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# 2009 John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law: Brief for the Petitioner, 27 J. Marshall J. Computer & Info. L. 131 (2009)

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# BRIEF FOR THE PETITIONER

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No. 2009-CV-0654

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IN THE
SUPREME COURT OF THE STATE OF MARSHALL

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PHILLIP NEVILSON,
Petitioner,
v.
MARSHOOGLE, INC.,
Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE FIRST DISTRICT COURT OF APPEALS
FOR THE STATE OF MARSHALL

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**BRIEF FOR PETITIONER**

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## QUESTIONS PRESENTED FOR REVIEW

I. Whether the First Circuit Court of Appeals for the State of Marshall erred in affirming the Circuit Court's decision to grant Marshoogle's motion for summary judgment in relation to Mr. Nevilson's claim for intrusion upon seclusion?

II. Whether the First Circuit Court of Appeals erred in affirming the Circuit Court's decision to grant Marshoogle's motion for summary judgment in relation to Mr. Nevilson's claim for publication of private facts?

III. Whether the First Circuit Court of Appeals erred in affirming the Circuit Court's decision to grant Marshoogle's motion for summary judgment in relation to Mr. Nevilson's claim for tortuous interference with business expectancy?

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## OPINIONS AND JUDGMENTS BELOW

The Opinion of the Marbury County Circuit Court (MCV-08-227), granting summary judgment in favor of the Respondent, is unreported. The Circuit Court held that no genuine issue of material fact existed as to Petitioner's claims of intrusion upon seclusion, publication of private facts and tortious interference with business expectancy. The Opinion and Order of the First Circuit Court of Appeal (Case No. 2008-CV01-0416), affirming the Circuit Court on all counts, is unreported and included in the Record ("R.") at 3.

## STATEMENT OF JURISDICTION

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

## RESTATEMENT AND MARSHALL REVISED CODE PROVISIONS

Restatement (Second) of Torts § 652B, sets forth the elements of a claim for intrusion upon seclusion as "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977).

Marshall Revised Code § 762(b) provides the law pertinent to a claim for invasion of privacy by publication of private facts as follows:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Marshall Revised Code § 762(b).

Tortious interference with business expectancy is outlined in Marshall Revised Code § 762(b) as "(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." Marshall Revised Code § 762(b).

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

Marshoogle, Inc. ("Marshoogle") is a corporation based and incorporated in the State of Marshall, which provides free services to Internet users through their website. (R. at 4). Marshoogle's operations originated as a search engine, but as the corporation grew it expanded

services to include e-mail, news, and mapping features. *Id*. *SportsBlog*, an aspect of Marshoogle News, contains athletic reports generated by both end-users and Marshoogle's staff reporters. *Id*. In June 2007, Marshoogle added a feature known as Marshoogle Avenue Perspective ("M.A.P."), to the mapping function *MarshMaps*. *Id*. M.A.P. allows users to search for a location and view a 360 degree street-level image of that address on their computer. *Id*.

The panoramic images that Internet users access on M.A.P. are made available by cars specially affixed with nine cameras at the end of a five-foot pole attached to the roof of the vehicle known as a M.A.P. mobile. *Id*. As the car drives down the street, the cameras rapidly capture images that are later downloaded into a program, which connects the separate photographs into one continuous image. *Id*. Once uploaded into the M.A.P. feature on Marshoogle's website, this amalgamated image enables a user to view a particular address as though he was physically driving down the street. *Id*. The M.A.P. feature further allows the user to zoom in on a particular area of the photo and adjust the image both horizontally and vertically. *Id*.

Initially, M.A.P.'s unedited images were available to all Internet users. *Id*. After receiving several complaints pertaining to the M.A.P. function capturing images of people, homes, and businesses, Marshoogle implemented a new policy aimed at reducing these complaints. (R. at 4-5). Specifically, this policy included a blurring technology, which automatically distorts individual faces and license plates on vehicles. (R. at 4). Additionally, Marshoogle provided an online image removal form where a user could request deletion of an image from the M.A.P. software if it includes a photograph of his person or property. (R. at 5). In January 2008, through a press release, Marshoogle publicized these options, stating a desire to preserve user satisfaction. *Id*.

When Marshoogle first added the M.A.P. element to *MarshMaps*, it promoted the feature as a benefit to tourism, real estate transactions, local businesses, and recreational activities. *Id*. As Marshoogle advertised the feature, it grew in popularity and online users began to find other uses for the M.A.P. function. *Id*. Users began to scour M.A.P. for images inadvertently captured of celebrities and other prominent individuals at their homes or favorite locations. *Id*. This was made possible by inputting an address of a particular person or by browsing through neighborhoods and known locations of interest. *Id*.

Mr. Phillip Nevilson ("Mr. Nevilson") is a successful young athlete whose talents elevated him from an underprivileged youth to a position of respect within the community and success in his athletic endeavors. *Id*. Mr. Nevilson was raised in the low income neighborhood of Lower Marshall Township, an area known for juvenile drug-related crimes. *Id*. In 1998, Coach Timothy Knight of the Marshall Athletic Club ("MAC")

recognized Mr. Nevilson's talent in the sport of diving at the young age of thirteen. *Id*. Coach Knight offered to personally train Mr. Nevilson at no cost, hoping to help him reach his diving potential. *Id*. The MAC is a private athletic club in the affluent neighborhood of Upper Marshall Township and is well-known for producing very talented swimmers and divers. *Id*.

During his training, Mr. Nevilson developed into a highly successful young diver, often placing first or second in his competitions, including wining three gold medals in the 2007 Junior World Diving Championships. *Id*. Due to his accomplishments, Mr. Nevilson decided to train for the July 2008 Olympic Trials in Marshall City, where he needed to finish either first or second for each event in which he desired to compete at the Olympic level. *Id*.

As Mr. Nevilson's achievements increased, so did the attention of the media. *Id*. Many news sources, including Marshoogle's *SportsBlog*, predicted that Mr. Nevilson would be highly successful at both the Olympic trials and the 2010 Olympics. *Id*. Because of his childhood in a troubled neighborhood and his ability to overcome the obstacles faced by most in the Lower Marshall Township, many began to view Mr. Nevilson as a role model for adolescents facing similar circumstances. (R. at 6).

Along with Mr. Nevilson's newfound fame came offers to participate in promotional campaigns and corporate endorsements. *Id*. In January 2008, he participated as an anti-drug spokesman in campaigns sponsored by Marshall City Against Drugs ("MCAD"). *Id*. However, Marshoogle's *SportsBlog*, expressed doubt as to the merit behind Mr. Nevilson's status as a role model. *Id*. Despite the critics, several businesses contracted with Mr. Nevilson for commercial promotions, including a local sports retailer SwimShop. *Id*. In early March 2008, rumors surfaced of a proposed three million dollar endorsement contract between Mr. Nevilson and Sunshine Athletic Wear ("Sunshine"), a national sportswear company. *Id*. This deal would go into effect when Mr. Nevilson qualified for the 2010 U.S. Diving Olympic Team. *Id*. On March 25, 2008, the national media reported a public statement made by Sunshine's President, Athena Buck, confirming the rumors as well as expressing enthusiasm for the endorsement and wishing Mr. Nevilson well in his trials. *Id*.

In October 2007, Mr. Nevilson moved out of Lower Marshall Township into a two-story house on the outskirts of Emerald Pools, a neighborhood known for its celebrity residents. *Id*. As a popular tourist destination, this neighborhood is frequented by double-decker tour busses that give their patrons a chance to sneak a glance at Emerald Pool's famous residents. *Id*. Despite the status associated with the neighborhood, Mr. Nevilson attempted to maintain his privacy. *Id*. In particular, he installed a six-foot privacy fence around his entire property, with

signs alerting "Private Property" and "No Trespass." *Id*. Mr. Nevilson cloistered himself from society and chose to avoid attracting attention, instead focusing on his training and the upcoming Olympic trials. *Id*.

After months of maintaining a quiet and confined existence, Mr. Nevilson's life of success and privacy was disrupted on the evening of April 15, 2008. (R. at 6-7). Mr. Nevilson was enjoying a glass of wine, some tobacco, and a televised basketball game, while resting in his window-side recliner on the second story of his home. (R. at 6). As was his custom, Mr. Nevilson smoked tobacco through his Moroccan hookah, a Middle-Eastern water pipe. (R. at 6-7). While Mr. Nevilson relaxed, Marshoogle's M.A.P. mobile was traveling down his street, capturing several photographs of his residence. (R. at 7). The photos taken included an image of Mr. Nevilson, seated by the window, inhaling from the hookah. *Id*. When the set of images were uploaded into the M.A.P. feature, Mr. Nevilson's face was not blurred in the picture, thus breaking company policy. *Id*.

On April 21, 2008, a posting on Marshoogle's *SportsBlog* directed users to the incriminating photo on M.A.P., referring to Mr. Nevilson as "Marshall's own 'three million dollar man'" and insinuating recreational marijuana use. *Id*. On April 30, 2008, Mr. Nevilson became aware of the photograph, and requested the immediate removal of the image. *Id*. Marshoogle did not comply with the request until May 7, 2008. *Id*.

