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## The Thirty-Second Annual John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law: Brief for the Petitioner, 30 J. Marshall J. Computer & Info. L. 373 (2013)

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# BRIEF FOR PETITIONER

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NO. 2013-CV-0123

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IN THE  
SUPREME COURT OF THE STATE OF MARSHALL  
FALL TERM 2013

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ALFRED BRADLO, AN INDIVIDUAL,  
Petitioner,  
v.  
XAVIER YUNGSTEIN, AN INDIVIDUAL,  
Respondent.

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ON APPEAL TO THE SUPREME COURT  
OF THE STATE OF MARSHALL

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ELIANA ALBELBAISI

ROBERT KOEHL

TODD W. SMITH

## QUESTIONS PRESENTED

I. Did the First District Court of Appeals for the State of Marshall err in affirming the Marbury County Circuit Court's decision to grant Mr. Yungstein's motion for summary judgment concerning Mr. Bradlo's claim for invasion of privacy through intrusion upon seclusion?

II. Did the First District Court of Appeals for the State of Marshall err in affirming the Marbury County Circuit Court's decision to grant Mr. Yungstein's motion for summary judgment concerning Mr. Bradlo's claim for invasion of privacy through false light?

III. Did the First District Court of Appeals for the State of Marshall err in affirming the Marbury County Circuit Court's decision to grant Mr. Yungstein's motion for summary judgment concerning Mr. Bradlo's claim for Intentional Infliction of Emotional Distress?

## OPINIONS BELOW

The Marbury County Circuit Court granted summary judgment in favor of the defendant Yungstein. The opinion of the Marshall Court of Appeals for the First District affirmed the Circuit Court's decision and is documented in the record at 3–14.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the *First Amendment* to the United States Constitution, reproduced herein as Appendix A.

## STATEMENT OF THE CASE

## I. STATEMENT OF THE FACTS

The following facts are not in dispute. R. at 3.

A. Yungstein photographed Bradlo inside a restroom and publicized the pictures with comments alleging that Bradlo had an infectious and deadly disease.

Yungstein took multiple pictures of Bradlo inside a restroom, documenting Bradlo's allergic reaction to shellfish. *Id.* at 5–6. Yungstein then published these pictures to the internet via social media, attaching comments alleging Bradlo had a contagious and infectious disease. *Id.* Because of Yungstein's actions, Bradlo suffered immediate and long-term detriment. *Id.*

Bradlo is an award winning movie director of documentaries that focus on the plight of third world countries. *Id.* at 3. Bradlo is also known as a philanthropist and advocate for third world nations. *Id.* at 4. Bradlo an ambassador for the United Nations had just returned from a trip from Africa prior to this incident with Yungstein. *Id.* Yungstein is an internet executive for Bongle, which is the internet corporation that recently developed the “Bongle Lens.” *Id.*

B. The Bongle Lens, the device used to photograph Bradlo.

The Bongle Lens is essentially a computer and camera inserted into glasses. *Id.* The glasses enclose: a camera, display, touchpad, power source, and a microphone. *Id.* The user can manipulate the device to search their field of vision, film, take pictures, and use the internet. *Id.* The Bongle Lens has the ability to record visual information and then upload this information to the internet. *Id.* The user activates the device’s verbal command feature by moving their head downwards or pressing a touchpad while giving a verbal command. *Id.* Once the user activates the device, the user can control the device with verbal commands. *Id.* The user must issue a verbal command or manipulate the touchpad to take a picture or video with the device. *Id.* The device was not widely available at the time of the incident, but Yungstein was testing the device for Bongle, and regularly wore the device. *Id.*

C. The incident and conduct under consideration for Mr. Bradlo’s claims for invasion of privacy and emotional distress.

The incident took place at Marshall Pick Ski Resort in the State of Marshall. *Id.* At the time of the incident in question, a snowstorm immobilized the resort, and the State of Marshall issued a state of emergency for the area. *Id.* at 5. The inclement weather removed the resort from outside assistance, with the exception of communication through internet access. *Id.* The resort enacted emergency procedures, and urged resort guests to report illnesses and crimes to the resort staff for the preservation of general order. *Id.*

During this snowstorm, Yungstein and Bradlo were dining separately at the resort’s restaurant. *Id.* Yungstein was wearing his Bongle Lens, was seated near Bradlo. *Id.* Yungstein observing other patron’s admiration for Bradlo’s achievements stated, “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[.]” *Id.*

Bradlo specifically ordered a meal prepared without shellfish because he is highly allergic to this ingredient. *Id.* at 5–6. The restaurant prepared Bradlo’s meal with shellfish, and Bradlo suffered an allergic

reaction. *Id.* Bradlo went to the restaurant's restroom to privately vomit and compose his appearance. *Id.* Yungstein entered the restroom while Bradlo was vomiting in a partially closed stall. *Id.* at 5. Observing Bradlo exit his stall, Yungstein inquired about Bradlo's health: because he was covered in perspiration, exhibiting a bright red rash around his arms, had traces of the meal's red sauce, containing shellfish around his mouth. *Id.* Before Bradlo could respond to Yungstein's health inquiry, Respondent quickly took multiple pictures with his Bongle Lens. *Id.* Bradlo explained that his appearance was the result of his meal, and concern was unnecessary. *Id.* Yungstein observed Bradlo compose his appearance and walk out of the restroom. *Id.*

After observing Bradlo, Yungstein contacted resort officials to report his observations, because of concern that Bradlo could have an illness from his last visit to Gatsuwana, a country known to harbor disease. *Id.* In response, the resort investigated the incident, but found that Bradlo merely had an allergic reaction to shellfish. Bradlo informed the resort officials that he would treat the reaction with medication, and the resort restaurant confirmed the careless use of shellfish in the Bradlo's meal. *Id.* at 6. Satisfied with this inquiry, resort officials suggested that Bradlo stay in his room as a matter of discretion. *Id.*

The following morning, Yungstein eager to find an explanation for Bradlo's appearance, impatiently contacted resort officials to inquire about the measures used to resolve this incident. *Id.* The resort informed Yungstein that an infestation occurred, and there was no reason for guests to be concerned. *Id.* Yungstein did not inquire further; instead, he posted the photographs of Bradlo in the restroom to his Facebook and Twitter accounts. *Id.* Subsequently, Yungstein posted the same pictures to the resort's Facebook account. *Id.* Yungstein also attached comments to all posted photographs, which stated that Bradlo had a deadly disease, which was contagious. *Id.* The comments also stated the resort was not concerned with protecting the health of its guests, and Bradlo was indifferent to exposing others to his disease. *Id.*

The other guests succumbed to panic in response to Yungstein's postings and proceeded to gather outside Bradlo's room. *Id.* Many guests made threatening and obscene remarks towards a terrified Bradlo. *Id.* Bradlo unable to leave the resort feared for his safety and to quell the misinformed and volatile guest's, the resort confined Bradlo in an isolated room. *Id.*

News of this incident spread outside of the resort, and local citizens reacting to the reports vandalized Bradlo's home in Marshall City. *Id.* Social media users overloaded the personal social media pages of Bradlo and his family with threats. *Id.* Yungstein's posts tarnished Bradlo's personal and public reputation, exemplified by protests and boycotts of

Bradlo's latest documentary. *Id.* Additionally, major news networks aired Yungstein's unchanged social media posts, which were available to all internet users. *Id.*

Once the snowstorm subsided, physicians specializing in infectious diseases examined Bradlo and confirmed that Bradlo's illness was purely the result of a shellfish allergy. *Id.* This incident caused Brando to suffer from depression and anxiety attacks, requiring the treatment of a physician. *Id.* Bradlo's treatment consisting of regular visits to a mental health professional and medication to treat mental health injuries. *Id.* Yungstein's actions damaged Bradlo's reputation, specifically in his role as a humanitarian, and philanthropist. *Id.*

## II. NATURE OF THE PROCEEDINGS

Bradlo commenced litigation against Marshall Pick Ski Resort and Xavier Yungstein, by filing suit in the Marbury County Circuit Court alleging: (1) invasion of privacy by intrusion upon seclusion, (2) invasion of privacy by false light, and (3) Intentional Infliction of Emotional Distress. *Id.* at 7. Marshall Pick Ski Resort quickly settled with Bradlo under sealed terms. *Id.* However, Bradlo continued litigation against Yungstein, who moved for summary judgment following discovery. *Id.* The Circuit Court granted summary judgment in Yungstein's favor on all three causes of action. *Id.* Bradlo appealed the Circuit Court's decision to the Marshall Court of Appeals for the First District, and the court affirmed the lower court's ruling on all causes of action. *Id.*

Mr. Bradlo respectfully requests that the Supreme Court of the State of Marshall reverse the decision of the Marshall Court of Appeals for the First Circuit, and remand this case back to the Marbury County Circuit Court so that a jury can properly decide these claims.

