
IN THE SUPREME COURT OF THE STATE OF MARSHALL

PHILLIP NEVILSON,)	
Petitioner,)	
)	
v.)	No. 2009-CV-0645
)	
MARSHOOGLE, INC., a Marshoogle)	
Corporation,)	
Respondent.)	

BRIEF ON APPEAL OF PLAINTIFF-APPELLANT PHILLIP NEVILSON

By: Team 4
Attorneys for Petitioner
September 4, 2009

QUESTIONS PRESENTED

- I. Whether the circuit court erred in granting summary judgment on Nevilson's claim of intrusion upon seclusion?
- II. Whether the circuit court erred in granting summary judgment on Nevilson's claim of publicity given to private life?
- III. Whether the circuit court erred in granting summary judgment on Nevilson's claim of tortious interference with business expectancy?

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STATUTES AND CONSTITUTIONAL PROVISIONS

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STANDARD OF REVIEW

“[A]ppellate review of a district court's summary judgment decision is de novo.” *Dillon Real Estate Co. Inc. v. City of Topeka*, 163 P.3d 298 (Kan. 2007); *see also Stachowski v. Sysco Food Services of Baltimore, Inc.*, 937 A.2d 195 (Md. 2007), *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454 (Wash. 2007). An appellate court's review of a grant of summary judgment is limited to the facts presented in the record. *MacGlashing v. Dunlop Equipment Co., Inc.*, 89 F.3d 932 (1st Cir. 1996); *Guillory v. Domtar Industries Inc.*, 95 F.3d 1320 (5th Cir. 1996); *Yanowitz v. L'Oreal USA, Inc.*, 116 P.3d 1123 (Cal. 2005). A grant of summary judgment is affirmed only when there is no genuine issue as to any material fact. *Sutton v. Ward*, 374 S.E.2d 277 (N.C. Ct. App. 1988); *Stroh v. Town of Java*, 463 N.W.2d 923 (S.D. 1990); *Rauch v. Officine Curioni, S.P.A.*, 508 N.W.2d 12 (Wis. Ct. App. 1993). Courts should view the evidence in a light most favorable to the non-moving party. *Martin v. Brevard County Pub. Sch.*, 543 F.3d 1261, 1265 (11th Cir.2008).

STATEMENT OF THE CASE

Statement of the Facts

Marshoogle operates a website which includes “*SportsBlog*,” a blog site consisting of entries posted by users and Marshoogle reporters, and “*MarshMaps*,” an online mapping service. (R. at 4.) *MarshMaps* has a feature called “M.A.P.,” which gives users a 360° panoramic view from the street of the entire surrounding area, along with a zooming feature that allows users to zoom in on a building, object, or person captured by the M.A.P. images. (R. at 4.) The images are captured through the use of “*M.A.P.mobiles*,” cars equipped with nine cameras affixed to a five foot pole mounted on the car’s roof. (R. at 4, Appendix 1.) Originally, images used by *MarshMaps* were not edited in any way. (R. at 4.) However, after numerous complaints regarding M.A.P. images capturing homes, businesses, and individuals, *MarshMaps* implemented automatic blurring technology, which automatically blurs the faces of people captured in M.A.P. images before incorporating such images into the M.A.P. feature. (R. at 4.) Additionally, *MarshMaps* has initiated a process by which users may request to remove from the M.A.P. feature photographs that they find objectionable. (R. at 5.) As M.A.P. gained popularity, users increasingly utilized this feature to search celebrity neighborhoods and “hotspots” in hopes of obtaining images of their favorite celebrities or their homes. (R. at 5.)

Phillip Nevilson (“Nevilson”) grew up an underprivileged youth in low income Lower Marshall Township. (R. at 5.) In 1998, at the age of thirteen, Nevilson was discovered by Coach Timothy Knight (“Coach Tim”), the director of the prestigious Marshall Athletic Club, which has produced some of the most successful swimmers and divers in the state. (R. at 5.) Coach Tim agreed to train Nevilson for free, and Nevilson went on to great success, placing in first or second in every competition that he participated in and winning three gold medals in the 2007

Junior World Diving Championships. (R. at 5.) After this, Nevilson spent the majority of his time training for the 2008 Olympic Trials, an event that would determine whether he would participate in the 2010 Olympics. (R. at 5.) The sports world viewed Nevilson as the “next big diving star” and a top contender for the 2010 Olympics. (R. at 5.) Marshoogle *SportsBlog* predicted that Nevilson “would trounce the competition at the trials and be the first to qualify for the 2010 US Olympic Diving Team.” (R. at 5.)

Nevilson was featured in anti-drug campaigns and was widely regarded as a role model for his success in overcoming the obstacles associated with growing up in poverty in Lower Marshall Township. (R. at 6.) Marshoogle *SportsBlog* reporters expressed skepticism about Nevilson’s role model status, calling it “exaggerated.” (R. at 6.) Nevilson received income from several endorsement contracts with local businesses, negotiated a three million dollar endorsement deal with Sunshine AthleticWear (“Sunshine”) contingent upon his qualifying for the 2010 Olympic Team, and received expressions of interest from several other major corporations wishing to use Nevilson as a spokesperson. (R. at 6.)

In October 2007, Nevilson moved to a house on the border of the affluent Emerald Pools neighborhood. (R. at 6.) Nevilson kept a low profile, focusing primarily on training and rarely socializing or going out in public. (R. at 6.) His home was surrounded by a six foot fence and signs reading, “no trespass,” and “private property.” (R. at 6.) On the night of April 15, 2008, Nevilson was secluded in the second story of his home, watching a basketball game, smoking tobacco from his hookah, and enjoying a glass of wine. (R. at 6-7.) Meanwhile, unbeknownst to Nevilson, an *M.A.P.mobile* passed his home and snapped several photographs, one of which depicted Nevilson in his living room as he was inhaling from the hookah (the “photograph”). (R. at 6-7.) Shortly thereafter, Marshoogle loaded the image into the M.A.P. website and, despite

Marshoogle's privacy policy, which included automatic blurring technology, the image of Nevilson's face was not blurred. (R. at 7.) On April 21, 2008, a reporter posted a link to the image of Nevilson on *SportsBlog* along with a post which read, "If you want to see what Marshall's own 'three million dollar man' does in his spare time, go on M.A.P." (R. at 7.) After this entry was posted, there was a "huge increase in traffic to the M.A.P. feature and *SportsBlog*" and as a result of the photograph, Nevilson was the subject of widespread negative media attention. (R. at 7.) On April 30, 2008, promptly upon learning of the image's existence, Nevilson contacted Marshoogle and requested the immediate removal of the images. Despite this request, the image was not removed until May 7, 2008, an entire week later. (R. at 7.) Rumors ensued regarding Nevilson's alleged drug use and several news outlets published "digitally enhanced" versions of the pictures and stories relating to the alleged drug use. (R. at 7.)

Following these events, members of the public expressed disappointment with, and even anger toward, Nevilson. (R. at 8.) The Marshall Diving Association launched a formal investigation of Nevilson's alleged drug use, and Marshall City Against Drugs ("MCAD") removed all references to him from its anti-drug campaign. (R. at 8.) Paparazzi began to convene outside Nevilson's home and follow him everywhere he went. (R. at 8.) Nevilson expended significant time and effort issuing press releases and making local television and radio appearances to explain the photograph and dispel rumors. (R. at 8.) In the wake of this publicity, Nevilson performed below expectations in the Olympic Trials, finishing third and failing to secure a position on the 2010 Olympic Team, thereby failing to secure the endorsement deal with Sunshine AthleticWear. (R. at 8.) Nevilson attributed his poor performance to the intense media coverage surrounding his alleged drug use and his attempts to clear his name, all

of which stemmed from the M.A.P. photograph. (R. at 8.) In addition, Nevilson's other prospective endorsement deals disappeared as well. (R. at 8.)

Procedural History

In August of 2008, Petitioner brought suit against Respondent alleging defamation, appropriation of name and likeness, intrusion upon seclusion, publicity given to private life, and tortious interference with business expectancy. (R. at 8.) The circuit court granted Respondent's motion to dismiss for failure to state a claim upon which relief may be granted, pursuant to Marshall R. Civ. P. 12(b)(6), with respect to the counts for defamation and appropriation of name and likeness. (R. at 8.) After the completion of discovery, Respondent moved for summary judgment on the three remaining counts, and the circuit court granted the motion on all three counts. (R. at 8.) Petitioner then appealed the circuit court's grant of summary judgment, and the Marshall Court of Appeals affirmed the circuit court's decision. (R. at 8.) Petitioner brings the instant appeal from the court of appeals decision to affirm the circuit court's grant of summary judgment in favor of Respondent.

SUMMARY OF THE ARGUMENT

One who intentionally intrudes upon the seclusion of another is subject to liability if the intrusion would be highly offensive to a reasonable person. It is the intrusion itself that subjects the defendant to liability. Publication, while not required, only serves to increase the extent of the intrusion. A plaintiff is entitled to a reasonable expectation of privacy when secluded in his home at night. Not only is such an expectation reasonable, the United States Supreme Court has consistently held that there is no place more private than one's home.

One is liable for public disclosure of private facts when he gives publicity to a matter regarding the private life of another, which would be highly offensive to a reasonable person, and is not of legitimate public concern. An individual's legal activity, in the privacy of his home at night, is a matter regarding his private life. Posting a photograph of such conduct on a publicly accessible internet website constitutes giving publicity to this matter. Though an individual may engage in some activity which is of legitimate public concern, this does not render all information regarding that individual information of legitimate public concern.

