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The Thirtieth Annual John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law: Brief for the Respondent, 29 J. Marshall J. Computer & Info. L. 139 (2011)

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No. 2011-CV-1001

IN THE SUPREME COURT OF MARSHALL

DONNIE DOLLAR.	)	On Appeal from the
	)	Marshall Court of Appeals
Defendant-Petitioner,	)	First District, No. 2010-016
	)	
v.	)	Circuit Court of Marshall County
	)	No. 10-C-1000
PETER PAYOFF,	)	
	)	Honorable Bernard Woburt
Plaintiff-Respondent.	)	Judge Presiding

RESPONDENT'S BRIEF

QUESTIONS PRESENTED

(1) Whether Petitioner, who arrived late to his Advanced Trial Advocacy Class and began recording it in the absence of explicit permission from the professor or any other participant, is excused from the Marshall State Eavesdropping Statute's requirement that he obtain the consent of all parties to a conversation prior to initiating a recording of said conversation.

(2) Whether the public disclosure of Respondent's kleptomania, initially communicated solely to his attorney in confidence, is sufficiently offensive to the reasonable person and removed from a legitimate matter of public concern so as to constitute the tort of public disclosure of private facts.

(3) Whether a claim for tortious interference with contractual relations is appropriate for summary judgment where the Petitioner expressed a general intent to interfere on an Internet posting, and later caused such interference by publicly disclosing private facts, obtained in part through unlawfully eavesdropping on Respondent.

OPINIONS BELOW

The Marshall County Circuit Court granted summary judgment in favor of Petitioner Donnie Dollar, in Case No. 10-C-1000. The Marshall Court of Appeals, First District, reversed and remanded for further proceedings in Case No. 2010-016. The Order and Opinion of the Marshall Court of Appeals can be found on pages 3-12 of the record.

STATUTORY PROVISIONS INVOLVED

The text of the statutory provisions involved is provided in Appendix A: Marshall State Eavesdropping Statute 75 MSC § 25-1.

STATEMENT OF THE CASE

Factual Background

Petitioner Donnie Dollar is an upper-level student at the John Marshall University Law Center in Marshall City. (R. 6). His family is considerably wealthy and politically active. (R. 6). Petitioner's father, Dudley Dollar, is the former head of the Donkey Committee, a political party with views antithetical to that of Peter Payoff, Respondent and former Mayor of Marshall City. (R. 6). Additionally, David Dollar, Petitioner's brother, publishes a blog that has openly criticized Mr. Payoff. (R. 6). A few weeks prior to the incident at issue herein, David Dollar posted a blog entry concerning business relationships that Mr. Payoff had formed with Sensational Publications and Ronald Crump for the production of an autobiography and reality television show, respectively. (R. 6). Petitioner, eager to "prove to his father that he was worthy of the family fortunes," responded to the post: "Payoff is going to make a fortune by talking about his crooked life. Someone should really stop these deals from happening." (R. 6).

Petitioner is enrolled in an Advanced Trial Advocacy class taught by Charlie Cheatem, an adjunct professor at John Marshall University Law Center and a prominent criminal defense attorney. (R. 4, 6). Mr. Cheatem acted as Mr. Payoff's attorney in a highly publicized criminal trial concerning allegations of corruption during Mr. Payoff's time in office. (R. 5). When Mr. Payoff's trial concluded with a hung jury, Mr. Cheatem invited Mr. Payoff to address his class. (R. 6). On the day in question, Petitioner arrived late to his Advanced Trial Advocacy class and found Mr. Payoff discussing his ultimate decision not to testify on his own behalf. (R. 6).

Although Petitioner was aware of John Marshall University's policy requiring permission to audiotape classes, and had in fact asked for such permission in prior instances, he did not do so during this particular class. (R. 6). Rather, he retrieved his mini-recorder and began recording

the discussion without authorization. (R. 6). After Mr. Payoff concluded his remarks, he left the classroom and Mr. Cheatem dismissed the class for a break. (R. 6). When the class resumed, a student inquired as to why it was generally a bad idea for a defendant to testify in his own defense, as Mr. Payoff had noted earlier. (R. 7). Mr. Cheatem explained that such testimony opens the door to questions about personal matters or mental disorders: "for example, 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. 7). Mr. Cheatem ended class soon after this comment, because he realized he had nearly violated his client's confidence; Mayor Payoff, despite his political success and strong record of public service, indeed suffers from kleptomania. (R. 7, 5). Although undergoing treatment at the John Marshall University Hospital for his condition, he has impulsively pilfered Pete Ross baseball cards ever since he was a child. (R. 5).

Petitioner had no way of knowing that Mr. Cheatem had actually revealed confidential information, but he posted the audio recording of the class discussion to the class's website, commenting, "the reason Payoff did not testify at his trial was to avoid disclosing that he had the mental disorder kleptomania." (R. 7). The website was accessible only to students of the course, but there were no technological safeguards in place to prevent posted material from being downloaded and published elsewhere. (R. 7).

Petitioner's recording spread like wildfire. (R. 7). Within days, students began commenting on the post and Petitioner continued to push the rumor along, suggesting that the corruption charges filed against Mr. Payoff were likely true given his kleptomania. (R. 7). Another student linked the recording to his SpaceBook page, a popular social media website, and it was soon heard by millions of people worldwide, including Ronald Crump. (R. 7).

Pursuant to a "morals clause" in Ronald Crump's contract to produce a reality television show with Mr. Payoff, which provided that the agreement could be terminated if he was found to be involved in any undisclosed immoral conduct, the pending corruption charges excluded, Crump cancelled the contract. (R. 7). Sensational Press, conditioning their agreement for Mayor Payoff's autobiography on the development and resultant publicity of the Crump reality show, terminated their agreement with Mayor Payoff, as well. (R. 7). In short, the public disclosure of Mayor Payoff's mental condition brought about a loss of millions of dollars. (R. 7).

Procedural History

Mayor Payoff filed suit against Petitioner for the civil penalty provided by the Marshall State Eavesdropping Statute ("MSES"), 75 MSC § 25-1; public disclosure of private facts; and tortious interference with the contractual relationship established with Crump and Sensational Press. (R. 7). Following discovery, the Marshall County Circuit Court granted Petitioner's motion for summary judgment, holding that Mr. Payoff failed to establish each of the three claims as a matter of law. (R. 7). The Marshall Court of Appeals for the First Circuit reversed, reasoning that genuine disputes of material fact precluded summary judgment on all three claims. (R. 8-12). This Court granted leave to appeal. (R. 2).

SUMMARY OF THE ARGUMENT

The First District Court of Appeals correctly reversed the Order of the Marshall County Circuit Court granting Petitioner summary judgment, as genuine issues of material fact exist with regard to all three of Respondent's claims.