## SUMMARY OF THE ARGUMENT

### I.

The appellate court erred in affirming the Circuit Court's decision to grant Respondent's motion for summary judgment concerning Bradlo's invasion of privacy claim of intrusion upon seclusion. Because the Circuit Court erred in not finding genuine issues of material fact concerning Bradlo's intrusion upon seclusion claim. Yungstein took unauthorized photographs of Bradlo in a restroom where a reasonable man would have an expectation of privacy, and would find Yungstein's actions highly offensive. Additionally, this intrusion caused Bradlo to seek medical care for anguish and suffering resulting from Yungstein's actions. The undisputed evidence does not establish as a matter of law

that Yungstein's actions were not an intrusion upon Bradlo's seclusion. Therefore, this Court must reverse the appellate court's decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

## II.

The appellate court erred in affirming the Circuit Court's decision to grant Respondent's motion for summary judgment concerning Bradlo's invasion of privacy claim of false light. Because the Circuit Court erred in not finding genuine issues of material fact concerning Bradlo's false light claim. Respondent subjected Bradlo to the false light of having an infectious and deadly disease, which would be highly offensive to any reasonable person. Yungstein acted with "actual malice," meaning he knew his statements to be false or acted with a reckless disregard for the truth. The falsity and publicity of these statements is uncontested by Yungstein and established in the undisputed evidence. The undisputed evidence does not establish as a matter of law that Yungstein's actions did not constitute a false light claim. Therefore, this Court must reverse the appellate court's decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

## III.

The appellate court erred in affirming the Circuit Court's decision to grant Respondent's motion for summary judgment concerning Bradlo's claim of Intentional Infliction of Emotional Distress. Because the Circuit Court erred in not finding genuine issues of material fact concerning Bradlo's emotional distress claim. Respondent intentionally subjected Bradlo to extreme and outrageous conduct with the intent to cause severe emotional harm. Respondent's actions truly caused Bradlo's severe emotional distress, which required treatment from medical professionals. The undisputed evidence does not establish as a matter of law that Yungstein's actions did not constitute a false light claim. Therefore, this Court must reverse the appellate court's decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

## STANDARD OF REVIEW

Appellate review of a Circuit Court's grant of summary judgment is *de novo* and the same standards used at the trial court apply; the evidence must demonstrate that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Marshall R. Civ. P. 56(c). In the review of a summary judgment, courts will

consider the entire record, all reasonable inferences fall in favor of the nonmoving party, and courts will presume that all factual disputes fall in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–61 (1986). Court’s will deny summary judgment where there is a genuine issue of material fact, and there is a possibility that a reasonable jury could find in favor of the nonmoving party. *Id.* The burden for establishing that there is no genuine issue of material fact rests with the moving party, but the nonmoving party must establish that there is *prima facie* evidence for all essential elements. *Id.*

## ARGUMENT AND AUTHORITIES

### I. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT, BECAUSE THE UNDISPUTED EVIDENCE IS SUFFICIENT TO ESTABLISH GENUINE ISSUES OF MATERIAL FACT FOR ALL ESSENTIAL ELEMENTS OF BRADLO’S INTRUSION UPON SECLUSION CLAIM.

The Circuit Court erred in granting Respondent’s motion for summary judgment, because the undisputed evidence establishes genuine issues of material fact concerning Bradlo’s intrusion upon seclusion claim. Bradlo presented *prima facie* evidence for the following essential elements: (1) an unauthorized intrusion or prying into the plaintiff’s seclusion took place; (2) the intrusion was highly offensive or objectionable to a reasonable man; (3) the matter upon which the intrusion occurs was private; and (4) the intrusion must causes anguish and suffering. Restatement (Second) of Torts § 652B (1977), *Melvin v. Burling*, 490 N.E.2d 1011, 1012 (Ill. App. Ct. 1986). Yungstein intruded into Bradlo’s reasonable seclusion by capturing images of him while inside a restroom. Yungstein’s photography of Bradlo in a state of duress, would be highly offensive to a reasonable person. Additionally, Bradlo maintained a reasonable expectation of privacy in the restroom. Therefore, this Court must reverse the appellate court’s decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

#### A. Respondent made an unauthorized intrusion into Bradlo’s seclusion by photographing his state of duress inside a restroom.

There are genuine issues of material fact concerning the element of unauthorized intrusion into Bradlo’s seclusion, because Respondent’s use of the Bongle Lens to photograph Bradlo’s state of duress while inside a restroom constitutes an unauthorized intrusion. Therefore, the undisputed evidence does not negate this element as a matter of law and establishes a genuine issue of material fact.



Some courts still follow the bright line rule that precludes recovery for intrusion in public places, which makes any photograph taken in a public location an authorized intrusion based on location. *Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1018 (D. Kan. 1986). However, the majority of jurisdictions have looked to the manner and context of the intrusion to determine if there was an unauthorized invasion. Court's reason that this element is established when the intruder behaves in a manner resembling, "watching, spying, prying, besetting, or overhearing." *Doe 2 v. AP*, 331 F.3d 417, 422 (4th Cir. 2003). Courts have also distinguished between public observation and an unauthorized intrusion by holding that the overzealous surveillance of a man is an intrusion dependent on the proof provided. *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1970). Therefore, the bright line rule precluding recovery has been abandoned by the majority of jurisdictions, making the determination of an unauthorized intrusion dependent of location, and reasoning that the manner of the intrusion, if overzealous can establish this element. *Id.*

For instance, the court in *Dailey Times Democrat v. Graham* held that the taking of a photograph of another in an embarrassing state is an unauthorized intrusion. *Dailey Times Democrat v. Graham*, 162 So.2d 474, 475–78 (Ala. 1964); *See also* Restatement (Second) of Torts § 652B cmt. B, illus. 7 (1977). In this case, a photographer took a photo of a woman in a state of unintentional undress without consent and then published the photograph in a local paper. *Id.* The court reasoned that when the use of mechanical aids, such as a camera documents a depiction of another without consent, there is an unauthorized intrusion. *Id.* Additionally, the *Graham* court held that the bright line ruling would not stand, "When a legal principle is pushed to an absurdity the principle is not abandoned, but the absurdity avoided." *Id.* at 478. Therefore, courts should not preclude recovery, irrespective of the intrusion occurring in a public place. *Id.*

Furthermore, in *Doe by Doe v. B.P.S.*, the court held that photographing an area where social norms dictate a reasonable expectation of privacy there is an unauthorized intrusion. *Doe by Doe v. B.P.S. Guard Servs. Inc.*, 945 F.2d 1422, 1427 (8th Cir. 1991). The court reasoned that the plaintiff's state of undress was not essential to establish an unauthorized intrusion. *Id.* Rather the unauthorized intrusion occurred when the defendant used a recording device to capture an image of the plaintiffs in an area with a reasonable expectation of privacy, specifically a changing room. *Id.*

While the type of mechanism used to intrude on others has changed over time, courts view any means of taking photos or videos without the consent of others in a restroom as an unauthorized intrusion. *See generally* Meche v. Wal-Mart Stores, 96–981, p. 5 (La. App. 3

Cir. 3/5/97); 692 So.2d 544, 547. Where the mere observation of another is may be an authorized intrusion, taking photographs of another in a restroom where social norms dictate an expectation of privacy there is an unauthorized intrusion. Additionally, courts have held that an unauthorized intrusion is the crux of this element, and later publication of the information gained during the intrusion is not necessary for recovery. *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

In the current case, Yungstein like the photographer in *Graham*, made an unauthorized intrusion by taking photographs of Bradlo with his Bongle Lens without Bradlo's consent or knowledge. R. at 5. Like the intruder in *Graham*, Yungstein made a nonphysical intrusion with mechanical aids to oversee Bradlo's private affairs. *Id.* Because Yungstein took photographs without Bradlo's knowledge or consent in a restroom, the conduct clearly resembles spying, prying, or overzealous surveillance. *Id.*

Yungstein's use of the Bongle Lens to intrude does not negate the intrusion, as the *Meche* court held, any unauthorized photos in a restroom, regardless of the means is an unauthorized intrusion. *Id.* Yungstein's actions constituted an unauthorized intrusion when he took photographs of Bradlo in restroom, just as the intrusion occurred in *Doe v. Doe*, when the defendants recorded the plaintiffs in a changing room. *Id.*

Therefore, the Circuit Court erred in granting Respondent's motion for summary judgment ruling, because the undisputed evidence clearly established that an unauthorized intrusion occurred when Yungstein used his Bongle Lens to photograph Bradlo inside a restroom.