To allege a reasonable expectancy of entering into a valid business relationship, a plaintiff need only demonstrate a probable future business relationship. Such a relationship exists where a public statement is made confirming the existence of a prospective relationship and its terms. A plaintiff need not allege that the defendant possessed perfect or precise knowledge of the deal and its terms. However, the element is satisfied where a defendant knows of a potential deal's existence and its terms. Motive and purpose are not necessary to prove a defendant's intent. An action is intentional when the defendant intended to bring about the interference or knew that the interference was substantially certain to occur as a result of its conduct. Impropriety is not required, and even if it is, Respondent's conduct was improper.

ARGUMENT

I. MARSHOOGLE’S ACT OF PHOTOGRAPHING NEVILSON WITHOUT HIS CONSENT OR KNOWLEDGE, WITH HIGHLY TECHNICAL EQUIPMENT, IN THE SECOND STORY LIVING ROOM OF HIS HOME, AT NIGHT, CONSTITUTED AN INTRUSION UPON NEVILSON’S SECLUSION.

Marshall courts have consistently applied Restatement (Second) of Torts §652B to actions involving intrusion upon seclusion. (R. at 9.) Section 652B states that, “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” Restatement (Second) of Torts § 652B (1977). Comment b to the Restatement states that an invasion may “be by the *use of the defendant’s senses, with or without mechanical aids, to oversee* or overhear the *plaintiff’s private affairs*, as by *looking into his upstairs windows* with binoculars or tapping his telephone wires.” Restatement (Second) of Torts § 652B cmt. b (1977) (emphasis added).

A. The Circuit Court Erred in Finding that the Intrusion Lie in the Photograph’s Publication Rather than the Taking of the Photograph Itself.

The Restatement does not require that plaintiffs prove any harm other than the deprivation of his seclusion. *See* Restatement (Second) of Torts § 652H cmt. a (1977). Rather, Comment a simply states that, “one who suffers an intrusion upon his solitude or seclusion, under § 652B, may recover damages for the deprivation of his seclusion.” Restatement (Second) of Torts § 652H cmt. a (1977). Comment b to the Restatement explains that, “[t]he intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the photograph” Restatement (Second) of Torts § 652B cmt. b (1977). A plain reading of the Restatement reveals that comment b is intended to *lessen* the burden on plaintiffs. It says that publication is not required, but in no way implies that publication is fatal to a claim.

However, Marshoogle argues, and the circuit court agreed, that the harm in this case stemmed from the publication of the images, rather than the intrusion itself, and that in such a case, a claim for intrusion upon seclusion must fail. In supporting this argument, Marshoogle relied upon the Seventh Circuit case, *Thomas v. Pearl*, 998 F.2d 447, 452 (7th Cir. 1993), which held that, “[n]o claim for intrusion upon seclusion of another, under Illinois law, results if harm flows from publication rather than intrusion.” Marshoogle argues that the harm in this case was caused by the subsequent publication of the picture, rather than the taking of the picture itself. However, this argument confuses the issue of the degree of the harm with the issue of the existence of an intrusion. If the content of the image is offensive, then regardless of the image’s publication, the taking of the photograph itself is offensive and must constitute the intrusion. Any subsequent publication of the photograph only operates to magnify the degree of the harm.

The filming of a person alone, regardless of publication, may constitute an invasion of privacy. See *Smith v. Fairman*, 98 F.R.D. 445, 450 (C.D. Ill. 1982). The court in *Fairman* stated that, “[e]ven if those portions of the film containing the plaintiff’s image were removed in the editing process, *the initial filming of the plaintiff would nonetheless constitute a violation of the plaintiff’s legitimate expectation of privacy.*” *Id.* (emphasis added).

Likewise, it is well established that an intrusion upon seclusion may take the form of peering into the windows of a private home. See *Lovgren v. Citizens First Nat’l Bank*, 534 N.E.2d 987, 989 (Ill. 1989); W. Prosser & W. Keeton, *Torts* § 117, at 854-56 (5th ed. 1984); Restatement (Second) of Torts § 652B cmt. *b.* (1977). “When a *picture is taken of a plaintiff while he is in the privacy of his home*, or in a hospital bed, *the taking of the picture may be considered an intrusion* into the plaintiff’s privacy *just as . . . looking into his upstairs windows with binoculars [is] considered an invasion of his privacy.*” Phillip E. Hassman, *Taking*

unauthorized photographs as invasion of privacy, 86 A.L.R.3d 374 (emphasis added). To argue that peering into one's window can constitute an intrusion upon a person's seclusion, but that when a photograph of that image is taken and published, causing further harm, liability for intrusion vanishes, is counter-intuitive and creates an absurd result. Marshoogle manipulates both the holding in *Pearl* and the Restatement to fabricate an argument that, rather than amplifying the harm, the publication of the images instead negates any claim for intrusion upon seclusion. Marshoogle thus contends that the harm stems only from the publication and not the taking of the photograph, failing to recognize that the harm in both instances is one in the same and that the distinction is simply one of degree. This tenuous argument is fatally flawed.

In *Pearl*, the plaintiff was a voluntary participant in a telephone conversation which was later played for other individuals. 998 F.2d at 452. Rather than holding that publication of information gained from an *intrusion* negates any claim for intrusion upon seclusion, the *Pearl* court held that when *there is no intrusion in the first instance*, such as when someone voluntarily engages in a conversation, a person does not intrude upon another's seclusion by publicizing information gained through that voluntary conversation. *Id.* Here, Marshoogle photographed an unsuspecting Nevilson while he was in the solitude of his home at night; thus, unlike in *Pearl*, the information in this case was the product of an intrusion.

The law simply does not support Marshoogle's position that the publication of information gained through an intrusion upon another's seclusion supersedes the intrusion itself as the sole source of harm. Thus, a claim for intrusion upon seclusion must fail where publication has taken place. Such a rule would be injurious to, rather than protective of, the individual right of privacy, and would relieve the most egregious intruders from liability, effectively rewarding them for the egregious nature and extent of their intrusion.

B. Nevilson had a Reasonable Expectation of Privacy While Secluded in His Home at Night.

The Court of Appeals incorrectly concluded that merely because Nevilson may have been visible through his second story window, no expectation of privacy existed, and therefore, Nevilson was not secluded and no intrusion could have occurred. An intrusion upon seclusion “is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.” *Shulman v. Group W. Productions, Inc.*, 955 P.2d 469, 490 (Cal. 1998). While the court below was correct in noting that a reasonable expectation of privacy is necessary, it was incorrect in extending case law involving activity that took place in public and was open to the public eye to apply to Nevilson’s activity in the second story of his home. Commenting on expectation of privacy, the California Court of Appeals stated:

“Privacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. There are degrees and nuances to societal recognition of our expectations of privacy: *the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.* Although the intrusion tort is often defined in terms of ‘seclusion,’ the seclusion referred to need not be absolute. ‘Like “privacy,” the concept of “seclusion” is relative. *The mere fact that a person can be seen by someone does not automatically mean that he or she can be legally forced to be subject to being seen by everyone.*’” In order for an expectation to be reasonable in the intrusion context, it *is not necessary that there be absolute or complete privacy.*

Sanchez-Scott v. Anza Pharmaceuticals, 103 Cal. Rptr. 2d 410, 416 (Cal. App. 2001) (emphasis added) (internal citations omitted).

The cases cited by Marshoogle, and relied upon by the court below, deal with activity and affairs that were not private. For instance in *Schiller v. Mitchell*, 828 N.E.2d 323, 329 (Ill. App. 2005), the court stated that the facts of that case were different from cases involving restrooms and doctors offices, which were inherently private places, explaining that in that case, “the camera was aimed at plaintiffs’ garage, driveway, side-door area, and backyard.” The court went

on to say that the plaintiffs in that case “[did] not explain why a passerby on the street or a roofer or a tree trimmer could not see what the camera saw[.]” *Schiller*, 828 N.E.2d at 329. However, the lower court missed a very important detail from that case. In *Schiller*, the camera captured only images of the outside of the plaintiffs’ home. *Id.* In this case, unlike in *Schiller*, the photograph constituted an intrusion upon seclusion, capturing pictures of Nevilson while inside “the most private place of all, his home.” *Lawrence v. Texas*, 539 U.S. 538, 567 (2003).

The home has been explicitly recognized as “the most private of places,” by the United States Supreme Court. *Lawrence*, 539 U.S. at 567. Likewise, in discussing what it called, “the unique importance of the home,” the Supreme Court, in *Minnesota v. Carter*, 525 U.S. 83, 106 (1998), called the home, “the most essential bastion of privacy recognized by the law.” In 1979, the Supreme Court explained that, “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.” *Payton v. New York*, 445 U.S. 573, 601 (1979).

Therefore, there is no place in which a person should be entitled to a greater expectation of privacy than in his home. The circuit court’s conclusion that any expectation of privacy that Nevilson had in his home was unreasonable because of the mere chance that a passenger on a double-decker tour bus, passing at this exact moment, may have been able to glance in the window at precisely the instant when Nevilson was inhaling, and somehow zoom in close enough to view or capture an image of Nevilson’s face, is simply unsupported. While Nevilson may have been sitting near a window, he was sitting near a window during the evening, on the second floor of the “the most essential bastion of privacy recognized by the law,” his home, which was surrounded by a six foot fence, and several signs indicating his intention to be free from such invasion.