Violation of the Marshall State Eavesdropping Statute

Petitioner violated the MSES, 75 MSC § 25-1, when he "use[d an] electronic device to hear or record" the in-class presentation made by Mr. Payoff without first obtaining his consent. (R. 14). The trial court incorrectly relied on *DeBoer v. Vill. of Oak Park*, 90 F. Supp. 2d 922 (N.D. Ill. 1999), when it held that Mr. Cheatem's Advanced Trial Advocacy class falls outside the scope of the MSES; for the purposes of the MSES, a "conversation" is "any oral communication between 2 (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. 8, 14). As the case law and plain meaning of the statute indicate, the in-class discussion conducted by Mr. Payoff and Mr. Cheatem fits squarely within the definition provided by the Marshall State legislators. At the very least, an issue of genuine material fact exists as to whether or not an in-class discussion is a "conversation" according to the definition provided by the MSES. Moreover, the policies set forth in the Marshall State University Law Center Student Handbook ("Handbook") plainly states that any person wishing to record any class, either in part or in entirety, is required to first obtain the permission of the instructor or person conducting the class. (R. 13). Based on the policies set forth in the Handbook, Mr. Payoff and Mr. Cheatem had no reason to believe they would be recorded in the absence of explicitly obtained permission and, as such, they lacked the notice necessary to impliedly consent. The unambiguous language of the MSES requires the consent of all parties prior to recording. (R.6). Thus, Petitioner, by

knowingly and intentionally using a mini-recorder device to tape his Advanced Trial Advocacy class without first acquiring the consent of all parties, acted in direct contravention of the MSES, and the grant of summary judgment on this issue was improper.

Public Disclosure of Private Facts

The tort of public disclosure of private facts is comprised of four distinct elements: the (1) 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. Petitioner publicly disclosed a private fact when he posted an unauthorized recording and accompanying comments regarding Mr. Payoff's mental disorder, kleptomania, on the Internet, and in doing so exposed such statements to publicity. (R. 7). Mr. Payoff's mental disorder is of a highly sensitive and private nature, and Mr. Payoff suffered embarrassment, public scrutiny, and tangible financial losses as a result of this disclosure. (R. 7). Finally, Mr. Payoff's mental disorder is not a matter of legitimate public concern, which is analyzed by balancing the individual's right to privacy against the public's right to information – the latter interest greatly outweighing the former where the news media makes the disclosure. Furthermore, given that Petitioner is not a media defendant, he should not be permitted to determine what information is for public consumption. Moreover, even those who are in the public eye are entitled to retain a zone of privacy, in this case the intimate details of one's private medical information, which even the public has no right to penetrate. Accordingly, the First District Court of Appeals decision reversing summary judgment on Respondent's public disclosure of private facts claim should be affirmed.

Tortious Interference with Contractual Relations

In order to prevail on a claim for tortious interference with contractual relations, a plaintiff must demonstrate: (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) that the defendant knows of the contract; (3) that 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 plaintiff. First, with regard to the first and fifth elements, it is undisputed that Respondent entered into valid contracts with Ronald Crump and Sensational Press Publications and that their nullification resulted in actual damage to Mr. Payoff. (R. 5, 7). Second, the knowledge component of the claim may be satisfied either with actual knowledge of the contract's existence or with enough knowledge that its existence could be discovered upon reasonable inquiry; it does not require knowledge of the specific terms of the contract. Peti-

tioner undoubtedly knew that Mr. Payoff had entered into the aforementioned contracts, as evidenced by his Internet commentary expressing his hope that someone would prevent both deals from coming to fruition. (R. 6). Third, Petitioner's commentary on his brother's website and the class webpage, as well as other factors, support the inference that Petitioner intended to interfere with Mr. Payoff's contractual relationship; at the very least, the record presents a genuine issue of material fact in this regard, and the Circuit Court incorrectly held that the truthfulness of Petitioner's disclosure was dispositive with respect to his liability. Because there remain triable issues of fact as to whether Petitioner's actions were justified, the First District Court of Appeals was correct to reverse summary judgment on Respondent's tortious interference with contractual relations claim, and the Court should affirm.

STANDARD OF REVIEW

The Court reviews an order granting summary judgment *de novo*, inquiring whether the trial court properly applied the standard for summary judgment. Specifically, the Court must determine whether the order was properly granted in the absence of any genuine dispute of material fact, and whether the facts entitle the moving party to judgment as a matter of law. *See* MARSHALL R. CIV. P. 56(c). A fact is material when its resolution "might affect the outcome of the suit under the governing law," and a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (interpreting the Federal Rules of Civil Procedure). On review, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

ARGUMENT

THE COURT OF APPEALS CORRECTLY HELD SUMMARY JUDGMENT WAS INAPPROPRIATE TO RESOLVE MR. PAYOFF'S CLAIM THAT PETITIONER VIOLATED THE MARSHALL STATE EAVESDROPPING STATUTE.

The MSES prohibits the use of any electronic eavesdropping device to hear or *record* any part of a conversation without the consent of *all* parties. 75 MSC § 25-1. The Marshall State Legislature provided definitions for the terms "eavesdropping device" and "conversation" to clarify their scope within Section 25-1 of the MSES. For the purposes of the MSES, "[a]n eavesdropping device is defined as anything used to hear or record a conversation," 75 MSC § 25-1(b)(1), and "the term conversation means any oral communication between 2 (two) or more persons," 75 MSC § 25-1(b)(2). Where such statutory language is clear and unambig-

uous, "statutes should be implied and interpreted as they are written." *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*, 920 N.E.2d 1087, 1093 (Ill. App. Ct. 2009); *see also Kozak v. Ret. Bd. of Firemen's Annuity & Ben. Fund of Chicago*, 447 N.E.2d 394, 399 (Ill. 1983). Moreover, where legislators have defined the terms utilized within the statute, "the very terms [the statute] uses should be construed according to those definitions." *In re Marriage of Almquist*, 704 N.E.2d 68, 71 (Ill. App. Ct. 1998).

To prove a violation of the MSES, Plaintiff must show: (1) knowing and intentional use (2) of an eavesdropping device (3) for the purpose of hearing or recording (4) all or any part of a conversation (5) without the consent of all parties to the communication. *See* 75 MSC § 25-1. It is undisputed Petitioner knowingly and intentionally utilized a mini-recorder to tape his Advanced Trial Advocacy class without first acquiring the explicit consent of Mr. Cheatem and Mr. Payoff. Moreover, based on the legislative intent as described above, there can be no question that the mini-recorder used by Petitioner qualifies as an "eavesdropping device" and that the in-class discussion conducted by Mr. Payoff and Mr. Cheatem is a protected communication under the MSES. Thus, Mr. Payoff has satisfied his burden in establishing that Petitioner's acts have violated the plain and unambiguous language of the MSES.

The Discussion in Petitioner's Advanced Trial Advocacy Class Constituted a Conversation Within the Meaning of the Marshall State Eavesdropping Statute.

The MSES defines conversation as "any oral communication between 2 (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." 75 MSC § 25-1(b)(2). The in-class discussion led by Mr. Payoff and Mr. Cheatem qualifies as a conversation under the statute. *Plock v. Bd. of Educ. of Freeport Sch. Dist. No. 145*, is directly on point. There, the court found in favor of the plaintiffs, special education teachers, who brought suit against a public school district to prevent them from utilizing audio-recording equipment in certain special education classrooms, claiming that it violated the Illinois Eavesdropping Act. *Id.* at 1093. The Illinois Act, nearly identical to the MSES, defines conversation as "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature justifying that expectation." 720 ILL. COMP. STAT. § 5/14-1 (2008). The *Plock* court held that the type of classroom activity that the special education teachers engage in constitutes a "conversation" within the meaning of the statute. *Plock*, 920 N.E.2d at 1093. In order to make this determination, the court distinguished the activities of the teachers in a classroom setting from pub-

lic speeches, lectures, or rallies taking place in open public spaces like those at issue in *DeBoer v. Vill. of Oak Park*, 90 F. Supp. 2d 922 (N.D. Ill. 1999). In *DeBoer,* the court held that a public speech is not a "conversation" within the meaning of the Illinois Act, and therefore not protected. *Id.* at 924. The court went on to explain that though not every "audible expression" is afforded protection, the public speech at issue was highly distinguishable from conversations in the classroom context due to the lack of an "exchange." *Id.* at 924 (citing *Almquist*, 704 N.E.2d at 71 (holding that a tape recording playing in the background of a phone call did not constitute participation in a conversation and that not all audible sounds will be afforded protection)).

