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BENCH MEMORANDUM

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I. INTRODUCTION

Petitioner, Aaron Murphy, appeals to the Marshall Supreme Court from a decision affirming the grant of summary judgment in favor of Respondent, MarshCODE, on his claims of defamation, false light invasion of privacy, and breach of contract. Thus, there are now three issues before the Marshall Supreme Court. The first two issues concern whether an individual can maintain an action of defamation and false light invasion of privacy when the false statement arose because of a computer malfunction. The last issue concerns whether the unilateral modification of a privacy agreement constitutes a breach of contract when assent to the modification requires no affirmative act of the other party.

A. Procedural History

Murphy's original complaint, filed in the Marbury County Circuit Court, set forth causes of action for defamation, false light invasion of privacy, and breach of contract against MarshCODE. Following discovery, MarshCODE moved for summary judgment on all three counts, which the circuit court granted.

Subsequently, Murphy lost its appeal to the First District Court of Appeals, which affirmed the circuit court's order on all three counts. Finally, Murphy petitioned for leave to appeal to the Supreme Court of Marshall. The Supreme Court granted leave to appeal the summary judgment order as to all three counts.

B. Background Information

The parties stipulate that the court of appeals' decision shall serve as the record on appeal. The court of appeals decision sets forth the following facts:

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 has 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. 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. A trained technician, employed by MarshCODE would then place 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 to remain 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: 1) "Your DNA, Your Health," which enabled customers to discover their potential genetic risks; and 2) "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, which provided 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 would notify the customer if a match was discovered. 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 or she wanted to initiate contact with this newfound potential relative, that is, send an "invitation" to the match's e-mail address on file with MarshCODE. The customer had the option to reveal as much or as little identifying information as he/she wished in this "invitation." In turn, the recipient of the invitation could either decline or accept the invitation and allow the customer to view the recipient's full profile on a secure, password protected "Build Your Family Tree" webpage 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, then he or 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 seventy-two (72) hours. Data subjects' information would still remain in the original database to be used strictly for research purposes. Subsequently, MarshCODE announced on its website to invite 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 postal mail depending on the preferred method of communication that was indicated in the original signed Agreement.

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, MarshCODE did not personally contact Murphy, nor did Murphy 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, both of which the church condemns as a sins. Murphy has spoken out against sex education in schools and gay marriage. He has also commented extensively on radio and television broadcasts promoting these views. He received a great deal of press coverage during the general elections of 2008. Murphy's views have provoked the reaction of several activist groups, especially gay rights organizations. Gay rights activists have regularly used many venues, including social media, to voice their opposition to Murphy's views and the Church's teachings. They have also organized 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 MarshCODE's "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 premarital 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 him and called for his resignation. The great majority of his community shunned him and the press hounded him. 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 of intentionally misusing 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 "Build 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. He would have never consented to such use had he been informed of the change. Murphy suggested that this whole incident was part of a greater plot aimed at discrediting his reputation 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 participate in the commercial service so that MarshCODE could remove have their genetic information from the commercial database. However, both the e-mail and the paper copy notice sent via postal 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.

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. However, in its 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 was evaluated using the test database, 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 did not work, causing the randomized (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, it is undisputed 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 had taken all necessary measures 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. Further, 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, as he was told by the Church officials, "the dust settles."

In June 2009, Aaron Murphy commenced litigation against MarshCODE.

II. ISSUES PRESENTED FOR REVIEW

Three main issues are raised on appeal: (1) whether the circuit court erred in granting summary judgment on Murphy's claim of defamation; (2) whether the circuit court erred in granting summary judgment on Murphy's claim for false light invasion of privacy; and (3) whether the circuit court erred in granting summary judgment on Murphy's breach of contract claim.

III. ANALYSIS

A. Standard of Review

In the State of Marshall, Rule 56 of the Marshall Rules of Civil Procedure governs summary judgment. Under this rule, summary judgment is proper only if there are no genuine issues of material fact. If so, then the moving party is entitled to a judgment as a matter of law.[1] A genuine issue of material fact exists only if "a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented."[2]

An appellate court reviews a grant of summary judgment *de novo,* applying the same standard as the trial court.[3] The court determines whether a genuine issue of material fact exists by viewing the evidence in the light most favorable to the non-moving party and drawing all reasonable and justifiable inferences in favor of that party.[4] The moving party bears the burden of identifying the material facts that are without genuine dispute, and which support the entry of summary judgment in favor of the moving party.[5] Alternatively, to survive the motion, the non-moving party must identify which material facts raise genuine issues of dispute.[6] However, because the entry of summary judgment "is a drastic means of disposing of litigation,"[7] the court should grant summary judgment only when the moving party's right to relief is "clear and free from doubt."[8] The mere fact that there exists "some alleged factual dispute between the parties"[9] or "some metaphysical doubt as to the material

1. Marshall R. Civ. P. 56(c) (R. at 1). Rule 56(c) is similar or identical to the corresponding provision of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 56(c).
2. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).
3. Delta Sav. Bank v. United States, 265 F.3d 1017, 1021 (9th Cir. 2001).
4. *Anderson*, 477 U.S. at 255.
5. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).
6. *Id.* at 324.
7. Purtill v. Hess, 489 N.E.2d 867, 871 (Ill. 1986).
8. *Id.*
9. *Anderson*, 477 U.S. at 247 (emphasis omitted).

facts"[10] is insufficient to defeat a motion for summary judgment.

B. Defamation

1. *General*

Murphy asserts that the personally identifying information MarshCODE sent to Billie Who through "Build Your Family Tree" constitutes defamation.

2. *Elements*

The Marshall courts have adopted the Restatement (Second) of Torts definition of defamation. A plaintiff must establish that there was: (1) a false and defamatory statement concerning the plaintiff; (2) unprivileged publication to a third party; (3) fault amounting to at least negligence on the part of the publisher; and (4) either actionability of the statement or the existence of special harm by the publication.[11]

i. False and Defamatory Statement Concerning the Plaintiff

The first element requires that the defendant has made a false statement concerning the plaintiff. Here, the parties stipulate that Murphy is not the father of Billie Who, i.e., that the statement is false; therefore, no further argument on this point is needed.

A statement is defamatory "if it tends to cause such harm to the reputation of another as to lower him in the estimation of the community, or, to deter third persons from associating or dealing with him."[12]

In this case, Murphy will argue that the information disseminated to Billie Who by MarshCODE's use of "Build Your Own Family Tree" is actionable as a defamatory statement. To support its contention, Murphy will argue that MarshCODE's statement that Murphy fathered a child out of wedlock and abandoned her and her mother hurt, or at least, called into question his professional integrity. The statement suggested that he is unfit for or acted in a manner incompatible with his trade or profession.[13] Courts have held that a "false allegation of fathering a child out of wedlock" would be defamatory *per se* if levied against a minister[14] and "charges against a clergyman of . . . moral misconduct" are defamatory *per se.*[15]

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10. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).
11. Restatement (Second) of Torts § 558 (1977).
12. *Id.* at § 559.
13. Restatement (Second) of Torts §§ 570, 573 (1977).
14. King v. Tanner, 539 N.Y.S.2d 617, 620 (N.Y. Sup. Ct. 1989).
15. *Id.*

Murphy will also stress that it is well-established that, as long as a jury could find that a reasonable reader would understand the information to be true, it constitutes libel.[16] In the case at bar, due to MarshCODE's "software, hardware and physical security measures" and the affirmation that any information received came from "people who have . . . agreed to share such information,"[17] the false information regarding Murphy was sent under the assumption that Murphy himself approved this information. Murphy will argue that the average person would reasonably understand the information to be true and, thus this statement qualifies as libel and is defamatory,[18] or, at the very least, constitutes a question that is better left for a jury to decide.[19]

Murphy will also claim that, under current law, a communication may defame another even if it has no tendency to adversely affect the other's personal or financial reputation.[20] A "communication need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them," but it suffices "that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them."[21] Although there is no universal standard as to what constitutes the relevant "community," the Supreme Court of Florida has stated that a plaintiff has a claim for defamation if he or she suffers injury in his or her "personal, social, official, or business relations"[22] or if such communication prejudices the plaintiff in the eyes of a "substantial and respectable minority of the community."[23] Thus, Murphy will argue that it is clear that the false statement made by MarshCODE was defamatory or at least presents a genuine issue of material fact as to whether its statement was defamatory.

In response, MarshCODE will argue that Appellant's defamation claim must fail because MarshCODE's accidental disclosure of Appellant's identity as Billie Who's natural birth father is not defamatory. While both parties have stipulated to the falsity of the statement,[24] fal-

16. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 513 (1991).

17. R. at 19.

18. *Masson*, 501 U.S. at 513.

19. N. Ind. Pub. Serv. Co., v. Dabagia, 721 N.E.2d 294, 301 (Ind. Ct. App. 1999). *See also* RESTATEMENT (SECOND) OF TORTS § 564 (1977). Additionally, a third party must understand that the statement in question must be about or concerning the plaintiff.

20. Murphy v. Harty, 393 P.2d 206, 214 (Or. 1964) (holding that it is libelious to publish about a man that he is a liar regardless of his profession or occupation); *see also* RESTATEMENT (SECOND) OF TORTS § 559, cmt. c (1977).

21. RESTATEMENT (SECOND) OF TORTS § 559, cmt. e (1977).

22. Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1114-15 (Fla. 2008) (citing Land v. Tampa Times Publ'g Co., 67 So. 130, 130 (1914)).

23. *Jews for Jesus*, 997 So. 2d at 1114-15.

