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The Thirtieth Annual John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law: Brief for the Petitioner, 29 J. Marshall J. Computer & Info. L. 103 (2011)

Nate Lindsey

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Case No. 2011-CV-1001

IN THE

SUPREME COURT OF THE STATE OF MARSHALL

FALL TERM 2011

DONNIE DOLLAR,

PETITIONER,

V.

PETER PAYOFF,

RESPONDENT.

ON WRIT OF CERTIORARI
TO THE MARSHALL COURT OF APPEALS

FIRST DISTRICT

BRIEF FOR PETITIONER

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

(1) Whether the court of appeals erred in reversing Donnie Dollar's summary judgment on Peter Payoff's claim of violation of the Marshall State Eavesdropping Statute;

(2) Whether the court of appeals erred in reversing Donnie Dollar's summary judgment on Peter Payoff's tortious interference with contractual relations claim;

(3) Whether the court of appeals erred in reversing Donnie Dollar's summary judgment on Peter Payoff's claim of public disclosure of private facts.

TO THE HONORABLE SUPREME COURT OF THE STATE OF MARSHALL

Donnie Dollar, Defendant in the Marshall County Circuit Court and Appellee in the Marshall Court of Appeals for the First District, submits this brief on the merits and in support of his request that this Court reverse the decision of the Marshall Court of Appeals for the First District and render summary judgment in favor of Petitioner.

OPINIONS BELOW

The Marshall County Circuit Court granted summary judgment in favor of Petitioner, Donnie Dollar, on all three counts in case number 10-C-1000. The Marshall Court of Appeals for the First District reversed and remanded the circuit court's judgment in case number 2010-016. The opinion of the Court of Appeals is contained in pages 3-13 of the record.

STATEMENT OF JURISDICTION

The statement of jurisdiction is omitted in compliance with Section 1020(C) of the Rules for the Thirtieth Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

CONSTITUTIONAL, STATUTORY, AND RESTATEMENT PROVISIONS

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Appendix B of the record provides the Marshall State Eavesdropping Statute. 75 MSC § 25-1. (R. at 14).

This case further requires the application and interpretation of various sections of the Restatement (Second) of Torts (1977). Section 767 provides the factors courts should consider when evaluating if a defendant's intentional interference with a contract is improper: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interest of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

Restatement, § 772 provides: One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other's contractual relation, by giving the third person truthful information.

Restatement § 652D provides: 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.

Finally, Marshall Rules of Civil Procedure Rule 56(c) provides summary judgment is appropriate when the evidence demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

STATEMENTS OF FACTS

Donnie Dollar (Dollar) is a student at Marshall State University Law Center. (R. at 6). The school is located in Marshall City, the capital of Marshall State. (R. at 3). Dollar comes from a politically influential family. (R. at 6). Dudley Dollar, Dollar's father, is the head of a local political party and Dollar's brother is an active member of the political blogging community. (R. at 6). Dollar is an average law student, but has a strong desire to prove he is worthy of the family's name. (R. at 6).

During the spring semester of 2010, Dollar was enrolled in Charlie Cheatem's (Cheatem) Advanced Trial Advocacy course. (R. at 6). Cheatem is an adjunct professor and distinguished criminal defense attorney who has won favorable outcomes for high profile clients throughout his career. (R. at 4). One of Cheatem's recent clients was Peter Payoff (Payoff) the former Mayor of Marshall City. (R. at 6).

Payoff is also an alumnus of the Marshall State University Law Center. (R. at 4). After passing the bar, Payoff briefly practiced law but soon married the daughter of a city councilman and subsequently began to ascend the local political ladder. (R. at 4). Payoff was eventually elected mayor and held the position for nearly 25 years. (R. at 4). Payoff's long political career was sustained by a platform of strong values concerning marriage, family, ethics, and the law. (R. at 4). In conjunction with these values, Payoff implemented a zero tolerance policy for ethical violations. (R. at 4). Approximately one year ago, Payoff left office. (R. at 4). Shortly thereafter, Payoff was indicted in the Marshall County Circuit Court due to allegations of corruption. (R. at 4). Payoff was accused of illegally pressuring the city's licensing and regulation committee to approve a building permit for a friend. (R. at 4).

Payoff's assertions of his strong values and character continued after his arrest and prior to the trial. (R. at 5). Payoff granted several interview requests and stated that he was an honest mayor and innocent of all crimes. (R. at 5). Payoff repeatedly asserted that he would testify to his innocence at trial. (R. at 5). The pre-trial publicity caught the notice

of billionaire Ronald Crump (Crump). (R. at 5). Crump and Payoff entered into a contract for Payoff to appear on a reality television show. (R. at 5). The contract contained a clause stating that if Payoff was found to be currently or formally engaged in any immoral conduct which was not disclosed to the producers, the contract would be null and void. (R. at 5).

Shortly after being approached by Crump, Sensational Press Publications (Sensational Press) solicited Payoff regarding a contract to write and publish Payoff's biography. (R. at 5). The publisher considered the reality show's publicity essential for the book's success, and conditioned the publication contract on Payoff's completion of the television show. (R. at 5). The reality show and publication contracts made national media in conjunction with the trial. (R. at 5).

After Cheatem agreed to represent Payoff, both signed a standard engagement letter containing provisions regarding confidentially in accordance with the disciplinary rules governing attorneys in the state of Marshall. (R. at 5). During confidential case strategy discussions, Payoff told Cheatem he was worried his mental health disorder, kleptomania, might be discovered during trial. (R. at 5). Payoff had a life-long struggle with stealing Pete Rose baseball cards ranging in value from pennies to thousands of dollars. (R. at 5). Payoff also disclosed to Cheatem he was seeking counseling for the condition. (R. at 5). Cheatem assured Payoff that the information would be protected by the attorney-client privilege. (R. at 5).

The trial began at the start of the spring semester at the Marshall State University Law Center. (R. at 5). The trial lasted nearly two months and coincided with Cheatem's Advanced Trial Advocacy course. (R. at 5). Cheatem utilized the trial as a teaching tool for Dollar and his fellow classmates. (R. at 5). The trial received daily publicity and Payoff continued to profess his innocence and willingness to personally take the stand. (R. at 6). In the end, however, Payoff did not take the stand due to his own unwillingness to answer questions and the advice of Cheatem. (R. at 6). At the conclusion of the trial, the jury was deadlocked and unable to return a unanimous verdict as required by the Marshall State Criminal Code. (R. at 6). The Marshall State prosecutors assured Payoff would be retried in a timely manner. (R. at 6). While evidence came to light prompting the State to drop the bribery charges against Payoff, the charges for corruption were reset for trial. (R. at 7).

The day the judge declared a hung jury, Cheatem and Payoff celebrated with a few drinks and then both proceeded to Cheatem's Advanced Trial Advocacy course. (R. at 6). On this particular day, Dollar was late arriving to class. (R. at 6). Dollar, wanting to record the class lecture but not wanting to interrupt Payoff, refrained from requesting permission. (R. at 6). Cheatem usually granted permission to record the lectures, so assuming this lecture was no different, Dollar pulled out his

mini-recorder and began to listen. (R. at 6). Payoff discussed with the class some of the trial strategies, including the decision to not take the stand on his own behalf. (R. at 6). Payoff told the students the he had wanted to testify, but was advised by Cheatem that it was generally a very bad idea for a defendant to testify at his own trial. (R. at 6). Payoff concluded his remarks to the class and Cheatem briefly dismissed the class for a break during the lecture. (R. at 6).

When class resumed, Cheatem began to discuss Payoff's decision not to testify. (R. at 6). Cheatem explained that "one important reason defendants should not testify is because it can open the door to embarrassing questions about personal matters, mental disorders, and other potentially prejudicial material." (R. at 6-7). As an example Cheatem stated "if it was revealed that a defendant had the mental disorder kleptomania, it could be extremely prejudicial, especially in cases involving fraud and dishonesty." (R. at 7). Realizing he may have inadvertently disclosed confidential information, Cheatem quickly dismissed the class.

Dollar had been interested in Payoff's lecture because of his family's general interest in Marshall County politics. (R. at 6). Coincidentally, a few weeks prior to Payoff's appearance in Cheatem's class, Dollar's brother made a blog post regarding the contracts Payoff had received. Dollar commented on his brother's blog, "Payoff is going to make a fortune by talking about his crooked life. Someone should really stop these deals from happening." (R. at 6).

Interested in discussing the illuminating class lecture, Dollar made his own post to the Advanced Trial Advocacy website stating "the reason Payoff did not testify at his trial was to avoid disclosing that he had the mental disorder kleptomania." (R. at 7). Dollar also posted the recording of the lecture to the message board. (R. at 7). The message board was only accessible to students who were enrolled in the course. (R. at 7). Students who had missed class that day listened to the lecture and began to post comments regarding their general disbelief that Payoff was "a thief". (R. at 7). Dollar responded asserting that the charges against Payoff were probably true because he had a problem with stealing. (R. at 7). One student from the class chose to take the material from the message board and post it to his personal SpaceBook page.[1] (R. at 7). From there the material spread to other SpaceBook users' pages and eventually gained widespread media notoriety. (R. at 7). As a result, Payoff lost his contracts with Crump and Sensational Press. (R. at 7). In addition, the disclosure of Payoff's affinity for stealing lead many of his

1. "SpaceBook is a form of social media where individuals can connect with others, post comments, stories, pictures, videos, and allow others to comment on them." (R. at 7 n.1).

strongest supporters to turn against him after assuming the corruption charges to be true. (R. at 7).

SUMMARY OF PROCEEDINGS

In June 2010, Payoff filed suit against Dollar for "(1) civil liability in violation of Marshall State Eavesdropping Statute 75 MSC §25-1; (2) tortious interference with contractual relations; and (3) public disclosure of private facts. (R. at 7). Dollar moved for summary judgment on all counts. (R. at 7). The Marshall County Circuit Court granted Dollar's motion on all three counts. (R. at 7).

