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The Thirty-Second Annual John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law: Bench Memorandum, 30 J. Marshall J. Computer & Info. L. 339 (2013)

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THE 32ND ANNUAL JOHN MARSHALL INTERNATIONAL MOOT COURT COMPETITION IN INFORMATION TECHNOLOGY AND PRIVACY LAW

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BENCH MEMORANDUM

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INTRODUCTION

Petitioner, Alfred Bradlo, is appealing the Court of Appeals' affirmation of a trial court order granting summary judgment in favor of Respondent, Xavier Yungstein, on his claims of invasion of privacy and intentional infliction of emotional distress.

The first issue in this case concerns whether an individual's conduct of taking a picture of another person in a public restroom constitutes invasion of that person's privacy in the form of intrusion upon seclusion. The second issue concerns whether the posting of such a picture with a comment suggesting that the person depicted in the picture has a contagious disease constitutes an invasion of privacy by placing that person in false light before the public. The final issue concerns whether posting such a picture on publicly available websites with the statement that the person depicted has a disease may constitute intentional infliction of emotional distress.

PROCEDURAL HISTORY

Bradlo's complaint, filed in the Marshall County Circuit Court, alleged violations of his right to privacy in the form of intrusion upon seclusion and placing him in false light, as well as intentional infliction of emotional distress. Following discovery, Yungstein moved for summary judgment. The Circuit Court granted the motion on all three counts. Bradlo appealed to the First District Court of Appeals, which affirmed the Circuit Court's order. Bradlo then petitioned for leave to appeal to the Supreme Court of Marshall. The Supreme Court granted leave to appeal the affirmation of the summary judgment order on all three counts.

BACKGROUND INFORMATION

The parties have stipulated that the Court of Appeals decision shall serve as the record on appeal. The Court of Appeals decision[1] sets forth the facts of the case as follows:

Alfred Bradlo is a famous movie director having recently won an Academy Award for Best Documentary Feature. His documentaries generally portray the day-to-day struggles of third world countries suffering from famine, disease, and civil war. Not only is Bradlo famous

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1. R. at 3. The remainder of the Statement of Facts presented here is set forth verbatim as it appears in the Court of Appeals' decision; the footnotes have been renumbered.

for his documentaries, he is also a goodwill ambassador for the United Nations and is well known for his charitable and philanthropic work in third world countries. His major advocacies are curing world hunger and promoting peace in undeveloped countries. Bradlo just recently returned from a trip touring Africa to determine the locale of his next documentary, making stops in Niger, Zimbabwe, Liberia, and other African countries.

Xavier Yungstein is a 28-year-old, high-level executive working for the Internet giant Bongle, Inc. Bongle, Inc. is an American corporation specializing in Internet-related services and products, including search options, software, and online advertising, among many others. The latest product invented by Bongle, Inc. is "Bongle Lens" (photograph of the device is attached as Appendix A).

Bongle Lens is a wearable computer that displays information with an optical head-mounted display. Essentially, Bongle Lens is a camera, display, touchpad, battery, and microphone built into spectacle frames so that the user can search a display in his field of vision, and film, take pictures, search, and translate on the go. Bongle Lens has the ability to take photos and record HD video. Bongle Lens can also use the Bongle software to video conference with the user's friends and show them what the user is viewing. Bongle Lens is activated and capable of interacting with the Internet either by touchpad or voice commands. A touchpad is located on the side of Bongle Lens, allowing a user to control the device by swiping through an interface displayed on the screen. Sliding backward shows current events, such as weather; and sliding forward shows past events, such as phone calls, photos, other Bongle users' updates, etc. To activate Bongle Lens by voice commands, the user must either tilt his head downward or tap the touchpad, and say, "Go, Lens." Once the Bongle Lens is activated, a user can command an action, such as "take a picture," "record a video," "search: what year did the Cubs win the World Series?" "give me directions to the Statue of Liberty," or "send a message to Mike." Search results are read back to the user, using a speaker that sits beside the ear, rendering the sound almost inaudible to other people.

Bongle Lens had not been available for sale to the public until summer of 2013. At the time the incident between Bradlo and Yungstein took place, Bongle Lens was only available to Bongle executives and a number of selected developers for private testing, as part of the pilot program before the public launch of the product. Yungstein was one of the first executives to test this product. Since Yungstein found the lens useful and fascinating, he wore his Bongle Lens on a regular basis to expose the product to the public.

In January 2012, both Bradlo and Yungstein were vacationing in the state of Marshall's Marshall Pick Ski Resort ("Marshall Pick"), a luxury resort frequented by celebrities and the rich and the famous. Bradlo checked into the Marshall Pick upon his return from Africa.

On January 8, 2012, a major snowstorm swept through Marshall. The swift onset of the storm and the heavy snowfall completely immobilized the luxury ski resort and the surrounding area for approximately one week. The State of Marshall issued a state of emergency and Marshall Pick was essentially cut off from outside resources until the storm subsided. The media coined the snowstorm the "Marshall Storm of the Century" since it was the biggest snowstorm in 100 years.

Guests and employees of Marshall Pick were stranded inside the resort. Help from the outside world was unable to reach the resort because all local roads leading to the resort were closed and helicopters were unable to get within landing distance due to strong, gusty winds. Although cell phone signals were disrupted, the resort's cable internet and wireless networks were still intact. The guests and the resort administration were able to communicate with the authorities via e-mails and the Internet. Additionally, the guests used social media sites to communicate with their families and friends to let them know the guests were safe.

Resort officials instituted emergency protocols. These protocols were to be followed by all staff members and guests alike in order to protect the health and safety of everyone in the resort. Some of the emergency protocols included: reporting theft, suspicious conduct, violence, and/or any type of virus/illness that a visitor may have. Resort staff had an obligation to report any of these, or other suspicious activity, to the administration. Guests were highly encouraged to report these incidents in order to maintain equanimity and to ensure the safety of guests. Once the Marshall Pick administration received a report, they would investigate and take any necessary actions to maintain the safety of staff and guests and preserve order in the resort.

On the evening of January 9, 2012, Yungstein was dining at the resort restaurant with his fiancée. As he had been doing consistently for the last few weeks, Yungstein was wearing his Bongle Lens. A couple of tables away Bradlo was also dining with a small group of friends. A number of guests kept stopping by Bradlo's table congratulating him for his awards and humanitarian work, as well as asking for autographs. At some point, Yungstein was heard saying to his fiancée: "I cannot believe people still fall for Bradlo's gimmicks. His humanitarian work is a joke. He doesn't care about people; he only travels to get publicity for his boring documentaries. The guy is a phony. I cannot stand him!"

Later that evening, Yungstein left the table to visit the restroom. As he entered the restroom, he noticed that someone using the stall adjacent to the stall he entered had left the door half-open, but Yungstein did not look through the half-open door. A few minutes later, while Yungstein was washing his hands, he heard sounds of a person vomiting and soon thereafter saw Bradlo walking out of the half-open stall in a bad condition. Bradlo was covered in sweat, with traces of what appeared to be blood around his mouth and on his hands. His arms were also covered with a bright red rash. Alarmed, Yungstein asked Bradlo if he was okay and quickly snapped a few pictures of Bradlo with his Bongle Lens. Bradlo managed to say a few words stating that "it was nothing; I just ate something funny." Bradlo quickly cleaned himself up and immediately left the restroom.

Yungstein was alarmed since it was well known that Bradlo had just come back from the disease-ridden country of Gatsuwana. Yungstein immediately notified the resort officials about the incident. The resort sent its staff to Bradlo's room to inquire about the incident. Bradlo informed the staff that he is allergic to certain shellfish that was normally used in the meal he ordered that evening. Although he had specifically instructed his server to make sure that his meal was prepared without any of this shellfish, apparently some had found its way onto his plate, which caused the violent allergic reaction. Bradlo assured the resort staff that he had his medication with him and he would be fine within the next few hours. The resort confirmed this story with Bradlo's server that night and advised Bradlo to stay in his room and keep a low profile for the next few days.

The next morning Yungstein was waiting for an announcement to be made by the resort about the incident that had occurred the previous evening. When Yungstein did not hear any announcement, he immediately contacted the resort administration and inquired about the measures it had taken to insure the safety of the guests. The administration assured him that it had investigated the incident and found no reason to worry, but gave no further details. Yungstein was not satisfied with the response and decided to take matters into his own hands. He quickly shared the pictures he had taken the night before with his Bongle Lens on his personal Facebook and Twitter accounts. He also posted the same pictures on Marshall Pick's Facebook account with comments such as, "Alfred Bradlo is carrying a deadly disease but Marshall Pick cares more about protecting his image than protecting the health of its guests" and "the great humanitarian is happy to share his experiences and his disease with the rest of the world!"

Soon panic spread throughout the resort. Some guests at the resort threatened Bradlo's safety and gathered outside his room shouting obscenities and even threats. Bradlo was terrified because he knew he

could not get away or leave the resort, and the large number of guests could overtake his security guards. In order to prevent a riot, Marshall Pick placed Bradlo under quarantine and placed security guards outside and around his room preventing him from leaving his room until the snowstorm ended. The rooms adjacent to Bradlo's room were also evacuated.

However, word of the incident quickly spread to the outside world via social media. Bradlo's personal social media pages, as well as his family's, got flooded with hate messages and threats to his family's safety. His personal residence in Marshall City was attacked and vandalized by angry citizens, accusing him of hypocrisy and selfishness. Major news channels reproduced the news as it had appeared on the social media websites. People protested outside the theaters showing Bradlo's latest film and called for a boycott of his documentary.