24. R. at 8.

sity alone does not satisfy a claim for defamation[25] because the court reviews the challenged statement from the perspective of the average reader judging the statement in the context in which it was made.[26] In *New York Times v. Sullivan*, the United States Supreme Court noted that an "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[27]

In addition, courts' willingness to recognize statements that are considered defamatory continually evolves with societal norms. For instance, in *Murphy v. Millennium Radio Group*, the court held that imputation of homosexuality cannot be defamatory in today's society.[28] Similarly, suggesting that a person had premarital sex and a child out of wedlock, or a gay child, should not be considered defamatory to the reasonable person given modern societal norms. Although Murphy presents evidence that members of his church condemn homosexuality and premarital sex,[29] a reasonable Marshall citizen would not think less of, or avoid associating with, a single parent or the parent of a homosexual child. Therefore, MarshCODE will assert that no genuine issue of material fact exists as to whether its statement was defamatory and this court should affirm summary judgment.

ii. Unprivileged Publication to a Third Party

The second element is that the defamatory statement was published to a third party.[30] Defamation is intended to protect an individual's interest in his reputation with his neighbors or associates in his community.[31] "Unless the defamatory matter is communicated to a third person, there has been no loss of reputation."[32] "Any act by which the defamatory matter is intentionally or negligently communicated to a third person may constitute publication."[33]

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25. New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964).

26. RESTATEMENT (SECOND) OF TORTS § 566 cmt. e (1977).

27. *New York Times*, 376 U.S. at 271-72.

28. Murphy v. Millennium Radio Grp., No. 08-1743, 2010 WL 1372408, at *7 (D. N.J. Mar. 31, 2010); *see also* Albright v. Morton, 321 F. Supp. 2d 130, 136 (D. Mass 2004) (finding that statement wrongfully identifying someone as homosexual is not defamatory *per se*).

29. R. at 6.

30. RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (1977).

31. Tumbarella v. Kroger Co., 271 N.W.2d 284, 289 (Mich. 1978); *see also* RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (1977).

32. Restatement (Second) of Torts §577 cmt. b (1977).

33. Restatement (Second) of Torts §577 cmt. a (1977). *See also* Ins. Research Servs., Inc. v. Assoc. Finance Corp., 134 F. Supp. 54, 61 (D.C. Tenn 1955); *see also* Restatement (Second) of Torts §577 cmt. c (1977).

In this case, Murphy will argue that communication of a defamatory matter to one person is sufficient to sustain a *prima facie* case for defamation. A defamatory statement published over the Internet is similar to a traditional publication of a defamatory statement in a traditional avenue of mass media, but on a much larger scale.[34] Publication on the Internet is satisfied upon the statement being posted on a website where it would be accessible to Internet users.[35] Whether the statement is actually read at that time is irrelevant for purposes of publication.[36] Accordingly, Murphy will assert that the communication of the false information from MarshCODE's "Build Your Family Tree" program to Ms. Who constituted an unprivileged publication to a third party.[37] This is similar to *Hecht v. Levin*, where the defamatory statement was made in a confidential grievance to a local bar association. The posting of the false information on the "Build Your Family Tree" website likewise constitutes an unprivileged publication.[38]

Murphy will rebut MarshCODE's argument that accidental communication does not constitute publication. In support thereof, he will claim that under the Restatement (Second) of Torts a defendant may be held liable for negligent publication of a defamatory statement so long as the defendant's affirmative action was the basis for creating an unreasonable risk of harm that a statement of a defamatory nature could be communicated to third persons.[39] Murphy will argue that a reasonable person would recognize that the creation of the MarshCODE's test database, knowingly containing false information of sensitive and personal data, and created an unreasonable risk that the defamatory matter would be communicated to a third person.[40]

Negligence is conduct creating unreasonable risk of harm.[41] The standard elements are: (1) duty, (2) breach of duty, and (3) damages proximately caused by that breach.[42] All elements of defamatory negligence are present in this case. MarshCODE had the duty to protect the integrity and confidentiality of the sensitive personal information it held, breached this duty by communicating Murphy's personal information to Who, and as a result Murphy suffered personal and professional harm.

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34. Firth v. State, 775 N.E.2d 463, 465 (N.Y. 2002).

35. Firth v. State, 706 N.Y.S.2d 835, 841 (N.Y. Ct. Cl. 2000).

36. *Id*.

37. RESTATEMENT (SECOND) OF TORTS § 577, cmt. a (1977) ("Any act by which the defamatory matter is intentionally or negligently communicated to a third person constitutes a publication").

38. Hecht v. Levin, 613 N.E.2d 585, 586 (Ohio 1993).

39. RESTATEMENT (SECOND) OF TORTS § 577 cmt. k (1977).

40. *Id.*

41. RESTATEMENT (SECOND) OF TORTS §282 (1965).

42. Western Inv., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005).

Additionally, although there is no specific evidence as to the causes of MarshCODE's system malfunction,[43] a court can infer negligence under the doctrine of *res ipsa loquitur* if (a) the injuring instrumentality was within the exclusive management and control of MarshCODE and (b) the accident is of the type that does not ordinarily occur if proper care is exercised by those in positions of management and control.[44] Here, MarshCODE's system was within its exclusive management and control. The fact that no specific safeguards or maintenance controls were put into place to ensure that the system accessed the production and not the test database suffices to prove that MarshCODE did not exercise proper care in overseeing the proper function of the program. Moreover, MarshCODE's failure to detect the problem in time, despite regular audits of its methods to protect against unauthorized access to its systems,[45] further supports finding negligence on its part. Murphy will claim that the fact that the malfunction in MarshCODE's system even occurred provides more evidence of negligence,[46] or at least that this is a question better left for a jury to decide. Therefore, this court must reverse the Appellate Court's decision.

MarshCODE will claim the "accidental communication of a matter defamatory of another to a third person is not a publication if there was no negligence."[47] Under the Restatement (Second) of Torts, a statement is made negligently if the defendant's actions created an unreasonable risk that the defamatory statement would be communicated to a third party.[48] MarshCODE's actions did not constitute "conduct which creates an unreasonable risk of harm."[49] MarshCODE will likely point to case law that establishes that negligence does not exist when the party sending the communication cannot reasonably anticipate that a third party will see the statement.[50] Further supporting this argument, MarshCODE will stress that the mere possibility that a third party

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43. R. at 7.

44. Maroules v. Jumbo, Inc., 452 F.3d 639, 642 (7th Cir. 2006).

45. R. at 16.

46. *See* Berg v. Cnty. of Allegheny, 219 F.3d 261, 275 (3d Cir. 2000) (reversing summary judgment for a municipality responsible for an errant computer system that issued an incorrect warrant, resulting in the plaintiff's unlawful arrest); Kroger Co. v. Sieling, No. 01-96-00201-CV, 1996 WL 711253, at *6 (Tex. App. Dec. 12, 1996) (holding that evidence that a person had an arrest record on a computer system was more than a mere scintilla of evidence of damage to the person's reputation in the community, even though the computer system was not accessible to the general public).

47. Morrow v. II Morrow, Inc., 911 P.2d 964, 967-68 (Or. App. Ct. 1996); RESTATEMENT (SECOND) OF TORTS § 577 ct. o (1977).

48. Campbell v. Salazsar, 960 S.W.2d 719, 726 (Tex. Ct. App. 1994).

49. Peagler v. Phoenix Newspapers, Inc., 560 P.2d 1216, XXXX (Ariz. 1977).

50. *Morrow*, 911 P.2d at 968 (citing PROSSER AND KEETON ON THE LAW OF TORTS § 113 (W. Page Keeton et al., eds., 5th ed. 1984).

might see the message does not qualify as negligence.[51] MarshCODE will argue that the information provided to Billie Who was not intended to be a publication of a defamatory statement.

Under the negligence standard, a plaintiff must establish both a breach of a duty owed to him and show that the breach caused him injury.[52] However, a breach of duty cannot be found when the defendant has adhered to normal business practices and has not taken an unreasonable risk of harm.[53] In the digital world scholars have interpreted this standard as requiring "the plaintiff to identify and plead an untaken precaution."[54] MarshCODE will likely point to *Morrow v. II Morrow, Inc.*, a libel action based on the accidental communication of a defamatory statement on a shared computer drive.[55] In *Morrow*, the court found that even though the employer defendant created, maintained, and allowed access to a shared drive to all employees, the employer did not have the requisite intent necessary to constitute a publication, nor could the employer reasonably anticipate that its shared drive would communicate a defamatory statement.[56] Similarly, here, there is no evidence on the record that MarshCODE intended to publish Murphy's identity or could have reasonably anticipated such information would be disclosed through the "Build Your Family Tree" program. On the contrary, MarshCODE created of the test randomized database in an attempt to protect the DNA donor's privacy, even by the programmers.[57] Therefore, MarshCODE cannot be found negligent since it did not know about the technical malfunction and did not intend to disclose Murphy's identity to Billie Who.[58] Since MarshCODE did not grant Billie Who access to the test database intentionally, and Murphy cannot prove negligence without identifying a specific breach of duty or causation, it does not amount to publication under the defamation standard.[59]

MarshCODE will also reject the application of the doctrine of *res ipsa loquitur*, claiming that the doctrine cannot be used in order to avoid identification of a breach when the alleged breach is "not a matter within

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51. Barnes v. Clayton House Motel, 435 S.W.2d 616, 617 (Tex. Civ. App. 1968). *See also* PROSSER AND KEETON ON THE LAW OF TORTS § 113 (W. Page Keeton et al., eds., 5th ed. 1984) ("[c]ourts have never imposed strict liability on the defendant for accidental and non-negligent publication of defamatory matter").

52. Roberts v. Ind. Gas & Water Co., 218 N.E.2d 556, 558 (Ind. App. 1966).

53. Shandrew v. Chicago St. P., M. & O. Ry. Co., 142 F. 320, 325-26 (8th Cir. 1905).

54. Meiring de Villiers, *Information Security Standards and Liability*, J. INTERNET L., at 24, 29 (2010), *available at* http://www.law.unsw.edu.au/staff/devilliersm/docs/Info_Sec-Stds.pdf.

55. *Morrow*, 911 P.2d at 964.

56. *Id.* at 967-68.