In any event, courts have recognized that, “[i]n order for an expectation to be reasonable in the intrusion context, it is not necessary that there be absolute or complete privacy.” *Sanchez-Scott*, 103 Cal. Rptr. 2d at 416; *see also Remsburg v. Docusearch, Inc.*, 816 A.2d 1001, 1008 (N.H. 2003) (explaining that one may have a reasonable expectation of privacy with respect to a social security number, even though it may be available in several contexts). The court in *Sanchez-Scott* went on to explain that, “[t]he mere fact that a person can be seen by *someone* does not automatically mean that he or she can be legally forced to be subject to being seen by *everyone*.” *Sanchez-Scott*, 103 Cal. Rptr. 2d at 416 (emphasis added). Put differently, “the mere fact a person can be seen by others does not mean that person cannot legally be secluded.” *Huskey v. NBC, Inc.*, 632 F. Supp. 1282, 1287 (N.D. Ill. 1986). Therefore, “the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law.” *Sanchez-Scott*, 103 Cal. Rptr. 2d at 416. Thus, a material question of facts exists as to whether Nevilson had a reasonable expectation of privacy and summary judgment was inappropriate.

C. Marshoogle’s Intrusion was Intentional Because Marshoogle Knew or Should Have Known that, Under the Circumstances, Photographing Nevilson’s Home at Night, With Highly Technical Equipment, Would Result in an Intrusion.

Marshoogle’s act of taking the photograph which depicted Nevilson in his home was intentional. Discussing the element of intent in the context of intrusion upon seclusion, the South Carolina Court of Appeals explained that, “[i]ntent is proved by showing that the actor acted willingly (volition) and that he *knew or should have known* the result would follow from his act. Neither deliberation nor purpose nor motive nor malice are necessary elements of intent.” *Snakenberg v. Hartford Casualty Ins. Co.*, 383 S.E.2d 2, 7 (S.C. App. 1989) (emphasis added). It has also been said that, “[i]n determining the criterion for liability [for intrusion upon

seclusion] the courts have looked to what was done rather than the precise motives which accompanied the acts.” *Love v. So. Bell Tel. & Telegraph Co.*, 263 So. 2d 460, 466 (La. Ct. App. 1972).

The facts strongly indicate that Marshoogle’s intent was to photograph Nevilson inside of his home. For instance, despite M.A.P.’s *automatic* blurring technology, Nevilson’s face was not blurred. It follows logically that Marshoogle must have been operating with disabled automatic blurring technology, despite the requests of many offended users, in order to take a clear picture of Nevilson’s face. Also telling is the fact that Marshoogle chose to take this picture at night, a time when the house was probably not well lit to be photographed. At night, the house was most likely bright inside and dark outside, and better lit for photographing individuals inside of the home than photographing the house itself.

Marshoogle openly intended the act of taking a photograph of Nevilson’s home, with nine cameras that extended five feet above the roof of a car, with the capability to zoom in on individuals captured in the photograph, and without blurring technology. Marshoogle also intended to take this picture at night, a time when it was more likely that the photograph would depict individuals inside the home. One taking a photograph under these circumstances knows, or at least should know, that this act is likely to result in an image of an individual inside of the home. Notwithstanding the strong evidence that Marshoogle intended such a result, and even assuming it did not intend that result or know of its likelihood, surely it *should have known* of the likelihood that such a result would occur. Thus, there exists at least a genuine issue of material fact regarding Marshoogle’s intent.

D. Marshoogle’s Conduct Would be Highly Offensive to a Reasonable Person.

To be liable for intrusion upon seclusion, the defendant’s intrusion must be such that it “would be highly offensive to a reasonable person.” Restatement (Second) of Torts §652B (1977). To determine whether an intrusion would be offensive to a reasonable person, courts look to: “(1) the degree of intrusion; (2) the context, conduct and circumstances surrounding the intrusion; (3) the intruder's motives and objectives; (4) the setting into which the intrusion occurs; and (5) the expectations of those whose privacy is invaded.” *Sanchez-Scott*, 103 Cal. Rptr. 2d at 377, citing *Hill v. NCAA*, 865 P.2d 633, 648 (Cal. 1994); *Shulman*, 955 P.2d at 493-494; *Miller v. NBC*, 187 Cal. App. 3d 1463, 1483-1484 (1986); see also *Wolfson v. Lewis*, 924 F. Supp. 1413, 1421 (E.D. Pa. 1996), *Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298, 302-303 (D. Del. 1999), *Medical Lab. Mgmt. Consultants v. ABC, Inc.*, 30 F. Supp. 2d 1182, 1189-1190 (D. Ariz. 1998).

1. The Degree of the Intrusion

There are several facts that make the degree of the intrusion weigh heavily in Nevilson’s favor. First, it bears repeating that this was an intrusion during the night into Nevilson’s home, a place that constitutes “the most essential bastion of privacy recognized by the law.” *Carter*, 525 U.S. at 106. Additionally, Marshoogle’s conduct was far more intrusive than necessary for any legitimate purpose that it may assert. Finally, Nevilson’s activity was not conducted in public, nor was it, in any real sense, open to the public eye. While it may have been open to the eye of nine automatic cameras, elevated five feet above the roof of a car, programmed to take rapid and continuous pictures, and with the capability to zoom in on a person’s face, it was certainly not activity that was open to the naked eye of any person on the public thoroughfares.

In determining the degree of the intrusion and specifically whether or not such an intrusion is unreasonable, courts balance the social need for the defendant's conduct against the individual's right of privacy. *N.O.C., Inc. v. Schaefer*, 484 A.2d 729, 733 (N.J. Super. Ct. Law Div. 1984), citing *Parish National Bank v. Lane*, 397 So. 2d 1282 (La. 1981). The "detective cases" are especially helpful in understanding this distinction. *Id.* These cases deal with insurance companies that hired private detectives to observe claimants. In several of these cases, although the insurance company has a legitimate need to observe the claimant, courts have found that the detectives have gone too far, committing intrusions that constitute invasions of privacy. *See Souder v. Pendleton Detectives, Inc.*, 88 So. 2d 716 (La. Ct. App. 1956) (conduct including using binoculars, taking pictures, trespassing on plaintiff's property, and watching him in his home by peeking through his windows constituted an invasion of privacy), *Pinkerton Nat'l Detective Agency, Inc. v. Stevens*, 132 S.E.2d 119 (Ga. Ct. App. 1963) (conduct including peeping in windows, eavesdropping, following, and coming to the person's door disguised as salesmen constituted invasion of privacy).

Unlike the "detective cases," Marshoogle argues not that it had an interest in surveillance of Nevilson, but that it had an interest in obtaining photographs of his home for its online navigation site, *MarshMaps*. Marshoogle had *no legitimate interest* in surveillance of Nevilson. While there may have been an interest in photographing the home for navigation and real estate purposes, there was absolutely no need for that photograph to depict Nevilson's un-blurred face while he was inside his home, and to afford the ability to zoom in closely on that image of him. Furthermore, there was no need for the photograph to be taken at night, when the chance of photographing an individual inside the home was far greater than the chance of taking a quality photograph of the home itself. The *Schaeffer* court explained that a defendant commits an

unreasonable intrusion by, “set[ting] out a course of conduct beyond what would be sufficient for the purpose intended . . . , which would disturb an ordinary person without hypersensitive reactions.” *Schaefer*, 484 A.2d at 733, *quoting Pinkerton*, 132 S.E.2d at 125. Marshoogle has done exactly that: it has engaged in far more intrusive activity than is necessary to achieve the legitimate goal of obtaining photographs of homes and businesses for a navigation website. Additionally, taking pictures of individuals in the privacy of their home at night would offend a person without hypersensitive reactions, especially considering that the pictures are intended for use on the internet.

Marshoogle argues that Nevilson’s conduct was not private because it would have been visible to any passenger on a tour bus or pedestrian on the street. *See* Restatement (Second) of Torts §652B cmt. c (1977) (explaining that there is no liability where appearance is public and open to the public eye). However, there is no evidence that any pedestrian or passenger on a tour bus would be able to see what the photograph captured. As mentioned earlier, the camera that took the photograph was equipped with zooming technology and programmed to rapidly and continuously take photographs. In order for someone on the public thoroughfares to observe what the photograph captured, they would have had to look into Nevilson’s window from a considerable distance and zoom in on Nevilson himself at the exact moment when he inhaled from the hookah. Conduct such as this is highly intrusive, and is the exact type of conduct that would constitute an invasion of privacy according to the “detective cases.” The only distinction is that in those cases, the detectives had a legitimate interest in observing those individuals, an important element that neither Marshoogle, nor a civilian on a public thoroughfare may boast. Therefore, Nevilson’s conduct was private, and no intrusion was warranted by any

countervailing social purpose so significant as to justify the eradication or suspension of Nevilson's right to privacy in his home.

2. The Context, Conduct and Circumstances Surrounding the Intrusion

It is important to note, once again, that Nevilson was in his home at night when the intrusion took place. Additionally, Nevilson actively sought to maintain his seclusion by erecting a six foot privacy fence around his lot and posting "no trespass" and "private property" signs. Under these circumstances, conduct as bizarre and intrusive as driving down Nevilson's street at night in a vehicle equipped with nine cameras attached to a five foot pole on the roof with zooming capability, aimed into Nevilson's home, and programmed to rapidly take photographs, must be considered highly offensive to a reasonable person.

The highly offensive nature of Marshoogle's actions becomes even more evident considering the context of the situation. First, the only legitimate purpose for such activity is to capture pictures of homes for *MarshMaps*. However, as discussed previously, this was done at night, when the lighting probably made it difficult to take a quality photograph of the house, but most likely favorable to photographing individuals inside of a house. Also, Nevilson's face was visible in the photograph even though automatic blurring technology had been implemented to avoid this very scenario and in response to numerous complaints from individuals depicted in *MarshMaps* images. Another important contextual element is the timing of the incident. Marshoogle photographed Nevilson's house on April 15, 2008, almost one year after *MarshMaps* was launched, but only three weeks after the announcement of Nevilson's three million dollar endorsement deal, and less than three months from the Olympic Trials. While it is possible that such a coincidence may have occurred, a much more plausible explanation, especially when taken in connection with the surrounding circumstances and the extent of

Marshoogle's conduct, is that Marshoogle intended to obtain a photograph of Nevilson, and succeeded in doing so.