On January 15, 2012, the snowstorm finally subsided and rescue crews were able to reach Marshall Pick and evacuate the resort. A group of infectious disease physicians also visited Marshall Pick and examined Bradlo. The examination confirmed that Bradlo was healthy and had only suffered from an allergic reaction to the shellfish in his meal—not a disease he contracted during his visit in Gatswuana, as everyone, including Yungstein, had originally thought. What appeared to be blood was in fact the tomato sauce that was used in his meal. Since the incident at the resort, Bradlo has suffered from depression and anxiety attacks severe enough to require medication and regular visits to a mental health professional.

On February 1, 2012, Bradlo filed suit against Marshall Pick and Yungstein for: (i) intrusion upon seclusion; (ii) false light; and (iii) intentional infliction of emotional distress. The legal action against Marshall Pick quickly settled under undisclosed, confidential terms. The case against Yungstein proceeded. Following discovery, Yungstein moved for summary judgment. The Circuit Court granted the motion on all three counts.

ANALYSIS

I. INVASION OF PRIVACY: INTRUSION UPON SECLUSION

A. In General

The common law tort of invasion of privacy comprises of four distinct causes of action;[2] however, Bradlo only raises two privacy causes

2. The four forms of invasion of privacy are: (i) unreasonable intrusion upon the seclusion of another; (ii) appropriation of the other's name or likeness; (iii) unreasonable

of action against Yungstein: intrusion upon seclusion and false light (analyzed infra). The *Restatement (Second) of Torts* (the "Restatement") defines intrusion upon seclusion as "an intentional interference with [a person's] interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man."[3] "Invasion of privacy . . . does not depend upon any publicity given to the person whose interest is invaded or to his affairs."[4] In other words, publicity or communication to a third party is not necessary in order to commit the tort of intrusion upon seclusion.[5] The tort "consists solely of an intentional interference [by another] upon the victim's interest in solitude or seclusion, either as to his person or as to his private affairs or concerns."[6]

The elements that the State of Marshall looks for in order to find a cause of action for intrusion upon seclusion are set forth in the Illinois case *Melvin v. Burling*, which states the following: "the facts which must be alleged are (1) an unauthorized intrusion or prying into the plaintiff's seclusion; (2) the intrusion must be offensive or objectionable to a reasonable man; (3) the matter upon which the intrusion occurs must be private; and (4) the intrusion causes anguish and suffering."[7] Although the last element pertaining to the causation of anguish and suffering is not required under the Restatement in order to establish liability, we will discuss it in this case since Bradlo also needs to establish this element for his claim of intentional infliction of emotional distress.

B. Elements

(1) Unauthorized Intrusion upon Seclusion

The first element that Bradlo must prove is that Yungstein committed an unauthorized intrusion upon Bradlo's seclusion. The Restatement states that an unauthorized intrusion need not be physical, but may occur by "mechanical aids" such as Yungstein's Bongle Lens.[8]

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publicity given to the other's private life; and (iv) publicity that unreasonably place another in a false light before the public. Restatement (Second) of Torts § 652A (1977).

3. *Id.* at § 652B cmt. a.

4. *Meyer v. O'Connor*, No. 4011945, 2005 Conn. Super. LEXIS 2862, at *6 (Conn. Super. Ct. Oct. 25, 2005).

5. *Plaxico v. Michael*, 735 So.2d 1036, 1039 (Miss. 1999).

6. *Meyer*, 2005 Conn. Super. LEXIS 2862, at *5.

7. *Melvin v. Burling*, 490 N.E.2d 1011, 1012 (Ill. App. Ct. 1986).

8. "The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself . . . it may also be by the use of the defendant's senses, with or without mechanical aids." Restatement (Second) of Torts § 625B cmt. b (1977).

Yungstein took a photo with his Bongle Lens eyeglasses after Bradlo had exited the restroom stall but while Bradlo was still inside the restroom. Bradlo will argue that Yungstein intruded upon his seclusion in the men's restroom when Yungstein took photos of Bradlo without his consent.[9] Bradlo will argue that matters occurring in restrooms, particularly matters involving bodily functions, are recognized as private. Thus, when Yungstein photographed Bradlo in the restaurant restroom, a location where it has been widely held that an individual maintains a reasonable expectation of privacy, Yungstein intruded upon Bradlo's seclusion.[10] Yungstein did not inform Bradlo that he was taking a photograph of Bradlo, nor did Yungstein ask for permission to do so. Yungstein's intentional action of taking photos of Bradlo without Bradlo's consent or knowledge was a non-physical invasion of Bradlo's privacy.

Bradlo will further argue that he has an expectation of solitude while inside a restroom, regardless of whether or not the restroom is private or public. Bradlo will maintain that the fact that he was in the common area of the restaurant restroom when he was photographed does not eliminate his reasonable privacy expectation to not be photographed. Bradlo could cite to *Sanders v. American Broadcasting Companies, Inc.*,[11] in which the court held that "the fact that the privacy that one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law."[12] In *Sanders*, the court found that "the mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone."[13] Bradlo should also analogize the degree of privacy that should be extended to a public restroom to that of a locker room or a work office.[14] Within the confines

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9. *Schmidt v. Ameritech Ill.*, 768 N.E.2d 303, 312 (Ill. App. Ct. 2002); *see also* Restatement (Second) Of Torts § 652B (1977); *see also Benitez v. KFC Nat. Mgmt. Co.*, 714 N.E.2d 1002, 1006 (Ill. App. Ct. 1999) (citing *Lovgren v. Citizens First Nat. Bank of Princeton*, 534 N.E.2d 987, 988 (Ill. 1989)) ("[T]he core of the tort of intrusion upon seclusion is the offensive prying into the private domain of another.").

10. *Vega v. Chi. Park Dist.*, No. 13-CV-451, 2013 WL 3866514 at *13 (N.D. Ill. July 25, 2013) (citing *Busse v. Motorola, Inc.*, 813 N.E.2d 1013, 1018 (Ill. App. Ct. 2004)) (finding that "a restroom . . . is a location where one expects a certain degree of privacy"); *State v. Berber*, 740 P.2d 863, 868-69 (Wash. Ct. App. 1987) (citing *Kroehler v. Scott*, 391 F. Supp. 1114, 1118 n. 4 (E.D. Pa. 1975) ("under normal circumstances, the utilization of a toilet for its customary purpose would give rise to an expectation of privacy").

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

12. *Id.*

13. *Id.*; *Huskey v. Nat'l Broad. Co., Inc.*, 632 F. Supp. 1282, 1288 (N.D. Ill. 1986) ("[V]isibility to some people does not strip [an individual] of the right to remain secluded from others.").

14. *Doe v. S. Gyms, LLC,* 112 So. 2d 822 (La. 2013) (holding that a hidden camera in

of a public restroom, any individual has the right to enjoy a certain degree of privacy.[15] The restroom is a place where an individual should be free from surveillance and have a right to be let alone. The fact that Bradlo was in a "public" area of the restaurant restroom is insufficient to conclude that the photographs were of a public, rather than a private, matter.[16] Any intentional intrusion upon Bradlo's seclusion while inside a restroom is an invasion of his privacy.

Yungstein will counter this argument by claiming that he did not intrude upon Bradlo's seclusion. Yungstein will argue that without an objectively reasonable expectation of seclusion or solitude, it is impossible to prevail on a claim for intrusion upon seclusion.[17] Yungstein will claim that Bradlo did not have an actual, objectively reasonable expectation of seclusion or solitude.[18] To establish an objectively reasonable expectation of privacy in a certain circumstance, a plaintiff must show the following: (i) the extent to which other persons had access to the subject place, and could see or hear the plaintiff; (ii) the identity of the intruder; and (iii) that the means of intrusion collectively point towards an expectation of privacy that society would recognize as reasonable.[19]

Yungstein will argue that Bradlo did not have a reasonable expectation of privacy since he was in the common area of a public restroom, as opposed to the restroom stall, when the photograph was taken.[20] Yungstein will argue he did not need any consent since Bradlo was in a public area.[21] Relying on *Tagouma v. Investigative Consultant Services*, Yungstein will argue that the surveillance, by way of the photograph, consisted of nothing more than an observation of Bradlo's activities that

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a locker room invades the gym patrons' privacy); *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063 (Cal. 2009) (holding that a secret video camera installed by an employer to spy on his employees in their shared and/or solo offices was an invasion of the employees' privacy because the employees expected a degree of relative seclusion and would not have reasonably expected to be videotaped by their employer).

15. *See Koeppel v. Speirs*, No. 9-902, 2010 Iowa App. LEXIS 25 (Iowa Ct. App. Jan. 22, 2010).

16. *Williams v. City of Tulsa,* 393 F. Supp. 2d 1124, 1131 (N.D. Okla. 2005) ("[E]ven in a public place there may be some matters so private that the invasion of which can create liability under the tort.").

17. *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 878 (8th Cir. 2000).

18. *PETA v. Bobby Bersoni, Ltd.*, 895 P.2d 1269, 1279 (Nev. 1995).

19. *Hernandez*, 211 P.3d at 1070.

20. *Tagouma v. Investigative Consultant Servs.,* No. 2006 CV 1532, 2009 Pa. D. & C. LEXIS 421 (Pa. Cnty. Ct. 2009) (granting summary judgment while holding that people located in a public space when observed, photographed, or filmed will not succeed on a claim for intrusion upon seclusion since they do not have a reasonable expectation of privacy in a public space).

