
IN THE SUPREME COURT OF THE STATE OF MARSHALL

Aaron MURPHY)	
Plaintiff-Appellant,)	
)	
v.)	No. 2010-CV-0654
)	
MARSHCODE CORP., a Marshall)	
Corporation,)	
)	
Defendant-Appellee.)	

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MARSHCODE, a Marshall)
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ORDER GRANTING LEAVE TO APPEAL

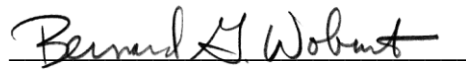
The Supreme Court of the State of Marshall hereby grants Aaron Murphy leave to appeal the decision of the First District Court of Appeals in Case Number 2009-CV01-0416, which affirmed the Marbury County Circuit Court's decision in favor of MarshCODE.

On appeal, the parties shall address the following issues:

- (1) whether the circuit court erred in granting summary judgment on Murphy's claim of defamation;
- (2) whether the court erred in granting summary judgment on Murphy's claim of false light invasion of privacy; and
- (3) whether the court erred in granting summary judgment on Murphy's breach of contract claim.

Pursuant to stipulation of the parties, the Opinion and Order of the Court of Appeals shall serve as the Record on Appeal herein.

Dated: July 19, 2010


BERNARD G. WOBURT
Chief Justice

**IN THE MARSHALL COURT OF APPEALS
FIRST DISTRICT**

Aaron MURPHY,)	
Plaintiff-Appellant,)	
)	
v.)	No. 2009-CV01-0416
)	
MARSHCODE, a Marshall)	
Corporation,)	
Defendant-Appellee.)	

OPINION AND ORDER

A.L. Reyes, Presiding Judge:

This is an appeal from the Order of the Marbury County Circuit Court, granting summary judgment in favor of Defendant-Appellee, MarshCODE, in case number MCV-08-227.

An appellate court reviews a grant of summary judgment *de novo*, applying the same standard as the trial court: the evidence must demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Marshall R. Civ. P., Rule 56(c). Applying this standard to the record on appeal, we affirm the order granting summary judgment.

Plaintiff-Appellant, Aaron Murphy, raises three separate assignments of error.

First, Appellant contends that the circuit court erred in granting summary judgment on his claim for defamation.

Second, Appellant contends that the circuit court erred in granting summary judgment on Murphy's claim for false light invasion of privacy.

Third and finally, Appellant contends that the circuit court erred in granting summary judgment on his breach of contract claim.

FACTS

The following facts are not in dispute:

Respondent-Appellee, MarshCODE is an internationally recognized corporate leader in the field of genetic research. Founded in 1997, MarshCODE is located in the state of Marshall. It is well documented that through its research efforts, MarshCODE accumulated the single largest DNA database in the country. Using this large DNA database, MarshCODE pioneered the “decoding” of the human genome and conducted groundbreaking research in the field of gene therapies. In addition, MarshCODE was tremendously successful in promoting the public’s understanding of the human genome and developing commercial uses for genetic information.

MarshCODE’s large DNA research database was created using volunteer data subjects. Each data subject signed a Study Participation Agreement, drafted by MarshCODE, setting forth certain terms of use and a privacy policy (relevant portions of this user agreement appear in Appendix A). After signing the Study Participation Agreement, a DNA sample was obtained using non-invasive buccal swab of the interior portion of each participant’s cheek. The buccal swab was then taken by a trained technician, employed by MarshCODE, who placed the swab and the relevant paperwork in a sealed container. The containers were temporarily stored in a secure locker. Each evening, all samples collected during the day were transferred to the MarshCODE’s central processing facility where, pursuant to the Study Participation Agreement, each sample was assigned a unique identifier to ensure the data subject’s anonymity. Information obtained from the samples was then uploaded into the MarshCODE’s DNA research database. The original samples were stored in a secure location at MarshCODE’s headquarters.

Following years of rapid growth, MarshCODE faced increasing competition and the impact of the global economic crisis. As a result, in early 2008, MarshCODE found itself in severe financial trouble. In order to combat financial concerns and become competitive in the changing industry, in late 2008, MarshCODE decided to change its business model and diversify from strictly scientific research to include commercial consumer-oriented services. Accordingly, MarshCODE developed two different commercial services: “Your DNA, Your Health” which enabled customers to discover their potential genetic risks and “Discover Your Roots” which used genetic testing to help customers discover their ancestry. With the “Discover Your Roots” service, MarshCODE compared the customer’s submitted genetic sample with genetic traits of people around the world using a technology known as genotyping, providing a broad picture of the customer’s genetic ancestry, and an in-depth comparison to populations around the world.