B. Yungstein's use of a Bongle Lens to capture images of Bradlo in a restroom would be highly offensive to a reasonable person.

There are genuine issues of material fact concerning the highly offensive nature of Yungstein's conduct, because the use of a Bongle Lens to capture images of Bradlo's state of suffering in a restroom would be highly offensive to a reasonable person. Taking pictures of another, regardless of state, or place in a restroom is highly offensive on its face. Therefore, the undisputed evidence does not negate this element as a matter of law, and establishes a genuine issue of material fact.

Courts consider all of the evidence in determining if conduct would be highly offensive to a reasonable person, specifically: (1) the extent of the intrusion, (2) the situation of the intrusion, (3) the conditions of the intrusion, (4) the behavior of the actor intruding, (5) the intent of the intruder, (5) where the intrusion occurred, and (6) the privacy expectations of the victim. *Wolfson v. Lewis*, 924 F. Supp. 1413, 1421 (E.D. Penn. 1996); *Tagouma v. Investigative Consultant Servs.*, 2009 Pa. Dist.

& Cnty. Dec. LEXIS 421at \*14–15 (Pa. Cnty. Ct. 2009). The determination of whether an intrusion is highly offensive is a question for the trier of fact, and a determination of whether the evidence could be highly offensive is a decision for a judge. *Wolfson*, 924 F. Supp. at 1421at 1418–21.

For instance, the court in *Graham* held that taking a picture of a woman's exposed underskirt was highly offensive regardless of the public location. *Dailey Times Democrat*, 162 So.2d at 477–78. In addition, the court in *Hernandez v. Hillsides* evaluated the offensive nature of an intrusion under, reasoning that social norms should determine what behavior is highly offensive to a reasonable person. *Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1066–76 (Cal. 2009). The court in *Wilcher v. City of Wilmington*, distinguished the application of social norms to by holding that a monitor watching a participant in a drug screening was not a highly offensive intrusion, because the monitor's intent was only to give validity to the testing. *Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298, 300–308 (D. Del. 1999).

In the present case, Yungstein's intrusion was highly offensive when evaluated through context like the court in *Graham*. While taking a photo of another is normally not highly offensive, when done in a restroom, especially when the person is in a state of sickness, the context of the situation makes the conduct highly offensive to any reasonable person. R. at 5. Therefore, just as the court in *Graham* evaluated the offensive nature of the intrusion contextually, this Court should use the same reasoning.

Additionally, Yungstein's intrusion evaluated under social norms like the evaluation in *Hernandez* is highly offensive, because social norms dictate that a restroom is a location to be void of documentation. Yungstein's action of leaving the restroom with permanent documentation of Bradlo's sickened state enhances the highly offensive nature of his conduct. *Id.* A reasonable person would find Yungstein's behavior to be highly offensive, because having permanent unwanted photographs taken in a restroom negates all social norms.

On the contrary, Yungstein's actions are not like the monitor in *Wilcher*, because Yungstein's documentation in a restroom was abnormal behavior under the context of seeing a person sick in a restroom. *Id.* Unlike the known documentation in *Wilcher*, Bradlo did not know he was photographed, and Yungstein took these photographs before asking if Bradlo needed help. *Id.*

Therefore, the Circuit Court erred in granting Respondent's motion for summary judgment ruling, because the undisputed evidence clearly established that Yungstein's behavior was highly offensive to a reasonable person.

C. Bradlo had a reasonable expectation of privacy in a restroom.

There are genuine issues of material fact concerning Bradlo's reasonable expectation of privacy in a restroom, because it is reasonable to expect another not to photograph your allergic reaction and disheveled state inside a restroom. Therefore, the undisputed evidence does not negate this element as a matter of law, and establishes a genuine issue of material fact.

To establish a reasonable expectation of privacy, Petitioner must establish a subjective expectation of privacy, and this expectation was objectively reasonable. *Kemp v. Block*, 607 F. Supp. 1262, 1264 (D. Nev. 1985).

In *Sanders v. ABC*, the court determined that while there may not be absolute privacy in an office, there could still be a reasonable expectation of privacy. *Sanders v. ABC*, 978 P.2d 67, 75–80 (Cal. 1999). The court reasoned that while the plaintiff did not have a complete expectation of privacy, there was a reasonable expectation that the defendant would not secretly record conversations with a camera hidden in a hat. *Id.* The court held that the expectation of privacy does not have to be absolute or complete just reasonable. *Id.* Additionally, in *Hernandez* the court determined that an expectation of privacy depends on whether there is an egregious breach of social norms. *Hernandez*, 211 P.3d at 1072–79 (Cal. 2009).

Like the plaintiff in *Sanders*, Bradlo may not have had an absolute expectation of privacy. However, the undisputed evidence does establish that Bradlo had a subjective expectation of privacy, because it can be inferred that he went to the restroom to prevent a public display of his allergic reaction. R. at 5. Additionally, Bradlo's expectation of privacy is objectively reasonable, because Bradlo was inside a restroom visibly closed from public view, and the Bongle Lens was not widely known to exist. R. at 3–5. Just as the plaintiff in *Sanders* reasonably expected not to be recorded in a workplace, Bradlo had an objectively reasonable expectation that his picture would not be taken inside a restroom. to not have his picture taken inside a restroom.

Likewise, society has deemed restrooms to be private places, because of the context of the nature of their existence. Considering the reasoning in *Hernandez*, Bradlo's expectation of privacy was absolute in a restroom; because the norms of society dictate that taking a picture of another without consent in a restroom is a prima facie breach of another's reasonable expectation of privacy. *Id.* at 5.

While the Respondent may contend that Bradlo was in a public place when the intrusion occurred, and this case should be precluded because of public location, this contention is moot. Courts have found that there can be reasonable expectations of privacy regardless of

location. *Dailey Times Democrat*, 162 So.2d at 477–78. In *Nader*, the court reasoned that a reasonable expectation not to be followed and documented could exist, regardless of the public location. *Nader*, 255 N.E.2d at 771 (N.Y. 1970). The court in *McLain v. Boise*, distinguished this reasoning by stating that observation in a public place if fragrant and unreasonable will be actionable. *McLain v. Boise Cascade Corp.*, 533 P.2d 343, 346–7 (Or. 1975). For that reason, any possible argument of precluding Bradlo’s claim, because of location is unfounded.

Therefore, the Circuit Court erred in granting Respondent’s motion for summary judgment ruling, because the undisputed evidence clearly established that Bradlo had a subjective expectation of privacy in a restroom. Bradlo’s expectation was also objectively reasonable, thus creating a genuine issue of material fact supported by the undisputed evidence.

D. Respondent’s intrusion caused Bradlo’s anguish and suffering.

There are genuine issues of material fact concerning the element of anguish and suffering, because Bradlo’s reputation and personal health have been greatly diminished by Yungstein’s actions. Therefore, the undisputed evidence does not negate this element as a matter of law, and establishes a genuine issue of material fact.