21. *Id.* at *21.

were plainly visible to anyone inside the public restroom.[22] Yungstein could also cite to *Sanders* to further support his argument that the first element of intrusion upon seclusion is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place."[23]

Yungstein will further argue that it is irrelevant that he was inside a restroom because it was a *public* restroom.[24] Yungstein will likely point out the fact that Bradlo was not only inside a public restroom at the time the photograph was taken, but he was in the public area of that public restroom. There is no reasonable expectation of privacy in the common area of a public restroom, where it is expected that any conduct will be observed by other individuals in the restroom.[25] Bradlo did not lock his private stall door while he was sick. Bradlo did not wait until he heard every other person in the public restroom exit before he left his private stall. Thus, Bradlo is not entitled to a reasonable expectation of privacy.[26] In *Craig v. M & O Agencies, Inc.*,[27] the court upheld summary judgment against the invasion of privacy claim because the plaintiff "had no reasonable expectation of privacy in the common area of the restroom, where she would expect her conduct to be observed by other individuals in the restroom."[28] As far as the manner in which the photograph was taken, Yungstein could point to *Shulman v. Group W Productions, Inc.*, to draw the distinction between using a camera to record publicly visible events and using a device (a microphone in the *Shulman* case) to amplify and record plaintiff's conversation with responding emergency medical personnel.[29] The *Shulman* court found that mere presence at the accident scene along with recording the plaintiff's conversation did not constitute an intrusion upon plaintiff's

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22. *Id.*

23. *Sanders v. Am. Broad. Cos.*, 978 P.2d. 67, 71 (Cal. 1999).

24. *See Tagouma*, 2009 Pa. D. & C. LEXIS 421, at *21.

25. *Craig v. M & O Agencies, Inc.*, 496 F.3d 1047, 1061 (9th Cir. 2007) (citing *United States v. Billings*, 858 F.2d 617, 618 (10th Cir. 1988)).

26. *See Tagouma*, 2009 Pa. D. & C. LEXIS 421, at *21.

27 . *Craig*, 496 F.3d at 1047. In this case, the plaintiff entered a restaurant restroom to avoid sexual advances from her boss. Her boss followed her into the restroom and when the plaintiff exited the stall, where she had found refuge, her boss approached her and kissed her. *Id.* However, when another person entered the restroom, plaintiff's boss quickly exited. Plaintiff filed a lawsuit against her boss for, *inter alia*, assault, battery, and invasion of privacy. As to the invasion of privacy claim, the court found that the plaintiff "had no reasonable expectation of privacy in the common area of the restroom, where she would expect her conduct to be observed by other individuals in the restroom." *Id.* It did not matter that her boss made an unwanted, intentional intrusion because he "only entered the common area of the restroom" where she had no expectation of privacy. *Id.*

28. *Id.* at 1060-61.

29. *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 494 (Cal. 1998).

expectation of privacy; however, the microphone amplification of the conversation that made it audible was a possible intrusion.[30] Unlike *Shulman*, Yungstein did not use technology to amplify or enhance his alleged intrusion into Bradlo's seclusion but took a quick photograph of what any other patron of the restaurant could have observed had he entered the restroom at that particular moment.[31] Therefore, as a matter of law, Yungstein will argue that Bradlo is not entitled to a claim for intrusion upon seclusion.[32]

(2) Offensive or Objectionable to a Reasonable Person

The second element that Bradlo must prove is that the intrusion is offensive or objectionable according to a reasonable person. In determining whether offensiveness exists in an action alleging the tort of intrusion, a court must consider a variety of circumstances including: (i) the degree of intrusion; (ii) the context, conduct, and circumstances surrounding the intrusion; (iii) the intruder's motives and objectives; (iv) the setting into which the intrusion occurs; and (v) the expectations of those whose privacy is invaded.[33] An invasion of privacy must be so unreasonable as to constitute an egregious breach of social norms.[34]

Bradlo will argue that taking a photo of someone in a public restroom outside the stall is offensive to a reasonable person because a reasonable person has a high expectation of privacy while in a restroom, regardless of whether or not the restroom is public. The fact that Bradlo could be seen by another patron of the restaurant in the public area of the restroom in a condition of illness does not mean that Bradlo forfeited his right of privacy.[35] Yungstein took photos of Bradlo after Yungstein had overheard Bradlo physically sick in the stall. When Bradlo exited the stall, in a vulnerable state, apparently sick and disheveled, Yungstein took the opportunity to raid Bradlo of any degree of privacy Bradlo may have left by taking photos of him with his Bongle Lens.

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30. *Id.*

31. *Id.*

32. *See Tagouma*, 2009 Pa. D. & C. LEXIS 421, at *21.

33. *Sanchez-Scott v. Alza Pharms.*, 103 Cal. Rptr. 2d 410, 410 (Cal. Ct. App. 2001); *see also Melvin v. Burling*, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 1986); *Hernandez v. Hillsides, Inc.,* 211 P.3d 1063, 1072 (Cal. 2009) (quoting *Shulman*, 955 P.2d at 490) (finding that "[t]he expectation of privacy must be 'objectively reasonable'").

34. *Hernandez*, 211 P.3d at 1072.

35. "To hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits [his] right of privacy merely because [he] happened at the moment to be part of a public scene would be illogical, wrong, and unjust." *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala.1964).

Here, Bradlo should argue that by photographing Bradlo covertly in such a vulnerable condition, Yungstein committed an "intrusion beyond the limits of decency that liability accrues."[36] In the present case, Yungstein's conduct was such that he should have realized that it would be offensive to a person of ordinary sensibilities.[37] Yungstein surreptitiously photographed Bradlo "in an embarrassing pose," violating the social norms that value privacy and solitude in the most intimate functions of daily life, such as those that take place inside a restroom. Such a violation of an individual's reasonable expectation of privacy in the restroom is an egregious breach of social norms.

Moreover, the surreptitious manner in which the photographs in question were taken support Bradlo's arguments since it has been held that even when an individual could be seen by others, that individual "may nevertheless have a claim for invasion of privacy by intrusion based on . . . covert videotaping" or photography.[38] Therefore, Yungstein intruded upon Bradlo's seclusion because it would be offensive or objectionable to a reasonable person to be secretly photographed in a restaurant restroom.[39] Further, in support of his argument that Yungstein's conduct was offensive or objectionable to a reasonable person, Bradlo could claim that Yungstein could have properly reported his concerns about Bradlo's illness to the resort staff without secretly taking photographs of him. In other words, Yungstein "could have minimized the privacy intrusion through other reasonably available, less intrusive means" and complied with the resort's emergency protocols without intruding upon Bradlo's seclusion.[40]

Yungstein will likely argue that, even if it could be concluded that Bradlo did have a reasonable expectation of privacy, photographing Bradlo in the public area of the public restroom while he was visibly ill cannot be considered "highly offensive" to a reasonable person.[41] It has been established that "[t]he law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such

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36. *Barber v. Time, Inc.*, 159 S.W.2d 291, 293 (Mo. 1942).

37. *Id.*

38. *Sanders v. Am. Broad. Cos.*, 978 P.2d. 67, 77 (Cal. 1999).

39. *See Vega v. Chi. Park Dist.*, No. 13-CV-451, 2013 WL 3866514, at *13 (N.D. Ill. July 25, 2013); *Melvin v. Burling*, 490 N.E.2d 1011, 1013-14 (Ill. App. Ct. 1986); *see also Doe 2 v. Associated Press*, 331 F.3d 417, 422 (4th Cir. 2003) (quoting *Snakenberg v. Hartford Casualty Ins. Co.*, Inc., 383 S.E.2d 2, 6 (S.C. Ct. App. 1989)) ("Intrusion . . . invaded an area 'which one normally expects will be free from exposure to' unauthorized photography.").

40. *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1073 (Cal. 2009).

41. *Tagouma v. Investigative Consultant Servs.*, No. 2006 CV 1532, 2009 Pa. D. & C. LEXIS 421, at *24 (Pa. Cnty. Ct. 2009).

publicity."[42] Yungstein will claim that the factors weighed in order to determine the degree of intrusion are the location, duration, and scope of the surveillance efforts.[43] Yungstein's alleged intrusion was minimal in location, duration, and scope, since the intent was to respond to an emergency situation. Yungstein took a few photographs in the public area of a public restroom. The alleged intrusion itself took place over the course of a few seconds and was limited in scope to document Bradlo's illness. In fact, the reason for taking the photographs was for the sole purpose of following the emergency protocols set in place by the resort, and not for the purpose to harass Bradlo.[44] Yungstein will also focus on the fact that Bradlo did not have any knowledge that he was being investigated at all. Yungstein did not enter the restroom with the intention to take Bradlo's picture. He was rather alarmed to find Bradlo in such poor condition and photographed him for the sole purpose of notifying resort officials, not to secretly view Bradlo while he was using the restroom. Bradlo was unaware that Yungstein was wearing Bongle Lens while he was inside the public restroom, so it was not "highly offensive" to a reasonable person.[45]

In addition, Yungstein could argue that this was an emergency situation and when a matter affects the health and safety of the public, the matter may lose its private character where an appropriate public need is demonstrated.[46] In *Hernandez v. Hillsides, Inc.*, the court found that video surveillance, limited to three occasions, specifically designed only to capture abnormal activity, could be justified.[47] Similarly, even if it were to be considered that Yungstein's intrusion was highly offensive to a reasonable person, Yungstein had a legitimate objective; thus, he can show "reasonable justification" and/or "beneficial motivation" to negate the offensive nature of the alleged intrusion.[48] Yungstein will argue that he had the legitimate motive and objective of capturing an image of Bradlo's illness to report it to hotel authorities in compliance with the emergency protocol issued by the resort in an attempt to protect public health and safety.

