several prospective endorsement deals, including a potential three million dollar contract from Sunshine AthleticWear.[148] Additionally, several other corporations expressed interest in Nevilson representing their products.[149] In *American Broadcasting Co. v. Maljack Productions, Inc*., American Broadcasting received footage from the BBC believing it could grant a license to the defendant Maljack Productions.[150] The BBC obtained an injunction preventing the defendant from distributing the film.[151] The defendant claimed that by the BBC sending cease and desist letters to various broadcasting agencies, including Reader's Digest, it tortiously interfered with its prospective economic advantage.[152] The court held that a reasonable juror could find that a single phone call with Reader's Digest was "sufficient to create a reasonable business expectancy and that the BBC was aware of that expectancy."[153]

The Sunshine AthleticWear contract was contingent on Nevilson becoming a member of the U.S. Olympic Diving Team. Nevilson will argue that he would have made the U.S. Olympic Diving Team. He had previously won three gold medals in the 2007 Junior World Diving Championships and it was predicted "he would trounce the competition" at the

142. *Lusher*, 509 N.E.2d at 446.
143. *Anderson*, 667 N.E.2d at1299-00.
144. *Id.* at 1299.
145. *Hoopla Sports and Entm't, Inc. v. Nike, Inc.*, 947 F.Supp. 347, 357 (N.D. Ill. 1996).
146. *Downers Grove Volkswagen, Inc.*, 546 N.E.2d at 37.
147. *Schuler v. Abbott Lab.*, 639 N.E.2d 144, 147 (Ill. App. Ct. 1993).
148. (R. at 6).
149. (R. at 6).
150. *Am. Broad. Co. v. Maljack Productions, Inc.,* 34 F.Supp.2d 665, 670 (N.D. Ill. 1998).
151. *Id.* at 670.
152. *Id.*
153. *Id.* at 674.

Olympic Trials.[154] Nevilson was also considered the favorite to place in the top spot by mainstream media and sports new outlets.[155] Furthermore, the president of Sunshine AthleticWear admitted an endorsement deal was already negotiated and would be signed if Nevilson made the U.S. Olympic Team.[156] Like in *American Broadcasting Co*., one prospective deal, the Sunshine AthleticWear contract, is enough to create a reasonable business expectancy.

Marshoogle will likely argue that Nevilson's chance of becoming a member of the U.S. Olympic Diving Team was speculative because he was just one of several athletic competitors vying for a spot on the Olympic team. In *Hoopla Sports and Entertainment, Inc. v. Nike*, the plaintiff's president conceived of a basketball game involving high school age boys, the theme of which was international peace and freedom.[157] The president sent a letter to the Sports Marketing Director at Nike soliciting Nike's sponsorship.[158] A year later Nike planned a nearly exact replica game, soliciting the same sponsors the plaintiff did.[159] The plaintiff alleged that Nike's actions interfered with the plaintiff's expectation with several sponsors.[160] The court held that Nike did not interfere with any expectancy because the plaintiff only wrote letters and hoping to receive an offer is not a sufficient expectancy.[161]

As in *Hoopla Sports and Entertainment*, Nevilson was only hoping to receive an offer once he was placed on the U.S. Olympic Diving Team. Furthermore, the Supreme Court of Illinois held that a leading candidate for a job was not a sufficient expectancy even if her interviewers recommended her for the job.[162] Likewise, Nevilson's hope of receiving an offer is not a sufficient expectancy. Marshoogle will also argue that "several other major corporations" informally expressing interest in Nevilson's representation[163] is too vague to identify a party with whom a potential business relationship could be formed.

Nevilson will argue that there is a specific third party, as well as a prospective class.[164] In *Downers Grove Volkswagen*, the plaintiff identi-

154. (R. at 5).
155. *Id.*
156. (R. at 6).
157. *Hoopla Sports and Entm't, Inc.*, 947 F.Supp. at 350.
158. *Id.*
159. *Id.* at 350-51.
160. *Id* at 357.
161. *Id.* at 358.
162. *Anderson*, 667 N.E.2d at1299-00.
163. (R. at 6).
164. *See Parkway Bank & Trust Co. v. City of Darien,* 357 N.E.2d 211, 215 (Ill. App. Ct. 1976) (stating that the third party can be a specific third party "or any clearly identifiable group of third parties contemplating prospective contractual arrangements with the plaintiff").

fied a class of people as those who had previously bought cars from the plaintiff in the past.[165] In *Crinkley v. Dow Jones and Co*., third party descriptions of manufacturers of medical instruments or healthcare products were deemed identifiable.[166] In this case there is a specific third party, Sunshine AthleticWear, but there is also a class of corporations who were rumored to have extended endorsement deals to Nevilson.[167] Those various corporations can be considered a prospective class.