Marshoogle's publication of the images on M.A.P. caused negative attention throughout the mainstream media, including numerous allegations of drug use supported by "digitally enhanced" versions of the images. *Id*. Mr. Nevilson became the subject of unwarranted scorn as the Marshall community expressed disappointment and frustration because they felt deceived by a well-known and well-respected young athlete. *Id*. The Marshall Diving Association instituted an official drug investigation, which placed Mr. Nevilson's chances for Olympic qualification in jeopardy. *Id*. In addition, Mr. Nevilson quickly lost his promotional campaign with MCAD and numerous endorsement deals, both sources stating that it would simply not be in their best interests to continue forward with Mr. Nevilson as their spokesman. (R. at 8). Mr. Nevilson feverishly attempted to counteract the negative publicity and false allegations by issuing press statements and addressing the media directly. *Id*. However, Mr. Nevilson's once quiet and private life was replaced by constant damaging media stories and paparazzi situated outside of his home. *Id*.

In June 2008, Mr. Nevilson participated in the Olympic Trials in Marshall City. His performance suffered due to the extensive criticism from the press and the public, as well as his endless attempts to clear his tarnished reputation. *Id*. He performed well below his average, finishing third, which made him unable to qualify for the Olympic diving team.

*Id*. As a result of sub-par performance and failure to qualify for the team, Mr. Nevilson's proposed endorsement deal with Sunshine did not come to fruition. *Id*. Following the Olympic Trials, Mr. Nevilson publicly announced that his inability to secure a position on the team was a consequence of the media allegations of drug usage and his attempts to rectify the wrongs against him. *Id*.

## II. COURSE OF PROCEEDINGS

In August 2008, Mr. Nevilson instituted an action against Marshoogle in Marbury County Circuit Court, asserting five claims: (1) defamation; (2) appropriation of name and likeness; (3) intrusion upon seclusion; (4) intrusion on privacy by publication of private facts; and (5) tortious interference with business expectancy. (R. at 3, 8). In response, Marshoogle moved to dismiss for failure to state a claim upon which relief can be granted pursuant to Marshall R. Civ. P. 12(b)(6).[1] (R. at 8). After the ruling on the motion, the lower court determined that the claims of intrusion upon seclusion, intrusion on privacy by publication of private facts, and tortious interference with business expectancy warranted further discussion. *Id*. During discovery, Marshoogle moved for summary judgment on the remaining three counts and the circuit court granted their motion. *Id*.

Mr. Nevilson appealed the summary judgment ruling to the First District of the Marshall Court of Appeals. (R. at 3). The court of appeals affirmed, finding that Mr. Nevilson did not establish each cause of action. (R. at 13). On the issue of intrusion upon seclusion, both the circuit and appellate courts held that Mr. Nevilson failed to show an actual intrusion into his private matters and declined to comment on the additional elements of the claim. (R. at 10).

Regarding the publication of private facts claim, Marshoogle conceded that a factual publication occurred. (R. at 11). Nevertheless, the appellate court affirmed the circuit court's grant of summary judgment. *Id*. In doing so, the First Circuit held that the images of Nevilson depicting him inside his home were not of a private matter. *Id*. Additionally, the court focused on the publication of certain facts as a legitimate public concern, instead of considering the lack of public interest inherent in lawful actions that occur within the privacy of one's home. *Id*.

The court of appeals also affirmed the grant of summary judgment for the final claim of tortious interference with business expectancy. (R. at 13). The court of appeals held that even if Marshoogle had knowledge of the prospective contracts and Mr. Nevilson had a reasonable expectancy of receiving the contracts for endorsement, Mr. Nevilson nonethe-

1. Marshall R. Civ. P. 12(b)(6) mirrors the language of Fed. R. Civ. P. 12(b)(6).

less failed to show intentional or purposeful interference on the part of Marshoogle. *Id*. The First Circuit affirmed the summary judgment holding on this count, by declining to recognize that Marshoogle acted improperly. *Id*. As a result of these decisions, the petitioner respectfully requests review. (R. at 2).

## SUMMARY OF THE ARGUMENT

As encroaching technologies shrink the realm of privacy and expose intimate details of the home, courts must craft a solution that will provide a remedy to the injured. When Marshoogle's prying cameras took photographs of Nevilson seated inside his home, they invaded his privacy by intruding into his private area of seclusion and this court should give Nevilson the opportunity to seek a remedy. Because Nevilson was inside his home when the images were captured, he had a reasonable expectation of privacy, which cannot be lost simply by leaving his curtains open. Marshoogle's cameras were intentionally photographing the interior of private residences and Marshoogle was aware that their photographs captured private matters. A jury would be capable of finding, and should have been allowed to determine, that the use of a nine-camera, car-mounted, drive-by imaging system is highly offensive to a reasonable person. Therefore, Nevilson properly satisfied the elements of intrusion upon seclusion and summary judgment should not have been granted.

The publication of such photographs further invaded Nevilson's privacy because they resulted in the publicity of his private life. When a person is secretly photographed while inside his home engaging in private acts, he maintains a reasonable expectation of privacy and has not left himself open to the public eye. Marshoogle's photographs represent only a single frame of an individual's entire life, striping the images of all contexts and depriving Nevilson of his autonomy. It is offensive that Marshoogle widely dispersed the images across the Internet, linked the photographs with addresses of private residences, and failed to protect the privacy of the individuals captured therein. Furthermore, the ability of the images to be reproduced, edited, and saved makes the publication most objectionable. Because Marshoogle published the private images of Nevilson in his home under false allegations and without connection to his diving abilities, the matter is not of a legitimate public concern. Thus, the elements of Nevilson's claim for publication of private facts have been properly established and the lower courts' grant of summary judgment was in error.

Upon publication of the photographs, Marshoogle continued to harm Nevilson by tortiously interfering with his business expectations. Not only did Marshoogle fail to blur Nevilson's face in the M.A.P. software, but also their *SportsBlog* feature directed Internet users to the images.

Further, the *SportsBlog* post insinuated that Nevilson used illicit substances and then directly referenced the proposed endorsement deal with Sunshine. As a result, Marshoogle's actions required Nevilson to defend his reputation, which caused him four months of stress and distraction. This prevented Nevilson from properly training for the Olympic trials, and thus caused Nevilson to suffer the loss of his expected contract with Sunshine. Therefore, the grant of summary judgment was erroneous because Nevilson established each element of tortious interference with business expectancy.

The lower courts erred in by granting summary judgment in favor of Marshoogle because Nevilson's claims present genuine issues of fact, which a jury must decide. Not only has Nevilson properly pleaded each cause of action, but his allegations also exceed the summary judgment standards required of the nonmoving party. This court should find that Marshoogle's intentional actions constitute an invasion into Nevilson's seclusion in his home, a publication of his private facts, and a loss of his business expectancy.

## ARGUMENT

This appeal challenges the lower courts' grant of Marshoogle's motion for summary judgment on three counts. First, the appellate court should have found that there exists some genuine issue of material fact surrounding Marshoogle's ability to use a highly offensive multi-camera system to capture Nevilson engaged in a private matter within his home. Second, summary judgment was incorrect because Marshoogle publicized private facts about Nevilson which are highly offensive and of no legitimate concern to the public. Finally, Marshoogle improperly and intentionally interfered with Nevilson's prospective contractual relations, resulting in the loss of business options, and thus summary judgment against Nevilson's claim for tortious interference of business expectancy was also improper.

A grant of summary judgment by a lower court is reviewed by an appellate court *de novo*. *Malmloff v. Kerr*, 879 N.E.2d 870 (Ill. 2007). The court must determine whether there exists any genuine issues of law or fact and whether the lower courts were correct in granting judgment as a matter of law to the moving party. *Espinoza v. Elgin*, 649 N.E.2d 1323 (Ill. 1995). Additionally, where reasonable persons may come to different results on disputed facts, summary judgment should be denied. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 607 N.E.2d 1204 (Ill. 1992). Moreover, "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). In reviewing a grant of summary judgment, the court should

make all reasonable inferences in favor of the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *see also Associated Milk Producers, Inc. v. Meadow Gold Dairies, Inc.,* 27 F.3d 268, 270 (7th Cir. 1994).

## I. MARSHOOGLE INTRUDED INTO NEVILSON'S SECLUSION BY UTILIZING AN OFFENSIVE MULTI-CAMERA SYSTEM TO INTENTIONALLY PHOTOGRAPH HIM WHILE HE WAS IN HIS HOME.

The right to privacy, as defined by the Honorable Thomas Cooley in 1888 is the right "to be let alone," is a longstanding protection of the American legal tradition. *See* Thomas C. Cooley, *Law of Torts* 29 (2d ed. 1888). Additionally, "[p]rivacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of law." *Leopold v. Levin*, 259 N.E.2d 250, 254 (Ill. 1970). In commenting on invasion of privacy, the California Supreme Court stated:

> A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.

*Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 489 (Cal. 1998). The right to privacy is a crucial aspect of American culture and thinking, and any action that encroaches upon this right should be scrutinized with the utmost consideration for potential adverse effects. Where such an encroachment is caused by the sweeping capabilities of modern technology, the courts should tread carefully, as the privacy torts must meet the rising need for protection against unwanted and unwarranted intrusion by the advances of technology. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890) (stating that "[p]olitical, social, and economic changes entail the recognition of new rights and the common law, in its eternal youth, grows to meet the demands of society"); *see also* 62 Am. Jur. 2d, *Privacy*, §1 (2009) (asserting that "[t]he courts should proceed with caution in defining the limits of the right of privacy").

The lower courts erred in holding that Nevilson failed to state a claim for intrusion upon seclusion. In order to successfully plead this cause of action, a plaintiff must show: (1) he was engaged in a matter which he has the right to keep private; (2) an intrusion occurred into this private matter; (3) the intrusion was intentional; and (4) the method of intrusion was highly offensive to a reasonable person. *See* Restatement (Second) of Torts § 652B (1977). Nevilson established each element of

the intrusion upon seclusion claim. First, Nevilson maintained a reasonable expectation of privacy in his home, and where one has a reasonable expectation of privacy, the matters conducted therein are private. Second, Marshoogle intruded into Nevilson's private life by capturing images of him while he was inside his home. Third, the intrusion was intentional because Marshoogle acted deliberately in photographing the entire street front which included views of the inside of Nevilson's home. Finally, Marshoogle's use of a multi-camera imaging system mounted on top of a vehicle that is capable of taking long-distance, highly detailed photographs of the inside of Nevilson's home is highly offensive to a reasonable person. Therefore, the lower court was erroneous in finding that Nevilson failed to state a claim for intrusion upon seclusion.

### A. Nevilson has a reasonable expectation of privacy within his home, and where one has a reasonable expectation of privacy the matters conducted therein are inherently private.

Marshoogle intruded into Nevilson's private matters because they captured images of him inside his home, where he had a reasonable expectation of privacy. The lower courts recognized that the privacy element is the most crucial aspect of the claim. (R. at 9); *Busse v. Motorola, Inc.*, 813 N.E.2d 1013, 1017 (Ill. App. Ct. 2004). Nevilson properly established that he was engaged in a private matter. All individuals are entitled to a reasonable expectation of privacy within their homes and courts have found that where one has a reasonable expectation of privacy, the matter will be deemed private. Absolute privacy is not required for an invasion to occur. Nevilson maintained a reasonable expectation of privacy because the images were captured by Marshoogle through utilizing sophisticated and discreet camera systems. Furthermore, when visibility is attained through technological advancements, the reasonableness of an expectation is not diminished. Finally, it is necessary for the courts to recognize when privacy torts do not adapt to changing technologies and views of citizens.

Nevilson was engaged in a private matter because he had a reasonable expectation of privacy at the time and location of the intrusion. The claim of intrusion upon seclusion "is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place." *Taus v. Loftus*, 151 P.3d 1185, 1212 (Cal. 2007) (quoting *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1998)). Nevilson is entitled to a reasonable expectation of privacy inside of his home. A residence is a private area where persons may be guaranteed an expectation of seclusion. *Mauri v. Smith*, 929 P.2d 307, 311 (Or. 1996). Nevilson maintains that same expectation of seclusion and privacy, free from the prying eyes of the outside world, within his own dwelling. Therefore, because Mar-

shoogle invaded an area in which Nevilson had a reasonable expectation of privacy (and where one has a reasonable expectation of privacy the matter is private), when Marshoogle captured the images of Nevilson seated inside his home, they invaded a private matter.

Additionally, Nevilson need only have a reasonable expectation of privacy, not factual or absolute privacy. The California Supreme Court held that "[in no case] have we stated that an expectation of privacy, in order to be reasonable for purposes of the intrusion tort, must be of absolute or complete privacy." *Sanders v. ABC*, 978 P.2d 67, 71 (Cal. 1991). Specifically, the court in *Sanders* held that "a person who lacks a reasonable expectation of complete privacy in a conversation, because it could be seen and overheard by coworkers, may nevertheless have a claim for invasion of privacy by intrusion based on a television reporter's covert videotaping of that conversation." *Id*. at 77. In *Sanders*, the plaintiff sued a broadcasting company for discreetly videotaping a conversation she had with another employer at her office. *Id*. at 69. The defendant urged that no reasonable expectation of privacy existed because the plaintiff was in her office, where absolute privacy does not exist. *Id*. at 73-74. However, the court held that with intrusion torts, privacy is not an "all-or-nothing" characteristic; rather, the concept of seclusion is relative. *Id*. at 77. Similarly, an absolute expectation of privacy does not always exist in the home, but this does not destroy a *reasonable* expectation of privacy. Much like the plaintiff in *Sanders*, Nevilson was visible to some, but his expectation of privacy was reasonable.

Nonetheless, visibility has its limitations. The lower courts stated that "no expectation of privacy exists when a person's appearance is public and open to the public eye." (R. at 10); *see also* Restatement (Second) of Torts § 652D cmt. b (1977). Yet, a determination of when a person is open to the public eye requires that person's presence in a public place. *See Gill v. Hearst Publ'g. Co.,* 253 P.2d 441 (Cal. 1953) (describing plaintiffs captured by photograph in an amorous pose at a public farmer's market); *see also Swerdlick v. Koch*, 721 A.2d 849, 857-58 (R.I. 1998) (describing defendant's recordation of the plaintiff's business activities that occurred outside of his house was open to the public eye). Cases where a reasonable expectation was destroyed by openness to the public eye involved plaintiffs in public areas. *Id*. Therefore, because Nevilson was not in a public place his reasonable expectation of privacy is not limited by openness to the public eye.

Furthermore, the use of technology to photograph a person does not render him open to the public eye. There exists a dichotomy between using the naked eye and using enhanced vision to intrude into the private lives of others because the manner in which a person may be viewed has an effect on the reasonableness of their expectation of privacy.

> [People] understand what can be seen inside their home through the naked eye by those standing beyond their property, and [they] can take appropriate steps to protect their privacy from what can be seen from the street or a neighboring apartment. It is much more difficult to gauge what can be seen through the use of [an enhanced vision device] . . . [W]ith the proper angle of sight, virtually everything could be seen through an undraped window. The 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.

*Digirolamo v. D.P. Anderson & Assocs.*, No. Civ.A. 97-3623, 1999 WL 345592, at *1 (Mass. Dist. Ct. May 26, 1999). The plaintiff in *Digirolamo* alleged an invasion of privacy because she was videotaped and photographed with a telescopic lens from a public street. *Id*. The defendant, while seated in a vehicle in the street, photographed her while she was in her fourth floor apartment. *Id*. The court held that the usage of such equipment was an invasion and encroached upon the plaintiff's reasonable expectation of privacy within her home, even though her curtains were open and the images were taken from a public road. *Id*. at *3.

The facts of *Digirolamo* are similar to the case at bar because Nevilson was viewed through a sophisticated camera system. The *Digirolamo* plaintiff and Nevilson were both photographed in the privacy of their homes above ground level. The defendants in both cases utilized advanced technology, either through a telescopic camera or a high definition nine-camera system. The court in *Dirigolamo* found that the use of such devices without the plaintiff's knowledge does not destroy the reasonableness of an expectation of privacy in one's home. *Id*. Because Nevilson had no reason to anticipate a potential invasion of privacy through the use of the M.A.P. mobile, he is not disrupted in the reasonableness of his expectation.

Nevertheless, the appellate court erroneously found that Nevilson did not have a reasonable expectation of privacy because the images captured by Marshoogle were "no different than what any pedestrian, driver or passenger on one of the numerous double-decker tourist buses that pass by that street every day might see and capture with their cameras." (R. at 10). The lower courts should have recognized the distinction between what can be seen by the naked eye and that which is perceptible through the usage of an enhanced vision device. The photographs taken by Marshoogle are different from what might have been viewed by a passer-by or captured by a tourist's camera on the double-decker bus. A passenger on the bus does not have the extensive capability of capturing an image in the same way as Marshoogle. Marshoogle's camera system ensured that the images captured were more accurate, numerous, and discreet than what a tourist might capture. For a tourist to photograph

the same image as Marshoogle, he would need to scan the windows for Nevilson, ready the camera, and take the picture, while on a moving vehicle. In contrast, Marshoogle used a sophisticated nine-camera system, mounted on the top of a car, to capture numerous images of Nevilson in the privacy of his own home in a matter of seconds. Thus, the fundamental difference between what a passenger would be able to photograph and what Marshoogle actually captured justifies the reasonableness of Nevilson's expectation of privacy.

Privacy is a concept that remains in flux, especially as society begins to acknowledge privacy invasions through the use of technology. "There are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Taus*, 151 P.3d at 1217. As the overarching theme of privacy torts, the current state of the law should adapt to the changing perceptions of the public. A strict reading of the law would require a citizen to live with his curtains perpetually drawn in order to avoid a potential invasion of privacy. Thus, courts should recognize that all citizens are granted privacy within their homes and that merely failing to close the curtains does not equate to leaving oneself open to the public eye.