To establish the existence of anguish and suffering the existence of actual injury must be present, such as the inability to sleep, inability to work, or harm to one’s reputation in their respective community. *Dietemann*, 449 F.2d at 246–50. Actual injury must be established to prove the element of anguish and suffering. *Schmidt v. Ameritech Ill.*, 768 N.E.2d 303, 315 (Ill. App. Ct. 2002). An injury requiring medical treatment, or harm to one’s reputation will suffice to establish anguish and suffering. *Id.*

For instance in *Schmidt v. Ameritech*, the court held that the evidence was insufficient to establish anguish and suffering, because the plaintiff lacked actual damages and failed to establish a causal relationship to the intrusion and suffering. *Id.* at 315–17. The court reasoned that recovery was dependent on a showing of an injury requiring medical treatment, or a visible injury to one’s reputation. *Id.* The plaintiff’s loss of job caused emotional distress, and this would have occurred regardless of an intrusion; so the court precluded the claim. *Id.*

Moreover, the court held in *Dietemann* held that later publication of information acquired by an intrusion would be actionable concerning anguish and suffering, regardless of the fact that publication of the intrusion is not an essential element. *Dietemann*, 449 F.2d at 246–50. The court reasoned that allowing later publication to account for actual damages did not infringe upon the *First Amendment* rights of the

intruder. *Dietemann*, 449 F.2d at 246–50; *See also* U.S. Const. amend. I. Additionally, the court reasoned that preventing the plaintiff from actual injury derivative of the publication, specifically emotional distress, would be improper, because this restriction would negate the real injury caused by the intrusion. *Id.*

In the present case, Bradlo has suffered actual injury in the form of anguish and suffering, unlike the plaintiff in *Schmidt*. This intrusion has caused Bradlo to seek counseling for depression and anxiety. R. at 6. In addition, Bradlo has taken anti-depressants to cope with the anguish and suffering caused by Yungstein's intrusion. *Id.* Additionally, this intrusion has caused harm to Bradlo's reputation, through protests and boycotts of his films, as well as loss of reputation as a humanitarian. *Id.*

Unlike the plaintiff in *Schmidt*, Bradlo's anguish and suffering would not have occurred regardless of Yungstein's actions. Without Yungstein's intrusion, Bradlo's allergic reaction would have gone unnoticed, because no one else saw Bradlo in the restroom. *Id.* at 5–6. Regardless of the reasoning in *Dietemann*, establishes that Yungstein's action of publishing Bradlo's picture taken during the intrusion is applicable to Bradlo's anguish and suffering. *Id.* The additional anguish and suffering resulting from having a picture of Bradlo's unkempt appearance inside a restroom, should not be precluded from Bradlo's claim, because it is derivative of Yungstein's intrusion. Therefore, the undisputed facts of this case create genuine issues of material fact concerning Bradlo's anguish and suffering.

Therefore, the Circuit Court erred in granting Respondent's motion for summary judgment ruling, because the undisputed evidence clearly establishes that Yungstein's intrusion caused Bradlo anguish and suffering. Bradlo suffered harm to his reputation and emotional harm; therefore, a jury should have decided the question of actual damages.

E. Respondent acted intentionally in this intrusion upon Bradlo's Seclusion, precluding any affirmative defense.

Yungstein's likely affirmative defense of intruding to protect other guests is a moot point, because the information must be truthful to receive *First Amendment* protection. *Bartnicki v. Vopper*, 532 U.S. 514, 517–35 (2001). In *Bartnicki v. Vopper*, the court held that the *First Amendment* protected the defendants from civil liability for illegally obtained conversations. *Bartnicki*, 532 U.S. at 517–34; *See also* U.S. Const. amend. I. But the court did reason that the protections of the *First Amendment* should still be balanced with the privacy rights of the individual, restraining this protection with the necessity that the information obtained and publicized be truthful. *Id.* The court reasoned

that even if the individual intrudes to protect others, *First Amendment* protections would not apply if the basis for the intrusion were false. *Id.*

The court in *Bartnicki* did reason that when a defendant obtains information illegally there is *prima facie* evidence to support all elements of intrusion claims. *Id.* at 517–34. Many jurisdictions have made Yungstein’s photography of Bradlo in a restroom without consent illegal. Tex. Penal Code Ann. § 21.15(b)(2) (West 2013) (The applicable law makes photography in a restroom without consent and with the intent to invade the victim’s privacy illegal.).

In the current case, Yungstein intruded upon Bradlo’s seclusion before he inquired about Bradlo’s health. R. at 5. The undisputed evidence establishes that Yungstein took photos of Bradlo prior to asking if Bradlo was healthy. *Id.* The resort staff informed Yungstein that an investigation into Bradlo’s health revealed no information of concern. *Id.* at 6. Yungstein’s intrusion was not for the protection of other guests, because Yungstein waited until the resort finished investigating Bradlo and did not find evidence of an infectious disease. *Id.* Yungstein’s actions are established to be intentional, because the Bongle Lens will not take photographs without an intentional verbal or physical command. *Id.* at 4.

Therefore, there is no protection for Yungstein’s actions, because they were blatantly false, and the illegality of his actions allows *prima facie* evidence for Bradlo’s claims. Accordingly, the undisputed evidence negates Yungstein’s affirmative defense rooted in the *First Amendment*.

#### CONCLUSION

The Circuit Court erred in granting Respondent’s motion for summary judgment, because the undisputed evidence establishes genuine issues of material fact concerning Bradlo’s intrusion upon seclusion claim. Yungstein’s photography without Bradlo’s consent establishes an unauthorized intrusion, because the use of the Bongle Lens as a mechanical device pierced Bradlo’s seclusion in the restroom. Yungstein’s intrusion would be highly offensive to a reasonable person, because it forgoes social norms to photograph another in a restroom. Bradlo had a subjective expectation of privacy in the restroom, and this expectation is objectively reasonable. The injuries to Bradlo’s mental health and reputation constitute *prima facie* evidence of actual damages in the form of anguish and suffering. Therefore, this Court must reverse the appellate court’s decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

II. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, BECAUSE THE UNDISPUTED EVIDENCE IS SUFFICIENT TO ESTABLISH GENUINE ISSUES OF MATERIAL FACT FOR ALL ESSENTIAL ELEMENTS OF BRADLO'S FALSE LIGHT CLAIM.

The Circuit Court erred in granting Respondent's motion for summary judgment, because the undisputed evidence establishes genuine issues of material fact concerning Bradlo's invasion of privacy claim for false light. The State of Marshall's statute governing claims for false light follows the *Restatement (Second) of Torts*. This statute permits recovery if an individual gives publicity to a matter placing another in a false light before the public, and the individual acts with actual malice. *Restatement (Second) of Torts* § 652E (1977). Liability is also dependent on *prima facie* evidence of: (1) A reasonable person would find the false light placed on the party to be highly offensive, and (2) the actor knew the information was false or demonstrated a reckless indifference as to the falsity of the publicized matter causing the other party's false light. *Id.*

Additionally, a plaintiff must present *prima facie* evidence for the following elements: (1) the statement must be false, (2) the statement must be highly offensive to a reasonable person, and (3) the statement must be made with knowledge of its falsity or with a reckless disregard of the truth. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 250–51 (1974). The undisputed evidence establishes the falsity and publicity of Yungstein's false light portrayed through social media, because Bradlo did not have an infectious disease. Yungstein's posts stating Bradlo had an infectious and deadly disease would be highly offensive to a reasonable person. Moreover, Yungstein's disregard for the resort's inquiry and the context of his actions creates a genuine issue of material fact concerning actual malice. Therefore, the Circuit Court erred in granting Respondent's motion for summary judgment, and the court must remand this case to the Circuit Court to determine in trial the liability of Yungstein. Therefore, this Court must reverse the appellate court's decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

A. Respondent publicized false information alleging Bradlo had an infectious disease.

The Circuit Court correctly found that the undisputed evidence established that the information Yungstein publicized was false. R. at 10. The undisputed evidence also establishes information was publicized, when Yungstein posted the false information to social media sites. *Id.* at 6. However, the lower court's rulings are in question, and this element should be further evaluated for due diligence.



To satisfy the publicity element, the defendant must have communicated the false information to the public or communicated in a way that one would be substantially certain that it would be public knowledge. *Hunter v. The Buckle, Inc.*, 488 F. Supp. 2d 1157, 1179 (D. Kan. 2007). (*citing* Restatement (Second) of Torts § 652D cmt. A (1977)). Publication through media, including newspapers and broadcasts will constitute publicity in a false light claim. *Philbrick v. eNom, Inc.*, 593 F. Supp. 2d 352, 381–82 (D. N.H. 2009).