57. R. at 7.

58. R. at 6, 7.

59. *See* RESTATEMENT (SECOND) TORTS § 577, cmt. o.

the common knowledge of laymen."[60] MarshCODE will likely point to *Racine County v. Oracular Milwaukee, Inc.*, where the Wisconsin Supreme Court indicated that the question of whether a software company adhered to computer industry standards presented[61] "'unusually complex or esoteric' issues [to] the jury[,]" and expert testimony could be required as a matter of law. Since this case presents software issues, which are not a matter of common knowledge, Murphy cannot use *res ipsa loquitur* to avoid identification of a specific fault on behalf of MarshCODE. Thus, MarshCODE will argue that Murphy failed to establish that MarshCODE intended or could reasonably anticipate that a third party would overhear the statement. Therefore, this Court should affirm the lower court's grant of summary judgment on behalf of MarshCODE.

iii. Fault on the Part of the Publisher

The third element of defamation requires that there be fault attributable to the defendant that amounts to at minimum negligence.[62] In *Gertz v. Robert Welch, Inc* the United States Supreme Court differentiated between public and private figures, deciding that statements concerning public figures were entitled to heightened First Amendment protection.[63] In contrast statements concerning private individuals do not enjoy this heightened protection.[64] The Court held that states could apply a lower standard than the *New York Times v. Sullivan* actual malice standard for cases involving a private individual.[65] A heightened standard will be imposed if the plaintiff is a public figure.[66]

The courts have recognized three types of public figures: (1) "all-purpose public figures" who become public figures by achieving such pervasive fame or notoriety that they become public figures for all purposes and all contexts; (2) "involuntary public figures" who become known to the community through no purposeful act by the individual; and (3) "limited-purpose public figures," who voluntarily inject themselves into a particular public controversy and thereby become public figures for a limited range of issues.[67]

In determining whether a plaintiff in a defamation action is an all-purpose public figure, the court may consider evidence regarding: (1)

60. Haddock v. Arnspiger, 793 S.W.2d 948, 951 (Tex. 1990).

61. Racine Cnty. v. Oracular Milwaukee, Inc., 2010 WI 25, ¶ 28, 323 Wis. 2d 682, ¶ 28, 781 N.W.2d 88, 96 (Wis. 2010).

62. New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

63. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-48 (1974).

64. *Id.*

65. *Id*. at 345-48.

66. *New York Times Co*., 376 U.S. at 280-81.

67. Wells v. Liddy, 186 F.3d 505, 532(4th Cir. 1999).

how well recognized plaintiff's name is; (2) previous coverage of the plaintiff in the media; (3) whether others alter or reevaluate their conduct or ideas in light of the plaintiff's actions; and (4) any other relevant evidence.[68] Few people achieve the legal status of an all purpose public figure because the courts must find that the person is of such celebrity that the individual's name becomes a household word, and the public follows his words and deeds, either because it regards his ideas, conduct, or judgment as worthy of its attention or because he actively pursues that consideration.[69]

To establish that a plaintiff is an "involuntary public figure," the defendant must demonstrate by clear evidence that: (1) the plaintiff has become a central figure in an important significant public controversy; (2) that the allegedly defamatory statement has arisen in conjunction with the controversy; and (3) that the plaintiff made an overt act, or failed to take action where a reasonable person would understand that this decision would likely cause public inquiry.[70] Thus, an individual does not become a public figure absent affirmative steps to attract public attention.[71] In other words, an otherwise private individual is not transformed into a public figure because he has become involved in a matter attracting the public's attention.[72]

A plaintiff is a limited purpose public figure if the defendant proves the following: (1) the plaintiff voluntarily engaged in significant efforts to influence a public debate or voluntarily assumed a position that would propel him to the forefront of a public debate on a matter of public concern; (2) the public debate or controversy and the plaintiff's involvement in it existed prior to the publication of the allegedly libelous statement; and (3) the plaintiff had reasonable access to channels of communication that would permit him to make an effective response to the defamatory statement in question.[73] A public controversy must be public in the sense that members of the public were discussing it, and persons beyond the immediate participants in the dispute are likely to feel the impact of its resolution.[74] Finally, the plaintiff's role within the public controversy

68. Wilson v. Daily Gazette Co., 588 S.E.2d 197, 205 (W. Va. 2003). The attainment of general public figure status is not to be lightly assumed, even if the plaintiff is involved in community affairs, and requires clear evidence of such stature. *Id*. Accordingly, this amounts to a fairly strong presumption against a finding of widespread notoriety. *See In re Thompson*, 162 B.R. 748, 766 (Bankr. E.D. Mich. 1993).

69. Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1294 (D.C. Cir. 1980).

70. *Wilson*, 588 S.E.2d at 208-09.

71. James v. Gannett Co., Inc., 353 N.E.2d 834, 840 (N.Y. 1976).

72. Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167-68 (1979).

73. State *ex rel.* Suriano v. Gaughn, 480 S.E.2d 548, 557 (W.Va. 1996).

74. *Waldbaum*, 627 F.2d at 1296.

is more than trivial or tangential.[75] An individual does not forfeit the full protection of privacy law merely by stating a position on a controversial issue if he or she is not a principal participant in the debate or is unlikely to have much effect on its resolution.[76]

One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct, fitness, or role in that capacity is subject to liability if, but only if, he: (1) knows that the statement is false and that it defames the other person (actual malice); or (2) acts in reckless disregard of these matters.[77] Actual malice is defined as actual knowledge that a statement was false at the time of publication, or that the defendant acted with reckless disregard as to the truth or falsity of the statement at the time of publication.[78]

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct,[79] fitness or role in his public capacity, is subject to liability, only if, he: (1) knows that the statement is false and that it defames the other; (2) acts in reckless disregard of these matters; or (3) acts negligently in failing to ascertain them.[80] Elements of a *prima facie* case of negligence are: (1) duty; (2) breach of duty; (3) causation; and (4) damages.[81] Plaintiff is required to establish that the defendant had a duty to conform to a certain standard of conduct, the defendant breached that duty, the breach caused the injury in question, and the plaintiff incurred actual loss or damage.[82]

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75. Wiegel v. Capital Times Co., 426 N.W.2d 43, 49 (Wis. Ct. App., 1988) (establishing that an individual does not forfeit the full protection of privacy law merely by stating a position on a controversial issue if he or she is not a principal participant in the debate or is unlikely to have much effect on its resolution).

76. *Id.*

77. *Id.* at 47; *see also* RESTATEMENT (SECOND) OF TORTS § 580(A) (1977).

78. St. Amant v. Thompson, 390 U.S. 727, 728 (1968).

79. Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-48 (1974). The question of whether a plaintiff is a public figure is one of law, not of fact, though the facts on which the determination is to be made may be in dispute and therefore subject to the determination of the fact finder. Curtis Pub. Co. v. Butts, 388 U.S. 130, 162 (1967) (holding that a former general who was a man of some political prominence and who made statements over radio station concerning matter on which press association article was based was a "public figure" for First Amendment purposes). Whether a statement about a plaintiff's conduct affects his capacity as a public figure is an unsettled area of law, therefore the determination depends upon both the nature of the office involved, with its responsibilities and necessary qualifications, and the nature of the private conduct and the implications that it has as to his fitness for the office. Clawson v. Longview Pub. Co., 589 P.2d 1223 (1979); RESTATEMENT (SECOND) OF TORTS § 580(A) cmt. b (1977).

80. RESTATEMENT (SECOND) OF TORTS § 580(B) (1977).

81. Todd v. First Baptist Church of West Point, 993 So.2d 827, 829 (Miss. 2008).

82. Krentz v. Consolidated Rail Corp., 910 A.2d 20, 27-28 (Pa. 2006).

Based on the above, the requisite degree of fault that must be established based on Murphy's status in the community turns on whether Murphy's status is: 1) a public figure, thereby requiring a showing of actual malice; or 2) a private figure, and therefore, only negligence must be established.

Murphy will most likely argue that he is a private individual and therefore, he only needs to establish that MarshCODE was negligent in publishing the defamatory statement.[83] Murphy will argue that he is unlike public figures "who have assumed roles of special prominence in the affairs of society, absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."[84] Murphy will rely on cases like *Waldbaum v. Fairchild Publications, Inc.*, where the court held that the plaintiff, president of the second largest corporation in the world, was not an all-purpose public figure.[85] Similarly, in *Ogle v. Hocker*, the Sixth Circuit held that the Bishop's description of himself as an "international evangelist" was insufficient to establish that he was a public figure, which would require proof of actual malice in his defamation action.[86] Also, in *Davis v. Keystone Printing Service, Inc.*, the appellate court held that a plaintiff, who was a minister, was not a public figure for purposes of his libel action against a newspaper which published a series of articles stating, among other things, that plaintiff lured members of his religious organization into homosexual encounters.[87]

Murphy will argue that while he is a minister of the Church of Primary Saints, and has commented extensively on both television and over the radio, he has not injected himself into the public conscious such as to warrant a finding that he is a public figure. Murphy will distinguish this case from instances where religious figures attained public figure status such as in *Falwell v. Penthouse Int'l, Inc.*,[88] or in *McManus v. Doubleday & Co.*,[89] where those figures had injected themselves into public controversies beyond religion itself. Murphy will argue that as a minister of

83. *Gertz*, 418 U.S. at 342-45; *see also* Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975) (noting that "sensational prying into private lives" is not "information to which the public is entitled"); Catsouras v. Dep't of Cal. Highway Patrol, 181 Cal. App. 4th 856, 874 (Cal. Ct. App. 2010) (adding that the First Amendment does not shield "sheer morbidity or gossip" about another's private life).

84. Ogle v. Hocker, 279 Fed. App'x. 391, 398 (6th Cir. 2008) (citing *Gertz*, 418 U.S. at 345, 352 (1974)).

85. Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296 (D.C.Cir. 1980).

86. *Ogle*, 279 Fed. App'x. at 339.

87. Davis v. Keystone Printing Service, Inc., 507 N.E.2d 1358, 1364 (1987).

88. Falwell v. Penthouse Int'l, Ltd., 521 F. Supp. 1204 (W.D. Va. 1981).

89. McManus v. Doubleday & Co., 513 F. Supp. 1383 (S.D.N.Y. 1981); s*ee Davis*, 507 N.E.2d at 1364.

the Church of Primary Saints his comments on radio and television expressed and promoted his Church's principles and values but these actions are not enough to turn him into a public figure, nor do they constitute an equivalent to injecting himself into a public controversy which gave rise to the defamation. Murphy will reiterate 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. Therefore, these activities cannot establish Murphy as newsworthy.[90] As a result, Murphy will argue that the court should find that he is a private individual, and therefore, Murphy only is required to prove that MarshCODE acted negligently in communicating the false statement in order to sustain his claim for defamation.