Marshoogle intruded into a private matter of Nevilson's life because he was inside his home, where he is afforded a reasonable expectation of privacy. Absolute privacy is not synonymous with a reasonable expectation of privacy for intrusion upon seclusion. The fact that Nevilson was visible to some does not legally force him to be visible to all. Furthermore, Nevilson was not open to the public eye because he was not in a public area. The use of an enhanced vision device to discreetly capture images of Nevilson does not disrupt the reasonableness of his expectation of privacy. Thus, Nevilson was engaged in a private matter at the time and location of Marshoogle's intrusion.

### B. Marshoogle committed an unauthorized intrusion into Nevilson's private affairs by taking photographs of the inside of his home.

The lower courts erred in finding that Nevilson failed to properly plead an intrusion by Marshoogle. An intrusion may include any action that violates the private life of another, such as peering through a window. Marshoogle intruded by photographing through Nevilson's windows, which is analogous to peering through them. The taking of the photographs constitute an invasion per se, regardless of the later publication of the images.

The lower courts incorrectly found that the actions of Marshoogle did not constitute an intrusion into his private affairs. Rather, "an intrusion may consist of watching, spying, prying, besetting, overhearing, or other similar conduct. Whether there is an intrusion is to be decided on the facts of each case." *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 6 (S.C. Ct. App. 1989). Furthermore, when a person "is merely in the seclusion of his home, the making of a photograph without his consent is an invasion of a private right, of which he is entitled to complain." William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 392 (1960). As such, Marshoogle invaded Nevilson's privacy when they took the photographs of him in his home. Taking pictures through a window of someone in their home is analogous to peering through a window. Although the claim of intrusion through the use of a multi-camera imaging device is novel, the analogous circumstance of a person peering into the windows of a private home has been long considered an actionable intrusion upon seclusion. *Benitez v. KFC Nat. Mgmt. Co.*, 714 N.E.2d 1002, 1006 (Ill. App. Ct. 1999) (citing *Lovgren v. Citizens First Nat. Bank*, 534 N.E.2d 987, 989 (Ill. 1989)). Therefore, any gaze that peers through the windows of a private residence, whether from human eyes or the permanent stare of a camera lens, is an actionable invasion of privacy.

Additionally, Marshoogle's actions are more intrusive than a simple glance through a window because the images are a permanent capture of private events. Ostensibly, "when a picture is taken of a plaintiff while he is in the privacy of his home, or in a hospital bed, the taking of the 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." Phillip E. Hassman, Summary and Comment, *Taking Unauthorized Photographs as Invasion of Privacy*, 86 A.L.R.3d 374 (1978). Furthermore, "[t]he intrusion may . . . be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs." Restatement (Second) of Torts §652B cmt. b (1977) . Because the invasion was completed through the use of a "mechanical aid," namely a sophisticated camera system, Marshoogle's intrusion into Nevilson's private affairs is all the more apparent. Therefore, the actions of Marshoogle resulted in an intrusion by using the cameras to capture images of Nevilson inside the privacy of his home.

Finally, the images captured by Marshoogle standing alone, regardless of the later publication, serve as an intrusion into his seclusion. The claim for intrusion upon seclusion "does not depend upon any publicity given to the person whose interest is invaded or to his affairs." *Id.* at §652B cmt. a. The lower courts erred in finding that Nevilson's claim for intrusion upon seclusion was based "upon the publication of the photographs in question and not the taking of the photographs per se." (R. at

10). To the contrary, Nevilson asserts that the act of taking the photographs alone is an actionable invasion of privacy because publication is not an element of the claim. The taking of such photographs, which capture Nevilson engaging in private activities in the home, is enough to serve as an invasion.

### C. Marshoogle's photographing of the interior of Nevilson's home was an intentional act.

The intrusion committed by Marshoogle into Nevilson's private affairs was intentional. Intent does not require malice, ill-will or purpose, but rather that the person act with willingness and that he either knows or should know of the consequences. Marshoogle willingly sent forth the M.A.P. mobiles to capture street-view images of the entire township. Furthermore, Marshoogle knew that the photographs taken by the M.A.P. mobiles were capturing private moments, as evidenced by the receipt of numerous complaints. Therefore, Nevilson contends that Marshoogle acted intentionally in capturing the images of him inside his home, as it acted willingly and knew of the consequences of such photographs.

Marshoogle's actions were intentional because it actually knew of the consequences that would follow from capturing the images. A defendant's action will be 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." *Snakenberg*, 383 S.E.2d at 6. Marshoogle acted willingly by sending the M.A.P. mobile throughout the State of Marshall to capture images of the entire street front. Furthermore, Marshoogle knew that images of private acts occurring in private dwellings would be captured, such as in Nevilson's case. In using advanced technologies to photograph homes and businesses from the roof of a car, Marshoogle knew their device could capture private images. This knowledge is evidenced by Marshoogle's use of a blurring function in the M.A.P. feature to distort images of faces and license plates. (R. at 4). In creating such an aspect within the software, Marshoogle acknowledged that its cameras were capturing private images. *Id*. Additionally, Marshoogle implemented an online form where users can request that a certain picture be removed from the M.A.P. feature. (R. at 4-5). The implementation of the blurring function and the image removal form demonstrates that Marshoogle knew that the M.A.P. mobiles were taking images that members of the public did not want captured.

Moreover, in *Snakenberg*, the defendant intentionally videotaped a space where females were changing and captured images of them doing so, 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." *Snakenberg*, 383 S.E.2d at 8. The "act of volition" refers to the requirement of willingness and the expected consequence relates to the knowledge element. In this case, Marshoogle's "act of volition" was using the M.A.P. mobile to capture images of the entire street front and the resulting exposure of citizens' private matters was an expected consequence. The "expected or natural consequence" of Marshoogle's action was the capturing of private images. Therefore, because Marshoogle meant to take photographs of anything viewable from the street, and knew that some images would contain private matters, Marshoogle intentionally invaded Nevilson's privacy in capturing the private images of him.

Marshoogle intentionally intruded into Nevilson's seclusion because it willingly captured photographs of entire street fronts with the M.A.P. mobile and knew that such images would contain some private matters. Marshoogle was aware of the potentially invasive character of the images captured by the M.A.P. mobile. Because of the user complaints, Marshoogle created a blurring feature to distort faces and license plates to protect the privacy of those photographed. Marshoogle also implemented an online user removal form, to give individuals a chance to object to and have removed certain images of their home or person. In responding to these concerns, Marshoogle demonstrated an awareness of the consequences of its actions. Thus, Marshoogle's continued photographing constituted an intentional act, thus fulfilling the third element of the invasion of privacy by intrusion upon seclusion claim.

### D. The indiscriminate use of a nine-foot tall, multi-camera system to capture images of the inside of one's home is highly offensive to a reasonable person.

The lower courts erred in granting summary judgment for Marshoogle because the method by which the images are captured is highly offensive to a reasonable person. The determination of whether a method of intrusion is highly offensive should be made by the jury and not on a motion for summary judgment. Also, Marshoogle's methods of using a highly sophisticated car-mounted, multi-camera imaging system to take drive-by photographs of private residences and the contents therein is highly offensive. Thus, Nevilson contends that the method by which Marshoogle captured the images of the interior of his home is highly offensive to a reasonable person.

The determination as to whether the photographing through the use of a drive-by camera system is highly offensive is one that should be made by a jury. Because this case presents a novel questions of fact as to how reasonable persons respond to the offensiveness of unknowing en-

croachments of technology, such a determination is one that a jury must resolve.

> Whether the intrusion is objectionable to a reasonable person is a factual question best determined by a jury. It may not be objectionable to peer through an open window where the curtains are not drawn, but the use of a powerful lens to observe the interior of a home . . . could be found objectionable to a reasonable person.

*Saldana v. Kelsey-Hayes Co*., 443 N.W.2d 382, 384 (Mich. Ct. App. 1989); *see also Jensen v. State*, 72 P.3 897, 902 (Idaho 2003). Just as the court in *Saldana* held that some may find it objectionable to use advanced technology to peer into someone's home, a group of Nevilson's peers might similarly find that the use of a multi-faceted camera system, mounted on top of a car, driving around neighborhoods and capturing images of people inside their homes might be offensive. *Saldana*, 443 N.W.2d at 384. Therefore, this case should be remanded to allow a jury to determine the issue of whether the manner in which Nevilson's image was captured is highly offensive.

The lower courts failed to recognize that individual citizens are at the mercy of Marshoogle's cameras, unable to anticipate and prepare for the permanent snapshots of their life, because such photographs were taken unnoticeably through the use of advanced imaging systems. The United States Supreme Court recognized that the use of a thermal imaging device involves highly technical equipment, which is capable of discreetly and quickly completing its task. *Kyllo v. United States*, 533 U.S. 27, 35 (2001). The Court stated "[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." *Id*. at 34-36.