Customers could also purchase the “Build Your Family Tree” option – an add-on to the “Discover Your Roots” service. The “Build Your Family Tree” service allowed customers to compare their DNA with other samples within MarshCODE’s database to discover any potential “matches,” i.e., relatives. MarshCODE’s trained analysts would perform the comparison and if a match was discovered, would notify the customer. At this point only limited match information was provided to the customer. This information included the analyst’s prediction of the possible relationship and broad demographical data (gender, age and general geographic location). The customer could then decide whether he/she wanted to initiate contact with this newfound potential relative, that is, send an “invitation” to the match’s email address on file with MarshCODE. The customer had the option to reveal as much or as little identifying information

he/she wished in this “invitation.” In turn, the recipient of the invitation could either decline or accept the invitation allowing the customer to view the recipient’s full profile on a secure, password protected “Built Your Family Tree” web page within MarshCODE’s website.

MarshCODE announced its entry into the consumer service market at a press conference on December 23, 2008. During that press conference, MarshCODE revealed that the “Discover Your Roots Program” would be launched on January 1, 2009. Also on December 23, 2008, MarshCODE posted on its website an updated Participation Agreement modifying the previous participation agreement and privacy policy. According to the new agreement, all genetic samples collected by MarshCODE since its inception in 1997 would be included in a new database created exclusively for use in the “Build Your Family Tree” service. If a data subject wished to have his/her genetic data removed from this new database he/she needed to contact the MarshCODE’s customer service department at any time and the information would be removed from the “Discover Your Roots” and “Build Your Family Tree” service within 72 hours. Data subjects’ information would still remain in the original database used strictly for research purposes. (The relevant portions from the 2009 privacy policy and terms of use are attached as Appendix B). Subsequently, an announcement was made on MarshCODE’s website inviting all donors and participants in the studies conducted in the previous years to participate in the new services. Individual notices were sent to all participants via e-mail and/or US mail depending on the preferred method of communication as this was indicated in the original Agreement they had signed.

Appellant, Aaron Murphy, is a minister of the Church of Primary Saints in the State of Marshall. Like many Marshall citizens, Murphy was interested in the potential scientific benefits of genetic research and volunteered to participate in a MarshCODE study in September of 2000. Since donating his DNA, Murphy was not contacted personally by MarshCODE, nor did he ever attempt to contact MarshCODE himself for any purpose. In the summer of 2001, Murphy graduated, got married and moved from his rental apartment in the city of Marshall to a new house he purchased in the northwest suburbs of Rosewood.

In the eight years since his ordination in 2002, Murphy has become a leading figure in this small but influential religious group known for its conservative views. He has preached regularly against pre-marital sex and homosexuality -- the church condemns both as a sins. Murphy has spoken out against sex education in schools and gay marriage. He has commented extensively on radio and television broadcasts promoting these views. He has received a great deal of press coverage during the general elections of 2008. Murphy’s views have sparked the reaction of several activist groups, especially gay rights organizations. Gay rights activists have regularly voiced their opposition to Murphy’s views and the Church’s teachings using many venues including social media and by organizing protests outside the Church and Murphy’s home.

In March 2009, Billie Who, a 22 year old active member of Marshall City’s gay rights group “The Coalition,” used the “Build Your Family Tree” program hoping to find some answers regarding the identity of her biological father. Billie never met her father. Billie’s mother, Helen Who, became pregnant when she was 18-years-old. Billie’s birth father abandoned Helen as soon as he learned of the pregnancy. When Billie was a toddler, Helen

married another man who raised Billie as his own daughter. Helen refused to give Billie any information about her biological father, stating “you are better off without him.” After Helen passed away, Billie Who was determined to find out the identity of her biological father. Through the “Build Your Family Tree” database, Billie Who found a purported DNA match identifying her biological father. When Billie utilized the program’s “invite” feature, much to her surprise, a full profile, complete with personally identifying information, for the DNA match, appeared. This profile included the full name and contact information for the DNA match. According to the information provided by “Build Your Family Tree,” Billie’s biological father was none other than Aaron Murphy. Billie was shocked by this revelation. As a gay member of the Marshall community, Billie found Murphy’s views on pre-marital sexual relations and homosexuality offensive and disturbing. Appalled by what she considered hypocrisy on behalf of her biological father, Billie Who went public with the news.

Soon, news about Aaron Murphy’s alleged illegitimate gay child spread through the news media and blogosphere. The church’s board placed Murphy on suspension pending an investigation into the validity of Billie Who’s claims. Even though Murphy vehemently denied the as yet unproven claims, church members immediately condemned against him and called for his resignation. He was soon shunned by the great majority of his community. Murphy was hounded by the press. He became distraught and refrained from leaving his house for days because of the paparazzi who followed him everywhere and the news crews camped outside his home.