Murphy will also claim that MarshCODE's argument that Murphy is at least a limited-purpose public figure must fail. Although "private persons can become public figures by thrusting themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"[91] it is also established that "mere association or involvement in a controversy is not necessarily enough.[92] Instead the court must analyze the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[93] Similarly, in *Wilson v. Daily Gazette Co*., the court held that 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."[94] Murphy will argue that he was merely expressing his church's views, and that there was not a previously ongoing public controversy at issue. Consequently, Murphy does not qualify as a limited-purpose public figure; therefore actual malice need not be proven. MarshCODE's failure to ensure that its test database with the erroneous information does not become available to its users constitutes clear and convincing evidence of negligence on the part of MarshCODE.

In addition, Murphy will claim that the publication concerns a private matter. The Supreme Court in *Time Inc. v. Firestone* held that private concerns or disagreements do not become public controversies simply because they attract public attention.[95] MarshCODE's "Build

90. Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167-68 (1979).

91. *Ogle*, 279 Fed. App'x. at at 399 (citing *Wolston*, 443 U.S. at 164).

92. *Id.*

93. *Id*. at 399 (citing *Wolston*, 443 U.S. at 167).

94. Wilson v. Daily Gazette Co., 588 S.E.2d 197, 207 (W. Va. 2003).

95. Time Inc. v. Firestone, 424 U.S. 448, 454-55 (1976). In *Firestone*, a well-known socialite brought a libel action against the publisher of a nationally distributed magazine that printed defamatory reports about her divorce proceedings. *Id.* at 449-59. The Supreme Court held that even if marital difficulties of wealthy individuals are interesting to some, the dissolution of marriage is not the sort of "public controversy" referred to in *Gertz*. *Id*. at 454.

Your Family Tree" program deals primarily with private quests for potential family members.[96] Like in *Firestone*, Mr. Murphy never voluntarily chose to publicize delicate private matters such as genetic information. Unlike *Lohrenz v. Donnelly*,[97] Murphy's professional career, by itself, although it involved supporting conservative views on sexuality disfavored by some Marshall citizens, has never created a major controversy; whereas *Lohrenz* concerns a plaintiff's "path breaking" role on whether women can be competent combat pilots. Thus, the "content, form and context" of MarshCODE's publication is unrelated to Murphy's ministry and pursuits.[98] Therefore, even if Murphy's stance on premarital sex and Ms. Who's false assumption concerning her biological father are of potential public interest, the publication at issue is solely a private concern, and the court should reverse the appellate court's decision.

In response, MarshCODE will argue that Murphy is a public figure under current case law, and accordingly, Murphy must to show that MarshCODE acted with actual malice. The United States Supreme Court classifies defendants who have achieved evasive fame, notoriety or commanded public interest as "all purpose" public figures and require a showing of actual malice in a defamation claim.[99] In addition, the Supreme Court recognizes an individual who has "thrust himself into the middle of a public issue"[100] as a "limited purpose" public figure. Accordingly, an individual deemed a "limited purpose" public figure must prove actual-malice standard to succeed in a defamation claim.[101]

To support this assertion, MarshCODE will argue that Murphy is a public figure due to Murphy's "extensive commentary" over both radio and television channels, the great deal of press coverage he received during the general election of 2008, as well as the numerous protests that organized outside both Murphy's home and the Church. MarshCODE will argue that Murphy's views have sparked the interest of several activist groups in the State of Marshall, making him a prominent figure in the community. Under *Gertz*, Murphy has thrust himself into society as a prominent minister.[102] Unlike in *Firestone* in which case the plaintiff did not seek out publicity, the record is clear that Murphy sought out

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96. R. at 4.

97. In *Lohrenz v. Donnelly*, the plaintiff was given limited purpose status due to her major role in the appropriateness of women serving in military combat. 350 F.3d 1272, 1281 (D.C. Cir. 2003). "Suiting up" as one of the first American female combat pilots meant "'special prominence'" in this controversy. *Id.* at 1282.

98. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

99. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 154 (1967); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 164 (1979); *Gertz*, 418 U.S. at 344.

100. *Wolston*, 443 U.S. at 380.

101. *Id.* at 351; *see also* WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568, 578 (Tex. 1998).

102. R. at 5.

press coverage to promote his views.[103] Like in *Suriano v. Gaughn*, Murphy voluntarily engaged in significant public debate on the topics of pre-marital sex and homosexuality.[104] Murphy spoke out against pre-marital sex and homosexuality in schools, commented extensively on radio and television programs, and caused strong reactions by activist groups. Murphy's public role existed prior to the inadvertent disclosure of Petitioner's identity to Billie Who.[105] Finally, Murphy had "reasonable access to channels of communication" and made an "effective response to the defamatory statement in question."[106] For these reasons, MarshCODE will argue that Murphy is, at minimum, a "limited purpose" public figure and must show that MarshCODE acted with the heightened actual malice standard regarding his defamation claim. Further, MarshCODE will claim that Murphy failed to prove that MarshCODE acted with actual malice but also failed to provide sufficient evidence to establish negligence of on behalf of MarshCODE. MarshCODE will assert that evidence from the Record conclusively proves that MarshCODE accidentally released false information and did not act with reckless disregard because it employed numerous protective measures to guard against the release of unauthorized or inaccurate information[107].

In addition, MarshCODE will argue that even though this information was private, it was directly relevant to an on-going public matter. Murphy as a minister had powerful influence within the community. Therefore, this type of influence could be similar to a statement that a public official's ability to serve the community could be compromised because he is an alcoholic.[108] Thus, the circuit court properly awarded summary judgment since Murphy failed to prove that MarshCODE acted with actual malice or reckless disregard for the truth.

iv. Actionability of the Statement or the Existence of Special Harm

The final element of defamation requires the plaintiff to establish either actionability of the statement as defamatory *per se*, or special harm caused by the publication.[109] If the statement at issue is plainly harmful to the plaintiff's reputation on its face, it is actionable *per se*, and the plaintiff need not prove actual or special damage.[110] On the

103. R. at 5.
104. State *ex rel*. Suriano v. Gaughn, 480 S.E.2d 548, 557-58 (W.Va. 1996).
105. *Id*.; R. at 5-6. *See also Gertz*, 418 U.S. at 344.
106. *Gertz*, 418 U.S. at 344; R. at 6.
107. R. at 7.
108. RESTATEMENT (SECOND) OF TORTS § 580(A) (1977).
109. *Id.* at § 559.
110. *Id.* at § 569-70. A statement is actionable *per se* if the statement accuses an individual of committing a criminal offense, engaging in serious sexual misconduct, or acting in

other hand, a statement that can be interpreted to have both a defamatory and non-defamatory meaning is not actionable *per se*.[111] In that case, the plaintiff must establish that the statement has a defamatory meaning and the existence of special damages having an economic or pecuniary value.[112] A statement itself may either be: defamatory *per se*, if the statement is so obviously and materially harmful that a court may presume injury to the plaintiff's reputation; or *per quod*, if the plaintiff must prove the defamatory meaning through extrinsic facts. [113]

A defamatory statement is subject to liability without proof of a special harm if the statement speaks to the conduct, characteristics, or a condition that would adversely affect the plaintiff's fitness to engage in his profession.[114] Actual harm is not necessary to make a communication defamatory so long as the communication's general tendency would be to deter third persons from associating with him.[115] However, a plaintiff may still be required to show proof of special harm, by establishing that the communication was in fact believed and so did in fact damage the plaintiff's reputation and cause pecuniary loss to him.[116]

In this case, Murphy will argue that the information disseminated to Billie Who by MarshCODE's use of "Build Your Own Family Tree" is actionable as a defamatory *per se*. To support this assertion, Murphy will argue that MarshCODE's statement that Murphy fathered a child out of wedlock and abandoned her and her mother, hurt or at least called into question his professional integrity, and suggested that he is unfit for or acted in a manner incompatible with his or her trade or profession.[117] Courts have held that a "false allegation of fathering a child out of wedlock" would be defamatory *per se* if levied against a minister[118] and "charges against a clergyman of . . . moral misconduct" are defamatory *per se*.[119] Also to further establish the defamatory nature of MarshCODE's statement, Murphy will point to the immediate and harsh reaction of his community, which marginalized him and called for his resignation.

In the alternative, Murphy will also argue that even if the court finds that MarshCODE's statement is not defamatory *per se*, it is defam-

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a manner that is incompatible with the person's chosen trade or profession. Bryson v. News Am. Pubs., Inc., 672 N.E.2d 1207, 1215 (Ill. 1996).

111. *Bryson*, 672 N.E.2d at 1215.

112. RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977).

113. Kolegas v. Heftel Broad. Corp., 607 N.E.2d 201, 206 (Ill. 1992).

114. *Id.* at § 573.

115. *Id.* at § 559 cmt. d.

116. *Id.*

117. RESTATEMENT (SECOND) OF TORTS §§ 570, 573 (1977).

118. King v. Tanner, 539 N.Y.S.2d 617, 620 (N.Y. Sup. Ct. 1989).

119. *Id.*

atory *per quod*. Murphy will argue that MarshCODE's communication to Ms. Who that Murphy is her biological father and the person who abandoned her mother is reasonably susceptible to a defamatory interpretation since it suggested that Murphy had acted contrary to the values he preached upon and portrayed him as an unfit minister and a hypocrite. It is well established that a statement is libel if a jury could find that a reasonable reader would understand the information to be true.[120]

Here, Murphy will argue that this element is met because a reasonable person reading MarshCODE's statement would understand this statement as true, based on the corporation's status in the community. The fact that the defamatory matter was written and published to another under the majority view, this electronic communication should be actionable as defamatory *per se*. Therefore Murphy is not required to plead special damages. Thus, Murphy will argue that there was sufficient evidence to overcome the motion for summary judgment, and that the Supreme Court of Marshall should reverse and remand the first issue.

In response, MarshCODE will argue that Murphy cannot meet the actual harm element of his defamation claim on the grounds that the electronic communication is not defamatory *per se*. The Seventh Circuit has recognized that statements are defamatory *per se* when the words impute: (1) the commission of a crime; (2) infection with a loathsome disease; (3) an inability to perform or a want of integrity in the discharge of duties of office or employment; or (4) lack of ability in that person's profession.[121] In the present case, none of the above is applicable. Although some courts recognize the imputation of sexual misconduct as defamatory *per se*,[122] having premarital relations and a child out of wedlock cannot be considered sexual misconduct under today's standards.