In determining what is highly offensive to a reasonable person, the lower courts declined to incorporate Marshoogle's invasive use of technology. Like the thermal imaging in *Kyllo*, it is highly offensive that, in the matter of a few seconds, a technologically advanced vehicle equipped with nine high-resolution cameras can snap continuous photos, which are later uploaded to an online integrated mapping feature. Because these images are taken discreetly with such advanced technology, homeowners or pedestrians may be caught in embarrassing, indecent, and often private moments without any warning. Therefore, Marshoogle's actions, in sending a camera-equipped vehicle unannounced through the streets of Marshall to capture images of homes, business, and people therein, could be found to be highly offensive to reasonable people. Thus, this court should find that the lower courts erred in granting summary judgment where a jury would be best suited to make such a factual deter-

mination, especially given the novel application of law to facts presented by this case.

A jury would likely find that Marshoogle's actual method of capturing images is highly offensive to a reasonable person. The mere fact that he was photographed with the sophisticated technology, instead of simply viewed by the naked eye, is part of what makes the circumstances so offensive. In her law review article discussing intrusion into one's privacy, University of Florida Levin College of Law Professor Lyrissa Lidsky wrote:

> Photographing may also be more intrusive because it creates the potential that the subject's actions will be exposed to a completely different audience than the one she intended or expected. Individuals typically tailor their behavior to the expected audience, and by denying individuals this opportunity, the defendant violates both their expectations of anonymity and their autonomy in selecting to whom they will reveal parts of themselves.

Lyrissa B. Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 Tul. L. Rev. 173, 237 (1998). This is all the more true when the invading eyes come not from individuals but from the permanent gaze of a camera lens. Though Nevilson may not mind the passing glance from a neighbor, he might certainly have drawn the curtains had he known that a high definition camera-equipped vehicle would pass down the street and capture continuous images of his street, house, and contents therein. It is highly offensive that, in a matter of seconds, the inside of one's home and any actions taking place within, can be captured by nine cameras mounted atop a vehicle. Therefore, this element of the claim against Marshoogle is satisfied because the manner in which the photographs were taken would be highly offensive to a reasonable person.

This court should find that the photographs taken of Nevilson inside the privacy of his home by the M.A.P. mobile establish all of the necessary elements of claim for inclusion into seclusion. First, Marshoogle photographed Nevilson engaging in private matters, since he was inside of his home and should be afforded a reasonable expectation of privacy therein. Second, the actions of Marshoogle constituted an invasion into Nevilson's private life because photographing the interior of a private residence with a technologically enhanced nine camera system is legally analogous to peering through the windows. Third, Marshoogle intentionally invaded Nevilson's privacy because Marshoogle willingly engaged in and knew of the potential consequences of such actions as evidenced by the steps taken by the site to protect images, protections that were not effective in protecting Nevilson. Finally, the use of a highly sophisticated, nine-camera system, which is mounted on top of a car to take multiple photographs of people and places in a matter of

seconds, is highly offensive or would be deemed so by a jury. Therefore, Marshoogle intruded into Nevilson's seclusion and this court should remand this case back to the lower court, finding they improperly granted summary judgment on this claim.

## II. A JURY SHOULD BE ALLOWED TO FIND, AND WOULD LIKELY DETERMINE, THAT NEVILSON HAS A VALID CLAIM FOR THE PUBLICATION OF PRIVATE FACTS BECAUSE MARSHOOGLE CAPTURED AND PUBLICIZED PRIVATE IMAGES OF NEVILSON, WHICH ARE HIGHLY OFFENSIVE AND NO LEGITIMATE CONCERN TO THE PUBLIC.

The lower courts erred in finding that Nevilson failed to establish a violation of his privacy rights through a public disclosure of private facts. Marshall law provides protection to citizens who are subjected to the unwarranted exposure of their private and personal information:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that: (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Marshall Revised Code 762(b). The matter publicized about Nevilson was private and thus, should be considered highly offensive to a reasonable person. In addition, the public does not have a legitimate concern in the publicized facts because the substance of the images captured is unrelated to Nevilson's role in the public eye. Therefore, this court should reverse the lower courts' decisions because Nevilson has established a viable claim for publication of private facts that a jury should be allowed to decide.

Moreover, because the privacy torts were created to remedy injuries where the laws of trespass and intentional torts left the injured without redress, there are often times when different privacy torts overlap. Several of the arguments supporting various elements of intrusion upon seclusion resurface when discussing publication of private facts. Though there are important distinctions between the two causes of action, certain features of the intrusion into seclusion tort are reestablished when discussing whether the matter is private and whether the matter publicized is highly offensive. Thus, in an attempt to maximize judicial efficiency, the aspects of publication of private facts which mirror intrusion upon seclusion will be mentioned where necessary, yet the full range of discussion is detailed in the previous section.

### A. Each citizen has a reasonable expectation of privacy within his home and Nevilson maintained this expectation, even though he was not absolutely or factually secluded from sight while inside his home.

The publication of the images by Marshoogle invaded Nevilson's privacy because the matter published was private. The images captured private matter for several reasons. First, Nevilson has a reasonable expectation of privacy in his home, and this expectation is not impaired by sitting next to an undraped window. Second, contrary to the opinion of the lower courts, Nevilson did not leave himself open to the public eye, no matter the position of his curtains. Third, the lower courts relied only on a portion of the Restatement comments and should have relied on the comments as a whole in crafting their opinion on whether the images captured a private matter. Thus, Nevilson did not waive his right to privacy because he was visible to a small fraction of the public while seated inside his home.

The images taken of Nevilson were of a private matter because they captured him inside his home. Every individual maintains a reasonable expectation of privacy within his home. The Supreme Court of the United States recognized that "in the home. . .all details are intimate details, because the entire area is held safe from prying government eyes." *Kyllo*, 533 U.S. at 37. Though *Kyllo* involved privacy in the context of Fourth Amendment search and seizures, the principle of privacy in the home transcends to invasion of privacy claims. *Digirolamo*, 1999 WL 345592 at *3 (holding that it is proper to seek guidance from criminal law cases when determining whether an intrusion infringes upon a reasonable expectation of privacy that one has where they reside). Additionally, courts have held that "what constitutes a private matter is dependent upon whether the Plaintiff has a reasonable expectation of privacy in the subject information." *Webb v. Bob Smith Chevrolet, Inc*., No. Civ.A.3:04 CV 66 H, 2005 WL 2065237 at *6 (W.D. Ky Aug. 24, 2005) *citing McCall v. Courier-Journal and Louisville Times Co., Ky.*, 623 S.W.2d 882, 887 (Ky. 1981) (adopting the Restatement (Second) of Torts Sec. 652B (1976)). Therefore, because the matter is private when a reasonable expectation of privacy exists, and because Nevilson has a reasonable expectation of privacy in his home, the images captured by Marshoogle represent the private matter of Nevilson.

Accordingly, Nevilson cannot be deprived of this reasonable expectation of privacy for simply declining to close his curtains. When the totality of his actions is taken into account, it cannot be stated that Nevilson left himself open to the public eye. Nevilson went to great lengths to maintain his privacy by installing a six-foot privacy fence and placing "No Trespass" signs around his yard indicating his intent to remain un-

disturbed. (R. at 6). Furthermore, Nevilson did not attempt to attract attention to himself. He chose to refrain from socializing and focus all his efforts on his athletic training. (R. at 11). In addition, he was on the second floor of his home, not in the yard or on the porch, evidencing his intent to remain private. (R. at 6). Despite these attempts, Marshoogle managed to use a discreet drive-by camera system to photograph Nevilson in this private, secluded area, which illustrates the invasiveness of Marshoogle's practices.

Being visible to some does not equate to a waiver of privacy to all. Even if it were determined that Nevilson had placed himself in the public eye, an invasion of privacy can occur when an individual is located outside of the home, *Sanders*, 978 P.2d 67, or is within the limited view of the public. *Huskey v. NBC*, 632 F. Supp. 1282, 1288 (N.D. Ill. 1986). The court in *Sanders* commented that "a reasonable expectation of privacy has been found in semi-public places, such as hospital rooms, private parties and the like." *Sanders*, 978 P.2d at 73. Thus, if individuals can be afforded privacy in semipublic places, such as hospital rooms, then certainly Nevilson cannot be stripped of his right of privacy merely because he declined to draw his blinds. Furthermore, it has also been established 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], but that does not mean they have opened the door to . . . cameras." *Huskey v. NBC*, 632 F.Supp. 1282, 1288 (N.D. Ill. 1986). Similarly, just because some passers-by may have been capable of viewing Nevilson does not automatically deprive him of the right to remain secluded from others, especially cameras. Because the right to privacy has been afforded to those located outside their home and those within the view of the public, Nevilson contends that he maintains a reasonable expectation of privacy.

Finally, the lower courts erred by relying on only a portion of the Restatement comments and instead, should have acknowledged the comments as a whole. These comments are taken out of context. The Marshall Code mirrors the Restatement and, as such, the Restatement comments provide authority in this case. According to the Restatement comments, "there is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye." Restatement (Second) of Torts §652D cmt. b (1977). The lower courts relied on this language in finding that Nevilson left himself open to the public eye in allowing himself to be photographed from a public street while seated in his home. (R. at 11). However, the same comment also states that "when a photograph is taken without the plaintiff's consent in a private place, or one already made is stolen from his home, the plaintiff's appearance that is made public when the picture appears in a newspaper is still a private matter, and his privacy is invaded." *Id*. The comments explain the reasoning

that "[e]ach individual has. . .activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or close friends. . .[including] most details of a man's life in his home." *Id*. Therefore, in leaving out that crucial language of the Restatement comments, the lower courts erred. This court should read the comments in their entirety and find that Nevilson did not leave himself open to the public, but instead, his privacy was invaded by the prying eyes of Marshoogle's multi-camera system.