3. Intruder's Motives and Objectives

Marshoogle operates several websites including *SportsBlog*, a site that, prior to the taking of this photograph, included content questioning Nevilson's role model status, setting the stage for the events to come and evidencing Marshoogle's media interest in Nevilson. Furthermore, *MarshMaps* gained popularity and was increasingly used to view images of celebrity houses and celebrity "hotspots," and even to obtain images of user's favorite celebrities captured by *M.A.P.mobiles*. Because the majority of Marshoogle's revenue comes from advertising, Marshoogle has a financial interest in bringing more users to the website and catering to the interests of those users. In addition to posting images of Nevilson on *MarshMaps*, Marshoogle posted a link on *SportsBlog* which directed users to the zoomed and un-blurred image of Nevilson. Accompanying the link was an entry reading, "[i]f you want to see what Marshall's own 'three million dollar man' does in his spare time, go on M.A.P." (R. at 7.)

These images were not used for navigation or real estate purposes, but rather as a tool to pry into Nevilson's personal life, something that *MarshMaps* had been used for at an increasing rate, and something that resulted in increased traffic to the site, thereby increasing Marshoogle's revenue. After Marshoogle placed the image of Nevilson on *MarshMaps*, the site did in fact receive a "huge increase" in traffic, a result it most likely intended. Marshoogle had a strong incentive to use *MarshMaps* in a manner that was demanded by the public in order to increase traffic to the site, and thereby increase revenue. Aware that users increasingly used the site as an instrument for viewing images of celebrities, Marshoogle catered to this use by obtaining such a photograph and posting a link to it on *SportsBlog*.

4. The Setting into Which the Intrusion Occurred

As discussed *supra*, there can be no more private setting than one's home. This is not a case where Nevilson was in a public place, or even a semi-public place, he was in the privacy of his own home, "the most essential bastion of privacy recognized by the law." *Minnesota v. Carter*, 525 U.S. 83, 106 (1998). This factor weighs heavily in Nevilson's favor.

5. The Expectations of Those Invaded

Again, Nevilson had a sound and justifiable expectation of privacy while he was secluded on the second floor of his home at night. The fact that he was in his home entitles him to a very strong expectation of privacy, and considering that this took place during the night, and that his property had signs and a large fence indicating that he intended to be secluded, should entitle him to expect an even greater degree of privacy.

Each and every factor leads to the conclusion that Marshoogle's conduct would be highly offensive to a reasonable person in Nevilson's position. Therefore, a genuine issue of material fact exists as to whether this conduct would be highly offensive to a reasonable person, and summary judgment was improper.

II. MARSHOOGLE'S ACT OF POSTING A PHOTOGRAPH OF NEVILSON ON ITS INTERNET MAPPING WEBSITE AND LINKING TO THAT PICTURE FROM ITS *SPORTSBLOG* WEBSITE CONSTITUTES A PUBLIC DISCLOSURE OF PRIVATE FACTS.

The statute governing claims for invasion of privacy based on public disclosure of private facts follows the second Restatement, and states:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

Marshall Revised Code 726(b). Thus, the tort consists of four elements: (1) publicity given, (2) to a matter concerning the private life of another, (3) of a kind that would be highly offensive to a reasonable person, and (4) is not of legitimate concern to the public. *See Id.*

A. Marshoogle’s Act of Posting the Photograph of Nevilson on the M.A.P. Website, and Posting an Entry With a Link to the Photograph on the SportsBlog Website Satisfies the Publicity Element.

The first element of the tort is publicity, and Marshoogle conceded that both the posting of the photograph in question on M.A.P. and the subsequent posting of a link to that photograph on *SportsBlog* constituted publication. (R. at 11.) Furthermore, in 2009, the Minnesota Court of Appeals was confronted with precisely this issue and stated, “[w]e hold that the publicity element of an invasion-of-privacy claim is satisfied when private information is posted on a publicly accessible Internet website.” *Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 44 (Minn. Ct. App. 2009). In *Yath*, the court said that the temporary posting of private information to a public website was enough to satisfy the publicity element, “***and the number of actual viewers was irrelevant.***” *Id.* (emphasis added).

The photograph in this case was not only posted on the M.A.P. website, but a link was posted on *Sportsblog* that specifically directed users to the M.A.P. photograph of Nevilson, for the purpose of viewing Nevilson’s private life. This purpose was clearly evidenced by the entry which read, “[i]f you want to see what Marshall’s own ‘three million dollar man’ does ***in his spare time***, go on M.A.P.” (R. at 7.) (emphasis added). Because the photograph constitutes private information, as illustrated *infra*, Marshoogle’s act of posting the pictures on M.A.P. and linking to them on *Sportsblog* satisfies the “publicity” element. As in *Yath*, this act constitutes posting private information on a publicly accessible Internet website, thereby satisfying the publicity element. *See Yath*, 767 N.W.2d at 44.

Even in the absence of a bright line rule regarding internet publicity, it can hardly be argued that the publication of the photograph in this case does not constitute publicity. Comment a to the Restatement clarifies that publicity is distinct from “publication” as that term is used in defamation jurisprudence, explaining that while “publication” includes any communication to a third party, “[p]ublicity,” on the other hand, means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.” Restatement (Second) of Torts § 652D cmt. a (1977).

Thus, although publication does not establish publicity *per se*, the photograph “published” in this case was certainly communicated to the public at large. A *SportsBlog* posting contained a link to the photograph and an entry that read, “[i]f you want to see what Marshall’s own ‘three million dollar man’ does in his spare time, go on M.A.P. (R. at 7.) Following this post, there was a “huge increase” in traffic to M.A.P. *Id.* It is also not disputed that Nevilson was the victim of widespread negative attention, resulting directly from Marhoogle’s acts of taking the photograph, subsequently posting that photograph to M.A.P., and linking to that photograph from *SportsBlog*. These acts resulted in further publication of the photograph by several tabloids and media outlets that printed stories about Nevilson using Marhoogle’s M.A.P. photograph. Any one of these acts individually – and certainly all of the them when taken together – constitutes, at the very least, “communication to so many persons that the matter must be regarded as substantially certain to become one of public knowledge[,]” if not communication to the public at large. Restatement (Second) of Torts § 652D cmt. a (1977).

B. Nevilson’s Engagement in Legal Conduct While on the Second Floor of His Home, At Night, While His Home Was Surrounded by a Six Foot Fence and Signs Reading, “No Trespass” and “Private Property,” Constitutes a Matter Concerning His Private Life.

Marshoogle argues that Nevilson’s activity was open to the public eye, and that as such, the photograph did not constitute private facts because it did not depict anything that a pedestrian, driver, or passenger of a tour bus could see. However, this conclusion is not in accord with the Restatement’s commentary regarding the “private life” element, which states:

There is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye. Thus he normally cannot complain when his photograph is taken while he is walking down the public street and is published in the defendant's newspaper. Nor is his privacy invaded when the defendant gives publicity to a business or activity in which the plaintiff is engaged in dealing with the public. *On the other hand, when a photograph is taken without the plaintiff's consent in a private place, or one already made is stolen from his home, the plaintiff's appearance that is made public when the picture appears in a newspaper is still a private matter, and his privacy is invaded.*

Restatement (Second) of Torts § 652D cmt. b (1977) (emphasis added). Marshoogle’s conduct is precisely that which the Restatement explicitly categorizes as an invasion of privacy. Marshoogle took the photograph of Nevilson, without his consent, while he was “in the most private of places, his home.” *Lawrence*, 539 U.S. at 567.

Marshoogle attempts to liken the facts of this case to those in cases involving conduct taking place in public, merely because Nevilson was near a window. It cannot legitimately be argued that one may not enjoy privacy unless he is completely concealed in a windowless corridor of his home. To the contrary, it has been said that, “[t]he mere fact that a person can be seen by *someone* does not automatically mean that he or she can be legally forced to be subject to being seen by *everyone*.” *Sanchez-Scott*, 103 Cal. Rptr. 2d at 416 (emphasis added). In fact, courts have recognized that one may have a reasonable expectation of privacy, and matters may

be classified as private, which occur in places other than, and necessarily less private than, one's home. See *Benitez v. KFC Nat'l Mgmt. Co.*, 714 N.E.2d 1002 (1999) (finding a reasonable expectation of privacy in a KFC restroom), *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914 (1999) (finding that cameras in a nurse's office which captured medical examinations constituted a private matter).

Neff v Time, Inc., 406 F. Supp. 858 (W.D. Pa. 1978), is an example of a case involving non-private facts. In that case, the Western District of Pennsylvania found that the facts publicized were not private where a baseball player was photographed with his zipper down during a game. *Id.* However, the facts of that case were drastically different from those of the present case. In *Neff*, the plaintiff was in public, and engaging in the activity of playing baseball for the enjoyment of the public. *Id.* "Neff's picture was taken in a public place with his knowledge and with his encouragement; he was catapulted into the news by his own actions; nothing was falsified; a photograph taken at a public event which everyone present could see, with the knowledge and implied consent of the subject, is not a matter concerning a private fact." *Id.* at 861. In stark contrast to the facts of *Neff*, Nevilson was alone, at night on the second floor of "the most essential bastion of privacy recognized by the law." *Carter*, 525 U.S. at 106.