In addition, even if a statement falls into one of these defamatory *per se* categories, the court will not consider it defamatory *per se* if it is susceptible to an innocent construction.[123] In the instant case, even if this court found the challenged statement that Murphy is Billie Who's biological father is defamatory, it was only defamatory *per quod.* The statement is susceptible to an innocent meaning and therefore cannot be

120. Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 513 (1991).

121. Republic Tobacco Co. v. N. Atl. Trading Co., Inc., 381 F.3d 717, 726 (7th Cir. 2004).

122. Bryson v. News Am. Pubs., Inc., 672 N.E.2d 1207, 1215 (Ill. 1996) (referring to plaintiff as a "slut" in magazine article was defamatory *per se.* Marshall v. Mahffey, 974 S.W.2d 942, 947-49 (Tex. App. 1998) (calling professional golfer's wife a slut was slanderous *per se*).

123. Kolegas v. Heftel Broad. Corp., 607 N.E.2d 201, 206 (Ill. 1992); Dusabek v. Martz, 249 P. 145, 146 (Okla. 1926).

defamatory *per se*.[124] Thus, Murphy must prove special harm in the form of specific pecuniary damages[125] and must prove these damages with particularity.[126] Murphy claimed injury to his reputation within both the community and his church, and a "demotion" within his church, but he failed to claim monetary harm. As mentioned above, general damages, including damages to reputation, injury for feelings, mental anguish, embarrassment, and mental suffering[127] do not suffice.

Based on the above, MarshCODE will argue that Murphy has failed to prove that he suffered the special harm required to sustain a defamation claim since the record only references general damages. Accordingly, this court should affirm summary judgment on behalf of MarshCODE regarding Appellant's defamation claim. Thus, this court should affirm the lower courts' decisions.

C. False Light Invasion of Privacy

1. *General*

Murphy's second claim is that MarshCODE placed him in a false light before the public. Murphy claims that MarshCODE's website "Build Your Family Tree" revealed false information stating that Murphy was the biological father of an illegitimate and openly gay child, Billie Who, and this information was made public which caused harm to Murphy.

False light invasion of privacy results in the plaintiff being unreasonably placed in a false light before the public due to the defendant publicizing a matter that is offensive to a reasonable person. This tort is distinct from defamation because the statement can be true, yet casts a person in a false light. Additionally, distinct from defamation the tort of false light seeks to redress the harm caused by the public exposure.

2. *Elements*

Marshall Courts have adopted the Restatement (Second) of Tort's definition of false light invasion of privacy. Thus, false light is publicity of a matter that places another in a false light which is "highly offensive to a reasonable person" and the actor "had knowledge or acted in reckless disregard" of the false matter.[128] False light is similar to defamation in

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124. *Kolegas*, 607 N.E.2d at 206.

125. *See* Tacket v. Delco Remy Div. Gen. Motor Corp., 937 F.2d 1201, 1204-06 (7th Cir. 1991) (plaintiff's defamation claim based on a defamatory bathroom sign failed since he did not sustain economic damages); Restatement (Second) of Torts §757 cmt. b (1977) (defining special harm for all defamatory publications).

126. Bruck v. Cincotta, 371 N.E.2d 874, 879-80 (Ill. App. Ct. 1977).

127. Chonich v. Wayne Cnty. Cmty. Coll., 973 F.2d 1271, 1277 (6th Cir. 1992).

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

several ways, but it also has important differences. First, the word "publicity" is distinct from "publication."[129] Publicity requires the information to be conveyed in a manner that it is "certain to become public knowledge."[130]

Second, "a false light privacy claim redresses mental distress from exposure to public view" while "a defamation claim redresses damage to reputation."[131] Thus, the plaintiff does not have to show damage to his reputation in order to recover on a false light claim.

Therefore, to assert a successful claim for false light invasion of privacy, the plaintiff must prove the following elements: (1) there exists a communication that places the plaintiff in a false light; (2) the communication must have been offensive to a reasonable person; (3) the communication must have been communicated to a large enough audience to qualify as publicity; and (4) the communication must have been intentionally communicated by the defendant.

i. False Light Portrayal

The first element of false light invasion of privacy is that the defendant must cast the plaintiff in a false light. This requirement may be met by a defamatory statement (in which case the plaintiff may be able to pursue defamation and false light as alternative theories), or by a true statement that causes characteristics, conduct, or beliefs to be falsely attributed to the plaintiff.[132]

Here, as previously discussed, both parties have stipulated to the fact that Murphy has no biological relationship to Billie Who; therefore, the information provided by MarshCODE's "Build Your Family Tree" website was false.[133] Thus, the communication that insinuated Murphy was Billie Who's father placed him in a false light. MarshCODE does not contest this issue MarshCODE; therefore, an analysis on this element is unnecessary.

ii. Highly Offensive to a Reasonable Person

The second element of false light invasion of privacy is the false light must be highly offensive to a reasonable person. This requirement is met "when the defendant knows that the plaintiff, as a reasonable man, would be justified in the eyes of the community in feeling seriously offended and aggrieved by the publicity; it is only when there is such a major misrepresentation of his character, history, activities or beliefs

129. *Id.* at § 652(D) cmt. a.
130. *Id*.
131. State v. Carpenter, 171 P.3d 41, 53 (Alaska 2007).
132. RESTATEMENT (SECOND) OF TORTS at § 652E cmt. b.
133. R. at 6.

that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy."[134]

Murphy will argue that a reasonable person would find it offensive if a website claiming to use conclusive DNA evidence links individuals together as family members wrongly states a relationship. Murphy will likely reiterate the argument made under the defamation section II.B.2.i & iv. In sum, Murphy will point to the fact the communication at hand presented as an undisputable scientific fact, *i.e.* that Murphy conceived an illegitimate child whose father abandoned her is offensive to a reasonable person, let alone a minister promoting the virtues of abstinence and family values.[135] Such communication constituted a "major misrepresentation of his character, history . . . [and] beliefs."[136] Murphy should emphasize that his character and reputation in the public is one that emphasizes the importance of family and marriage. A reasonable person in Murphy's position would consider this to be highly offensive.[137] Murphy will claim that the key purpose to the false light invasion of privacy claim is to protect the plaintiff's interest in his privacy relative to the customs of the time and place, to his occupation, and to the habits of his neighbors and fellow citizens.[138] Regardless of Murphy's occupation or particular position, the inference of abandoning a child is still one a reasonable person would find highly offensive.

In the alternative, Murphy will argue that the question of what would be offensive to a reasonable person is always one for the trier-of-fact to determine.[139] The public outcry following the publication of such information evidences the highly offensive nature of the MarshCODE publication. Accordingly, Murphy will argue that a jury of his peers might find the false information highly offensive, which means there is a genuine factual dispute on this issue. Therefore, summary judgment was inappropriate.

In response, MarshCODE will argue that Murphy has failed to meet this element because a reasonable person would not be offended. MarshCODE will contend that Murphy is only offended because of his

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134. RESTATEMENT (SECOND) OF TORTS § 652E cmt. c. (1977).

135. R. at 5.

136. 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).

137. *See* RESTATEMENT (SECOND) OF TORTS § 652E cmt. c. (1977).

138. *Id.*

139. Braun v. Flynt, 726 F.2d 245, 252-53 (5th Cir. 1984) (holding it is the duty of the jury, not the court, to determine whether publicity is false and highly offensive to a reasonable person within the context of a false light claim); Meyerkord v. Zipatoni Co., 276 S.W.3d 319, 326 (Mo. Ct. App. 2008) (noting that the question of whether a misrepresentation is considered to be highly offensive to a reasonable person is a question for the jury).

personal beliefs on premarital sex and homosexuality. MarshCODE will claim that in order to prevail on a claim for false light invasion of privacy, the plaintiff must prove that the false light in which he was portrayed created such a major misrepresentation of character, history, activities, or beliefs that a reasonable man would be justified in feeling seriously offended and aggrieved by the publicity.[140] MarshCODE will argue that due to the "ambiguity and subjectivity" involved,[141] courts have narrowly construed the highly offensive element of false light.[142] Consequently, claims for false light invasion of privacy have been examined under an ordinary, reasonable person standard, rather than a reasonable person in a plaintiff's position. Therefore, statements that merely place a plaintiff in an unfavorable light do not rise to the level of highly offensive for purposes of a false light claim.[143] For example, in *Klayman v. Segal*, the allegedly false statement attributed to the leader of a conservative, pro-life ethics organization in an article discussing his relentless attempts for television appearances, that if a school shooting occurred, he would say "So what? We're doing important things here," did not place him in a highly offensive false light.[144] Murphy's erroneous identification as Billie Who's biological father, although unpleasant to some, cannot rise to the egregious level required to be highly offensive to a reasonable person.[145]

MarshCODE will likely reiterate its arguments under III. B. 2. i. & iv and argue that an ordinary, reasonable person misidentified as a child's natural parent would not find this statement offensive. Merely

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140. RESTATEMENT (SECOND) OF TORTS § 652E cmt. c (1977).

141. *Welling*, 866 N.E.2d at 1056 (citing Denver Publ'g Co. v. Bueno, 54 P.3d 893, 903-04 (Colo. 2002).

142. Machleder v. Diaz, 801 F.2d 46, 58 (2d Cir. 1986).

143. *See Machleder*, 801 F.2d at 58 (portrayal of plaintiff as "intemperate and evasive" did not qualify)*; see, e.g.*, Straub v. Scarpa, 967 So.2d 437, 439 (Fla. Dist. Ct. App. 2007) (inference that homeowner association board member's previous spending levels were "unnecessary" did not rise to level of highly offensive); Parano v. O'Connor, 641 A.2d 607, 609 (Pa. Super. Ct. 1994) (article's reference to a hospital administrator as adversarial, uncooperative, and less than helpful was not highly offensive); Salek v. Passaic Collegiate Sch., 605 A.2d 276, 278-79 (N.J. Super. Ct. App. Div. 1992) (humorous pictures of faculty member in school yearbook, which allegedly implied a sexual relationship with another faculty member, were not highly offensive).