On appeal, the Marshall Court of Appeals for the First District reviewed the grant of summary judgment. (R. at 3). The court of appeals found "that a classroom discussion qualifies as a conversation" and was therefore protected by the provisions of the Marshall State Eavesdropping Statute. (R. at 8-9). As to Payoff's tortious interference with a contract claim, the court of appeals held Dollar's intent to interfere with the contracts is "a question of fact for the jury to decide" regardless of whether his statements were truthful. (R. at 11). Finally, the court of appeals disagreed with the circuit court's analysis of Payoff's public disclosure of private facts claim. The court of appeals found that (1) Payoff's private facts were "clearly given publicity" as a result of Dollar's posting of the recorded lecture and his comments, (2) Payoff's visitation of a doctor was a private concern, (3) whether visiting a mental health doctor is considered highly offensive to a reasonable person is a question of fact, and (4) Payoff's kleptomania was not a matter of public concern. (R. at 11). Consequently, the court of appeals affirmed Payoff's assignments of error and reversed the circuit court's grant of summary judgment. (R. at 12). All three counts were remanded for action consistent with the opinion. (R. at 12).

On July 15, 2011 this Court granted Dollar leave to appeal the decision of the Marshall Court of Appeals for the First District reversing the circuit court's grant of summary judgment. (R. at 2).

SUMMARY OF ARGUMENT

The court of appeals erred when it reversed the decision granting summary judgment in favor of Dollar because Payoff failed to raise genuine issues of material fact regarding his claims for (1) violation of the Marshall State Eavesdropping Statute (2) tortious interference with a contract, and (3) public disclosure of private facts.

First, Dollar's Advanced Trial Advocacy lecture does not constitute a "conversation" under the Marshall Eavesdropping Statute because the lecture is a speech-like communication of a public nature. Public policy weighs against an interpretation of "conversation" so broad that public

communications could not be easily recorded. Furthermore, public policy should direct this Court to refrain from unnecessarily interfering in the internal policies of an educational institution by broadening the definition beyond what was reasonable intended by the Marshall State Legislature. Because a law school lecture is not a "conversation," Payoff failed to show a genuine issue of material fact regarding his claim for violation of the statute.

Second, Payoff failed to raise a genuine issue of material fact on his tortious interference with a contract claim because he never offered anything to suggest Dollar or Cheatem's statements were false. Giving truthful information is an absolute justification to intentional interference with contractual relations. Despite being intentional, Dollar's interference was lawful under the applicable seven-factor balancing test. The undisputed facts demonstrate the Dollar's posts to the class webpage were truthful. (R. at 5). Dollar was not acting maliciously when we made the online postings rather he was acting to gain the approval of his father and to inform the public about career politician's hypocrisy. (R. at 6, 10).

Finally, Payoff failed to raise a genuine issue of material fact regarding his claim for public disclosure of private facts. First, no public disclosure occurred because Dollar's posts to his private class webpage were the equivalent of private communications sent to his classmates and no evidence suggests these communications were substantially certain to become public knowledge. Second, Dollar's postings did not rise to the level of "highly offensive" as a matter of law, because the content and context of the postings involve embarrassing behavioral conduct and not intimate health details rising to the level of morbid sensationalism. Third, Dollar's postings were clearly of legitimate public concern as they involved the character and fitness of a former public official who had willingly placed his character in the media spotlight. In conjunction with Payoff's failure to prove Dollar's postings were not a legitimate public concern, Dollar's postings are shielded from tort liability by the First Amendment's protection of freedom of speech. Payoff's interest in keeping these facts private do not outweigh the public's interest in Dollar's ability to freely participate in political discourse.

ARGUMENT AND AUTHORITIES

The Marshall Court of Appeals for the First District reversed the Marshall County Circuit Court's grant of summary judgment in favor of Dollar and remanded the case for further action. When there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, Marshall Rule of Civil Procedure 56(c) requires summary judgment. MARSHALL R. CIV. P. 56(c). Summary judgment

should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 447 U.S. 317, 322 (1986). If a reasonable jury could not return a verdict favorable to the nonmoving party, then there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Further, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323. An appellate court reviews a grant of summary judgment *de novo* and considers the evidence "in the light most favorable to the nonmoving party". (R. at 3); *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

NO GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING PAYOFF'S CLAIM FOR VIOLATION OF THE MARSHALL STATE EAVESDROPPING STATUTE

Payoff first alleges that Dollar violated the Marshall State Eavesdropping Statute when he recorded Payoff and Cheatem during the Advanced Trial Advocacy lecture. (R. at 6-7). The circuit court granted summary judgment in Dollar's favor, determining the class lecture did not qualify as a "conversation" under the statute. (R. at 8). The court of appeals reversed, supplying a dictionary definition for "conversation" and asserting that the class lecture was a "conversation" under this definition and subsequently under the statute. (R. 8-9). By ignoring the statute's provided definition of "conversation" and the evidence regarding the intent behind the adoption of the definition, the court of appeals inadvertently adopted a definition broader than the Marshall Legislature intended. In this case the facts show the Marshall Legislature adopted its definition of 'conversation' to remove any expectation of privacy element from an interpretation of what constitutes liability under the statute. This definition does not demonstrate the Marshall State Eavesdropping Statute was intended to impose liability on communications of a public nature such as law school lectures. Such a reading would be against public policy and result in undesirable consequences for public communications, specifically in institutions of higher education.

The Marshall State Eavesdropping Statute is modeled after the Illinois Eavesdropping Statute. (R. at 9). Marshall's Statute imposes civil liability for any person who commits eavesdropping by "knowingly and intentionally us[ing] an eavesdropping device for the purpose of hearing or recording all or any part of any conversation . . .". (R. at 9); 75 MSC § 25-1. The statute defines 'conversation' as, "any oral communication between two or more persons regardless of whether one or more of the

parties intended their communication to be of a private nature under circumstances justifying that expectation." (R. at 9).

The court of appeals correctly stated that Dollar's liability hinges on whether his class lecture qualifies as a conversation under the statute. (R. at 8). The first rule of statutory construction is to ascertain and give effect to the legislature's intent. *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*, 920 N.E.2d 1087, 1092 (Ill. App. Ct. 2009) (citing *People v. Roake,* 778 N.E.2d 272 (Ill. App. Ct. 2002)). Statutes that define the very terms they use should be construed according to those definitions. *In re Marriage of Almquist*, 704 N.E.2d 68, 71 (Ill. App. Ct. 1998) (citing *Garza v. Navistar Int'l Transp. Corp.,* 666 N.E.2d 1198 (Ill. 1996)). However, courts also attempt to avoid absurd results from the inflexible application of a general definition. *See, e.g., United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation leading to an absurd result). Therefore, the Court's statutory interpretation involves the application of the specific statutory language and definitions while avoiding any unreasonable results by inflexible application. When the general meaning used in a statute would result in absurd results due to a broad definition of the word, evidence of congressional intent must be used to lend the term its proper scope. *Pub. Citizen v. U.S. Dep't. of Justice*, 491 U.S. 440, 454 (1989).

The circuit court relied on *DeBoer v. Village of Oak Park* in determining that Dollar's lecture was not a conversation and was actually representative of public comments made to an audience. (R. at 8). The court's decision in *DeBoer* examined an exception in the Illinois Eavesdropping Act which stated that "any broadcast by radio, television or otherwise. . . of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made" were exempt from liability. *DeBoer v. Vill. of Oak Park*, 90 F. Supp. 2d 922, 924 (N.D. Ill. 1999) (discussing 720 ILL. COMP. STAT. § 5/14–3(c) (2008)). In light of this exemption, the court reasoned that during a public communication "conversations" only occurred between individuals in attendance not between the main public speaker and the audience. *Id.* The court elaborated that the Illinois legislature would not have intended the absurd result that "anyone who tape records the players' speeches at a Chicago Bulls' championship celebration in Grant Park could be held civilly or criminally liable under [the Act] for taping the event without the consent of each and every person in attendance." *Id.* Distinguishing common meaning "conversations" and other forms of communication, the court stated it was not aware of any decision that applied the eavesdropping statute to "a public speech, *lecture*, rally, or ceremony". *Id.* (emphasis added).

The court of appeals relied on *Plock* when remanding the district court's summary judgment for further action. (R. at 9). In *Plock*, plain-

tiffs were special education teachers subject to a new video recording monitoring policy, which was instituted after complaints of misconduct. *Plock v. Bd. of Educ. of Freeport Sch. Dist. 145,* 920 N.E.2d 1087, 1089-90 (Ill. App. Ct. 2009). Relying on *DeBoer*, the school board defended the policy against the Illinois Eavesdropping Act by arguing the Act only applied to conversations where those communicating had objective expectations of privacy, therefore conversations taking place in "public arenas" like a classroom were not subject to the Act. *Id.* at 1094-95. The court did not accept this logic because the statute's definition made clear that the act prohibited the recording of "conversations" regardless of whether any party has an expectation of privacy. *Id.* at 1094 (citing *In re Marriage of Almquist,* 704 N.E.2d 68 (Ill. App. Ct. 1998)). However, the court did not foreclose an examination of the public nature of communication in determining whether communication fit into the definition of "conversation" provided by the statute. The defendant argued that the classroom communication was similar to the speech in *DeBoer* because it lacked "open-ended verbal give and take." *Id.* at 1093. The court rejected this argument stating that educators provided daily instruction and guidance for the acquirement of independent living skills necessarily requiring ongoing oral exchanges. *Id.* Importantly, the court differentiated between classroom oriented communication and lectures when it stated "the speech-like communication that the defendant describes *might occur at a university* where a professor delivers a lecture to a large audience of students." *Id.* (emphasis added).