2. *Knowledge of the Expectancy*

The second element of the tort requires that the defendant had knowledge of the expectancy of the business relationship between the plaintiff and a third party. However, the defendant does not have to have knowledge of the specific details of a plaintiff's prospective business relationships.[168] Likewise, knowledge of the specific customers or the specific nature of the relationship between the plaintiff and a third party is not required either.[169] Therefore, it is sufficient for the plaintiff to merely allege knowledge of business relationships.[170]

Nevilson will argue that Marshoogle knew of his relationship with Sunshine AthleticWear. Marshoogle had a popular *SportsBlog* that included posts from Marshoogle News' own staff who posted predictions that Nevilson "would trounce the competition at the trials."[171] The national media and local news outlets throughout Marshall picked up the statements from the president of Sunshine AthleticWear.[172] Furthermore, the *SportsBlog* referred to Nevilson as the "three million dollar man," referring to Sunshine Athletic-Wear's offer.[173]

Marshoogle is unlikely to be successful in arguing that it had no knowledge of Nevilson's expectancy of any business relationships. Marshoogle could possibly attempt to claim that it had openly questioned Nevilson's status on *SportsBlog* where it was stated that "his role model status was exaggerated."[174] Thus, Marshoogle had no *actual* knowledge of any expectancy because his popularity was greatly overstated. Additionally, the rumors of deals with various unidentified corporations were just that, unsubstantiated rumors that may prove to be false.

165. *Downers Grove Volkswagen*, 546 N.E.2d at 37.
166. *Crinkley v. Dow Jones & Co.*, 385 N.E.2d 714, 721-22 (Ill. App. Ct. 1978).
167. (R. at 6, 12).
168. *Malatesta v. Leichter*, 542 N.E.2d 768, 780 (Ill. App. Ct. 1989).
169. *Id.* at 780.
170. *Id.*
171. (R. at 4-5).
172. (R. at 6).
173. (R. at 7).
174. (R. at 6).

3. *Purposeful Interference of Expectancy*

The third element of the tort requires the plaintiff to show that the defendant purposefully interfered with the business expectancy. The defendant's intentional interference must prevent the plaintiff's "expectancy from ripening into a valid business relationship."[175] The defendant must have intent to interfere with the relationship and that intent must actually cause the interference. This element encompasses two components, intention and causation. However, even if the defendant intentionally interferes with the plaintiff's business expectancy, he may be able to raise the affirmative defense of privilege.

a. Intention

The first component of the purposeful interference element is intention. The plaintiff must allege facts that show the defendant acted with the purpose of injuring plaintiff's expectancies.[176] The defendant must have purposely caused a third party not to enter into a contractual relationship with the plaintiff.[177] Therefore, the plaintiff must allege facts that indicate that the defendant "acted with the purpose of injuring plaintiff's expectancies."[178]

Nevilson will argue that interference with a prospective economic advantage is deemed purposeful or intentional when the actor desires to bring about such interference or knows that his or her actions are at least "substantially certain" to result in such interference.[179] Thus, it is sufficient to allege "some impropriety committed by the defendant in interfering with the plaintiff's expectancy of entering into a valid business relationship with an identifiable third party."[180] Nevilson will analogize to the facts in *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc.*, where the defendant published a brochure with false information about the plaintiff's services.[181] In *Downers Grove* the court stated, "an allegation that a party essentially printed information with a reckless disregard for the truth is sufficient to allege improper conduct."[182]

Consequently, Nevilson will claim that although the mere publication of the infamous photograph on M.A.P. might have not been deemed

175. *J. Eck & Sons, Inc. v. Reuben H. Donnelley Corp.*, 572 N.E.2d 1090, 1093 (Ill. App. Ct. 1991).

176. *Hoopla Sports & Entm't, Inc.*, 947 F.Supp. at 357.

177. *Parkway Bank & Trust Co.,* 357 N.E.2d at 215.

178. *Hoopla Sports & Entm't, Inc.*, 947 F.Supp. at 357.

