No. 2009-CV-0654

IN THE

SUPREME COURT OF THE STATE OF MARSHALL

PHILLIP NEVILSON,

Plaintiff-Appellant,

v.

MARSHOOGLE, INC.,
a Marshall Corporation,

Defendant-Appellee.

On Writ of Certiorari to the
First District Court of Appeals
for the State of Marshall

BRIEF FOR APPELLEE

TEAM NO. 2

Attorneys for Appellee

QUESTIONS PRESENTED

I. Whether the circuit court and court of appeals correctly held that an aspiring Olympic diver and anti-drug spokesman failed to raise a genuine issue of material fact on an intrusion upon seclusion claim when his claim was based on a compromising image of him in an opened second-floor window captured by an Internet company photographing images from the public street while creating an online virtual neighborhood tour.

II. Whether the circuit court and court of appeals correctly held that no genuine issue of material fact existed on a public disclosure of private facts claim based on postings of accurate images of a well-known athlete and anti-drug spokesman smoking from a hookah when those images were taken from a public vantage point.

III. Whether the circuit court and the court of appeals correctly held that an athlete failed to raise a genuine issue of material fact on a tortious interference with business expectancy claim based on blog postings about his smoking from a hookah and the endorsement contracts comprising his expectancy were expressly contingent on his making the Olympic Diving Team.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

I. STATEMENT OF THE FACTS 3

II. SUMMARY OF THE PROCEEDINGS 5

SUMMARY OF THE ARGUMENT 7

ARGUMENT AND AUTHORITIES 9

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT ON NEVILSON'S CLAIM OF INTRUSION UPON SECLUSION 10

A. Marshoogle Did Not Physically Enter Nevilson's Property or Use Sensory Enhancements to Otherwise Intrude into His Zone of Privacy 10

B. A Reasonable Person Would Not Object to Marshoogle's Actions in Capturing Street Images for Its Online, Virtual Map 14

C. The Matter Was Not Private as the M.A.P. Mobile Captured the Images From a Public Vantage Point Where Passing Tourists Could Have Observed Nevilson's Conduct 18

D. Nevilson's Allegations of Anguish and Suffering Did Not Result from the Taking of the Photographs 20

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT ON NEVILSON'S CLAIM OF PUBLICITY GIVEN TO PRIVATE LIFE 21

A. The Photographs Did Not Concern a Private Matter Because the M.A.P. Mobile Cameras Merely Recorded What Any Pedestrian, Driver, or Passenger on a Tourist Bus Might See 22

B. A Reasonable Person Would Not Regard the Posting of Accurate Photographs of Nevilson Smoking from a Hookah as Highly Offensive 23

C. The Fact that an Athlete and Anti-Drug Spokesman Smokes from a Hookah Is a Matter of Legitimate Concern to the Public 25

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT ON NEVILSON'S CLAIM OF TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY 27

A. Nevilson's Expectancy of Endorsement Contracts Were Far Too Speculative to Support a Viable Tortious Interference Claim as All Were Contingent on His Performance in the Upcoming Olympic Trials........................28

B. Marshoogle's Actions Did Not Constitute Purposeful Interference that Prevented Nevilson's Alleged Business Expectancy from Ripening 31

1. Marshoogle did not engage in any purposeful or unjustified interference in posting the images to the M.A.P. feature or including a hyperlink to them on the "SportsBlog" 32

2. Marshoogle's actions did not prevent Nevilson from realizing his alleged business expectancy 34

C. Marshoogle's Postings Did Not Damage Nevilson 35

D. Marshoogle Has a Valid First Amendment Defense that Defeats Nevilson's Claim as a Matter of Law 36

CONCLUSION...37

APPENDICES:

APPENDIX "A": M.A.P. Mobile.. A-1

TABLE OF AUTHORITIES

Page(s)

CASES:

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) ... 9

Augustine v. Trucco,
268 P.2d 780 (Cal. 1954) ... 34

Bain v. Gillispie,
357 N.W.2d 47 (Iowa Ct. App. 1984) ... 29, 30

Baptist Health v. Murphy,
226 S.W.3d 800 (Ark. 2006) ... 32

Beckstrom v. Direct Merch.'s Credit Card Bank,
No. Civ-04-1351, 2005 WL 1869107
(D. Minn. Aug. 5, 2005) ... 12

Begin v. Mich. Bell Tel. Co.,
Nos. 279891, 284114, 2009 WL 1835091
(Mich. Ct. App. June 25, 2009) ... 11

Blatty v. N.Y. Times Co.,
728 P.2d 1177 (Cal. 1986) ... 36

Boring v. Google, Inc.,
598 F. Supp. 2d 605 (W.D. Pa. 2009) ... 15

Borse v. Piece Goods Shop, Inc.,
963 F.2d 611 (3d Cir. 1992) ... 15

Boston Herald, Inc. v. Sharpe,
737 N.E.2d 859 (Mass. 2000) ... 25

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) ... 9

Chi.'s Pizza, Inc. v. Chi.'s Pizza Franchise Ltd. USA,
893 N.E.2d 981 (Ill. App. Ct. 2008) ... 32, 33

Chisholm v. Football Capital Corp.,
3 F. Supp. 2d 925 (N.D. Ill. 1998) ... 22, 24

City Nat'l Bank of Fort Smith v. Unique Structures, Inc.,
929 F.2d 1308 (8th Cir. 1991) 32

Cole v. CSC Applied Techs., L.L.C.,
No. CV-07-1027-L, 2008 WL 2705458
(W.D. Okla. June 9, 2008) 14

Cornfield v. Consol. High Sch. Dist. No. 230,
991 F.2d 1316 (7th Cir. 1992) 9

Daly v. Viacom, Inc.,
238 F. Supp. 2d 1118 (N.D. Cal. 2002) 22

Dietemann v. Time, Inc.,
449 F.2d 245 (9th Cir. 1971) 13

Doe v. Mills,
536 N.W.2d 824 (Mich. Ct. App. 1995) 11

Dow Chem. Co. v. United States,
749 F.2d 307 (6th Cir. 1984) 19

Downing v. Abercrombie & Fitch,
265 F.3d 994 (9th Cir. 2001) 25, 26

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985)...37

Duran v. Detroit News, Inc.,
504 N.W.2d 715 (Mich. Ct. App. 1993) 22

Elgin v. St. Louis Coca-Cola Bottling Co.,
No. 4:05-CV-970-DJS, 2005 WL 3050633
(E.D. Mo. Nov. 14, 2005) 17

Engel v. 34 E. Putnam Ave. Corp.,
No. FST-CV-075004566, 2009 WL 1662932
(Conn. Super. Ct. May 15, 2009)..32

Four Navy Seals v. Associated Press,
413 F. Supp. 2d 1136 (S.D. Cal. 2005)...23

George A. Fuller Co. v. Chi. Coll. of Osteopathic Med.,
719 F.2d 1326 (7th Cir. 1983) 37

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 24, 34

Green v. Chi. Tribune Co.,
675 N.E.2d 249 (Ill. App. Ct. 1996) 25

Gruen Indus., Inc. v. Biller,
608 F.2d 274 (7th Cir. 1979) 32

Hayes v. N. Hills Gen. Hosp.,
590 N.W.2d 243 (S.D. 1999) 34

Haynes v. Alford A. Knopf, Inc.,
No. 91-C-8143, 1993 WL 68071 (N.D. Ill. Mar. 10, 1993) 23

Hester v. Barnett,
723 S.W.2d 544 (Mo. Ct. App. 1987) 16, 17

Hill v. Nat'l Collegiate Athletic Ass'n,
865 P.2d 633 (Cal. 1994) 14, 15

Hough v. Shakopee Pub. Sch.,
608 F. Supp. 2d 1087 (D. Minn. 2009) 14

Hougum v. Valley Mem'l Homes,
574 N.W.2d 812 (N.D. 1998) 14

Hustler Magazine v. Falwell,
485 U.S. 46 (1988) 33

In re Asia Global Crossing, Ltd.,
322 B.R. 247 (S.D.N.Y. 2005) 18

In re Nw. Airlines Privacy Litig.,
No. CV-04-126, 2004 WL 1278459
(D. Minn. June 6, 2004) 14

Int'l Union v. Garner,
601 F. Supp. 187 (M.D. Tenn. 1985) 18

Israeli Aircraft Indus., Ltd. v. Sanwa Bus. Credit Corp.,
850 F. Supp. 686 (N.D. Ill. 1993) 31

James v. Gannett Co.,
353 N.E.2d 834 (N.Y. 1976) 26, 27

Kapellas v. Kofman,
459 P.2d 912 (Cal. 1969) 25

Keyzer v. Amerlink, Ltd.,
618 S.E.2d 768 (N.C. Ct. App. 2005) 13

Klein v. Grynberg,
44 F.3d 1497 (10th Cir. 1995) 31

Kobeck v. Nabisco, Inc.,
305 S.E.2d 183 (Ga. Ct. App. 1983) 11

Kohler v. City of Wapakoneta,
381 F. Supp. 2d 692 (N.D. Ohio 2005) 13

Kremmerer v. John D. & Catherine T. MacArthur Found.,
594 F. Supp. 121 (N.D. Ill. 1984) 31

Lamminen v. City of Cloquet,
987 F. Supp. 723 (D. Minn. 1997) 34

Leang v. Jersey City Bd. of Educ.,
969 A.2d 1097 (N.J. 2009) 12

Lovgren v. Citizens First Nat'l Bank of Princeton,
534 N.E.2d 987 (Ill. 1989) 10, 11, 20, 36

Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.,
306 F.3d 806 (9th Cir. 2002) 18, 19

Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.,
30 F. Supp. 2d 1182 (D. Ariz. 1998) 15, 33

Michaels v. Internet Entm't Group, Inc.,
No. CV-98-0583, 1998 WL 882848 (C.D. Cal. 1998) 26

Miller v. Nat'l Broad. Co.,
232 Cal. Rptr. 668 (Ct. App. 1986) 23

Miller Foods, Inc. v. Schubert-Loughran,
No. CV-020815760s, 2009 WL 1688344
(Conn. Super. Ct. May 20, 2009) 32

Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.,
108 F.3d 522 (4th Cir. 1997) 32

Nevilson v. Marshoogle, Inc.,
No. MCV-08-227 (Marbury Co. Cir. Ct. 2009).. *passim*

Newman v. Jewish Cmty. Ctr. Ass'n of Indianapolis,
875 N.E.2d 729 (Ind. Ct. App. 2007)..11

N.Y. Times v. Sullivan,
376 U.S. 254 (1964)...33, 36, 37

R&A Small Engine, Inc. v. Midwest Stihl, Inc.,
No. 06-877, 2006 WL 3758292 (D. Minn. Dec. 20, 2006) 34

Roth v. United States,
354 U.S. 476 (1957)..36

Schiller v. Mitchell,
828 N.E.2d 323 (Ill. App. Ct. 2005) 19

Showler v. Harper's Magazine Found.,
222 F. App'x 755 (10th Cir. 2007) 22

Shulman v. Group W. Prods., Inc.,
955 P.2d 469 (Cal. 1998)...26

Smith-Utter v. Kroger Co.,
No. 07-1213-EFM, 2009 WL 790183
(D. Kan. Mar. 24, 2009)...11

Stien v. Marriott Ownership Resorts, Inc.,
944 P.2d 374 (Utah Ct. App. 1997) 12, 15, 16

Team Gordon, Inc. v. Fruit of the Loom, Inc.,
No. 3:06-CV-201-RJC, 2009 WL 426555
(W.D.N.C. Feb. 19, 2009)...35

Tinius v. Carroll County Sheriff Dep't,
321 F. Supp. 2d 1064 (N.D. Iowa 2004)..18

Unelko Corp. v. Rooney,
912 F.2d 1049 (9th Cir. 1990) 33

UST Corp. v. Gen. Road Trucking Corp.,
783 A.2d 931 (R.I. 2001)..35

Webb v. CBS,
No. 08-C-6241, 2009 WL 1285836 (N.D. Ill. May 7, 2009) 12, 13

Wilcher v. City of Wilmington,
60 F. Supp. 2d 298 (D. Del. 1999) 15, 16

Wolfson v. Lewis,
924 F. Supp. 1413 (E.D. Pa. 1996) 15

Young v. Mem'l Hermann Hosp. Sys.,
573 F.3d 233 (5th Cir. 2009) 9

Youst v. Longo,
729 P.2d 728 (Cal. 1987) 29

UNITED STATES CONSTITUTION:

U.S. Const. amend. I .... *passim*

STATUTES & RULES:

Fed. R. Civ. P. 56(c) 9

Marshall Rev. Code § 762(b) .... *passim*

Marshall R. Civ. P. 12(b)(6) 5

Marshall R. Civ. P. 56(c) 9

SECONDARY MATERIALS:

The American Public Transit Center,
Bus and Trolleybus Definitions (2009),
http://www.apta.com/research/stats/bus/definitions/cfm 19

L. Lee Byrd,
Note, *Privacy Rights of Entertainers and Other Celebrities: A Need for Change*,
5 Ent. & Sports L.J. 95 (1988) 26

1 J. Thomas McCarthy,
The Rights of Publicity and Privacy (2d ed. 2005) 26

Andrea Peyser,
Pool Fool Letting Endorsement Deals Go Up In Smoke,
N.Y. Post, Feb. 2, 2009, at 5 27

Restatement (Second) of Torts § 652B (1977) 10, 18

Restatement (Second) of Torts § 652B cmt. c (1977) 17

Restatement (Second) of Torts § 652D cmt. c (1977) 23, 24

Restatement (Second) of Torts § 652D cmt. d (1977) 25

Restatement (Second) of Torts § 744B, special note (1977) 30

Restatement (Second) of Torts § 766 cmt. j (1977) 31

Restatement (Second) of Torts § 766B (1977) 28

Restatement (Second) of Torts § 774 cmt. c (1977) 35

1 George B. Trubow,
Privacy Law & Practice (1991) 11

No. 2009-CV-0654

IN THE

SUPREME COURT OF THE STATE OF MARSHALL

PHILLIP NEVILSON,

Plaintiff-Appellant,

v.

MARSHOOGLE, INC.,
a Marshall Corporation,

Defendant-Appellee.

On Writ of Certiorari to the
First District Court of Appeals
for the State of Marshall

BRIEF FOR APPELLEE

TO THE HONORABLE SUPREME COURT OF THE STATE OF MARSHALL:

Appellee, Marshoogle, Inc., defendant in the Circuit Court for Marbury County and Appellee in the First District Court of Appeals for the State of Marshall, submits this brief on the merits and in support of its request that this Court affirm the lower courts and render summary judgment in Appellee's favor.

OPINIONS BELOW

The Circuit Court for Marbury County granted summary judgment in favor of the Appellee, Marshoogle, in an unreported opinion styled *Nevilson v. Marshoogle*, No. MCV-08-227 (Marbury Co. Cir. Ct. 2009). The opinion of the First District Court of Appeals of the State of Marshall affirming the circuit court's judgment in all respects in case No. 2008-CV-0416 is contained in the record at pages 3–13.

STATEMENT OF JURISDICTION

The Statement of Jurisdiction is omitted in accordance with Section 1020(2) of the Rules for the Twenty-Eighth Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application and interpretation of the First Amendment to the United States Constitution, which provides: "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

This case also involves the application and interpretation of the Marshall Revised Code, § 762(b), which provides for a cause of action for public disclosure of private facts when "one . . . gives publicity to a matter concerning the private life of another" that (1) would be highly offensive to a reasonable person; and (2) is not of legitimate public concern. *Id.* Section 762(b) also provides a cause of action for tortious interference with business expectancy where: (1) a reasonable expectancy of entering into a valid business relationship existed; (2) the defendant had knowledge of the expectancy; (3) the defendant purposefully interfered with the expectancy, preventing its realization; and (4) damages resulted from the interference. *Id.*

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Appellee Marshoogle, Inc. ("Marshoogle") is a Marshall Corporation that provides free internet-based services to Marshall citizens. (R. at 4.) These services are designed to enhance and improve the lives of Marshall residents. (R. at 4.) Marshoogle's services, which are free to users and are wholly funded through paid advertisements, include a search engine, electronic mail, "SportsBlog" and "MarshMaps." (R. at 4.)

Marshoogle Avenue Perspective. A feature of "MarshMaps," Marshoogle Avenue Perspective ("M.A.P."), allows users to type in an address and view a 360-degree panoramic view of the area surrounding the address. (R. at 4.) Essentially, M.A.P. provides virtual neighborhood tours, allowing users to feel like they are "driving down the street." (R. at 4.) Marshoogle creates the M.A.P. system with a M.A.P. mobile, a vehicle that has an adjustable five-foot pole with nine attached cameras. (R. at 4; *see* R. at app. I.) (Appendix I is reproduced in Appendix "A.") The M.A.P. mobile captures the images as it travels down a public street. (R. at 4.) A computer program ultimately connects the captured images to create one "continuous amalgamated image," which is uploaded to the online M.A.P. program. (R. at 4.)

Marshoogle employs the use of state-of-the-art technologies to protect the privacy of individuals that may be inadvertently caught on film by the M.A.P. mobile. (R. at 4.) According to a Marshoogle press release, "Marshoogle is committed to ensuring the satisfaction of [its] users" and has therefore "implemented blurring technology and operational controls including image removal." (R. at 5.) Marshoogle's blurring technology "automatically blurs the faces of the individuals and car license plates appearing in any of the digital images, prior to the these pictures being incorporated into the M.A.P. feature." (R. at 4.) Marshoogle has also

implemented a formal process by which users can request that an image be totally removed from the M.A.P. server. (R. at 4–5.) The M.A.P. program has seen growing popularity amongst Marshall residents, and has never before been legally challenged prior to this suit. (R. at 5.)

Mapping in Emerald Pools. On April 21, 2008, a M.A.P. mobile was capturing street images in the Emerald Pools neighborhood in Marshall City. (R. at 6.) Emerald Pools is a popular tourist attraction because many of its residents are famous celebrities. (R. at 6.) As the M.A.P. mobile was driving through the street of Emerald Pools, it took photographs of the streets and surrounding buildings, just as the M.A.P. mobiles do in all other neighborhoods. (R. at 7.) The images were subsequently uploaded to Marshoogle's computers, automatically transformed into an amalgamated image, and then uploaded to the M.A.P. server. (R. at 7.)