Not only was Neff's conduct open to the public eye and in a public place, but he was voluntarily putting himself in the public eye; he was, in other words, what the Restatement refers to as a "voluntary public figure." See Restatement (Second) of Torts § 652D, cmt. e (1977). Marshoogle argues that Nevilson's status as a diving champion makes him a "voluntary public figure" according to commentary to the Restatement and, thus, the photograph did not concern a private matter. Comment e to the Restatement begins by explaining that:

One who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions or activities having general economic, cultural, social or similar public interest, or by submitting himself or his work for public judgment, cannot complain when he is given publicity that he has sought, even though it may be unfavorable to him. *So far as his public appearances and activities themselves are concerned, such an individual has, properly speaking, no right of privacy, since these are no longer his private affairs.*

Restatement (Second) of Torts § 652D cmt. e (1977) (emphasis added). Thus, while a public figure's public appearances and activities are not private, he may still enjoy a right of privacy in his private affairs.

However the comment goes on to qualify this privacy right even further, stating that, “[i]n such a case, however, the legitimate interest of the public in the individual may extend beyond those matters which are themselves made public, and to some reasonable extent may include information as to matters that would otherwise be private.” *Id.* Describing those private facts that may be made public in the case of a voluntary or involuntary public figure, comment h explains that, “[t]he extent of the authority to make public private facts is not, however, unlimited.” Restatement (Second) of Torts § 652D cmt. h (1977). “The limitations, in other words, are those of common decency, having due regard to the freedom of the press and its reasonable leeway to choose what it will tell the public, but also due regard to the feelings of the individual and the harm that will be done to him by the exposure.” *Id.*

Nevilson did not place himself in the public eye when it came to activities conducted in the privacy of his own home. In fact, he went out of his way to ensure that his private life, and specifically his private home life, would stay private and not be subjected to publicity. Nevilson erected a six foot tall privacy fence around his property, posted “no trespass” and “private property” signs, and rarely socialized or appeared in public. Thus, even if Nevilson is found to

be a voluntary public figure, the publicity given to the photograph cannot be construed as “publicity he has sought.” Restatement (Second) of Torts § 652D cmt. e (1977). On the contrary, this publicity represents, “prying into private lives for its own sake,” as the Restatement specifically defines as an invasion of privacy. Restatement (Second) of Torts § 652D cmt. h (1977); *Virgil v. Sports Illustrated*, 424 F. Supp. 1286, 1289 (S.D. Cal 1976).

Marshoogle argues that because Nevilson was an anti-drug spokesperson, he has opened himself up to publicity regarding his hookah smoking habits and alleged drug use. However, the parties have stipulated that the photograph depicts Nevilson using tobacco and not marijuana, therefore, Nevilson’s status as an anti-drug advocate does not bear any relation to his personal choice to smoke tobacco in the privacy of his home.

Regardless, a balance must be struck between the legitimate right of the press to the information, and the individual’s right to privacy. *See Galella v. Onassis*, 487 F.2d 986, 995 (2d. Cir. 1973). Here, the legitimate right of the press to the information, if any, is marginal and verges on mere prying in to Nevilson’s private life for its own sake. On the other hand, Nevilson’s interest in privacy is very weighty because he was secluded to, “the *most* essential bastion of privacy recognized by the law.” *Carter*, 525 U.S. at 106 (emphasis added). If a line is to be drawn at all, it must necessarily be drawn somewhere before this point, and in favor of protecting the right to privacy in one’s home. In other words, when balancing these interests, surely no heavier weight exists than the interest in privacy in one’s home, and any interest that Marshoogle may assert does not equal nor outweigh Nevilson’s strong interest in privacy in “the most private of places, his home.” *Lawrence*, 539 U.S. at 567.

C. Publication and Publicity Given to a Photograph Containing a Zoomed Image of an Individual's Face, Taken Without His Consent, And While that Individual is in the Privacy of His Home, Would Be Highly Offensive to a Reasonable Person.

“The third element requires that a reasonable person of ordinary sensibilities would find such publicity highly offensive. In making this determination, the customs of the time and place, occupation of the plaintiff and habits of his neighbors and fellow citizens are material.” *Harris v. Easton Pub. Co.*, 483 A.2d 1377, 1384 (Pa. Super. Ct. 1984), *citing* Restatement (Second) of Torts § 652D cmt. c; *Aquino v. Bulletin Co.*, 154 A.2d 422, 425 (Pa. Super. Ct. 1959). Comment c to the Restatement explains that a person “must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others.” Restatement (Second) of Torts § 652D cmt. c (1977).

However, the photograph taken in this case goes far beyond this sort of “casual observation,” and into the realm of prying into Nevilson’s private life. *Id.* Photographing, with highly technical equipment including zooming technology, the activities of an individual in the privacy of his home, without his consent, would certainly be offensive to a person of reasonable sensibilities. The publicity given to the photograph both exacerbates this harm and creates a new and subsequent harm. Because it is highly offensive to be photographed in one’s home, in an intrusive manner and without one’s consent, it is also offensive and intrusive, and indeed more so, to have such a photograph subsequently published and publicized, revealing private information to the public.

“[T]he customs of the time and place, occupation of the plaintiff and habits of his neighbors and fellow citizens” weigh heavily in favor of finding this conduct to be highly offensive. First, the time and place that the conduct occurred was in Nevilson’s home, “the most

essential bastion of privacy recognized by the law” (*Carter*, 525 U.S. at 106), and during the evening hours, a time when people generally keep to themselves and expect a certain elevated level of privacy.¹ In *Jones v. United States*, 357 U.S. 493, 498, (1958), the United States Supreme Court said, “it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home.” Given this context, and consideration of the habits of neighbors and fellow citizens, taking pictures of individuals inside their home at night must be considered highly offensive.

Marshoogle argues that Nevilson’s occupation as a star diver weighs against finding this conduct to be highly offensive. While it is true that Nevilson’s role as a person of public interest may make certain conduct less private, it is absurd to argue that such intrusive prying into a man’s private residence is completely justified and defensible merely because of his success as a diver. He may expect that certain matters regarding his life may be less private; however, conduct engaged in while confined in one’s home, having no relation to the reason for his public interest, must remain private. Nevilson’s success as a diver does not justify the complete abolishment of all of his privacy rights.

For the same reasons that the taking of the photograph was highly offensive, so as to make it an intrusion upon Nevislon’s seclusion, the publicity given to the photograph is also

¹ “[T]he Supreme Court has . . . repeatedly acknowledged the especially intrusive nature of nighttime searches of the home. See, e.g., *Gooding v. United States*, 416 U.S. 430, 462 (1974) (Marshall, J., dissenting) (noting that “there is no expectation of privacy more reasonable and more demanding of constitutional protection than our right to expect that we will be let alone in the privacy of our homes during the night”); *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971) (referring to a midnight entry into a home as an “extremely serious intrusion”); *Monroe v. Pape*, 365 U.S. 167, 209-210 (1961) (Frankfurter, J., concurring in part, dissenting in part) (noting that, at common law, nighttime searches of the home were the most obnoxious form of official intrusion); *Frank v. Maryland*, 359 U.S. 360, 366 (1959) (noting that the intrusion did not involve a “midnight knock on the door, but an orderly visit in the middle of the afternoon”); *Jones v. United States*, 357 U.S. 493, 498 (1958) (noting that “it is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home”).” *State v. Jackson*, 742 N.W.2d 163, 175-76 (Minn. 2007).

highly offensive. The publicity given to the photograph, if found not to be an invasion of privacy based on some “public figure” status achieved by Nevislon, has the effect of punishing him for his success by allowing all members of the public to pry, uninvited, into “the most essential bastion of privacy recognized by the law” (*Carter*, 525 U.S. at 106), and “the most private of places, his home.” *Lawrence*, 539 U.S. at 567.

D. Nevilson’s Occasional Use of Tobacco While in the Privacy of His Home is Not a Matter of Legitimate Public Concern.

The fact that an individual engages in activity that may be of legitimate public concern does not render all information regarding that individual information of legitimate public concern. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975); *see also Gilbert v. Med. Econ. Co.*, 665 F.2d 305, 308 (10th Cir. 1981). “Because each member of our society at some time engages in an activity that fairly could be characterized as a matter of legitimate public concern, to permit that activity to open the door to the exposure of any truthful secret about that person would render meaningless the tort of public disclosure of private facts.” *Gilbert*, 665 F.3d 305, 308 (10th Cir. 1981). Additionally, it is important to recognize that, “there are limits as well to what matters are of legitimate public concern.” *Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007). “Therefore, to properly balance freedom of the press against the right of privacy, *every private fact disclosed* in an otherwise truthful, newsworthy publication *must have some substantial relevance to a matter of legitimate public interest.*” *Gilbert v. Med. Econ. Co.*, 665 F.3d 305, 308 (10th Cir. 1981).

Thus, even if certain aspects of Nevilson’s private life are newsworthy, information regarding Nevilson’s legal use of tobacco while in the privacy of his home is not substantially relevant to any matter of legitimate public interest. Marshoogle asserts that Nevilson’s status as

an anti-drug spokesperson makes matters regarding his alleged drug use matters of legitimate public concern; however, the photograph in this case does not depict Nevilson using drugs. In fact, it has been stipulated and agreed by the parties that the photograph depicts Nevilson's legal use of tobacco, while in the solitude and privacy of his home, something that has no relevance, and is certainly not "substantially relevant," to any matter that Marshoogle may argue is one of legitimate public concern.

First, it should be noted that Nevilson is heralded as a role model because of his ability to overcome the obstacles of poverty, not because of any saintly public perception of his private affairs. If Marshoogle posits the argument that Nevilson's smoking is somehow substantially relevant to some *general* role model status that may be ascribed to him, i.e. that children will do as he does, it is important to take note that private smoking is different than public smoking. It is not disputed that children emulate their role models. However, it is also to be noted that the vast majority of individuals engage in conduct privately that they would not engage in publicly, especially if they had assumed the status of role model. Nevilson did not engage in public smoking, an activity that would likely be visible to children, and may be emulated by those children. On the other hand, Nevilson's private smoking, like many other private activities, was done in a manner that is not likely to be visible, and certainly not intended to be visible, to children and therefore not likely or intended to be emulated by children. In this respect, Nevilson's activity of privately smoking tobacco is not related to, nor does it rise to the level of being *substantially* relevant to Nevilson's general role model status. At an absolute minimum, a genuine issue of material fact as to whether Nevilson's legal use of tobacco in the privacy of his home is substantially related to a matter of legitimate public concern.