While the Marshall Eavesdropping Statute has no exemptions, the statute does define 'conversation' utilizing Illinois' definition. The legislative intent of the Illinois Eavesdropping Act was examined in *In re Marriage of Almquist*. *In re Marriage of Almquist*, 704 N.E.2d 68, 71 (Ill. App. Ct. 1998). In an investigation of the legislative history surrounding the definition the court stated, "the addition of a definition of 'conversation' to the eavesdropping statute was an effort narrowly tailored to the goal of removing any expectation of privacy element from the crime of eavesdropping." *Id.* The court determined "it was not the legislature's intent to provide a definition of 'conversation' so broad as to encompass any audible expression whatsoever." *Id.* Thus the addition of the definition was not meant to signify a broadening of the plain meaning, but as a tool for eliminating what surely would have been a legal barrier to recovery in many cases.

DeBoer, *Plock*, and *In re Marriage of Almquist,* demonstrate that while the definition of 'conversation' utilized by both Illinois and Marshall removes a requirement for expectation of privacy, the actual nature of the communication must still be examined. True "public" communication is meant for distribution to large targeted groups and lacks substantial "mutual discourse." *DeBoer v. Vill. of Oak Park*, 90 F. Supp. 2d 922,

924 (N.D. Ill 1999). As the court in *DeBoer* alluded to, if no examination of the public nature of a communication was made, public speeches, lectures, and presentations could not be recorded without the consent of all attendees. Furthermore, if only minimal "mutual discourse" is required then in order to record public communication culminating with a question and answer session the recorder would need the consent of all parties present to do so. These reasons reflect the *Plock* court's distinguishing of lower-level classroom "conversations" and "speech-like communication" by professor's teaching at universities.

The court of appeals erred in not specifically examining the definition and history of the adoption of "conversation" by the Illinois legislature, which would have exposed the desire to remove any requirement of subjective expectation of privacy from the statutory language. Any necessary interpretations beyond this definition should refrain from creating absurd results. In order to avoid such results, the Court should examine the public nature of the communication and the amount of mutual discourse involved as the courts in *DeBoer* and *Plock* did to interpret the same definition. These policy considerations weigh heavily in favor of allowing the recording of communications of a public nature such as university lectures. Recording class lectures is common place to enhance the academic experience, specifically for students who are unable to attend class or have certain disabilities requiring recorded assistance. *See Littsey v. Bd. of Governors of Wayne State Univ.*, 310 N.W.2d 399 (Mich. Ct. App. 1981). Furthermore, courts in this nation have avoided unnecessary interference in the internal affairs of academic institutions. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems."); *Smith v. Tarrant Cnty. Coll. Dist.*, 694 F. Supp. 2d 610, 617 (N.D. Tex. 2010) (quoting *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

In this case, the lecture Dollar recorded should be considered speech-like public communication and not a "conversation". In higher education settings, specifically lecture courses, students are not substantially involved in mutual exchange, but are the target of a main speaker who wishes to deliver specific information. This type of communication is more similar to the public speech in *DeBoer* as compared to the personal one-on-one conversations between special education teachers attempting to impart general life skills during formative years. The Marshall State University Law Center should be allowed to control its academic policies with regard to classroom lectures without undue interference. Broadening the types of communication that fall under the statute's definition of "conversation" to the point where the state legislature is interfering with a public education institution's ability to regulate academic policies was clearly not intended by the Marshall Legislature. For

these reasons the court of appeals decision should be reversed and summary judgment should be granted in favor of Dollar.

NO GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING PAYOFF'S TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS CLAIM.

Payoff alleges that Dollar knew of his contracts with Crump and Sensational Press and intentionally posted Dollar's own statements and the statements of Cheatem online to induce the termination of the contracts, therefore, Dollar's second issue on appeal is whether the appeals court erred in reversing the order of summary judgment in favor of Dollar and remanding the case. Because Payoff is unable to show genuine issues of material fact in relation to Dollar's justification of only giving truthful information as well as his interference being proper, the court of appeals erred in its ruling and decision to remand for further action.

The state of Marshall has recognized a cause of action for tortious interference with a contract. Plaintiffs in Marshall are required to plead and prove the following five elements: "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against the third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in so doing acts without justification; (5) resulting in actual damage to the plaintiff." *Gupton v. Son-Lan Dev. Co.*, 695 S.E.2d 763, 770 (N.C. Ct. App. 2010). Marshall's characterization of the plaintiff's burden is consistent with the Restatement's requirement that the interference be not only "intentional," but also "improper." RESTATEMENT (SECOND) OF TORTS *§* 767 (1979).

While the undisputed facts in this appeal show the existence of a contract, Dollar's knowledge of the contract, Dollar's intentional interference, and the resulting damages to Payoff, the remaining element of Payoff's tortious interference with a contract claim has not been met. Payoff cannot demonstrate Dollar acted without justification when posting to his class webpage and his brother's blog. Furthermore, Dollar has shown that his interference was justified because he only posted truthful statements on the internet and his conduct was proper. Due to Payoff's inability to satisfy all the elements of the claim and Dollar's justified and proper interference, this Appellate Court should reinstate the circuit court's grant of summary judgment in favor of Dollar.

Dollar was justified in posting on his class webpage because his statements were truthful.

Payoff has not suggested that Dollar's statements were false. (R. at 3-11). In fact, the record contains Payoff's admission that the statements

were true when Payoff told Cheatem about his kleptomania. (R. at 5). These undisputed facts create the following issue of first impression in this Court: are truthful statements actionable for tortious interference with contractual relations under the common law? (R. at 9.)

The Restatement (Second) of Torts answers this question with an emphatic "no". Section 772 of the Restatement makes this clear in subsection (a) by providing: "One who intentionally causes a third person not to perform a contract . . . with another does not interfere improperly with the other's contractual relation, by giving the third person truthful information." RESTATEMENT (SECOND) OF TORTS § 772 (1979). The comments provide:

> There is of course no liability for interference with a contract . . . on the part of one who merely gives truthful information to another. The interference in this instance is clearly not improper. *This is true even though the facts are marshaled in such a way that they speak for themselves and the person whom the information is given immediately recognizes them as a reason for breaking his contract or refusing to deal with another*. It is also true whether or not the information is requested.

RESTATEMENT (SECOND) OF TORTS § 772 cmt. b (1979) (emphasis added).

Due to a lack of binding authority, the Marshall Court of Appeals for the First District turned to other jurisdictions for guidance. The overwhelming majority of jurisdictions follow the Restatement's approach holding truthful statements do not give rise to tortious interference. Out of the 38 interpretations of state common law, 34 have found truth justifies tortious interference. *TMJ Implants Inc. v. Atena, Inc.*, 498 F.3d 1175, 1201 (10th Cir. 2007) (stating Colorado law, true statement not actionable); *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1473 (10th Cir. 1995) (considering Oklahoma law, stating jury instruction was proper when it stated truthful communications are justified and not actionable), *vacated on other grounds,* 517 U.S. 1216 (1996); *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1089, 1092 (11th Cir. 1994) (examining Florida law, citing RESTATEMENT (SECOND) OF TORTS § 772, cmt. b (1979)); *Su v. M/V S. Aster*, 978 F.2d 462, 474-75 (9th Cir. 1992) (concerning Washington law, citing RESTATEMENT (SECOND) OF TORTS § 772); *Thompson v. Paul*, 402 F. Supp. 2d 1110, 1116-17 (D. Ariz. 2005) (dealing with Arizona law, citing RESTATEMENT (SECOND) OF TORTS § 772), *rev'd in part on other grounds*, 547 F.3d 1055 (9th Cir. 2008); *Toucan Scan, Inc. v. Hell Graphics Sys., Inc.*, No. 91-1171-FR, 1993 U.S. Dist. LEXIS 3193 at (D. Or. March 9, 1993) (considering Oregon law, requiring the statement to be false for intentional interference); *Int'l City Mgmt. Ret. Corp. v. Watkins*, 726 F. Supp. 1, 6 (D.D.C. 1989) (concerning District of Columbia law, applying RESTATEMENT (SECOND) OF TORTS § 772); *SAS*