The Marshall County Circuit Court incorrectly relied on *DeBoer* for its determination that the type of communication occurring in Mr. Cheatem's Advanced Trial Advocacy class falls outside the scope of the MSES. The Circuit Court, in applying *DeBoer,* adopted a narrow reading of "conversation," requiring mutual discourse rather than a one-sided oratory. (R. 8). The First District Court of Appeals explicitly rejected this definition and opted instead for a broader reading, stating, "a conversation as defined by the statute could occur in a large group setting with one primary speaker." (R. 8). Conversation as defined by *DeBoer* is restricted to a "mutual discourse as opposed to a statement or declaration by one person alone." *DeBoer*, 90 F. Supp. 2d at 924. Those familiar with the law school setting and class format are aware of its utilization of the Socratic Method to encourage a back and forth between the professor and student, a characteristic which distinguishes it from that of the one-sided lecture or public speech. It was not uncommon for Mr. Cheatem and his students to engage in a discourse. Moreover, the record attests to the fact that students were free to ask questions during the course of class, often leading to back and forth exchange on a particular point. Thus, not only does the nature and format of Mr. Cheatem's Advanced Trial Advocacy Class closely resemble the type of classroom interaction addressed in *Plock,* but it also satisfies even the narrowest reading of "conversation" as utilized in *DeBoer*.

Neither the MSES, nor its accompanying legislative documents, support any contention that the term "conversation" should be interpreted narrowly. The unambiguous language of the MSES and its definitions do not support the assertion that the type of discussion that occurred in Petitioner's Advanced Trial Advocacy class is somehow unprotected by MSES. Legislators, in offering definitions to terms utilized within the statute, felt it necessary to offer clarification as to what types of communications are to be considered conversations for the purpose of the statute. In drafting the statute and the accompanying definitions, to protect *any* oral communication between two or more persons, the Marshall State legislature chose to keep the MSES broad in scope. If Petitioner

wishes the MSES to be narrowly tailored as to exclude such communication is the classroom setting, his recourse must lie with the Marshall State Legislature. Even if the Court were to find the dispute over whether or not classroom communication is protected by the MSES a valid one requiring the intervention of the judiciary, it is not a determination that should be made at the summary judgment stage. Consequently, the Circuit Court erred when it improvidently granted summary judgment and the decision of the Court of Appeals should be affirmed.

Petitioner Knowingly and Intentionally Used a Mini-Recorder to Tape the Class Discussion Led By Mr. Payoff and Mr. Cheatem Without Acquiring the Consent of All Parties.

The MSES requires the consent of *all* parties to a conversation. 75 MSC § 25-1. Additionally, Section Fourteen of the Handbook requires that: "[a]ny student, faculty member, or administrator wishing to record any class or portion of a class must first obtain the permission of the instructor or any party teaching or conducting a presentation in class prior to the recording for each class session or portion of each class section." (R. 13). Despite his awareness of this requirement, Petitioner did not seek permission and opted instead to violate both the MSES and the Handbook guidelines because he was tardy to class. As a result, neither Mr. Cheatem nor Mr. Payoff gave their explicit consent or provided Petitioner with the authorization required to lawfully record the Advanced Trial Advocacy class.

In certain contexts, absent explicit consent, "implied consent may be deduced from the prevailing circumstances in a given situation." *People v. Ceja*, 789 N.E.2d 1228, 1241 (Ill. 2003). In *Ceja,* the defendant was found to have impliedly consented to eavesdropping when, with full knowledge that he was being monitored, the statements he made to another inmate in a holding cell were overheard via an intercom. *Id.* at 1241. Unlike *Ceja*, the case at bar is not a context in which implied consent may be inferred. Section Fourteen of the Handbook makes the conduct expected by all students, faculty members, administrators, and guest speakers abundantly clear. According to the protocol, permission to record is to be explicitly sought for each and every instance of recording and as such cannot be inferred from prior history or custom. (R. 13). Correspondingly, consent to recording cannot be implied as it must be explicitly sought and provided. *Ceja* also suggests that implied consent can be inferred from "the language or acts that tend to prove that a party knows of, or assents to, encroachments on the routine expectation that conversations are private." *Ceja*, 789 N.E.2d at 1241. Mr. Cheatem and Mr. Payoff had no reason to anticipate that the class may have been recorded; thus, unlike the defendant in *Ceja,* they lacked the notice neces-

sary to consent through acts or language showing assent. In fact, they had every reason to believe, based on the protocol outlined by the Marshall State University Law Center, that the class would not be recorded in the absence of their explicit permission. Furthermore, there is evidence in the record to suggest that even the Marshall University Law Center administration felt that the unauthorized recording of school lectures was an act likely to fall under the purview of the MSES. Thus, they enacted the strict policies regarding recording, as set forth in Section Fourteen of the Handbook, in order to prevent potential MSES violations. (R. 4). In light of the foregoing reasons, implied consent by Mr. Cheatem and Mr. Payoff cannot be deduced. However, assuming, *arguendo*, that this Court finds that implied consent may be deduced in light of all the circumstances, the issue of whether or not consent was issued, either explicitly or implicitly, should be submitted to a jury and not decided at the summary judgment stage.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER PUBLICLY DISCLOSED A PRIVATE FACT WHEN HE DISSEMINATED, VIA THE INTERNET, PRIVATE INFORMATION ABOUT MR. PAYOFF'S MENTAL HEALTH DISORDER THAT WAS NOT OF PUBLIC CONCERN.

An individual's right to privacy is of paramount importance, and has been recognized as fundamental since 1890, when Justices Warren and Brandeis published their groundbreaking article on the subject. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Thereafter, courts began to acknowledge this right as one worthy of legal protection. *See* William Prosser, *Privacy*, 48 CALIF. L. REV. 383, 385-89 (1960). At law, four distinctly separate privacy invasions gained recognition: intrusion into one's solitude and private affairs, the misappropriation of an individual's likeness, false light publicity, and public disclosure of private facts embarrassing to the individual. *Id.* at 389. Mr. Payoff has brought this claim against the Petitioner for the public disclosure of private facts. Petitioner publicly disclosed private information, via the Internet, about Mr. Payoff's mental health and in doing so subjected him to suffer embarrassment, public backlash in the form of repudiated political support, and considerable financial loss due to nullified business contracts.

The Marshall Court of Appeals adopted the test set forth in *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998), to evaluate a claim for the public disclosure of private facts. (R. 11). According to this test, in order to sustain an action for public disclosure of private facts, a plaintiff must show: (1) 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,* 955 P.2d at 478. Petitioner publicly disclosed private facts about Mr. Payoff that did not rise to the level of public concern when he posted an unauthorized audio recording and accompanying comments to his school's Advanced Trial Advocacy Class webpage disclosing that Mr. Payoff suffers from the mental disorder, kleptomania. (R. 7). As Mr. Payoff's mental disorder is of a personal and sensitive nature, such a disclosure would be considered highly offensive to a reasonable person. Therefore, this Court should find that, by disclosing information on the Internet regarding Mr. Payoff's mental disorder that would be considered highly offensive to a reasonable person, Petitioner committed the tort of public disclosure of private facts.