III. MARSHOOGLE’S INTENTIONAL ACTS OF TAKING AND PUBLICIZING A PHOTOGRAPH OF NEVLISON ENGAGING IN THE LEGAL USE OF TOBACCO, WHILE IN THE PRIVACY OF HIS HOME, AND SHORTLY BEFORE NEVLISON’S PARTICIPATION IN THE OLYMPIC TRIALS, WITH KNOWLEDGE OF HIS PROSPECTIVE ENDORSEMENT CONTRACTS, CONSTITUTES TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY.

The Marshall Revised Code requires the following elements to be satisfied in order to prevail on a claim for tortious interference with business expectancy: “(1) a reasonable expectancy of entering into a valid business relationship; (2) the defendant’s knowledge of the expectancy; (3) the defendant’s purposeful interference that prevents the realization of the business expectancy; and (4) damages resulting from the interference.” Marshall Revised Code § 762(b). Marshall’s statute does not include an “impropriety” element as many states do. Thus, a plaintiff’s burden in showing an intentional interference with business expectancy is softened, requiring a plaintiff to show that the act was intentional (i.e. defendant knew or should have known that it was likely to result), but not inquiring into the defendant’s motives or ill will. *See* Restatement (Second) of Torts § 766B cmt. d (1977).

A. Considering Nevilson’s History of Success, Reports from Numerous Media Outlets, Including Marshoogle, and Statements Made by Sunshine’s President, Nevilison had a Reasonable Expectancy of Entering into a Valid Business Relationship With Sunshine and Several Other Major Corporations.

A plaintiff asserting a claim for tortious interference with business expectancy need not base such a claim on interference with an existing contract, rather, “[a] probable future business relationship that gives rise to a reasonable expectancy of financial benefit is enough.” *Stehno v. Sprint Spectrum, L.P.*, 186 S.W.3d 247, 251 (Mo. 2006). *See also* Restatement (Second) of Torts, § 766B (1977); *Lusher v. Becker Brothers, Inc.*, 509 N.E.2d 444, 446 (Ill. App. 1987); *Harris v. Perl*, 197 A.2d 359, 363 (N.J. 1964). Explaining the need for a tort action for

interference, the court in *Mayflower Industries v. Thor Corp.*, 83 A.2d 366, 367 (N.J. Super. Ct. CH. Div. 1951), quoted Dean Prosser, stating that:

“In a civilized community, which recognizes the right of private property among its institutions, the notion is intolerable that a man should be protected by the law in the enjoyment of property, once it is acquired, but left unprotected by the law in his efforts to acquire it. . . .” Prosser goes on to say: “and that since a large part of what is most valuable in modern life depends upon the ‘probable expectancies,’ as social and industrial life becomes more complex the courts must do more to discover, define and protect them from undue interference.”

Mayflower Industries v. Thor Corp., 83 A.2d 366, 367 (N.J. Super 1951) (internal citations omitted).

Nevilson had earned “significant income” from endorsement deals with local businesses and appeared in TV commercials. On March 25, 2008, Sunshine’s president, Athena Buck, made a public statement confirming rumors that Sunshine and Nevilson had entered into a three million dollar endorsement deal contingent upon Nevilson’s qualifying for the Olympic Diving Team. Nevilson needed to finish first or second in all events at the Olympic Trials in order to make the Olympic team. Considering that Nevilson had never finished lower than second in any athletic competition since the commencement of his training with Coach Tim, it seemed quite reasonable, and in fact very likely, that Nevilson would secure a position on the Olympic Diving Team.

Furthermore, Marshoogle not only shared this belief, but predicted that, “[Nevilson] would trounce the competition at the trials and be the first to qualify” (R. at 5.) Thus, it cannot be said that Nevilson did not have a reasonable expectancy of entering into a valid business relationship. Not only did the public and mainstream media, including Marshoogle, believe that Nevilson would qualify and therefore consummate the deal with Sunshine, but a valid business relationship between Nevilson and Sunshine already existed. A three million

dollar agreement was already in place, although contingent upon Nevilson's success at the Olympic trials. Sunshine's President made a public announcement "admitting that her company *had negotiated* a three million dollar endorsement deal with Nevilson" (R. at 6.) (emphasis added). Furthermore, there were several other major corporations which expressed interest in employing Nevilson as a spokesperson for their products.

Courts have recognized a reasonable expectancy in situations where the relationship expected is one far less certain to occur than the relationships in this case. For instance, a plaintiff claiming a valid business expectancy in his chance at being elected to political office, a far less reasonable expectancy than in the present case, stated a valid claim. *Gold v. Los Angeles Democratic League*, 49 Cal. App. 3d 365 (1975). In *Gold*, the defendants mailed voter guides naming another individual as the Democratic candidate for city controller, even though the plaintiff had received that nomination. *Id.* at 375. The court held that the plaintiff stated a valid claim for interference in that case. *Id.* at 376.

Our case involves an opportunity much more likely to have occurred than that in *Gold*. As discussed *supra*, Nevilson's deal with Sunshine was publically announced and confirmed by Sunshine's president. While this deal was contingent upon Nevilson placing first or second at the Olympic Trials, he had never placed lower than second in any event. Additionally, it was widely believed that Nevilson would qualify with ease, and Marshoogle itself predicted that Nevilson would, "trounce the competition," and be "first to qualify." (R. at 5.) This is exactly the type of "probable expectancy" referred to by Dean Prosser, which it would be intolerable not to protect.

B. Marshoogle Had Knowledge of Nevilson’s Business Expectancy, As Evidenced by Sunshine’s Public Statement and Marshoogle’s Reference to Nevilson as “Marshall’s Own ‘Three Million Dollar Man.’”

The second element of tortious interference with business expectancy is the defendant’s knowledge of that expectancy. *See* Marshall Revised Code § 762(b). In its opinion and order the Marshall Court of Appeals stated, “[a]s to the second element, the record provides sufficient facts and Marshoogle concedes that it, as well as most citizens of Marshall, was well aware of the statements made by the Sunshine AthleticWear president regarding Nevilson’s possible endorsement deal as well as the rumors about other possible sponsorships.” (R. at 12.)

In any event, it is not necessary for a plaintiff to allege that the defendant had perfect or precise knowledge of the terms and conditions of the contract or business relationship. *Cohen v. Battaglia*, 202 P.3d 87, (Kan. App. 2009). The facts of our case clearly show that Marshoogle had, at the very least, such imperfect or imprecise knowledge. In fact, Marshoogle actually knew of several precise terms of the deal, including its contingency on Nevilson’s qualification for the Olympic team and the deal’s three million dollar price tag.

In addition to Sunshine’s public statement, Marshoogle’s conduct also evinced the existence of a business relationship. “An interferer’s knowledge of a plaintiff’s relationship or expectancy may be shown by the interferer’s conduct or spiteful or threatening words.” *National R.R. Passenger Corp. v. Veolia Transp. Services, Inc.*, 592 F. Supp. 2d 86, 99 (D.D.C. 2009). Not only may one infer that Marshoogle, as the operator of a major sports media outlet, gained knowledge of the deal through Sunshine’s public statement, Marshoogle’s own conduct and spiteful words illustrate knowledge of Nevilson’s expectancy. Marshoogle’s own *SportsBlog* post read, “[i]f you want to see what Marshall’s own ‘three million dollar man’ does in his spare time, go on M.A.P.” (R. at 7.)

Regardless of whether Marshoogle knew the precise terms and intricacies of the deal between Nevilson and Sunshine, it concededly knew of the deal's existence. Through the statement of Sunshine's president, Marshoogle also knew of the exact amount of money that Nevilson stood to make. Furthermore, it knew that the deal was contingent upon Nevilson's qualifying for the Olympics, which Marshoogle predicted that he would do easily. Thus, Marshoogle possessed, at an absolute minimum, the type of imperfect, yet sufficient knowledge required to satisfy this element of § 762(b). At the very least, a genuine issue of material fact exists as to Marshoogle's knowledge.

C. Marshoogle Knew that its Acts of Posting, Linking to, and Blogging about the Photograph of Nevilson were Substantially Certain to Result in an Interference With Nevilson's Business Expectancy and the Evidence Demonstrates that Marshoogle Intended Such a Result.

Comment d to Section 766B of the Restatement² explains that, “[t]he interference with the other's prospective contractual relation is intentional if the actor desires to bring it about *or if he knows that the interference is certain or substantially certain to occur as a result of his action.*” Restatement (Second) of Torts § 766B cmt. d (1977) (emphasis added); *see also In re Cantu*, 400 B.R. 104, 108 (Bankr. S.D. Tex. 2008), (“intent to injure is not a required element of tortious interference; rather, intent to cause the consequences of one's act or belief that the consequences are substantially certain to result from one's act is required.”). Regarding the element of intent, comment d refers to Section 766, comment j, which states, “[t]he rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire

² *d. Intent and purpose.* The intent required for this Section is that defined in § 8A. The interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action. (See § 766, cmt. j). Restatement (Second) of Torts § 766B, cmt. d. (1977).

but known to him to be a necessary consequence of his action.” Restatement (Second) of Torts § 766 cmt. j (1977).

1. Marshoogle Knew that its Acts of Posting and Linking to a Photograph of Nevilson Using Tobacco, Which Appears to Depict Him Using Marijuana, and of Referring to Nevilson’s Three Million Dollar Sunshine Deal, were Substantially Certain to Result in an Interference With Nevilson’s Business Expectancy.