Inst., Inc. v. S & H Computer Sys., Inc., 605 F. Supp. 816, 831 (M.D. Tenn. 1985) (examining Tennessee law, applying RESTATEMENT (SECOND) OF TORTS § 722); *Bosarge v. Bankers Life Co.*, 541 So. 2d 499, 501 (Ala. 1989) (holding truthful statement that plaintiff was no longer an insurance agent of the defendant not actionable); *Francis v. Dun & Bradstreet, Inc.,* 4 Cal. Rptr. 2d 361, 364 (Cal. Ct. App. 1992) (applying RESTATEMENT (SECOND) OF TORTS § 772); *Commonwealth Constr. Co. v. Endecon, Inc.*, No. 08C-01-266 RRC, 2009 LEXIS 76 at 22 (Del. Super. Ct. Mar. 9, 2009) (citing RESTATEMENT (SECOND) OF TORTS § 772); *Gunnels v. Marshburn*, 578 S.E.2d 273, 275 (Ga. Ct. App. 2003) (giving truthful account of plaintiff's action not actionable); *Kutcher v. Zimmerman*, 957 P.2d 1076, 1090-91 (Haw. Ct. App. 1998) (citing RESTATEMENT (SECOND) OF TORTS § 772, cmt. b); *Soderlund Bros., Inc. v. Carrier Corp.*, 663 N.E.2d 1, 10 (Ill. App. Ct. 1995) (citing RESTATEMENT (SECOND) OF TORTS § 772 cmt. b); *Cohen v. Battaglia*, 202 P.3d 87, 98-99 (Kan. Ct. App. 2009) (applying RESTATEMENT (SECOND) OF TORTS § 772); *McClure v. McClintock*, 150 S.W. 332, 333 (Ky. 1912) (determining truthful letters inducing a party to terminate a contract not actionable); *State Bank of Commerce v. Demco of La., Inc.*, 483 So. 2d 1119, 1122 (La. Ct. App. 1986) (holding without knowledge of a letters falsity there is no tortuous interference claim); *Rutland v. Mullen*, 798 A.2d 1104, 1110 (Me. 2002) (requiring proof of falsity, unlawful coercion, or extortion for tortious interference); *Travelers Indem. Co. v. Merling*, 605 A.2d 83, 90 (Md. 1992) (stating truthful letter not unlawful), *cert. denied*, 506 U.S. 975 (1992); *United Truck Leasing Corp. v. Geltman*, 533 N.E.2d 647, 651 n.5 (Mass. App. Ct. 1989) (accepting RESTATEMENT (SECOND) OF TORTS § 772); *Glass Serv. Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 871 (Minn. Ct. App. 1995) (citing RESTATEMENT (SECOND) OF TORTS § 772, cmt. b); *Macke Laundry Serv. Ltd. P'ship v. Jets Serv. Co., Inc.*, 931 S.W.2d 166, 181 (Mo. Ct. App. 1996) (applying RESTATEMENT (SECOND) OF TORTS § 772); *Reico v. Evers*, 771 N.W.2d 121, 132-33 (Neb. 2009) (citing RESTATEMENT (SECOND) OF TORTS § 772); *Montrone v. Maxfield*, 449 A.2d 1216, 1217-18 (N.H. 1982) (citing RESTATEMENT (SECOND) OF TORTS § 772); *E. Penn Sanitation, Inc. v. Grinnell Haulers, Inc.*, 682 A.2d 1207, 1218 (N.J. Super. Ct. App. Div. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 772); *Denby v. Pace Univ.*, 741 N.Y.S.2d 408, 409 (N.Y. App. Div. 2002) (holding that truthful letter was not unlawful means); *VSD Comm'n, Inc. v. Lone Wolf Publ'g Grp., Inc.*, 478 S.E.2d 214, 217 (N.C. Ct. App. 1996) (holding truthful statements not actionable for interference); *Dryden v. Cincinnati Bell Tel.*, 734 N.E.2d 409, 414 (Ohio Ct. App. 1999) (applying RESTATEMENT (SECOND) OF TORTS § 772); *Walnut St. Assoc., Inc. v. Brokerage Concepts, Inc.*, 20 A.3d 468, 479 (Pa. 2011) (adopting RESTATEMENT (SECOND) OF TORTS § 772); *Fin. Review Serv., Inc. v. Prudential Ins. Co. of America*, 50 S.W.3d 495, 505 (Tex. App. 1998) (cit-

ing RESTATEMENT (SECOND) OF TORTS § 722); *Hechler Chevrolet, Inc. v. Gen. Motors Corp.*, 337 S.E.2d 744, 748 (Va. 1985) (giving truthful information is not improper interference); *Tiernan v. Charleston Area Med. Ctr., Inc.*, 506 S.E.2d 578, 592-93 (W. Va. 1998) (adopting RESTATEMENT (SECOND) OF TORTS § 722); *Liebe v. City Fin. Co.*, 295 N.W.2d 16, 20 (Wis. Ct. App. 1980) (citing RESTATEMENT (SECOND) OF TORTS § 722); *Allen v. Safeway Stores, Inc.*, 699 P.2d 277, 280 (Wyo. 1985) (applying RESTATEMENT (SECOND) OF TORTS § 722). Nineteen of the 34 states have done so by explicitly relying on Section 772. Of the remaining four, one court found that truth is not an absolute defense to tortuous interference and the other three erroneously decided that truthful statements can be the basis for tortuous interference. *C.N.C. Chem. Corp. v. Pennwalt Corp.*, 690 F. Supp. 139, 143 (D.R.I. 1988) (Rhode Island law, truthfully repeating something known to be false is improper); *Hayes v. Advanced Towing Serv., Inc.*, 40 S.W.3d 800, 805 (Ark. Ct. App. 2001) (truthfulness of the statement is one factor to be consider along with others under the RESTATEMENT (SECOND) OF TORTS § 676 balancing test); *Morrison v. Miss. Enter. for Tech.*, 798 So. 2d 567, 575 (Miss. Ct. App. 2001) (accurate information can be actionable if given without sufficient reason); *Pratt v. Prodata, Inc.*, 885 P.2d 786, 790 (Utah 1994) (rejecting RESTATEMENT (SECOND) OF TORTS § 772).

Giving truthful and only truthful information, as an absolute defense, has been the basis for awarding summary judgment even when the plaintiff can establish that the defendant bore ill will towards the plaintiff. *Gunnels v. Marshburn*, 578 S.E.2d 273, 275 (Ga. Ct. App. 2003). In *Gunnels*, the plaintiff was terminated from her position as a nurse at a hospital for her overuse of prescription drugs. *Id.* at 274. Gunnels brought a tortuous interference with a contract claim against Dr. Marshburn as a result of the termination. *Id.* Marshburn's office received a call from a pharmacist in a different town claiming that Gunnels was attempting to obtain refills on a prescription written by a doctor who no longer had a medical license because he fell victim to dementia. *Id.* Upon hearing this information, Marshburn told the city's police department and a Drug Enforcement Agency investigation began. *Id.* The hospital's personnel director was told that criminal charges would have been filed had the other doctor not had dementia. *Id.* Gunnels was ultimately terminated and sued Marshburn. The trial court granted summary judgment for Marshburn and the decision was affirmed on appeal. *Id.* at 274-75. On appeal, Gunnels established that Marshburn was angry with her for reporting him when he performed surgeries that he was not authorized to conduct. *Gunnels,* 578 S.E.2d at 274. Despite the established ill will, the court held that Gunnels did not show Marshburn had done anything wrong. *Id.* at 275. Marshburn merely "truthfully reported what had occurred to law enforcement authorities. Therefore, the

'improper action or wrongful conduct' element common to all tortuous interference claims has no evidentiary support." *Id.*

Generally, there cannot be "*any*" liability for interference premised on truthful communication even if the communication was "*entirely*" motivated by actual malice, defined as "hate, spite, or ill will." *See Reico v. Evers,* 771 N.W.2d 121, 136 (Neb. 2009) (emphasis in original). In *Reico,* Reico, the plaintiff, brought a tortious interference claim against Evans for turning over e-mails to the university's dean and legal department that were used to determine that Reico sexually harassed Evans. *Id.* at 125, 129. Evans waited over three years before turning over the e-mails and only did so after Reico complained about Evans' behavior in a faculty meeting to the department chair. *Id.* at 129. However, the district court granted Evans summary judgment and the Supreme Court of Nebraska affirmed the order on appeal. *Id.* at 125

The *Reico* court needed to determine if Evans's interference was improper in turning over the e-mails to the dean and legal department. The Restatement provides a seven-factor balancing test to determine if a defendant's interference is improper. RESTATEMENT (SECOND) OF TORTS § 767 (1979). Section 772 of the Restatement is a special application of Section 767. *Reico*, 771 N.W.2d at 132. When the facts of a case deem a special application of Section 767 appropriate, "the responsibility [of the court] in the particular case is simply to apply it to the facts involved; and there is no need to go through the balancing process afresh." RESTATEMENT (SECOND) OF TORTS § 767 cmt. j (1979). In other words, when merely giving truthful information is the defense, the "seven-factor balancing process in Section 767 need not be performed." *E.g, Cohen v. Battaglia,* 202 P.3d 87, 99 (Kan. Ct. App. 2009). The Supreme Court of Nebraska, in *Reico*, did just that and held liability does not incur for giving truthful information to another despite Evans' ill will towards Reico for sexually harassing her and complaining about her arguably unprofessional behavior. *Reico*, 771 N.W.2d at 132.

Only Utah has taken the extreme position of rejecting Section 772. That court held "even where a defendant's means were proper, we reject defendant's call to adopt truthfulness as an absolute defense." *Pratt v. Prodata, Inc.*, 885 P.2d 786, 790 (Utah 1994). In Utah, liability for tortuous interference can be found based on improper means or an improper purpose. *Id.* The majority voiced its strong concern that the improper-purpose test should be "revisited and recast to minimize its potential for misuse." *Id.* at 789. Furthermore, the court expressed "grave doubts about the soundness" of Utah's improper-purpose test. *Id*. at 790. In this case, Dollar would still be justified under this aberrant test for two reasons. First, Dollar had a sincere desire to disclose the truth to the public. (R. at 10). Second, Dollar could personally gain his father's confi-

dence by demonstrating his worth in the political arena. (R. at 6). Dollar acted for his own and the public's interest neither of which are improper.

A severe minority of courts has held malice to defeat a justification. *E.g, Langer v. Becker*, 531 N.E.2d 830, 833 (Ill. App. Ct. 1988); *Nesler v. Fisher & Co. Inc.*, 452 N.W.2d 191, 195 (Iowa 1990). In *Langer*, a conditional justification involving corporate governance could have been overcome by a showing of actual malice. *Langer,* 531 N.E.2d at 833. In order to show actual malice, a plaintiff must demonstrate more than ill will. *Id.* Here, Dollar's assertion of truth is an absolute justification which cannot be overcome. Regardless, his public and personal motivations do not amount to actual malice towards Payoff rendering the application of this rule moot.

In *Nesler*, the Supreme Court of Iowa held that acts done with "spite or with a willful disregard for the rights of the plaintiff" would defeat a justification. *Nesler,* 452 N.W.2d at 195. The *Nesler* court erroneously relied on Comment (d) of Section 767 of the Restatement by claiming "when the act is done with a desire to interfere with contractual relations, the motive behind the act rather than the act itself is determinative." *Id*. at 197. In reality, the plaintiff's interest in his or her contract will "normally outweigh" a defendant's competing economic interest. RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1979). This factor is only one in a complex set of factors used to determine if the interference is improper under Restatement § 767. The justification of protecting one's own economic interests is not at issue here, by contrast, Dollar asserted truth, an absolute defense.