Marshoogle publicized facts that Nevilson had the right to keep private. He was engaged in a private activity while located inside his home, an area in which individuals maintain a reasonable expectation of privacy. The lower courts analyzed only a portion of the Restatement comments instead of relying on the comments as a whole, which, when viewed together, prove that a person cannot leave himself open to the public eye when he is photographed while inside his home. Therefore, because Nevilson did not leave himself open to the public, evidenced by the many steps he took to protect his privacy, this court should find that the desire to keep the curtains open cannot be an action which waives any right to privacy in the home.

### B. The images captured by Marshoogle are highly offensive because they represent only a moment in a person's life and the vast publication of such an image allows for limitless viewing, reproduction, and manipulation.

Both the district and appellate courts failed to consider that Marshoogle's publishing of the images of Nevilson may be highly offensive to a reasonable person. This element under the publication of private facts claim determines whether the publicity is of a kind highly offensive to the reasonable person, in contrast to the highly offensive element under intrusion upon seclusion, which examined the method of intrusion. Because of the novelty of a claim for publication of private facts in the context of the vast and instantaneous publication over the Internet, the determination of whether the subject matter publicized is highly offensive to a reasonable person should be resolved by a jury and not through a motion for summary judgment. Additionally, because of the instantaneous distribution of Nevilson's private matters onto the Internet, Marshoogle's publication is highly offensive.

Because of the complex factual issues and the novel application of the law to the facts at hand, the determination of whether this particular kind of discreet and automated publicity is highly offensive should be resolved by a jury and not through a motion for summary judgment. Courts have found that the determination of what is highly offensive in the context of publication of private facts is a question for the trier of

fact. S*ee Vassiliades v. Garfinckel, 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 Publ'g. 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). This case presents a new issue as to whether a particular advancement in technology, namely cameras mounted atop vehicles that drive around neighborhoods, and are capable of photographing the interior of a home, is highly offensive to a reasonable person. There exists no case law on point in relation to this specific issue and invasion of privacy torts have not yet adapted to ensure a remedy in such a situation. Therefore, this novel question of fact is best determined by a jury.

Marshoogle's publication of Mr. Nevilson's images is highly offensive to a reasonable person because it strips an individual of his ability to control his image towards others. 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." 62A Am. Jur. *Privacy* §1 (2d. ed. 2009) *see also* Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 199 (1890) (commenting that "the individual is entitled to decide whether that which is his shall be given to the public."). The Restatement comments articulate that "[e]ach 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." Restatement (Second) of Torts §652D cmt. b. (1977). In this case, Nevilson had no reason to anticipate that his private actions would be secretly photographed and publicized to an endless public via Marshoogle's *MarshMaps* and *SportsBlog*. If Nevilson had known that this particular moment in his life would be broadcast through the Internet, he would have had the opportunity to protect himself against such unwanted attention. Individuals have the ability to choose how they wish to present themselves, whether in a job interview, in a relaxed social setting, or in the comfort of their home. The dissemination of these images, which represent a mere snapshot of Nevilson's life, deprive him of the opportunity to disclose his private facts at will and remove those facts from the context in which they occurred. Marshoogle deprived Nevilson of the ability to choose how the public sees him by capturing pictures of him in circumstances, which he wished to be kept private, and publishing such images across the Internet for world-wide viewing.

Even though Nevilson was engaged in an activity that may have been visible to some people, this does not equate to an assent to publication of such activities to the entire world via the Internet. The Restatement comments to §652D, Publicity Given to Private Life, state that "[i]t

is only when the publicity. . . is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises." Restatement (Second) of Torts §652D cmt. c. (1977). Nevilson has reason to feel seriously aggrieved because even with all the steps he had taken to ensure his privacy, for example, the six-foot fence and the "No Trespass" signs, he could have never been prepared to not only be indiscriminately photographed within his home, but also have his private image uploaded across the Internet. The ability of a corporation to publicize these pictures to a virtually endless audience on the Internet, where they are capable of magnification and reproduction, is an occurrence that reasonable individuals would find highly offensive.

Furthermore, in *Gill v. Hearst Publishing Co.*, though the plaintiffs were photographed in public, the dissent argued that the defendant could not force the plaintiffs into view of a larger population through the publication of the photograph. "By plaintiffs doing what they did in view of a tiny fraction of the public, does not mean that they consented to observation by the millions of readers of the defendant's magazine." *Gill,* 253 P.2d at 446 (Carter, J., dissenting). Furthermore, the argument advanced by the dissent supports Nevilson's claim because he was not in public when photographed. He did not openly display himself to the public but rather preferred his privacy and remained within the privacy of his home. If it can be found that a person did not consent to further publication of an image taken in public, it follows that a person does not consent to further publication of an image taken of him in private. Therefore, capturing and publishing images of Nevilson engaging in a private activity within the walls of his home would be highly offensive to a reasonable person.

Finally, the matter publicized is highly offensive because the images were automatically downloaded and incorporated by Marshoogle into a free online mapping feature, immediately accessible to all Internet users. When a claimant establishes that the publication was highly offensive to a reasonable person, he has met his burden of proof. *See Interphase Garment Solutions, Inc. v. Fox Television Stations, Inc*., 566 F. Supp. 2d 460, 467 (D. Md. 2008) (finding that a "publication that was not 'highly offensive' [cannot] qualify for an invasion of privacy suit"); *see also Post-Newsweek Stations Orlando, Inc. v. Guetzloe*, 968 So. 2d 608, 613 (Fla. Dist. Ct. App. 2007). In this case, the method of publication included an automatic image amalgamation, which linked the individual photographs together to form one continuous image that was integrated into the *MarshMaps* software. Instantaneously, millions of users across the Internet were able to access the image of Nevilson through *MarshMaps* by plugging in his address, browsing through his neighborhood, or accessing the link on Marshoogle's *SportsBlog*. This publication is further offensive because the user can simply save the images to his computer, al-

lowing for reproduction and manipulation, evidenced by the additional posting of Nevilson's image on Marshoogle's *SportsBlog* captioned with false allegations of drug use. Therefore, the method of publication implemented by Marshoogle is highly offensive to a reasonable person.

A jury is best equipped to determine whether Marshoogle's publication is highly offensive because this case presents novel issues of fact. Marshoogle's pictures should be considered highly offensive because they deprive Nevilson of his autonomy. Because Nevilson was photographed while in private and the inclusion of those images on *MarshMaps* forced him into limitless view of all Internet users, Marshoogle's publication is highly offensive. Moreover, because Marshoogle's publication of the photographs was automatically distributed to the entire Internet, the images were easily reproduced, altered, and edited. Thus, this court should find that a reasonable person would regard the publication of the images of Nevilson as highly offensive.

### C. The photographs captured of Nevilson do not constitute newsworthy information and as such, are of no legitimate concern to the public.

The circuit and appellate courts below should have found that the images of Nevilson within his home were of no legitimate public concern. This conclusion that the photographs are newsworthy is erroneous for several reasons. First, neither the publicity of entirely private facts nor the dispersal of false information is newsworthy. Second, the images of Nevilson engaging in private matters are not newsworthy, regardless of his position of minimal recognition. Third, the private images captured of Nevilson were published with false allegations, and as a result, are not newsworthy. Fourth, Marshoogle is neither a mainstream media outlet nor did it publicize the images with a desire to spread truthful newsworthy information. Finally, the lower courts reliance on *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), is inappropriate because of the limited application to this case. Thus, Nevilson contends that summary judgment should be reversed because the images captured by Marshoogle of Nevilson are of no legitimate public concern.

The images captured of Nevilson are not newsworthy, and thus of no legitimate public concern. Courts have routinely held that the terms "newsworthiness" and "legitimate public concern" are interchangeable. *Shulman*, 955 P.2d at 477-80; *Diaz v. Oakland Tribune, Inc.,* 139 Cal. App. 3d 118, 128-30 (Cal. App. 1983). For example, in *Shulman v. Group W. Productions, Inc.,* the California Supreme Court determined, that newsworthiness, otherwise known as legitimate public concern, is a bar to liability in the publication of private facts tort. *Shulman*, 955 P.2d at 478-79. Newsworthiness does not act as an automatic and complete bar

to liability; though, there are certain elements, such as private information and false information, which place limits on newsworthiness. *Id*. A comment to the Restatement confirms that, "the limitations, [of newsworthiness]. . . are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure." Rest. 2d Torts §652D cmt. h (1977). Therefore, for Marshoogle to properly claim newsworthiness, its actions must comport with common decency and the private facts disclosed can be neither purely private information nor false facts. Marshoogle, however, cannot be pardoned from publishing the images under this tort because the images are not newsworthy. Not only is there no logical connection between the photographs to Nevilson's status, but also Marshoogle published images of private matters with underlying false allegations. As such, this court should find that Marshoogle can be liable for the tort of publication of private facts because Nevilson has established that the images are not newsworthy.