179. Restatement (Second) of Torts § 766B cmt. b (1979).

180. *Romanek v. Connelly*, 753 N.E.2d 1062, 1073 (Ill. App. Ct. 2001) *citing Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 371 (Ill. 1998).

181. *Downer Grove Volkswagen v. Wigglesworth Imports Inc.*, 546 N.E.2d 33, 35 (Ill. App. Ct. 1989).

182. *Id*. at 37.

sufficient to satisfy this element, the subsequent publication on *SportsBlog* with the suggestive comments, clearly insinuating that Nevilson smoked marijuana and directing Internet users to visit the photograph on M.A.P. constitutes sufficient evidence that Marshoogle acted with impropriety and reckless disregard for the truth in this instance. Marshoogle had knowledge of Nevilson's status as a spokesperson of Marshall City Against Drugs and his impending deals.[183] Marshoogle knew or should have been at least "substantially certain" that its actions would result in such interference. Indeed, because of these false allegations and the resulting negative media attention, Nevilson focused on clearing his name and lost focus in his preparation Olympic Trials ultimately costing him the qualification to the 2010 Olympics. In additional support of his argument Nevilson will point to Marshoogle's failure to blur his picture on the website and its subsequent delay in removing the photographs, arguably in order to benefit from the increased traffic to its website.[184] Based on the above, Nevilson will claim that he has sufficiently alleged that Marshoogle acted with "some impropriety" interfering with his business expectancy.

Marshoogle will likely claim that Nevilson failed to establish that Marshoogle "acted with the purpose of interfering with appellant's prospective economic advantage"[185] In support of his argument Marshoogle could point to *Crinkley v. Dow Jones & Co.*, where the court considered an alleged interference with prospective business relationships when the defendant published a defaming article about the plaintiff. The court dismissed this claim because, although defendant intended to make the statements, the plaintiff could not show that the defendant acted with the purpose to interfere with business relationships.[186] Marshoogle could also point to the Restatement for a list of factors to be considered in similar cases, including, among others; the nature of the actor's conduct, the actor's motive, and the interests sought to be advanced by the actor.[187] In addition, even though an actor may know that interference will result, if the primary purpose of the conduct is legitimate, then the conduct may not be actionable.[188]

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183. (R. at 6).

184. (R. at 7).

185. *Crinkley*, 385 N.E.2d at 722 (Ill. App. Ct. 1978).

186. *Id.* at 880.

187. Restatement (Second) of Torts § 766B cmt. d (1979). "Together these factors mean that the actor's purpose is of substantial significance. If he had no desire to effectuate the interference by his action but knew that it would be a mere incidental result of conduct he was engaging in for another purpose, the interference may be found to be not improper." *Id.*

188. *Id.*

Based on the above, Marshoogle will claim that it did not publish the picture in question with the purpose of harming Nevilson, but rather to update and enhance the M.A.P. feature, which constitutes a legitimate purpose. Furthermore, the comments in question on *SportsBlog* were made to discuss and report news and events regarding sports and athletes. *SportsBlog* acted as any other news outlet or discussion forum. In addition, comments critical of Nevilson's activities had been published before on *SportsBlog*, but Nevilson did not complain and the comment did not affect his popularity or business relationships.[189] Any harm resulting from the posting on *SportsBlog* was merely incidental, and did not occur due to improper action by Marshoogle. As to the removal of the photograph in question, Marshoogle will argue that it promptly removed the picture upon Nevilson's request.[190] In addition, Marshoogle could prove there was an electronic malfunction and not intentional human intervention that left Nevilson's face visible in the picture. Therefore, no impropriety may be established.

b. Causation

The second component of the purposeful interference element is causation. The defendant's actions must be the cause of the interference with a plaintiff's business expectancy. This purposeful interference must prevent "the expectancy from ripening into a valid business relationship."[191]

Nevilson will likely argue that Marshoogle's printing of the picture and subsequent negative publicity surrounding him caused him to perform below average. Additionally, the appearance of impropriety on Nevilson's part caused him to lose his prospective endorsement deals. It was revealed to Nevilson that it was not "in the company's best interests to have him represent them."[192] Marshoogle will likely counter argue that it is not responsible for Nevilson's performance in the Olympic Trials because any number of factors could have come into play. Nevilson's ability could have been overblown and the competitors, who beat Nevilson, beat him purely based on skill. However, Marshoogle will likely lose on its claim that it's posting of the pictures and subsequent criticisms of Nevilson did not cause the chain reaction of other media outlets republishing and commenting on the pictures. Furthermore, Nevilson was made aware that the sponsors did not want his representation because of the surrounding controversy.[193]