Murphy accused MarshCODE that it intentionally misused the genetic data he had donated as part of a research study while he was still a graduate student. Murphy claimed that he never consented for his DNA to be included in the “Built Your Family Tree” service. As a matter of fact while he wholeheartedly supported use of genetic information for scientific research, he strongly opposed such commercial uses of genetic information and he would have never consented to such use had he been informed about the change Murphy suggested that this whole incident it was part of a greater plot aimed at his reputation discrediting him in the eyes of the community and distracting the public from the message his church attempted to promote.

MarshCODE denied such allegations claiming that it had no interest in Murphy’s professional or social aspirations. Additionally, MarshCODE sent a detailed notice to all participants in its previous and ongoing studies advising them about the change in MarshCODE’s Terms and Conditions of Use. This notice instructed participants to contact MarshCODE, if they wished to not be included in the commercial service, i.e. have their genetic information removed from the database used for the commercial services. However, both the e-mail and the paper copy notice sent via United States mail to the address MarshCODE had on file for Aaron Murphy were returned as undeliverable. MarshCODE contended that its policy and Terms and Conditions of Use protected participants like Murphy because it allowed participants to request that their information be removed from the database at any time. Thus, Murphy could still choose to have his information removed from the database since there is no time limitation.

The Church of Primary Saints, Aaron Murphy and MarshCODE all initiated separate investigations into the matter. MarshCODE’s internal investigation revealed that a malfunction within the “Build Your Family Tree” program had occurred.

In developing the “Build Your Family Tree” program, two databases were created. A test database used during the initial construction of the “Build Your Family Tree” program contained all DNA collected under the MarshCODE participation agreement. The data subjects’ names were randomized to enable testing of program functionality while protecting the identity of the data subjects from the programmer. In operation, a different database was used. This “production database” associated the correct data with the DNA and all personally identifiable information was removed. After the program, using the test database, was evaluated, and the “Build Your Family Tree” program was deemed viable, the program was modified to retrieve records from the production database. MarshCODE’s own investigation confirmed that the modification step didn’t work, causing the randomized (i.e., incorrectly associated data) to be returned. Thus, when Billy Who entered her username and password into the system, the program accessed the test database instead of the production database. The record is not clear as to whether this malfunction was due to human error or a technology failure. Nonetheless, there is no question that Mr. Murphy’s personally identifiable information was unintentionally returned to Billy Who.

MarshCODE publicly apologized for the mistake and assured all customers that it has taken all measures necessary to remedy the situation and secure all data in its possession. MarshCODE’s mistake, its subsequent public admission, and apology received more press coverage than the initial paternity claims against Aaron Murphy. Even so, the Board of Directors for the Church or Primary Saints advised Mr. Murphy that the negative publicity hurt the Church and refused to allow him to resume his preaching duties and public appearances on behalf of the church. Instead, Mr. Murphy was restricted to administrative duties, at least until “the dust settles” as he was told by the Church officials.

In June 2009, Aaron Murphy filed suit against MarshCODE for: (1) defamation; (2) invasion of privacy by placing him before the public in a false light; (3) breach of contract.

Following discovery, MarshCODE moved for summary judgment on all three counts. The circuit court granted the motion on all three counts.

ANALYSIS

A. STANDARD OF REVIEW

Summary judgment is a procedural device that enables a court to dispose of part or all of a case prior to trial. Summary judgment is appropriate only when the moving party can establish that there is no genuine issue of material fact and that the party is entitled to a judgment as a matter of law. The appellate court reviews a grant of summary judgment *de novo*.

B. DEFAMATION

Marshall courts have consistently followed the Restatement of Torts in analyzing whether a defendant is liable for defamation. Under this analysis, there must be: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3)

fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. See Restatement (Second) of Torts § 558. The law of defamation was intended to protect an individual's interest in his reputation with his neighbors or associates in his community. See Restatement (Second) of Torts § 577 cmt b (1977). A communication may be defamatory of another although it has no tendency to affect adversely the other's personal or financial reputation; thus, the imputation of certain physical and mental attributes is defamatory because it tends to deter third persons from associating with the person so characterized. See Restatement (Second) of Torts § 559 cmt. c (1977).

In the present case, both Petitioner Murphy and Respondent MarshCODE have stipulated to the falsity of the information in regards to Murphy's genetic sample stating that he is the biological father of Billie Who.

As to the second element, to constitute a publication, it is necessary that the defamatory matter be communicated to someone other than the person defamed. See Restatement (Second) of Torts §. 577 cmt b (1977). Murphy argued that communication of a defamatory matter to one person is sufficient to sustain a *prima facie* case for defamation. See Restatement (Second) of Torts § 577 cmt b (1977); *Hecht v. Levin*, 613 N.E. 2d 585, 587 (Ohio 1993) (the publication element for defamation was met where the defamatory statement was made in a confidential grievance to a local bar association). Posting of the false information on the "Built Your Family Tree website" suffices for establishing the element of publication, since the defamatory statement may be made to a third party by any method of communication. See Restatement (Second) of Torts § 577 cmt. a (1977).