For example, the court in *Jenkins* held that publishing statements on a website satisfies the publicity requirement because these communications have the ability to reach the public at large. *Jenkins v. Am. Chiropractic Bd. of Nutrition*, 2008 Conn. Super. LEXIS 2059 at \*14–17 (Conn. Super. Ct. 2008). Additionally, in *Staten* the court held the defendant liable for invasion of privacy, because posting pictures and commentary on the internet that placed the plaintiff in a false light, established the publicity element. *Staten v. Steel*, 191 P.3d 778, 793–95 (Or. Ct. App. 2008).

In the present case, Respondent, like the defendant in *Jenkins*, posted misleading pictures of Bradlo and added false commentary to the pictures to his personal and the resort's social media sites. R. at 6. The undisputed evidence establishes that the information was publicized, because resort guests, news media, and other citizens reacted to the posts. *Id.* The undisputed evidence also established that the allegations were false, because a team of medical professions confirms this fact. *Id.* Therefore, there is no question that posting pictures and commentary on social media, Yungstein publicized false information placing that placed Bradlo in a false light.

B. The false light Yungstein placed on Bradlo would be highly offensive to a reasonable person.

There are genuine issues of material fact concerning the highly offensive nature of Yungstein's portrayal of Bradlo, because portraying that another has an infectious disease on social media is *prima facie* evidence of this element. A reasonable person would find the portrayal to be highly offensive. Therefore, the undisputed evidence does not negate this element as a matter of law, and establishes a genuine issue of material fact.

The crux of this element is establishing that a reasonable person would find the false light portrayed on another highly offensive. *Strickler v. NBC*, 167 F. Supp. 68, 69–71 (S.D. Cal. 1958). To survive summary judgment, *prima facie* evidence must exist to support this element. *Id.* *Prima facie* evidence is established contextually through the court's evaluation of the entire portrayal resulting in another being

placed in false light. *Stockalert, Inc. v. Nasdaq Stock Mkt.*, 1998 U.S. Dist. LEXIS 13537, at \*41–44 (S.D.N.Y. Aug. 31, 1998). If the false portrayal could have an offensive meaning, then a jury should evaluate the portrayal by balancing factors including, (1) the degree of the privacy incursion, (2) context of the portrayal, (3) circumstantial evidence, and (4) the privacy expectations of the individual. *Miller v. NBC*, 232 Cal. Rptr. 668, 678–84 (Cal. Ct. App. 1986). Courts objectively evaluate the evidence to preclude portrayals that are only subjectively offensive to a hypersensitive person. *Lougren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 989–92 (Ill. 1989).

In the present case, the undisputed evidence establishes that a jury could find Yungstein's depiction of Bradlo highly offensive, because anyone presented with Yungstein's false portrayal of Bradlo would find it to be highly offensive. R. at 5. Yungstein's portrayal of Bradlo clearly conveyed that Bradlo had an infectious disease and was indifferent to spreading said disease to others. *Id.* This interpretation of Yungstein's portrayal of Bradlo was understood to have a negative context by: (1) the resort employees, (2) other guests at the resort, and (3) others in the community. *Id.* at 5–6.

The undisputed evidence allows a reasonable jury to balance the evidence and conclude that the false portrayal was highly offensive. The incursion on Bradlo's privacy was highly offensive, because it disclosed a picture of him in a sickened state within a restroom. *Id.* at 5. The context of the false portrayal affords itself to being highly offensive, because Yungstein used the internet to post, which is a highly visible platform. *Id.* at 6. Additionally, the false information in this case is highly offensive on its face, because a reasonable person would find the false stigmata of being associated with a deadly disease highly offensive. *Id.* A reasonable person evaluating the circumstantial evidence that Bradlo only had an allergic reaction and not an infectious disease would find this portrayal highly offensive. *Id.* at 5–6. Yungstein's indifference to the resort's report of Bradlo's condition also allows a reasonable person to find this portrayal highly offensive. *Id.* Bradlo also had a high degree of privacy expectation of not being accused of a highly contagious disease or having a photo posted on the internet without his consent. *Id.*

Therefore, the Circuit Court erred in granting Respondent's motion for summary judgment, because the undisputed evidence clearly establishes that a jury could find Yungstein's false portrayal of Bradlo to be highly offensive. Because a reasonable jury could determine that the portrayal was highly offensive, there is a genuine issue of material fact concerning this element.

C. Respondent's intentional indifference or reckless disregard for the truth concerning Bradlo's health satisfies the burden of actual malice.

There are genuine issues of material fact concerning the requirement that Yungstein proceeded with actual malice, because resort officials informed Respondent that Bradlo's health was not an issue of concern. The undisputed evidence establishes that Yungstein met the burden of actual malice by posting on social media in disregard to the truth. Therefore, the undisputed evidence does not negate this element as a matter of law, and establishes a genuine issue of material fact concerning Yungstein's intent.

The State of Marshall has adopted a statute, which follows the *Restatement (Second) of Torts*. Consequently, Bradlo must establish that Respondent had knowledge of or acted in reckless disregard to the false light placed on Bradlo through the publicized material. The majority of courts weigh the *First Amendment* consideration applied through actual malice for false light claims. *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967); *See also* U.S. Const. amend. I.

1. *Yungstein knew the false light placed on Bradlo was fictitious, or alternatively acted with a reckless disregard in his portrayal of Bradlo.*

The standard for whether Yungstein acted reckless is subjective, meaning the Respondent must have considered had serious doubts as to the publicity's truth. *St. Amant v. Thompson*, 390 U.S. 727, 730–31 (1968). Actual malice requires Respondent to have publicized the false information with a high degree of cognizance the information's falsity. *Id.*

For instance, the court in *Cantrell v. Forest City Pub. Co.*, held actual malice to exist, because the defendant knew the information creating a false light was false, or had a reckless disregard to the falsity of the plaintiff's portrayal. *Cantrell*, 419 U.S. at 246–54. In *Cantrell*, a reporter claimed to have interviewed a woman who was not present and made misrepresentations through photographs and comments concerning the financial status of her family. *Id.* The court reasoned that the plaintiff's statements derived from a fictitious interview constituted actual malice through direct knowledge of the falsity. *Id.* Additionally, the court held that the false portrayal of the plaintiff's economic standing constituted actual malice through a reckless disregard to the truth. *Id.*

In the instant case, Yungstein stated that Bradlo was carrying a deadly disease and was intentionally sharing this disease with others, which is like the false statements concerning the reporter's interview in *Cantrell*. Yungstein like the defendant in *Cantrell* publicized known false statements, because the resort informed Yungstein about their inquiry into Bradlo's health, and there was no need to worry.

Like the defendant in *Cantrell*, Yungstein made further misrepresentations that Bradlo was happy to infect others with this disease, which is false. Where the court in *Cantrell* negated the defendant's motion for summary judgment through clear and convincing evidence for the actual malice element, there is similar evidence in this case to support actual malice.

There are genuine issues of material fact present in the undisputed evidence, because the resort informed Yungstein that there was no reason for concern and proceeded to publicize a false representation of Bradlo. Therefore, Yungstein's actions and intent established the element of actual malice.

*2. A negligence standard is applicable because Bradlo's allergic reaction was a private matter.*

While the State of Marshall and other jurisdictions currently use the standard of actual malice for recovery, other courts have reasoned that the absolute application of actual malice to uphold *First Amendment* protection is too broad. *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 753–62 (1985); *See generally* *Gertz v. Welch*, 418 U.S. 323, 330 (1974) (The United States Supreme Court has precluded the blind application of actual malice in similar torts and allowed individual states to apply a base negligence standard.). Where matters are private and not of public interest, courts are increasingly ruling that regardless of whether a plaintiff is a public or private individual a negligence standard is applicable to protect the privacy rights of individuals. *Id.* Therefore, the current case is an opportunity for the State of Marshall to clarify the law, and balance the personal protection of free speech with citizens' rights to reasonable expectations of privacy.