144. Klayman v. Segal, 783 A.2d 607 (D.C. 2001).

145. *Machleder*, 801 F.2d at 58. *See, e.g.*, Cantrell v. Forest City Publ'g. Co., 419 U.S. 245, 247-48 (1974) (false portrayal of family living in abject poverty exposed them to pity and ridicule); Braun v. Flynt, 726 F.2d 245, 247, 253 (5th Cir. 1984) (printing photo of female entertainer's amusement park novelty act in "hardcore men's magazine" was highly offensive); Parnigoni v. St. Columba's Nursery Sch., 681 F. Supp. 2d 1, 19-20 (D.D.C. 2010) (statements implying plaintiff was a threat to children because of her relationship with an alleged sex offender were highly offensive); Benz v. Wash. Newspaper Publ'g Co., No. 05-1760, 2006 WL 2844896 at *6 (D.D.C. Sept. 29, 2006) (articles implying plaintiff was in a sexual relationship with "porn king" were highly offensive).

because the false light in which plaintiff was placed is contrary to his character or position in society does not automatically follow that the false light is highly offensive to a reasonable person. Therefore this Court should affirm the lower courts' grant of summary judgment in favor of MarshCODE.

iii. Publicity

The third element of false light invasion of privacy is that the false light must be publicized. This element is another element that is distinct from defamation.[146] For false light to be actionable, the communication must be communicated to a large number of people that it becomes public knowledge or that it is "certain to become public knowledge."[147]

Murphy will likely argue that even though under the Restatement (Second) of Torts publicity requires that a 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.[148] In the present case, MarshCODE's communication to Billie Who was substantially certain to become public knowledge because of the nature of the information and Billie Who role in the specific social group. Given Murphy's views on sexuality and Who's role in the community, MarshCODE's publication logically and inevitably led to the publication's widespread dissemination. Murphy will argue that his right to privacy protects him from exposure of private facts that tend to humiliate a plaintiff regardless of the number of people the facts were exposed to.[149]

In addition, Murphy should point to a number of jurisdictions that have rejected the Restatement's strict approach determining when a

146. *Welling,* 866 N.E.2d at 1057 (citing the RESTATEMENT (SECOND) OF TORTS § 652E (1997) to illustrate the difference between publication and publicity).

147. RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977).

148. *Id.*

149. *See, e.g.*, Boroquez v. Robert C. Ozer, P.C., 923 P.2d 166, 173-74 (Colo. Ct. App. 1995) (there was a publication when information was communicated to fellow employees, club members, church members, family, or neighbors, as opposed to the general public at large); Meyerkord v. Zipatoni Co., 276 S.W.3d 319, 323 (Mo. Ct. App. 2008) (finding that the plaintiff adequately alleged that the content of the defendant's website was wrongly attributed to him and that this caused him to suffer shame, embarrassment, humiliation, harassment, and mental anguish); Beaumont v. Brown, 257 N.W.2d 522, 531 (Mich. 1977) (the employee alleged sufficient facts to constitute a question for the jury as to whether embarrassing private facts about the employee were involved in a public disclosure, when an employer wrote a letter addressed to one individual containing allegations of disloyalty and insubordination for an employee); McSurely v. McClellan, 753 F.2d 88, 112 (D.C. Cir. 1985) (actions of the defendants resulted in plaintiff's invasion of privacy through humiliation and embarrassment).

"special relationship" is present - "when the communication was made to a particular public, such as employees, club members, church members, family or neighbors."[150] Courts in these jurisdictions examine the circumstances, the nature of the disclosure, and the relationship on a case-by-case basis to determine whether publicity is satisfied. However, the actual number of people to whom information is disclosed is not a dispositive factor for satisfying "publicity." Murphy could analogize his case to *Patchowitz v. LeDoux*, in which an invasion of privacy was found when an emergency medical technician disclosed private medical facts to the plaintiff's co-worker.[151] In *Patchowitz*, the court found that the "character and nature of one person to whom offending information was communicated" should be fully probed at trial.[152] Under this interpretation, Murphy satisfies the "publicity" element for his false light claim because, even before this communication occurred, Billie Who and Murphy had a "special relationship" based on their opposing ideological viewpoints of homosexuality.[153] MarshCODE's publication led to the assumption that Murphy was a hypocrite and the widespread publicity of these false facts was inevitable. Like in *Patchowitz*, MarshCODE invaded Mr. Murphy's privacy when it disclosed private genetic facts to Who. Murphy will claim that invasion of a plaintiff's privacy is critical when exposing "private facts to a public who[se] knowledge of those facts would be embarrassing to the plaintiff."[154] For the reasons above Murphy will argue that he satisfies the "publicity" element in the present case or at minimum constitutes an issue of material fact better left for the jury to decide.

In response, MarshCODE will claim that the release of information to a single person, Billie Who, does not meet the definition of publicity as required by the Restatement. Publicity requires that a matter be 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."[155] Thus, "it is not an invasion of the right of pri-

150. Duncan v. Peterson, 835 N.E.2d 411, 1049 (Ill App. Ct. 2005).

151. Patchowitz v. LeDoux, 666 N.W.2d 88, 95 (Wis. Ct. App. 2003). Robert C. Ozer, P.C. v. Borquez, 940 P.2d 371, 378 (Colo. 1995) (publicity element is satisfied when the "publication" to a third party centered on a "special relationship" between the plaintiff and whom the information was divulged); *see also* Chisholm v. Foothill Capital Corp, 3 F. Supp. 2d 925, 940 (N.D. Ill. 1998); Hill v. MCI WorldComm Commc'n, Inc, 141 F. Supp. 2d 1205, 1213 (S.D. Iowa); *McSurely,* 753 F.2d at 112.

152. *Patchowitz*, 666 N.W.2d at 95. *See also Chisholm*, 3 F. Supp. 2d at 940; Poulos v. Lutheran Soc. Serv. of Illinois, Inc., 728 N.E.2d 547, 555 (Ill. App. Ct. 2000).

153. R. at 5.

154. Beaumont v. Brown*,* 257 N.W.2d 522, 531 (Mich. 1977), *overruled on other grounds; See* Bradley v. Saranac Cmty. Sch. Bd. of Educ*.,* 565 N.W.2d 650 (Mich. 1997).

155. Hunter v. The Buckle, Inc., 488 F. Supp. 2d 1157, 1179 (D. Kan. 2007) (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (1977)).

vacy. . .to communicate a fact concerning the plaintiff's private life to a single person or even a small group of persons."[156] Unlike in defamation, publicity requires publication in such a manner that would reach a large audience. MarshCODE will likely cite abundant case law in cases involving privacy claims in the form of false light and of publication of private facts to support its claim that a communication to a single person or even a small group of people does not constitute publicity.[157] In *Moore*, the court held that false statements made about the plaintiff to several individuals during a meeting did not qualify as publicity.[158] Similarly, in the present case, the release of Murphy's name to a sole individual, Billie Who, did not constitute publicity.[159] In addition MarshCODE should argue that Billie Who publicized the information, not MarshCODE. MarshCODE will assert that it is not responsible for the further dissemination of the false information.[160] Rather, Billie Who released the information, but she is not a party to this case. MarshCODE will also note that it did nothing to publicize the information. On the contrary, MarshCODE publicly apologized for the error and their correction received more press than the initial mistake.[161] However, courts have held that that rumors, generated in this case through the blogosphere and news media, do not rise to the level of publicity.[162]

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156. *Id.*

157. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 554 n.3 (Minn. 2003); *see* RESTATEMENT (SECOND) OF TORTS § 652E cmt. a (1977). Thus, courts have almost universally adopted the definition of publicity found in RESTATEMENT (SECOND) OF TORTS § 652D cmt. a. Moore v. Big Picture Co., 828 F.2d 270, 273 (5th Cir. 1987). S*ee* Polin v. Dun & Bradstreet, Inc., 768 F.2d 1204, 1206 (10th Cir. 1985) (distributing plaintiff's credit report to seventeen subscribers did not meet element of publicity); Jones v. United States Child Support Recovery, 961 F. Supp. 1518, 1521 (D. Utah 1997) (delivering "Wanted" poster to plaintiff's employer and close relatives was insufficient to meet element of publicity); Grigorenko v. Pauls, 297 F. Supp. 2d 446, 448-49 (D. Conn. 2003) (disclosing allegations of plagiarism to nine persons at Yale and three persons outside of Yale community "[fell] well short of publicizing the allegations"); Handler v. Arends, No. 0527732S, 1995 WL 107328, at *9 (Conn. Super. Ct. Mar. 1, 1995) (communicating to ten department members did not constitute publicity); Wells v. Thomas, 569 F. Supp. 426, 437 (E.D. Penn. 1983) (sharing information at a staff meeting or upon an individual's request did not constitute publicity).

158. Moore v. Big Picture Co., 828 F.2d 270, 274 (5th Cir. 1987).

159. *Bodah*, 663 N.W.2d at 556; *Moore*, 828 F.2d at 274.

160. "The gravamen of the action of invasion of privacy, on the grounds herein under discussion, is and should remain publication by the defendant. To allow the cause of action to be premised on any conduct of the defendant which could foreseeably result in media publicity putting the plaintiff in a bad light, would expand the concept of invasion of privacy beyond manageable limits." La Fontaine v. Family Drug Stores, Inc., 360 A.2d 899, 902 (Conn. Super. Ct. 1976) (citing Winters v. Concentra Health Services Inc., No. CV075012082S, 2008 WL 803134, at *16-17 (Conn. Super Ct. Mar. 5, 2008)).