Petitioner Disclosed Mr. Payoff's Private Condition When He Posted Commentary on the Internet About Mr. Payoff's kleptomania.

Publication is no longer limited to traditional sources of news media such as newspapers or television news broadcasts, but has expanded to include, among other things, the Internet. The Internet, with its universal accessibility, has created an outlet for endless publication. Courts have recognized that "[a]ny person or organization with a computer connected to the Internet can 'publish' information." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997). The requirement of public disclosure generally connotes publicity; publicity requires communication to the public in general or to a large number of persons, so as to become some matter of public knowledge. *See Green v. Chicago Tribune Co.*, 675 N.E.2d 249 (Ill. App. Ct. 1996); *Brown v. Mullarkey*, 632 S.W.2d 507 (Mo. Ct. App. 1982); *Killilea v. Sears, Roebuck & Co*., 499 N.E.2d 1291 (Ohio Ct. App. 1985). Utilizing a vehicle like the Internet, published statements on webpages and blogs have the ability to reach an infinite and indiscriminate audience. "[The Internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno,* 521 U.S. at 853.

Petitioner posted comments regarding Mr. Payoff's mental disorder, kleptomania, on the webpage for his Advanced Trial Advocacy Class and in doing so promulgated and exposed such statements to publicity. Though the school webpage on which Petitioner initially disseminated information was limited in access to students of the class, this point has no bearing on his liability. Even where a matter becomes inadvertently public by means initiated by the defendant, the defendant can still be held liable for public disclosure. *Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371 (Colo. 1997); *Beaumont v. Brown*, 257 N.W.2d 522, 529-30 (Mich. 1977), *overruled on other grounds by Bradley v. Saranac Cmty.*

Sch. Bd. of Educ., 565 N.W.2d 650 (Mich. 1997). It is undisputed that because of Petitioner's initial disclosure the information eventually reached a massive audience. (R. 7). Petitioner's comments and posted recording were made entirely public when they were transferred to the website "Spacebook," a freely accessible domain. (R. 7). Subsequently, the national media began to broadcast the recording, thus exposing Mr. Payoff's condition to the entire world. (R. 7).

Mr. Payoff's Mental Health Disorder Was of a Private and Sensitive Nature and Not Part of the Public Record.

Mr. Payoff's struggle with the mental disorder, kleptomania, is an intimate fact of the utmost sensitivity. In order to succeed on a claim for public disclosure of private facts, a plaintiff must next prove that the facts disclosed were private in nature. RESTATEMENT (SECOND) OF TORTS § 652B (1977). Facts that are part of the public record will not be considered private. *Florida Star v. B.J.F.*, 491 U.S. 524, 532 n.7 (1989); *Robert C. Ozer, P.C.*, 940 P.2d 371; RESTATEMENT (SECOND) OF TORTS § 652B (1977). However, according the to the Restatement, facts related to intimate family matters, sexual relations, and "unpleasant or disgraceful or humiliating illnesses" are private in nature and are thus awarded privacy protection, the disclosure of which can constitute an invasion. RESTATEMENT (SECOND) OF TORTS § 652B (1977). Courts applying this standard have recognized health as a distinct category of facts meritorious of privacy protection. *See*, *e.g.*, *Vassiliades v. Garfinckel's Brooks Bros., Inc.*, 492 A.2d 580, 587-88 (D.C. 1985) (plaintiff's cosmetic surgery was private in nature); *Miller v. Motorola, Inc.,* 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (plaintiff's mastectomy was considered private); *Young v. Jackson*, 572 So.2d 378, 382 (Miss. 1990) (plaintiff had a right to keep hysterectomy private and therefore disclosure was actionable); *Hillman v. Columbia Cnty.*, 474 N.W.2d 913, 923 (Wis. Ct. App. 1991) (plaintiff's HIV-positive status was private). Consequently, issues regarding treatment or the nature of a medical condition have typically been considered private. *Doe v. Mills*, 536 N.W.2d 824, 829-30 (Mich. Ct. App. 1995).

Few things are as intimate and private in nature as one's medical health and history. In *Sargeant v. Serrani*, 866 F. Supp. 657 (D. Conn. 1994), a Connecticut police officer brought an invasion of privacy claim following the publication of statements by the town mayor alleging the plaintiff had abused sick leave policy and made statements referring to the plaintiff's health. The court found that "[a] reasonable person would consider Sargeant's medical diagnosis to be a private fact, and Sargeant did not voluntarily reveal this fact but actively sought to keep it private." *Id.* at 667. Mr. Payoff's struggle with the mental disorder kleptomania was entirely private. Mr. Payoff expressed considerable concern that this private information not become public when he disclosed his condi-

tion to his attorney, Mr. Cheatem. Furthermore, Mr. Payoff was assured that this information would remain private as it is protected by attorney-client confidentiality. Though Mr. Payoff had sought medical attention for his condition at the University of Marshall Hospital, the nature and substance of these sessions is protected by doctor-patient confidentiality and was not a matter of public knowledge prior to Petitioner's disclosure. Mental health conditions are often associated with a social stigma. This public perception of mental health ailments aids in placing them in the category of "disgraceful or humiliating illnesses," as outlined by the Restatement; a distinction which affords them protection as private facts.

A Reasonable Person Would Find That the Invasion of Mr. Payoff's Privacy and the Disclosure and Exploitation of His Mental Heath Disorder Was Highly Offensive.

In order to succeed on his public disclosure of private facts claim, Mr. Payoff must show that the published fact in question would be considered highly offensive to a reasonable person. RESTATEMENT (SECOND) OF TORTS § 652D cmt c (1977). A disclosure that would inflict embarrassment or emotional distress on a reasonable person is considered highly offensive. *Robert C. Ozer, P.C.*, 940 P.2d at 378. When analyzing the highly offensive requirement, "the determination of whether a disclosure is highly offensive to the reasonable person is a question of fact and depends on the circumstances of a particular case." *Id*. Moreover, where there is a dispute regarding the offensiveness of the publication and determination as a matter of law is not possible, the issue presents a "question of fact for the jury to determine." *Miller*, 560 N.E.2d at 903. The potential for reasonable minds to disagree regarding the offensiveness of publication presents an issue of material fact, and where such a dispute is genuine the grant of summary judgment is improper.

Courts often draw on the various factors related to society's perception of offensiveness when determining if a disclosure is highly offensive. This reliance on societal perception is often supplemented by a factual and circumstantial inquiry into the context of the publication. *See Robert C. Ozer, P.C.*, 940 P.2d at 378 (whether or not a disclosure is highly offensive is a question of fact that largely depends on the circumstances of a given case); *Green*, 675 N.E.2d 249 (proposing that when analyzing the highly offensive requirement the court "examine the allegations of the context, conduct and circumstances surrounding the publication as well as the publication itself"). Due to the private and sensitive nature of his disorder, Mr. Payoff has suffered substantial embarrassment and backlash after this information became public knowledge. Following publication, Mr. Payoff lost out on profitable contracts, suffered loss of backing from many of his strongest supporters, and was presumed to be guilty of corruption, all as a result of the disclosure of his mental disor-

der. A reasonable person could determine that the disclosure of such an intimate fact and the resultant embarrassment and harmful consequences of its publication are highly offensive. In *Swarthout v. Mut. Serv. Life Insurance Company*, 632 N.W.2d 741, 745 (Minn. Ct. App. 2001), the court held that the issue of whether or not disclosure of plaintiff's use of high blood pressure medication was highly offensive constituted an issue of fact for a jury to determine and as such summary judgment was precluded. The disclosure in the present case is even more extreme. Whether or not the disclosure of Mr. Payoff's mental disorder is highly offensive remains a question of fact for a jury and one that should not be disposed of at the summary judgment stage.