The court in *Greenmoss*, held that regardless of whether an individual is a private or public person actual malice should only apply where the matter is of public concern. *Id.* The court reasoned that public figures are no less deserving of privacy than private figures when the issue is of a private matter. *Id.* The fact that an event has gained media attention does not make it a public matter creating a need for the application of actual malice. *Time, Inc. v. Firestone*, 424 U.S. 448, 453–64 (1976); *see generally* *Wood v. Hustler*, 736 F.2d 1084, 1090 (5th Cir. 1984) (the application of discretion in applying actual malice provides clarity to false light claims). To determine if actual malice is necessary for *First Amendment* protection the issue must first be determined to be public or private concern. *Id.* Court's evaluate the publicized issue's context, content, and form to determine if it is a public matter. *Connick v. Myers*, 461 U.S. 138, 147–48 (1983); *See* U.S. Const. amend. I.

In the present case, Bradlo's allergic reaction to shellfish is a private matter, without Yungstein's publicity of a false portrayal, this incident would have been unknown to anyone outside the restroom. R. at 5–6. While the media did give some attention to Yungstein's false portrayal of Bradlo this does not make his illness a public matter. Id. at 6. Just as the court in *Firestone* reasoned a private divorce is not a public matter, Bradlo's allergic reaction was a private matter, and the law should provide adequate privacy protection. *Id.*

Regardless of whether this Court applies a negligence or actual malice standard, Bradlo has presented genuine issues of material fact concerning the required element of actual malice, which establishes that the lower courts erred in granting Respondent's motion for summary judgment. However, the application of a negligence standard in this case would create stability in the law, promote privacy interests, and still maintain adequate *First Amendment* protections.

#### CONCLUSION

The Circuit Court erred in granting Respondent's motion for summary judgment, because the undisputed evidence establishes genuine issues of material fact concerning Bradlo's false light claim. The falsity and publicity of the information portraying Bradlo in a false light is not in contention in this case. However, the undisputed evidence establishes that the portrayal of Bradlo would be highly offensive to a reasonable man, because any reasonable person would find the false implication of having an infectious and deadly disease highly offensive. There are also genuine issues of material fact concerning Yungstein's intent regardless of whether the court evaluates this element on an actual malice or negligence standard. Therefore, this Court must reverse the appellate court's decision and remand this cause of action to the Circuit Court so a jury can properly decide these claims.

#### III. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, BECAUSE THE UNDISPUTED EVIDENCE SUFFICIENTLY ESTABLISHES GENUINE ISSUES OF MATERIAL FACT FOR ALL ESSENTIAL ELEMENTS OF BRADLO'S EMOTIONAL DISTRESS CLAIM.

The Circuit Court erred in granting Respondent's motion for summary judgment, because the undisputed evidence establishes genuine issues of material fact concerning Bradlo's Intentional Infliction of Emotional Distress claim. The State of Marshall statute governing emotional distress claims emulates the Restatement (Second) of Torts. *See* Restatement (Second) of Torts § 46 (1965). The statute specifically 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.” Marshall Revised Code 138(b).

Bradlo has presented *prima facie* evidence all essential elements of an emotional distress claim including: (1) the actor’s behavior must be truly extreme and outrageous, (2) the actor must intend, or know that there is an elevated likelihood that this conduct will cause severe emotional distress; and (3) the actor’s conduct must cause severe emotional distress. *McGrath v. Fahey*, 533 N.E.2d 806, 808 (Ill. 1986); *Public Finance Corp. v. Davis*, 360 N.E.2d 765, 766–69 (Ill. 1976). Yungstein’s photography in a restroom and posting pictures on social media with a caption alleging Bradlo had an infectious and deadly disease is extreme and outrageous behavior. Yungstein intended for his actions to cause severe emotional distress or at the least knew there was a high probability of causation. Additionally, Respondent’s actions are the cause of Bradlo’s truly severe emotional distress. Therefore, this Court must reverse the appellate court’s decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

A. Yungstein’s photography of Bradlo in a restroom and later publication of pictures with captions alleging that Bradlo had an infectious disease is extreme and outrageous conduct.

There are genuine issues of material fact concerning the element requiring extreme and outrageous conduct, because Yungstein’s invasion of Bradlo’s privacy in a restroom and then publicizing malicious information is outrageous conduct. Therefore, the undisputed evidence does not negate this element as a matter of law, and establishes genuine issues of material fact that a jury should determine.

To determine if the conduct is in fact extreme and outrageous this Court must first evaluate the evidence to determine if a reasonable just could view this conduct to meet the standard. *Schafer v. Hicksville Union Free Sch. Dist.*, 2011 U.S. Dist. LEXIS 35435 at \*43–47 (E.D.N.Y. 2011) (*commenting on* Restatement (Second) of Torts § 46 cmt.d (1965)). A just should then evaluate the evidence presented to determine whether the conduct actually constitutes extreme and outrageous behavior. *Id.* For extreme and outrageous conduct to be tortious, the conduct must be cross all standards of decency, and society must view this conduct as atrocious, and intolerable. *Hudson v. Michael J. O’Connell’s Pain Care Ctr., Inc.*, 822 F. Supp. 2d 84, 98 (D. N.H. 2011).

For instance, the court in *Conniff v. Dodd, Mead & Co.*, held that there was sufficient evidence to overcome a motion for summary judgment, because the publisher’s statements to the press provided *prima facie* evidence of extreme and outrageous behavior. *Conniff v. Dodd*,

*Mead & Co.*, 593 F. Supp. 266, 267–70 (S.D.N.Y. 1984). The court reasoned that the publisher’s statements that the plaintiff’s book was trash sufficiently established genuine issues of material fact for extreme and outrageous behavior. *Id.* The court only determined if the evidence allowed the publishers conduct to be extreme and outrageous, and correctly held that, a jury should decide if the conduct actually established this element. *Id.*

Additionally, the court in *Ponzini v. Monroe County* denied a motion for summary judgment, because there was *prima facie* evidence of extreme and outrageous behavior. The court reasoned that a jury should determine this issue regardless of, “obstacles to such a claim under case law are indeed formidable.” *Ponzini v. Monroe County*, 897 F. Supp. 2d 282, 290–91 (M.D. Penn. 2012). The plaintiff alleged that the defendants failed to provide medical services and acted with indifference to known medical conditions while in confinement. *Id.* The court reasoned that the defendant’s behavior could have been extreme and outrageous, regardless of whether there were difficulties that might preclude a favorable final judgment for the plaintiffs. *Id.* Moreover, in *Sawicka v. Catena*, the court held that the placement of a camera in a restroom to observe employees was extreme and outrageous behavior as a matter of law. *Sawicka v. Catena*, 79 A.D.3d 848, 849–50 (N.Y. App. Div. 2010).

On the contrary, the court in *Hustler Magazine v. Falwell*, held that the defendant’s actions were extreme and outrageous, but such conduct was protected by the *First Amendment*. *Hustler Magazine v. Falwell*, 485 U.S. 46, 47–57 (1988); *See also* U.S. Const. amend. I. The defendant published an ad parody of a religious leader in a pornographic magazine, which negated the public figure’s character causing severe emotional distress. *Id.* at 50–57. The court reasoned that the plaintiff’s conduct was actionable for an emotional distress claim, but the plaintiff’s status as a public figure required the existence of actual malice for recovery. *Id.* Additionally, in *Foy v. Giant Food, Inc.*, the court precluded the plaintiff’s claim of emotional distress because the governing law legally supported the employer’s conduct. *Foy v. Giant Food, Inc.*, 298 F.3d 284, 288–91 (4th Cir. 2002).

In the present case, the actions of Yungstein are far more horrendous weighed against societal norms, than the conduct held to be extreme and outrageous in *Coniff* and *Ponzini*. In *Coniff*, the conduct was negating the worth of a book, where Yungstein posted pictures of Bradlo in a restroom and attached a comment alleging Bradlo had an infectious disease. R. at 6. Where the plaintiff in *Ponzini* barely established *prima facie* evidence for this element, the undisputed evidence establishes that Yungstein took photographs of Bradlo state of duress in a restroom. *Id.* at 5. Yungstein’s conduct is more outrageous, because he

posted these photographs to social media pages alleging Bradlo had an infectious disease. *Id.* at 6. Additionally, the Yungstein's use of a Bangle Lens, to capture images of Bradlo in a restroom is extreme and outrageous conduct as a matter of law, like the recording in *Sawicka*. *Id.* at 5.