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42. William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 397 (1960).

43. *Hernandez*, 211 P.3d at 1072; *see e.g.*, *Johnson v. Allen*, 613 S.E.2d 657, 659-61 (Ga. Ct. App. 2005).

44. *Johnson*, 613 S.E.2d at 659-61.

45. *Tagouma*, 2009 Pa. D. & C. LEXIS 421, at *24.

46. *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975); *see also Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 494 (Cal. 1998) (finding that the legitimate motive of pursuing a socially important story justified some otherwise tortious intrusions by the media).

47. *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1080 (Cal. 2009).

48. *Id.*

(3) Private Matter

The third element that Bradlo must prove is that the matter upon which the intrusion occurred was private.[49] In order for an expectation of privacy to be reasonable in the context of the tort of intrusion upon seclusion, it is not necessary that there be absolute or complete privacy.[50] Bradlo will likely argue that he has a reasonable expectation of privacy inside a public restroom, regardless whether or not he is inside the stall or in the common area of a public restroom. Even though the restroom common area does not provide absolute privacy, this is irrelevant in a cause of action for intrusion upon seclusion. Bradlo would likely point to the Restatement, section 652B, comment (c) which clearly states: "The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs."[51] "[T]here may be some matters about the plaintiff, such as his underwear, or lack of it, which are not exhibited to the public gaze; and there may still be invasion of privacy when there is an intrusion upon these matters."[52]

Bradlo will argue that the question does not turn on whether a private matter was intruded upon, nor should the court should focus on whether the conduct took place in a public or private restroom, but rather on whether Bradlo possessed a reasonable expectation of privacy in this particular restroom under these particular circumstances. In *People v. Hemmings*,[53] the court held that a person may claim a reasonable expectation of privacy if he demonstrates that: (i) he possessed an actual, subjective expectation of privacy; and (ii) his expectation was objectively justifiable so that society recognizes it as reasonable.[54] Bradlo left the dining room and entered an area (a public restroom) that is deemed relatively private by society, intending for his illness and conduct inside the restroom to be kept private. If he had not intended for his illness and conduct to remain private, Bradlo would have stayed in the dining room and not retreated to the restroom when he had fallen ill. As mentioned above, "those activities that require a person to disrobe or involve private bodily functions fall within those that society will afford privacy."[55] Thus, while Bradlo was in the restroom sick, he

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49. *Melvin v. Burling*, 490 N.E.2d 1011, 1014 (Ill. App. Ct. 1986).

50. *Sanchez-Scott v. Alza Pharms.*, 103 Cal. Rptr. 2d 410, 412 (Cal. Ct. App. 2001).

51. Restatement (Second) of Torts § 652B cmt. c (1977).

52. *Id.*

53. *People v. Hemmings*, 937 N.Y.S.2d 549, 552 (N.Y. Sup. Ct. 2012) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967)).

54. *Id.*

55. *Id.*

possessed the requisite "objectively reasonable expectation of seclusion or solitude."[56]

In addition, Bradlo may also point to the surreptitious nature of the Bongle Lens camera Yungstein used and reiterate that he at least expected to be free from surveillance when performing a private bodily function in a restroom. He could point to *Dietmann v. Time, Inc.*,[57] which held that even when an individual accepts the possibility of being heard or seen by another person, he "does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording."[58]

Yungstein will likely argue that Bradlo's claim should fail because Bradlo did not establish that he attempted to keep any facts private.[59] In *Medical Laboratory Management Consultants v. American Broadcasting Companies*,[60] the court explained the affirmative steps taken to ensure that a matter is kept private.[61] Additionally, in *State v. Orta*,[62] the court rejected the defendant's challenge of his drug conviction on the basis that the transaction took place in a restroom stall in a popular dance hall, because the defendant did not lock the stall door and he did not assure the door was fully closed.[63] Though the defendant in the *Orta* case did not leave the stall while others were in the restroom as Bradlo did here, the *Orta* court held that the defendant took no steps to keep the matter private. In the case at hand, Yungstein should rely on the facts that Bradlo failed to take any steps to ensure his privacy, such as closing his restroom stall while he was ill or waiting until no one remained in the restroom before exiting his restroom stall. If Bradlo had taken such measures, his "private" conduct would not have been exposed to the public, including Yungstein. Bradlo allowed his activities to be viewed by any patrons in the common area of the public restroom; thus, his actions were not private.[64] Therefore, as a matter of law, Yungstein will argue that Bradlo's claim for intrusion upon seclusion should fail.

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56. *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 813 (9th Cir. 2002).

57. *Dietmann v. Time, Inc.*, 449 F.2d 245, 245 (9th Cir. 1971).

58. *Id.*at 249.

59. *Acosta v. Scott Labor LLC*, 277 F. Supp. 2d 647, 650 (N.D. Ill. 2005).

60. *Med. Lab. Mgmt. Consultants,* 306 F.3d at 806.

61. *Id.* at 813.

62. *State v. Orta*, 663 N.W.2d 358, 362 (Wis. Ct. App. 2003).

63. *Id.* at 360-62.

64. *Acost*a, 277 F. Supp. 2d at 650.

(4) Anguish and Suffering

Lastly, Bradlo must prove that the intrusion caused him anguish and suffering. In order to successfully bring a tort of intrusion upon seclusion, "a plaintiff must prove actual injury in the form of, for example, medical care, an inability to sleep or work, or a loss of reputation and integrity."[65] As a result of Yungstein's intrusion upon Bradlo's seclusion, Bradlo will argue that his reputation suffered tremendously. Not only did Bradlo enroll in weekly counseling, he also began taking antidepressants due to the incident at the ski resort. Bradlo's anguish and suffering was caused by the intrusion itself, and not the subsequent publication of the material.[66] Similar to Bradlo, the plaintiffs in *Webb v. CBS Broadcasting, Inc.* brought a claim for an intrusion upon seclusion and a claim for the subsequent publication of the material gathered during the intrusion.[67] In *Webb*,[68] the court held that the plaintiffs sufficiently alleged the four *Melvin* requirements of intrusion upon seclusion, including anguish and suffering, where the defendant videotaped the plaintiffs in bathing suits while swimming in their backyard.[69] Bradlo could analogize to the plaintiffs in *Webb*, since he chose to retreat into a private area and was surreptitiously photographed in a highly personal, private, and vulnerable moment. Thus, like in *Webb*, this Court should find that Bradlo experienced anguish and suffering proximately caused by the intrusion itself. Additionally, this Court should find that the emotional distress Bradlo suffered due to the publication of the photographs did not negate from the suffering caused by the intrusion itself.[70]

Yungstein will counter Bradlo's argument regarding his anguish and suffering by arguing that Bradlo failed to demonstrate that the intrusion itself caused Bradlo anguish and suffering. The basis for intrusion upon seclusion is the intrusive and offensive prying into another's privacy, not publication or publicity.[71] The anguish and suffering of the alleged victim, Bradlo, is not to be presumed and must be a result of the actual intrusion.[72] Yungstein will argue that all of the "actual injuries" that Bradlo suffered from were a result of the subsequent negative

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65. *Schmidt v. Ameritech Ill.*, 768 N.E.2d 303, 316 (Ill. App. Ct. 2002).

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

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Lovgren v. Citizens First Nat. Bank of Princeton*, 126 Ill.2d 411, 417 (1989); Restatement (Second) Of Torts § 652B, cmt. a (1977).

72. *Schmidt v. Ameritech Ill.*, 768 N.E.2d 303, 316 (Ill. App. Ct. 2002).

media attention that he received after the publication of the photographs, not from the actual alleged intrusion that occurred by the taking of the photographs by Yungstein.[73] Therefore, Yungstein will argue that any injury that Bradlo claims cannot establish a basis of liability for intrusion upon seclusion since the harm would come from a publication, rather than the actual intrusion.[74] Yungstein will argue that Bradlo failed to state a claim for intrusion upon seclusion because the resulting anguish and suffering came from the publication, rather than from the intrusion.[75] Thus, Bradlo is not entitled to a claim for intrusion upon seclusion as a matter of law.

II. INVASION OF PRIVACY: FALSE LIGHT

A. General

An invasion of privacy may also be committed when a person "unreasonably places the other in false light before the public."[76] This invasion of privacy occurs when a person publishes a false statement about another person. However, the false statement must be highly offensive to a reasonable person. Additionally, the publishing individual must make the statement with the knowledge that it is false or with reckless disregard of the truth.

B. Elements

Bradlo's second claim alleges that Yungstein committed an invasion of privacy in the form of publicly placing him in false light. The elements that the State of Marshall requires for a false light invasion of privacy claim include: (1) the statement must be false; (2) the statement must be highly offensive to the reasonable person; and (3) the statement must be made with knowledge of its falsity or reckless disregard of the truth.

(1) Statement must be False

The first element of the false light invasion of privacy tort is that the statement must be false. Bradlo will likely argue that Yungstein

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73. Id.

74. *Webb v. CBS Broad., Inc*., No. 08 C 6241, 2009 WL 1285836, at *4 (N.D. Ill. May 7, 2009); *see Meyer v. O'Connor*, No. 4011945, 2005 Conn. Super. LEXIS 2862 (Conn. Super. Ct. Oct. 25, 2005) (holding that the invasion of privacy does not depend upon any publicity given to the person whose interest is invaded or to his affairs).

75. *Thomas v. Pearl*, 998 F.2d 447, 452 (7th Cir. 1993); *see also Schmidt*, 768 N.E.2d at 316.