The Post on "SportsBlog." That same day, an entry appeared on Marshoogle's "SportsBlog" stating: "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.) The "SportsBlog" post contained a hyperlink to an image on the M.A.P. feature of MarshMaps. (R. at 7.) The "SportsBlog" entry, which a reporter posted, commented on the fact that the M.A.P. mobile captured an image of Phillip Nevilson, an anti-drug spokesperson and aspiring Olympic athlete, smoking from a hookah. (R. at 7.) Because Nevilson had not closed his curtains and was next to the window when the M.A.P. mobile drove by, his actions were visible from the public street even though he had a six-foot fence surrounding his property. (R. at 7.)

The Request for Removal. Nevilson first contacted Marshoogle on April 30, 2008. (R. at 7.) He asked that Marshoogle remove the images of him smoking from the M.A.P. feature of MarshMaps. (R. at 7.) Within a week, Marshoogle honored Nevilson's request by removing the images completely from the system. (R. at 7.)

Nevilson Fails to Qualify for the Olympics. A few months after the images were uploaded, Nevilson competed in the Olympic Trials. He was an aquatic diver training for the Olympics. (R. at 5.) To become a member of the Olympic Team, Nevilson "needed to place in the top two for each of the events [in which] he wished to compete." (R. at 5.) When the Olympic Trials were held in Marshall City in July 2008, Nevilson did not do as well as he had hoped. (R. at 5.) He placed third in his event, earning him an alternate spot and not one of the two highly coveted spots on the United States Olympic Diving Team. (R. at 8.) Following the Trials, Nevilson blamed his poor performance on adverse media coverage stemming from the M.A.P. images showing him smoking from a hookah. (R. at 8.)

II. SUMMARY OF THE PROCEEDINGS

The Circuit Court. In August 2008, Appellant filed suit against Marshoogle alleging "defamation, appropriation of name and likeness, intrusion upon seclusion, publicity given to private life," and that Marshoogle's actions caused him to lose endorsement deals that he would have received had he made the Olympic Team. (R. at 8.) Specifically, Nevilson blamed Marshoogle for his lackluster performance. (R. at 8.) In his estimation, Marshoogle created the controversy, which prevented him from reaching his potential on the diving platform. (R. at 8.)

Marshoogle moved to dismiss Nevilson's claims under Marshall Rule of Civil Procedure 12(b)(6), arguing that Nevilson failed to state a claim upon which relief could be granted. (R. at 8.) The circuit court granted Marshoogle's motion on the defamation and appropriation of name and likeness claims, and later granted Marshoogle's summary judgment motion on the remaining causes of action. (R. at 8.)

The Court of Appeals. Nevilson appealed the trial court's judgment to the First District Court of Appeals. (R. at 13.) In an opinion and order dated May 8, 2009, the court of appeals

affirmed the circuit court's grant of summary judgment as to all three causes of action. (R. at 13.)

First, the court of appeals found that no intrusion upon seclusion took place because "the M.A.P. mobile in question did nothing more than legally capture imagery from public roads, which is no different than what any pedestrian, driver, or passenger on one of the numerous double-decker tourist buses that pass by the street everyday might see and capture with their cameras." (R. at 10.) Second, the court of appeals found that no public disclosure of private facts occurred because "the images depicting Nevilson . . . were captured from the public street" and, therefore, could not constitute publication of a private fact. (R. at 11.) The court of appeals also found that Nevilson's actions were of legitimate public interest because he was a public figure. (R. at 11.) The court reasoned that "when an individual voluntarily places himself in the public eye, he cannot complain when he is given publicity that he sought." (R. at 11.) Finally, the court of appeals found that no tortious interference of business expectancy occurred because Marshoogle did not act improperly or with the intent to injure Nevilson's business expectancy. (R. at 13.)

This Court granted Appellant leave to appeal on July 14, 2009. (R. at 2.)

SUMMARY OF THE ARGUMENT

The First District Court of Appeals properly affirmed the circuit court's grant of summary judgment on Nevilson's causes of action because he did not raise a genuine issue of material fact on any of the three pled causes of action.

I.

Nevilson has not raised a genuine issue of material fact on his intrusion upon seclusion claim. First, Nevilson cannot show Marshoogle intentionally invaded Nevilson's privacy. When Marshoogle captured the images for its Marshall Avenue Perspective feature, no one physically entered Nevilson's property or used sensory enhancements or telephoto lenses to pry into his private space. Second, Marshoogle's actions were not highly offensive to a reasonable person because the photographs were not captured in an effort to exploit or defame Nevilson, but rather were captured in an effort to produce a free and effective virtual map for Marshall residents. A reasonable person would not be offended by the context, conduct, and circumstances surrounding Marshoogle's actions. Third, Nevilson did not have a reasonably objective expectation of privacy because the photographs were taken in public, where anyone could have viewed Nevilson's conduct. Finally, Nevilson's damages are not the result of the actual act of taking the photographs. Rather, he complains about the publicity given to this information. Because the tort of intrusion upon seclusion is a *conduct*-based tort, and *not* a publication-based tort, the trial court and the court of appeals properly held that summary judgment was appropriate on the intrusion upon seclusion claim.

II.

Nevilson similarly has not raised a genuine issue of material fact on his publication to private facts claim. First, the photographs of Nevilson were taken from a public vantage point,

where anyone passing by would have been able to view Nevilson and his actions. Nevilson could have, but chose not to, take affirmative measures to shield his actions from public view and, as a result, cannot show a reasonable expectation of privacy under the circumstances. Second, the published photographs do not reveal facts that a reasonable person would find highly offensive. The photographs, as Nevilson contends, show nothing more than Nevilson smoking from a hookah. While tabloid media outlets expounded on the possibilities of what other substances Nevilson may have been smoking, Nevilson was a public figure and had media access to clear up any misconceptions. Finally, because Nevilson was a well-known public figure and role model in Marshall, the photographs were of legitimate public concern. Because of these evidentiary showings, the trial court and the court of appeals properly held that summary judgment was appropriate on the publication to private facts claim.

III.

Nevilson similarly has not raised a genuine issue of material fact on his tortious interference with business expectancy claim. In his estimation, an endorsement contract—contingent entirely on his athletic performance—qualifies as a reasonable and valid business expectancy. Nevilson is mistaken. While he may have high hopes for a good showing, the possibility of winning a competitive sporting event has never been something a court has been willing to characterize as a valid business expectancy to support a tortious interference claim. Furthermore, Nevilson cannot show that Marshoogle acted to prevent that expectancy from ripening. The photographs on M.A.P. were merely incidental to the M.A.P. feature, and the posting on "SportsBlog" was consistent with the reporter's First Amendment rights to properly report news of legitimate public concern. Because Nevilson cannot establish that Marshoogle caused Nevilson to lose a speculative and contingent endorsement, the trial court and the court of

appeals properly held that summary judgment was appropriate on the tortious interference with business expectancy claim.

This Court should affirm the court of appeals in all respects.

ARGUMENT AND AUTHORITIES

The circuit court resolved this case by granting summary judgment in Marshoogle's favor on all three of Nevilson's claims. Summary judgment allows a court to efficiently dispose of a case without the need of a full trial. Marshall Rule of Civil Procedure 56(c) governs the grant of summary judgment and provides that summary judgment is proper when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Marshall R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (interpreting similar Federal Rule of Civil Procedure 56(c)). A reviewing court should consider the entire record in assessing whether summary judgment is proper. *See* Fed. R. Civ. P. 56(c). Genuine issues of material fact exist only when a "fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A reviewing court examines the trial court's grant of summary judgment de novo, applying the same standards as the trial court. *Young v. Mem'l Hermann Hosp. Sys.*, 573 F.3d 233, 235 (5th Cir. 2009). On review, the court determines whether genuine issues of material fact exist by viewing the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences from the evidence. *Anderson*, 477 U.S. at 255. The moving party "must identify specific facts to establish that there is a genuine triable issue." *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1320 (7th Cir. 1992).

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT ON NEVILSON'S CLAIM OF INTRUSION UPON SECLUSION.

Nevilson's first claim alleges that Marshoogle invaded his privacy by intruding upon his seclusion. Nevilson's claim was brought under Marshall state common law, which explicitly recognizes a cause of action for intrusion upon seclusion. (R. at 9.) Marshall courts interpreting the State statute for intrusion upon seclusion consistently apply the Restatement (Second) of Torts § 652B ("The Restatement"). (R. at 9.) To successfully raise a claim of intrusion upon seclusion, a plaintiff must show:

(1) an unauthorized intrusion or prying into the plaintiff's seclusion took place;

(2) the intrusion was offensive or objectionable to a reasonable man;

(3) the matter upon which the intrusion occurs was private; and

(4) the intrusion caused anguish and suffering.

(R. at 9); Restatement (Second) of Torts § 652B (1977).

The undisputed facts show that Nevilson cannot meet his summary judgment burden on any of the four Restatement elements. Because Nevilson cannot make a prima facie case, there are no facts that create a genuine issue of material fact to overcome summary judgment. This Court should affirm the decision of the circuit court and the court of appeals.

A. Marshoogle Did Not Physically Enter Nevilson's Property or Use Sensory Enhancements to Otherwise Intrude into His Zone of Privacy.