Regardless of Marshoogle’s purpose or desire, the intent element is satisfied because Marshoogle knew or should have known that publicizing a photograph of Nevilson using tobacco – which appears to depict Nevilson using marijuana – along with posting a link to the photograph on *SportsBlog* referencing the Sunshine endorsement deal, would be substantially certain to interfere with Nevilson’s ability to secure endorsement contracts. Major corporations endorse athletes based upon both their athletic success and their positive image. By contrast, athletes whose reputations have been tarnished quickly lose or fail to obtain such deals. In 2005, Michael Vick ranked 33 among Forbes Top 100 Celebrities,³ and prior to the decline of his public image, had a long list of endorsement contracts including Nike, EA Sports, Coca-Cola, PowerAde, Kraft, Rawlings, Hasbro and AirTran.⁴ In the wake of publicity given to several non-athletic issues which greatly damaged his reputation, Vick lost all of these lucrative endorsement contracts and vanished from the Forbes Top 100 list completely. While certainly an extreme example, this illustrates that, insofar as endorsements are concerned, an athlete’s public image is seldom severable from his athletic performance. In this case, media coverage resulting from Marshoogle’s posting of a photograph appearing to depict Nevilson using marijuana had a

³ Forbes Top 100 Celebrities, 2005, <http://www.forbes.com/lists/2005/53/20CG.html>.

⁴ Theresa Howard, *Where have baseball players' endorsements gone?* USA Today, Sept. 28, 2009, http://www.usatoday.com/money/advertising/adtrack/2003-09-28-visa_x.htm.; Bill Briggs, *NFL megastar Vick’s endorsements in danger*, MSNBC, July 18, 2007, <http://www.msnbc.msn.com/id/19834805>.

negative effect on his public image. This harm to his reputation foreclosed his ability to secure endorsement deals.

Marshoogle argues it was not the damage to Nevilson's public image which caused the deal with Sunshine to evaporate, but rather Nevilson's inability to qualify during the Olympic Trials. However, as previously demonstrated, an athlete's athletic success alone will not attract or secure endorsement deals. Nevilson and Marshoogle knew that, just as such deals depend on athletic success, they also depend on a positive public image. While it may be true that Nevilson's negotiations with Sunshine did not completely cease until he failed to qualify for the Olympic Diving Team, this does not mean that his failure to qualify alone spoiled the deal. Additionally, even if the sole requirement for the Sunshine deal's completion was Nevilson's success at the Olympic Trials, the same may not have been true of his other potential deals.

Even assuming Nevilson's failure to qualify alone destroyed the Sunshine deal, the negative publicity and damage to his reputation that resulted from the photograph impinged upon his ability to adequately prepare himself, both mentally and physically, for the Olympic Trials. This photograph was posted on the internet less than three months before the Olympic Trials. Nevilson spent a significant amount of time and effort to clear his name during this period, time and effort that could have been used for preparation and training. Nevilson issued several press releases explaining the photograph, contacted the media in a proactive manner, and made several appearances on TV and radio. Additionally, a full investigation was launched by the Marshall Diving Association into Nevilson's alleged drug use, which threatened to disqualify him from the Olympic Trials.

Not only was Nevilson's time used for damage control rather than athletic training, his mental preparedness was compromised as well. In this period, shortly before the most important

athletic event of Nevilson's life, formerly admiring fans and citizens "expressed their disappointment, and in some cases anger, towards what they claimed was a betrayal of trust by their athletic idol and role model." (R. at 7.) This loss of support from the community, the looming drug use investigation, Nevilson's numerous television and radio appearances, the constant and invasive presence of paparazzi, and the immense importance of the rapidly approaching Olympic Trials added a tidal wave of anxiety and pressure to what was probably already the most stressful period in Nevilson's life. While sometimes given a superhuman persona, athletes are only human. To expect a person to perform at his or her peak under the extreme conditions and circumstances that Nevilson faced, in such close proximity to the Olympic Trials, is an unreasonable expectation. Under these circumstances, Marshoogle knew that its actions were at least *substantially certain* to have a negative effect on Nevilson's reputation, training, or mental preparedness, thereby interfering with his ability to secure endorsement deals.

2. Although Impropriety is Not an Element of Tortious Interference With Business Expectancy, Marshoogle's Conduct Was Improper.

The Marshall statute does not require impropriety as many other state statutes do, and thus, Nevilson is not required to show that Marshoogle's actions were improper. Marshoogle relies on *Romanek v. Connelly*, 753 N.E.2d 1062, 1073, (Ill. App. 2001), to argue that "purposeful interference," as required by the Marshall statute, is synonymous with "impropriety." However, this approach of treating impropriety as subsumed within intent is inconsistent with the Restatement. The Restatement says, "[o]ne who intentionally *and* improperly interferes with another's prospective contractual relation," explicitly requiring the interference to be both "intentional" and "improper." Restatement (Second) of Torts § 766B,

(1977) (emphasis added). To conclude that the drafters of the Restatement intended for the term “intentional” to include “improper,” when both words are used in the section, runs contrary to the general canons of statutory construction. For example, it is a general rule of statutory construction that, “[c]ourts are to accord a meaning, if possible, to every word in a statute.” *Platt v. Union Pac. RR Co.*, 99 U.S. 48, 58 (1879). If “purposeful” was intended to include “improper,” the later use of the word “improper” would be superfluous and redundant, a result that courts seek to avoid. *See Id.*, *Cole v. U.S. Capital, Inc.*, 389 F.3d 719, 725 (7th Cir. 2004).

Furthermore, Marshall’s deliberate omission of the term “improper” from Section 762B evinces an intent by the legislature not to require plaintiffs to allege and prove impropriety. “The maxim ‘*expressio unius est exclusio alterius*,’ that the mention of one thing in a statute impliedly excludes another thing,” leads to the conclusion that the Marshall legislature intended not to require “impropriety” as an element of tortious interference with business expectancy. *Patterson v. Beall*, 19 P.3d 839, 845 (Okla. 2000). If the Marshall legislature intended to require the interference to be “improper” as well as “purposeful,” such a requirement would have been explicitly included in the statute, just as that requirement is included in the Restatement.

In the alternative, Marshoogle’s conduct was improper. The *Romanek* court went on to say that, “facts must be alleged suggesting that the defendant acted intentionally with the aim of injuring the plaintiff’s expectancy.” *Romanek*, 753 N.E.2d at 1073. Such facts are plentiful in this case, and an application of the Restatement’s factors for determining impropriety makes clear that any element of impropriety that this Court may require is certainly satisfied. The relevant factors in determining whether an interference is improper are: “(a) the nature of actor’s conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interest sought to be advanced by the actor, (e) the proximity or remoteness of

actor's conduct to the interference and (f) the relations between the parties.” Restatement (Second) of Torts, § 767 (1977); *see also Northside Mercury Sales & Serv., Inc. v. Ford Motor Co.*, 871 F.2d 758, 761 (8th Cir 1989), *Zilg v. Prentice-Hall, Inc.*, 717 F.2d 671, 677 (2nd Cir. 1983), *Adler, Barish, Daniels, Levin & Creskoff v. Epstein*, 393 A.2d 1175, 1184 (Pa. 1978).

As to the first factor, Marshoogle’s conduct was of an extremely improper and invasive nature. Marshoogle photographed Nevilson’s home using nine cameras that extended five feet above the roof of a car and directed at Nevilson’s second story window. Additionally, Marshoogle equipped the photograph with acute zooming capabilities and failed to use automatic blurring technology that had been implemented for privacy purposes. Marshoogle also took this picture at night, when the lighting made it far more likely that the photographs would depict individuals inside the home, rather than depict a quality image of the home itself. Marshoogle posted this picture on the internet, and immediately upon learning of its existence, Nevilson requested its removal. Despite this request, Marshoogle took an entire week to remove the images from the M.A.P. website. Rather than removing the image, Marshoogle posted a blog including a link to the photograph, which specifically referenced Nevilson’s potential endorsement contract with Sunshine. In light of these circumstances, it is clear that Marshoogle’s conduct was of an improper nature.

Second, Marshoogle had a strong motive and interest to interfere with Nevilson’s endorsement deals and cause him humiliation and reputational damage. Marshoogle argues that the photograph of Nevilson smoking his hookah inside of his home posted on the internet M.A.P. website were completely incidental to the M.A.P. feature. However, the facts of this case do not lend themselves to the conclusion that taking and posting this picture was merely an accident, incidental to the operation of the M.A.P. website. For instance, Nevilson’s face appeared clearly

in the photograph, despite Marshoogle's automatic blurring technology. Again, though Marshoogle asserts that its intention was to take pictures of Nevilson's house for the M.A.P. feature, this picture was taken at night, when the lighting was likely better for capturing images of individuals inside the home, rather than of the home itself.

Marshoogle knew that Nevilson was becoming a high profile athlete, that he had several pending endorsement deals, that he was competing in the Olympic Trials in July, and that those trials had serious implications for his career. Additionally, the M.A.P. website was frequently and increasingly used as a way for users to search for pictures of their favorite celebrities or celebrity homes. The circumstances strongly evidence Marshoogle's motive to post and publicize this photograph in an effort to increase traffic to its websites, and thereby increase its revenue. Marshoogle disregarded its own privacy policy and had knowledge of Nevilson's status as a subject of growing public interest and of the increasing public use of M.A.P. to view images of celebrities. Following Marshoogle's posting of, linking to, and blogging about the photograph, it received a "huge increase in traffic to [its] M.A.P. feature and '*SportsBlog*.'" (R. at 7.) Nevilson, on the other hand, had a strong interest in obtaining the endorsement deal with Sunshine, as well as other endorsement deals with several major corporations. Therefore, while Marshoogle's interest in gaining increased traffic to its websites – through misuse of those sites, at Nevilson's expense – was malicious in nature, Nevilson's interest was simply that of achieving success through honest hard work.