While Mr. Payoff's Career and Public Persona May be Newsworthy, the Intimate Details of His Mental Health Are Not.

The final element of a public disclosure of private facts claim is that the subject of the publication be one that is not of legitimate public concern. *Shulman,* 955 P.2d at 478. The newsworthiness of a publication is determined by a standard that is generally one based on community mores and commonly held perceptions of decency. *See Virgil v. Time, Inc.*, 527 F.2d 1122, 1129 n.12 (9th Cir. 1975); *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762, 772 (Cal. Ct. App. 1983); RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977); DAVID A. ELDER, PRIVACY TORTS § 3:17 (2011). Where courts utilize community standards and perceptions to guide their analysis, the determination is one of fact on which reasonable minds can disagree; as such it is a determination that should be submitted to a jury. *Virgil,* 527 F.2d at 1129 n.12; *Diaz*, 188 Cal. Rptr. at 772.

The fact that Mr. Payoff suffers from a mental disorder for which he seeks medical treatment is not a matter of legitimate public concern. Private medical information of a highly sensitive and confidential nature should be insulated from intrusion, despite any general interest in the lives of individuals in the public eye. Mr. Payoff has endured a life long struggle with kleptomania, which manifests itself in an uncontrollable urge to steal Pete Rose baseball cards. This is a highly limited manifestation and one that had no negative impact on his ability to serve as Mayor of Marshall City. Though public figures may sacrifice some modicum of privacy interest with regard to their public personas, to allow the public to penetrate one's private medical history under the guise of legitimate public concern would be to allow morbid and sensational prying into the private lives of individuals merely because they are of general interest. Whether or not Mr. Payoff's mental health disorder or the medical treatment he seeks can be considered a matter of legitimate public concern, is one on which reasonable minds can disagree. Thus, it is an

issue that should be submitted to a jury and not dismissed of at the summary judgment stage.

1. Petitioner does not qualify for the heightened deference given to media outlets defending against claims of public disclosure of private facts.

Courts often analyze legitimate public concern in terms of newsworthiness. *Virgil*, 527 F.2d at 1122, 1128-29. The public's interest in matters of legitimate public concern is often protected and enabled by constitutionally recognized rights of free speech and freedom of the press; such interests will inevitably come into play when analyzing the newsworthiness. *Shulman*, 955 P.2d at 478; *Diaz*, 188 Cal. Rptr. at 769. Moreover, whether the fact was newsworthy should be "measured along a sliding scale of competing interests; the individual's right to keep private facts from the public's gaze versus the public's right to know." *Diaz*, 188 Cal. Rptr. at 771. The *Shulman* court considered a three factor analysis when determining newsworthiness: first, the "normative assessment of the 'social value' of a publication"; second, the degree of intrusion and the extent to which the plaintiff played an important role in public events; and third, some sort of nexus between the information discloses and "the nature of the activity or event that brought the plaintiff to public attention." *Shulman*, 955 P.2d at 484. This analysis places great weight on freedom of the press and the media's right to determine matters of legitimate public interest. Whether or not a non-media defendant has the authority to determine what matters are newsworthy has yet to be addressed by this Court. In the present case, Petitioner is not a media defendant and neither Petitioner's Advanced Trial Advocacy class webpage nor Spacebook are the type of sources worthy of media protection. Because Petitioner's non-media status has a significant bearing on the issue of legitimate public concern and as this Court has not yet set a standard for non-media defendants, Petition should not *a priori* be afforded the higher deference given to media defendants in cases like *Virgil* and *Shulman*.

2. Even if Mr. Payoff is considered a Public Figure, the intimate details of his mental health are not matters of legitimate public concern and should be protected from intrusion.

Despite the broad scope and reach of public concern, the Restatement acknowledges that a "line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake." RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977). Additionally, courts have imposed limitations on the scope of the public's interest

in certain matters. *Vassiliades* concerned the disclosure of before and after images of the plaintiff's cosmetic surgery procedure, by her physician, on a local televised program promoting an upcoming department store showcase entitled "Creams versus Plastic Surgery." 492 A.2d at 585. The court held that "[c]ertain private facts about a person should never be publicized, even if the facts concern matters which are, or relate to persons who are, of legitimate public interest." *Id.* at 587-88. As noted above, the Restatement offers protection those illnesses that are "disgraceful or humiliating." RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977). As kleptomania is a stigmatized and widely misunderstood disorder, it falls squarely in this distinct category outlined by the Restatement. Thus, it is precisely the sort of private information that, according to the court in *Vassiliades*, ought to be shielded from publicity.

In *Gallela v. Onassis*, 487 F.2d 986 (2d Cir. 1973), despite acknowledging that Mrs. Onassis was a prominent public figure and therefore "subject to news coverage," the court maintained that a public figure is still entitled to retain some privacy rights. In *Diaz*, a student body president brought suit for public disclosure of private facts against a newspaper for alleging that she was a transsexual. In holding that Diaz's sexual identity was not newsworthy as a matter of law, the California court recognized that, "[w]here the publicity is so offensive as to constitute a morbid and sensational prying into private lives for its own sake, it serves no legitimate public interest and is not deserving of protection." *Diaz,* 88 Cal. Rptr. at 773.

As addressed above, various courts have "concluded that there is no legitimate public interest generally in disclosure of private medical information." *See* DAVID A. ELDER, PRIVACY TORTS § 3:17 (2011). *White v. Township of Winthrop,* 116 P.3d 1034, 1038 (Wash. Ct. App. 2005), concerned a full-time deputy marshal, suffering from epilepsy, who was forced to resign when his medical treatment conflicted with his ability to perform his professional duties. The court found that the legitimacy of a public interest in the specific nature of the plaintiff's medical condition, as opposed to a more generalized legitimate public interest "in the announcement that his resignation was for health reasons," was an issue for the jury. *Id.* at 1038. Assuming, *arguendo*, that this Court finds that medical information is not protected as a matter of law, at the very least a jury should be allowed to balance Mr. Payoff's significant interest in the privacy of his medical condition against the public's interest in his persona. Moreover, this Court should acknowledge the serious implications to public policy in sanctioning the disclosure of one's private medical information and recognize that to allow publication of an individual's medical history and treatment would constitute the type of morbid and sensational prying addressed by the Restatement.

The grant of summary judgment by the Circuit Court was improper in light of the genuine issues of material fact that exist as to the deference that should be afforded to a non-media defendant and whether or not Mr. Payoff's medical condition is newsworthy. As such, summary judgment on these issues was correctly precluded and the decision of the Court of Appeals should be affirmed.

THE COURT OF APPEALS CORRECTLY FOUND THAT GENUINE ISSUES OF MATERIAL FACT PRECLUDED SUMMARY JUDGMENT ON MR. PAYOFF'S TORTIOUS INTERFERENCE CLAIM.