Nevilson cannot raise any genuine issue of material fact under the first element of intrusion upon seclusion, that an unauthorized intrusion or prying into his seclusion took place. An overwhelming majority of courts recognize that the guiding principle behind the tort of intrusion upon seclusion is an objective to punish or deter the method of obtaining private information, and not how the acquired information is subsequently published to others. *See, e.g.*, *Lovgren v.*

Citizens First Nat'l Bank of Princeton, 534 N.E.2d 987, 989 (Ill. 1989) ("The basis of the tort is the offensive prying into the private domain of another."); *Begin v. Mich. Bell Tel. Co.*, Nos. 279891, 284114, 2009 WL 1835091, at *10 (Mich. Ct. App. June 25, 2009) ("[I]ntrusion upon seclusion focuses on the manner in which information is obtained."); *Smith-Utter v. Kroger Co.*, No. 07-1213-EFM, 2009 WL 790183, at *5 (D. Kan. Mar. 24, 2009) ("Generally, the tort . . . is based upon the manner in which an individual obtains information."). Nevilson's claim fails the intrusion element for two reasons.

First, Marshoogle never physically entered Nevilson's private space. An intrusion occurs when there is "some entry, penetration, trespass, or acquisition, as in a physical entry into an area or curtilage, or wiretapping or eavesdropping, or watching through lens or camera, or opening and reading private mail." 1 George B. Trubow, *Privacy Law & Practice* § 1.06[3] (1991). The record establishes that Marshoogle's M.A.P. mobile was navigating public city streets at the time that the images of Nevilson were captured. (R. at 4.) In focusing on the physical nature by which information is obtained, some courts have recognized that an action for intrusion upon seclusion is analogous to an action for trespass. *Begin*, 2009 WL 1835091, at *10; *Doe v. Mills*, 536 N.W.2d 824, 832 (Mich. Ct. App. 1995); *Kobeck v. Nabisco*, 305 S.E.2d 183, 185 (Ga. Ct. App. 1983); *see also Newman v. Jewish Cmty. Ctr. Ass'n of Indianapolis*, 875 N.E.2d 729, 736 (Ind. Ct. App. 2007) ("[T]here have been no cases in Indiana in which a claim of intrusion was proven without physical contact or invasion of the plaintiff's physical space."). Intrusion upon seclusion penalizes an intentional, unreasonable, and highly offensive interference with another's solitude—an act that cannot generally occur without a physical invasion. Thus, without a physical trespassory invasion, Nevilson's claim of intrusion upon seclusion necessarily fails as a matter of law.

Second, the record establishes that Marshoogle did not intentionally engage in surreptitious behavior, or employ the use of sensory enhancements to obtain information that could not been seen with the "naked eye" from a public vantage point. Courts that do not explicitly require a physical trespassory invasion do require, at a minimum, an intentional act of trickery or the use of sensory enhancements. *See, e.g.*, *Beckstrom v. Direct Merch.'s Credit Card Bank*, No. Civ-04-1351, 2005 WL 1869107, at *4 (D. Minn. Aug. 5, 2005) ("Intrusion upon seclusion is an intentional tort."); *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 378 (Utah Ct. App. 1997) (intrusion must be both intentional and substantial); *Leang v. Jersey City Bd. of Educ.*, 969 A.2d 1097, 1115 (N.J. 2009) (holding that a defendant is liable for intrusion upon seclusion only when the intrusion is intentional).

For example, a federal district court in the Northern District of Illinois recently explained what was required to raise a genuine issue of material fact on the intrusion element when the defendant did not physically enter the plaintiff's property. *Webb v. CBS*, No. 08-C-6241, 2009 WL 1285836 (N.D. Ill. May 7, 2009). There, a cameraman with a CBS local affiliate used a sensory enhancement—a telephoto lens—to record what was happening in the backyard of a man accused of murdering his estranged wife. *Id.* at *1. The cameraman shot the footage from a neighbor's second story window and was able to have an unobstructed view over a seven-foot fence into the area surrounding the pool. *Id.* The target of the story was a reporter who had befriended the accused husband, and the videotape captured images of the reporter attending a pool party in her subject's backyard with her two young children. *Id.* The footage also captured images of the reporter's children, the accused's sister and other members of the accused's family. *Id.* at *2. The story broke on the CBS-affiliate's website and on a television broadcast questioning the reporter's ethics for socializing with the subject of her story. *Id.* The accused's

sister sued CBS, the reporter, the cameraman and the neighbor for intrusion upon seclusion. *Id.* In denying CBS's motion for judgment on the pleadings, the court focused on the fact that its cameraman had used a telephoto lens to look into the backyard and the "plaintiff's allegations that they were swimming in the backyard pool of a private home surrounded by a seven foot privacy fence . . . ." *Id.* at *3.

Other courts have relied on similar intentional methods of gaining access to an area thought to be private. An Ohio court in *Kohler v. City of Wapakoneta* recognized that "the use or installation of hidden listening devices or cameras" is sufficient to constitute an intrusion upon the seclusion of another. 381 F. Supp. 2d 692, 704 (N.D. Ohio 2005) (noting defendant deliberately placed recording devices, which qualifies as a sensory enhancement, next to a women's room toilet). Likewise, a North Carolina court recognized intrusions when a defendant engaged in "eavesdropping by wiretapping or microphones, peering through windows, persistent telephoning, . . . and opening personal mail." *Keyzer v. Amerlink, Ltd.*, 618 S.E.2d 768, 771 (N.C. Ct. App. 2005). Finally, in the case of *Dietemann v. Time*, an intrusion upon seclusion was found when two reporters gained entrance to the plaintiff's home by subterfuge, and took pictures with a hidden camera. 449 F.2d 245, 249 (9th Cir. 1971). These cases illustrate that intentional and deliberate schemes to see what is otherwise not visible to the naked eye are required to satisfy the intrusion element.

In contrast, the images of Nevilson were captured without any physical manipulations or actions by Marshoogle's employee. Though Nevilson argues that Marshoogle's actions were akin to "peering into his windows," his windows were on the second floor and were wide open to the viewing public. The M.A.P. mobile had an unobstructed view into Nevilson's second-floor room. Had he been on the first floor, the M.A.P. mobile would not have been able to see his

actions. The cameras were affixed to the M.A.P. mobile on the public street and the photographs were taken from the public street while the vehicle was traveling—no attempts were made to "peer into" Nevilson's windows. Marshoogle was solely concerned with capturing footage of Marshall City streets to provide Marshoogle M.A.P. users with a complete virtual reality experience.

Because Marshoogle did not physically trespass into Nevilson's seclusion and because Marshoogle did not intentionally employ the use of electronic devices, sensory enhancements, or engage in surreptitious behavior in an effort to invade Nevilson's privacy, Nevilson has failed to allege any actionable intrusion. Accordingly, summary judgment in favor of Marshoogle was proper on this element.

B. A Reasonable Person Would Not Object to Marshoogle's Actions in Capturing Street Images for Its Online, Virtual Map.

Nevilson cannot raise any genuine issue of material fact under the second element of intrusion upon seclusion, that the intrusion was highly offensive to a reasonable person. Although the interpretation and application of a reasonable person standard is ordinarily a fact question, it can nonetheless also be decided as a matter of law when "only one conclusion can be drawn from the evidence." *Hough v. Shakopee Pub. Sch.*, 608 F. Supp. 2d 1087, 1117 (D. Minn. 2009) (citing *Hougum v. Valley Mem'l Homes*, 574 N.W.2d 812, 818 (N.D. 1998)); *see also Cole v. CSC Applied Techs., L.L.C.*, No. CV-07-1027-L, 2008 WL 2705458, at *2 (W.D. Okla. June 9, 2008) (holding as a matter of law that intrusions do not rise to the level of highly offensive to a reasonable person); *In re Nw. Airlines Privacy Litig.*, No. CV-04-126, 2004 WL 1278459, at *5 (D. Minn. June 6, 2004) (same).

Cases interpreting the Restatement definition of intrusion upon seclusion apply a balancing test for determining whether an intrusion rises to the level of highly offensive. In *Hill v.*

National Collegiate Athletic Ass'n, the California Supreme Court adopted a factor-based standard for determining the offensiveness of an invasion under § 652B of the Restatement that examines:

(1) the degree of the intrusion;

(2) the context, conduct, and circumstances surrounding the intrusion;

(3) the intruder's motives and objectives;

(4) the setting into which the intruder invades; and

(5) the expectations of those whose privacy is invaded.

865 P.2d 633, 648 (Cal. 1994). Other courts have used this balancing test to determine whether an intrusion rises to the level of "highly offensive." *See, e.g.*, *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 625 (3d Cir. 1992) ("[D]etermining whether an alleged invasion of privacy is substantial and highly offensive to the reasonable person necessitates the use of a balancing test."); *Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298, 303 (D. Del. 1999) (same); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 30 F. Supp. 2d 1182, 1189 (D. Ariz. 1998) (same); *Wolfson v. Lewis*, 924 F. Supp. 1413, 1421 (E.D. Pa. 1996) (same). Under this analysis, Nevilson cannot establish that Marshoogle's actions would be highly offensive to a reasonable person.

First, the intrusion, if any, by the Marshoogle M.A.P. mobile was minimal.[1] In *Stien v. Marriott Ownership Resorts, Inc.*, a court of appeals in Utah found that the degree of intrusion was minimal, thus failing to establish the tort of intrusion upon seclusion, when a videotape of

[1] A federal court in Pennsylvania dealt with similar technology in *Boring v. Google*. 598 F. Supp. 2d 605, 698–99 (W.D. Pa. 2009). There, however, the court examined a trespass claim resulting from Google's capturing of street images on a private road for its Google Street View Program. Even under those circumstances, the court held that was not an actionable intrusion upon seclusion claim.

seventeen Marriott employees was edited to seem like the employees were responding to the question "[w]hat's sex like with your partner" and shown at a formal company Christmas party for the amusement of others. 944 P.2d at 379. Those facts were far more significant and egregious than what happened here where the M.A.P. mobile only briefly navigated past Nevilson's home and took street pictures of the area without even stopping. Marshoogle's actions were not a significant intrusion so as to be highly offensive.