This court should follow the overwhelming majority of jurisdictions by adopting Section 772 of the Restatement (Second) of Torts and reinstate the Order of the circuit court granting summary judgment on behalf of Dollar. At issue are the three truthful statements Dollar made. Dollar's post on his brother's blog stated, "Payoff is going to make a fortune by talking about his crooked life. Someone should really stop these deals from happening." (R. at 6). Dollar also posted on a message board that was only accessible to students in his trial advocacy class that "the reason Payoff did not testify at his trial was to avoid disclosing that he had the mental disorder kleptomania." (R. at 7). Lastly, Dollar stated that the bribery charges against Mayor Payoff were probably true as the former mayor had a problem with stealing on that same message board. (R. at 7). Dollar's statements were either his honest personal opinion or true statements both of which are not actionable as tortuous interference with contractual relations. *Soderlund Bros., Inc. v. Carrier Corp.*, 663 N.E.2d 1, 29 (Ill. App. Ct. 1995). Gunnels should not have been able to refill prescriptions written by a former doctor with dementia, Reico should not have sexually harassed Evans, and Payoff should not have been able to make millions of dollars based on lies. Furthermore, the

people such as Dollar that expose these wrongs should be rewarded not punished. The law should not deter people from telling the truth no matter the surrounding circumstances.

By adopting Section 772 the state of Marshall will avoid the imprecise and unpredictable seven-factor balancing test of Section 767 and judges in Marshall courts will be more capable to act in accordance with the theory of judicial restraint. The balancing test of Section 767 has been criticized on multiple grounds namely that the factors are so abstract that they are indeterminate. Dan Dobbs, the preeminent legal scholar on torts, asserts, "The problem is not merely one of predictability but whether a process of decision that cannot describe the wrongful acts it condemns is either judicial or entirely fair." DAN DOBBS, THE LAW OF TORTS 1264 (2002). Furthermore, the adoption of Section 772 allows judges to forego making the unnecessary decision on a significant question of constitutional law regarding whether truthful speech is protected under state and federal constitutions.

If this Court declines to adopt Section 772 or to otherwise protect giving truthful information, summary judgment for Dollar is still appropriate because his conduct was proper under the Section 767 balancing test.

The Restatement provides seven factors to consider when determining if a defendant's interference with a contract is improper. The factors are as follows:

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

RESTATEMENT (SECOND) OF TORTS § 767 (1979). Because this test is a balancing test, the factors are interrelated and none are dispositive in terms of whether the interference is proper or improper.

The nature of the actor's conduct is a "chief factor in determining whether the conduct is proper or not, despite any harm to the other person." RESTATEMENT (SECOND) OF TORTS § 767 cmt. c (1979). The interference is ordinarily improper if illegal means are used because the harm is immediate. *Id.* Here, Dollar used perfectly lawful means by posting true statements and a true recording on the internet. Even if recording the class was illegal, posting it on the message board was not and does not constitute illegal means. The situation would be different if Dollar engaged in fraud or physical violence or other illegal means. RESTATEMENT (SECOND) OF TORTS, § 767 cmt. c (1979). Furthermore, the harm to Payoff was not realized until several third parties reposted on their re-

spective SpaceBook pages and the national media discovered the story. Dollar did not cause this immediate harm by merely posting to his classes private webpage. Another consideration regarding the nature of the actor's conduct is "the manner of presenting an inducement." *Id*. Here, Dollar did not call Crump and tell him of Payoffs' violation of the morals clause. The actual connection between Dollar's private class webpage postings and Crump's discovery was remote. Furthermore, Dollar did not specifically take any action which led to the termination of Payoff's contract with Sensational Press. The actions of the Payoff and Crump caused that contract to be void. In essence, Dollars manner of inducement was completely inadvertent, and this weighs heavily in favor of his means being proper.

Determining the motive of the defendant is important under this balancing test because if the motive was solely to interfere then the interference is almost certain to be improper. RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1979). This was not the case with Dollar because he was acting out of a desire to personally gain his father's confidence and to let the public know something of legitimate concern. (R. at 6, 10). Dollar's lack of motive to specifically harm Payoff is significant because:

> [I]f there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose . . . the factor of motive carries little weight towards producing a determination that the interference was improper.

RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1979).

Although, Payoff did have an interest in his contracts, some contractual interests receive more protection than others. RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1979). The Restatement looks to the definiteness of the interest as it relates to the plaintiff's expectancy to determine the level of protection. *Id.* Here, the contracts were not definite. The Crump contract was subject to the morals clause, a condition subsequent, and the Sensational Press contract was subject to a condition precedent. (R. at 5). Payoff could not have had an objectively reasonable strong expectancy because he knew that his actions alone, if discovered, would render both contracts void. (R. at 5). Overall, these contracts are not of the type that should be afforded a high level of protection.

The next two factors, the actor's interests and the social interests, are so intertwined they can be address in conjunction with one another. Dollar was acting to gain his father's confidence and in the public interest by making the message board posts. When the actor's interest is a public one, there are many relevant considerations for determining if the defendant's interference is proper. Here, those factors would include whether Payoff was lying about his behavior, whether Dollar actually

believed a career politician lying to the public is prejudicial to the public interest, whether Dollar acted in good faith for the protection of the public interest, whether the contractual relation involved is incident to Payoff's lying, and whether Dollar employed wrongful means to accomplish the result. RESTATEMENT (SECOND) OF TORTS § 767 cmt. f (1979). All of those considerations suggest Dollar's interference was proper.

The proximity or remoteness of Dollar's interference is also an important consideration. Dollar could not have reasonably thought that his posts to the course webpage would cause contracts worth millions of dollars to become void. One student chose to repost Dollar's post on his public SpaceBook page eventually causing the information to go viral and gain national media attention. (R. at 7). Those events were not foreseeable and Dollar was not even aware of the specific terms of Payoff's contract, which might have been effected by the information disclosed. (R. at 10). Dollar's interference was tangential to the actual harm, which strongly suggests his interference was proper. In the instant case, Cheatem's divulging of his client's confidences is more representative of the foreseeability required for interference with Payoff's contracts.

The relations between the parties are the Restatement's final factor in the Section 767 balancing test. Here, the relevant relationship is between the contracting parties. Their relationship is defined by two contracts which were both voidable for different reasons. Saliently, Payoff's own actions could have terminated both contracts if Crump had independently realized Payoff's undisclosed misconduct. This weighs in favor of Dollar's interference being proper.

The facts of this case are more properly dealt with under Section 772 because truth is the defense[2], and it is much easier to determine if a justification applies then to trudge through the Section 767 multi-factor balancing test. This court should adopt Section 772 and order summary judgment for Dollar on Payoff's tortuous interference claim. In the alternative, summary judgment is still appropriate under Section 767 because even though Dollar's interference was intentional it was still proper under the relevant considerations.

2. Here Dollar's truthful speech is also protected by the First Amendment. *See Infra* Part III.D.

THE COURT OF APPEALS ERRED IN REVERSING SUMMARY JUDGMENT BECAUSE NO GENUINE ISSUE OF MATERIAL FACT EXISTS REGARDING PAYOFF'S CLAIM FOR PUBLIC DISCLOSURE OF PRIVATE FACTS AND DOLLAR'S CLASS WEBPAGE POSTS ARE PROTECTED BY THE FIRST AMENDMENT

Payoff alleges that Dollar invaded his privacy under the theory of public disclosure of private facts. The state of Marshall recognizes that a plaintiff alleging the tort of public disclosure of private facts must show (1) the public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person, and (4) which is not of legitimate public concern. *Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 478 (Cal. 1998). While this case presents undisputed facts demonstrating that Dollar posted information on to his class webpage related to Payoff's kleptomania, these posts did not constitute a public disclosure because they were the equivalent of private messages sent to Dollar's classmates. These posts did not meet the threshold of highly offensive to a reasonable person. Finally, Dollar's posts were of a legitimate public concern. The undisputed facts demonstrate that as a former public official on trial for misconduct, Payoff's character and fitness were matters of public concern. This conclusion of law is buttressed by Payoff's own purposeful actions placing his character and fitness under media and public scrutiny.

Furthermore, regardless of whether Payoff has shown facts sufficient to support the elements of his public disclosure of private facts claim, Dollar's posts are protected by the First Amendment. Courts in this nation are well aware of the inescapable tension between privacy law and the First Amendment's protection of freedom of speech. As recently as last year, the Supreme Court reiterated that "[t]he ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). Consequently, "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Smith v. Daily*, 443 U.S. 97, 102 (1979). Dollar was using truthful facts which he legally overheard during his class lecture to participate in discourse regarding a career public official on trial for misconduct. The interest in such speech far outweighs any interest Payoff has in shielding this information from the public. For one or both of the foregoing reasons, this Court should reverse the judgment of the court of appeals and reinstate the summary judgment dismissing Payoff's invasion of privacy claim.

Dollar's postings to his class webpage were the equivalent of private communications and cannot be determined to have been substantially certain to become public knowledge.

Payoff's claim must fail because Dollar's class webpage posts do not constitute "public disclosure" under the common law tort of public disclosure of private facts. In order to prevail on such a claim, the plaintiff must demonstrate that a private fact was "made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." RESTATEMENT (SECOND) OF TORTS §652D cmt. a (1977). "Publicity" in a privacy invasion tort differs from "publication" in a defamation case, which can include any communication by the defendant to a third person. *Tureen v. Equifax, Inc.*, 571 F.2d 411, 417 (8th Cir. 1978). This definition of publicity has been adopted for public disclosure of private facts and false light torts in most jurisdictions. *See Moore v. Big Picture Co.*, 828 F.2d 270, 273 (5th Cir. 1987).