While the case *sub judice* is one of first impression in the State of Marshall, the elements of a claim for tortious interference with contractual relations are well defined. The plaintiff must demonstrate "(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person;[1] (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 plaintiff." *Gupton v. Son-Lan Dev. Co.*, 695 S.E.2d 763, 770 (N.C. Ct. App. 2010). Upon defendant's motion for summary judgment, the plaintiff "need not prove his claim; he need only show that there is a genuine issue of material fact as to each of these elements." *Gil v. Reed*, 381 F.3d 649, 659 (7th Cir. 2004). Here, there is no question that a reasonable jury could, and indeed should conclude that Petitioner knew of Mr. Payoff's contracts and posted his comments to the Internet with the express intention of interfering therewith. As the Marshall Court of Appeals recognized, the trial court therefore improvidently granted Petitioner's motion for summary judgment, and its judgment must be affirmed.

Mr. Payoff Need Not Demonstrate Petitioner Had Knowledge of the Specific Provisions of His Contract With Ronald Crump, But Rather Only That He Knew of its Existence.

At trial, Petitioner claimed that there was insufficient evidence for a jury to find he had knowledge of Mr. Payoff's contracts with Ronald Crump and Sensational Press Publications, principally because he was not aware of the legal particulars thereof. (R. 10). Not only does this argument confuse the "knowledge" element of a tortious interference claim, but there is also ample evidence to create a triable issue of fact.

Inextricably bound up with the question of intent, it is essential a defendant have knowledge of the contract with which he is purported to

1. Defendants concede that a valid and enforceable contract existed between Mr. Payoff and Ronald Crump. (R. 10).

interfere. *Gianacopoulos v. MOS Design, Inc.*, No. 3:05-2417, 2008 WL 1774094, at *6 (M.D. Pa. April 16, 2008) ("It is obvious that one cannot intentionally interfere with a contract of which he has no knowledge."). Neither the courts of the State of Marshall or any other jurisdiction have ever required, however, that the defendant have complete, actual knowledge of the agreement's particulars and attendant circumstances. Rather, the knowledge element may be satisfied by either actual knowledge that a contract exists, or "knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties." *See Cont'l Research, Inc. v. Cruttenden, Podesta & Miller*, 222 F. Supp. 190, 199 (D. Minn. 1963) (quoting *Swaney v. Crawley*, 191 N.W. 583, 584 (Minn. 1923)). Knowledge of the contract is necessary only to the extent required to demonstrate that the defendant acted with the purpose of interfering. See RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (1979). Accordingly, "the defendant need not have full knowledge of all the detailed terms of the contract." *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 796 (Tex. Ct. App. 1987) (citing *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445 (N.Y. 1980)); *see also Ryan, Elliott & Co., Inc. v. Leggat, McCall & Werner, Inc.*, 396 N.E.2d 1009, 1012-13 (Mass. App. Ct. 1979); *Posner v. Lankenau Hosp.*, 645 F. Supp. 1102, 1112-13 (E.D. Pa. 1986). "The element of knowledge by the defendant is a question of fact, and proof may be predicated on circumstantial evidence." *Texaco* 729 S.W.2d at 797 (citing *American Cyanamid Co. v. Elizabeth Arden Sales Corp.*, 331 F. Supp. 597 (S.D.N.Y. 1971)).

There is no question on this record that Petitioner knew Mr. Payoff had entered into contracts to appear on a reality television show and to author a biography. News of the contracts had made national headlines and had also been published on David Dollar's Internet site. Even if Petitioner had not heard of the contracts through national media outlets, he certainly read about them on his brother's website; just a few hours after the posting, Petitioner commented, "Payoff is going to make a fortune by talking about his crooked life. Someone should really stop these deals from happening." (R. 6).

While the record is silent as to the level of detail communicated by David Dollar and the news media, Petitioner had sufficient knowledge to preclude summary judgment on the element of knowledge; his argument that he did not have knowledge of the "morals clause" and there could not have intended to interfere was squarely rejected in *Posner*. There, the plaintiff claimed that the Lankenau Hospital's bad faith refusal to let him add an additional pulmonary physician to the medical staff caused him to incur an inordinate workload, which ultimately led to the cancellation of his prospective contract to provide diagnostic services to several hospitals in the Virgin Islands. *Posner*, 645 F. Supp. at 1112. In re-

sponse to the hospital's motion for summary judgment arguing, inter alia, that it had no knowledge of the terms of the contracts, Posner claimed that "everyone" knew about the deals, and that that was enough to create a triable issue of fact. *Id.* at 1112-13. Agreeing, the court first rejected the hospital's argument that knowledge of the contracts' specific terms was required as a matter of law. Rather, "the actor must have knowledge of the contract with which he is interfering and of the fact he is interfering with the performance of a contract." *Id.* at 1112. The court acknowledged that awareness of the detailed terms of the contract would support the requirement that the hospital *knew* it was interfering, but held the absence of such knowledge nondispositive: "Because questions of fact exist concerning the question of whether defendants knew that their actions would interfere with plaintiff's prospective business relations in the Virgin Islands . . . [the Court] will deny defendants' motion on this issue." *Id.* at 1113.

Similarly, Mr. Payoff need not have demonstrated at trial that Petitioner knew of the morals clause, or any other provision of the agreement, because there are sufficient facts on which a reasonable jury could conclude Petitioner knew he was interfering with the contracts. First, at this stage of the proceedings, the details of the contract with which Petitioner were familiar are unknown. It is entirely possible, for example, that he learned of the morals clause through the reporting of one of numerous media outlets that ran the story. Although he argues before this court that he had no knowledge of the provision (R. 10), the trial court did not make a specific finding of fact one way or another. Summary judgment is inappropriate where, as here, issues of material fact ultimately turn on the credibility of witnesses. *See Anderson*, 477 U.S. at 255. If Petitioner had not learned of the morals clause specifically, a reasonable jury may also be entitled to infer that he had assumed there would be such a clause when he acted. Petitioner, after all, was at the time of his actions an upper-level classman at the Marshall State University Law Center, and presumably familiar with the types of provisions commonly found in contracts like the ones at issue. On motion for summary judgment, the non-moving party is entitled to inferences such as these. *Id.* Finally, and most critically, even if Petitioner had no knowledge whatsoever of the moral clause, his knowledge of the contract itself, coupled with a demonstrable intent to interfere therewith, is sufficient to meet this element of the tort. *See* RESTATEMENT (SECOND) OF TORTS § 766 cmt. i (1979); *Posner*, 645 F. Supp. at 1112-13.

Genuine Issues of Material Fact With Regard To Whether Petitioner Intended to Interfere With Mr. Payoff's Contracts Precluded Summary Judgment.

As noted by the court below, "[i]ntent may be formed by acting for the purpose of interfering with the contract, desiring to interfere while acting for some other reason, or knowing that interference is certain or substantially certain to occur." RESTATEMENT (SECOND) OF TORTS § 766 cmt. j (1979). "[I]ntentional interference does not require an intent to injure, only an intent to cause interference or a substantial certainty that interference will occur." *Wardlaw v. Inland Container Corp.*, 76 F.3d 1372, 1376 n.2 (5th Cir. 1996) (citing *Sw. Bell Tel. Co. v. John Carlo Tex., Inc.*, 813 S.W.2d 613, 619 (Tex. App. 1991)). Here, the procedural posture of this case is critical: "Where the defendant's intent is at issue, summary judgment is appropriate only if *all* reasonable inferences defeat the plaintiff's claims." *White v. Roper*, 901 F.2d 1501, 1505 (9th Cir. 1990) (emphasis added) (internal quotation omitted); see also *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Stop Treaty Abuse–Wis., Inc.*, 991 F.2d 1249, 1258 (7th Cir. 1993) ("[C]ases involving motivation and intent are usually not appropriate for summary judgment.").