Second, the context, conduct, and circumstances of the intrusion were harmless. In *Wilcher v. City of Wilmington*, a district court in Delaware found that the context, conduct, and circumstances surrounding a drug testing policy where firefighters were forced to provide urine samples—in front of collection monitors—did not rise to the level of implicating the tort of intrusion upon seclusion. 60 F. Supp. 2d at 304. Again, the facts here are far less controversial. The Marshoogle M.A.P. mobile was on a mission to solely capture images of streets and buildings, and Marshoogle had employed sophisticated technologies in an attempt to reduce any inadvertent captured pictures of individuals ending up on the M.A.P. server. (R. at 4–5.) Tens of thousands of images were captured in this process, and nothing in the record indicates Marshoogle even knew the images in the window were even captured. Marshoogle was not out on a mission to photograph him.

Third, Marshoogle's motives and objectives were solely aimed at providing users with a fully functional M.A.P. program. This is far different from cases where courts have questioned a defendant's motives and allowed an intrusion claim. For example, in *Hester v. Barnett*, a Montana court of appeals found an actionable intrusion upon seclusion where a pastor gained access to a home "through the pretense as counselor to assist in the correction of the children's behavior, when the true motive was to harm the [family] by the disclosure of the information

obtained through that guile." 723 S.W.2d 544, 563 (Mo. Ct. App. 1987). Marshoogle's motives and objectives are nothing like those involved in *Hester*. Marshoogle had no intention to disturb Nevilson at all.

Fourth, the alleged intrusion took place on public city street, wholly failing to implicate or intrude upon any private setting. As previously stated, Marshoogle did not gain access into Nevilson's home with an intent to invade his privacy. Instead, Marshoogle was merely traversing public roadways, failing to implicate any sensitive privacy setting.

Fifth, Nevilson could not possibly have had an expectation that passersby would not view his conduct—Nevilson was conducting himself in front of an open window, in full view of the unsuspecting public. (R. at 6–7.) A district court for the Eastern District of Missouri in *Elgin v. St. Louis Coca-Cola Bottling Co.* recognized that "there is no liability for observing a plaintiff or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye." No. 4:05-CV-970-DJS, 2005 WL 3050633, at *3 (E.D. Mo. Nov. 14, 2005) (citing Restatement (Second) of Torts § 652B cmt. c (1977)). As Nevilson conducted himself in full view of the public eye, he could not possibly have had a high expectation of privacy.

Because an application of the *Hill* factors and consideration of the degree, context, and motives of Marshoogle's actions weighs heavily in Marshoogle's favor, Nevilson has failed to allege that Marshoogle's actions were highly offensive to a reasonable person. Accordingly, summary judgment in favor of Marshoogle was proper on this element.

C. The Matter Was Not Private as the M.A.P. Mobile Captured the Images From a Public Vantage Point Where Passing Tourists Could Have Observed Nevilson's Conduct.

Nevilson cannot raise any genuine issue of material fact under the third element of intrusion upon seclusion, that the matter intruded upon was private. An individual claiming an intrusion upon seclusion must show "a subjective expectation of privacy and that the expectation is objectively reasonable." *In re Asia Global Crossing, Ltd.*, 322 B.R. 247, 257 (S.D.N.Y. 2005); *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 812 (9th Cir. 2002). While Nevilson may have a subjective expectation of privacy within his home, a person cannot have a legitimate and objective expectation of privacy "in being free from the dissemination of inferences drawn from observations readily perceivable in public view." *Int'l Union v. Garner*, 601 F. Supp. 187, 191 (M.D. Tenn. 1985).

Liability cannot attach for intrusion upon seclusion when observations are made in "public and open to the public eye." *See* Restatement (Second) of Torts § 652B cmt. c (1977); *Tinius v. Carroll County Sheriff Dep't*, 321 F. Supp. 2d 1064, 1083 (N.D. Iowa 2004). The Ninth Circuit Court of Appeals recognized this principle in *Medical Laboratory Management Consultants* when ABC filmed a documentary emphasizing the degree of error medical laboratories have when performing pap smear tests. 306 F.3d at 812. For purposes of that documentary, an ABC producer posed as a representative of a Michigan women's health clinic to gain access to the plaintiff's laboratory. *Id.* at 810. Because the laboratory invited the disguised reporters—who were complete strangers—onto the laboratory premises, the court was required to analyze whether the laboratory manager had a reasonable expectation of privacy. *Id.* The Court noted that in considering whether an individual had a subjective expectation of privacy, "[a] comparison of what precautions he took to safeguard his privacy interest with the precautions he

might reasonably have taken is appropriate." *Id.* at 813 (citing *Dow Chem. Co. v. United States*, 749 F.2d 307, 312–13 (6th Cir. 1984)). In that case, the court recognized that the individual's affirmative steps to prevent reporters from entering his private office—closing the door and asking the reporters not to enter—reflected a subjective expectation of privacy. *Id.*

The affirmative steps to protect the plaintiffs privacy in *Medical Laboratory Management Consultants* is precisely what is missing in this case. Nevilson took no affirmative steps whatsoever to prevent the public from viewing what went on in his home. Nevilson was sitting in front of an open window in his home with his lights illuminated. (R. at 6–7.) Nevilson's neighborhood is a well-known popular tourist attraction and is frequented by double-decker bus tours seeking to view the homes of the famous residents. (R. at 6.) Nevilson, as one of the city's famous residents, would have been such a target of the tours.[2] (R. at 6.) Despite this, Nevilson took no affirmative measures, such as drawing the blinds or dimming the lights, to shield his actions from the public eye. (R. at 6–7.) Nevilson made his actions viewable to the public to such an extent that even a passing vehicle could capture images of his actions. The record cannot support a finding that Nevilson had an objectively reasonable privacy expectation. *See Schiller v. Mitchell*, 828 N.E.2d 323, 326 (Ill. App. Ct. 2005) (dismissing intrusion claim where defendant placed surveillance "camera aimed at the garage, driveway, and side-door of plaintiff's home" because plaintiff had no reasonable expectation of privacy in those areas visible to the public).

[2] Any passenger on the top level of a double-decker bus could see over Nevilson's six-foot privacy fence. According to The American Public Transit Center, a double-decker bus has a "[t]otal bus height of usually 13 to 14.5 feet." The American Public Transit Center, *Bus and Trolleybus Definitions* (2009), http://www.apta.com/research/stats/bus/definitions/cfm.

Because Nevilson took no affirmative measures to shield his conduct, but rather conducted himself in full view of the public eye, he cannot show that Marshoogle intruded upon a private matter. Accordingly, summary judgment in favor of Marshoogle was proper on this element.

D. Nevilson's Allegations of Anguish and Suffering Did Not Result from the Taking of the Photographs.

Nevilson cannot raise any genuine issue of material fact under the fourth element of intrusion upon seclusion, that the intrusion caused anguish and suffering. "The basis of the tort is not publication or publicity; rather, the core of this tort is the offensive prying into the private domain of another." *Lovgren*, 534 N.E.2d at 989. Any injury that may have resulted from the publication of any photographs obtained by Marshoogle would have to be evaluated under a claim of disclosure private facts, and not under a claim of intrusion upon seclusion. *See id.* at 989; *see also infra* Section II (discussing why any argument that a cause of action for a publication based tort similarly must fail). Nonetheless, the gravamen of Nevilson's complaint and the entirety of his damage model relies not on the manner in which the images were obtained but, rather, the publicity they received after Marshoogle, the reporter, Nevilson and the general public learned they were contained on the M.A.P. feature.

Nothing about the method in which the images were obtained could cause the mental anguish and suffering Nevilson alleges. The M.A.P. mobiles randomly travel city streets to obtain full photographic coverage of streets, buildings, and landmarks to produce a complete virtual map for Marshoogle users. (R. at 4.) The images are then digitally processed and uploaded to the M.A.P. server. (R. at 4.) At the time that the images were captured by the M.A.P. mobile, neither Marshoogle nor Nevilson were aware of the contents of the photographs, or that the photographs in question had even been taken. (R. at 7.) Thus, as a matter of law, the actual act of capturing the photographs of Nevilson could not have caused him any suffering or

harm. It was not until a third party posted the hyperlink to the images on the M.A.P. server that Marshoogle, Nevilson, and the public became aware of the photograph's contents.

Because the alleged mental anguish and suffering alleged in the complaint could not have resulted from the manner in which M.A.P. obtained the images, Nevilson has failed to establish as a matter of law that Marshoogle caused his anguish or suffering. Thus, summary judgment in favor of Marshoogle was proper on this element.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT ON NEVILSON'S CLAIM OF PUBLICITY GIVEN TO PRIVATE LIFE.

Nevilson's second claim alleges that Marshoogle invaded his privacy by publically disclosing private facts displayed on its M.A.P. feature and then also by including a hyperlink on its "SportsBlog." (R. at 11.) Nevilson's claim was brought under Marshall Revised Code § 762(b), which provides a cause of action for public disclosure of private facts. (R. at 10.) To successfully raise a claim of public disclosure of private facts, a plaintiff must show:

(1) publication of a matter concerning the private life of another;

(2) that the matter publicized would be highly offensive to a reasonable person; and

(3) that the matter is not of legitimate concern to the public.