To satisfy the definition of "publicity" the defendant must either make a communication to the public at large or communicate to individuals in such a large number that the information is deemed to have been communicated to the public. *Yath v. Fairview Clinics*, 767 N.W.2d 34, 42 (Minn. 2009). The distinction is one between private and public means of communication. *Id.* For example, "any publication in a newspaper or a magazine, even of small circulation . . . or any broadcast over the radio, or statement made in an address to large audience" would constitute publicity under an invasion of privacy claim. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 554 (Minn. 2003). However, communications which are private in nature and targeted to a small group do not qualify as publicity. *Polin v. Dun & Bradstreet, Inc.*, 768 F.2d 1204, 1206-07 (10th Cir. 1985) (finding a credit report sent to only seventeen subscribers did not constitute publicity); *Grigorenko v. Pauls*, 297 F. Supp. 2d 446, 448-49 (D. Conn. 2003) (finding disclosure to twelve persons was too limited to satisfy publicity element); *Wells v. Thomas*, 569 F. Supp. 426, 437-38 (E.D. Pa. 1983) (finding disclosure to community of staff members did not constitute publicity); *Handler v. Arends*, No. 0527732 S, 1995 LEXIS 660, at *24 (Conn. Super. Ct. Mar. 1, 1995) (finding disclosure of denial of tenure to ten members in a department meeting did not constitute publicity).

While private messages can be considered "publicity" for purposes of satisfying the elements of public disclosure of private facts, the nature of the messages must be public. For example, in *McFarland v. McFarland*, defendants sent emails to over 300 area households accusing plaintiff of physical abuse. *McFarland v. McFarland,* 684 F. Supp. 2d 1073, 1093 (N.D. Iowa 2010). The court explained that for an invasion of privacy

claim, disclosure to 300 households was sufficiently broad to satisfy the element of publicity. *Id.*

Importantly, proof that the disclosed information is substantially certain to become public knowledge cannot merely be alleged based on a possibility or even the defendant's hope that the private facts are spread. In *Guthrie v. Bradley*, the court rejected the argument that because the defendant had emailed one reporter information, that communicated information was substantially certain to become public knowledge. *Guthrie v. Bradley,* No. 06-0619, 2008 U.S. Dist LEXIS 72027, at *50 (W.D. Pa. Sept. 15, 2008). Likewise in *Roe ex rel. Roe v. Heap*, the mere fact that defendant had emailed messages to a handful of athletic officials and requested the information be disseminated did not constitute a substantial certainty that the information would become public. *Roe v. Heap,* No. 03AP-586, 2004 LEXIS 2093, at **37 (Ohio Ct. App. May 11, 2004).

Finally, courts have identified the importance of causation regarding publicity. *See Curry v. Vill. of Blanchester*, No. CA2009-08-010 LEXIS 2855, at **33 (Ohio Ct. App. July 19, 2010) (holding a rumor spread by another party did not constitute publicity); *Wells v. Thomas*, 569 F. Supp. 426, 437 (E.D. Pa. 1983) (holding information which was overheard at a staff meeting and spread to others was "mere spreading of the word by interested persons in the same way rumors are spread"). Due to the increasing ability to easily disseminate information to the public in the digital age, courts have been careful in applying fault to defendants who did not publicly post information on the internet. *See Yath v. Fairview Clinics,* 767 N.W.2d 34, 43 (Minn. 2009) (not finding liability when information posted to public social media site was not attributable to defendants); *Steinbuch v. Cutler*, 463 F. Supp. 2d 1, 4 (D.D.C. 2006) (warning plaintiff regarding need for good faith belief that all defendants accused of public disclosure of private facts are in fact liable based on their respective publications).

In the instant case, Payoff's cannot demonstrate the element of public disclosure because Dollar's postings on his class webpage, which could only be accessed by students enrolled in the course, constituted a private communication. Dollar's post is the equivalent of a student sending an e-mail to his classmates to discuss that day's lecture. In keeping with those cases examining e-mails to targeted groups as private communication, Dollars communication to members of his class through their private webpage message board should not constitute publicity. Unlike the mass-communication present in *McFarland*, Dollar's communications were to a handful of classmates. Furthermore, his communications did not rise to the level of public disclosure, because it could not be substantially certain that such a small amount of private communications would become public knowledge.

The court of appeals mistakenly concluded that merely because the information was later given publicity, this met the requirement that Dollar's disclosure was substantially certain to lead to that publicity. Here, Dollar did not even suggest that such information should be disseminated and even if he had, such a suggestion is still not evidence of substantial certainty of public knowledge. Courts have clearly articulated that publicity requires a message to be "public" in character. The ease of digital dissemination should not be sufficient proof for substantial certainty of public knowledge. Such a holding would necessarily require Dollar and all others to refrain from communicating about personal matters using digital means.

Dollar's postings were merely embarrassing facts about behavioral misconduct and are not the type of private facts that once disclosed would be highly offensive to a reasonable person.

Payoff cannot prove that Dollar's class webpage postings would be highly offensive to a reasonable person. The court of appeals erred in its determination that whether a disclosure is considered highly offensive is a question of fact. The requirement has been criticized as being "fraught with ambiguity and subjectivity . . . necessarily involving a subjective component", and many federal courts have made the determination that various publications are not "highly offensive" as a matter of law. *Machleder v. Diaz*, 801 F.2d 46, 58 (2d Cir. 1986) ("In order to avoid a head-on collision with First Amendment rights, courts have narrowly construed the highly offensive standard."); *Grimes v. CBA Broad. Int'l of Canada*, 905 F. Supp. 964, 968 (N.D. Okla. 1995) (adopting rule similar to that in defamation so that threshold determination of "highly offensive" is determined as a matter of law).

The *Machleder* court utilized comments from the restatement in determining the standard for "highly offensive". RESTATEMENT (SECOND) OF TORTS §652E cmt. c (1977) ("It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may be reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy."). Section 652D likewise has a comment regarding what should be considered highly offensive in relation to public disclosure of private facts. Comment (a) states, "The protection afforded to the plaintiff's interest in his privacy must be relative to the customs of the time and place, to the occupation of the plaintiff and to the habits of his neighbors and fellow citizens." Therefore the context of the disclosure of private facts must be examined to determine whether such disclosure, as a threshold matter, might be considered highly offensive to a reasonable person given the circumstances.

In *Machleder*, the plaintiff business owner was accused of illegally dumping chemicals outside of his business and portrayed as evasive and intemperate regarding his alleged actions. *Machleder,* 801 F.2d at 58. The court there concluded that as a matter of law, no reasonable juror could have found this to meet the definition of highly offensive. Similarly, in *Virgil v. Sports Illustrated*, the fact that the actions of a professional athlete, including putting cigarettes out in his own mouth, eating bugs, and getting into gang fights might have been seen as embarrassing, these facts did not rise to the level of highly offensive as a matter of law. *Virgil v. Sports Illustrated,* 424 F. Supp. 1286, 1289 (S.D. Cal. 1976). Importantly, the court in *Virgil* examined the plaintiff's public figure status[3] in determining the disclosed facts could not be considered so "morbid and sensational" to reach the level of highly offensive. *Id.* at 1289-90.

In contrast, the court in *Urbaniak v. Newtown* held that the disclosure of a private citizen's HIV positive status was highly offensive. *Urbaniak v. Newton,* 277 Cal. Rptr. 354, 360 (Cal. Ct. App. 1991). In *Miller v. Motorola, Inc.* the court found that health concerns involving a mastectomy and reconstructive surgery should be sent to the jury to determine whether the disclosure to coworkers was highly offensive. *Miller v. Motorola, Inc.,* 560 N.E.2d 900, 903 (Ill. App. Ct. 1990). Similarly in *Johnson v. K-Mart Corp.* a mixture of private facts, which included number of sexual partners and prostate health, constituted at least an issue of fact regarding whether the disclosed information made public to an employer was highly offensive. *Johnson v. K-Mart Corp.,* 723 N.E.2d 1192, 1197 (Ill. App. Ct. 2000).

In the instant case, given the circumstances surrounding Payoff and the content and context of the Dollar's posts, discussion of the likelihood of Payoff's kleptomania cannot be considered morbid sensationalism. The disclosure of a private individual's struggle with kleptomania is similar to the disclosure of alleged misconduct in *Machleder.* While kleptomania is a "health issue" it involves behavioral difficulties as opposed to intimate health conditions such as sexually transmitted diseases or cancer diagnoses. Disclosure of Payoff's kleptomania is better compared with the disclosure of the embarrassing behavioral issues the plaintiff in *Virgil* hoped to shield from public view. Dollar's posts regarding a public official's conduct is not only expected, but encouraged by society. Like the plaintiff in *Machleder*, Payoff, by his occupation and actions, opened himself to scrutiny regarding the topics of the lecture. Because Payoff's kleptomania represented behavioral misconduct which he opened him-

3. *See Infra* Part III.D.1 for a discussion of the court of appeals misplaced use of *Galella v. Onassis* for public figure analysis. *Galella v. Onassis,* 487 F.2d 986 (2d Cir. 1973).

self up for scrutiny regarding, this Court should determine the class webpage posts by Dollar were not highly offensive as a matter of law.

Dollar's postings were of legitimate public concern because they involved the misconduct of a public official who was not only adamant in the media regarding his high standard of ethics, but also on trial for misconduct related to his tenure in office.

Payoff cannot demonstrate that Dollar's posts regarding his kleptomania were not a matter of a legitimate public concern. "Legitimate public concern" and "newsworthiness" have often been used synonymously, and are interrelated as tools for assessing the social value of published facts. *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1145-46 (S.D. Cal. 2005) ("Newsworthiness, otherwise known as legitimate public concern, is a bar to liability in the publication of private facts tort."); *Catsouras v. Dep't of Cal. Highway Patrol*, 104 Cal. Rptr. 3d 353, 392, (Cal. Ct. App. 2010) (citing *M.G. v. Time Warner, Inc.*, 107 Cal. Rptr. 2d 504 (2001)). Under either term, establishing this element is a complete defense to the tort. *Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 479 (Cal. 1998). This is due to the general assumption that a right of privacy does not exist in the dissemination of news and news events. *See Melvin v. Reid*, 297 P. 91 (Cal. App. Ct. 1931).