MarshCODE argued that an accidental communication of an alleged matter defamatory to a third person is not a publication if there was no negligence. Restatement (Second) of Torts § 577 cmt o (1977). MarshCODE claimed that its only affirmative act was to create a database containing the information in question and post such material on a page within the internal corporate network designated to serve testing purposes with access permitted only to other MarshCODE engineers. Thus, the act of posting such information on an internal network which was not intended to communicate such information to a third person and did not create an unreasonable risk of the communication, does not fulfill the element of publication. See Restatement (Second) of Torts § 577 cmt o (1977). Therefore MarshCODE could not be held liable for unauthorized access to the page nor for subsequent publications of the information by third parties of newsworthy material taken from the page.

In addition, Murphy argued that he is a private individual, and therefore, he need only establish that MarshCODE was negligent in publishing the defamatory statement. The fact that he had commented on several occasions in radio and television shows did not render him a public figure. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296 (D.C. Cir. 1980) (the court held that the plaintiff, president of the second largest corporation in the world, was not an all-purpose public figure). Murphy stressed that an otherwise private individual is not transformed into an involuntary public figure merely because he has become involved in a matter attracting the public's attention nor do these activities establish that Murphy is "newsworthy." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167-68 (1979); *Wilson v. Daily Gazette*

Co., 588 S.E.2d 197, 207 (W.Va. 2003) (a plaintiff should not be considered a limited-purpose public figure absent the existence of a pre-defamation public controversy in which the plaintiff has become directly involved). In the alternative, even if Murphy is established as a limited-purpose public figure, Murphy argued that, the matter at issue was of a purely private matter; thus, he needed only establish that the defendant was at least negligent in making the statement. See Restatement (Second) of Torts § 580(A) cmt. b (1977). *Anson v. Erlanger Minerals and Metals, Inc.*, 702 P.3d 393 (1985). MarshCODE's failure to keep the test database with the erroneous information from becoming available to its users constitutes clear and convincing evidence of negligence of its part.

In turn, MarshCODE argued that Murphy's pervasive and vocal involvement in community affairs have gained him widespread notoriety and constitute clear evidence of his public figure status. *Wilson v. Daily Gazette Co.*, 588 S.E.2d 197, 205 (W. Va. 2003); *In re Thompson*, 162 B.R. 748, 766 (Bkrcty.E.D.Mich.1993). Therefore, Murphy is required to establish fault amounting to actual malice on the part of MarshCODE in order to state a sufficient claim for defamation, and must establish actual harm. Murphy is unable to satisfy either of these elements. In the alternative, MarshCODE argued that Murphy is either an involuntary public figure, or a limited purpose public figure. As MarshCODE indicated Murphy is an involuntary public figure because it can meet the two part requirements set forth in *Wilson v. Daily Gazette Co.*, i.e. Murphy was a central figure and that this was an ongoing public controversy. MarshCODE argued that it remains unsettled whether a public figure should retain the heightened standard of proof where an alleged defamatory communication is made in a private communication. Plaintiff has the ultimate burden of proof regarding the defendant's negligent conduct, and if plaintiff fails to establish defendant's negligence, he must then establish by clear and convincing evidence that the defendant acted with actual malice. See Restatement (Second) of Torts §580 B cmt j (1977).

Finally, as to actual harm, Murphy argued that this element is met because a reasonable person reading this statement would understand based on MarshCODE's status in the community that this was a true statement. The fact that the defamatory matter was written and published to another under the majority view, this statement should be actionable as *libel per se*; See Restatement (Second) of Torts § 569 (1977) (a statement is actionable *per se* if a statement accuses an individual of committing a criminal offense, engaging in serious sexual misconduct, or acting in a manner that is incompatible with the person's chosen trade or profession. See Restatement (Second) of Torts § 570 (1977)); therefore Murphy need not plead special damages.

MarshCODE argued that Murphy cannot meet the actual harm element of his defamation claim on the grounds that the email as written is not *defamatory per se*. So long as a statement could be interpreted to have both a defamatory and non-defamatory meaning it is not actionable *per se*. Plaintiff must establish that the statement had a defamatory meaning and the existence of special damages having an economic or pecuniary value. See Restatement (Second) of Torts § 575 cmt. b (1977).

This court finds MarshCODE's arguments persuasive and affirms the circuit court's ruling on this count.