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

taking a photograph, publishing the photograph to social media, and subsequently claiming that Bradlo contracted a deadly disease when in fact he did not, satisfies this element. In order to satisfy the first element of the tort of false light, the statement must be materially and substantially false.[77] Minor errors are not enough to be tortious.[78] The plaintiff must be able to verify that the statement is false.[79] After the incident, Bradlo was examined by a doctor who verified that Bradlo had merely had an allergic reaction; therefore, the statement made by Yungstein was false.

Yungstein will likely argue that Bradlo must allege that the statement made by Yungstein was false. However, "strong language critical of the plaintiff is insufficient to support a false light cause of action."[80] The plaintiff needs to be able to verify that the statement made was either true or false to satisfy this element.[81] However, even though the statement might be interpreted as a negative critique of the plaintiff, if the plaintiff is unable to verify the statement as either true or false, then this element is not satisfied.[82]

(2) Statement must be Highly Offensive to the Reasonable Person

The second element for a claim of false light is that the false light must be highly offensive to a reasonable person. A statement is highly offensive as follows:

> when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity; it is only when there is such a major misrepresentation of his character, history, activities, or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy.[83]

Bradlo will likely argue that he meets this element because the statements made are highly offensive to a reasonable person. Courts have found a wide range of matters to be offensive, including publicizing a false positive result on a drug test,[84] accusations of committing domestic violence,[85] accusations of being an uncaring and insensitive

77. *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967).
78. *Id.*
79. *Salamone v. Hollinger Int'l, Inc.*, 807 N.E.2d 1086, 1093 (1st Dist. 2004).
80. *Id.*
81. *Id.*
82. *Id.*
83. Restatement (Second) of Torts § 652E cmt. c (1977).
84. *White v. Fraternal Order of Police*, 909 F.2d 512, 522 (D.C. Cir. 1990).
85. *McFarland v. McFarland*, 684 F. Supp. 2d 1073, 1093 (N.D. Iowa 2010).

husband of a depressed wife who later commits suicide,[86] and false descriptions of a family's poverty and their living conditions.[87] In this case, Bradlo had been known for his humanitarian work around the world and his dedication to improving the lives of others. The publication of the photographs, and the accusation that he was carrying a deadly disease and trying to conceal it at the expense of the health of the other resort guests, is a major misrepresentation of his character, and any reasonable person would be highly offended by this statement.

Also, Bradlo will likely claim that this was not a "minor mistake in reporting, even if made deliberately, or false facts that offend a hypersensitive individual."[88] The allegation that someone has contracted a deadly disease does not constitute a minor mistake. Although "complete and perfect accuracy . . . is seldom attainable by any reasonable effort," a minor mistake is something such as a wrong address or a mistaken date of when a person entered his career.[89] Bradlo will argue that contracting a deadly disease is far different than providing an incorrect home address. Yungstein's false statements were not the result of a misunderstanding, but rather driven by the conviction that he had "good reason" to believe that Bradlo had contracted a disease in Africa,[90] despite the resort's assurances that there was no reason for concern. Bradlo will argue that the record provides evidence as to the devastating effect these statements had on Bradlo's career and mental health,[91] and will claim that he satisfies the second element as well.

In response, Yungstein will likely argue that Bradlo failed to meet this element because a reasonable person would not be offended. Yungstein will claim that in order to prevail on a claim for false light invasion of privacy, Bradlo must prove that the false light in which he was portrayed created such a major misrepresentation of character, history, activities, or beliefs that a reasonable man would be justified in feeling seriously offended and aggrieved by the publicity.[92] Although there is no single test to objectively determine the highly offensive requirement, courts agree that the analysis under this prong of the false light privacy tort must be narrow and subjective; the publication of private information, which places a person in a false light, must be

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86. *Varnish v. Best Medium Pub. Co.*, 405 F.2d 608, 612 (2d Cir. 1968).

87. *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 246-48 (1974).

88. *Lanigan v. Resolution Trust*, 1994 U.S. Dist LEXIS 158, at *15 (N.D. Ill. Jan. 7, 1994) (citing *Lovgren v. Citizens First Nat. Bank of Princeton*, 126 Ill.2d 411, 417 (1989)).

89. Restatement (Second) of Torts § 652E cmt. c (1977).

90. R. at 10.

91. R. at 5-6.

92. Restatement (Second) of Torts § 652E cmt. c (1977).

"offensive to the ordinary person."[93]

Therefore, Yungstein will argue that "minor mistakes in reporting, even if made deliberately, or false facts that offend a hypersensitive individual will not satisfy this element of offensiveness."[94] Therefore, statements that merely place a plaintiff in an unfavorable light do not rise to the level of highly offensive for purposes of a false light claim.[95]

Yungstein will argue that Bradlo may have found the statements highly embarrassing and offensive due to his heightened sensitivity; however, no matter how offensive a plaintiff may view the defendant's false portrayal, liability is only permitted where an ordinary, reasonable person would find the conduct highly offensive.[96] Yungstein's statements about Bradlo are not as egregious as those which courts have been willing to find highly offensive. For instance, in *Douglass v. Hustler Magazine*,[97] unauthorized use of a model's nude photograph in Hustler Magazine was highly offensive because it falsely portrayed her as a lesbian and as willing to be associated with Hustler Magazine. Similarly, in *Time, Inc. v. Hill*,[98] the false presentation that a family was held hostage, subjected to violence, and severely beaten was found highly offensive. In *Villalovos v. Sundance Associates, Inc.*,[99] the court found that the publication of a picture with comments was highly offensive and derogatory because it suggested the plaintiff had a "desire to commit adultery and to be used and abused as a sex object." An ordinary, reasonable person would not find what Yungstein said to be of-

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93. *See, e.g.*, *Welling v. Weinfeld*, 866 N.E.2d 1051, 1059 (Ohio 2007); *Machleder v. Diaz*, 801 F.2d 46, 49 (2d Cir. 1986) (holding that "to sustain a false light invasion of privacy claim, [the] portrayal must be . . . offensive to an ordinary person"); *Dresbach v. Doubleday & Co.*, 518 F. Supp. 1285, 1293 (D.D.C. 1981) (establishing that "to recover on a false light theory, plaintiff must show publication of private information which places him in a false light, which would be offensive to the ordinary person").

94. *Lanigan v. Resolution Trust*, 1994 U.S. Dist LEXIS 158, at *15 (N.D. Ill. Jan. 7, 1994) (citing *Lovgren v. Citizens First Nat. Bank of Princeton*, 126 Ill.2d 411, 417 (1989)).

95. *See Machleder*, 801 F.2d at 58 (recognizing that defendant's portrayal of the plaintiff as "intemperate and evasive" and as a dumper of chemical waste was not highly offensive even though plaintiff was very embarrassed by the false statements); *Salek v. Passaic Collegiate Sch.*, 605 A.2d 276, 278-79 (N.J Super. Ct. App. Div. 1992) (establishing that pictures of a school faculty member in the school's yearbook, which implied a sexual relationship with another faculty member, were not highly offensive even though plaintiff was mortified by the untrue innuendo); *Thomason v. Times-Journal, Inc.*, 379 S.E.2d 551, 554 (Ga. Ct. App. 1989) (establishing that a false portrayal by defendant that the plaintiff had died in obituary when in fact the plaintiff was actually alive, was not highly offensive even though plaintiff was humiliated).

96. *Cox v. Hatch*, 761 P. 2d 556, 562 (Utah 1988).

97. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1129 (7th Cir. 1985).

98. *Time, Inc. v. Hill*, 385 U.S. 374, 378 (1967).

99. *Villalovos v. Sundance Assocs., Inc.*, No. 01 C 8468, 2003 WL 115243, at *2 (N.D. Ill. Jan. 13, 2003).

fensive. Thus, Yungstein will argue that this element has not been met.

(3) The Statement must be Published with Knowledge of its Falsity or Reckless Disregard of the Truth

The third element of false light is that the defendant acted with malice and either actual knowledge or a reckless disregard of the truth of the statements that were published.

Bradlo must show that Yungstein had knowledge of the falsity of the statement, or acted in reckless disregard of the truth, when he publicly placed Bradlo in false light.[100] Bradlo will argue that Yungstein was informed by the resort staff that Bradlo's situation had been resolved and that he did not have a deadly disease. Therefore, Yungstein had actual knowledge that his statement was indeed false and still went on to post the statement to the Internet.

Bradlo may also argue that if Yungstein did not make the statement with actual knowledge, he made the statement with reckless disregard of the truth as to the falsity of his statement, which also satisfies this third element.[101] The United States Supreme Court has been clear that "the knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection."[102] This standard has also been embraced by the United States Supreme Court in defamation and false light cases involving public figures.[103] However, the First Amendment protects the right to free speech and free press, which are necessary elements of the "profound national commitment" to the "uninhibited, robust, and wide-open" debate of public issues.[104] Therefore reckless disregard must be proved by clear and convincing evidence[105] although "its outer limits will be marked out through case-by-case adjudication."[106] While statements "in good faith and unaware of its probable falsity" should be protected, "where a story is fabricated by the defendant, [or] is the product of his imagination" will not be protected.[107]

Although there is no single adequate definition of reckless disregard or "actual malice" there are a number of ways to prove that the requisite "actual malice" existed on the part of the defendant.[108]

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100. Restatement (Second) of Torts § 652E (1977).
101. *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 991 (Ill. 1989).
102. *Garrison v. State of La.*, 379 U.S. 64, 75 (1964).
103. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964); *Time, Inc.*, 385 U.S. at 390.
104. *Sullivan*, 376 U.S. at 270.
105. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 (1984).
106. *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).
107. *Id.* at 731-32.
108. *See Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967) (holding that the *N.Y. Times*

Bradlo, by virtue of his profession and his capacity as a United Nations' goodwill ambassador, is undoubtedly a public figure and must satisfy the actual malice standard. In general, the term "actual malice" includes at minimum a "high degree of awareness . . . of probable falsity," or having "entertained serious doubts as to the truth of . . . publication,"[109] such as when publication takes place despite knowledge of contradictory evidence.