(R. at 10); Marshall Rev. Code § 762(b).

The undisputed facts show that Nevilson did not raise a genuine issue of fact on any of the three required elements. Because Nevilson cannot make a prima facie case, he has not created a genuine issue of material fact to overcome summary judgment. This Court should affirm the decision of the circuit court and the court of appeals.

A. The Photographs Did Not Concern a Private Matter Because the M.A.P. Mobile Cameras Merely Recorded What Any Pedestrian, Driver, or Passenger on a Tourist Bus Might See.

Nevilson cannot raise any genuine issue of material fact under the first element of public disclosure of private facts, that the matter publicized was private. The tort of public disclosure of private facts is "meant to protect against the disclosure of 'intimate' details the publicizing of which would be not merely embarrassing and painful but deeply shocking to the average person subjected to such exposure." *Chisholm v. Foothill Capital Corp.*, 3 F. Supp. 2d 925, 940–41 (N.D. Ill. 1998). As previously stated in the intrusion analysis, what Nevilson leaves open to public view is not what the law recognizes as being "private."[3] *See Duran v. Detroit News, Inc.*, 504 N.W.2d 715, 720 (Mich. Ct. App. 1993) ("[T]he information disclosed must be of a private nature that excludes matters already of public record or otherwise open to the public eye."); *Showler v. Harper's Magazine Found.*, 222 F. App'x 755, 764 (10th Cir. 2007) (holding that photographs taken of an open casket at a funeral did not constitute public disclosure of private facts because "[p]laintiffs opened up the funeral scene to the public eye").

A federal court in the Northern District of California explained this concept in *Daly v. Viacom, Inc.* 238 F. Supp. 2d 1118 (N.D. Cal. 2002). There, the plaintiff brought an action for invasion of privacy after the defendant released video and images of the plaintiff kissing a rock musician in the women's restroom as part of a television program "Bands on the Run." *Id.* at 1123–24. The court rejected the plaintiff's argument that an invasion of privacy had occurred, noting that the plaintiff kissed the man "in public and plain view." *Id.* at 1124.

[3] The analysis that defeats the private fact element under an intrusion upon seclusion claim is equally applicable to defeat the private matter element under a public disclosure of private facts claim.

Similarly, the images of Nevilson smoking from a hookah, were captured *from public and plain view*. A moving vehicle, travelling down a public city street captured the photographs. Marshoogle cannot be held responsible for actions that Nevilson willingly made public by sitting in front of an open, unobstructed window, facing a public city street. Because Marshoogle took the photographs while travelling down a public city street, Nevilson has failed to allege that the information published was private. Accordingly, summary judgment in favor of Marshoogle was proper on this element.

B. A Reasonable Person Would Not Regard the Posting of Accurate Photographs of Nevilson Smoking from a Hookah as Highly Offensive.

Nevilson cannot raise any genuine issue of material fact under the second element of public disclosure of private facts, that the matter publicized would be highly offensive to a reasonable person. Marshall Rev. Code § 762(b)(a). Whether the publication of an allegedly private fact constitutes highly offensive conduct is a question of law to be decided by the court. *Haynes v. Alford A. Knopf, Inc.*, No. 91-C-8143, 1993 WL 68071, at *5 (N.D. Ill. Mar. 10, 1993). As with the analysis performed under the tort of intrusion upon seclusion, discussed *supra*, Section I.A, courts have considered the degree, context, conduct, and circumstances surrounding the intrusion as well as the intruder's motives and objectives. *Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1145 (S.D. Cal. 2005); *Miller v. Nat'l Broad. Co.*, 232 Cal. Rptr. 668, 679 (Ct. App. 1986); *Chisholm*, 3 F. Supp. 2d at 941 ("[T]he court should consider the context, conduct, and circumstances surrounding the publication as well as the publication itself.").

In a comment, the Restatement (Second) of Torts explains situations that, as a matter of law, would not be highly offensive to a reasonable person. An illustration explains that "[one] 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). This is particularly true when a person is able to make those observations while standing or travelling on a public street. Under the Restatement formulation, the tort of public disclosure of private facts is "meant to protect against the disclosure of intimate details the publicizing of which would be not merely embarrassing and painful but deeply shocking to the average person subjected to such exposure." *Chisholm*, 3 F. Supp. 2d at 941.

In applying the Restatement and the *Hill* factors discussed in the intrusion section, *supra*, Nevilson cannot demonstrate that the publication of the images was highly offensive to a reasonable person. The context, conduct, and circumstances surrounding the publication of the photographs does not reflect offensive actions. Marshoogle published the photographs with the sole purpose of providing a virtual map—it did not publish the photographs with knowledge of their contents. Indeed, Marshoogle's systems took affirmative steps to prevent publication of people and license plates. (R. at 4.)

Finally, Nevilson concedes the image is authentic—he was smoking from a hookah. His complaint is what that image conveys to others. The photographs themselves cannot be considered "highly offensive and objectionable" because, as Nevilson so adamantly asserts, they accurately depict him smoking from a hookah. As Nevilson is a public figure, he had undemanding access to the media and could have easily clarified any misunderstandings or misinterpretations of the photographs. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."). The subsequent posting on "SportsBlog," which a reporter posted, only directed the public to accurate images of Nevilson. (R. at 7.) The

fact that Nevilson smokes from a hookah is not the sort of fact that this tort was designed to shield.

Because the photographs accurately depict Nevilson smoking from a hookah, and because the context, conduct, and circumstances surrounding the publication do not reveal highly offensive conduct on the part of Marshoogle, Nevilson has failed to allege that the information published was highly offensive to a reasonable person. Accordingly, summary judgment in favor of Marshoogle was proper on this element.

C. The Fact that an Athlete and Anti-Drug Spokesman Smokes from a Hookah Is a Matter of Legitimate Concern to the Public.

Nevilson cannot raise any genuine issue of material fact under the third element of public disclosure of private facts, that the matter publicized was not of legitimate concern to the public. The publication of images of Nevilson smoking from a hookah was not "a morbid and sensational prying into private lives for its own sake." *Green v. Chi. Tribune Co.*, 675 N.E.2d 249, 256 (Ill. App. Ct. 1996); *see also Boston Herald, Inc. v. Sharpe*, 737 N.E.2d 859, 873 (Mass. 2000) ("When the subject matter of publicity is of legitimate public concern . . . there is no invasion of privacy."); Restatement (Second) of Torts § 652D cmt. d (1977) (same).

While freedom of the press is a fundamental principle of our Constitution, a balance must be struck between those facts that are truly newsworthy and those that are of no legitimate public concern. Courts consider several factors in determining whether or not a matter is considered newsworthy including: (1) the social value of the facts published; (2) the depth of the article's intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily acceded to a position of public notoriety. *Kapellas v. Kofman*, 459 P.2d 912, 922 (Cal. 1969). "[W]hen the legitimate public interest in the published information is substantial, a much greater intrusion into an individual's private life will be sanctioned." *Id.*; *see also Downing v. Abercrombie &*

Fitch, 265 F.3d 994, 1001 (9th Cir. 2001) ("[N]o cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know."). Implicit in the notion of "newsworthiness" is the fact that those who voluntarily place themselves in the public eye, such as celebrities or, in this case, athletes, have a diminished expectation of privacy. 1 J. Thomas McCarthy, *The Rights of Publicity and Privacy* § 5:77 (2d ed. 2005); L. Lee Byrd, Note, *Privacy Rights of Entertainers and Other Celebrities: A Need for Change*, 5 Ent. & Sports L.J. 95, 98 (1988) (noting that most public persons seek and consent to publicity).

Nevilson bears the burden of demonstrating that the publicized matters are *not* newsworthy. *Michaels v. Internet Entm't Group, Inc.*, No. CV-98-0583, 1998 WL 882848, at *7 (C.D. Cal. 1998); *Shulman v. Group W. Prods., Inc.*, 955 P.2d 469, 479 (Cal. 1998) (holding that "the lack of newsworthiness is an element of the private facts tort," making newsworthiness a complete bar to common law liability). The facts in the record establish, as a matter of law, that the photographs published of Nevilson were of a legitimate public concern, thus defeating Nevilson's claim of publication of private facts. The record establishes that Nevilson had a "growing reputation" and had received publication from "[m]ainstream media and sports news outlets." (R. at 5.) Nevilson's publicity resulted in his becoming a role model, and led him to be "featured in several promotional publications of Marshall City Against Drugs campaign." (R. at 6.) Nevilson's fame also landed him spots on several TV commercials, including much publicity regarding his contingent endorsement deal in the national media. (R. at 6.) Further, the fact that Nevilson potentially stood to represent the United States of America in the Olympics weighs heavily in favor of a stance that these images were of legitimate public concern. Had Nevilson earned a spot on the Olympic Diving Team, he would have received *worldwide* media attention. Thus, it cannot be disputed that Nevilson was a public figure. *See James v. Gannett Co.*, 353

N.E.2d 834, 876 (N.Y. 1976) ("The category of public figures . . . include[s], without doubt . . . performers such as professional athletes.").