189. (R. at 6).
190. (R. at 4).
191. *J. Eck & Sons, Inc.*, 572 N.E.2d at 1092.
192. (R. at 8).
193. *Id.* The Marshall City Against Drugs campaign refused any further work with Nevilson on the campaign. *Id.*

c. Privilege Defense

A third component that may be raised by Marshoogle is the privilege defense. The opportunity to obtain customers is a protected business expectancy.[194] A party is privileged to interfere with a relationship between a plaintiff and a third party if the interference was without malice or was not done with wrongful means.[195] Wrongful means includes interference that is improper.[196] Such improper conduct includes publishing information with a reckless disregard for its truth.[197] To determine if publishing information with a reckless disregard for its truth rises to the level of improper conduct, there are several factors to consider:

> (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties.[198]

Marshoogle will likely argue that it was privileged to post the picture in question on M.A.P. because it was trying to enhance its mapping feature and draw visitors to its website, which is a legitimate business purpose. The pictures taken were to create a 360 degree tour of the whole town in an entirely automated process.[199] Marshoogle did not intentionally take Nevilson's picture but the instance was haphazardly captured by the photographic lens. Additionally, Marshoogle could claim that Nevilson's representation as the face of Marshall's anti-drug campaign was a social wrong and Nevilson should not be allowed to protest the very thing he did himself.

Nevilson will likely argue that Marshoogle posted the picture and *SportsBlog* directed users to it insinuating illegal drug use without verifying if Nevilson was actually doing drugs. Nevilson was using a hookah pipe to smoke tobacco rather than illegal drugs.[200] Furthermore, Nevilson will argue that Marshoogle acted purely in its own economic interests because it did not blur his face in the published picture, even though it was Marshoogle's policy to do so through a completely automated process.[201] Furthermore, Marshoogle's *SportsBlog* claimed Nevilson's role model status in Marshall's anti-drug campaign was exaggerated. The

194. *Downers Grove Volkswagen*, 546 N.E.2d at 37.
195. *Am. Broad. Co.*, 34 F.Supp.2d at 674.
196. *Downers Grove Volkswagen*, 546 N.E.2d at 36.
197. *Id.* at 37.
198. *Id.*
199. (R. at 4).
200. (R. at 6).
201. (R. at 4).

relationship between Nevilson and Marshoogle could be considered antagonistic.

4. *Damages*

The fourth element of the tort constitutes of damages resulting from the interference."[202] The plaintiff must prove that actual damages occurred to fulfill the final element of the claim.[203] General damages are allowed because "the defendant should not be surprised by a proffer of proof of the item of damage, since it is the natural and necessary consequence of the compensable injury alleged."[204] Because lost profits involve some uncertainty, the court is allowed to consider proof of inferential character.[205]

Nevilson will likely argue that he suffered actual damages due to Marshoogle's interference. The court is allowed to make certain assumptions in calculating damages. In *Maletesta*, the court permitted certain valuation assumptions and those assumptions "do not render the valuation faulty."[206] Before Marshoogle's interference, Nevilson had the prospect of a three million dollar contract, as well as several other pending endorsement deals. It may be difficult to quantify possible endorsement deals that do not mention a dollar amount. However, the loss of the three million dollar contract with Sunshine AthleticWear is easy to calculate.

Marshoogle will likely argue that the damages are too speculative. With Sunshine AthleticWear, the contract was contingent on Nevilson's placement on the Olympic Diving Team. Even with Nevilson's favored status as the frontrunner, there was nothing to guarantee he would become a member of the Olympic Diving Team. Furthermore, there were only rumors of other endorsement contracts with other various companies.

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202. Marshall Rev. Code § 762(b); (R. at 12). *See also Lusher v. Becker Bros, Inc*., 509 N.E.2d 444 (Ill.App. Ct. 1987); *Downers Grove Volkswagen*, 546 N.E.2d 33.

203. *Hackman v. Dickerson Realtors, Inc.*, 557 F.Supp.2d 938, 953 (N.D. Ill. 2008).

204. *Downers Grove Volkswagen*, 546 N.E.2d at 38.

205. *Maletesta*, 542 N.E.2d at 784.

206. *Id.*