Reckless disregard or actual malice has been found in a number of diverse cases. For example, *Harte-Hanks Communications, Inc. v. Connaughton* addressed a publication of a front-page story accusing an unsuccessful candidate for public office of corruption.[110] The court found that the defendant had failed to thoroughly investigate the story and actively omitted contradictory evidence.[111] Other instances include publication of a judge's statements by a newspaper reporter without an effort to check the accuracy of such statements before publication;[112] publication of nude photos of an actress without a valid release form;[113] and a newspaper article accusing a police captain of refusing to arrest a child molester based on the statements of a single person with no direct knowledge of events.[114] Bradlo will argue that Yungstein published his photographs and his inflammatory comments with full knowledge that he lacked evidence to support them. Yungstein deliberately ignored the resort's assurances that there was no reason for concern. Yungstein's conduct is evidence that his claims were false but he chose to share his photos of Bradlo publicly on Facebook and Twitter, accusing Bradlo of having a deadly disease, and endangering the lives of all of the resort guests. Thus, Bradlo will argue that Yungstein recklessly disregarded the truth.

In response, Yungstein will argue that Bradlo failed to show that Yungstein acted with knowledge or reckless disregard as to the falsity of the information published. Yungstein will turn to the case of *Welling v. Weinfeld*, which stated, "the plaintiff's privacy is not invaded when unimportant false statements are made, even when they are made deliberately."[115] A plaintiff's privacy is invaded "only when there is such a major misrepresentation of his character, history, activities or beliefs

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standard of actual malice applies to false light claims); *see also* Restatement (Second) Of Torts § 652E cmt. d (1977).

109. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989) (quoting *Garrison v. State of La.*, 379 U.S. 64, 74 (1964) *and St. Amant*, 390 U.S. at 730-31).

110. *Harte-Hanks*, 491 U.S. at 660.

111. *Id.*

112. *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746, 759-60 (Mass. 2007).

113. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1139 (7th Cir. 1985).

114. *Mahnke v. Nw. Publ'ns, Inc.*, 160 N.W.2d 1, 5-6 (Minn. 1968).

115. *Welling v. Weinfeld*, 866 N.E.2d 1051, 1057-58 (Ohio 2007).

that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy."[116]

In *New York Times Company v. Sullivan* and *Gertz v. Robert Welch, Inc.*, the Supreme Court established the precedent that, by virtue of their status as individuals in the communal spotlight, public figures must bear the cost of their recognition, and thus must show actual malice.[117] Therefore, the element of "knowledge of falsity or reckless disregard of probable falsity" in a false light claim brought by a public figure, is equivalent or synonymous by the Supreme Court to the "actual malice" standard of defamation.[118] A plaintiff must prove with "clear and convincing evidence" that the defendant published a false statement with knowledge of, or with reckless disregard as to, the falsity of the assertion.[119] A publication does not lose its First Amendment protection simply because it is outrageous, shocking, embarrassing, or offensive.[120] In *Harte-Hanks*, the Supreme Court explained: "[T]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term . . . Actual malice, instead requires at a minimum that the statements were made with a reckless disregard for the truth."[121] A public figure must provide sufficient evidence to allow the conclusion, in fact, that the defendant "entertained serious doubts as to the truth" of his expression and proceeded anyway.[122]

Yungstein will argue that he did not act with knowledge or reckless disregard of the truth when he published the information because he had good reason to believe that Bradlo had contacted a serious, deadly disease from Gatsuawana and he was trying to notify the other people staying at the resort so that the disease would not spread. Yungstein was concerned for his well-being, and the well-being of the guests stranded at the resort. He was concerned for the apparent lack of investigation by the resort of a potentially dangerous situation and expressed his concerns via the only medium available to him at that time. Even though the resort administration had assured Yungstein that it

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116. *Id.*

117. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 281 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

118. *Gertz*, 418 U.S. at 345-46.

119. *See Kolegas v. Heftel Broad. Corp.*, 607 N.E.2d 201, 210-11 (Ill. 1992); *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 991 (Ill. 1989).

120. *Holloway v. Am. Media, Inc.*, 947 F. Supp. 2d 1252, 1261 (N.D. Ala. 2013).

121. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 666-67 (1989).

122. *Id.* at 665; *see also Hussain v. Palmer Commc'ns Inc.*, 60 Fed. Appx. 747, 752 (10th Cir. 2003); *see St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

had investigated the matter and there was no reason for concern, Yungstein was never informed about the specific details of this case. Thus, he had valid reason to doubt the verbal assurances he received. Therefore, Bradlo failed to provide concrete and definitive examples of reckless disregard for the truth to meet the actual malice standard; therefore, this Court should affirm the appellate court's decision.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. General

Bradlo's final claim is for intentional infliction of emotional distress (IIED). The common law of the State of Marshall follows the Restatement governing claims for IIED. The applicable section states:

> one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.[123]

B. Elements

In order to prevail on a claim for IIED, the plaintiff must meet three elements. Those three elements are: (1) the conduct involved must be truly extreme and outrageous; (2) the actor must either intend that his conduct inflict severe emotional distress, or know that there is at least a high probability that his conduct will cause severe emotional distress; and (3) the conduct must in fact cause severe emotional distress.[124]

(1) Extreme and Outrageous Conduct

The first element requires that the defendant's conduct be extreme and outrageous. According to the Restatement, "liability has been found only where conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[125] Whether an actor's conduct is extreme and outrageous depends on the facts of each case, including the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was

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123. Restatement (Second) of Torts § 46(1) (1965).

124. *McGrath v. Fahey*, 533 N.E.2d 806, 808 (Ill. 1988).

125. Restatement (Second) of Torts § 46 (1965).

repeated or prolonged.[126]

Bradlo will argue that Yungstein's action of secretly taking the pictures of Bradlo while in the restroom with his Bongle Lens was extreme and outrageous. Bradlo will likely cite to numerous cases where the courts have found that secret photographing or recording satisfies an individual's claim of extreme and outrageous conduct. For instance, in *Sawicka v. Catena*, a business owner installed a camera in the workplace restroom and recorded plaintiff employees' restroom activities.[127] The court found that the secret monitoring and recording of the plaintiffs while they used the restroom was "unquestionably outrageous and extreme" conduct.[128]

Furthermore, the distribution of the photographs via posting on social media sites, accompanied by a caption claiming that Bradlo has a deadly disease that would infect the trapped population of the ski resort, satisfies the extreme and outrageous conduct required for an IIED claim.[129] For instance, in *Dana v. Oak Park Marina*,[130] the court held that the surreptitious recording of the plaintiffs in various stages of undress and disclosure of the recordings to third parties without the plaintiffs' knowledge or consent was sufficient to establish extreme and outrageous conduct.[131] Yungstein used his camera hidden on the frame of his Bongle Lens (otherwise appearing as regular eyeglasses) to take photographs of Bradlo without his knowledge and later published those photographs with inflammatory comments again without Bradlo's knowledge or consent.

Moreover, Bradlo will claim that the dissemination of false information, by itself, suffices to establish extreme and outrageous conduct under IIED.[132] He could analogize to the facts in *Chuy v. Philadelphia Eagles Football Club*,[133] where the court determined that the national publication of false news by a doctor about an athlete's health supported a finding that the doctor's conduct was extreme and outrageous.[134] In Bradlo's case, Yungstein was told by hotel administration that Bradlo did not have a disease and they "assured him they had investigated and found no reason to worry." Despite that, Yungstein proceeded to

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126. *Id.*

127. *Sawicka v. Catena*, 912 N.Y.S.2d 666, 667 (N.Y. App. Div. 2010).

128. *Id.*

129. *See, e.g.*, *Doe v. Hofstetter*, No. 11-2209, 2012 U.S. Dist. LEXIS 82329 at *20-21 (D. Colo. June 13, 2012) (finding publication of private photos to social media website extreme and outrageous conduct satisfying IIED claim).

130. *Dana v. Oak Park Marina,* 660 N.Y.S.2d 906, 906 (N.Y. App. Div. 1997).

131. *Id.* at 910.

132. *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1274-75 (3d Cir. 1978).

133. *Id.* at 1265.

134. *Id.* at 1274-75.

post the picture with the caption in complete disregard of the effects on Bradlo's life. The statement alone that Yungstein attached to the photo concerning an infectious disease, without reference to where the picture was taken, is extreme and outrageous. Bradlo will contend that these facts meet the threshold for extreme and outrageous behavior as defined by law. At the very least, this is an instance where summary judgment was improper and a jury should have been able to decide the outcome.[135]

Yungstein will likely present five arguments. First, Yungstein will likely argue that his conduct was privileged conduct, "meaning that defendants acted within their legal right—and no circumstances are present that would defeat that privilege."[136] The Restatement states that, "[t]he conduct, although it would otherwise be extreme and outrageous, may be privileged under the circumstances. The actor is never liable, for example, where he has done no more than to insist upon his legal rights in a permissible way, even though he is well aware that such insistence is certain to cause emotional distress."[137] To determine whether certain actions qualify as outrageous and extreme conduct, the court must perform an objective analysis to determine whether the conduct would arouse resentment in an average member of the community[138] based on a non-exclusive list of factors including the legitimacy of the defendant's objective, and the plaintiff's susceptibility to harassment.[139] Yungstein will claim that liability attaches only when the defendant has been in a special position to inflict mental suffering, and his behavior has been especially calculated to inflict it.[140] Yungstein will likely argue that taking a picture of Bradlo and posting that picture on his Facebook and Twitter accounts with captions was within his legal right, especially in view of the circumstances of emergency in the resort. Therefore, Yungstein will argue that he acted within his legal right and because he acted within his legal right, he should not be held liable for the claim of IIED.