C. INVASION OF PRIVACY: FALSE LIGHT

The State of Marshall has adopted the Restatement (Second) of Tort's definition of false light invasion of privacy:

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. See Restatement (Second) of Torts § 652(E) (1977).

While false light is similar to defamation it differs in many important ways. First, the term "publicity" is distinct from "publication." "Publicity" 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. The difference is not one of the means of communication, which may be oral, written or by any other means. It is one of a communication that reaches, or is sure to reach, the public." See Restatement (Second) of Torts § 652(D) cmt a (1977). Additionally, a "false light privacy claim redresses mental distress from exposure to public view" while "a defamation claim redresses damage to reputation." *State v. Carpenter*, 171 P.3d 41, 53 (Ala. 2007). Stated another way, the plaintiff does not have to show damage to his reputation in order to recover on a false light claim.

As mentioned above both parties have stipulated that Aaron Murphy's information on MarshCODE's "Build Your Family Tree" website was false. However, the parties disagree as to the remaining elements of the tort.

First, the information must have been "publicized," which is different from "published." *Welling v. Weinfeld*, 866 N.E.2d 1051, 1057 (Ohio 2007) adopting Restatement of the Law 2d, Torts (1977), Section 652E. Publicity 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" *Id.*, quoting Restatement of the Law 2d, Torts, Section 652D, Comment a.

Murphy argued that posting the false information on the "Build Your Family Tree" website constituted publicity. This type of communication is of a nature that would be "substantially certain to become one of public knowledge", especially considering the facts of this case. Restatement (Second) of Torts § 652D cmt. a. (1977).

MarshCODE argued that "Build Your Family Tree" is a paid service and not a public website made available to the public at large. The information is only available to paid members who are matched to other profiles. The posting of Murphy's information was insufficient to constitute publicity. In this case, Mr. Murphy's information became erroneously only available to Billie Who before it was removed from the website. MarshCODE argued that this is

insufficient to constitute publicity for false light invasion of privacy. *Jones v. United States Child Support Recovery*, 961 F. Supp. 1518, 1520-21 (D. Utah 1997) (distribution to a “handful of people” was insufficient to constitute “publicity”).

Second, Murphy argued that any reasonable person would find it offensive when a website claiming to use conclusive DNA evidence links individuals together as family members, wrongly states a relationship, thus placing Murphy in a false light before the public. Murphy argued that the false information about his alleged illegitimate child constituted a major misrepresentation of his character, history and beliefs, which would reasonably be considered offensive by a reasonable person in his position, giving rise to a cause of action for invasion of privacy. *Welling v. Weinfeld*, 866 N.E.2d 1051, 1057 (Ohio 2007). *Meyerkord v. Zipatoni Co.*, 276 S.W.3d 319, 323 (Mo. Ct. App. 2008)

MarshCODE counter-argued that the invasion of privacy in the form of false light requires that the statement must be of the kind that would be objectionable to the ordinary person under the circumstances and the hypersensitive individual will not be protected.¹ Consequently, Marsh CODE claimed that a reasonable person would not be offended, but Murphy is only offended because of his personal beliefs on pre-marital sex.

Third, Murphy argued that he is a private figure and should only have to show that MarshCODE was “negligent” in posting the false information on its “built Your Family Tree” website. *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1091 (5th Cir. 1984) (applying negligence standard to false light claim brought by private figure); *Braun v. Flynt*, 726 F.2d 245, 249 (5th Cir. 1984) (holding that defendant who placed private figure in a false light was not entitled to heightened protection of actual malice standard). Murphy argued he is entitled to a lower standard of proof based on the U.S. Supreme Court’s opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and caveat created in the comments to the Restatement. *Restatement (Second) of Torts § 652E, Caveat (1977)*. Murphy argued that MarshCODE was clearly “negligent” and argued in the alternative that MarshCODE acted with “reckless disregard” because it failed to implement proper procedures to ensure the information on “Build Your Family Tree” website was accurate.

In contrast, MarshCODE claimed that Murphy cannot prove it acted with “knowledge or reckless disregard” in posting Murphy’s information on its website. MarshCODE argued the malice standard should apply, because Murphy is a limited purpose public figure. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.) According to MarshCODE, Murphy’s position in the community as a minister and his purposeful injection into the public debate over pre-marital sex and homosexuality qualified him as a limited purpose public figure. Additionally, MarshCODE argued it did not act with knowledge the information was false, nor did it act with “reckless disregard.” MarshCODE regrets the mix-up happened but contends it occurred because of a technical glitch that could not rise to the level of actual malice or “reckless disregard.”

¹ See Prosser and Keeton on Torts 864-865 (W. Page Keeton ed., 5th ed. 1984).