While the court precluded the plaintiff's emotional distress claim in *Hustler*, the conduct was still determined to be extreme and outrageous, and is analogous to the present case. Like the defendant in *Hustler*, Yungstein also presented a false portrayal to a widely viewed medium. *Id.* at 6. Where the portrayal in *Hustler* was outrageous, likewise Yungstein's fictitious and denigrating comments as to Bradlo's person establishes extreme and outrageous behavior. *Id.* Additionally, Bradlo's emotional distress claim is not precluded like the claim in *Foy*, because Yungstein's conduct of taking photos of another in a restroom without consent is illegal in many jurisdictions. *See, e.g.* Tex. Penal Code Ann. § 21.15(b)(2) (West 2013) (The applicable law makes unconsented photography in a restroom with the intent to invade the victim's privacy illegal.); *See* Part I.(A)–(D). The criminal nature of Yungstein's actions establishes *prima facie* evidence for this element.

Therefore, the Circuit Court erred in granting Respondent's motion for summary judgment, because the undisputed evidence clearly established that Yungstein's conduct was extreme and outrageous. There is sufficient evidence for this element to be determined in the Circuit Court by a jury.

B. Respondent intended or knew there was a high probability that his actions would cause Bradlo severe emotional distress.

There are genuine issues of material fact concerning Respondent's intent to cause Bradlo severe emotional distress, Yungstein acted in disregard to the resort's findings, and posted comments that were impossibly false. Therefore, the undisputed evidence does not negate this element as a matter of law, and establishes genuine issues of material fact for a jury to determine.

The requisite conduct must be intended, or the actor must be substantially certain that their actions will cause severe emotional distress. *McGrath*, 533 N.E.2d 809–10. Intentional conduct is established when Respondent's actions are conducted with a reckless indifference to the rights of the other party. *Anderson v. Knox*, 297 F.2d 702, 730 (9<sup>th</sup> Cir. 1961). Court's adopting the Restatement (Second) of Torts § 46, will only grant summary judgment when the evidence as a whole overwhelmingly establishes that the intentional acts were not meant to cause emotional distress. *Toles v. Toles*, 45 S.W.3d 252, 260 (Tex. App. 2001). Recovery does not require an overt expression of the intent. *Id.*



For instance, in the court in *Falwell v. Flint*, held that the defendant's actions established the requisite intent, and reasoned that this intent could be inferred from the contextual and circumstantial evidence. *Falwell v. Flint*, 797 F.2D 1270, 1272–78 (4th Cir. 1986), *rev'd on other grounds*, *Hustler Magazine v. Falwell*, 485 U.S. 46, 54–57 (1988). The court held that the defendant desired or a high probability that his actions would cause severe emotional distress, because intent could be inferred from the publication of a parody, which was a drastic contradiction of the plaintiff's character. *Id.* Furthermore, in *Toles v. Toles*, the court held that the defendant's intent was sufficient to survive summary judgment, because contextually were sufficient to establish the required intent and this finding was not contrary to the evidence as a whole. *Toles*, 45 S.W.3d at 260.

In the present case, the undisputed evidence supports Yungstein's intent contextually just as evidence in *Falwell* and *Toles* established intent. First, Yungstein publicly stated his animosity for Bradlo prior his tortuous conduct. R. at 5. Second, Yungstein took a photo in the restroom of Bradlo in a sickened state, which was unnecessary if his only concern was the safety of the resort patrons, because there photographs were not used in his report to the resort. *Id.* at 5–6. Third, the language of the posted comments supports this element, because Yungstein stated, “[T]he great humanitarian is happy to share his experiences and his disease with the rest of the world.” *Id.* at 6. If Yungstein's intent were to warn others, then the inclusion of Bradlo's name would not be necessary. Rather Respondent intended this comment to cause Bradlo severe emotional distress. Fourth, Yungstein posted on the resort's social media page, after posting on Bradlo's social media page, which denotes Yungstein's intent to cause Bradlo server emotional distress. *Id.*

The undisputed evidence does not allow for the overwhelming support negating this element, rather the evidence yields that Yungstein desired or was substantially certain that his actions would cause Bradlo severe mental distress. By evaluating the evidence as a whole, including the context of Yungstein's actions and the circumstantial evidence, this element is established. Bradlo's claim is established. Therefore, there is sufficient evidence for this element to be determined in the Circuit Court by a jury.

C. Respondent's conduct also constitutes Reckless Infliction of Emotional Distress.

In the alternative, the undisputed evidence establishes genuine issues of material fact that Respondent was reckless in causing Bradlo's severe emotional distress. Reckless conduct exists when a person knows or has reason to know of facts, which produce a significant degree of

risk of harm to another, and deliberately proceeds with a conscious indifference to said risk. *Twyman v. Twyman*, 855 S.W.2d 619, 623–25 (Tex. 1993). Severe emotional distress must be the intended consequence or principal risk of the actor’s behavior. *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 66–68 (Tex. 1998).

For instance, the court in *Salamone v. Oak Park Marina*, held that a plaintiff could recover for reckless emotional distress, when a defendant records the plaintiff in a restroom causing severe emotional distress. *Salamone v. Oak Park Marina*, 688 N.Y.S.2d 362, 363 (N.Y. App. Div. 1999). The court reasoned that the plaintiff did not need to be in the recorded videos, but only needed to have severe emotional distress, causally related to the defendant’s actions. *Id.*

In the instant case, Bradlo’s severe emotional distress was the result of Yungstein’s photography. R. at 5–6. Just as the court in *Salamone* held that emotional distress claims were sufficient if the emotional harm causally resulted from a bathroom recording, Bradlo’s emotional distress is rooted in Yungstein’s pictures taken inside a restroom. *Id.* at 5–6.

While Yungstein’s actions were intentional, the evidence at the very least establishes genuine issues of material fact concerning Yungstein’s reckless intent. Therefore, the lower courts erred in holding that Yungstein did not act with the requisite intent for this claim and this Court should remand this case for a jury to decide this issue.

#### D. Respondent’s actions truly caused Bradlo’s severe emotional duress.

There are genuine issues of material fact concerning the causation of Bradlo’s severe emotional distress. Because of Respondent’s actions, Bradlo has directly suffered severe emotional duress that is causally connected to Respondent’s intended actions. Additionally, the Circuit Court found that there was evidence to support this element for survival of a summary judgment motion. R. at 13.

Court’s adopting the Restatement (Second) of Torts § 46 define proximate cause as a natural occurrence resulting in sequence with the actor’s conduct and resulting in the foreseeable consequences of the actor’s conduct through ordinary care. *Skaggs Alpha Beta, Inc. v. Nabhan*, 808 S.W.2d 198 (Tex. App. 1991); *See Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 66 (Tex. 1998) (*Commenting on Restatement (Second) of Torts § 46*). When an individual’s extreme and outrageous conduct has the purpose to cause harm, then mental anguish associated with the intended harm is foreseeable and proximate cause is established. *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 755–57 (Tex. App. 1998).