Alternatively, if the privileged conduct argument does not succeed, Yungstein's second argument will likely be that his conduct was not extreme and outrageous because he merely took a picture of a celebrity in a public area and that does that not meet the standard of extreme and outrageous conduct. Bradlo is a public figure and therefore publishing

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135. *Hensley v. Heavrin,* 282 S.E.2d 854, 855 (1981); *Bell v. Dixie Furniture Co., Inc.*, 329 S.E.2d 431, 431 (S.C. 1985).

136. *Howell v. N.Y. Post Co., Inc.*, 612 N.E.2d 699, 704 (N.Y. 1993).

137. Restatement (Second) of Torts § 46 (1965).

138. *Honaker v. Smith*, 256 F.3d 477, 490 (7th Cir. 2001).

139. *Id.* at 491.

140. *See McGrath v. Fahey*, 533 N.E.2d 806, 808 (Ill. 1988); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874, 888 (1939).

information about him is reasonable, and Yungstein reasonably believed that Bradlo had a serious, contagious medical condition that could possibly infect and spread throughout the entire resort.

In addition, it was for the public good that Yungstein was informing others of Bradlo's medical condition for their health and safety.[141] "The personalities and affairs of celebrities are viewed as inherently public" and "a celebrity creates audience appeal not only through the substantive achievements that bring him fame, but at the expense of the privacy that he must surrender in becoming a public personality."[142] Although celebrities are entitled to a right of privacy, that right of privacy is greatly diminished because they are public figures, so information about them becomes public interest.[143] Yungstein will assert that Bradlo is a public figure because Bradlo is a famous movie director, a goodwill ambassador for the United Nations, and well known for his charitable and philanthropic work in third world countries. Therefore, Yungstein will likely argue that because Bradlo is a public figure, information about him is of public interest, so the picture and caption he posted on Facebook and Twitter accounts were of public interest, hence not extreme and outrageous conduct.

The third argument that Yungstein will likely present is that the means by which he took the picture and the location he took it does not meet the strict threshold required to be considered extreme and outrageous conduct. Courts adopt a high standard in order to allow freedom of individual action while providing reasonable opportunity for redress for victims of conduct that is determined to be "atrocious and utterly intolerable in a civilized community."[144] For instance, in *Howell v. New York Post Company, Inc.*, the court struck down a plaintiff's argument that the "manner in which her photograph was obtained constituted extreme and outrageous conduct."[145] In that case, the individual who took the picture trespassed onto the secluded grounds of a private psychiatric facility and took a picture of a patient.[146] The court held that the conduct "does not remotely approach the required standard."[147]

The fourth argument that Yungstein will likely present is that posting the picture he took of Bradlo on his Facebook and Twitter accounts was protected by his right to free speech; therefore, it does not constitute extreme and outrageous conduct. The First Amendment

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141. Jamie E. Nordhaus, *Celebrities' Rights to Privacy: How Far Should the Paparazzi Be Allowed to Go?*, 18 Rev. Litig. 285, 289 (1999).

142. *Id.* at 290-91.

143. *Id.* at 289.

144. *Twyman v. Twyman*, 855 S.W.2d 619, 622 (Tex. 1993).

145. *Howell v. N.Y. Post Co., Inc.*, 612 N.E.2d 699, 704 (N.Y. 1993).

146. *Id.* at 700.

147. *Id.* at 705.

provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[148] The First Amendment is applied to the states through the due process clause of the Fourteenth Amendment.[149] "It is a prized American privilege to speak one's mind although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded vigorous advocacy no less than abstract discussion."[150]

Yungstein will likely argue that posting the picture of Bradlo on his Facebook and Twitter accounts with captions is speech that is protected by the First Amendment of the U.S. Constitution. Yungstein will claim that although he is asserting his First Amendment rights against a private party, not a state official, he still has First Amendment protections because the speech here involves public concern.[151] For instance in *Snyder v. Phelps*, the father of a deceased service member brought an action of IIED against a church and its members for picketing nearby the funeral.[152] The picketers carried hateful signs, such as "God Hates Fags" and "God Hates You."[153] The *Snyder* Court had to

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148. U.S. Const. amend. I.

149. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 882 N.E.2d 1011, 1019 (Ill. 2008).

150. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

151. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

152. *Id.* at 1213-14.

153. *Id.* at 1213. The Restatement of Torts (Third) states:

> Communications causing emotional harm and constitutional limitations. Communicative conduct that is constitutionally protected may cause emotional harm. If an actor's conduct is sufficient for liability under this Section but is protected by the First Amendment, liability cannot be imposed.
>
> The Supreme Court has long held that the First Amendment imposes limits on the extent to which state tort law, regardless of the specific tort claim, may impose liability for communicative conduct. In *Hustler Magazine v. Falwell*, First Amendment limitations barred liability in a case in which the plaintiff alleged intentional infliction of emotional harm. 485 U.S. 46 (1988). In the *Falwell* case, it was apparent that the defendants' "gross and repugnant" parody of the plaintiff caused (and was intended to cause) the plaintiff substantial emotional harm. Nevertheless, the Court, relying on *New York Times v. Sullivan*, held that the threshold for imposing liability for intentionally inflicting emotional harm on a public figure by means of a communicative act is a factual statement that is published with knowledge that the statement is untrue or with reckless disregard for the truth. 376 U.S. 254 (1964). Because the defendants' communication in *Hustler* was parody that could not reasonably be understood as factual, the damages award was reversed.
>
> Furthermore, even in cases in which the defendant communicates facts, the First Amendment limits the scope of liability provided in this Section. Thus, publication of truthful information obtained lawfully may not ordinarily be the basis for an award of damages in tort, regardless of the emotional harm that might occur to, for example, a rape victim whose identity is lawfully discovered by a reporter

determine whether the picketers' speech was private or public in order to determine whether it deserved First Amendment protection, which is determined by "the content, form, and context of that speech."[154] The court held that the speech was considered public concern; therefore, the speech was entitled to special protection and consequently the claim for IIED was set aside.[155] Other courts have recognized this privilege as well.[156] Yungstein will claim that his speech is of public concern because the topic of Bradlo's health condition and the health of those stranded by the storm should be considered as relating to "any matter of political, social, or other concern to the community."[157] It is also "a subject of legitimate news interest; that is, a subject of general interest and value and concern to the community."[158] Moreover, a medical issue is a quintessential issue of public concern.[159] It has also been established that Internet speech enjoys full First Amendment protection.[160] Therefore, Yungstein's conduct is protected speech. In addition, Bradlo is a public figure and publications regarding a public figure are not privileged under the First Amendment unless there is proof that the publication was false and made with actual malice.[161] Yungstein will claim that Bradlo failed to provide any evidence on this point.

Bradlo will counter argue that First Amendment rights do not apply in this case. *Hustler Magazine v. Falwell*[162] is distinguishable from these facts because the photographing of Bradlo and publication of the images with Yungstein's comments did not contribute to public and political debate in the same way as the cartoon protected in *Hustler*. In *Hustler*, an ad parody was published in Hustler magazine in 1983

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and revealed in a newspaper article.

In addition to federal and state constitutional protections for speech that causes emotional harm and their constraints on liability under this Section, defamation law provides a variety of state common-law privileges.

Restatement (Third) of Torts: Physical & Emotional Harm § 46 (2012); *see* Restatement (Second) of Torts §§ 583-613. Where applicable, these privileges also limit liability when a communication is the basis for a claim under this Section. Restatement (Third) of Torts: Physical & Emotional Harm § 46 (2012).

154. *Snyder*, 131 S. Ct. at 1213-14.

155. *Id.* at 1219.

156. *See Howell v. N.Y. Post Co., Inc.*, 612 N.E.2d 699, 704-05 (N.Y. 1993) (establishing that "[a] newspaper's publication of a newsworthy photograph is an act within the contemplation of the privileged-conduct exception").

157. *Connick v. Myers*, 461 U.S. 138, 146 (1983).

158. *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 83-84 (2004).

159. *In re Med. Lab. Mgmt. Consultants*, 931 F. Supp. 1487, 1491 (D. Ariz. 1996).

160. *Reno v. Am. Civil Liberties Union*, 521 U.S. 884, 863, 870 (1997) (establishing that there is no "basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet).

161. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

162. *Id.*

depicting a politically active minister with a nationally syndicated television program, a general public figure, in a morally debased and utterly false light.[163] The court held that in order for an IIED claim based on the publication of a political cartoon to defeat First Amendment protection, the public figure must prove the defendant acted with reckless disregard of whether or not the asserted fact is true.[164] Here, Yungstein was told that Bradlo was not infected and there was nothing to worry about, taking it out of the realm of public concern, and affording it no constitutional protection. Yungstein's posting of the pictures and the caption was not a matter of public concern, as they were shown to be false. Speech deals with matters of public concern. Yungstein was informed that Bradlo did not carry any disease so there was no matter of public concern. Therefore, First Amendment protection does not apply.