The district court agreed with MarshCODE. The court held that Murphy failed to establish the publicity element in his cause of action for false light invasion of privacy claim, noting that even if Murphy succeeded in proving that the posting of the information in question on “Build Your Family Tree” website constituted publicity, he would still fail in proving the remaining elements.

We also find MarshCODE’s arguments persuasive. Accordingly, this court AFFIRMS the lower court’s grant of MarshCODE’s motion for summary judgment as to false light invasion of privacy.

D. BREACH OF CONTRACT – USER AGREEMENT

Murphy’s third claim is that MarshCODE breached the Study Participation Agreement between him (Murphy) and MarshCODE. When Murphy signed the Study Participation Agreement he expected MarshCODE to honor the contract by keeping all the confidential information encrypted and secured for his protection, never disclose this information to third parties and use it for research purposes.

Even though Marshall courts recognize a cause of action for breach of contract, there is no controlling authority on point to the instant matter. Thus, we turn to other jurisdictions for guidance. To succeed on a claim for a breach of contract in the State of Marshall, a plaintiff must plead and prove four elements: a) the existence of a contract, b) the performance of its conditions by the plaintiff, c) a breach by the defendant, and d) damages as a result of the breach. *Kopley Group V., L.P. v. Sheridan Edgewater Properties, Ltd.* 876 N.E.2d 218, 226, (Ill. App. 1 Dist., 2007)

As to the first element of this cause of action, Murphy argued that the Study Participation Agreement constitutes a contract between the two parties and that MarshCODE is bound by the unilateral contract which was formed when Murphy signed the Study Participation Agreement in MarshCODE’s laboratory before surrendering genetic material to MarshCODE for testing. MarshCODE argued that the privacy policy contained in the Study Participation Agreement does not as a matter of law, constitute a unilateral contract which would make damages available to Murphy, as the usual rule in contract cases is that general and not specific statements regarding policies are not contractual. *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 741 (Minn.2000), also *Pratt v. Heartview Foundation*, 512 N.W.2d 675, 677 (N.D.1994). MarshCODE also argued that when the language of a policy agreement vests discretion to the author of the agreement, in this case MarshCODE, to determine what certain words mean within the policy no contractual obligation bounds MarshCODE. *Grenier v. Air Express Int’l Corp.*, 132 F.Supp.2d 1198, 1201 (D.Minn.2001) (Doty, J.).

Murphy argued that *Grenier* and *Martens* are distinguishable from this case because the privacy policy of the Study Participation Agreement is very specific and definite as to whom MarshCODE was allowed to disclose Murphy’s genetic information. A unilateral contract is formed, argued Murphy, when there is a definite in form offer that is communicated and accepted by the offeree for valuable consideration *Pine River State Bank v. Mettelle*, 333 N.W.2d 622, 626 (Minn.1983) Murphy contended that the Study Participation Agreement is an offer for a

unilateral contract: MarshCODE's promise of confidentiality in exchange for Murphy's performance, i.e. his giving of genetic material for testing. *Duldulao v. Saint Mary of Nazareth Hosp. Center* 115 Ill.2d 482, 489-490, 505 N.E.2d 314, 31, 106 Ill.Dec. 8, 12 (Ill., 1987).

As to the second element of the cause of action, Murphy argued in accordance to the privacy policy provisions of the Study Participation Agreement he provided his contact information as well as his genetic and phenotypic information to MarshCODE when he signed the Study Participation Agreement thus fulfilling his obligation to perform on his side.

MarshCODE opposed Murphy's position saying that in the hypothetical situation, a contract is formed between the parties and the legal notice which is incorporated in the Study Participation Agreement and which Murphy signed, makes it very clear that it is the responsibility of the participant to keep his contact information current, accurate and complete. So when Murphy's contact information changed, Murphy had the contractual obligation to inform MarshCODE and by not doing so he simply did not perform the condition of the contract which was updating the relevant data.

In relation to the third element of the cause of action Murphy said that MarshCODE was bound by the assertions of the Study Participation Agreement that it would keep his genetic information confidential and provide maximum protection from unauthorized access. Murphy also contended that according to the Study Participation Agreement MarshCODE was supposed to use individual genetic and phenotypic information to conduct MarshCODE-authorized scientific research and development. Nowhere in the Agreement is there a provision that allows MarshCODE to use the relevant information for commercial purposes and profit from that use. Therefore, Murphy argued, MarshCODE breached the Study Participation Agreement.

MarshCODE denied Murphy's contention arguing first that the Study Participation Agreement contained a provision that allowed MarshCODE to revise the Terms and Conditions of Use at any time, and second, that the 2009 Participation Agreement and Terms of Use gave each participant the ability to delete their account with MarshCODE. Once the information was deleted it would be unavailable for any third party to be able to through MarshCODE's website.