Furthermore, the lower courts should have found that because there was no connection between the substance of the photographs and Nevilson's status as a role model, the private images posted by Marshoogle were of no legitimate public concern. The appellate court concluded that as an athlete, Nevilson would be considered a public figure, and as such, the matters concerning him would be of public interest. (R. at 11). What the court failed to consider, however, was that not all matters concerning someone with some recognition within the community are newsworthy, especially matters occurring within the privacy of one's home. "Newsworthiness 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." *Four Navy Seals v. Assoc. Press*, 413 F. Supp. 2d 1136, 1146 (S.D. Cal. 2005) *citing Shulman*, 955 P.2d at 478-79. The images on M.A.P. of Nevilson enjoying a quiet evening in the privacy of his home do not bear "a logical connection" to his abilities as a young diver. Specifically, the intrusion into Nevilson's private life by Marshoogle, and the resulting sufferance by Nevilson, is much greater than any relevance the images have to his status as an athlete. Thus, because the photographs published by Marshoogle have no logical connection to his reason for semi-public status, such images cannot be of a legitimate public concern.

The images portray Nevilson within his home engaging in private and lawful acts, therefore, they cannot constitute newsworthy information. Courts have recognized the limited nature of the public's interest in certain affairs, finding that even if there is a legitimate public interest, some matters should simply be outside the scope of the public realm. *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"). In *Shulman*, accident victims sued television producers for the publication of private facts surrounding their accident. While the court in that case found that the victims' stories were of a legitimate public interest, it noted:

> Most persons are connected with some activity, vocational or avocational, as to which the public can be said as a matter of law to have a legitimate interest or curiosity. To hold as a matter of law that private facts as to such persons are also within the area of legitimate public interest could indirectly expose everyone's private life to public view.

*Shulman*, 955 P.2d at 483-84. Unlike the victims in *Shulman*, Nevilson's publicized matter was private because it captured him smoking tobacco through a hookah within his home, which is of no legitimate public concern. Both the activity and location make this image non-newsworthy. Specifically, while some citizens of Marshall may be curious to know whether Nevilson smokes as a hobby, deeming this of public concern would open the floodgates to allowing developing technologies to encroach upon every individual's right to privacy. Nevilson's connection with the community, through his diving success, does not mean that as a matter of law, every aspect of his private life is of a legitimate concern to the public. Because Nevilson engaged in the photographed activities within the privacy of his own home, such behavior is indeed private. Consequently, the public has no legitimate concern as to the private and legal activities that a person engages in while in his home. Therefore, because the images reveal Nevilson inside his home, this court should find such depictions are inherently private and not of public concern.

The photos of Nevilson and the underlying captions on *SportsBlog* are not a legitimate concern to the public because the implications therein are false. Thus, "the dissemination of truthful, newsworthy material is not actionable as a publication of private facts." *Shulman*, 955 P.2d at 478-81. In this case, Marshoogle's publication on *SportsBlog* insinuated that Nevilson smoked marijuana, an untrue statement, and linked users to the image of him on M.A.P smoking tobacco out of a hookah. It is not disputed that Nevilson did not use marijuana; this fact is evidenced by his eventual competition at the Olympic Trials, after a formal drug investigation initiated by the Marshall Diving Association was

completed. (R. at 7-8). Therefore, because this publication was false, Marshoogle cannot claim that Nevilson's private facts were newsworthy.

Many of the cases addressing the issue of newsworthy information occur in the context of a newspaper, magazine, or television program publicizing truthful private facts. *See Shulman*, 955 P.2d 469 (involving a publication by television program); *Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill. App. Ct. 1996) (involving a publication of private statements and photographs in a newspaper). Thus, no leniency should be given to the freedom of the press in this case because Marshoogle is a private corporation who published the images of Nevilson without any regard for the desire to spread truthful newsworthy information. Instead, the discussion should focus on Marshoogle's vast publication of purely private images without any connection to a reliable publisher who seeks to disperse truthful newsworthy information. This contention is supported by the fact that like *SportsBlog,* weblogs, are not held to the same journalistic standards that regulate the mainstream media. *Doe v. Cahill*, 884 A.2d 451, 467 (Del. 2005) (discussing "the normally (and inherently) unreliable nature of assertions posted in chat rooms and on blogs"). Therefore, because Marshoogle is not considered a member of the press, the images cannot be of a legitimate concern to the public.

Finally, the lower courts incorrectly relied on *Cox Broadcasting* in finding that the public has a legitimate interest in the photographs published of Nevilson because matters relating to him are of public concern. (R. at 11). In *Cox*, the father of a deceased rape victim brought an invasion of privacy action against a local broadcasting company for publicizing the identity of the victim, his daughter, during television coverage of the trial of the alleged rapists. *Cox,* 420 U.S. at 469. The law of the state provided that it was illegal to publicize the name of a rape victim. *Id*. The Supreme Court narrowly held that the State may not "impose sanctions on the accurate publication of the name of a rape victim obtained from public records." *Id*. at 491. The Court specifically ruled that, "[r]ather than address the broader question. . .whether the State may ever define and protect an area of privacy free from unwanted publicity in the press, it is appropriate to focus on the narrower interface between press and privacy that this case presents." *Id*. However, such a reliance on *Cox* is inappropriate because the Supreme Court's holding has been recognized as extremely narrow. *See Shulman*, 955 P.2d at 481. Because the Court in *Shulman* declined to address the broader issues of publicity, which are relevant to the outcome of this case, and because the actual holding in *Cox Broadcasting* is therefore inapplicable to the present case, the sole reliance on this case by the lower courts was improper.

The Supreme Court of California has also recognized the limited application of *Cox*, finding that "[it does] not, however, enunciate a general test of newsworthiness applicable to other factual circumstances." *Shul-*

*man*, 955 P.2d at 481. Further, the question remains as to "whether liability can constitutionally be imposed for . . . private facts [other than public records] that would be highly offensive to a reasonable person and that are not of legitimate [public] concern." Restatement (Second) of Torts § 652D, Special Note on Relation of § 652D to the First Amendment to the Constitution (1977). Thus, the lower courts' reliance on *Cox* as the prime authority on what constitutes a legitimate public concern is misplaced because of *Cox*'s narrow holding, as it declined to address the broader question of newsworthiness.

Marshoogle's publication of the images of Nevilson is not a legitimate public concern. Specifically, the images containing a private matter, captioned with false allegations, bear no connection to Nevilson's slight status within Marshall, Nevilson has established that the images are not newsworthy. Finally, the lower courts sole reliance on *Cox* was improper as *Cox* does not create a broader rule that would be applicable to this case. This court should find that the images of Nevilson are not newsworthy, and as such, summary judgment on this case should be reversed.

Marshoogle invaded Nevilson's privacy by publicizing private facts, which are highly offensive and are not of a legitimate concern to the public. Nevilson was in the privacy of his own home while photographed, engaging in the private and lawful act of smoking tobacco. The publicity given to these images is highly offensive to reasonable people because of the private matter of the photographs, the location of Nevilson, and the large audience who could view the images on the Internet. Such photographs strip an individual of his autonomy and ability to present his own image, through the use of a modern and discreet technology, and the determination as to whether such a situation is highly offensive should be made by a jury. Marshoogle did not spread truthful or newsworthy information and cannot claim the rights granted to members of the press. Thus, because Nevilson did not inject himself into the public eye and the images dispersed contained private images of him inside his home, such information cannot be of a legitimate public concern and is thus protected information which was offensively taken and used by Marshoogle. Nevilson concedes that this court should remand this case to the lower court so that a jury can decide these issues.

## III. MARSHOOGLE IMPROPERLY AND INTENTIONALLY INTERFERED WITH NEVILSON'S BUSINESS EXPECTATIONS BY INSINUATING HIS PARTICIPATION IN ILLEGAL CONDUCT, DIRECTING INTERNET USERS TO AN IMAGE WHICH SUPPORTS THIS FALSE IMPLICATION, AND DIRECTLY REFERENCING THE PROPOSED ENDORSEMENT DEAL.

The lower courts erred in granting summary judgment on Nevilson's claim for intentional interference with prospective business relations because Marshoogle purposefully and improperly interfered with Nevilson's prospective endorsement deal with Sunshine. To succeed on a claim of intentional interference with business expectancy, the plaintiff must show: "(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." Marshall Revised Code § 762(b). The lower courts acknowledged that Nevilson had a reasonable expectation of entering into a valid business relationship. (R. at 12). Furthermore, Marshoogle conceded that it knew of Nevilson's expectation of an endorsement contract with Sunshine, due to the press announcements made by Sunshine's president in the months leading up to the Olympic Trials. (R. at 12). As such, the lower courts recognized the establishment of the first two elements of the claim. However, the lower courts erroneously granted summary judgment because Marshoogle caused Nevilson's damages when they purposefully interfered with his business expectancy.