(2) Intent to Inflict Severe Emotional Distress

To succeed on a claim for IIED, a plaintiff must demonstrate that the defendant intentionally or recklessly engaged in extreme and outrageous conduct that caused the plaintiff to suffer severe emotional distress.

Bradlo will argue that the posting of the picture with the caption by Yungstein was intentionally done to cause emotional distress, and alternatively with complete reckless disregard. It has been determined that this element is satisfied either "when a defendant's actions, by their very nature, were likely to cause severe distress or when the defendant knew that a plaintiff was particularly susceptible to such distress and that, because of this susceptibility, the defendant's actions were likely to cause it to occur."[165] Such severe emotional distress that results from being recorded in a private place is necessarily caused by the person making the record. Bradlo will argue that the facts in this case support a finding that Yungstein posted the photos and comments with the intent to cause emotional distress. The record indicates that Yungstein did not like Bradlo or believe that Bradlo was a humanitarian, shown by Yungstein's statement, "I cannot believe people still fall for Bradlo's gimmicks. His humanitarian work is a joke, he does not care about the people, he only travels to get publicity for his boring documentaries. This guy is such a phony, I cannot stand him!"[166] It can be argued that Yungstein's actions were a witch hunt to reveal Bradlo as a phony, giving rise to an intentional violation.

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163. *Id.*
164. *Id.*
165. *Honaker v. Smith*, 256 F.3d 477, 494 (7th Cir. 2001).
166. R. at 5.

In the alternative, Bradlo will claim intentional conduct is established when Yungstein's actions are conducted with a reckless indifference to the rights of the other party.[167] At the very least, Yungstein was reckless with regards to causing Bradlo emotional distress, as shown by his lack of concern for Bradlo and general distaste for him. Bradlo could again rely on *Chuy* in which the court held that intentionally propagating false information with the natural and probable consequence of causing the plaintiff emotional distress is equivalent to the "deliberate disregard of a high degree of probability that the emotional distress will follow" required for IIED.[168] Furthermore, Bradlo could claim that this intent could be inferred from the contextual and circumstantial evidence.[169] Bradlo can show that Yungstein took and published photographs of Bradlo in a state of illness making comments in his attempt to show his phony theory, released the pictures with the caption, after being told there was no disease, with no thought to the effects on Bradlo; such reckless indifference is equivalent to an intentional violation.

Yungstein will likely argue that Bradlo has failed to establish this intent element. The second element requires that the defendant intended to inflict severe emotional distress upon the plaintiff. This element can be satisfied if the defendant either intends that his "conduct inflicts severe emotional distress, or knows that there is at least a high probability that his conduct will cause severe emotional distress."[170] Demonstrating intent requires proof that the defendant specifically aimed his behavior at inflicting severe emotional distress.[171] Yungstein will likely argue three reasons why he did not have the intent nor did he possess the reckless disregard to cause Bradlo severe emotional distress.

First, Yungstein will likely argue that his intent was to spread a message and protect the resorts' guests by posting the photo of Bradlo on his Facebook and Twitter accounts with the caption—not to cause Bradlo severe emotional distress. Yungstein intended to take the pictures so that he could adequately report to the resort administration Bradlo's health condition. Yungstein will likely assert that "[t]he rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts

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167. *Anderson v. Knox*, 297 F.2d 702, 730 (9th Cir. 1961).

168. *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1275 (3d Cir. 1978); Restatement (Second) of Torts § 46 cmt. i (1965).

169. *Falwell v. Flint*, 797 F.2d 1270, 1272-78 (4th Cir. 1986), *rev'd on other grounds, Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54-57 (1988); *see also Toles v. Toles*, 45 S.W.3d 252, 260 (Tex. App. 2001).

170. *McGrath v. Fahey*, 533 N.E.2d 806, 808 (Ill. 1988).

171. *See Honaker v. Smith*, 256 F.3d 477, 494 (7th Cir. 2001).

that are definitely inconsiderate and unkind."[172] Yungstein will likely assert that "[t]here is no occasion for the law to intervene in every case where someone's [*sic*] feelings are hurt."[173] In addition, Yungstein will argue that "[t]here must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam."[174]

Yungstein will also argue that Bradlo cannot establish that Yungstein acted with reckless disregard. Courts generally require proof that the defendant acted with no consideration of knowledge that his actions had a high probability of inflicting severe emotional distress.[175] Such knowledge is found only when (i) the actions, by their very nature, are likely to cause severe distress; or (ii) when the defendant has some special knowledge that the plaintiff is particularly susceptible to such distress making it more likely that certain actions would cause severe distress.[176] Yungstein will claim, that he neither intentionally nor recklessly inflicted severe emotional distress upon Bradlo. Yungstein acted with a legitimate motive, to protect the resort guests, and lacked any special knowledge that would inform him of the high probability that his actions would inflict severe emotional distress upon Bradlo, nor was the public's reaction to Yungstein's foreseeable or probable.

Second, Yungstein will likely argue that these alleged statements were not made directly to Bradlo and even if they were "[m]ere threats, annoyance or other petty oppression, no matter how upsetting, are insufficient to constitute the tort of intentional infliction of emotional distress."[177] In *Martin v. Citibank, N.A.*, the court held that a bank employee failed to establish intentional infliction of emotional distress for racial discrimination because the conduct was not intentionally directed at the plaintiff.[178] In the *Martin* case, a bank employee alleged that the employer discriminated against the minority employee and five other minority employees, requiring them to do polygraph tests during the bank's investigation of missing funds.[179] The court stressed that New York courts are strict in applying the elements of IIED and that the claim failed because the conduct was not directly intended at the

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172. Restatement (Second) of Torts § 46 (1965).

173. *Id.*

174. *Id.*

175. *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 682 (Cal. Ct. App. 1986).

176. *Honaker*, 256 F.3d at 494 (citing *Pavilon v. Kaferly*, 561 N.E.2d 1245, 1252 (Ill. App. Ct.1990)). In *Pavilon*, the defendant had a close relationship with the plaintiff that provided special knowledge that the plaintiff was undergoing psychotherapy. *Pavilon*, 561 N.E.2d at 1252.

177. *Owen v. Leventritt*, 571 N.Y.S.2d 25, 25 (N.Y. App. Div. 1991).

178. *Martin v. Citibank, N.A.*, 762 F.2d 212, 220 (2d Cir. 1985).

179. *Id.* at 214.

plaintiff.[180]

Third, Yungstein will likely argue that he had a First Amendment right to post the pictures on his Facebook and Twitter accounts because "[i]t is clear that speech over the internet is entitled to First Amendment protection."[181]

(3) Severe Emotional Distress

The third element requires that the plaintiff has suffered severe emotional distress. Evidence of the emotional duress at the time of the event and duress resulting after the event are sufficient to establish severe emotional harm.[182] Bradlo will claim that the undisputed facts of this case support the severity of his emotional distress. After Yungstein released the picture and caption, the social media sites went viral with the information, catching the mainstream media's attention, all of which casted Bradlo in a false light, and causing threats to Bradlo's reputation, family, and career, along with personal safety. At the resort, Bradlo was quarantined to a small room with the need for security to ensure his safety because guests at the resort gathered outside his room, shouting obscenities and threats. After years of working to establish a good reputation in the world and countless hours of volunteer work, Bradlo can show that his home was vandalized, his movie boycotted, and his family's safety threatened. Since the incidents resulting from Yungstein's posting of the picture with the caption, Bradlo has suffered from depression and anxiety attacks so severe he is currently on medication and needs to see a physician on a regular basis.[183] Therefore, Bradlo will claim that there is prima facie evidence of severe emotional distress, or at minimum, a jury must decide his claim for emotional distress.

Yungstein will likely argue that Bradlo failed to prove that Yungstein had the intent to cause severe emotional distress; therefore, the court does not even have to address this third element. Yungstein will likely argue that even if Bradlo has proven that Yungstein had the intent to cause emotional distress—that is not enough. Bradlo sought medical treatment and is now on medication, but this evidence is insufficient to constitute severe emotional distress because "neither physical injury nor the need for medical treatment is a necessary prerequisite to establishing severe emotional distress."[184] The "emotional distress that

180. *Id.* at 220.

181. *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005).

182. *Welsh v. Cmmnw. Edison Co.*, 713 N.E.2d 679, 684 (Ill. App. Ct. 1999); *Morgan v. Anthony*, 27 S.W.3d 928, 929-31 (Tex. 2000).

183. R. at 6-12.

184. *Doe*, 884 A.2d at 456.

is caused must be severe, so infliction of emotional distress alone is insufficient to give rise to cause of action."[185] In determining whether emotional distress is severe, intensity and duration of the distress are used as factors.[186]

In addition, severe distress must be proven; however, in many situations the defendant's extreme and outrageous conduct is used to determine whether distress existed.[187] Severe emotional distress must be reasonable under the circumstances.[188] This requires not only proof with direct evidence of the severity of Bradlo's distress, but also that a reasonable person would, under the circumstances, exhibit similar levels of distress.[189] Yungstein will argue that Bradlo's reaction was exaggerated and unreasonable. Even if Bradlo can prove that his reaction was, in fact, severe, Bradlo cannot prove that the reaction he exhibited was equivalent to what a reasonable person might experience. Therefore, Bradlo cannot demonstrate, as a matter of law, that he experienced severe emotional distress.

185. *Pub. Fin. Corp. v. Davis*, 360 N.E.2d 765, 767 (Ill. 1976).
186. *Id.*
187. Restatement (Second) of Torts § 46 (1965).
188. *Computer Publ'ns, Inc. v. Welton*, 49 P.3d 732, 736 (Okla. 2002).
189. *See id.*; *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 445 (Tex. 1995).