The District Court agreed with MarshCODE's position and granted MarshCODE's motion for summary judgment. We affirm the District Court's ruling as the privacy policy included in the Study Participation Agreement is not contractual. We do not address the final point regarding damages. Thus, we affirm.

CONCLUSION

For all of the reasons set forth herein, Appellant's assignments of error are denied and the circuit court's Order granting summary judgment in favor of Defendant is hereby AFFIRMED.

DATED: May 8, 2010



A.L. REYES
PRESIDING JUDGE

APPENDIX A

1. Legal Notice

The following terms and Conditions are designed to tell you about MarshCODE's policies regarding your participation in MarshCODE's studies including the collection, handling and use of your sample and information, which are subject to these terms and conditions.

PLEASE READ THESE TERMS AND CONDITIONS CAREFULLY AS YOUR SIGNING THIS FORM CONSTITUTES ACCEPTANCE OF THEM.

MarshCODE may revise these Terms and Conditions of Use at any time by updating the relevant this posting on MarshCODE's website and by sending out relevant notices to you, using your preferred method of communication, via e-mail or via US mail, as these preferences are expressed in the questionnaire you have completed. It is your responsibility to keep your contact information accurate, current, and complete. To that end please contact MarshCODE at customerrelations@MarshCODE.com any time your contact information has changed. MarshCODE will take reasonable steps to update or correct personally identifiable information in its possession that you have previously submitted.

[.....]

3. Privacy Policy:

MarshCODE respects your privacy. This notice applies to the collection and handling of your personal information. When you agree to participate in MarshCODE genetic research program you are agreeing to provide your contact information, genetic information (the As, Ts, Cs, and Gs at particular locations in your genome), and phenotypic information (including disease conditions and personal traits determined through questionnaire responses).

After selecting to participate in the MarshCODE genetic research program through donating a saliva sample, your genetic and phenotypic information will be kept in a secured protected research database. All genetic information is encrypted and secured for your protection. MarshCODE uses the same encryption as banks and other financial companies so as to provide maximum protection from unauthorized access.

MarshCODE provides each donor a unique identifier. Any time your information is used, MarshCODE will only refer to this unique identifier. Additionally, the only way to trace this information to you is through the unique MarshCODE identifier number, which will only be accessible by the MarshCODE database analysts.

MarshCODE claims ownership of a donor's saliva sample and will destroy the physical sample after extracting the necessary genetic information. MarshCODE uses individual genetic and phenotypic information to conduct MarshCODE-authorized scientific research and development. Your personal information will never be associated with your genetic information during

MarshCODE sponsored research. E-mail addresses provided by users are only used for the purposes of contacting users in relation to future studies by MarshCODE.

Unless you have agreed otherwise in writing with MarshCODE, you agree that you are responsible for protecting and enforcing those rights and that MarshCODE has no obligation to do so on your behalf. Further, you acknowledge and agree that MarshCODE is free to preserve and disclose content to non-profit or commercial partner organizations conducting scientific research, law enforcement agencies, or others if required to do so by law or in the good faith belief that such preservation or disclosure is reasonably necessary to: (a) comply with legal process or obligations that MarshCODE may owe pursuant to ethical and other professional rules, laws, and regulations; (b) enforce the Terms of Service; (c) respond to claims that any content violates the rights of third-parties; or (d) protect the rights, property, or personal safety of MarshCODE, its users, its clients, and the public.

To keep your personally identifiable information accurate, current, and complete, please contact MarshCODE at customerrelations@MarshCODE.com.

[...]

APPENDIX B

WELCOME TO THE NEW MARSHCODE!

December 23, 2009 – MarshCODE today emerged as a newly financed, private company focused on advancing the science of human genetics and its application to products and services that improve human health. The new company will be building on the scientific leadership in genetics it developed over more than a decade. MarshCODE will continue all of its operations and product lines in this field, including its new MarshCODE diagnostics disease risk tests; MarshCODE personal genome scans; and service offerings including genotyping, sequencing and ancestry data analysis. Going forward, MarshCODE will concentrate on translating its science into medically and commercially important products and services.

[...]

MarshCODE was founded to empower individuals and develop new ways of accelerating research. The members of MarshCODE have come together because we believe in the combined potential of genetics and the Internet to have a significant, positive impact. MarshCODE operates one of the most productive human gene discovery engines in the world. It is driven by genetic and medical data from 140,000 participants from around the globe taking part in its gene discovery work; comprehensive genealogies linking the 140,000 Marshall participants; a major CLIA- and CAP-certified genotyping and sequencing facility; and statistical and informatics tools for mining large datasets, for maximizing the information derived from genotyping and sequencing data, and for visualizing genetic and disease data in research, in the clinic, and for subscribers to its genome scans.