Several factors conspire to "raise[ ] a conflict sufficient to create a jury question on the issue of intent." *Wardlaw*, 76 F.3d at 1376. First, Petitioner's post on his brother's Internet site "a few weeks" before his unlawful disclosure of Mr. Payoff's kleptomania evinces knowledge of Mr. Payoff's relationships with Crump and Sensational, as well as a desire that they be destroyed. Petitioner wrote, "Payoff is going to make a fortune by talking about his crooked life. Someone should really stop these deals from happening." (R. 6). Upon hearing Cheatem discuss a history of kleptomania as one reason a defendant may choose not to testify at trial, Petitioner seized upon the opportunity. Not only did he post the recording of the lecture in clear contravention of Marshall State University's Code of Conduct, but he also added the comment, "the reason Payoff did not testify at his trial was to avoid disclosing that he had the mental disorder kleptomania." (R. 7). At the time of his posting, Petitioner had no reason to even believe in the truth of this statement; Cheatem was not referring to Mr. Payoff during the lecture, nor did he allude that this may have been the reason Mr. Payoff chose not to testify. Rather, Petitioner engineered the statement with the express purpose of interfering with Mr. Payoff's contractual relations.

Petitioner's argument before this Court, that he was "justified in posting the lecture online in that the public has a right to know that Plaintiff Payoff was a thief," (R. 10), belies any contention that he did not intend the post to propagate through the Internet as it did. Petitioner

posted his comment knowing that the "public" would receive his message. Having familiarity with the University's website and knowing full well that Mr. Payoff was the "talk of the Marshall City legal community," (R. 7), Petitioner counted on students to spread the rumor he started. Fanning the fire along the way, Petitioner additionally posted that the bribery charges levied against Mr. Payoff were probably true. (R. 7). Whether he acted principally to interfere with the agreements, or whether he considered the resulting interference a welcome consequence of informing the public is inconsequential. RESTATEMENT (SECOND) OF TORTS § 766, cmt. j (1979). An upper classman at the Marshall State University Law Center, Petitioner may very well have known the elements of tortious interference and, while desiring to interfere with the contracts, chose a seemingly innocuous forum to initiate the rumor precisely to avoid civil liability. Lending further support to such an inference, nearly Petitioner's entire family is engaged in political campaigns antithetical to Mr. Payoff's positions. Petitioner's father, whom he is on the record as being anxious to impress, is the head of the Donkey Committee. Viewing these facts in their totality, a reasonable jury could certainly conclude that Petitioner posted the lecture and started the rumor of Mr. Payoff's kleptomania maliciously, with an aim to impress his father and stop Mr. Payoff from "making a fortune by talking about his crooked life." (R. 6).

"It is not this Court's function . . . to weigh conflicting evidence and inferences, or to assess the credibility of the witnesses. Rather, [its] role is merely to [ask whether] a substantial conflict existed in the evidence to create a jury question." *Wardlaw*, 76 F.3d at 1378. Drawing all reasonable inferences in favor of the Respondent, this case should have been sent to the jury.

The Trial Court's Reliance on *Miller v. Lockport Realty Group, Inc.* Was Misplaced, as Liability for Interference With Contractual Relations May Be Imposed Notwithstanding the Truthfulness of Petitioner's Speech.

The trial court was also incorrect to hold, as a matter of law, that Petitioner could not have intended to interfere with Mr. Payoff's contracts because he was providing only truthful information. (See R. 10 (citing *Miller v. Lockport Realty Group, Inc.*, 878 N.E.2d 171, 179 (Ill. App. Ct. 2007))). Not only does the proposition fly in the face of common sense, but the court wrenches *Miller* out of context; while truthfulness may serve as a proxy for the wrongfulness of a defendant's conduct in some circumstances, here there are bases of liability independent of the veracity of Petitioner's statements. First, it is not at all clear how Petitioner could not have intended to interfere with Mr. Payoff's contractual relations simply because he began a rumor which ultimately proved to be

true. If one has the destruction of a contractual relationship as his objective, and can accomplish the task through purposeful direction of the truth, his conduct does not become any less wrongful. A defendant's liability "may arise from improper motives or from the use of improper means." *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 1371 (Or. 1978) (emphasis added). Rather, the trial court should have considered *Miller* as it impacts the fourth element of Mr. Payoff's tortious interference claim: that Petitioner "acted without justification." *Gupton*, 695 S.E.2d at 770.[2]

"[T]he concept of 'justification' is not clearly defined in the law of interference with contractual relations." *Blair v. Boulger*, 336 N.W.2d 337, 341 (N.D. 1983). However, most jurisdictions consider this element to require an inquiry into whether the defendant's actions were improper. *See*, *e.g.*, *Hennum v. City of Medina*, 402 N.W.2d 327, 337-38 (N.D. 1987); *see also* PROSSER & KEATON ON TORTS § 129 (W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, David G. Owen eds., 5th ed. 1984) ("[I]t is clear that liability is to be imposed only if the defendant intends to interfere with the plaintiff's contractual relations, at least in the sense that he acts with knowledge that interference will result, and if, in addition, he acts for an improper purpose.").

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference and (g) the relations between the parties.

RESTATEMENT (SECOND) OF TORTS § 767 (1979). The interplay between these factors is critical to the proper application of the law. "If the conduct is independently wrongful – as, for example, if it is illegal because it is in restraint of trade . . . the desire to interfere with the other's contractual relations may be less essential to a holding that the interference is improper." RESTATEMENT (SECOND) OF TORTS § 767 cmt. d (1979). "On the other hand, if the means used by the actor are innocent or less blameworthy, the desire to accomplish the interference may be more essential to a holding that the interference is improper." *Id.* Like the elements discussed above, "[w]hether or not interference with contractual

2. In many jurisdictions, the burden of pleading and proving that the interfering conduct was nevertheless "justified" is placed on the defendant. *See, e.g., Roy v. Coyne*, 630 N.E.2d 1024 (Ill. App. Ct. 1994). The Court need not resolve this question in the case at bar; no matter where the burden is placed, triable issues of fact precluded summary judgment on this element.

relations is justified is basically a question of fact." *Blair*, 336 N.W.2d at 342.

Factor (a): The nature of the actor's conduct.

The nature of the actor's conduct must be considered, as "liability may arise from improper motives *or* from the use of improper means." *Top Serv. Body Shop*, 582 P.2d at 1371 (Or. 1978) (emphasis added). Acts may be improper "by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession." *Id.* Here, there are triable issues of fact as to whether Petitioner's conduct was wrongful in nature; there is evidence from which a reasonable jury could conclude that he not only violated the MSES, 75 MSC § 25-1, but that he also publicly disclosed private facts in violation of the common law.