As a public figure, Nevilson inherently has a reduced expectation of privacy. His expectation of privacy was even further reduced by the fact that his neighborhood was a "popular tourist attraction," frequented by "double-decker celebrity bus tours." (R. at 6); *see supra* Section I.C n.2 (discussing the average height of a double-decker tour bus). Being a "role model" and an advocate and spokesperson for Marshall City's campaign against drug use, photographs of Nevilson using a device commonly used to smoke marijuana, an illegal substance, were necessarily of legitimate public concern. Andrea Peyser, *Pool Fool Letting Endorsement Deals Go Up In Smoke*, N.Y. Post, Feb. 2, 2009, at 5 (describing Michael Phelps, an Olympic Swimmer, who stood to lose millions of dollars of athletic endorsements after he was caught smoking "a substance that definitely was not tobacco" from a large water pipe). When the photographs were first published, Marshoogle had no knowledge of what the photographs depicted—thus, a reasonable person may well have believed Nevilson to be smoking an illegal drug, in direct contradiction of his position against the use of illegal drugs.

Because Nevilson was an anti-drug spokesperson and role-model who had received national media attention, he has failed to allege that the information published was not of legitimate public concern. Accordingly, summary judgment in favor of Marshoogle was proper on this element.

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT ON NEVILSON'S CLAIM OF TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY.

Nevilson's final claim alleges that Marshoogle's publication of images on M.A.P. and publication of a hyperlink to "SportsBlog" tortiously interfered with his business expectancy.

(R. at 12.) Nevilson's claim was brought under Marshall Revised Code § 762(b), which provides a cause of action for tortious interference with business expectancy upon a showing of:

(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.

(R. at 12); Marshall Rev. Code § 762(b); *see* Restatement (Second) of Torts § 766B (1977) (similar provision for intentional interference with prospective contractual relations). Only elements one, three and four are contested. *See* R. at 12 (showing Marshoogle conceded that it was aware of the statements of Nevilson's potential endorser).

Nevilson did not raise a genuine issue of material fact on the three contested elements. Because Nevilson cannot make a prima facie case for tortious interference with business expectancy and, as a result, cannot meet his burden to overcome summary judgment. This Court should affirm the decision of the circuit court and the court of appeals.

A. Nevilson's Expectancy of Endorsement Contracts Were Far Too Speculative to Support a Viable Tortious Interference Claim as All Were Contingent on His Performance in the Upcoming Olympic Trials.

Nevilson cannot raise any genuine issue of material fact under the first element of tortious interference with business expectancy, that he possessed a valid and reasonable expectancy. Marshall Rev. Code § 762(b). Nevilson's so-called expectancy was an endorsement contract that was expressly "contingent upon his becoming a member of the Olympic Diving Team." (R. at 6.) Nevilson knew he had to place first or second to make the Olympic team, and, thus, his expectancy was far too speculative.

The California Supreme Court recognized this concept in a case involving horse racing. *Youst v. Longo*, 729 P.2d 728 (Cal. 1987). During the eighth race at Hollywood Park, one jockey allegedly steered his horse into the path of the plaintiff's horse, causing the horse to break his stride. *Id.* at 730–31. Though the offending jockey's horse was disqualified by race officials, the plaintiff sued, claiming his horse would have won the race but for the defendant jockey's actions. *Id.* at 731. The plaintiff asserted a claim for tortious interference with business expectancy and sought as damages the prize money for winning first place. *Id.* In sustaining the demurrer, the court explained:

> Determining the probable expectancy of winning a sporting contest but for the defendant's interference seems impossible in most if not all cases, including the instant case. Sports generally involve the application of various unique or unpredictable skills and techniques, together with instances of luck or chance occurring at different times during the event, any one of which factors can drastically change the event's outcome. . . . Usually, it is impossible to predict the outcome of most sporting events without awaiting the actual conclusion.

Id. at 736.

If this Court were to find an expectancy existed in a sporting event, nothing would stand in the way of an unhappy gambler, arguing that his wager was a "sure thing." Nothing would prevent a collegiate athlete from arguing that making a professional league team was a valid and reasonable expectancy, and nothing would prevent a stockbroker from arguing that a denied bank loan cost him millions in the market. Interference with the chance of winning a contest, such as the Olympic Trials at issue here, presents a situation too uncertain upon which to base tort liability.

An Iowa state court of appeals applied this same rationale in the context of a collegiate basketball game. *Bain v. Gillispie*, 357 N.W.2d 47 (Iowa Ct. App. 1984). A novelty store in Iowa City specializing in University of Iowa sports memorabilia sued a referee for making a bad

call in the collegiate basketball game between the Iowa Hawkeyes and the Purdue Boilermakers. *Id.* at 48. In rejecting the claim, the court, in Iowa reasoned:

> Heaven knows what uncharted morass a court would find itself in if it were to hold that an athletic official subjects himself to liability every time he might make a questionable call. The possibilities are mind boggling. If there is a liability to a merchandiser like the Gillispies, why not to the thousands upon thousands of Iowa fans who bleed Hawkeye black and gold every time the whistle blows? It is bad enough when Iowa loses without transforming a loss into a litigation field day for "Monday Morning Quarterbacks."

Id. at 49–50.

Though the Restatement (Second) of Torts has acknowledged that as a general rule competitive events cannot give rise to a legally recognized business expectancy, it does recognize a very narrow circumstance where tort liability could exist—when someone stops a prohibitive frontrunner in the *middle* of a competitive event. In a special note, the Restatement explains that there are "[c]ases in which the plaintiff [was] wrongfully deprived of the expectancy of winning a race or a contest, when he has had a substantial certainty or at least a high probability of success." Restatement (Second) of Torts § 744B, special note, pp. 55–60 (1977). The example provided describes such a situation:

> [A] plaintiff is entered in a contest for a large cash prize to be awarded to the person who, during a given time limit, obtains the largest number of subscriptions to a magazine. At a time when the contest has one week more to run and the plaintiff is leading all other competitors by a margin of two to one, the defendant unjustifiably strikes the plaintiff out of the contest and rules him ineligible. In such a case there may be sufficient certainty established so that the plaintiff may successfully maintain an action for loss of the prospective benefits.

Id.

According to the complaint here, Nevilson was harmed before the Olympic Trials began. (R. at 7.) An athletic contest yet to start could not fit within the narrow circumstance described in the Restatement's special note. A reputation does not win the Olympic Trials. A diver cannot

get a substantial lead in the Olympic Trials by placing first or second in competitions leading up to the Olympic Trials. He must perform well on the day of the competition. *See Klein v. Grynberg*, 44 F.3d 1497, 1506 (10th Cir. 1995) (holding that mere hope is insufficient to meet the reasonable likelihood requirement to establish an expectancy). The alleged expectancy was conditioned on Nevilson placing in either first or second place in the Olympic Trials—a highly competitive process where no one could possibly predict results.[4]

Because the outcome of the Olympic trials is far too speculative to predict, Nevilson has failed to allege that he possessed a valid and reasonable expectancy. As a result, summary judgment in favor of Marshoogle was proper on this element.

B. Marshoogle's Actions Did Not Constitute Purposeful Interference that Prevented Nevilson's Alleged Business Expectancy from Ripening.

Nevilson cannot raise any genuine issue of material fact under the third element of tortious interference with business expectancy, that Marshoogle purposely interfered, causing Nevilson to lose his expectancy. Marshall Rev. Code § 762(b)(3); Restatement (Second) of Torts § 766 cmt. j (1977). Nevilson cannot meet his burden as the record does not establish that Marshoogle took any actions to intentionally harm him. Nevilson's poor performance, not the publication of photographs, caused him to fail to qualify for the Olympic Diving Team.

---

[4] Furthermore, the record is unclear as to the extent that negotiations between Nevilson and Sunshine had progressed. To the extent that any endorsement deal remained contingent on Nevilson's making the Olympic Diving Team, Nevilson's expectancy was still under negotiation and cannot, as a matter of law, constitute a valid expectancy for purposes of this tort. *See, e.g.*, *Israeli Aircraft Indus., Ltd. v. Sanwa Bus. Credit Corp.*, 850 F. Supp. 686, 693 (N.D. Ill. 1993) (finding that no valid expectancy existed because business relations were still under negotiation); *Kremmerer v. John D. & Catherine T. MacArthur Found.*, 594 F. Supp. 121, 122–23 (N.D. Ill. 1984) (finding no valid expectancy because the contract was still being negotiated).

1. Marshoogle did not engage in any purposeful or unjustified interference in posting the images to the M.A.P. feature or including a hyperlink to them on the "SportsBlog."

To rise to the level of intentional conduct, courts have generally required that the defendant act "with a purpose to interfere" with the expectancy. *See Gruen Indus., Inc. v. Biller*, 608 F.2d 274, 282 (7th Cir. 1979). The tort is similar to other intentional torts in that "the defendant must have either desired to bring about the harm to the plaintiff or have known that this result was substantially certain to be produced by his conduct." *Baptist Health v. Murphy*, 226 S.W.3d 800, 808 (Ark. 2006) (citing *City Nat'l Bank of Fort Smith v. Unique Structures, Inc.*, 929 F.2d 1308, 1317 (8th Cir. 1991)). Courts require that the defendant's conduct be malicious in nature before imposing tort liability for interference with business expectancy. *See Miller Foods, Inc. v. Schubert-Loughran*, No. CV-020815760s, 2009 WL 1688344, at *7 (Conn. Super. Ct. May 20, 2009); *Engel v. 34 E. Putnam Ave. Corp.*, No. FST-CV-075004566, 2009 WL 1662932, at *2 (Conn. Super. Ct. May 15, 2009). Malice, under the law, requires proof that a defendant "acted intentionally, purposefully, and without legal justification." *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 108 F.3d 522, 527 (4th Cir. 1997). Nevilson's claim that Marshoogle intentionally interfered with his business expectancy fails for two distinct reasons.