While some courts have examined the fourth element of legitimate public concern and First Amendment claims simultaneously, judicial restraint requires the court to avoid constitutional questions when possible. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."). For this reason many courts examine legitimate public concern and "newsworthiness" under pure common law jurisprudence. For instance, the court in *Briscoe v. Reader's Digest Ass'n, Inc.* utilized a three part analysis in determining newsworthiness, examining 1) the social value of the facts published, 2) the depth of the articles intrusion into ostensibly private affairs, and 3) the extent to which the party voluntarily acceded to a position of public notoriety. *Briscoe v. Reader's Digest Ass'n, Inc.* 483 P.2d 34, 42 (Cal. 1971), *overruled on other grounds by Gates v. Discovery Commc'n, Inc.*, 101 P.3d 552 (Cal. 2004). More recently these three factors have been synthesized and described as an assessment of "the logical relationship or nexus, or the lack thereof, between the events or activities that brought the person into the public eye and the particular facts disclosed." *Taus v. Loftus*, 151 P.3d 1185 (Cal. 2007).

In examining the social value of the facts published, courts have looked to both the content and the context of the information given publicity. In *Cinel v. Connick*, information regarding sexually-explicit and potentially illegal photographs and video was leaked from a criminal investigation. *Cinel v. Connick,* 15 F.3d 1338, 1340-41 (5th Cir. 1994). The court rejected plaintiff's invasion of privacy argument holding that the materials were of significant public concern because they reflected on the guilt or innocence of alleged criminal conduct. *Id.* at 1346. The Court in *Diaz v. Oakland Tribune, Inc.* took a close look at not only the content of the disclosure but of how the information was disclosed as well. *Diaz v. Oakland Tribune, Inc.,* 188 Cal. Rptr.762, 773 (Cal. Ct. App. 1983) (explaining "the social utility of the information must be viewed in context"). The case concerned a newspaper which had published a story disclosing facts about a local student-body president's transexuality and gender corrective surgery. *Id.* at 765. While the court entertained the fact that the election of the first "female" student body president could be newsworthy, the article's tone of outing and ridiculing weighed against any social utility of addressing contemporary student life issues. *Id.* at 773.

Examining the second factor of "depth of intrusion" involves a more abstract analysis. One court described this task as being conducted "with an eye toward community mores." *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 841 (C.D. Cal. 1998) (citing *Virgil v. Time, Inc.,* 527 F.2d 1122, 1131 (9th Cir. 1975)). In *Shulman*, the court examined the depth of intrusion in what appeared to be a physical sense. *Shulman v. Group W Prod., Inc.*, 955 P.2d 469, 494-95 (Cal. 1998). In that case, the plaintiff was an accident victim who was filmed while she was trapped in her vehicle and subsequently extracted and transported by emergency medical professionals. The court stated that because this was "the last thing an injured victim should have to worry about," the intrusion was substantial. *Id.* at 494. The court in *Michaels* examined the substance of the information being disclosed to ascertain the depth of the intrusion. In that case, a videotape of a couple's sexual relations was found to be among "the most private of private affairs." *Michaels,* 5 F. Supp. 2d at 841.

In examining the relation of the plaintiff and their public notoriety, courts have given weight to elected occupations as well as the relation of the disclosure to conduct related to their public position. Persons who voluntarily seek public office or willingly become involved in public affairs waive their right to privacy of matters connected with their public conduct. *See Kapellas v. Kofman*, 459 P.2d 912, 924 (Cal. 1969); *Santillo v. Reedel*, 634 A.2d 264, 266 (Pa. 1993) ("A claim that [the elected official] violated the law was relevant and newsworthy."). The public should be given every opportunity to learn about and discuss facts that may affect

a person's fitness for office. *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 37 n.5 (Cal. 1971). Courts have held that this waiver of privacy is not limited to the duration of a position or even the duration of the time in the public eye. *Montesano v. Donrey Media Grp.*, 668 P.2d 1081, 1088 n.8 (Nev. 1983) ("There can be no doubt that one quite legitimate function of the press is that of educating or reminding the public as to past history, and that the recall of former public figures, the revival of past events that once were news, can properly be a matter of present public interest." (citing William L. Prosser, *Privacy,* 48 CALIF. L. REV. 383, 418 (1960)), *quoted with approval in, Werner v. Times-Mirror Co.,* 14 Cal. Rptr. 208 (Cal. Ct. App. 1961).

In *Cinel*, despite the fact that the plaintiff was a criminal defendant, the court noted that because the elected district attorney's actions were also implicated by the disclosure, there was a legitimate public concern in the performance and discretionary decisions of the elected prosecutor. *Cinel v. Connick*, 15 F.3d 1338, 1346 (5th Cir. 1994). While the court in *Diaz* acknowledged that the student body president was a public figure for some purposes, her gender was not one of those. *Diaz v. Oakland Tribune, Inc.,* 188 Cal. Rptr. 762, 769 (Cal. Ct. App. 1983). Specifically the court stated that it could "find little if any connection between the information disclosed and Diaz's fitness for office. *Id.* at 773.

The undisputed facts in this case establish that Dollar's class webpage postings were a matter of legitimate public concern. First, the content and context of his communications demonstrate high social value. Dollar's post involved commenting on the appearance of misconduct by a former public official who was likely to again face charges for misconduct in relation to his elected position. (R. at 7). As Cheatem's lecture explained, in cases of fraud or dishonesty, proof of a behavioral disorder like kleptomania would weigh heavily against the defendant's case. (R. at 7). These facts demonstrate the class webpage posts contained social utility in two ways. First, Dollar was capable of utilizing the private class webpage for what it was designed for, academic discussion outside of class regarding those topics elaborated on during his Advanced Trial Advocacy lecture. Second, by Cheatem's own admission, as a former public official, kleptomania would clearly affect the way in which Payoff was perceived by a jury of his peers, and more importantly his voters. Behavioral disorders undoubtedly effect a public official's character and fitness for an elected position.[4] Unlike the strictly personal information disclosed in *Diaz*, the information Dollar discussed on his class webpage not only implicated Payoff's guilt or innocence at trial,

4. *See* Clark v. Va. Bd. Of Bar Examiners, 880 F. Supp. 430, 439 n.18 (E.D. Va. 1995) (listing mental health questions regarding kleptomania on several state bar applications).

but at the same time, implicated the public's concern regarding his performance and fitness for public office.

In examining the depth of the intrusion, Dollar's class webpage postings cannot be said to "deeply" intrude in a physical sense, as Dollar was no more than a passive listener of Payoff and Cheatem's lecture. Unlike the accident victim in *Shulman*, the possibility of someone recording a class lecture could not be the last thing on Payoff's mind because such a recording is foreseeable in the academic setting.

Finally, Payoff was by no means an innocent bystander in the creation of his own newsworthy event. Payoff is a career politician, holding his former office as mayor for nearly twenty five years. (R. at 4). As a former public official[5], facts which implicate his character and fitness, performance, and certainly those which may influence a pending criminal trial regarding conduct as a public official are of legitimate public concern. Payoff's recent vacating of his office for a little over a year does not affect this analysis. Furthermore, weighing in favor of the disclosure of his kleptomania being legitimate public concern in terms of "newsworthiness" is the fact that Payoff has actively sought the public spotlight and utilized it to proclaim his high moral character. (R. at 4-6). In essence, Payoff's occupation and actions open the door to information that would bring into question his moral fitness. Kleptomania as a behavioral disorder clearly implicates his moral fitness and is therefore a legitimate public concern. The circuit court erred in merely examining the issue as a health care matter and deeming it not a legitimate public concern.

Dollar's class webpage postings are protected by the First Amendment because the interest in robust political discourse outweighs a former public official's privacy interest in shielding previous misconduct from the public view.

Dollar's class webpage postings are constitutionally privileged speech. The Supreme Court has held that the First Amendment will often protect speech that might otherwise represent an actionable tort. *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50-51 (1988)). This privilege is especially true concerning public figures and matters of public concern. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48-52 (1988). While the Supreme Court has denied ruling on the broad question of whether truth alone is a defense, speech on public issues occupies the "highest rung of the hierarchy of First Amendment values and is entitled to special protection."

5. *See Infra* Part III.D.1 for a discussion of the court of appeals misplaced use of *Galella v. Onassis* for public figure analysis. Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

Snyder, 131 S. Ct. at 1211 (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)).

The First Amendment protects the reporting of true facts from damage claims as long as the facts are "discussed in connection with matters of the kind customarily regarded as news." *Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981). The Supreme Court has held that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need . . . of the highest order." *Smith v. Daily*, 443 U.S. 97, 103 (1979). Moreover, the Supreme Court has recognized the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (citing *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). Discussing the difficulties of applying bright line rules to speech implicating First Amendment issues, the Court in *Florida Star v. B.J.F* stated, "We continue to believe that the sensitivity and significance of the interests presented in clashes between the first amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case." *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989). This same principle applies to the Supreme Court decision in *Bartnicki v. Vopper*. *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001). Dollar's class webpage postings were matters of public concern and the content and context of those postings as representative of legitimate public concern outweigh any interest in privacy a former public official has in shielding embarrassing facts from the public view.

Dollar's class webpage postings constitute speech on matters of public concern which should be protected by the First Amendment as they involve alleged misconduct on the part of a former public official.