161. R. at 7.

162. Curry v. Blanchester, No. 2009-08-010, 2010 WL 2807948, at *12 (Ohio Ct. App. July 19, 2010) (defendant's comment to one person coupled with evidence that rumor was spread by another party did not constitute publicity); *Wells*, 569 F. Supp. at 437 (informa-

In addition, contrary to the public communications made in cases such as *Lovgren* and *Biederman's*, the release of Murphy's information was made through the "Build Your Family Tree" program - a secure, password-protected service available only to paying customers.[163] Lastly, MarshCODE removed the information and publicly apologized to Murphy for the mistake, which in accordance with *Bodah*, suggests that any allegations of publicity after that time amount to nothing more than speculation.[164] For these reasons, Murphy is unable to show that MarshCODE's release of his information satisfied the publicity element. Therefore, his claim for false light invasion of privacy cannot withstand a motion for summary judgment.

iv. Communication by the Defendant

The fourth element of false light invasion of privacy is that the defendant must have communicated the information that placed the plaintiff in a false light before the public. States are divided as to the requisite degree of defendant's conduct - ranging from negligence to actual malice.[165] Similar to the discussion above with regards to defamation, the majority of jurisdictions require that the plaintiff show that the defendant acted with malice; either knowledge or a reckless disregard the communication would place the plaintiff in a false light.[166]

Murphy will argue that he is a private figure and should only have to show that MarshCODE was negligent in posting the false information on its "Build Your Family Tree" website.[167] Murphy should argue he is entitled to a lower standard of proof based on the United States Supreme Court's opinion in *Gertz v. Welch*,[168] and the caveat and comment d to section 652E of the Restatements.[169]

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tion shared with employees at a staff meeting, even if eventually spread to others across the organization, did not constitute publicity, "but a mere spreading of the word by interested persons in the same way rumors are spread").

163. R. at 4, 5; Lovgren v. Citizens First Nat'l Bank of Princeton, 534 N.E.2d 987, 990 (Ill. 1989); Biederman's v. Wright, 322 S.W.2d 892, 898 (Mo. 1959).

164. Bodah v. Lakeville Motor Express, Inc., 663 N.W.2d 550, 558 (Minn. 2003).

165. *See* Wood v. Hustler, 736 F.2d 1084, 1091-93 (5th Cir. 1984) (applying negligence standard to false light claim brought by private figure); Colbert v. World Publ'g Co., 747 P.2d 286, 290-92 (Oka. 1987) (citing varying standards, ultimately applying a malice standard to false light).

166. *Colbert*, 747 P.2d at 291 (finding a majority of jurisdictions apply the actual malice standard).

167. *Wood*, 736 F.2d at 1091 (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).

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

169. RESTATEMENT (SECOND) OF TORTS § 652E cmt. d (1977).

Murphy will likely reiterate his arguments under III.B. iii. to claim that he is a private individual. He will stress that "[a] private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention."[170] Therefore, this court should hold that private individuals, like Murphy, are not required to show actual malice to recover for false light invasion of privacy.[171] Murphy will also reiterate his claim under the defamation argument that his biological or non-relation to Billie Who is unrelated to any matters of public interest in which he might have been involved. Accordingly, he does not need to show actual malice to be compensated for his injuries.

In addition, Murphy will stress once again that MarshCODE was negligent in posting and communicating the false information on its "Build Your Family Tree" website. MarshCODE had a duty to exercise more caution when operating its programs and to establish safeguards against accidental disclosure of genetic information, given the amount of sensitive genetic information it holds. Even if Murphy is considered a limited public figure, there is evidence that MarshCODE acted with reckless disregard of the truth of Murphy's information, or at minimum, a jury should be allowed to hear testimony and make its own inferences,[172] similar to *Curtis Publ'g Co. v. Butts*. In *Curtis Publ'g Co.*, the Supreme Court held that a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence to show actual malice.[173] Murphy will argue that the court could reasonably find that MarshCODE acted in reckless disregard because it failed to conduct a basic check of the accuracy of the information it publicized to Billie Who, and failed to conduct an elementary check that the correct database was linked to the website. Thus, there is a genuine issue of material fact with regard to MarshCODE's fault, rendering summary judgment inappropriate.

MarshCODE will also re-iterate its arguments under the defamation section and claim that the Appellant has also failed to show that MarshCODE acted in reckless disregard as to the falsity of the information released to Billie Who. In order to satisfy the final element of a false light claim, a plaintiff must prove that the defendant had knowledge of or acted in reckless disregard as to the falsity of the publicized matter

170. Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 167 (1979).

171. Time, Inc. v. Hill, 385 U.S. 374, 390 (1967).

172. *See* Lorentz v. Westinghouse Elec. Corp., 472 F. Supp. 946, 953 (W.D. Pa. 1979).

173. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 138-39 (1967) (examining a situation where college football coaches were incorrectly accused of fixing a heated rivalry game based on an overheard communication and holding that failing to take the most "elementary" precautions to check the accuracy of the allegations amounted to reckless disregard of the truth).

and the false light in which the plaintiff would be placed.[174] In the instant case, Murphy is at minimum, a "limited purpose" public figure because he has thrust himself into the public light by vigorously promoting his religious views in the media.[175] Thus, even if this court chooses to recognize the *Gertz* distinction and apply a lower standard of negligence to private individuals,[176] Murphy is not a private individual. Therefore, Murphy must meet the higher standard of actual malice in order to succeed in his claim for false light invasion of privacy.

Furthermore, MarshCODE will claim that Murphy cannot prove that MarshCODE acted with knowledge or acted in reckless disregard as to the falsity of the publicized matter and the false light in which he would be placed.[177] This "actual malice" test involves a subjective inquiry - whether the defendant acted with a high degree of awareness of probable falsity.[178] It requires sufficient evidence "that the defendant in fact entertained serious doubts as to the truth of his publication."[179] However, in *Buendorf v. Nat'l Pub. Radio, Inc.*, the court held that the defendant's statements did not rise to the level of reckless disregard when the evidence showed that the radio news analysts could have been "more diligent in their research" but did not "entertain serious doubts" as to whether a secret service agent was a homosexual.[180]

Thus, MarshCODE will repeat its arguments under the defamation section and stress again that Murphy cannot prove that MarshCODE acted with actual malice or reckless disregard. To the contrary, MarshCODE took affirmative steps to conceal and protect participants' identities by creating a test database prior to releasing "Build Your Family Tree." Additionally, MarshCODE had no knowledge that the information released to Billie Who was false nor had an indication that the test database instead of the production database was connected to the website. MarshCODE launched an investigation into the matter and issued a public apology to Murphy.[181] Because Murphy cannot show that MarshCODE had knowledge as to the falsity of the information released

174. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

175. *Curtis Publ'g Co.*, 388 U.S. at 155 (considering an athletic director of major university and retired Army officer as a public figure because he commanded a sufficient continuing public interest); Anderson v. Low Rent Hous. Comm'n of Muscatine, 304 N.W.2d 239, 246 (Iowa 1981) (secretary considered a public figure by inviting attention and influencing controversy surrounding issues in the city government).

176. Some courts have simply held that negligence is insufficient to support a claim for false light invasion of privacy. Zeran v. Diamond Broad., Inc., 203 F.3d 714, 719 (10th Cir. 2000); Rush v. Philadelphia Newspapers, Inc., 732 A.2d 648, 654 (Pa. Super. Ct. 1999).

177. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

178. Howard v. Antilla, 294 F.3d 244, 252 (1st Cir. 2002).

179. *Id.* (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

180. Buendorf v. Nat'l Pub. Radio, Inc., 822 F. Supp. 6, 12 (D.D.C. 1993).

181. R. at 7.

to Billie Who or acted in reckless disregard as to the falsity of such information, Murphy's claim for false light invasion of privacy must fail. Accordingly, MarshCODE will ask this court to affirm summary judgment on behalf of MarshCODE.

D. Breach of Contract

1. *General*

For his third claim, Murphy contends that MarshCODE breached its agreement that Murphy signed before donating his DNA by making this information publicly available without Murphy's consent. As a result, Murphy has brought a breach of contract claim against MarshCODE.

2. *Elements*

The Marshall Courts recognize a cause of action for breach of contract. However, with no controlling authority on point to the instant matter, Marshall Courts turn to other jurisdictions for guidance. Therefore, to succeed on a claim for a breach of contract in the State of Marshall, a plaintiff must plead and prove four elements: (1) the existence of a contract; (2) the performance of its conditions by the plaintiff; (3) a breach by the defendant; and (4) damages as a result of the breach.[182]

i. Existence of a Contract

When a company reduces to writing general statements regarding the company's policy, and there is no express language within the text of the policy providing for commitments on either side amounting to contractual obligations, then no contract can even be inferred from such a statement.[183] Language in the policy that lacks specificity and is not sufficiently definite cannot be considered contractual in nature.[184] Also, general statements about company policies, with no indicia of intent to contract, are not contractually binding.[185]

Murphy will argue that the policy was part of the bargained-for agreement with MarshCODE. Murphy will likely cite to cases such as *Meyer v. Christie*, where the court found that when a bank promises to keep a customer's financial information confidential according to its privacy policy it is bound by that promise, since the privacy policy is in effect part of the "bargained-for exchange with the bank."[186] Furthermore, *Jet Blue Airways Corp.*, the court held that when plaintiffs fail to state

182. Kopley Group v., L.P. v. Sheridan Edgewater Properties, Ltd., 876 N.E.2d 218, 226 (Ill. App. Ct. 2007).

183. Johnson v. Nat'l Beef Packing Co., 220 Kan. 52, 551 P.2d 779, 782 (1976).

184. Pratt v. Heartview Found., 512 N.W.2d 675, 678 (N.D. 1994).

185. Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 741 (Minn.2000).

186. Meyer v. Christie, 2007 WL 3120695, *4 (D.Kan. 2007).

with specificity in their complaint that they actually read the privacy policy, they are not deprived of their contractual claim.[187] In the very same opinion, the court distinguished *Northwest* by noting that the *Northwest* court relied "on an overly narrow reading of the pleadings."[188]

Murphy will also state that courts have concluded that a unilateral contract is formed when there is a definite in form offer that is communicated and accepted by the offeree for valuable consideration.[189] Additionally, an offer for a unilateral contract is the promise of confidentiality in exchange for a customer's performance, i.e. the giving of genetic material for testing.[190] He will argue that he has a contractual claim, according to the court in *Jet Blue*, against MarshCODE although he failed to allege in his complaint that he actually read the policy. Here, the Agreement uses the word "Agreement" in the title, and the first paragraph includes in all-capital letters the words, "PLEASE READ THESE TERMS AND CONDITIONS CAREFULLY AS YOUR SIGNING THIS FORM CONSTITUTES ACCEPTANCE OF THEM."[191] The use of the terms "agreement" and "acceptance" as well as the requirement of a signature are evidence that MarshCODE intended the document to have contractual capacity. No language in the Agreement contradicts or causes ambiguity about this intent.[192] The agreement with MarshCODE was that the company would keep his information confidential and that is why he gave his saliva sample. Thus, Murphy will argue that the contract was formed when MarshCODE offered confidentiality to get from Murphy, the genetic material.