For instance, the court in *Wilson v. Wilkins*, held that the plaintiff's emotional distress was proximately caused by the defendant's conduct of threatening the plaintiff's property and well-being. *Wilson v. Wilkins*, 25 S.W.2d 428, 428–29 (Ark. 1930). While the defendants' only intended their threats towards the plaintiff to cause the plaintiff to leave his property, emotional distress was still a foreseeable result of their conduct. *Id.* Additionally, court in *Ruiz v. Bertolotti*, held that the use of an intermediary to cause emotional harm did not preclude recovery. *Ruiz v. Bertolotti*, 37 Misc. 2d 1067, 1068–69 (N.Y. Sup. Ct. 1962). The plaintiffs alleged that the defendant, acting through an intermediary, made threats to their safety resulting in emotional distress. *Id.* The defendant was unable to produce evidence disproving the plaintiff's claim as a matter of law, and the court reasoned that the use of an intermediary did not negate proximate causation. *Id.*

On the contrary, the court in *Dempsey v. National Enquirer*, did not find that the plaintiff's alleged facts constituted a claim for emotional distress, because the behavior of the defendant was not extreme and outrageous, which negated proximate cause. *Dempsey v. Nat'l Enquirer*, 702 F. Supp. 927, 928–34 (D. Me. 1988). The court held that a minor misrepresentation published in an article was not outrageous or extreme. *Id.* Therefore, court reasoned that, without extreme conduct, severe emotional distress would be unforeseeable. *Id.* The court held that the lack of foreseeability negated proximate cause, precluding recovery. *Id.*

In the present case, severe emotional duress was a foreseeable result of Respondent's actions, just as emotional harm was foreseeable in *Wilson*. R. at 5–6. When Yungstein posted photos and comments alleging Bradlo had an infectious deadly disease, severe emotional distress was foreseeable, just as threatening someone's safety allowed for the foreseeable result of emotional harm in *Wilson*. *Id.*

Moreover, as an intermediary did not negate the plaintiff's claim in *Ruiz*, the fact that some of Bradlo's emotional harm resulted in others reacting to Yungstein posting on social media sites should not negate proximate cause in Bradlo's the present case. *Id.* Because the negative reactions from others viewing Yungstein's posts is foreseeable. *Id.* at 6. Publicizing that Bradlo was purposefully infecting others with a disease allows for the foreseeable result that individuals would threaten Bradlo's safety and result in emotional distress. *Id.*

In contrast, the present case is unlike *Dempsey* because Yungstein's conduct was extreme and outrageous. See Part III. A. Yungstein's posting that Bradlo had an infectious deadly disease was more than just a minor misrepresentation like the conduct in *Dempsey*. Therefore, with *prima facie* proof of extreme and outrageous behavior, there is also *prima facie* proof that Yungstein's conduct proximately

caused Bradlo's severe emotional distress.

By posting photos with comments, alleging Bradlo had an infectious disease; Yungstein was the proximate cause of Bradlo's emotional duress. Therefore, the undisputed evidence establishes genuine issues of material fact that a jury must decide in the Circuit Court.

E. Bradlo truly suffered severe emotional distress.

There is a genuine issue of material fact concerning the severity of Bradlo's emotional distress. The undisputed evidence establishes that Bradlo needed the care of mental health professionals and medication to treat depression and anxiety, resulting from his severe emotional distress. Additionally, the Circuit Court found that there was evidence to support this element sufficient to survive a summary judgment motion. R. at 13.

The evidence of a case must support the severity of emotional distress factually. *Welsh v. Commonwealth Edison Co.*, 713 N.E.2d 679, 684 (Ill. App. Ct. 1999). Evidence of the emotional duress at the time of the event and duress resulting after the event are sufficient to establish severe emotional harm. *Morgan v. Anthony*, 27 S.W.3d 928, 929–31 (Tex. 2000).

For instance, the court in *Public Finance Corp.*, held that emotional distress standing alone, without factual support would negate recovery. *Public Finance Corp.*, 360, N.E.2d at 767. The court stated, "Although fright, horror, grief, shame, humiliation, worry, etc. may fall within the ambit of the term [emotional distress,] these mental conditions alone are not actionable." *Id.* The court reasoned that severe emotional distress occurs if a reasonable man could not bear the effects of the harm. *Id.* The court also held that the intensity and length of the suffering were sufficient evidence for the measurement of the severity. *Id.*

On the contrary, the court in *Welsh*, precluded the plaintiff's emotional distress claim, because the plaintiffs failed to allege facts that if deemed true would support the severity of their distress. *Welsh*, 713 N.E.2d at 684. The court reasoned that that hospitalization or medical treatment would suffice as evidence of severe emotional distress. *Id.* Rather, the Plaintiffs general pleadings lacked factual evidence to support a claim for severe emotional distress. *Id.*

In the instant case, Plaintiff did not give general allegations of emotional distress; rather Bradlo supported his claim with factual evidence. R. at 6–12. Bradlo stated that he needed the care of a physician for treatment of severe mental distress, and made regular visits for treatment. *Id.* Bradlo also stated that he was on medication prescribed to treat anxiety and depression resulting from his emotional distress.

*Id.* Therefore, Bradlo did plead facts sufficient to support his claim of severe emotional distress.

Therefore, there is *prima facie* evidence of Bradlo's severe emotional distress. While the Circuit Court did find Bradlo's emotional distress to be severe, a jury must decide his claim for emotional distress as a whole. *Id.* at 13.

#### F. Actual Malice precludes the Respondent's affirmative defense

The Respondent correctly asserted that the *First Amendment* applies to emotional distress claims, but these protections are not absolute. Rather courts balance these protections by allowing recovery when actual malice exists. The lower courts erred by not applying actual malice as the standard for recovery, because Yungstein's defense was affirmative in nature.

The court in *Hustler*, correctly reasoned that when that one's speech involving a public figure or public interest results in severe emotional distress there is protection under the *First Amendment*. *Hustler Magazine*, 485 U.S. at 47–57 (1988). However, the court also held that this protection was not absolute, and establishing actual malice allows for recovery, negating any affirmative defense. *Id.* Plaintiff has already established that *prima facie* proof of actual malice exists in the undisputed evidence. See Part II. C.1. Therefore, the respondents bear the burden of establishing as a matter of law that the undisputed evidence does not establish actual malice.

#### CONCLUSION

The Circuit Court erred in granting Respondent's motion for summary judgment, because the undisputed evidence establishes genuine issues of material fact concerning Bradlo's emotional distress claim. The undisputed evidence establishes that Yungstein's conduct was extreme and outrageous, that he acted with the requisite intent, and that his conduct in fact caused Bradlo's severe emotional distress. Yungstein's *First Amendment* protections are limited in this case because actual malice has been established. Therefore, this Court must reverse the appellate court's decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

## CONCLUSION OF THE ARGUMENT

The appellate court erred in affirming the Circuit Court's decision to grant Respondent's motion for summary judgment concerning Bradlo's claim for intrusion upon seclusion. Because the Circuit Court erred in not finding genuine issues of material fact concerning Bradlo's intrusion claim. Yungstein photographed Bradlo in a restroom without consent, while Bradlo was in a state of duress. Bradlo was in a place of seclusion with a reasonable expectation of privacy when the intrusion occurred, and any reasonable person would find Yungstein's conduct highly offensive. In addition, this intrusion caused Bradlo anguish and suffering from this intrusion, specifically in his mental health and reputation. Therefore, this court must reverse the appellate court's decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

Likewise, the appellate court erred in affirming the Circuit Court's decision to grant Respondent's motion for summary judgment concerning Bradlo's claim for false light. Because the Circuit Court erred in not finding genuine issues of material fact concerning Bradlo's false light claim. The undisputed evidence establishes that Yungstein publicized false information, and that this portrayal of having a contagious deadly disease would be offensive to any reasonable person. Yungstein also acted with actual malice, but this court should apply a negligence standard to this case to clarify the law, concerning private issues concerning public and private individuals. Therefore, this court must reverse the appellate court's decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

Furthermore, the appellate court erred in affirming the Circuit Court's decision to grant Respondent's motion for summary judgment concerning Bradlo's claim of Intentional Infliction of Emotional Distress. Because the Circuit Court erred in not finding genuine issues of material fact concerning Bradlo's emotional distress claim. The undisputed evidence establishes that Bradlo's conduct in the restroom and in publicizing Bradlo's picture is extreme and outrageous behavior. Yungstein's behavior supports the notion that he acted intentionally or recklessly to cause Bradlo's emotional distress. Additionally, Yungstein's actions were the actual and proximate cause of Bradlo's severe mental distress. Therefore, this court must reverse the appellate court's decision and remand this cause of action to the Circuit Court where a jury can properly decide these claims.

For the specified reasons Petitioner, Alfred Bradlo, respectfully requests that this Court reverse the First District Court of Appeal's decision and remand this case to the Marbury County Circuit Court to be set for trial.

Dated: September 23, 2013.

Respectfully submitted,

/s/ \_\_\_\_\_  
Counsel for Petitioner  
Alfred Bradlo

#### APPENDIX A

##### U.S. CONST. AMEND. I

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.