Properly understood, *Miller* and *Soderlund Bros., Inc. v. Carrier Corp.*, 663 N.E.2d 1 (Ill. App. Ct. 1995), upon which *Miller* relies, go no further than to illustrate the often-critical importance of this factor in evaluating the conduct at issue's propriety. In *Soderlund Bros.*, the defendant claimed it bore no liability for interference with a prospective contract because it was merely competing with the plaintiff's business. *Id.* at 10. Reasoning that the defendant's motive was therefore not improper, the court went on to consider whether the same could be said of the means employed: "the defendant can raise . . . the privilege of competition provided, of course, the defendant has not employed a wrongful means and is not motivated solely by malice or ill-will." *Id.* "Acts of competition which are never privileged include fraud, deceit, intimidation or deliberate disparagement . . . [which] require[ ] proof that the statement be false." *Id.* In this context, and in this context alone, "there is no liability for interference with a prospective contractual relation on the part of one who merely gives truthful information to another." *Id.* at 11. Where there are other indicia of wrongfulness, however, the truthfulness of the statements do not insulate the defendant from liability.[3]

Factor (b): The actor's motive.

As discussed, a triable issue of fact exists as to whether Petitioner acted with the deliberate intention of destroying Mr. Payoff's contractual

3. *Miller* and *Soderlund Bros.* also involved claims for interference with prospective business relationships, as opposed to contractual relations. "The difference between the two torts is that the tort of interference with contractual relations affords a *greater* degree of protection to the parties to a business relationship. The sacrosanct contractual relation takes precedence over the conflicting rights of any presumptive interferor, including his right to compete and his own prospective advantage." *Belden Corp. v. InterNorth, Inc.*, 413 N.E.2d 98, 101 (Ill. App. Ct. 1980) (citing PROSSER & KEETON ON TORTS § 129, at 945 (4th ed. 1971)) (emphasis added).

relationships with Crump and Sensational. "Where the actor's conduct is not criminal or fraudulent, and absent some other aggravating circumstances, it is necessary to identify those whom the actor had a specific motive or purpose to injure by his interference and to limit liability accordingly. The extent of liability . . . is fixed in part by the motive or purpose of the actor." *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340 (9th Cir. 1980). Just a few weeks before beginning the rumor regarding Mr. Payoff's kleptomania, Petitioner had written, "Payoff is going to make a fortune by talking about his crooked life. Someone should really stop these deals from happening." (R. 6). This, coupled with Petitioner's family's rivalry with Mr. Payoff, suggests that his motivation in violating the eavesdropping statute and disclosing private facts was precisely to interfere with the contracts.

Factor (c): The interests of the other with which the actor's conduct interferes.

This factor recognizes that "[s]ome contractual interests receive greater protection than others." RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1979). "[T]he fact that a contract violates public policy, as, for example, a contract in unreasonable restraint of trade . . . may justify an inducement of breach that, in the absence of this fact, would be improper." RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1979). Nothing about Mr. Payoff's relationship with Crump and Sensational tends to excuse Petitioners' actions, so this factor should not carry any significance in the Court's analysis.

Factor (d): The interests sought to be advanced by the actor.

"In some cases the actor may be seeking to promote not solely an interest of his own but a public interest." RESTATEMENT (SECOND) OF TORTS § 767 cmt. f (1979). In such cases, the analysis requires an inquiry into whether the defendant's conduct was justified in that the public interest was ultimately vindicated. Relevant questions in determining whether his interference is improper include: "[W]hether the actor actually believes that the practices are prejudicial to the public interest, whether his belief is reasonable, whether he is acting in good faith for the protection of the public interest, and whether the actor employs wrongful means to accomplish the result." RESTATEMENT (SECOND) OF TORTS § 767 cmt. e (1979). At trial, Petitioner suggested that his actions were not wrongful because "the public has a right to know that Plaintiff Payoff was a thief." (R.10). Regardless of whether Petitioner was actually intending to act virtuously in starting a rumor regarding Mr. Payoff's kleptomania, the method he chose was against the law. Such private facts were not appropriate for disclosure, and the MSES explic-

itly prohibited the recording of the class lecture. This is not the type of interest that this factor is designed to safeguard.

Factor (e): The social interests in protecting the freedom of action of the actor and the contractual interests of the other.

The social interests in protecting the actions of the defendant on the one hand, and the contractual security of the plaintiff on the other, are typically taken into account only when a direct balancing of the private interests leads to a stalemate. *See* RESTATEMENT (SECOND) OF TORTS § 767 cmt. g (1979). Mr. Payoff's interest in the security of his contractual relations, as well as his interest in keeping private facts concerning his mental and physical health private, towers above any interest asserted by Petitioner in this case. Even if social interests in the matter are considered, however, "both social and private interests concur in the determination that persuasion *only by suitable means* is permissible . . . ." RESTATEMENT (SECOND) OF TORTS § 767 cmt. g (1979) (emphasis added).

Factor (f): The proximity or remoteness of the actor's conduct to the interference.

Where the defendant's conduct immediately and directly interferes with another's contractual relations, "other factors need not play as important a role in the determination that the actor's interference was improper." *JamSports and Ent'mt, LLC v. Paradama Prod., Inc.*, 360 F. Supp. 2d 905, 907 (N.D. Ill. 2005) (quoting RESTATEMENT (SECOND) OF TORTS § 767 cmt. h (1979)). Again, however, "[t]he weight of this factor . . . may be controverted by the factor of motive if it was the actor's primary purpose to interfere . . . or perhaps by the factor of the actor's conduct if that conduct was inherently unlawful or independently tortious." *Id.*

Factor (g): The relations between the parties.

Finally, this factor evaluates whether the relationship between the parties has any bearing on the wrongfulness of the defendant's action. In a case where the defendant, through some power he has over the plaintiff as a result of a business relationship, interferes with a contract, the interference may not necessarily be wrongful. *Halverson v. Murzynski*, 487 S.E.2d 19, 21 (Ga. Ct. App. 1997) (citing RESTATEMENT (SECOND) OF TORTS § 767 cmt. i (1979)). Of course, no such situation is present in the case at bar. If anything, the relationship between the parties tends only to bolster the inference of wrongfulness: Petitioner and his family are active political rivals of Mr. Payoff.

On balance, the factors identified by the Restatement weigh heavily in support of a factual finding that Petitioner's conduct was not justified.

The Marshall County Circuit Court erred in granting summary judgment to Petitioner, and the order of the First District Court of Appeals should be affirmed.

CONCLUSION

As the First District Court of Appeals for the State of Marshall recognized, genuine issues of material fact rendered Petitioner's motion for summary judgment improper. This court should affirm the decision of the Court of Appeals and remand to the Circuit Court for the resolution of the factual disputes present in this case.

APPENDIX A

Marshall State Eavesdropping Statute 75 MSC §25-1:

(a) A person commits eavesdropping when they:

(1) Knowingly and intentionally use an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless they do so with the consent of all of the parties to such conversation or electronic communication.

(b) Definitions:

(1) An eavesdropping device is defined as anything used to hear or record a conversation, even if the conversation is conducted in person.

(2) For the purposes of this section, the term conversation means any oral communication between 2 (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.

(3) For purposes of this section, the term electronic communication means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or part by a wire, radio, pager, computer, electromagnetic, photo electronic or photo optical system, where the sending and receiving parties intend the electronic communication to be private and the interception, recording, or transcription of the electronic communication is accomplished by a device in a surreptitious manner contrary to the provisions of this Article.

(c) Civil remedies to injured parties.

(1) Any or all parties to any conversation upon which eavesdropping is practiced contrary to this section shall be entitled to the following remedies:

(A) To an injunction by the circuit court prohibiting further eavesdropping by the eavesdropper and by or on behalf of their principal, or either;

(B) To all actual damages against the eavesdropper or their principal or both;

(C) To any punitive damages which may be awarded by the court or by a jury.