We believe the potential benefits of sharing genetic information outweigh the privacy risks. MarshCODE believes that by enabling its members to share their data, we are providing them a beneficial feature they want and are entitled to have as custodians of their own genetic information. Thus we have determined that it is in the best interests of the community to combine the genetic data accumulated over the years of research to the new services that MarshCODE set to offer, namely the “Discover Your Roots” and “Build Your Family Tree” service.

MarshCODE employs robust, multi-layered encryption and authentication methods and conducts regular audits of our methods to protect against unauthorized access to our systems. We also employ software, hardware and physical security measures to prevent unauthorized access to the computers where we store donors’ data.

However, at MarshCODE, customer choice and control are critical to our goal of providing genetic information within a trusted environment. Therefore if you do not wish to participate in our services, then you may choose to have your information excluded from our new services by sending a request to our Customer Support at customerrelations@MarshCODE.com.

You may ask for such removal at any time even after the launch of the new services in January 2009. When instructed to remove a donor’s information, we remove from our systems all

Genetic and Phenotypic Information that can be associated with your Account Information within 72 hours from the time of the initial removal request. However, Genetic Information and/or Phenotypic Information you have provided for research prior to your request for deletion will not be removed from ongoing or completed studies that are using the information.

[...]

APPENDIX C

2009 Participation Agreement and Terms of USE

1. Legal Notice

WELCOME TO THE WORLD WIDE WEB SITE OF MARSHCODE (THE "MARSHCODE WEBSITE" OR "THIS WEBSITE"). THE FOLLOWING TERMS AND CONDITIONS ARE DESIGNED TO TELL YOU ABOUT MARSHCODE'S POLICIES REGARDING YOUR USE OF THIS WEBSITE, WHICH IS PROVIDED SUBJECT TO THESE TERMS AND CONDITIONS.

PLEASE READ THESE TERMS AND CONDITIONS CAREFULLY AS USE OF THIS WEBSITE CONSTITUTES ACCEPTANCE OF THEM.

2. Notice

Notices to you may be made via either email or regular mail. MarshCODE may also provide notices of changes to the TOS or other matters by displaying notices or links to notices to you generally on this website.

3. Changes to the Terms

MarshCODE may revise these Terms and Conditions of Use at any time by updating this posting. When these changes are made, MarshCODE will make a new copy of the TOS available at www.MarshCODE.com/legal/tos and any new additional terms will be made available to you via either email or regular mail. You should visit this page from time to time to review the then-current Terms and Conditions of Use because they are binding on you. Certain provisions of these terms may be superseded by expressly designated legal notices or terms located on particular pages at this Website.

You understand and agree that if you use the Services after the date on which the TOS have changed, MarshCODE will treat your use as acceptance of the updated TOS.

[...]

4. Privacy Policy

a. General

Privacy has become a subject of debate in today's information age. We recognize that genetic information is sensitive for many people. We believe all efforts must be made to guarantee individuals complete control over access to their genetic information. We believe the potential benefits of sharing genetic information outweigh the privacy risks. MarshCODE believes that by

enabling its members to share their data, we are providing them a beneficial feature they want and are entitled to have as custodians of their own genetic information.

MarshCODE employs robust, multi-layered encryption and authentication methods and conducts regular audits of our methods to protect against unauthorized access to our systems. We also employ software, hardware and physical security measures to prevent unauthorized access to the computers where we store donors' data.

[...]

c. Uses of Information

We use personal information to provide you with the services offered by MarshCODE. That also includes genetic and personal information submitted by participants in previous studies. Our services give you access to your Genetic Information, as well as the opportunity to share and compare your Genetic and Phenotypic Information with that of other people who have also agreed to share such information.

[...]

d. Your Choices and Privacy Preferences

At MarshCODE, customer choice and control are critical to our goal of providing genetic information within a trusted environment. Participation in activities and services that involve personal information is voluntary. Examples of such activities include sharing your account information with other MarshCODE customers, responding to surveys, joining a MarshCODE-authorized research project, and subscribing to a newsletter.

If your personal information changes, or if you no longer wish to participate in our services, then you may correct, update, or modify or delete your account by making the change via your account page, or by sending a request to our Customer Support at customerrelations@MarshCODE.com.

When deleting an account, we remove from our systems all Genetic and Phenotypic Information that can be associated with your Account Information within 72 hours from the time of the initial removal request. However, Genetic Information and/or Phenotypic Information you have provided for research prior to your request for deletion will not be removed from ongoing or completed studies that are using the information. Neither Account Information nor a link to your account are used in MarshCODE-authorized research. In addition, we retain limited Account Information related to your order history (e.g., name, contact, and transaction data) for accounting and compliance purposes.