Dollar's speech in this case is clearly a matter of public concern regarding a career politician's conduct and fitness for office. Despite the guiding principles setting out the First Amendment's protection of speech regarding public concerns, "The boundaries of what constitutes speech on matters of public concern are not well defined." *Snyder v. Phelps*, 131 S. Ct. 1207, 1211 (2011). In *Connick v. Myers,* the Court stated that matters of public concern can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). The Court has explained that when deciding whether speech is of public or private concern the court examines the content, form, and context of the speech as revealed

by the whole record, where no factor is dispositive. *Snyder*, 131 S. Ct. at 1211 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)). While the content of Dollar's speech may appear to be private as it involves an individual's treatment of a mental disorder, the context of Dollar's speech surrounds the misconduct of a career public official. Such matters are undoubtedly of legitimate public concern and therefore Dollar's truthful speech is protected by the First Amendment.

The right of free public discussion regarding the capacity of elected officials has long been identified by the Court as a fundamental principle of American government. *New York Times Co. v. Sullivan*, 376 U.S. 254, 275-76 (1964) (discussing James Madison and Elliot's Debate). Specifically, "the disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection." *Brawner v. City of Richardson, Tex.*, 855 F.2d 187, 191-92 (5th Cir. 1988).

Here, the court of appeals reliance on *Galella v. Onassis* to expand a public figures privacy interest is misplaced. *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973). In that case, the defendant had actually violated a restraining order and was found to be putting the former First Lady and her children in danger because of his admitted tortious conduct. *Id.* at 991. The court clearly stated that, "Crimes and torts committed in news gathering are not protected." *Id.* at 995. The court in *Galella* was not attempting to broaden the privacy rights of public figures, but was merely articulating that the First Amendment was not "an absolute shield against liability to any sanctions". *Id.* at 991. Dollar's alleged invasion of privacy does not involve stalking, violating a restraining order, or endangering others. Dollar merely posted facts which had been articulated during his law school lecture. While the discussion involved private matters concerning Payoff, Payoff is a public figure, specifically a formal public official, and therefore subject to accusations regarding his character, fitness and alleged misconduct. Such speech is not only protected by the First Amendment, but essential to a free democratic process.

***Bartnicki* is controlling if this court determines Dollar did not violate the Marshall State Eavesdropping statute, but an inadvertent violation of the statute under these circumstances would not tip the scales against the need to protect speech regarding truthful information which was lawfully overheard.**

The Supreme Court has recently examined the issues affecting the balance of interests between free speech regarding matters of public concern and privacy in light of a public disclosure of private facts claim. While the Court's decision in *Bartnicki* necessarily mandates a reversal of the

court of appeals decision if it is determined that Dollar did not violate the eavesdropping statute, a determination that Dollar did violate the statute does not refute the same outcome. *Bartnicki* is a narrow holding, fact specific to the issues before the court in that case. The dicta in *Bartnicki* from all nine justices demonstrate that an examination of the facts in the instant case should protect Dollar's speech regardless of whether he violated the statute by recording his class lecture. Dollar was merely attempting to discuss with his classmates matters of public concern regarding a former public official. Payoff's privacy expectations in protecting what was disclosed during the lecture cannot outweigh the high public interest in the disclosure of information regarding a former public official's character and misconduct. Imposing liability on Dollar's actions would have an unnecessary chilling effect on free speech by threatening meaningful political discourse without successfully furthering the state's interest in protecting facts of a private nature which are not of legitimate public concern.

Assuming arguendo that Dollar's disclosures are of public concern, if they were obtained legally, i.e. without violating the Marshall Eavesdropping Statute, Dollar's disclosures are protected from tort liability by the First Amendment's right to freedom of speech. In *Bartnicki*, the defendant radio station received an illegally intercepted cell phone conversation from an anonymous source. *Bartnicki v. Vopper,* 532 U.S. 514, 518-19 (2001). The tape concerned bargaining between the school board and local union and included what amounted to a threat of violence. *Id.* The Court determined that because the radio station had not participated in the illegal interception, the broadcast of the information gained was protected by the First Amendment even though the defendants knew the conversation had been illegally intercepted. *Id.* at 518-19, 534-35.

In this case, if Dollar legally obtained information regarding a matter of public concern, by parallel reasoning it is clear that he has just as much right to disclose that information as a media outlet would have to disclose information illegally obtained by a third party without the knowledge or participation of the media outlet. If on the other hand, Dollar was found to have violated the Marshall Eavesdropping Statute, it would be an error to assume parallel reasoning would foreclose Dollar's First Amendment privilege. Justice Stevens begins the *Bartnicki* opinion by clearly stating, "These cases raise an important question concerning what degree of protection, if any, the First Amendment provides speech that discloses the content of an illegally intercepted communication. *That question is both novel and narrow.*" *Id.* at 517. The Court identified the issue as "where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it unlawfully, may the government pun-

ish the ensuing publication of that information based on the defect in a chain". *Id.* at 528 (quoting *Boehner v. McDermott*, 191 F.3d 463, 484 (D.C. Cir. 1999) *cert. granted, judgment vacated,* 532 U.S. 1050 (2001)).[6] The Court determined "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern." *Bartnicki*, 532 U.S. at 535. Neither the question nor the answer can be said to directly control Dollar's communications if it is deemed he violated the eavesdropping statute. Therefore a deeper analysis of the dicta in the Court's opinion is needed to discover direction.

Justice Breyer's concurrence is helpful in understanding the weighing of interest at stakes. He states the true question to be determined is, "whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences." *Id.* at 536. Three facts were central to the majority's holding in *Bartnicki*. First, the defendants who disclosed the information took no part in the illegal interception of the phone conversation. *Id.* at 525. Second, the defendants' access to that information was lawful. *Id.* Third, the subject matter of the conversation was a matter of public concern. *Id.* With these facts in mind, the Court determined that the enforcement of the provision would impose a sanction on the publication of truthful information, and that privacy must give way when balanced against the interest in publishing matters of public importance. *Id.* at 534-35.

The nature of the privacy interest at stake was further discussed by both the concurrence and the defense. In examining the overall privacy interest that eavesdropping and wiretapping statutes are meant to protect Justice Breyer distinguished between eavesdropping on a stranger's telephone conversation happening in close vicinity and eavesdropping by means of technology that captures an encrypted cell phone conversation from a far. *Bartnicki*, 532 U.S. at 539. The majority noted that the handful of cases litigating the particular wiretapping statute at issue involved crimes of ill intent motivated by financial gain or domestic disputes. *Id.* at 530. The dissent also emphasized this as a core factual consideration underemphasized by the majority. *Id.* at 541-42 (discussing the dangers of diminishing laws protecting electronic communication).

In examining the personal privacy interest at stake, Justice Breyer stated that the law recognizes a privilege for reporting threats to public safety. Similarly, the law emphasizes the need to disclose matters of

6. *Boehner v. McDermott* is a case factually similar to *Bartnicki* with one important distinction. Defendant was a United States Representative and member of the Ethics Committee subject to special rules regarding disclosures. Boehner v. McDermott, 484 F.3d 573, 587 (D.C. Cir. 2007) (". . . McDermott's speech was otherwise limited in this fashion by the rules, he was not afforded the First Amendment protection recognized in *Bartnicki*. . .").

public concern regarding the conduct of public officials. *See Santillo v. Reedel*, 634 A.2d 264, 266 (Pa. 1993). This analogy was alluded to by Justice Breyer's concurrence when he stated, "the speakers themselves . . . were "limited public figures,". . .voluntarily engaged in a public controversy." *Bartnicki*, 532 U.S. at 539.

The issue presented in this case examines whether the state may impose civil liability on speech constituting information of legitimate public concern, when the substance of the information was obtained legally, but the information happened to be illegally recorded. Here, the typical ill-intent which eavesdropping statutes are drafted to prevent is absent. Dollar was only recording the class because such recordings were typically allowed by Cheatem. (R. at 6). Similar to the defendants in *Bartnicki*, Dollar and his classmates all had lawful access to the information because it was presented to them during the lecture. In this case, Dollar is the innocent auditor of a class lecture who happened to hear and record private facts of great public concern regarding a former public official. Had the tape recording of the class lecture not been made, there would be no question that Dollar and his classmates could have legally discussed the lecture which involved current newsworthy events surrounding a former public official.

Payoff's interest in privacy is further diminished by his status as a public figure. As Justice Breyer explained, public figures have a diminished privacy interest, specifically when they have voluntarily engaged in a controversy. *Id.* Payoff is not only a career politician who may very well continue down that path in another elected capacity, but he also voluntarily placed his political fitness in front of the media. Payoff's policies as mayor reflected a continuing effort to present himself and his office as highly ethical. After leaving office, when these ethical assertions came into doubt, Payoff "made a celebrity of himself" by engaging the media to publicly refute the charges and bolster his ethical reputation and ultimate innocence. (R. at 5). Payoff's occupation and media actions clearly demonstrate a legitimate public interest in disseminating information to refute claims made by a public official regarding his political fitness.

While the First Amendment's protection of speech regarding public concern does not demand Payoff completely forfeit his privacy, speech regarding information legally obtained which effects a public official's character is absolutely protected. Punishing Dollar's disclosure is a poor fit for deterring the dissemination of such information, considering another student could have legally done so without recording the class lecture. Relatedly, these facts make clear that Payoff's interest in maintaining the private nature of his kleptomania was best protected by the doctrine of attorney-client confidentiality. The "real" violation of Payoff's interest in privacy occurred when Cheatem disclosed his confi-

dential statements. The appropriate remedy lies in a complaint for this breach of confidence and a breach of contract action. (R. at 5). To punish citizens who discovered this information due to Cheatem "spilling the beans" would create a chilling effect to private citizens who inadvertently uncover such information.

Dollar is merely participating in discourse at the heart of this country's democratic process, "for speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. State of Louisiana.*, 379 U.S. 64, 74-75 (1964). The interest in ensuring the vitality of such speech clearly outweighs the interest Payoff has in keeping secret information that may refute his self-created image as an ethical public official. The judgment of the court of appeals should be reversed and summary judgment should be granted in favor of Dollar.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully Submitted,
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September 28th, 2011