First, Marshoogle's actions were not intentional because Marshoogle's posting of the images showing Nevilson smoking from a hookah were incidental to the M.A.P. feature's objectives. When the images captured by Marshoogle's M.A.P. mobile were published to the M.A.P. database, Marshoogle had no knowledge of their contents. At the time the photographs were taken by the M.A.P. mobile, Marshoogle knew neither the photograph's contents nor the fact that the M.A.P. mobile had driven past Nevilson's home. (R. at 4); *see also Chi.'s Pizza,*

Inc. v. Chi.'s Pizza Franchise Ltd. USA, 893 N.E.2d 981, 863 (Ill. App. Ct. 2008) ("Plaintiffs must prove that the defendants acted intentionally with the aim of injuring plaintiffs' expectancy."). Rather, Marshoogle uploaded the street photographs for its M.A.P. feature. Under these circumstances, Nevilson cannot show, as he must, that Marshoogle maliciously and intentionally interfered with his business expectancy.

Second, the reporter's posting of the hyperlink to the images on the M.A.P. server was comment on a legitimate news story, not on Nevilson's business affairs. Nevilson was "widely viewed as a success story for underprivileged youth" and "was heralded as the next big diving star and a top contender in the 2010 Olympics." (R. at 5.) Nevilson cultivated an image as a good boy, whose "journey to success reflected a general feeling among the people of Marshall that Nevilson represented the true potential of Marshall's youth." (R. at 6.) Therefore, it is understandable that a sports reporter—whose job is to fully report on the latest sports developments—would submit a post illustrating that Nevilson may not have been the "success story," "true potential," or "next big . . . star" that everyone thought him to be.

When dealing with the publication of information, tortious interference claims are governed by the First Amendment. *See Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (holding that tortious interference with business expectancy claims are governed by the First Amendment). Settled law recognizes that the First Amendment protects the media in its collection and dissemination of information regarding matters of the public interest. *N.Y. Times v. Sullivan*, 376 U.S. 254, 269 (1964). A plaintiff "cannot recover damages stemming from the publication of protected speech without first meeting the requirements imposed by the First Amendment for defamation claims." *Med. Lab. Mgmt. Consultants*, 30 F. Supp. 2d at 1199 n.19 (citing *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988)). Thus, because Nevilson has

acknowledged that he smoked from a hookah, he cannot prevail under a theory of tortious interference. *See Gertz*, 418 U.S. at 342–43 (holding that the Constitution forbids liability for defamation without proof of fault).

2. Marshoogle's actions did not prevent Nevilson from realizing his alleged business expectancy.

In addition, the purposeful or unjustified interference must actually prevent Nevilson's economic advantage from ripening. *Augustine v. Trucco*, 268 P.2d 780, 791 (Cal. 1954). To meet this burden, Nevilson must show a direct causal link between Marshoogle's actions and the harm he suffered. *Lamminen v. City of Cloquet*, 987 F. Supp. 723, 731 (D. Minn. 1997); *R&A Small Engine, Inc. v. Midwest Stihl, Inc.*, No. 06-877, 2006 WL 3758292, at *4 (D. Minn. Dec. 20, 2006); *Hayes v. N. Hills Gen. Hosp.*, 590 N.W.2d 243, 250 (S.D. 1999) (holding that the plaintiff must show "that it is reasonably probable that . . . prospective economic advantage would have been realized but for the defendant's conduct"). Nevilson's poor performance, not Marshoogle's actions, caused him to lose his endorsement contracts.

Under the facts presented here, the causal chain between Nevilson's failure to obtain his endorsement and Marshoogle's actions are far too attenuated to show "but for" causation. Essentially, Nevilson argues that Marshoogle's pictures prompted negative publicity from tabloid news sources and his emotional distress, ultimately causing his failure to perform at his diving competition. In his view, this series of events prevented his expectancy from ripening. This is far too attenuated to prove that Marshoogle's actions prevented an expectancy from being realized. Consistent with the well-founded precedent interpreting the tort, Nevilson must show that Marshoogle's actions *directly* prevented his business expectancy from ripening. Nevilson

cannot do so and now attempts to use Marshoogle as an insurer for his failed athletic performance.[5]

Because Marshoogle's publication of the photographs was merely incidental to the M.A.P. program and served a legitimate newsworthy purpose, Nevilson has failed to prove that Marshoogle intentionally interfered with his expectancy, preventing it from ripening. Thus, summary judgment in favor of Marshoogle was proper on this element.

C. Marshoogle's Postings Did Not Damage Nevilson.

Nevilson cannot raise any genuine issue of material fact under the fourth element of tortious interference with business expectancy, that Marshoogle's actions caused Nevilson damage. Nevilson has the burden of establishing that he suffered damages "with reasonable certainty." *UST Corp. v. Gen. Road Trucking Corp.*, 783 A.2d 931, 942 (R.I. 2001) (citing Restatement (Second) of Torts § 774(a) cmt. c (1977)). The analysis explaining that Marshoogle's actions did not prevent Nevilson's expectancy from ripening, *supra*, Section III(B), is equally applicable to establish that Marshoogle's actions did not cause Nevilson damage.

Because Nevilson cannot lose something that he never possessed, his "endorsement contract with Sunshine Athleticwear as well as additional endorsement deals resulting from his

[5] Many endorsement contracts contain a morals clause. *See, e.g.*, *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, No. 3:06-CV-201-RJC, 2009 WL 426555, at *4 (W.D.N.C. Feb. 19, 2009) (recognizing racecar driver's endorsement contract contained a morals contract, allowing Fruit of the Loom to terminate his endorsement if he "commits or has committed any act . . . or becomes involved in any situation . . . involving . . . moral turpitude . . . or otherwise reasonably tending to bring him into public disrepute"). These clauses provide a basis for avoiding contractual obligations to protect companies that may not want their brand name associated with a celebrity spokesperson involved in an ongoing scandal. While the record is silent as to whether the proposed endorsement contract with Sunshine Athleticwear had such a clause, this is potentially another reason why Nevilson might not have been able to receive the damages he claims in this suit.

rising popularity and impending qualification for the 2010 Olympic Team" do not meet the standard for proving damages with reasonable certainty. (*See* R. at 12.) Nevilson cannot establish the loss of his endorsement contracts with reasonable certainty and, thus, has failed to allege sufficient facts to show that Marshoogle's actions caused him damage. Accordingly, summary judgment in favor of Marshoogle was proper on this element.

D. Marshoogle Has a Valid First Amendment Defense that Defeats Nevilson's Claim as a Matter of Law.

Even if Nevilson could have established that the postings caused a loss of business expectancy, his claim would still fail. The gravamen of Nevilson's case is that Marshoogle should be liable for damage to his reputation supposedly caused by Marshoogle's postings on the M.A.P. feature and the "SportsBlog." Nevilson cannot avoid First Amendment protections by artfully pleading his claim as a tortious interference with business expectancy. *Blatty v. N.Y. Times Co.*, 728 P.2d 1177, 1182 (Cal. 1986). The tortious interference with business expectancy claim addresses First Amendment concerns differently than Nevilson's other claims. The public disclosure privacy tort incorporates First Amendment concerns in the tort's elements. Marshall Rev. Code § 762(d). The intrusion privacy tort focuses on how the information is acquired, not the speech. *Lovgren*, 534 N.E.2d at 989. In contrast, the First Amendment provides an affirmative defense to any claims based on truthful speech on a matter of public concern. *Blatty*, 728 P.2d at 1182. Constitutional protection does not depend on the label a plaintiff gives to a cause of action.

The United States Supreme Court has recognized that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). This is the underlying premise of our Constitutional system. "It is a prized American privilege to speak one's mind,

although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for vigorous advocacy no less than abstract discussion." *Sullivan*, 376 U.S. at 269. "It is speech on matters of public concern that is at the heart of the First Amendment's protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985). Therefore, any restrictions on free speech must be contemplated in light "of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-opened." *Sullivan*, 376 U.S. at 270.

The image is an accurate depiction of Nevilson smoking from a hookah. (R. at 7.) He does not contend that the image has been altered or misrepresented. His claim necessarily fails because truthful information is not actionable. *George A. Fuller Co. v. Chi. Coll. of Osteopathic Med.*, 719 F.2d 1326, 1332 (7th Cir. 1983). Marshoogle's postings were privileged because they were done for the purpose of reporting on a legitimate news story and were not being misrepresented by Marshoogle. Because the mere provision of truthful information cannot be the basis of a tort claim, summary judgment on this issue was proper.

CONCLUSION

This Court should AFFIRM the First District Court of Appeals' judgment in all respects. Specifically, this Court should find that Nevilson failed to raise a genuine issue of material fact on the claims that an intrusion upon seclusion occurred, that a disclosure of Nevilson's private life was made public, or that Marshoogle tortiously interfered with Nevilson's business expectancies.

Respectfully submitted,

____

ATTORNEYS FOR APPELLEE

APPENDIX TABLE OF CONTENTS

Page

APPENDIX “A”: M.A.P. Mobile A-1

APPENDIX “A”

M.A.P. Mobile