Marshoogle argues that its conduct was remote in relation to the interference. Specifically, Marshoogle argues that it was Nevilson's failure to qualify for the Olympic Team, rather than Marshoogle's posting the photograph on the internet, which interfered with Nevilson's potential endorsement contracts. However, this argument makes an unfair

distinction, as the injury to Nevilson's reputation necessarily harms his ability to obtain endorsement deals. This argument is also disingenuous, as Marshoogle specifically intended to interfere with Nevilson's potential endorsement deal with Sunshine, evidenced by the *SportsBlog* entry referring to him as the "three million dollar man." This is undeniably a reference to Nevilson's three million dollar Sunshine deal. Thus, Marshoogle's conduct is not only extremely close in proximity to, but in fact constitutes the very interference with Nevilson's business expectancy. This "proximity" factor weighs heavily in favor of finding Marshoogle's conduct to be improper.

An examination of the relationship between the parties involved further illustrates the improper nature of Marshoogle's conduct. Marshoogle generates the majority of its revenue through ad sales and media-related services. Advertisers seek websites with the greatest number of visitors, and media-related services rely on attracting a large number of readers or users. In either event, increased traffic to Marshoogle's websites results in increased revenue. In order to increase traffic, Marshoogle covers stories that incite interest in its readers, and the best way to do that is to generate negative news.⁵

Marshoogle's conduct leading up to the posting and publicizing of the photograph illustrates a scheme by Marshoogle to market Nevilson as an individual of public interest because of his athletic ability, and subsequently drum up controversy surrounding his personal

⁵ *Checkout Retail Week*, Mar. 13, 2009, ("In my experience the news media are prone to scaremongering and exaggeration and for the most part they are bringers of bad news - generating higher ratings and higher newspaper sales rather than good news."); Robin Miller, *What makes this news?* *The Reporter* (Vacaville, California) Oct.18, 2008, ("In a nutshell, the reader lamented that there is 'never' any 'good' news in the paper. This complaint is almost always backed up with a comment that the reader 'knows' we want to publish 'bad' news to sell more papers."); *Making room for more good news*, *Herald News* (Passaic County, NJ) Mar. 2, 2008, ("The news media are, for the most part, the bringers of bad news ... and it's not entirely the media's fault, bad news gets higher ratings and sells more papers than good news.").

life. In 2007, the media heralded Nevilson as the “next big diving star,” and Marshoogle predicted that he would, “trounce the competition at the trials and be the first to qualify for the 2010 Olympic Diving Team.” (R. at 5.) After building Nevilson up as an icon, Marshoogle engaged part two of its plan: to publish negative news about Nevilson’s private life. Marshoogle expressed skepticism about Nevilson’s position as spokesperson for MCAD, stating that, “although Nevilson was undeniably a very talented athlete, his role model status was exaggerated.” (R. at 6.) Marshoogle was careful to keep intact Nevilson’s status as a talented athlete, as this made him a media target, while at the same time generating controversy about his personal life, an area of intense interest to the public.⁶ The final step in Marshoogle’s plan was to deal a crippling blow: posting, linking to, and blogging about the un-blurred photograph of Nevilson in the privacy of his home which appeared to depict Nevilson using marijuana. This timeline of Marshoogle’s conduct and relationship with Nevilson strongly illustrates the impropriety of Marshoogle’s conduct.

Thus, regardless of whether “impropriety” is subsumed within the meaning “purposeful,” as that term is used in Section 762(b) of the Marshall Revised Code, Marshoogle’s conduct clearly satisfies that element, or at the very least, raises a genuine issue of material fact.

D. Nevilson Has Suffered Damages in the Form of Lost Benefits and Revenue Due to the Loss of Prospective Endorsement Deals and Pain and Suffering Including Damage to His Reputation Due to Marshoogle’s Interference.

Section 774A of the Restatement outlines the damages recoverable for tortious interference with business expectancy:

⁶*Hurray for Hollywood?; There’s No Show Like a Showbiz Show, Whether it’s a Glut of Celebrity News or a Series With ‘Coincidental’ Themes*, Hartford Courant (Connecticut) Aug.10, 2005, (“As with the intense interest in the private lives of celebrities, fans are interested in the lives of athletes.”)

(1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for (a) the pecuniary loss of the benefits of the contract or the prospective relation; (b) consequential losses for which the interference is a legal cause; and (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.

Restatement (Second) of Torts § 774A (1977).

Based upon Nevilson's past performance and predictions by the media, including Marshoogle, the presence of damages stemming from Marshoogle's interference with Nevilson's potential Sunshine endorsement deal is undeniable. Media outlets, including Marshoogle's *SportsBlog*, predicted that Nevilson would easily qualify for the 2010 Olympics, heralding him as, "the next big diving star." (R. at 5.) In fact, Nevilson needed only to place second in each event to qualify, an outcome that looked very promising considering that he had never placed lower than second in any athletic event since the commencement of his training with Coach Tim in 1998.⁷ Furthermore, Marshoogle itself believed that Nevilson would easily qualify for the 2010 Olympics, stating that Nevilson would "trounce the competition at the trials and be the first to qualify for the 2010 US Olympic Diving Team." (R. at 5.) The Sunshine deal was undeniably worth three million dollars, a figure that was publically announced, reported by the national media, and known by Marshoogle as evidenced by its *SportsBlog* post. Thus, Marshoogle is at least liable to Nevilson for a sum well in excess of three million dollars, comprised of the Sunshine endorsement deal along with several other potential deals with major corporations.

Even if this Court does not agree that the evidence illustrates with a reasonable degree of certainty that, absent Marshoogle's interference, Nevilson would have suffered damages in

⁷ "When the tortfeasor has prevented the beginning of a new business or the prosecution of a single transaction, *all factors relevant to the likelihood of the success* or lack of success of the business or transaction that are reasonably provable are to be considered, *including* general business conditions and the *degree of success of similar enterprises*." Restatement (Second) of Torts § 774A, cmt. d. (1977).

excess of three million dollars, “the injured party may ‘recover damages for . . . business interference without proving specifically the amount of pecuniary loss resulting therefrom.’” *Garcia v. Mountain States Telephone & Telegraph Co.*, 315 F.2d 166, 167 (10th Cir. 1963), quoting *Mountain States Telephone & Telegraph Co. v. Hinchcliffe*, 204 F.2d 381, 382 (10th Cir.1953). A court may consider the rather telling fact that the question of whether the deals would have been obtained is “‘made hypothetical by the very wrong’ of the defendant.”⁸ Restatement (Second) of Torts § 774A cmt. c (1977), quoting *Harris v. Perl*, 197 A.2d 359, 365 (N.J. 1964). In other words, absent the interference, we would know whether Nevilson would have qualified for the 2010 Olympics or otherwise secured endorsement contracts. The court in *Harris* explained, “[t]he question is whether a wrongdoer should be permitted to avoid real damages by raising an issue made hypothetical by his very wrong. We think he should not.” *Perl*, 197 A.2d at 365. This is precisely what Marshoogle attempts to do in this case.

Nevilson also suffered both emotional distress and actual harm to his reputation as a result of Marshoogle’s interference. The harm to Nevilson’s reputation is apparent from a myriad of evidence. Articles were published in several newspapers concerning Nevilson’s alleged drug use, some including “digitally enhanced” versions of the photograph with captions such as, “Nevilson has reached new highs.” (R. at 7.) The photograph was on the front page of the popular Marshall newspaper, *The Marshall Tribune*, with a caption reading, “Shame on You Nevilson!” (R. at 7.) Fans and citizens of Marshall were disappointed and angry with Nevilson,

⁸ “If the question is whether the plaintiff would have succeeded in attaining a prospective business transaction in the absence of defendant’s interference, ***the court may, in determining whether the proof meets the requirement of reasonable certainty, give due weight to the fact that the question was “made hypothetical by the very wrong” of the defendant.*** Sometimes, when the court is convinced that damages have been incurred but the amount cannot be proved with reasonable certainty, it awards nominal damages.” Restatement (Second) of Torts § 774A, cmt. c. (1977) (emphasis added).

claiming that Nevilson, their idol and role model, had betrayed their trust. Additionally, MCAD ceased using Nevilson as a spokesperson and removed all references to him from its anti-drug campaign and all current and potential endorsement deals disappeared. All of these consequences of the photograph's publication evidence serious damage to Nevilson's reputation.

For these reasons and those discussed *supra*, Marshoogle is liable to Nevilson for pain and suffering as a result of the interference, in addition to any actual reputational harm. Nevilson has become the subject of intense media scrutiny, subjected to incessant paparazzi presence outside of his home, criticized harshly by the public – including former fans – and being forced to exert significant time and effort in an attempt to clear his name.

CONCLUSION AND RELIEF REQUESTED

This Court is confronted today with the responsibility of upholding one's right to privacy in the most private of places: his home. Petitioner respectfully requests that this Court reverse the Marshall Court of Appeals' decision to grant summary judgment in favor of Respondent. There exist, at the very least, genuine issues of material fact with respect to whether Marshoogle's conduct constituted an intrusion upon seclusion, whether Marshoogle's conduct constituted public disclosure of private facts, and whether Marshoogle intentionally interfered with Nevilson's business expectancy. For the foregoing reasons, Petitioner asks that this Honorable Court reverse the decision of the Marshall Court of Appeals.

Respectfully Submitted,

Date: September 4, 2009

Team 4
Attorneys for Petitioner

APPENDIX 1

Marshall Revised Code § 726(b).

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that:

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.