### A. Marshoogle improperly interfered with Nevilson's business expectations by failing to distort the image of him on *MarshMaps*, by directing any number of Internet users to the photograph, and by implying illegal activity in connection with his potential endorsement contract.

The lower courts erred in finding that Nevilson failed to show how Marshoogle purposefully interfered with his business expectations. Aware of the pending contract for the endorsement deal with Sunshine, Marshoogle intentionally interfered with Nevilson's prospective business relationship because Marshoogle did not adhere to its standard business policy of blurring images. Additionally, Marshoogle purposefully directed users to the incriminating image captured by the M.A.P. mobile in order to harm Nevilson's reputation and distract him from his preparation for the upcoming Olympic Trials. Finally, the false implication that Nevilson participated in illegal drug use, as well as the specific reference to the contract with Sunshine, evidences that Marshoogle acted to deliberately interfere with Nevilson's business prospects.

Marshoogle interfered with Nevilson's business expectation to enter into the endorsement deal with Sunshine because it acted with the purpose of injuring him. Courts have found that in order to show purposeful interference, "a plaintiff must set forth facts which suggest that the defendant acted with the purpose of injuring the plaintiff." *J. Eck & Sons, Inc. v. Rueben H. Donnelley Corp*., 572 N.E.2d 1090, 1093 (Ill. App. Ct. 1991). In this case, Marshoogle acted with the purpose of injuring Nevilson when it failed to comply with its routine business practice of blurring the faces of individuals who appear in any of the digital images captured by the M.A.P. mobile, prior to these pictures being incorporated into the M.A.P. feature. (R. at 4). The blurring technology employed by Marshoogle was created for the purpose of making faces unrecognizable once uploaded into the M.A.P. feature and, had it been utilized in this instance, Nevilson would not have been the target of such negative attention. Marshoogle argued that the images which captured Nevilson smoking tobacco were entirely incidental to the M.A.P. feature. (R. at 13). However, had the routine business practices of Marshoogle been employed, then Nevilson would have never been targeted.

Furthermore, in directing users to the image through the *SportsBlog* posting, Marshoogle saw the opportunity not only to increase the traffic on their own website (which increases their revenue as they are solely sponsored by advertisements), but also to interfere with Nevilson mentally, as he prepared for the Olympic Trials. Marshoogle alleged that Nevilson smoked marijuana, purposefully directed users to the unblurred image of him on M.A.P., and directly referenced the proposed endorsement deal with Sunshine. The resultant negative attention compelled Nevilson to refocus his efforts away from training to efforts of clearing his name. The distraction, stress, and time commitment of combating the negative effects of Marshoogle's actions interfered with Nevilson's ability to compete at his optimal level, and as such, the inability to qualify for the U.S. Olympic Diving Team resulted in the loss of the proposed deal with Sunshine. Thus, Marshoogle acted with the intent to injure Nevilson's business expectancy because it failed to employ the blurring technology, which caused Nevilson to suffer the loss of his business expectancy.

Both the district and appellate courts erred in reasoning that Marshoogle did not act with purpose of interfering. When referring to "purposeful interference" it is sufficient that the plaintiff 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." *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). The facts of this case are similar to *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc*., 546 N.E.2d 33 (Ill. App. Ct.

1989), where the defendant published a brochure which falsely stated the information about the plaintiff's services. *Id*. at 35. The court stated, "an allegation that a party essentially printed information with a reckless disregard for the truth is sufficient to allege improper conduct." *Id*. at 37.

Similarly, Marshoogle acted with impropriety by publishing the image on *SportsBlog* and thus, implying that Nevilson smoked illicit substances. The comment posted on Marshoogle's *SportsBlog*, directed readers to the image of Nevilson smoking tobacco through his hookah and suggested that Nevilson uses marijuana recreationally. (R. at 7). Marshoogle acted with reckless disregard for the truth by linking Nevilson to a course of illegal conduct that he neither previously nor presently engages in. By directly supplying viewers with a way to draw such inferences, Marshoogle improperly and purposefully interfered with Nevilson's business expectations. These false allegations, the resultant negative media attention, and efforts spent clearing his name caused Nevilson to shift his focus away from his Olympic Trials preparation and towards the efforts of clearing his tarnished name. Nevilson has sufficiently alleged that Marshoogle improperly interfered with his business expectations and the rulings of the lower courts should be reversed.

Accordingly, the grant of summary judgment by the lower courts was erroneous because Marshoogle intentionally interfered with Nevilson's expected business relationships. By insinuating that Nevilson smokes marijuana, Marshoogle acted improperly. The failure to blur Nevilson's face in the M.A.P. feature, in direct contrast with the company's policy, and the express mention of both the image on M.A.P. and Nevilson's proposed contract with Sunshine in the *SportsBlog* post, show that Marshoogle intentionally interfered with Nevilson's expected endorsement deal. Therefore, because Nevilson can establish improper conduct on behalf of Marshoogle, there exist genuine issues of fact which should be properly evaluated by a jury.

### B. Marshoogle caused Nevilson to suffer damages because its false implications of illegal drug usage by Nevilson led to his inability to advance to the Olympics, which deprived him of his prospective contract with Sunshine.

The lower courts further erred in granting summary judgment on Nevilson's claim for tortious interference with business expectancy because Marshoogle's actions caused Nevilson to suffer damages. By publicizing the photograph and insinuating illegal drug usage, Marshoogle set into motion a whirlwind of events that required Nevilson to defend his reputation and character. As a consequence of Marshoogle's actions, Nevilson's expected endorsement with Sunshine did not come to fruition.

Accordingly, Marshoogle's photograph and underlying comments damaged Nevilson.

Nevilson's assertion that Marshoogle's actions resulted in his loss of business expectations was a proper pleading of damages. In order to plead damages for tortious interference with business expectancy, it is sufficient to plead general damages. *Downers,* 546 N.E.2d at 38 (Ill. App. Ct. 1989). In *Downers*, the plaintiff established a business expectancy and successfully alleged that "its standing, reputation, prestige, good will, and business [had] been greatly damaged and shall be in the future damaged." *Id*. The court therein found this to be sufficient to allege damages for a claim of tortious interference with prospective business expectancies. *Id*.

Similarly, the actions by Marshoogle caused Nevilson to suffer damage to his standing, reputation, prestige, and good will. Marshoogle knew that Nevilson expected to play a major role in the upcoming Olympic trials and knew that Nevilson would receive a three million dollar contract with Sunshine when he qualified for the Olympics. (R. at 5-6, 12). Despite this knowledge, Marshoogle continued in its course of action, which required Nevilson to spend months attempting to repair the reputational damage Marshoogle caused him. Specifically Marshoogle's accusations caused a formal drug investigation by the Marshall Diving Association, which placed Nevilson's qualifications for the Olympic Trials in jeopardy and causing him emotional distress. (R. at 7).

Furthermore, Nevilson used "significant air time" on several television and radio shows to combat the intense criticism and allegations spawned by Marshoogle's comments. (R. at 8). Because he had to spend a significant amount of time taking unnecessary drug tests to clear his name and repair his widespread negative image that Marshoogle's allegations created, Nevilson was distracted both mentally and physically. Consequently, Nevilson competed well below his average performance and did not qualify for the Olympics. As a result of not placing at the Olympic Trials, and thus failing to make it to the Olympics, Nevilson was deprived of the three million dollar contract with Sunshine. Nevilson attributed his damages to the "intense media coverage surrounding his alleged drug use and his efforts to clear his name." (R. at 8). Whether Nevilson, with proper practice time and lack of distractions both emotionally and mentally, would have advanced to the Olympics is a question of fact to be determined by a jury. Therefore, this court should reverse the decision of summary judgment and remand this case to the lower court to be heard before a jury.

Marshoogle purposely and intentionally interfered with Nevilson's expected business relationships and caused him to suffer great losses. By implying that Nevilson smokes illicit substances and attempting to

support such statements by connecting images captured by the M.A.P. mobile, Marshoogle's conduct passes the threshold of impropriety. Marshoogle's actions were intentional because they failed to blur Nevilson's face, purposefully directed online users to the image, and referenced the prospective deal with Sunshine. Because Nevilson was forced to defend his reputation and good name as a result of Marshoogle's comments and publications of the images, Nevilson suffered emotionally and mentally, which ultimately led to his distraction from proper Olympic Trials preparation. Therefore, the lower courts erred in granting summary judgment on Nevilson's claim for tortious interference with business expectancy and this court should reverse its holding.

## CONCLUSION

For the foregoing reasons, the Petitioner, Mr. Phillip Nevilson, respectfully requests that this Court reverse the decision of the Marshall Court of Appeals for the First District and remand for a full jury trial on the matter. For the claims of both intrusion upon seclusion and publication of private facts, questions of fact remain that pertain to the determination of whether Marshoogle's methods of intrusion and publication were highly offensive to a reasonable person. Additionally, the activities inside one's home can neither be stripped of their inherent private quality nor are they a legitimate public concern. Finally, Marshoogle's improper actions caused Mr. Nevilson to sustain a loss of business expectancy as a matter of law.

Respectfully Submitted,

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Attorneys for the Petitioner