In response, MarshCODE will argue that the privacy policy, incorporated in the Study Participation Agreement, constitutes nothing beyond general statements of policy. MarshCODE will likely rely on cases such as *Dyer v. Nw. Airlines Corps*, where the court found that the broad statements in airlines' privacy policy do not give rise to contract claims when the passengers do not state in their claim that they read the policy and relied on it.[193] Also, according to the court in *Northwest Airlines Privacy Litig.*, the statements in a privacy policy of an airline do not rise to the level of a unilateral contract.[194] If the plaintiff alleges reliance on the privacy policy, but fails to allege that they actually read the text of

187. *In re* Jet Blue Airways Corp. Privacy Litig., 379 F.Supp.2d 299, 325-26 (E.D.N.Y. 2005).

188. *Id.*

189. Pine River State Bank v. Mettille, 333 N.W.2d 622, 626 (Minn.1983).

190. Duldulao v. Saint Mary of Nazareth Hosp. Center, 505 N.E.2d 314, (Ill. 1987).

191. R. at 14.

192. R. at 14-15.

193. Dyer v. Nw. Airlines Corp, 334 F. Supp. 2d 1196, 1199-1200 (D.N.D. 2004).

194. *In re* Northwest Airlines Privacy Litig., 2004 WL 1278459, at *5-6 (D.Minn. June 6, 2004).

the policy, an essential element of the contractual formation is missing and there is no contract claim.[195] Finally, in *Grenier v. Air Express Int'l Corp.*, no contractual obligation binds the author when the language of a policy agreement vests discretion to the author of the agreement to determine what certain words mean within the policy.[196]

Moreover, there is no language in the body of the policy that indicates MarshCODE's intention to be bound contractually from that document. Also, that the privacy policy does not have specific language which could be considered contractually obligating. MarshCODE will also take the position that the broad statements in their policy do not give contractual claims to participants of the study. Therefore, since the language of the policy is broad, MarshCODE has the discretion to determine what the terms mean and how they should be interpreted. Finally, in response to Murphy's claim that he relied on the policy, MarshCODE will argue that this claim is without merit because Murphy failed to assert that he every actually read the policy.

ii. Performance of the Conditions by the Plaintiff

The second element is that the plaintiff performed their requirements under the contract. When a party signs a consent form for a company to use blood samples for research, this indicates that they agree to participate in such a study.[197] Additionally, a party, which is responsive and provides accurate information within a contractual relationship, discharges their contractual obligation to provide information to the opposite contracting party.[198]

Murphy will argue that he fulfilled his obligation to provide the necessary contact information to MarshCODE when he gave them his physical and electronic address. Furthermore, Murphy can argue that compared to his contractual obligation to surrender his DNA the failure to update his contact information was unimportant. Thus he substantially performed the conditions of the contract.[199] In return, Murphy trusted in MarshCODE's privacy policy, which indicated the strictest security measures would be taken. Murphy will argue, "[o]ne of the fundamental rules of unilateral contracts is that the terms of the contract cannot be modified after the offeree has begun to perform."[200] Here, Murphy performed his contractual obligations the moment he provided the saliva sample, but MarshCODE attempted to modify or renege its

195. *Id.*

196. Grenier v. Air Express Int'l Corp., 132 F. Supp. 2d 1198, 1201 (D.Minn. 2001).

197. Grimes v. Kennedy Krieger Inst., Inc., 782 A.2d 807, 844 (Md. 2001).

198. *In re* e2 Comm., Inc., 354 B.R. 368, 382 (Bankr. N.D. Tex. 2006).

199. VRT, Inc. v. Dutton-Lainson Co., 530 N.W.2d 619, 623 (Neb. 1995).

200. Englert v. Nutritional Sci., L.L.C., No. 07AP989, 2008 WL 4416597, at *11 (Ohio Ct. App. Sept. 30, 2008) (citing RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. d (1981)).

part of the agreement after Murphy performed his contractual obligations, i.e. receiving the full benefit it expected. Therefore, MarshCODE breached its obligations and as a result substantially injured Murphy's well-being and reputation. MarshCODE is attempting to escape liability for its breach based on a technicality of the language it drafted. Murphy performed the conditions of the contract that related to giving contact information to MarshCODE. For these reasons Murphy will argue that he should be discharged from this obligation and that summary judgment should not be granted because MarshCODE's employees failed to enter the information.

In response, MarshCODE will oppose these statements by citing relevant case law that indicates that when Murphy signed the Study Participation Agreement he agreed to update his contact information. The Agreement clearly states that the participant is responsible to keep his contact information "current, accurate, and complete."[201] When Murphy's physical and electronic address changed in 2001 he failed to notify MarshCODE. Accordingly, he did not fulfill his contractual obligation, thereby preventing MarshCODE from being able to notify him.[202] He was obligated to contact MarshCODE and inform them of this change but he failed to do so. MarshCODE will argue it is well established that the party first in default cannot recover for the subsequent failure of the other party to perform[203] and "one need not continue to perform a contract when the other party has first breached."[204] MarshCODE will finally argue that Murphy defaulted in his duty to update his contact information and there was no need to continue performance on MarshCODE's side since Murphy was the first one to breach.[205] Consequently, Murphy's failure to update his contact information prevents him from recovering under breach of contract,[206] and the court should affirm the Appellate Court's decision.

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201. R. at App. A.

202. R. at 5; Kemmons Wilson, Inc. v. Allied Bank of Tex., No. 02A01-9107CF00131, 1992 WL 1982, at *6 (Tenn. Ct. App. Jan. 3, 1992) (quoting Anderson v. Jasper Fed. Sav. & Loan Ass'n, 738 S.W.2d 768, 770 (Tex. App. 1987)) ("Where the obligation of a party depends on a certain condition being performed and the fulfillment of that condition is prevented by the act of another party, the condition is considered fulfilled. This is also true where the other party hinders or makes impossible the fulfillment of a condition").

203. *See* 14 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 43:5 (4th Ed. 1990).

204. Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997).

205. *Id.*

206. *See* Perez v. Alcoa Fujikura, Ltd., 969 F. Supp. 991, 1007 (W.D. Tex. 1997) (holding plaintiff had no basis to recover under a breach of contract claim when he failed to perform his obligations in accordance with a food service agreement).

iii. The Defendant Breached the Contract

Finally, the plaintiff must establish that the defendant breached their contractual duties. When a party acquires confidential information within the context of a confidential relationship it is well settled that he cannot disclose such information in an unauthorized or unprivileged manner.[207] A physician's failure to disclose economic interest to a patient may give rise to a cause of action to such a patient.[208]

In this case, Murphy will argue that MarshCODE could not unilaterally change any of the terms of the contract because unilateral contract was formed MarshCODE. MarshCODE had a duty to clearly demonstrate in the Agreement the proper way of modifying the unilateral contract formed because it was dealing with sensitive genetic information.[209] MarshCODE breached the original privacy policy when it modified the terms and conditions of the original Agreement so it could use the genetic and personal information from its DNA research participants in its new programs for commercial purposes.[210]

Murphy could argue that there is a spilt in different jurisdictions as to whether an employer may unilaterally modify a contract that was based on a promise from an employee handbook or policy statement. Under one approach, as expressed by *Demasse v. ITT Corp*.,[211] an employer may not unilaterally modify an implied-in-fact contract without the assent or acceptance of the modification by the employee and additional consideration afforded to the employee.[212] The second approach, as expressed in *Amus v. Pacific Bell*,[213] is that an employer may unilaterally modify an employee handbook or policy so long as the employees received reasonable notice of the modification and the modification does not interfere with their vested benefits.[214] Murphy will argue that even if this court were to adopt the *Asmus* approach, it would still find MarshCODE could not unilaterally modify the Agreement because it did not give Murphy reasonable notice of the modification. MarshCODE had to obtain at least Murphy's informed consent before using his sensitive and confidential genetic information for other commercial purposes. Accordingly, Murphy will argue that MarshCODE's failure to inform him or

207. Horne v. Patton, 287 So. 2d 824 (Ala. 1973); MacDonald v. Clinger, 446 N.Y.S.2d 801 (N.Y. App. Div. (1982); Humphers v. First Interstate Bank of Or., 696 P.2d 527 (Or. 1985).

208. Moore v. Regents of Univ. of Cal., 793 P.2d 479, 483 (Cal. 1990).

209. Yeazell v. Copins, 402 P.2d 541, 545-546 (Ariz. 1965).

210. R. at 13.

211. Demasse v. ITT Corp., 984 P.2d 1138 (Ariz. 1999).

212. *See, e.g.*, *id.* at 1153.

213. Amus v. Pacific Bell, 999 P.2d 71 (Cal. 2000).

214. *See, e.g.*, *id.* at 81.

get his consent constitutes breach of contract and this issue should be reversed and remanded to the trial court.

In response, MarshCODE will argue they tried to contact Murphy personally and also posted the new policy online. MarshCODE will support the position that there is no breach of duty because MarshCODE met their obligation of good faith and fair dealing by trying to contact Murphy via both electronic and regular mail.[215] It is due to Murphy's failure to maintain his contact information as required by the privacy statement, that he was never actually notified. In addition, MarshCODE can argue that the wording in the privacy policy gave them the discretion to modify the terms of the Agreement unilaterally and thus Murphy cannot hold them accountable for breach of contract.[216] As a result, MarshCODE will argue that the lower court's decisions should be affirmed.

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215. Commercial Ventures, Inc. v. Rex M. & Lynn Lea Family Trust, 177 P.3d 955, 964 (Idaho 2008).

216. Associated Or. Veterans v. Dep't of Veterans' Affairs, 712 P.2d 103, 107 (Or. 1985).